

**McGaw of Puerto Rico, Inc. and Congreso de Uniones Industriales de Puerto Rico.** Cases 24-CA-6680, 24-CA-6950, and 24-CA-6979

October 31, 1996

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX AND HIGGINS

On May 22, 1996, Administrative Law Judge George Aleman issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief.

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

The Board has considered the decision and the record in light of the exceptions and briefs, and has decided to affirm the judge's rulings, findings,<sup>1</sup> and conclusions and to adopt the recommended Order as modified.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, McGaw of Puerto Rico, Inc., Sabana Grande, Puerto Rico, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(a) and reletter the subsequent paragraphs.

“(a) Within 14 days from the date of this Order, offer Jose Luis Pacheco, Francisco Jusino, Raquel Gonzalez, Scipio Vega, Maria Belen, Charlie Silva, Vigdalia Rodriguez, and Nitza Nazandrio full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

“(b) Make Jose Luis Pacheco, Francisco Jusino, Raquel Gonzalez, Scipio Vega, Maria Belen, Charlie Silva, Vigdalia Rodriguez, and Nitza Nazandrio whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.”

2. Replace relettered paragraph 2(e) with the following.

“(e) Within 14 days after service by the Region, post at its facility in Sabana Grande, Puerto Rico, copies of the attached notice marked “Appendix.”<sup>43</sup> Copies of the notice, on forms provided by the Regional Director for Region 24, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 1, 1994.”

3. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES  
POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD  
An Agency of the United States Government

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

Section 7 of the Act gives employees these rights.

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

WE WILL NOT lay off or otherwise discriminate against any of you because of your support for Congreso de Uniones Industriales de Puerto Rico, or any other union, or in order to discourage you or any

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

We find no merit to the Respondent's allegations of bias, prejudice, and abuse of discretion on the part of the judge. On our full consideration of the record and the decision, we find no evidence that the judge prejudged the case or demonstrated a bias against the Respondent in his analysis or discussion of the evidence or in his credibility resolutions.

In adopting the judge's finding that Production Superintendent Geraldo Gonzalez threatened employees with a loss of wages and to have them blacklisted, we find it unnecessary to rely on the judge's adverse inference drawn from Gonzalez purported failure to deny employee Maria Belen's testimony in these respects. The record shows that Gonzalez denied threatening employees “in any way or any manner.” Our finding in this regard, however, does not affect the judge's crediting of Belen that these threats and other coercive statements were made inasmuch as the judge found that Belen was the more credible witness.

other employees from engaging in such conduct or other protected concerted activities.

WE WILL NOT change the way we make shift assignments from seniority in classification to plantwide seniority in order to discriminate against you because of your support for the above labor organization or any other union, or to discourage you from engaging in such activities.

WE WILL NOT ask you to engage in the surveillance of, or to report on the union activities of other employees.

WE WILL NOT tell you that it would be futile to engage in union activities by suggesting that we can affect the outcome of any union election through intimidation, and WE WILL NOT interrogate you, threaten you with plant closure, loss of wages, and with being blacklisted from obtaining employment with employers because you engaged in union or other protected concerted activities.

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

WE WILL, within 14 days from the date of the Board's Order, offer Jose Luis Pacheco, Francisco Jusino, Raquel Gonzalez, Scipio Vega, Maria Belen, Charlie Silva, Vigdalia Rodriguez, and Nitza Nazandrio full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Jose Luis Pacheco, Francisco Jusino, Raquel Gonzalez, Scipio Vega, Maria Belen, Charlie Silva, Vigdalia Rodriguez, and Nitza Nazandrio whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges of Jose Luis Pacheco, Francisco Jusino, Raquel Gonzalez, Scipio Vega, Maria Belen, Charlie Silva, Vigdalia Rodriguez, and Nitza Nazandrio, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discharges will not be used against them in any way.

MCGAW OF PUERTO RICO, INC.

*Virginia Milan-Giol and Ismael Rodriguez-Izquierdo, Esqs.,* for the General Counsel.<sup>1</sup>

*Francisco Chevere and Alcides Reyes-Gilestra, Esqs.* (*McConnell, Valdes*), for the Respondent.

## DECISION

### STATEMENT OF THE CASE

GEORGE ALEMAN, Administrative Law Judge. Pursuant to changes filed by the Union, Congreso de Uniones Industriales de Puerto Rico, the Regional Director for Region 24 of the National Labor Relations Board (the Board), on March 24, 1995,<sup>2</sup> issued an order consolidating cases, third consolidated amended complaint and amended notice of hearing, alleging that the Respondent, McGaw of Puerto Rico, Inc. in various manner violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act). By answer dated April 10, 1995, the Respondent admitted some and denied other allegations in the above complaint, and denied having committed any unfair labor practices. A hearing on the complaint allegations was held before me in Hato Rey, Puerto Rico, from June 26 to 30, 1995, during which all parties were afforded full opportunity to call and examine witnesses, to submit oral as well as written evidence, and to argue orally on the record.

On the basis of the entire record in this proceeding,<sup>3</sup> including my observation of the demeanor of the witnesses, and having considered briefs filed by the General Counsel and the Respondent, I make the following

### FINDINGS OF FACT

#### I. JURISDICTION

The Respondent, a Delaware corporation, operates a facility in Sabana Grande, Puerto Rico, where it is engaged in the manufacture of medical devices and related products. In the normal course and conduct of its above-business operations, the Respondent annually purchases and receives goods and products valued in excess of \$50,000 directly from suppliers located outside the Commonwealth of Puerto Rico. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The Respondent further admits, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

<sup>1</sup> Here referred to as the General Counsel.

<sup>2</sup> See G.C. Exh. 1(ggg). (G.C. Exh.) refers to a General Counsel's Exhibit; (R. Exh.) to a Respondent's Exhibit; and (Tr.) to transcript page(s).

<sup>3</sup> Following the close of the hearing the Respondent, on August 2, 1995, filed an unopposed motion to admit into evidence a copy of 29 L.P.R.A. § 185(a), a Puerto Rico statute pertaining to employee layoffs, commonly known as Puerto Rico Law 80, with explanatory notes. The record was kept open to allow the parties the opportunity to photocopy and translate the applicable provisions of Law 80. Accordingly, the Respondent's unopposed motion is granted, and the documents submitted with the motion are received in evidence and made part of the record as R. Exh. 12. The General Counsel's unopposed motion to have her exhibits translated and made part of the record is also granted.

## II. ALLEGED UNFAIR LABOR PRACTICES

A. *The Allegations*

The consolidated complaint, as further amended at the hearing, alleges that the Respondent violated Section 8(a)(1) by:

1. Soliciting employees, sometime in February or March 1994,<sup>4</sup> to engage in the surveillance and reporting of other employees' union activities (G.C. Exh. 1(ggg), par. 7(c)).

2. Expressing to employees on or about March 10, the futility of engaging in union activities by telling them it was easy to install fear in them so that they could vote against the Union (G.C. Exh. 1(ggg), par. 7(r)).

3. On or about March 10

(a) Interrogating an employee concerning the Union's activities in the plant.

(b) Threatening employees with plant closure and loss of wages if they supported the Union.

(c) Threatening to "blackball" employees regarding future employment opportunities if they supported the Union. (G.C. Exh. 1(ggg), par. 7(s).)

4. Prohibiting employees on or about June 22, from talking about the Union at the plant at any time (G.C. Exh. 1(ggg), par. 7(w)).

The consolidated complaint further alleges that the Respondent violated Section 8(a)(1) and (3) by:

1. Changing, in or about February, the seniority policy for its line production clerks (LPCs) from one determined by job classification to that of general plantwide seniority (G.C. Exh. 1(ggg), par. 6(d)).

2. Laying off nine LPCs on June 30 because "they joined and assisted the Union and engaged in concerted activities, and/or to discourage these and other employees from engaging in these activities." (G.C. Exh. 1(ggg), pars. 6(h-i).)<sup>5</sup>

B. *Factual Background*

The Respondent, as noted, manufactures medical supplies and equipment from its facility in Sabana Grande, Puerto Rico, where it has been in operation since about 1974. At all times relevant here, the Respondent has maintained an employee complement of approximately 1100 employees employed in various positions. One such position, which is at issue here, is that of the LPC who performs functions akin to that of a leadperson, serving as liaison between supervisors and production employees, keeping track of production, and performing other related tasks. The record reflects that the Union has been engaged in a continuing effort to organize Respondent's employees since the latter part of 1992. Thus, two Board-conducted elections were held, on February 11 and November 9, 1993, in which the Union failed to

achieve a majority vote (G.C. Exhs. 59, 60).<sup>6</sup> Despite these setbacks, the Union continued its efforts to represent the employees. Alleged discriminatee Charlie Silva testified, without contradiction, that on May 29, the Union began its campaign for a third election by holding a meeting of prounion employees at a local beach known as "El Combate." The meeting was arranged by Union President Jose Figueroa, Silva, Lourdes Irizarry, and her husband, and former employee, Juan Vargas.<sup>7</sup> In preparation for this meeting, the Union, assisted by Irizarry, Vargas, and Silva, prepared and distributed leaflets announcing the time and place of the meeting. Silva testified, without contradiction, that during the meeting he observed Supervisor Gualberto Nunez standing about 300 feet away, and that employee Miguel Alicea, a member of the "Vote No" group that supported the Respondent during the Union's organizational drives, was also seen nearby. Silva stated he could not tell if Nunez actually observed the meeting in progress.<sup>8</sup>

On July 27, 1993, Ira Marshall assumed the position of general manager at the Sabana Grande facility. Previously, he was employed by another firm, Baxter, one of Respondent's competitors. According to Marshall, when he began working with Respondent the latter was "a disorganized mess." Marshall analogized the Respondent's financial and unproductive condition to that of a "critically ill patient." To remedy the problem, Marshall became convinced that the entire production process needed changing. To this end, the Respondent invested large amounts of capital aimed at overhauling the production line through the replacement of its "workcell" method of operation to a conveyor belt system of production (R. Exhs. 2, 4, 5).<sup>9</sup> The first conveyor belt was installed in November 1993, two more were installed in April 1995, and the last two were installed in July 1994, following the disputed June layoffs. According to Marshall, with the installation of the conveyor system, the Respondent's level of service to customers increased from 37 to 98 percent, its efficiency rate in 1994 went from 82 to 93 per-

<sup>6</sup>In the first election, the Union received more than half of the valid votes counted; there were, however, a number of challenged ballots sufficient to affect the outcome of the election.

<sup>7</sup>Vargas had been employed by Respondent as a mechanic. The complaint initially alleged he was unlawfully discharged for his union activities on about June 3 (G.C. Exh. 1(ggg), par. 6(f)). On June 26, 1995, prior to the start of the hearing, the Respondent and the Union entered into a private settlement agreement resulting, inter alia, in the withdrawal of the above allegation (see G.C. Exh. 2).

<sup>8</sup>Contrary to the Respondent's assertion in its posthearing brief (p. 32), the complaint does not allege that such conduct was violative of the Act, and no such finding is made here. Although Nunez is not alleged to be a 2(11) supervisor, Respondent does not dispute Silva's description of him as such and indeed seems to concede his status as a "management employee." Nunez' presence in the vicinity of the meeting was neither contested nor explained by Respondent, and Nunez, who could have disputed Silva's above assertion, was not called to testify. Given these circumstances, I find it reasonable to infer that Nunez did observe the meeting and who was in attendance and, in all likelihood, reported his observations to Respondent.

<sup>9</sup>Generally, the workcell system consisted of approximately 50 tables located in a large room, with 10 or so employees gathered around each table. Each employee's function was to completely assemble a given product. Under the conveyor system, the employee was responsible only for the partial assembly of a product as it moved along the conveyor belt.

<sup>4</sup>All dates are in 1994 unless otherwise indicated.

<sup>5</sup>Named as discriminatees in the complaint are Jose Luis Pacheco, Francisco Jusino, Raquel Gonzalez, Scipio Vega, Lourdes Irizarry, Maria Belen, Charlie Silva, Vigdalia Rodriguez, and Nitza Nazario. At the hearing, the Respondent and alleged discriminatee Lourdes Irizarry entered into a private settlement agreement, which I approved, whereby for a sum certain, Irizarry waived her right to reinstatement. Thus, the issue as to her layoff is not before me (G.C. Exh. 3; Tr. 23). Other complaint allegations were settled by the parties at the hearing resulting in the withdrawal of Cases 24-CA-6775, 24-CA-6896, 24-CA-6665, and disposing of certain other complaint allegations (Tr. 5-25).

cent,<sup>10</sup> and its production time dropped from 2 months to 27 days. By June 1994, Marshall became convinced it was time to start receiving some "payback" for the large amount of capital that had been invested.

Marshall testified that with the mechanization of the production line, the LPC position became virtually obsolete. He stated that much of the work performed by the LPCs consisted of providing support services to production line personnel that included substantial clerical work, quality assurance, training, recordkeeping, and other peripheral matters, and that with advent of the conveyor system, installation of a computerized system, a Kronos timekeeping system, aimed at better monitoring labor reporting activities, absenteeism, and scheduling, a large portion of the LPCs functions were eliminated.<sup>11</sup> Thus, according to Marshall, with the switch-over to the conveyor system of production, the LPCs "really didn't have much to do." Marshall averred that it was this factor, along with his personal view that the LPCs served as an unnecessary layer between supervisors and assemblers, that led to his decision to eliminate the LPC position. Marshall testified that after discussing the matter with Human Resources Manager Alex Solla and consulting with legal counsel, the decision was made to lay off 10 LPCs by June 30.<sup>12</sup>

Marshall claims he first made known his intention to eliminate the LPC position in a May 18 memo he sent to Solla, where he expressed his views as to the changes that would be needed to make the Respondent more competitive (R. Exh. 6). While the memo makes reference to Respondent's need for "less unskilled people" due to the operational changes wrought by the conveyor system, and the need to establish a "new more technical and flat organization," and to replace "many people that cannot adapt to the technology," it does not, contrary to Marshall's assertion, make reference to any projected or scheduled layoff of LPCs. Rather, the memo simply instructs Solla to meet with Operations Manager Juan Luis Santa to "develop a tentative plan to organize and upgrade our human technical expertise—[and that] this should be done by 6/10/94 [sic]."

However, on June 8, Marshall sent his "boss," Gary Sielski, a memo outlining plans to restructure the production process and indicating, inter alia, that he was anticipating making several changes, the first of which involved eliminating 10 LPC positions, stating quite clearly that "[t]he objective will be to discharge people by performance, educational training, and seniority" (emphasis added), and further noting that the reorganization and restructuring would continue after the remaining conveyor belts are installed (R. Exh. 7). The

following day, June 9, Marshall received a memo from Santa in which the latter described his "scenario of each reorganization phase" and stated, in words strikingly similar to those contained in Marshall's June 8 memo to Sielski, that he had requested Solla to "reduce ten (10) production line clerks, based on performance, academic background, and seniority" (emphasis added), with the suggestion that the reduction occur by no later than the end of June (R. Exh. 8).<sup>13</sup> A few days later, on June 13, Marshall submitted a "MONTHLY ACTIVITY REPORT" to Sielski describing the Company's "Financial and Income Statement" for the month of May, and setting forth the Company's current activities, plans, and priorities for the Company which, significantly, identified the elimination of the "union threat" as Respondent's second highest priority (see G.C. Exh. 58).

The Respondent, as noted, eliminated 9 LPC positions during the June 30 layoff, rather than the 10 called for in the Marshall/Santa memos, and did so using plantwide seniority, rather than the criteria outlined in the memos. When asked to explain why Respondent did not select the individuals for layoff using the criteria proposed in his memo, Marshall suggested that Santa had been behind the change, speculating that Santa must have done so because as an "operations person" Santa obviously sought to retain the best people on the job. Marshall claimed that Santa had consulted with Solla and Respondent's legal counsel and that following such discussions, Santa was advised to "just stick with Law 80" to implement the layoffs, and that based on such consultations, which Marshall claims he was not privy to, "the decision was made to just do it straight Law 80 length of service and classification." In fact, Marshall states he first learned of the decision to use plantwide seniority when Solla approached him and said, "[W]e're going to follow Law 80 and just use, you know, length of service." Marshall suggests implicitly that he had nothing to do with the ultimate decision to deviate from his original proposal, and that it was Solla and Santa who, following advice from legal counsel, agreed to conduct the layoffs using strict plantwide seniority (Tr. 299).

I was unimpressed by Marshall's overall demeanor on the witness stand and by his testimony in general which, as will be noted infra, is full of inconsistencies and untruths. I do not mean to suggest that his entire testimony is being rejected, for I am convinced that he accurately described his overall involvement in the introduction of the conveyor system to Respondent's production process, and the impact it had on Respondent's operations. However, his remaining testimony regarding matters raised by the complaint allegations was blatantly misleading if not patently false. Marshall, for example, was being less than candid and deliberately misleading in suggesting that the proposal to eliminate 10 LPC positions using criteria other than plantwide seniority originated with Santa, for it is patently clear that it was Marshall who first proposed it to Sielski in his June 8 memo, 1 day

<sup>10</sup> According to Marshall, an 82-percent efficiency rate meant that almost 20 percent of the work force was not being productive.

<sup>11</sup> R. Exh. 10 contains a description of the LPCs' job functions.

<sup>12</sup> Marshall, however, was vague as to when he first began considering the elimination of the LPCs. Thus, he stated this was a "hard question" for him to answer because since coming to McGaw, he had never seen a need for such a position. While he admitted, after some prompting by Respondent's counsel, that discussions began "some months before we made the final decision," he nevertheless hedged this answer stating, "I don't know if I could put a hard, fast date on it. But that's something that we had been continually looking at with putting the conveyors in as how we would restructure the supervision and the management of that department. And so that was always a consideration." (Tr. 293.)

<sup>13</sup> Notwithstanding Respondent's implicit suggestion in its posthearing brief (p. 22, fn. 7), there is no indication that the reference to "seniority" in the Marshall and Santa memos is to plantwide seniority. It could equally refer to seniority in the particular classification. Marshall did not explain what he was referring to in his memo when he mentioned seniority, and Santa was not called to testify. It is, in any event, patently clear that the decision to go with strict plantwide seniority was a deviation from Marshall's initial plan to apply other criteria to effectuate the June layoffs.

before he received Santa's memo containing virtually the identical proposal. Indeed, I suspect, given the similarity in language between Marshall's June 8 proposal and the language in Santa's subsequent June 9 memo, that in his memo Santa was merely reiterating to Solla what he understood to be Marshall's directive regarding the planned elimination of 10 LPC positions. Santa, who could have cleared up any ambiguities or inconsistencies regarding this matter, was not called to testify. Marshall's further claim that he was not involved in the decision to utilize plantwide seniority to implement the layoffs is simply not credible, for I find it highly unlikely, given his high managerial position and the fact that it was Marshall who first called for the elimination of 10 LPC positions using something other than plantwide seniority, that the decision to reject his proposal would have been made without his knowledge or input. Solla, like Santa, was not called by Respondent to corroborate Marshall's claim of noninvolvement in the decision-making process. The Respondent instead relies exclusively on hearsay statements which Marshall claims were made to him by Solla regarding the substance of what occurred at the alleged meeting (which Marshall claims he did not attend) held by Solla, Santa, and legal counsel, wherein the decision to use plantwide seniority to conduct the June layoffs was made. I do not credit Marshall's testimony as to what he may have been told by Solla, as to his denial of involvement in the decision to change the way the June layoffs were to be conducted, or as to what he believes may have been Santa's reason for proposing in his June 9 memo the use of other criteria to effectuate the layoffs. Further, I draw an adverse inference from Respondent's failure to call either Santa or Solla to testify, and conclude that had it done so neither would not have corroborated Marshall's testimony as to why Respondent deviated from Marshall's initial directive to conduct the June layoff using criteria other than plantwide seniority. *Guardian Industries Corp.*, 319 NLRB 542 (1995).

Equally unconvincing was Marshall's explanation of what he meant by his "dissolve union threat" comment made in his June 13 monthly report to Sielski. Thus, responding to a leading question from Respondent's counsel, Marshall rather feebly explained that maintaining good employee relations programs was a high company priority, and that it was through such programs that Respondent hoped to persuade employees that a third party, e.g., the Union, was not needed, and that through this evolutionary process the Respondent hoped to eventually "dissolve the union threat." Although Marshall's testimony was rather vague on this point, interpreting it in a light most favorable to Respondent, I conclude this is what Marshall intended to convey in his somewhat confusing response to counsel's leading question. However, given Marshall's lack of candor on other matters, and the pattern of unlawful conduct engaged in by him and other management personnel (described below). Marshall's above explanation, that the union threat would simply "dissolve" through some benign evolutionary process, is not worthy of belief. Rather, I find it more reasonable to infer given the above unlawful conduct by Marshall and others and the closeness of the last election, that Marshall viewed the union threat with some urgency and had no intentions of sitting idly by to see whether the "Union threat" would dissipate or "dissolve" through implementation of employee pro-

grams, none of which incidentally were identified by the Respondent.

The Respondent, as noted, laid off the nine LPCs on June 30. It should be noted that prior to the June layoffs, the Respondent had "plans to hire 39 people, 29 for increased production and 10 for backlogged rework" (G.C. Exh. 58) and, in fact, hired some 10 temporary employees into assembler positions in July. In April 1995, the Respondent conducted another layoff in which five additional LPCs were let go, along with employees in other classifications.

Alleged discriminatees Vigdalia Rodriguez, Raquel Gonzalez, Charlie Silva, Maria Belen, Nitza Nazario, and Scipio Vega testified as to what they were told when advised of the layoff and, in certain instances, to conversations they had with management officials regarding Respondent's purported change in policy. Rodriguez, for example, testified she began working for Respondent on the production line about 15 years ago, and 2-3 years later was made a LPC. Initially, she worked the first shift, and on becoming a LPC was transferred to the second shift. Thereafter, due to her seniority in the LPC classification, she was reassigned to the first shift. However, by memo dated February 10, and at a February 28 meeting with Production Supervisor Santiago Perez, Rodriguez was told she was being switched to the second shift. When she asked why she was being moved to the second shift after spending "so little time" in the first shift, Perez responded that the "Company policy had changed a while back" and that shift changes were not to be assigned using plantwide, rather than classification, seniority. Perez, according to Rodriguez, did not identify how long the "policy change" had been in effect. Rodriguez complained that employees had not been notified of the change, and that no notice had been posted on the bulletin board advising of the change. Perez, an admitted supervisor, was not called to testify in this matter and, consequently, Rodriguez' testimony in this regard stands unrefuted and is credited.

As to the layoff, Rodriguez testified that on June 30, she was called to a meeting with Production Supervisor Cindy Montalvo, Second-Shift Superintendent Luis Bonilla,<sup>14</sup> and a secretary named Zoraida. At this meeting, she was handed a layoff letter by Montalvo and after reading it asked how many people were being dismissed. Bonilla responded that 9 of the 19 LPCs were being laid off "because of [a] restructuring and reorganization of the plant." When asked if she had anything to say, Rodriguez told Bonilla "they should treat their employees a little better" because "they were treating them too hurriedly, and . . . as pack animals . . . that if employees were treated a little bit better, they could get a little bit more out of them." Rodriguez testified that

<sup>14</sup> Although Rodriguez did not identify Bonilla by job title, alleged discriminatee Nazario, as noted *infra*, referred to him as the second-shift superintendent. Nazario's testimony in this regard was not challenged by Respondent either at the hearing or in its posthearing brief. Further, Bonilla's presence and active participation in the June 30 layoff interviews conducted by management, during which he answered employee questions as to the number of employees being laid off, and agreed to investigate Nazario's complaint involving the placement of another employee, convinces me that Respondent held him out to be a member of its supervisory/managerial team. Accordingly, I find that Bonilla was, at all times relevant, a supervisor within the meaning of Sec. 2(11) of the Act. The Respondent has not contended otherwise.

when jobs had been eliminated in the past, citing the sterilization department and the mechanics, the affected employees were relocated to other positions. Rodriguez did not ask and was not offered a transfer to any other position, and conceded that in terms of seniority in the LPC classification, she was one of the nine least senior employees.

Raquel Gonzalez briefly testified to being the third least senior employee among the LPCs, and that on June 30, when notified she was being laid off, was told by Supervisor Camen Pacheco that the layoff resulted from a restructuring and reorganization of Respondent's operation, and that there were too many LPCs. Gonzalez testified she was a member of the "Vote No" group which supported the Company in the elections.

Nitza Nazario testified to a February conversation with management officials regarding a change in her shift, and as to the June 30 layoff. Regarding the former, Nazario recounted a meeting she attended on February 11, at which Production Superintendent Geraldo Gonzalez,<sup>15</sup> Production Supervisor Gloria Zapata, and Employee Relations Specialist Sylvia Gregory (all admitted statutory supervisors) were present. At this meeting, Nazario was handed a letter stating that "[p]ursuant to the seniority policy of our company, we have restructured the assignment of work shifts of the line production clerk position, in accordance to the date when the incumbents in such position began working at McGaw of Puerto Rico, Inc. (plant seniority)," and that according to Nazario's starting date with Respondent, she would "have to cover the second shift" (G.C. Exh. 8). Gonzalez further advised her that the assignment of shifts based on the number of years worked with the Company rather than on seniority in any particular classification was a "new change of policy." Nazario claims she voiced her objection to this policy change, because it was made without prior notice to employees and because it meant that despite her 13 years' seniority as a LPC, she would have to take the second shift while employee Barbara Pacheco, who had been a LPC for only 2 years, would get the preferred first shift because of her overall greater plantwide seniority.

Soon after she began working the second shift on February 28, Nazario had a conversation with Marshall, Solla, and with Respondent's second-shift superintendent, Luis Bonilla. At this meeting, Nazario repeated her dissatisfaction with the policy change, noting that as a result of the change, she "was closer to the guard house" because if Respondent "kept adding line clerk positions, and there were people that had lower numbers than me, I would be falling further and further behind."<sup>16</sup> Nazario recalled having told Solla and Bonilla that "with this new policy they were trying to bene-

fit some people, and hurt other people," and that while she did not mention any name in particular, she was referring to employee Lourdes Irizarry, one of the Union's leading adherents. Neither Solla nor Bonilla responded to her comments. Nazario also expressed concern to Solla and Bonilla over the fact that employee Olga Ramirez, who had greater plantwide seniority over Nazario and who had been simply a backup helper, was made a LPC without having gone through Respondent's jobposting/bidding process. While Solla and Bonilla agreed to look into the matter, Nazario heard nothing further from them.

Regarding her layoff, Nazario testified that about 3 hours into her shift on June 30, her supervisor, Camen Pacheco, asked to speak with her, and when she informed Pacheco she was on her way to pick up some requisitions, the latter insisted that Nazario follow her. Pacheco walked with Nazario to the latter's desk where she was told to remove her things. Pacheco then led Nazario to an office where Second-Shift Superintendent Luis Bonilla, and human resources department employee, Zoila Romero, were waiting. Bonilla informed Nazario she was "done with the Company," because the Company was letting nine LPCs go. He assured Nazario she had done nothing wrong. Pacheco then read a layoff letter and handed it to Nazario (G.C. Exh. 9). As she read the letter, Nazario reminded Bonilla of the February meeting in which Respondent purportedly changed policies overnight. Bonilla, Pacheco, and Romero simply looked at each other and said nothing, at which time Nazario signed the layoff notice, headed to the reception area accompanied by Pacheco, and left the premises.

Nazario's testimony was undisputed.<sup>17</sup> Thus, two of the attendees at the February meeting, Zapata and Gregory, were not called to testify and Gonzalez, who did testify, was not asked about this meeting. Likewise, Solla and Bonilla were not called to testify and while Marshall did testify, he was not asked about Nazario's claim that she complained to him, Bonilla, and Solla in late February about the change in policy and her shift change. Nor were Pacheco and Romero called to testify regarding the specifics of Nazario's layoff interview. Accordingly, I credit Nazario, whose demeanor was sound and testimony convincing, and find that at the February 8 meeting, Gonzalez told her that Respondent had instituted a new policy and would henceforth rely on plantwide seniority, rather than seniority in particular job classification, in making shift changes.

Silva testified he was not at work on June 30, when the layoffs occurred, because he had taken a vacation day to attend his son's graduation, and did not learn of his layoff until 8:30 a.m. the following day, July 1, when several of the laid-off LPCs informed him of the layoff. Believing it to be a joke, Silva called Respondent and spoke with Employee

<sup>15</sup> While no longer employed at the Sabana Grande facility at the time of the hearing, Gonzalez nevertheless remains employed by the Company at its California offices.

<sup>16</sup> An employee's identification number purportedly reflects his or her overall plantwide seniority. Thus, the lower the number the greater the employee's plantwide seniority, and, conversely, the higher the number the lower his or her overall plantwide seniority. Nazario's reference to the "guard house" was a suggestion that she could anticipate being out the front gate based on the application of this purported policy change. This is evident from her further testimony that she believed "if the moment came that they were going to be dismissing people . . . I would be one of the people that would be affected."

<sup>17</sup> A memo prepared by Bonilla memorializing his June 30 meeting with Nazario and placed in her file lends credence to Nazario's testimony as to what transpired during her layoff interview. Thus, it reflects she told Bonilla she had been anticipating the layoff ever since Respondent changed the manner by which it would reassign LPCs to companywide seniority, and that while she believed the change was made to show favoritism toward LPC Olga Ramirez and to hurt LPC's Ramon Alameda or Lourdes Irizarry, she personally never expected to be hurt by the change (G.C. Exh. 12(d)).

Relations Manager Miriam Figueroa.<sup>18</sup> When he arrived at the Company, Silva did not meet with Figueroa but instead met with Gregory, Zapata, and Severa. Zapata then read the layoff letter aloud to Silva (G.C. Exh. 6) and asked if he had any questions. Silva mentioned that in the past when the Company eliminated positions employees were afforded an opportunity to work in production, and asked why the Company was not doing the same this time around. According to Silva, Zapata responded that "the Company policy had changed, and that they would no longer be doing it that way." When questioned by the General Counsel as to what other occasions he was referring to, Silva testified to an occasion about 3 to 4 years before the layoff when the maintenance positions were eliminated due to subcontracting out of the work and the affected employees were transferred to the production department and not laid off. He also testified that when the sterilization department was eliminated, the sterilizers were likewise reassigned to production, and that when certain mechanic positions were eliminated, the affected individuals were similarly placed in production. Silva also pointed out that when Respondent consolidated both plants and combined all employees into one location, it eliminated some five to six LPC positions, his own included, and that rather than being laid off, he was reassigned for approximately 6 months to the production line where he performed assembly and correlation work, after which he volunteered to do LPC work on the third shift, and eventually transferred to the second shift, again as a LPC.

Like Nazario's testimony, Silva's testimony regarding the specifics of his layoff was uncontested as neither Zapata nor Gregory, both admitted supervisors, was called to testify in rebuttal. I credit Silva, who displayed excellent demeanor on the stand and who testified in a candid and forthright manner, and find that Zapata informed him that because of a change in company policy he could not be reassigned to another position. As the Respondent's defense is predicated exclusively on a claim that it consistently applied its plantwide seniority policy and that no changes were made to its policy for the June layoff, Zapata's and Gregory's testimony as to what they may have told Silva during his layoff interview takes on added importance, and Respondent's failure to call them as witnesses in this matter, when they clearly would have been favorably disposed to Respondent's view, warrants an adverse inference that if called, they would not have been supportive of Respondent's position *Guardian Industries Corp.*, 319 NLRB 542 (1995).<sup>19</sup> Further, as noted *infra*, Silva's testimony that the Respondent has in the past reas-

signed, rather than laid off, employees following the elimination of a department is supported by documentary evidence and is credited.

Alleged discriminatee Maria Belen also testified regarding the specifics of her layoff. Thus, she testified that at approximately 5:30 p.m. on June 30, her supervisor, Ginette Lopez, took her into one of the personnel offices where she met with Figueroa and Severa. On arrival Figueroa handed Lopez a letter which the latter read aloud informing Belen that due to a restructuring and reorganization of the plant, the LPC positions were no longer necessary, and she was being laid off. Belen complained that what was being done was unfair, and asked why she and other LCPs were not being relocated to other positions, as had been the practice,<sup>20</sup> to which Figueroa replied that the Company had changed policies and that the new policy was to no longer relocate people to lower positions. Belen complained that she and other employees had not been given prior notice of any such policy change. Except for her testimony that Figueroa told her she could not be reassigned because Respondent had changed policies, which Figueroa denies, Belen's testimony is undisputed. However, as more fully discussed *infra*, Figueroa was not a credible witness, and I credit Belen over Figueroa and find that Figueroa informed Belen that due to a change in policy, she could not be reassigned to a different position.<sup>21</sup>

In addition to testimony regarding her layoff, Belen testified to certain statements made to her by supervisors which, while not alleged as unlawful, shed light on other events discussed, *infra*. Belen readily admits that she was not a union supporter but instead favored the Company's position, but concedes she never openly manifested her views one way or the other. Belen testified in a candid and straightforward manner, and incidentally without contradiction, that weeks before the November 1993 election, her supervisor, Jose Carrera, inquired whether it was true that she was "promoting the Union amongst the employees" and that she informed Carrera that the only time she had mentioned the Union was when an employee asked her how she felt about the Union. Belen claims that in Carrera's presence, she told the employee she "couldn't answer or say anything about the Union because I never worked with a union, since this was my first job, and I never had the opportunity, and didn't know what belonging to a union went with it." She also testified, again without contradiction, that admitted Supervisors Wilbert Vasquez and Cindy Montalvo asked her why she had not identified herself as a nonunion employee by wearing a "NO" sticker, and that she replied she considered herself a key person among employees, and that wearing such a sticker might create friction with the Company. Neither Carrera, Vasquez, nor Montalvo was called to refute the above assertions. Accordingly, Belen's testimony in this regard is credited.

<sup>18</sup> While the complaint does not allege that Figueroa is a statutory supervisor, the record including her testimony at the hearing and documents received in evidence, unquestionably establishes, and the Respondent does not dispute, that at all relevant times, Figueroa was a supervisor within the meaning of Sec. 2(11) of the Act.

<sup>19</sup> A similar adverse inference is warranted with respect to Rosa Severa who was identified by both Silva and alleged discriminatee Belen as a supervisor. Severa, like others referred to at the hearing as supervisors by the various discriminatees who testified, was not alleged as such in the complaint. However, Severa's presence with other management officials at the layoff interviews, the fact that she has been identified by Silva and Belen, both credible witnesses, as a supervisor, and the Respondent's failure to contest their characterization of her as such, leads me to conclude that during the relevant time period discussed here, she was in fact a 2(11) supervisor.

<sup>20</sup> Belen cited two examples in which employees in the classifications of mechanics and sterilizers were relocated to production following elimination of their positions (Tr. 170).

<sup>21</sup> Like Severa, Lopez is not alleged in the complaint to be a supervisor. However, her actions in summoning Belen to the layoff interview, Belen's identification of Lopez as her supervisor, and Respondent's failure to dispute this assertion, supports the inference, which I draw, that at all relevant times Lopez was a statutory supervisor as defined by the Act.

Scipio Vega testified to having been hired initially in early 1990 as a temporary assembler, eventually became permanent on or about March 2, 1992, and at some point thereafter was made a LPC on the third shift, where he remained until laid off on June 30. He testified that on June 30, after reporting for work as usual, his supervisor, Wilbert Vasquez, asked him to get his briefcase and come to the office, where he met with Supervisors Figueroa and Severa. After being read a layoff letter, Vega asked why, given his seniority, he could not be reassigned to the position of assembler with a lower salary, but that Vasquez told him that "Company policy is that if a job classification is eliminated, there is no chance of relocation."

Vega's testimony was not contested. Vasquez, an admitted supervisor, was not called to refute Vega's assertions, and while Figueroa testified at the hearing, she had a poor recollection as to which laid-off employees she met with. Thus, she made no mention of any meeting with Vega and was not asked about any statement attributed to Vasquez by Vega. Accordingly, I credit Vega and find that Vasquez informed him that company policy prohibited the relocation of laid-off employees to other departments once their job classification was eliminated. Vasquez' statement to Vega, like Figueroa's comment to Belen, reflected a change in policy for, as found below, Respondent's past practice had been to permit the reassignment of laid-off employees to other positions.

The only company witness called by Respondent to testify as to what the laid-off employees may have been told was Figueroa. Figueroa testified that she coordinated the entire process and executed the terminations which included notifying the affected employees orally and in writing. She stated that management teams of two to three representatives each were set up to provide the layoff notifications, and that she personally notified two or three of the individuals, including employee Belen and possibly another employee named Olga Ramirez, of their layoff. Figueroa claims that in her meetings with the affected employees, she basically read the layoff letter to the employee and then asked if they wished to comment on anything. Figueroa recalled one of the employees, she could not recall whom, commenting that "it was not fair, so many years," and asking if she (or he) "would receive severance pay or be allowed to stay in another position."<sup>22</sup> Figueroa claims she tried to identify with the employees by stating, "I know it doesn't feel good going through this process" and that as to the severance pay, informed them that "we were simply following Law 80, and Law 80 has no severance pay, and layoff for just cause. The Company, however, would give them a bonus, a minimum of one week, up to four weeks of salary, according to the years of service." Regarding possible reassignment to some other position, Figueroa allegedly told them that "we don't have any openings at that time, and if we do that, we would be violating Law 80." Figueroa admitted that following the June layoffs, the Respondent hired some 50 "temporary" production employees, and stated that if any of the laid-off employees had asked to be rehired as a temporary employee, Respondent would not have done so.

Figueroa's testimony was also central to Respondent's defense that it conducted the June layoffs just like all its prior layoffs. Thus, Figueroa pointed out that in layoffs conducted in October 1993, February 1994, and April 1995, the Respondent, as it did with the June 1994 layoff, utilized strict plantwide seniority as required by Law 80 to determine which employees would be laid off. She also testified that Respondent has always used this same statutory framework to make shift assignments.<sup>23</sup> Figueroa testified that employees affected by a layoff have never been allowed to bump into other positions or been reassigned because such bumping and reassignments are not allowed under Law 80. She conceded, however, that the Respondent deviated from this particular practice when it eliminated the sterilization department by transferring the sterilizers to machine assembly positions, but suggested that Respondent decided to retain the sterilizers because it wasn't sure if the sterilizers would be needed in the future. She claims that as a result, the sterilizers were "transferred to an area where their skills or knowledge could be put into effect or work" and on at least one occasion, went back to being sterilizers. Finally, Figueroa denied having made any remarks about a change in company policy during her meetings with employees.

I place no credence in Figueroa's testimony as it conflicts with the more credible documentary and testimonial evidence of record. For example, documents received in evidence regarding the October 1993 layoff belie Figueroa's claim that strict plantwide seniority was always used to affect layoffs, and that employees selected for layoff have never been allowed to bump or to be reassigned into other positions because of restrictions imposed by Law 80. Thus, in a September 23, 1993 memo from Alex Solla to "All Personnel" regarding the anticipated October 1993 layoff, Solla informed employees that the layoff would affect some 142 regular and temporary employees<sup>24</sup> and, more importantly, that "*Seniority (employment date) by classification and general performance are the criteria used in order to determine affected employees,*" and that "hourly employees affected and having more seniority in the organization will be offered the opportunity of bumping/replace other employees with less seniority in Assembler I positions" (G.C. Exh. 25).<sup>25</sup> Solla's memo

<sup>23</sup> Figueroa also made some vague reference to a 1991 layoff but gave no specifics as to how they were implemented, which category of employees were affected, or the number of employees involved.

<sup>24</sup> Apparently seeking to downplay and distinguish the significance of the October 1993 layoff from the disputed June layoffs, the Respondent avers in its posthearing brief (p. 6) that most of the employees affected by the October 1993 layoff were of "temporary" status. The Respondent, however, has either not reviewed the evidence in this case or is engaging in a deliberate distortion of pertinent facts, for Figueroa's own testimony, corroborated by documentary evidence, establishes without question that most of the affected individuals were regular, not temporary, employees (Tr. 331; R. Exh. 9).

<sup>25</sup> I read Solla's reference to "seniority (employment date) by classification" as indicating that seniority in a particular classification, rather than plantwide seniority, was to be used. While the inclusion of the phrase "employment date" can be read as a reference to the affected employee's hiring date, the phrase is qualified by the reference to classification seniority, raising the reasonable inference, which I draw, that "employment date" refers to the date the affected employee began working in a particular classification, and not

*Continued*

<sup>22</sup> However, when asked by me whether all three had asked similar questions, Figueroa changed her testimony somewhat by testifying, "Yeah, more or less similar because of what the letter stated. Uh-huh."

makes patently clear that factors other than strict plantwide seniority were used in conducting the October 1993 layoffs and additionally that employees were afforded "bumping" rights, notwithstanding Figueroa's claim to the contrary. Indeed, by her own admission, and as evident from an October 7, 1993 memo addressed by her to the "HR Team" regarding those layoffs (see G.C. Exh. 25), Figueroa was actively involved in implementing those layoffs and was fully aware that the above criteria described in the Solla memo were to be used to affect the layoffs. Figueroa's contrary testimony at the hearing was therefore deliberately misleading, if not palpably false.<sup>26</sup>

Further, in February 1992, following the reorganization of its engineering department, the Respondent eliminated several mechanic positions. The affected employees, however, were not laid off but instead were reassigned to other departments, and advised that "*the elimination of these positions was carried out taking into consideration several factors such as general skills and abilities, seniority, attitude and others concerning general performance* [G.C. Exh. 29]." In May 1992, Respondent, continuing its efforts at restructuring the engineering department, eliminated four LPC positions using the same above-described factors. It did not, however, lay off any of the affected LPCs but rather, like the mechanics, reassigned them to assembler positions (G.C. Exh. 42). The above documents thus contradict and render specious Figueroa's claim that Respondent has always applied strict plantwide seniority to effectuate layoffs, and her claim that Respondent does not reassign, or afford bumping rights to, employees affected by a layoff due to legal constraints placed on it by Law 80.

Figueroa's testimony is further undermined by the different reasons she gave to explain why Respondent, in an apparent departure from what it claims was its past practice, chose to retain the sterilizers following elimination of their department. Thus, while testifying that Respondent retained the sterilizers because they might be needed in the event Re-

when he/she was first hired. In any event, it was incumbent on Respondent, as the originator of these records, to explain or clarify any ambiguities in this regard, which Respondent has not done.

<sup>26</sup> The Respondent suggests that R. Exh. 9(b), which purports to list the employees laid off in October 1993 by their ID number, supports its claim that the layoffs were done according to plantwide seniority. I disagree, for when viewed together with other documentary evidence, more particularly G.C. Exh. 55, which lists the hiring and termination dates for employees from January 1, 1990, to December 31, 1994, it becomes fairly evident that R. Exh. 9 is at best ambiguous, if not erroneous. For example, while R. Exh. 9(b) identifies Assembler Dano Suarez (ID# 92587) as having been laid off in October 1993, G.C. Exh. 55 (at p. 9) shows a termination date of April 1995. Similarly, others, e.g., Mariano Irizarry-Rodriguez (ID# 92573), Julio Garcia-Ortiz (ID# 92575), Eric Gonzalez-Pabon (ID# 92585), Eric Gutierrez-Lebron (ID# 92591), who were allegedly laid off in October 1993 as per R. Exh. 9(b), are shown in G.C. Exh. 55 to have been laid off at a later date. Respondent did not explain this apparent inconsistency between the two documents, which undoubtedly came from its own files. A review of G.C. Exh. 55 also shows that in certain instances, employees with a lower ID number and presumably higher overall plantwide seniority were laid off before employees in the same classification having a higher ID number and possessing less seniority (compare, e.g., Luis-Morales-Fosse [ID# 92552] and Dario Suarez [ID# 92587], at G.C. Exh. 55, p. 9), further undermining Respondent's argument that strict plantwide seniority was used in the October 1993 layoff.

spondent decided to reopen the sterilizer department, Figueroa on cross-examination conceded she had not provided this as the reason in her sworn affidavit to the Board, but instead had asserted that the sterilizers were kept on because Respondent's former management had made a commitment to retain them. Figueroa's testimony in this regard, like her other testimony, was simply not convincing. Rather, I find that the action taken with respect to the sterilizers was no different than that taken during the February 1992 reorganization of the engineering department, when mechanics were reassigned to other positions, and during the October 1993 layoff when the affected employees were allowed to "bump" into other positions.

### C. Findings on the Specific Complaint Allegations

#### 1. The 8(a)(1) conduct

##### a. Soliciting employees to engage in surveillance and to report on other employees' union activities

Alleged discriminatee Raquel Gonzalez testified in a very candid and forthright manner that sometime in February or March, while in her work area, Manufacturing Supervisor Olga Albino, an admitted 2(11) supervisor, approached her and said that "if at any time Ms. Lourdes Irizarry approached me or any of the employees concerning the Union, or the Union movement, or gave me cards, and if she approached me regarding, or made any comments regarding the Union movement, for me to let her know that Lourdes was working for the Union, or talking about the Union." (Tr. 115-116.) Gonzalez was not an active union supporter and, indeed, readily admitted that she was a member of the "Vote No" group which supported the Company. She testified to telling Albino that she would indeed let her know if Irizarry approached her. She in fact never told Albino anything about Irizarry. While this allegation was denied in its answer, Respondent did not call Albino as a witness to refute Gonzalez' assertion, nor did it question Gonzalez about this incident during her cross-examination. Accordingly, given the credible and undisputed nature of Gonzalez' testimony, I find that Respondent, through Albino, violated Section 8(a)(1) of the Act by asking Gonzalez to engage in the unlawful surveillance, and to report on the union activities, of chief union proponent, Irizarry. *Albertson's Inc.*, 307 NLRB 787, 794 (1992).

##### b. Telling employees it would be futile to engage in union activities

Alleged discriminatee Charlie Silva testified that on or about March 10, at approximately 2:30 p.m., as he was reporting to work, he went by Solla's office to hand him a letter containing a list of some five or six suggested productivity incentives for company employees (see G.C. Exh. 7). Solla, according to Silva, stated that he and other employees "were mistaken with the union idea because if Sabana Grande had been a large town, the Union would have won. But since Sabana Grande was a small town, it was a town with people with small minds. And that it would be easy for the Company to scare people and get them to vote against

the Union."<sup>27</sup> Silva's testimony in this regard is undisputed. Although Solla was no longer employed by Respondent at the time of the hearing, the Respondent has neither contended nor shown that Solla was unavailable to testify. Given the uncontroverted nature of Silva's testimony and his general reliability as a witness, I find Solla made the remarks attributed to him by Silva, which in turn are chargeable to Respondent, and that such comments were clearly designed to convey the impression that employees were powerless to prevent Respondent from affecting the outcome of any election through intimidation and that, consequently, it was futile for them to pursue union representation. Accordingly, I find that by engaging in the above conduct, the Respondent violated Section 8(a)(1) of the Act, as alleged.

*c. Interrogation; threats of plant closure, and loss of wages, "blackballing" employees*

Maria Belen testified that sometime in April, as she was heading towards the Company's infirmary, she ran into Production Superintendent Geraldo Gonzalez as he was coming out of his office, and that he asked her if she had heard any comments. Thinking that Gonzalez was referring to production problems, Belen replied that things were going well. However, Gonzalez proceeded to ask her "[W]hat kind of comments I had overheard about the Union." Belen responded by asking Gonzalez what kind of comments he had expected her to hear, noting that up to that point all the comments she had overheard had come from management. At that point, Gonzalez, according to Belen, commented that "if the Union came back the new people that had purchased McGaw, which was IVAX, that IVAX was not going to spend a single penny in campaigning against the Union . . . and what they would do would be to close the plant without warning . . . that the people were not going to even be paid for the last week that they had worked since the closing would be without warning." Gonzalez further added that "the people that were laid off for that reason would not be able to get work from other companies because they would know that the reason for the layoff was because of unions." (Tr. 143.) Belen told Gonzalez that while there were people who had worked on the Union's behalf, there were many more who had campaigned for the Company, and that it would be unfair to them not to be able to find jobs with other companies.

Geraldo Gonzalez was employed at Respondent's Sabana Grande facility from 1988, until June 1994, when he transferred to its California office, where he currently serves as senior manufacturing supervisor. He acknowledged having

<sup>27</sup> The Respondent objected to Silva's testimony in this regard, and I sustained the objection as it was not responsive to the question posed to him by the General Counsel which simply asked if Silva recalled having had a conversation in March with any company manager or supervisor. Although the General Counsel did not follow up on this alleged conversation, during cross-examination Respondent's counsel acknowledged and implicitly revived Silva's above objected-to answer with the following question (Tr. 93):

Q. Okay. And according to what you testified to today that during this time Mr. Solla sat there talking about the Union, and Sabana Grande being a small town, among other things. That's your testimony?

A. Yes, sir, that happened after we finished with the conversation regarding the document I had given him.

worked with Belen in the production department, but denied conversing with her about the Union, and specifically denied ever having interrogated her or commenting about any plant closure. He also generally denied having threatened any employee during his tenure at Sabana Grande stating, in purely self-serving fashion, "[W]e are not allowed to do that. The law specifically says that you don't do that." On cross-examination, Gonzalez was nonresponsive and evasive to questions posed by the General Counsel regarding his knowledge of the union activities of certain individuals. Thus, while admitting he knew that Irizarry and Vargas had been employees of Respondent, when asked if he was aware they were union leaders, replied somewhat evasively, "Neither one of them told me specifically one way or the other," but when pressed eventually conceded knowing of their involvement with the Union. Similarly, when asked if he knew that Silva was also a union leader, Gonzalez again became evasive responding, "Not from my knowledge through him." He subsequently conceded it had been mentioned to him.

As between Belen and Gonzalez, I find Belen was the more credible witness. Unlike Gonzalez, Belen answered all questions in a candid and forthright manner, and provided greater detail regarding the circumstances surrounding her conversation with Gonzalez. Gonzalez, on the other hand, was deliberately evasive regarding his knowledge of employees' involvement in union activities. Further, his terse testimony denying that he ever interrogated Belen or mentioned plant closure to her came in response to some very general questions posed to him by Respondent's counsel, and seemed rehearsed and insincere. Given his poor demeanor on the witness stand, and attempt to avoid providing direct answers to the General Counsel's questions on his knowledge of employee union activity, I find his testimony not to be credible. Further, Gonzalez was not questioned about, and consequently has not denied, Belen's testimony that he told her employees would suffer a loss of wages caused by the abrupt and unannounced closure of the facilities by Respondent's new owners, IVAX, or her claim that he threatened to "blackball" laid-off employees. Accordingly, I draw an adverse inference from Respondent's failure to elicit a denial or evidence from Gonzalez regarding this latter testimony by Belen. *Asarco, Inc.*, 316 NLRB 636, 640 (1995). Thus, crediting Belen's testimony, I find that sometime in April, Respondent, through Gonzalez, unlawfully interrogated Belen in an effort to ascertain what employees were discussing about the Union, threatened her with plant closure and loss of wages if the Union came in, and threatened to interfere with the ability of employees who were laid off to obtain other employment because of their union activities. Such comments predictably would have a dampening effect on prounion ardor and inhibit union activity, and violate Section 8(a)(1) of the Act. *299 Lincoln Street, Inc.*, 292 NLRB 172, 191 (1988).

*d. Prohibition against employees' discussion of the Union*

The complaint alleges, and the Respondent denies, that on or about June 22, the Respondent prohibited employees from discussing the Union among themselves. The General Counsel relies on the testimony of alleged discriminatees Rodriguez and Silva to support the allegation, while the Re-

spondent relies on Marshall's testimony as well as that of Miriam Figueroa.

Rodriguez testified that at a June 22 employee meeting held by management and attended by Marshall, Solla, and Severa, Marshall stated that "he was worried because when he got up in the morning he turned on his radio . . . and heard some news where there had been a fire in a factory nearby where a third party had been involved." Marshall went on to state that "he did not want third parties involved in the plant with them because [the employees] could talk with them, or dialogue with them." He also asked employees if they had noticed that there had been salary increases, parties, and other things at the plant. Rodriguez recalled that one employee, Ramon Ruiz, raised a question regarding a conversation he had had with a supervisor in which the latter commented that the Company would leave if the Union came back. In response to Ruiz' comment, Marshall stated that "neither the employees nor the supervisors needed to talk about a union, that the only people that could talk about Unions were himself and Alex Solla." (Tr. 39.)

In a similar vein, Silva testified that during one of Marshall's quarterly meetings held on or about June 23, Marshall stated that Respondent had a lot of money to invest in employees as far as salaries and benefits go, "and that they didn't want third parties to come in order to obtain those benefits for the employees." Silva also recalled Marshall stating that "he did not want to hear employees talking in the hallways, whether it be pro or con, for or against the Union, and that if there needed to be any Union talk in McGaw it would be done between himself and Alex Solla in his office." Finally, Silva recalls a question by an employee before the meeting ended pertaining to whether the Company's financial condition was such as to affect the employees' ability to obtain loans from local banks. Marshall, according to Silva, told the employee that "things were looking good" at the Company, that sales were up, and that "they could borrow money because at the moment there were no plans to fire or dismiss anybody." (Tr. 67-70.)

Marshall admits to having conducted a quarterly meeting among employees on or about June 22, at which he discussed the plant's operation and Respondent's goals, using prepared slides, after which he basically opened it up for a questions and answers. He claims that because emotions were running fairly high due to the recent union elections, and to avoid things getting "out of control," he stressed to employees that "no one was to be threatening anyone. You know, for supporting or not supporting the Union." Marshall claims he did this because he "didn't want to see people get hurt, or problems, or this sort of thing." However, when asked if he ever told employees he did not want them talking about the Union, Marshall testified that the matter had come up in the form of an employee question during one of his employee meetings and that Solla had responded, "[T]hat the people that are authorized to discuss, as far as the Company was concerned, the Union was Alex Solla and myself." Marshall claims that he first learned of Solla's remark after the meeting was over, when Solla informed him about the employee's question and his response thereto. Seeking to clarify his answer, Marshall stated that the phrase "as for as the Company was concerned" was meant as a reference to those management officials who were authorized to speak for Respondent. Marshall testified that the reason Solla answered

the question was because it was asked in Spanish and Solla was more proficient than he in the language.

Figueroa testified she served as interpreter at the June 22 meeting, and that Marshall, as he did at every meeting, informed employees that he would not allow any threats in or among employees, and that if anyone felt threatened he or she should speak with Solla or himself. Although Figueroa testified to having heard employee Ramon Ruiz ask a question, her testimony as to what specifically Ruiz asked was vague and seemed contrived. Thus, she initially testified that Ruiz asked whether employees were allowed to talk about the Union, or something to that effect, and that Solla responded that "the only management representatives [allowed] to make any updates on the Union was either Ira [Marshall] or [himself]." However, she subsequently modified her testimony by stating that Ruiz' question actually pertained to the closing of the plant. As noted supra, Figueroa was not a credible witness and her testimony in this regard is rejected.

While there are minor differences between Rodriguez' and Silva's testimony as to what exactly Marshall said in response to the employee's question, they both agree on one vital point, to wit, that Marshall expressly told employees not to discuss the Union among themselves and that only he and Solla were permitted to discuss the Union. Crediting a composite version of their testimony, I find that Marshall expressly forbade employees from discussing the Union. Although, Marshall, as noted, claims that Solla, and not he, responded to the employee's question, Respondent's admission in its posthearing brief that Marshall authored the statement renders the claim specious and casts doubt on Marshall's overall credibility as a witness.<sup>28</sup> Indeed, given that Marshall had an interpreter present, Figueroa, through whom he was able to communicate with employees throughout the course of the meeting on the state of Respondent's operations and its goals, his suggestion that Solla had to respond to Ruiz' question because Solla was more proficient than he in the Spanish language, simply does not ring true. The weight of the credible evidence, and Marshall's own lack of candor regarding other matters mentioned supra, convinces me that Marshall indeed instructed employees on June 22, not to dis-

<sup>28</sup> Respondent states in its posthearing brief (at p. 30) that "Mr. Marshall informed employees that himself or Alex Solla, the HR Manager at the time, were the only management employees authorized to speak about the union on McGaw's behalf (emphasis added)," confirming Rodriguez' and Silva's testimony that Marshall, not Solla, made the remark.

Marshall, as noted, suggests that the alleged remark (which he attributes to Solla) was meant to inform employees that he and Solla were the only management individuals authorized to speak to employees on Respondent's behalf regarding the Union, and was not intended as a prohibition against employees discussing the Union among themselves. Assuming, however, that this was the true intent of the remark, on its face the remark could only have been construed by employees as a prohibition on their right to openly discuss the Union among themselves, and there is no indication that Marshall attempted to clarify or explain what he intended by the remark. Any ambiguity in this regard must be resolved against Respondent. I note in any event that the coercive nature of an employer's remark is not measured by the motive or intent behind it but rather is determined by whether the remark in question could reasonably have a tendency to interfere with the free exercise of employee rights under the Act. *MK Railway Corp.*, 319 NLRB 337 (1995).

cuss the Union among themselves, and that only he and Solla were authorized to do so. An employer violates Section 8(a)(1) of the Act when it prohibits employees from discussing union-related matters while allowing discussion of other nonwork-related subjects. *Williamette Industries*, 306 NLRB 1010 (1992). The Respondent here does not contend, nor is there any evidence to show, that in restricting such discussion at the workplace, the Respondent was acting pursuant to some lawful no-solicitation policy prohibiting discussion of all nonwork-related matters, or that it, indeed, it had such a policy. In these circumstances, I find that Respondent interfered with employees' Section 7 rights by prohibiting them from discussing the Union among themselves, in violation of Section 8(a)(1) of the Act.

## 2. The 8(a)(3) allegations

### a. *The change in policy for LPCs from seniority in classification to plantwide seniority*

The complaint alleges and the General Counsel contends that in February 1994, the Respondent unlawfully changed its method for assigning shifts to employees in the LPC classification from one based on the employee's seniority in the classification to one based on strict plantwide seniority. The General Counsel argues that the Respondent implemented this sudden change in policy in order to discriminate against certain LPCs, whom it knew were leaders of the union movement, and to discourage other employees from engaging in such activities. The Respondent denies that any change in policy occurred, and contends only that it has always used plantwide seniority to not only make shift assignments but also to select employees for layoff.

In determining whether the alleged conduct is violative of Section 8(a)(3) and (1), as alleged in the complaint,<sup>29</sup> the Board utilizes the causation test set forth in its *Wright Line* decision.<sup>30</sup> Under *Wright Line*, the initial burden of proof rests with the General Counsel who must make a prima facie showing that the adverse action taken by the employer against employees was motivated at least in part by the employees' union or other protected concerted activity. To make out a prima facie case, the General Counsel must show that the affected employees engaged in union activities, that the employer was fully aware or had reason to believe that the employees were engaged in such activities, and that it harbored antiunion animus. Once this is established, the burden shifts to Respondent to show that the same action would have been taken even without regard to any union or protected concerted activity the employees may have engaged in. *Virginia Metal Products*, 306 NLRB 257, 259 (1992). To sustain its burden, an employer may not simply present a legitimate reason for its actions but rather must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected conduct. However, where the employer's reasons for its actions are found to be pretextual, that is if the reasons either did not exist or were not in fact relied upon, then the employer

will not have met its burden and the inquiry is logically at an end. *Berg Product Design*, 317 NLRB 92, 95 (1995); and *T&J Trucking Co.*, 316 NLRB 771 (1995).

The General Counsel, I find, has made a prima facie showing under *Wright Line*, supra, that the change in policy was motivated by antiunion considerations. Initially, there is no disputing that the Union's most active and vocal supporters were to be found within the LPC classification. Thus, LPCs Rodriguez, Irizarry, and Silva all served as observers for the Union during the Board-conducted elections, openly discussed the Union with other employees, and distributed authorization cards. Irizarry wore a prounion sticker and, together with her husband, Vargas, addressed employees openly in front of Respondent's premises using a loudspeaker. Irizarry and Rodriguez also held union meetings in their homes. Silva, in addition to his other above-described union activities conducted weekly radio broadcasts lasting from 2-3 hours over local radio on Sundays conveying the union message. Like Irizarry and Vargas, he openly spoke to employees in front of Respondent's facility as they entered and exited the premises. Thus, the union activities of these three individuals is not subject to question.

Further, given their overt prounion conduct, including their involvement as union observers, I find that the Respondent had actual knowledge of their activities. Indeed, Superintendent Geraldo Gonzalez' begrudgingly admitted knowing that Irizarry, her husband, Vargas, and Silva were leaders in the Union's organizational drive, and Marshall's testimony, that he observed the union van parked in front of Respondent premises with loudspeakers "blowing right into our cafeteria," concurs with Irizarry's testimony that she and her husband openly communicated with employees using loudspeakers, and supports a finding that Respondent was fully aware of her activities. Further, Respondent's attempt to solicit Raquel Gonzalez to spy and report on Irizarry's union activities makes clear that Respondent viewed the latter as a main player in the union movement. I also find it reasonable to infer, from Silva's credible testimony that he openly distributed union propaganda and spoke to employees as they entered and exited Respondent's premises, that Marshall, who admits to having observed employees being addressed through loudspeakers, or other management personnel must also have seen Silva engaging in such activities.

In addition to knowing of Irizarry's, Silva's, and Rodriguez' involvement with the Union, the inquiries and comments addressed by Supervisors Carrera, Vasquez, and Montalvo to Belen regarding her union sympathies, her non-committal responses to the inquiries, and the fact that she subsequently became the target of an unlawful interrogation and threats from Production Superintendent Gonzalez, convince me that Respondent may have believed, or at least suspected, that Belen was also a union activist or supporter.

Evidence of Respondent's hostility and animosity towards the union permeates the record. Marshall, himself, readily admitted that Respondent was strongly opposed to having a "third party," a euphemism for the Union, come between Respondent and its employees. Despite being victorious in the last election, there is little doubt that Respondent continued to perceive the Union as a real threat whose activities needed watching, as evident from its attempt to persuade Gonzalez to keep tabs and report on Irizarry's movements, and whose elimination it deemed to be of the highest prior-

<sup>29</sup> The General Counsel's posthearing brief erroneously cites this as an 8(a)(1) violation only (see G.C. Br. 39-40).

<sup>30</sup> 251 NLRB 1083 (1980), enfd. 662 F.2d 800 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

ity, as set forth in Marshall's June 13 memo to Sielski. It also displayed its antiunion animus when it sought to intimidate and coerce employees through interrogations and threats that included telling them it could influence the outcome of any election, threatening to "blackball" them for having engaged in union activities, and prohibiting them from discussing the Union among themselves.

Thus, the above facts make it patently clear that the Respondent knew full well who the Union's most ardent supporters and leaders were, and was keenly aware that most could be found within the LPC classification. It is equally clear that Respondent was adamantly opposed to the Union, and that it took steps aimed at discouraging further support for the Union that included threats and intimidation. The General Counsel theorizes that Respondent's change in policy in February, from using seniority in classification to using plantwide seniority to make shift assignments for employees in the LPC classification, was simply a continuation of Respondent's scheme to discriminate against union supporters within that classification and to discourage others from following in their footsteps. The General Counsel also suggests that by switching to plantwide seniority, the Respondent was laying the groundwork for the eventual termination of the union leaders in the LPC classification. Thus, she notes that had Respondent used seniority in classification to effectuate the June layoffs, leading union adherents Irizarry and Rodriguez, and suspected union supporter, Belen, would not have been laid off as they apparently had been working as LPCs longer than at least 10 others in that classification seniority of the LPCs (G.C. Exh. 11, 12). This undisputed fact, coupled with Respondent's knowledge of union activities of certain LPCs and its animosity towards the Union, supports the inference that the Respondent's change in policy was motivated by antiunion considerations. Accordingly, I find that the General Counsel has satisfied her initial burden under *Wright Line* of showing that the change in policy regarding shift assignments for LPCs was unlawfully motivated and violative of Section 8(a)(3) and (1) of the Act. The burden now rests with the Respondent to show that the change was motivated by legitimate nondiscriminatory reasons, and that it would have occurred even without the employees' union activities. A review of the credible evidence of record convinces me that it has not done so.

The Respondent's defense to this allegation, as noted, rests exclusively on its claim that it has always used plantwide seniority to make assignments, and that the shift changes it made in February 1994 among employees in the LPC classification was consistent with that past practice. The only evidence in support of its position came from Figueroa who testified that Respondent has always applied the plantwide seniority requirements of Law 80 to not only make shift assignments but also to effectuate layoffs. Her testimony, however, conflicts with that of Nazario and Rodriguez who testified that shift changes have always been assigned on the basis of a LPC's seniority in the classification. More significantly, Nazario, as noted, credibly and without contradiction, testified that when she was notified on February 11 of her shift change, Geraldo Gonzalez stated that Respondent had instituted a "new change of policy" whereby such assignments were now to be made based on plantwide, rather than

classification, seniority.<sup>31</sup> Rodriguez similarly testified, without contradiction, that after being assigned from the second shift to the first due to her seniority as a LPC, she was likewise informed on February 10, that she was being moved back to the second shift because of a change in policy whereby such assignments would henceforth be determined according to plantwide seniority. Further, the memo given to Nazario, stating that Respondent was "restructuring the assignment of work shifts" of the LPCs pursuant to the Company's seniority policy and advising her of the change, strongly suggests that Respondent was indeed instituting a new policy rather than adhering to an old one (G.C. Exh. 8(b)). If, as Respondent suggests, it has always used plantwide seniority, it would seem logical that no "restructuring" was needed as employees obviously would have already been in their proper shifts. Indeed, the fact that Nazario and Rodriguez had their shifts changed in February to conform to what Respondent claims was its past practice of assigning shifts using plantwide seniority is a clear indication that initially these employees had previously been assigned to their pre-February shifts on the basis of something other than plantwide seniority. While the Respondent has offered no explanation for this apparent paradox, the only obvious answer in my view is that the LPCs, prior to February 1994, were not being assigned to shifts according to plantwide seniority and that Respondent, for some unexplained reason, felt compelled in February 1994 to institute what Gonzalez identified as a "new change of policy." Thus, except for Figueroa's testimony, which I find not to be credible, the Respondent presented no evidence to substantiate its claim of a "plantwide seniority" past practice regarding shift assignments, or to refute the opposing and more credible testimony provided by Rodriguez and Nazario on this issue. The Respondent's failure to present any credible evidence to refute this allegation leaves intact the General Counsel's prima facie case, and warrants a finding that the Respondent violated Section 8(a)(3) and (1) of the Act when it changed its policy of using seniority in classification to plantwide seniority in order to discriminate against certain LPCs because of their union activities, and to discourage other employees from engaging in similar conduct.

#### b. *The June 30 layoffs*

The complaint, as noted, alleges that Respondent laid off the above-named nine LPCs because they joined or assisted the Union or engaged in concerted activities, and/or to discourage these and other employees from engaging in such activities. More specifically, the General Counsel in her posthearing brief alleges that Respondent "eliminated the position of [LPC] in order to fire the union leaders who worked in this classification, and thus kill the union movement" and that "[i]n its desire to disguise and camouflage its true purpose, Respondent 'swept out' nonunion supporters along with the known union leaders." To accomplish this, the Respondent used strict plantwide seniority to select employees for lay off, which the General Counsel avers was a deviation from its past practice of selecting employees based on seniority in

<sup>31</sup> As Gonzalez, who testified at the hearing, was not asked about and did not deny the comments attributed to him by Nazario, I draw an adverse inference from Respondent's failure to question him about such matters. *Asarco, Inc.*, supra.

classification and other criteria. According to the General Counsel, the Respondent's decision to use plantwide seniority to conduct the June layoffs was merely an extended application of the unlawful change in policy instituted by Respondent in February discussed above. The gist of the General Counsel's argument is that had Respondent not changed its policy, leading union adherents Lourdes Irizarry and Vigdalia Rodriguez, and suspected union supporter, Maria Belen, would not have been laid off as they had greater seniority in the LPC classification than others who were not laid off. The General Counsel also seems to argue, implicitly, that even if these employees had been properly selected for layoff, Respondent's past practice, which was not followed during the June layoffs, has been to grant employees affected by a job elimination or possible layoff the right to bump or to be reassigned to other positions or classifications. The factors, the General Counsel further argues, coupled with the timing of the layoffs and Respondent's union animus, clearly establish that the June 30 layoff of the nine LPCs was motivated by unlawful considerations and violated Section 8(a)(3) and (1) of the Act.

The Respondent asserts that it laid off the nine alleged discriminatees for legitimate business reasons, arguing that the layoffs resulted from a restructuring and reorganization of its manufacturing operations which caused many of the functions performed by LPCs to be eliminated, rendering such positions superfluous. Further, it asserts that the June layoffs, like all prior layoffs, were conducted in strict compliance with the provisions of Law 80, which purportedly dictates that all reductions in force caused by, inter alia, changes in an employer's operation due to technology or reorganization must be done according to the plantwide seniority of employees in the affected classification.

Applying the *Wright Line* analysis to the alleged discriminatory layoffs, I find that the General Counsel has made a prima facie showing that the layoff of the nine LPCs on June 30 was motivated by antiunion considerations. As found above, the Respondent had knowledge that at least three of the LPCs selected for layoff—Rodriguez, Irizarry, and Silva—were leaders in the Union's drive to organize its employees, and suspected that a fourth, e.g., Belen, may also have been involved in or was supportive of such activities. As further discussed above, the Respondent's antiunion animus is well established in the record and demonstrates quite clearly that Respondent was strongly opposed to the Union and engaged in efforts to undermine employee support for the Union through unlawful means that included threats, interrogations, solicitation of surveillance, and changing its policy for making shift assignments so as to prejudice the union supporters in the LPC classification.

While not disputing and indeed conceding that three of the LPCs had engaged in "overt union activities,"<sup>32</sup> the Respondent nevertheless argues that the General Counsel has not shown that the other laid off LPC's engaged in such activities or established that it knew of such activities. It notes

<sup>32</sup>It admits that "only three of the nine dismissed employees were engaged in overt union activities" (R. Br. 37). While not mentioning by name which of the three it was referring to, it is reasonable to assume that Respondent was referring to Irizarry, Rodriguez, and Silva. However, as found above, the facts support a finding that Respondent believed Belen to likewise have been involved in union activities.

in this regard that some of the affected employees, e.g., Gonzalez and Nazario, may indeed have been procompany rather than prounion, casting doubt on the General Counsel's theory that the layoffs were unlawfully motivated.<sup>33</sup> In essence, it argues that the General Counsel did not meet her burden of proof under *Wright Line*, supra, as she has not shown that "all of the laid off employees engaged in union activities." The Respondent's contention is without merit, for where the central aim of a layoff is to discourage union activity or to retaliate against employees because of the union activities of some, as the General Counsel alleges here, the layoff will be found to be unlawful even though employees who might have been neutral or even opposed to the Union are laid off with their counterparts, *Birch Run Welding & Fabricating v. NLRB*, 716 F.2d 1175, 1180 (6th Cir. 1985); *American Wire Product*, 313 NLRB 989, 994 (1994); and *Mini-Togs*, 304 NLRB 644 (1991). This theory is applicable even in situations where known union adherents or leaders from other departments are not discharged or laid off, as Respondent contends is the case here, for as the court noted in *Birch Run Welding & Fabricating v. NLRB*, supra, "the focus of the theory is upon the employer's motive in ordering extensive layoffs rather than upon the anti-union or pro-union status of particular employees." See *J. T. Solocomb Co.*, 314 NLRB 231, 241 (1994); and *LWD, Inc.*, 295 NLRB 766, 779 (1989). In any event, while the record suggests that supporters of the Union could be found in other departments, except for Vargas, Irizarry's husband, who was a mechanic and not a LPC, there is no evidence to indicate that other employees were as actively involved or had assumed the leadership roles undertaken by LPC's Rodriguez, Irizarry, and Silva.

The Respondent also argues that the timing of the June 30 layoffs, "eight months after the last period of protected activity" occurred, militates against a finding that the layoffs were unlawfully motivated and undermines the General Counsel's prima facie case (R. Br. 35). I disagree, for, as noted above, on May 29, just 1 month prior to the June layoffs, employees were continuing to engage in protected activities by distributing leaflets announcing, and attending, the May 29 union meeting at El Combate beach, a meeting which, as noted, Respondent learned of from Supervisor Nunez. Further, Respondent's own conduct following the last election on November 1993, beginning with its attempt sometime in February or March 1994 to solicit Gonzalez to spy and report on Irizarry's union activities, and continuing through June 22, when Marshall imposed the gag order prohibiting employees from discussing the Union among themselves, along with the fact that, as expressed in Marshall's June 8 memo, the Union was seen as a continuing threat that had to be dissolved, establishes rather convincingly that Respondent was fully aware just 1 week before the layoffs that the union movement was alive and well at its facility. Thus, Respondent's suggestion that the timing of the layoffs is a factor in its favor is without merit. Indeed, unlike layoffs that preceded and followed the June 30 layoffs, wherein affected

<sup>33</sup>Gonzalez, as noted, was a member of the "Vote No" group which supported the Company. Nazario testified she always supported the Company and had voted against the Union during both elections. She further testified that her procompany stance was well known by most managers and supervisors.

employees received ample notice of the layoff,<sup>34</sup> the nine LPCs selected for layoff on June 30 were given no prior warning. Thus, most, if not all, of the discriminatees laid off on June 30, first learned they were to be laid off after reporting to work on June 30, and in Silva's case, learned of it by word of mouth on July 1. Thus, if anything, the timing of the layoffs, and the abrupt manner in which they were carried out constitutes persuasive evidence that the layoffs were unlawfully motivated. *Cleansoils, Inc.*, supra.

In light of the above, I find that the General Counsel has made a strong prima facie showing that antionion considerations factored into Respondent's decision to lay off the nine LPCs on June 30, and that she has accordingly satisfied her *Wright Line* burden in this case. Having so found the burden shifts to the Respondent to demonstrate that it would have laid off the nine LPCs even without regard to any union activities. The Respondent has not sustained its burden in this case.

Initially, I have no difficulty finding that beginning sometime in October 1993, and continuing through July 1994, Respondent's manufacturing processes underwent a dramatic change with the introduction of the conveyor system and automatic time recording system that altered and presumably improved its production process. This fact is well documented in the record and the General Counsel does not contend otherwise. There is also evidence to suggest that these changes impacted on the functions typically performed by LPCs resulting in a diminution of their overall duties. Belen, for example, testified she saw a reduction in the amount of clerical work previously performed by LPCs, noting that with the installation of the automatic timeclocks, she no longer had to verify employee timecards or compute employees' production efficiency rate. However, she further testified that while "some clerical work was eliminated, physical work was added" to her duties, noting that with the speed of the conveyors the production employees "could not take all of what went by, and we [the LPCs] would have to take over what went by them." She nevertheless admitted on cross-examination that before the conveyors were installed, the lion's share of the work performed by LPCs consisted of clerical type work, but denied that the need for LPCs as a link between supervisors and employees was in any diminished with the introduction of the conveyors.

Jose Carrero, Respondent's first-shift superintendent, similarly testified that the conveyor system brought about a change and a reduction in the duties performed by the LPCs. According to Carrero, many LPC duties, such as labeling and recording lot numbers on labeled products, maintaining employee production count, and doing "line clearance" work, were simply no longer required after the conveyors were installed because much of the tabulation previously performed by LPCs was performed by a packing machine which counted the product as it moved along the conveyor belts. Carrero testified that the LPCs were quite capable of performing production work and that, indeed, as a result of a reduction in

their functions, many LPCs would oftentimes be at the conveyor belt and work alongside other production employees.<sup>35</sup>

The record evidence, including Carrero and Belen's testimony, convinces me that the LPC's duties were in fact much reduced with the introduction of the conveyor belt system. It is not, however, all that clear from the record evidence that the LPC position was rendered wholly unnecessary to the production process, as Respondent suggests. I believe that the truth lies somewhere in between, that is, that with the advent of the conveyor system, the LPCs indeed had less work to do, leading Respondent to conclude that it could do with fewer LPC positions, and to its decision to eliminate nine such positions.<sup>36</sup> The inquiry, however, does not end here, for assuming that a layoff was inevitable, there remains the question whether these employees were improperly selected for layoff because of their union activities, and whether they would have been reassigned to other positions had they not engaged in such activities. The record evidence establishes quite clearly that they would not have been laid off.

The Respondent's initial defense to this complaint allegation is that it conducted the layoffs using plantwide seniority in accordance with its established past practice and as required by the provisions of Law 80, to which it claims it has always adhered. The evidence of record, including Respondent's own documents, contradicts Respondent's assertion in this regard for, as noted above, during the October 1993 layoff, the Respondent utilized such factors as the employees' seniority in classification and general job performance, and not strict plantwide seniority, to conduct those layoffs. Although the Respondent claims that it also used plantwide seniority to effectuate layoffs that occurred in April 1994 and April 1995, it produced no documentary evidence to support its claim. The only evidence in this regard came from Figueroa who stated in general terms that the plantwide seniority requirements of Law 80 were used to effectuate those layoffs. Figueroa, as noted, lied about the manner in which the October 1993 layoffs were conducted for, as noted, she had firsthand knowledge that plantwide seniority had not been used to effectuate those layoffs. Her prevarication in

<sup>35</sup> Carrero's testimony regarding the work performed by LPCs and the effect the introduction of the conveyor system had on their duties is credited. Carrero, however, also testified regarding the sterilization department, stating that the reason the sterilizers, which were about 10 in number, were transferred to production (a different classification) in October 1993, and not laid off, is because Respondent wanted to keep them available in the event it decided to reopen the sterilization department. This, however, conflicts with Figueroa's sworn statement in her affidavit, which as noted conflicts with her testimonial evidence, that the sterilizers were kept on because prior management had given them assurances they would not be laid off. Given these inconsistencies, Carrero's explanation as to why the sterilizers were not laid off, like Figueroa's, is not credited.

<sup>34</sup> See, e.g., G.C. Exh. 11(g) reflecting that on March 23, 1995, LPC Ramon Alameda was notified he would be laid off effective April 7, 1995. Similar letters were sent to LPCs Ana Velasquez and Awilda Sanabria providing advance notice of their anticipated layoff.

<sup>36</sup> The General Counsel, in any event, does not seriously challenge Respondent's claim that fewer LPCs were needed following the switch to a conveyor system of production. Rather, she simply questions, in rhetorical fashion, why Respondent retained 10 LPCs if by June 1994 there was not much work for them to do (G.C. Br. 18, fn. 5). While the issue is not free from doubt, given the reduction in the amount of work available for LPCs to perform following installation of the conveyor belt system, it is not unreasonable to believe that Respondent would want to keep some employees as LPCs to handle existing work, but that the amount of work available for LPCs would not support a full complement of 19 LPCs.

this regard, coupled with the fact that her testimony regarding the April 1994 and April 1995 layoffs is uncorroborated, renders her testimony as to how such layoffs were conducted unreliable and not credible.<sup>37</sup> Further undermining Respondent's claim that plantwide seniority was always used to effectuate layoffs are the Marshall/Solla memos of June 8 and 9, showing quite clearly that Respondent's initial intent was to eliminate 10 LPC positions using such criteria as "performance, academic background, and seniority," and not plantwide seniority. If strict plantwide seniority was the established past practice, why did Marshall and Solla both propose in their respective memos deviating from such practice? The answer is fairly obvious. Marshall, who as noted above, was fully aware of how the October 1993 layoffs were conducted, was simply adhering to what he understood to have been Respondent's true past practice in directing that employees be selected for layoff based on "performance, academic background, and seniority," rather than strict plantwide seniority. Except for Marshall's vague testimony that a "decision" was thereafter made to deviate from this past practice by using strict plantwide seniority instead, the Respondent provided no plausible explanation for having deviated from the practice. Indeed, if it had always adhered to a past practice of using plantwide seniority, there would have been no need for any such "decision." Finally, I find somewhat ludicrous Respondent's suggestion in its posthearing brief that it was concerned with being exposed to liability if it did not apply the plantwide seniority requirements of Law 80 to the June layoffs, for this clearly was not a concern to the Respondent in the past as evident from the fact that during prior layoffs, e.g., October 1993, it utilized factors other than plantwide seniority to effectuate layoffs.

Accordingly, I find Respondent's explanation that the alleged discriminatees were laid off in accordance with an established past practice of using plantwide seniority to be false. Rather, I am convinced that to the extent there was a past practice, it consisted of applying factors other than strict plantwide seniority. Respondent's deviation from this past practice was unexplained. Even assuming, *arguendo*, that Law 80 dictates that strict plantwide seniority be used to effectuate layoffs, it is clear that Respondent has not previously felt the need to comply with its provisions. Rather,

<sup>37</sup> The only documentation received in evidence regarding the February 1994 layoffs in R. Exh. 9 which simply lists the individuals affected by that particular layoff but offers no explanation as to how the selection was made. In fact, an unexplained discrepancy between R. Exh. 9, G.C. Exh. 55, and G.C. Exh. 56 cast doubt on the validity of the claim that plantwide seniority was used exclusively to effectuate the February 1994 layoff. Thus, R. Exh. 9 identifies five individuals, by name and employee number, holding the position of "Whse. Material Handler" as having been laid off. G.C. Exh. 55, p. 8, however, reflects that whse. material handler, Rafael Sanchez, whose employee number is "92504" and presumably had less plantwide seniority than at least three of the five material handlers laid off in February 1994, was retained. G.C. Exh. 56, which lists all employees laid off from January 1, 1990–December 31, 1994 does not list Sanchez as having been laid off during that period. Thus, if, as suggested by Respondent, the February 1994 layoff was conducted in accordance with plantwide seniority, then Sanchez clearly should have been laid off before whse. material handlers Jorge Collado, Pedro Martinez, and Felix Torres, all of whom had lower employee numbers and should have been retained over Sanchez.

I am convinced that Respondent conveniently raised the statutory provisions as an attempt to justify post hoc its discriminatory conduct.

The Respondent also explained that it did not reassign any of the nine alleged discriminatees to other positions because of restrictions imposed on it by Law 80, to which it claims it has long adhered, which prohibit bumping rights and precludes the reassignment of employees into other positions or classifications. The documentary evidence of record belies such a claim for, as previously indicated, during the October 1993 layoff, employees selected for layoff were afforded the right to bump into other positions (see G.C. Exh. 25), and when Respondent reorganized the engineering department in February 1992, and eliminated the sterilization department in October 1993, the affected employees were not laid off but instead were reassigned to other job classifications (G.C. Exhs: 28, 29, 42). Further, Figueroa's own statement to Belen and Supervisor Zapata's remark to Silva during their respective layoff interviews, to the effect that they would not be reassigned because Respondent had adopted a new policy of not reassigning employees, establishes quite clearly that to the extent there was a past practice, it consisted of allowing employees selected for layoff to exercise bumping rights and to relocate to other available jobs in the same or different classification. Thus, Respondent's contention that it was merely adhering to a past practice by not reassigning any of the LPCs to other positions is clearly without merit.

Further, while the language of Law 80 can be read as requiring that layoffs caused by technological or reorganization changes in an employer's operations should be conducted in accordance with plantwide seniority,<sup>38</sup> I find nothing in the provisions of Law 80 that can be viewed as a restriction on an employer's right to reassign employees affected by such a layoff. In fact, the explanatory notes to Law 80 suggest quite the opposite. Thus, referring to a layoff due to technological changes, the provision heavily relied on by Respondent in its posthearing brief, the explanatory notes state that "if the skills required to operate new machinery, to work new designs or to adapt to new procedures can be easily acquired through a simple and inexpensive training *the employer is under the obligation to provide said training and cannot fire the employees* who need it under penalty of being responsible under Law 80." (Emphasis added.)

The Respondent here makes no claim that the LPCs could not have been trained to work on the production line. Indeed, Carrero's testimony makes clear that not only were the LPC's capable of performing production work on the conveyor system, but they in fact had frequently done so. Thus, Respondent's failure to reassign the LPCs laid off on June 30, was not only inconsistent with its past practice, but also may have been in violation of the very statute it professes

<sup>38</sup> This is not to suggest that the Respondent was legitimately relying on Law 80 when it used plantwide seniority to lay off the nine LPCs in June 1994. Rather, the gist of Respondent's argument is that it has always used the plantwide seniority requirements of Law 80 in conducting layoffs, an assertion which as found above is not supported, and indeed is contradicted, by the record. I am convinced that prior to June 1994, the Respondent had never relied on the seniority provisions of Law 80 to effectuate a layoff.

to rely on.<sup>39</sup> Further, assuming arguendo that Respondent honestly believed that Law 80 proscribed the reassignment of laid-off employees, an argument which has not been made here and which I, in any event, I reject, it offered no explanation as to why, if as it alleges it has always adhered to Law 80, it allowed such reassignments to occur during prior layoffs and job eliminations in contravention of such belief.

In summary, the weight of the credible testimonial and documentary evidence convinces me, and I find, that the reasons proffered by Respondent for laying off the nine LPCs on June 30, 1994, and for refusing to reassign them to other positions are pretextual, and that, as argued by the General Counsel, the Respondent opted to lay off all nine of the alleged discriminatees in an effort to rid itself of the Union's most ardent supporters and to serve notice of the extent to which it would go to avoid the unionization of its plant. While Marshall may legitimately have anticipated the elimination of certain LPC positions, I am convinced given his June 22, remarks to employees, to wit, "things were looking good" at the Company, sales were up, and Respondent had "no plans to fire or dismiss anybody,"<sup>40</sup> that but for the union activities of certain of the LPCs, Respondent would not have conducted the June layoffs and instead would have reassigned the targeted employees to other positions consistent with its past practice. As the Respondent's reasons for the layoffs are found to be pretextual, the General Counsel's prima facie case remains intact. Accordingly, I find that the June 30 layoff of the nine alleged discriminatees was unlawful and violative of Section 8(a)(3) and (1) of the Act.

#### CONCLUSIONS OF LAW

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

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

3. By soliciting employees to engage in the surveillance of, and to report on the union activities of union supporters, telling them it would be futile for them to engage in union activities interrogating them regarding their union activities, prohibiting them from discussing the Union among themselves, and threatening them with plant closure, loss of wages, and with being "blackballed" for engaging in protected, concerted activities, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

<sup>39</sup>The Respondent does not contend that positions were not available for the LPCs or that its failure to reassign them resulted from some decline in production. The record in this regard would not support such a position for it is clear from Marshall's June 13 MONTHLY ACTIVITY REPORT to Sielski that Respondent anticipated hiring at least 39 people due to increased production and to handle a backlog of work (G.C. Exh. 58).

<sup>40</sup>These remarks, if true, would contradict Marshall's claim that the layoff had been anticipated for some time. Marshall, however, was not asked about and did not deny making such remarks during the June 22 meeting, even though given the inherent contradiction between the remarks and his June 8 memo suggesting the possible discharge of 10 LPCs, this would have a reasonable line of inquiry for Respondent's counsel to have pursued. I draw an adverse inference from Respondent's failure to question Marshall regarding statements attributed to him. *Asarco, Inc.*, surpa.

4. By changing the way it makes shift assignments to employees in the LPC classification from one based on seniority in classification to plantwide seniority, the Respondent discriminated against employees from engaging in such activities, and has engaged in unfair labor practices within the meaning of Section 8(a)(3) and (1) and Section 2(6) and (7) of the Act.

5. By laying off Jose Luis Pacheco, Franciso Jusino, Raquel Gonzalez, Scipio Vega, Maria Belen, Charlie Silva, Vidgaldia Rodriguez, and Nitza Nazario on June 30, 1994, because of the union activities of some of these individuals, the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(3) and (1) and Section 2(6) and (7) of the Act.

#### REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that it unlawfully laid off Jose Luis Pacheco, Franciso Jusino, Raquel Gonzalez, Scipio Vega, Maria Belen, Charlie Silva, Vidgaldia Rodriguez, and Nitza Nazario, the Respondent shall be required, within 14 days of this Order,<sup>41</sup> to offer them full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and shall make them whole for any loss of earnings they may have suffered as a result of the discrimination against them, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). The Respondent shall also be required, within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges, and within 3 days thereafter notify the above employees in writing that this has been done and that the discharges will not be used against them in any way.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>42</sup>

#### ORDER

The Respondent, McGaw of Puerto Rico, Inc., Sabana Grande, Puerto Rico, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Soliciting employees to report on the union activities of other employees and to engage in the surveillance of activities engaged in by union adherents.

(b) Telling employees it would be futile for them to engage in union activities by informing them it could through intimidation affect the outcome of any union election.

<sup>41</sup>See *Indian Hills Care Center*, 321 NLRB 144 (1996), where the Board set forth specific time deadlines for a respondent to comply with the specific remedial provisions of its orders.

<sup>42</sup>If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(c) Interrogating employees about comments they may have overheard regarding the Union, and threatening them with plant closure, loss of wages, and to have employees blacklisted for engaging in union or other protected, concerted activities.

(d) Prohibiting employees from discussing the Union among themselves and telling them that only specified management personnel were allowed to talk about the Union.

(e) Laying off employees because they engaged in activities on behalf of the Union and in order to discourage other employees from engaging in such activities.

(f) Changing the way it makes shift assignments from seniority in classification to plantwide seniority in order to discriminate against employees in a particular classification, because they engaged in union activities and to discourage employees from engaging in such activities.

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

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

(a) Within 14 days from the date of this Order, off Jose Luis Pacheco, Franciso Jusino, Raquel Gonzalez, Scipio Vega, Maria Belen, Charlie Silva, Vigdalia Rodriguez, and Nitza Nazario immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, with prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings or benefits they may have suffered as a result of the discrimination against them in the manner set forth in the remedy section of this decision.

(b) Within 14 days from the date of this Order, remove from its files any reference to the unlawful layoffs and notify Jose Luis Pacheco, Franciso Jusino, Raquel Gonzalez, Scipio Vega, Maria Belen, Charlie Silva, Vigdalia Rodriguez, and Nitza Nazario, and within 3 days thereafter notify the employees in writing that this has been done and that the layoffs will not be used against them in any way.

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

(d) Within 14 days after service by the Region, post at Sabana Grande, Puerto Rico, copies of the attached notice marked "Appendix."<sup>43</sup> Copies of the notice, on forms provided by the Regional Director for Region 24, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

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

<sup>43</sup>If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."