

Unbelievable, Inc. d/b/a Frontier Hotel & Casino and Local Joint Executive Board of Las Vegas, Culinary Workers Union, Local 226, and Bartenders Union, Local 165, affiliated with Hotel Employees and Restaurant Employees International Union, AFL-CIO. Cases 28-CA-11001, 28-CA-11026, 28-CA-11057, 28-CA-11075, 28-CA-11111, 28-CA-11143, and 28-CA-11549

May 30, 1997

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX AND HIGGINS

On May 31, 1995, Administrative Law Judge Gerald A. Wacknow issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel and the Charging Party filed cross-exceptions and a supporting brief. In addition, the Respondent and the Charging Party each filed an answering brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions, cross-exceptions, and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions only to the extent consistent with this Decision and Order.²

The Respondent, a Nevada corporation, operates a hotel and gaming casino at its facility in Las Vegas, Nevada. After it purchased these operations in July 1988, the Respondent recognized the Charging Party, Local Joint Executive Board of Las Vegas, Culinary Workers Union, Local 226, and Bartenders Union Local 165, affiliated with Hotel Employees and Restaurant Employees International Union, AFL-CIO, as the exclusive representative of an existing unit of its hotel, restaurant, and casino employees. The instant consolidated cases (also known as *Frontier III*) focus on the period commencing May 1991 and examine the Respondent's conduct vis-a-vis the Union and the unit employees represented by it.³

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

² We shall modify the judge's recommended Order in accordance with our decision in *Indian Hills Care Center*, 321 NLRB 144 (1996).

³ In *Frontier Hotel & Casino (Frontier I)*, 309 NLRB 761 (1992), enfd. 71 F.3d 1434 (9th Cir. 1995), the Board found that the Respondent violated Sec. 8(a)(1) and (5) of the Act. There, the Respondent unilaterally ceased making pension contributions for the employees represented by the Union, unilaterally changed employee work rules in July 1990, and ejected union business agents from its facility. On September 6, 1995, the Court of Appeals for the Ninth Circuit enforced, with sanctions, the Board's Order in *Frontier I*, 71 F.3d 1434.

I. The judge found that the Respondent unlawfully threatened employees Patricia Fisher and Vincent Curreri in June 1991;⁴ it engaged in unlawful surveillance of employees' union leafleting activity on August 3; it unlawfully discharged and/or suspended employees James Boyd, Wilfredo Bermudez, Jacob Grimberg, Jose Landeros, Vincent Curreri, Russell Cobleigh, and Joann Romersa; and it unlawfully failed to furnish requested relevant information to the Union. Based on these findings, the judge concluded that the Respondent had violated Section 8(a)(1), (3), and (5) of the Act. The judge further found that the Union's ongoing protest against the Respondent was an unfair labor practice strike from its September 21 commencement.⁵ The Respondent excepts to all these matters. We find no merit in its exceptions and adopt these findings and conclusions.⁶

In *Frontier Hotel & Casino (Frontier II)*, 318 NLRB 857 (1995), the Board found that the Respondent committed violations of Sec. 8(a)(1), (3), and (5) directed at its engineering department employees represented by the International Union of Operating Engineers, Local 501, AFL-CIO, and 8(a)(1) and (5) violations aimed at its employees represented by Professional, Clerical and Miscellaneous Employees, Local 995, affiliated with International Brotherhood of Teamsters, AFL-CIO. In that case, the Board gave a reimbursement remedy for negotiation and reasonable litigation expenses incurred by the General Counsel and the two unions involved.

⁴ All dates are in 1991 unless otherwise indicated.

⁵ We adopt the judge's finding that the strike was an unfair labor practice strike from its inception. Because unfair labor practice strikers are entitled to special reinstatement rights, even if there is no allegation of any denial of reinstatement, we have incorporated language assuring their reinstatement rights into the Order.

⁶ The judge found that the discharges and suspensions of these seven union supporters violated Sec. 8(a)(3) and (1) of the Act. In fn. 16 of his decision, he stated that it was unnecessary for him to pass on whether this discipline also violated Sec. 8(a)(5) as had also been alleged by the complaint. He therefore dismissed these 8(a)(5) allegations.

We agree with this result, but we do not adopt the judge's entire reasoning for his dismissal. The 8(a)(5) allegations had been premised on the theory that this discipline was unlawful because it had been based on the Respondent's application of its new July 1990 work rules. We note that these 8(a)(5) issues presented here, in *Frontier III*, are fully encompassed within the pending compliance proceedings in *Frontier I*, supra. In that case, the Board's Order specifies a full remedy for employees who were unlawfully disciplined based on the application of any work rule unilaterally created or changed by the Respondent in July 1990. Therefore, to act on the same matter here would constitute a waste of the Board's valuable resources.

As previously stated, we affirm the judge's findings that the Respondent unlawfully refused to provide requested data concerning the current employees' job classifications, wage rates, and names. The Respondent argues that the judge improperly rejected its posthearing defense that purported picket line misconduct by the Union and the strikers justified its refusal, in June 1992, to comply with the Union's information request. We find no merit in this argument and adopt the judge's ruling in fn. 19 of his decision. This belated defense was untimely raised after the hearing closed and was neither presented nor litigated during the hearing which took place on several days during an approximate 18-month period.

Continued

II. The judge dismissed the remaining complaint allegations involving Terry Lemley's discharge, the Respondent's cash discrepancy rule, certain statements by Security Guard "Craig" and Supervisor Diaz, the Respondent's denial of union access, and surface bargaining by the Respondent after contract negotiations resumed in 1991. The General Counsel and the Charging Party seek our reversal of the last four dismissals.⁷ We find merit in their arguments, except we adopt, but on a different ground, the dismissal of the allegation involving Security Officer "Craig." Thus, for the reasons stated below, we find that the Respondent unlawfully threatened employee Delgado in violation of Section 8(a)(1); it unlawfully imposed a new requirement on Union Representatives Hughes and Kelly to gain access to its facility in violation of Section 8(a)(5) and (1); and it engaged in bad-faith bargaining in 1991 in violation of Section 8(a)(5) and (1).

The 8(a)(1) issues

1. The judge found that, on July 24, Security Officer "Craig" had a conversation with employee Jacob Grimberg in which Craig stated, *inter alia*, "that Unions were a thing of the past and that the union activity of the employees, including their right to strike would be unproductive and would not cause the Respondent to sign a union contract, and, moreover, that the Respondent would never sign a contract." He further found that Craig's comments should reasonably have been understood as an expression of his personal beliefs and, therefore, did not violate Section 8(a)(1) of the Act. Now, for the first time in these proceedings, the General Counsel, joined by the Charging Party, argues to the contrary.

The record clearly shows that Craig's statements were never alleged by the consolidated complaint nor litigated by the parties as a separate, independent violation of the Act. Rather, throughout the hearing and in his posthearing brief to the judge, the General Counsel gave explicit assurances that Craig's statements were submitted only as evidence in support of the 8(a)(5) surface bargaining theory. Given these cir-

We note that the judge, in the same *fn.* 19, incorrectly stated that, prior to the institution of any future compliance proceedings, the Respondent must first bargain over the disclosure of the information. Here, we adhere to our standard remedy for this kind of violation by requiring the Respondent simply to furnish the information. However, in the event that it continues to withhold the information, the Respondent may seek to establish, in later compliance proceedings, that the information is not being furnished at that later time because there is, at that point, a clear and present danger that the information would be misused by the Union. See *Page Litho, Inc.*, 311 NLRB 881, 882-883 (1993). Such a showing of clear and present danger will be limited to matters that either (1) occurred after the unfair labor practice hearing closed or (2) were not known and could not have reasonably been known by the Respondent before the unfair labor practice hearing closed.

⁷No party excepts to the other dismissals.

cumstances, we decline to pass on whether Craig's statements independently violated Section 8(a)(1).

2. Commencing in May 1991, the Union renewed its organizing efforts and distributed union buttons for employees to wear. On June 27, Jose Diaz, the restaurant supervisor, spoke about union buttons in a conversation overheard by Marcial Delgado, a busboy who was on duty. The judge credited the testimony of Delgado, but he dismissed the 8(a)(1) allegation based on comments by Diaz because there was no showing that Diaz had intended his remarks to be heard by any employee. We reverse and find that Diaz' intent is immaterial.

According to Delgado, sometime after he learned that Jose Landeros, a waiter, had been suspended on June 27, he observed Diaz talking with another individual at a table in the restaurant. Delgado and another busboy stood behind a divider near Diaz' table, but hidden from the latter's view. Delgado heard Diaz state that "anybody who he sees wearing those buttons was going to get anything, any little kind or sort of little thing to get them fired for any little purpose, if he seen somebody wearing the button." Based on the credited evidence, we find that Diaz threatened to discharge employees who wore union buttons.

Under well-established Board law, an employer violates Section 8(a)(1) of the Act if its conduct may reasonably be said to have a tendency to interfere with the free exercise of employee rights. In situations analogous to Delgado's encounter with Diaz, the Board has found violative coercive threats made by a supervisor, irrespective of his intent. See, e.g., *Williams Motor Transfer*, 284 NLRB 1496, 1499 (1987) (company president's threats overheard by a driver nearby in the next room); *Perko's Inc.*, 236 NLRB 884 *fn.* 2 (1978) (company president's threats overheard by a waitress seated at a nearby table in the restaurant). See also *Crown Stationers*, 272 NLRB 164 (1984) (store manager's threatening letter discovered and read by an employee). Similarly, we find that, irrespective of his intent, Diaz threatened to discharge employees wearing union buttons and this threat had a tendency to interfere with the free exercise of employee rights. Therefore, we conclude that the Respondent violated Section 8(a)(1) as alleged.

The 8(a)(5) issues

In July 1988, the Respondent extended recognition to the Union and also adopted the Union's existing contract that was due to expire the following year. Beginning in 1989, the Respondent and the Union engaged in contract negotiations for a successor agreement. When they were unable to reach a new agreement, the Respondent implemented its final offer, including article 4.01 (the union access provision), in

February 1990,⁸ and the parties did not resume bargaining again until August 7, some 18 months later.

1. An 8(a)(5) issue presented in this case involves the Union's right of access to the Respondent's property. The outstanding complaint alleges that on July 11, the Respondent rescinded the authorization established by the expired contract and past practice regarding two union representatives' access to its facility. According to the judge's findings, on July 11, the union representatives, Heidi Hughes and Cara Kelly, attempted to enter the Respondent's property. Human Resources Director John Patton instructed the Respondent's security guard to insist that Hughes and Kelly acknowledge, in writing, their familiarity with article 4.01 before allowing them to enter the premises. Hughes and Kelly refused to sign, and the guard consequently denied their entry.

The record shows that neither Hughes nor Kelly had been forewarned of the new access restriction. In fact, the evidence establishes that this new access restriction was imposed by the Respondent without any prior notice or opportunity for bargaining being given to the Union. In his testimony, Patton revealed that the restriction was in response to the Respondent's complaints about union visits that formed the basis for the expulsions of union agents which were discussed in *Frontier I*.

The judge found that after July 11 union representatives did enter the Respondent's premises without signing a copy of article 4.01. However, there is no direct evidence that the restriction imposed on Hughes and Kelly was ever rescinded by Patton. In a telephone conversation that took place during the week following July 11, Hughes asked Patton about rescinding this new access restriction. The credited evidence shows that Patton indicated that he could not rescind the policy, but he would have to check with higher company officials. Patton never told Kelly that the restriction was rescinded and indeed, on August 20, the Respondent eliminated article 4.01 and all union access to the hotel property.⁹

The judge found that the denial of access to Hughes and Kelly on July 11 was lawful. For the reasons below, we reverse and find a violation of Section 8(a)(5) and (1) of the Act.

At the outset, we note that the terms of article 4.01 were not something new to the Union, Hughes, or Kelly. Pursuant to article IV of the expired agreement, union representatives were allowed to enter the Re-

spondent's property for various purposes as long as their visits did not interfere with either the employer's business operations or the employees' work production. See *Frontier I*, supra at 763.¹⁰ Under article IV, the agents could be asked to wear an identification badge in certain nonpublic areas. However, no other conditions or requirements placed on the agent's entry were specified by article IV. After the contract expired, the provisions of article IV continued in effect—first, as a surviving term and condition of employment and, then, as article 4.01 of the Respondent's implemented February 1990 offer.¹¹ Thus, as of July 11, the terms of article 4.01 had been the practice for at least 3 years.

In addition, we note the absence of any evidence that the intended visit by Hughes and Kelly on July 11 was inconsistent with the stated purposes of article 4.01 or that their visit would have interfered with the Respondent's business operations or the employees' work production that day. Therefore, we find that Hughes' and Kelly's request comported with article 4.01 and the only reason that they were denied access was that they refused to sign a copy of article 4.01.

The Respondent essentially admitted that, in insisting that Hughes and Kelly sign a copy of article 4.01, it did not rely on any particular problems with their individual conduct in the past or as anticipated that day; rather, its claim was that it imposed the restriction because of complaints it had about purported abuse of the union access by others over the previous few years. This justification was meritless for at least two reasons.

First, even assuming there were instances of abuse that warranted changing the practice, the Respondent would still have a statutory obligation to bargain over any changes, since access by representatives of an incumbent union for representational purposes is a mandatory subject of bargaining. The Act requires that, instead of implementing its own solution to perceived abuse, the Respondent bargain with the Union over possible solutions to any problems with access.

Second, because, as Patton admitted in his testimony, the alleged incidents of abuse were visits by several union representatives commencing in October 1989, the Respondent was effectively relying on claims already rejected by the Board and a reviewing court.

¹⁰ Art. IV reads as follows:

Authorized representatives of the Union shall be permitted to visit the Employer's establishment to see that this Agreement is being enforced and to collect union dues, assessments and initiation fees, provided that such visits by Union representatives shall not interfere with the conduct of the Employer's business or with the performance of work by employees during their working hours. Union representatives may be required to wear identification badges in non-public areas.

¹¹ As set forth in sec. III,B,4(b) of the judge's decision, the text of art. 4.01 is the same as art. IV of the expired contract.

⁸ There is no allegation that this implementation was unlawful.

⁹ Elsewhere in our decision, we note that the record shows that, the Respondent, by letter from its attorney dated August 20, notified the Union, in pertinent part:

Therefore, the elimination of 4.01 is effective immediately and all non-employee Union agents are not permitted on the property of the Frontier Hotel for the purpose of engaging in any Union business.

These are the visits considered by the judge in *Frontier I*, supra, 309 NLRB at 763–766, who found that the Respondent's expulsions of the agents were based on "no grounds or flimsy grounds" and amounted to unlawfully interfering with Section 7 rights, in violation of Section 8(a)(1) and depriving employees of contractually granted access to their bargaining representative, in violation of Section 8(a)(5). The judge's findings were affirmed on review by both the Board and Ninth Circuit. If the incidents relied on could not lawfully justify the Respondent's restrictions on union agents when the incidents took place, a fortiori they could not be dredged up to justify restrictions imposed on other union agents later on.¹²

In dismissing the access restriction allegation on the basis of his finding that asking Hughes and Kelly to sign an acknowledgment of existing conditions on entry was "a non-burdensome request," the judge appears to have accepted the Respondent's argument in its brief to the judge that, under the reasoning of *Peerless Food Products*, 236 NLRB 161 (1978), the restriction was not "a material, substantial, and . . . significant" change in terms and conditions of employment, and therefore did not rise to any bargaining obligation. Id., quoting *Rust Craft Broadcasting*, 225 NLRB 327 (1976). We disagree. Any change that actually interferes with contractually agreed employee access to the unit collective-bargaining representatives for representational purposes is a material change. *Ernst Home Centers*, 308 NLRB 848, 849 (1992). In *Peerless Food Products* the alleged change was to noncontractual past practice regarding union access. The employer had implemented a general rule as to access by any non-employee to the plant floor during working time, and the Board found no violation because it found no evidence that the employer actually had applied, or intended to apply, the rule so as to reduce the access of union representatives to employees for any representational purpose. In the present case, however, the Respondent's new restriction was specifically aimed at union representatives and it actually resulted in denying employee access to the representatives on the day

¹² We also reject the Respondent's alternative argument that the last paragraph of art. 24.02 of its implemented February 1990 offer relieved its obligation to bargain over changes in the Union's access. Art. 24.02 appears in the management-rights provisions of the implemented offer and addresses an entirely different matter—the Respondent's ability to establish and enforce reasonable work rules for employees. In this connection, the last paragraph of art. 24.02 indicates that the Respondent may establish and maintain work procedures which are not inconsistent with the terms of this agreement. Furthermore, having the union agents sign a copy of art. 4.01 is arguably inconsistent with art. 4.01. Art. 4.01 specifically delineates conditions placed on the Union's access. None of these conditions require the union agent to publicly acknowledge his or her familiarity with art. 4.01.

the restriction was imposed.¹³ Nor can the restriction be dismissed as a wrongful refusal to comply with a minor administrative detail—no different from the contractual provision that union representatives could be asked to wear badges in nonpublic areas. Having a document thrust at them with a demand for signature when there was no signing requirement in the contractual access provision and when the Respondent itself had a record of unlawful conduct in relation to the provision would reasonably have been a cause for alarm. Hughes and Kelly could reasonably have believed that the Respondent was attempting to compel union acquiescence in adding to the agreement a new condition for entry.

Accordingly, for all the reasons stated above, we find that the Respondent violated Section 8(a)(5) and (1) of the Act as alleged when it denied two union representatives access to its facility on July 11 because they refused to sign a copy of article 4.01.¹⁴

2. Paragraphs 6(a), (b), (d), (f), and (g) of the outstanding consolidated complaint further allege that the Respondent engaged in bad-faith bargaining and/or surface bargaining, i.e., that it bargained without any real intention of reaching agreement during contract negotiations with the Union in violation of Section 8(a)(5) and (1) of the Act. In this connection, the complaint specifies three acts or events taking place in 1991: (1) the above-described denial of plant access to Representatives Hughes and Kelly on July 11, (2) a cash discrepancy rule for beverage department employees purportedly instituted on July 18, and (3) the Respondent's August 7 bargaining proposals to eliminate the contractual provisions regarding union plant visitation and pension benefits and contributions. No exceptions have been filed to the judge's dismissal of the July 18 allegation. Since we have already discussed the

¹³ There is also no merit to the Respondent's argument that its failure to try to require other union representatives to sign a copy of art. 4.01 after July 11 somehow excuses its wrongful exclusion of Hughes and Kelly on that date. The credited evidence does not establish, nor does the Respondent affirmatively claim, that Patton ever rescinded his July 11 order. In fact, 5 weeks later, as more fully described below, the Respondent went even further in denying the Union's access rights when its August 20 letter notified the Union that "all non-employee Union agents are not permitted on the property of Frontier Hotel for the purpose of engaging in any Union business." In any event, the Respondent's conduct on July 11 would still constitute a violation even if it had not thereafter treated other union representatives in the same manner. See *Cherry Hill Textiles*, 309 NLRB 268, 271 (1992) (single instance of denial of access to union representatives found unlawful).

¹⁴ Member Higgins does not pass on the issue of whether the Respondent made a "material, substantial and significant" change on July 11 when it required the Union to acknowledge in writing the extant access policy. In this regard, Member Higgins notes that the Respondent thereafter made such a change on August 20 when it discontinued the policy. Since that change was made in the absence of a good-faith impasse, it was unlawful. A conclusion that the July 11 conduct was also unlawful would not add materially to the remedy.

July 11 allegation, we next consider whether the Respondent engaged in unlawful bargaining when it insisted on its August 7 proposals. As explained below, the Respondent's approach to bargaining on its August 7 access proposal, culminating with its elimination of all union representative access rights shortly after the narrowly circumscribed negotiations concluded, amounted to bargaining in bad faith. It was the kind of piecemeal bargaining tactic condemned by the Board in *Winn-Dixie Stores, Inc.*, 243 NLRB 972, 974 (1979), as a "disparagement of the collective-bargaining process."

The relevant facts pertaining to the August 7 proposals and negotiations between the Respondent and the Union can be briefly summarized as follows. When the collective-bargaining agreement expired in June 1989, the Respondent and the Union engaged in contract negotiations during the remainder of that year through February 1990, when the Respondent implemented its final contract offer. In adopting the expired contract in 1988, the Respondent had agreed to permit plant visitations by union representatives (art. IV) and to make periodic contributions to the Southern Nevada Culinary Workers and Bartenders Pension Fund (art. 27). Neither practice was changed by the Respondent's implemented February 1990 offer. However, during the period of October 1989 through October 1990, the Respondent unlawfully ejected several union representatives from its premises and, beginning in June 1990, it unlawfully ceased making pension contribution payments.¹⁵

On April 8, shortly after the March hearing before Administrative Law Judge James M. Kennedy in *Frontier I* had been concluded, the Respondent's attorney and chief negotiator, Joel Keiler, contacted the Union to resume negotiations on two specific issues: the elimination of union access and pension contributions. Both issues had been the subject of pending complaint allegations in *Frontier I*. Keiler's requests for these limited negotiations apparently continued through July 23.¹⁶ By letter dated July 23, less than 2 weeks after Union Representatives Hughes and Kelly were denied access to the Respondent's facility, Keiler informed the Union's chief negotiator, John Wilhelm:

This is the third time since April 8, 1991, that I have written you or Jim Arnold about setting a date to negotiate. The Frontier wants to negotiate to eliminate 4.01 from the expired contract and to formalize the elimination of the pension plan.

In both prior letters, I proposed dates for negotiations. You rejected my dates. You did not propose any dates for your availability. If you do not propose dates for negotiations in response to this letter, I will not write a fourth time to beg you to meet. Instead, the Frontier will unilaterally eliminate 4.01 and will use as a fall-back argument for eliminating the pension plan, your refusal to meet.

In response to Keiler's letter, the Union and the Respondent met on August 7.¹⁷ At the meeting, Keiler presented a written proposal containing two items:

- (1) Eliminate Section 4.01¹⁸ from expired contract. Result will be no union business agent visitation.
- (2) Eliminate all pension language. Result will be that if pension has not already been eliminated, it will certainly be eliminated as of August 7, 1991.

The meeting continued with a "fairly extensive" discussion between Keiler and the Union's counsel, Richard McCracken, about the pension item of the proposal. When asked whether the Respondent's cessation of pension contributions meant that the Respondent was of the view that the pension was not "still in effect" Keiler expressed the view that it was not; but he said he would concede "for purposes of discussion" that the pension was still in effect. After a caucus with another Respondent representative, according to Wilhelm's testimony, Keiler stated that although the Respondent did not agree that the pension had been in effect between the spring of 1990 and August 7, 1991, "in the unlikely event . . . that someone ultimately found that the cessation of the pension contribution was illegal, that this was their fall-back position, that if it was illegal to stop in June 1990, it wasn't going to be illegal to stop after August 7th, 1991." As indicated below, however, there was no mention of eliminating the pension in a letter Keiler later wrote to the Union concerning the August 7 negotiations, and the record is silent as to whether the Respondent ever purported to implement its proposal concerning formal elimination of all pension language.

The access proposal, however, was a different matter. Wilhelm testified as follows concerning the bargaining on the proposal for the elimination of article 4.01:

Mr. Keiler said that in The Frontier's view, activities of a number of the Union Business Agents on

¹⁵For a fuller discussion of these violations, see *Frontier I*, 309 NLRB at 761-762, 767.

¹⁶We note that during this period the Union renewed its efforts to organize the Respondent's employees and the Respondent began its counter-campaign of unlawful threats, surveillance of employees' union activities, and discharges and/or suspensions of union supporters.

¹⁷The judge's factual findings relating to this August 7 meeting reflect the testimony given by Wilhelm. Like the judge, we also have relied on Wilhelm's testimony in restating and amplifying the facts on which we base our decision.

¹⁸Keiler sometimes referred to art. 4.01 of its implemented February 1990 offer as "Section" 4.01.

the premises were improper and so they wanted to avoid that problem by simply banning all Union Representatives from the premises at all times. And we had a lengthy discussion in which I asked Mr. Keiler questions about how that would work, for example if the Union Business Agent needed to come on the premises to investigate a potential grievance, would he or she be able to. The answer was no.

I asked if the Union Representative needed to consult with employees on work time, for example in the employee cafeteria, would they be able to do that, and the answer was no.

I asked if—I asked other similar situations, and in all cases the answer was The Frontier did not want Union Representatives on the premises at any time for any reason.

I pointed out to Mr. Keiler that this issue too was the subject of National Labor Relations Board proceedings and that we had the same difficulty bargaining on this issue as on others, in addition to which substantively, we disagreed.

Mr. Keiler said that he would like our response to these two proposals. I attempted to engage Mr. Keiler in the discussion about all of the issues that were outstanding between the parties, which were virtually the entire contract, and I asked Mr. Keiler, for example, why The Frontier proposed to substitute a drastically inferior health and welfare plan for the health and welfare plan that had been in effect under the expired contract. His answer was, "Because it's cheaper."

I asked Mr. Keiler why The Frontier wanted to eliminate any protection for either the Union contract or the employees' jobs in the event The Frontier were sold during the term of the contract. He said because they could get a better price if the Union contract and the employees didn't have that protection.

And I asked Mr. Keiler about a number of other issues. Mr. Keiler said that the Union should have asked these questions a long time ago, that he had not written the last, best, and final proposal, that I should have asked his predecessor, an attorney by the name of Efrogmson, these questions, and *that it was too late now, and that he wasn't interested in further discussing issues other than these two.*

I told him that we would need some time to consider these two proposals. I proposed that we meet—that we would caucus and meet again at 6:00 p.m. that same day. Mr. Keiler said that he saw no need to come back, we should write him a letter with our response, and left. [Emphasis added]

Approximately 2 weeks later, and without any further negotiations, the Respondent notified the Union that it had implemented its proposal to eliminate the union business agent access provision "effective immediately." The letter, dated August 20 and addressed to Wilhelm from Keiler, stated in pertinent part:

On Wednesday, August 7, 1991, we met to negotiate at the request of the Frontier Hotel.

The Frontier Hotel had two proposals. The first was to eliminate Section 4.01. We discussed this and the Union, then rejected the proposal in its entirety.

The second proposal was to eliminate the pension, if it had not already been eliminated. The Union refused to discuss this proposal.

The Union had no proposal, which prompted me to ask what the Union had been doing for the last year and a half. I asked you to meet again during the weeks of August 12, 1991 or August 19, 1991. You refused and said you would send me a letter. You sent no letter. Therefore, the elimination of 4.01 is effective immediately and all non-employee Union agents are not permitted on the property of the Frontier Hotel for the purpose of engaging in any Union business.

This letter, which the judge inexplicably failed to discuss, refutes the Respondent's contention in its brief to the Board that the proposal to eliminate union representative access was not "subsequently implemented." Notice to the Union that its agents are not permitted on the Respondent's property "for the purpose of engaging in any Union business" clearly constituted implementation of the proposal.¹⁹ Nor does the evidence of the presence of union business agents on the premises after that notice was given nullify its message. The record evidence of such appearances after August 20 was limited to three occasions in September, in which a union representative accompanied an employee to a meeting at which he was notified of his termination. None of these were private meetings between the representatives and the unit employees. Rather, all three were disciplinary meetings set by the Respondent. If, as seems the case, these were meetings at which discipline might be imposed after the employee told his version of the incident for which he was ostensibly being punished, the Respondent may well have permitted the presence of a union representa-

¹⁹ Because there was no mention of the pension plan in the August 20 letter and no other evidence of statements concerning an elimination of pension language, there is no basis for finding bad-faith bargaining in this case on that subject. Of course, the Respondent is under an obligation by virtue of the order in *Frontier I* to make all pension fund payments wrongfully withheld after May 1990 and continuing until "such time as the Respondent negotiates in good faith with the Union to a new agreement or an impasse." 309 NLRB at 768.

tive in order to avoid running afoul of its duties under *NLRB v. Weingarten*, 420 U.S. 251 (1975). It is not necessarily inconsistent with the Respondent's firmly announced decision to eliminate all rights of access under article 4.01.²⁰

In sum, the August 7 negotiations as proposed and carried out by the Respondent were not part of a good-faith effort to canvass the issues separating the parties with a view to finding common ground on which a contract might be reached. As the testimony above reveals, Keiler rebuffed all attempts to discuss anything other than the two items he wished to eliminate forthwith. The negotiations thus had the sole and single-minded purpose of isolating an existing benefit and an existing practice which the Respondent disliked and eliminating them regardless of what the Union might have to say about them. As the Board observed concerning the employer's approach to negotiating the wage increase at issue in *Winn-Dixie Stores*, supra, "Such tactics amount to little more than a ritual or pro forma approach to bargaining and hardly constitute the 'kind of rational exchange of facts and arguments which increases mutual understanding and then results in agreement.'" 243 NLRB at 974-975, quoting Cox, *The Duty to Bargain in Good Faith*, 71 Harv. L. Rev. 1401, 1433 (1958).

Accordingly, we find that the Respondent engaged in bad-faith bargaining in violation of Section 8(a)(5) of the Act.

3. We finally consider the surface bargaining complaint allegations. The General Counsel argues that certain additional conduct in 1992, especially the Respondent's June 3 proposals to the Union, constitute evidence of surface bargaining. For the reasons stated by the judge, we agree that the 1992 conduct was not shown to constitute additional violations of the Act. Therefore, we adopt the judge's dismissal of these allegations. However, we note that the bad-faith bargaining found in this case would taint any further claims of impasse in bargaining for a contract, until such time as the violations are remedied.

ORDER

The National Labor Relations Board orders that the Respondent, Unbelievable, Inc. d/b/a Frontier Hotel & Casino, Las Vegas, Nevada, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening to discharge employees who wear union buttons on behalf of Local Joint Executive

Board of Las Vegas, Culinary Workers Union, Local 226, and Bartenders Union, Local 165, affiliated with Hotel Employees and Restaurant Employees International Union, AFL-CIO.

(b) Coercively telling employees that their union activities were being watched and that engaging in such activities could result in unspecified reprisals.

(c) Engaging in surveillance of employees' union activities without justification.

(d) Discharging and/or suspending employees because they have engaged in union activities.

(e) Failing to furnish the Union with requested information concerning the current complement of its employees.

(f) Refusing to bargain in good faith with the Union as the exclusive collective-bargaining representative of an appropriate unit of its employees, by unilaterally announcing and implementing certain changes in unit employees' terms and conditions of employment, unless it has reached impasse in good-faith collective-bargaining with the Union.

(g) Refusing to bargain in good faith with the Union over the Respondent's August 7 access proposal and thereafter unilaterally eliminating article 4.01 of the implemented February 1990 offer.

(h) Denying access to its premises to union representatives because they refuse to sign a copy of article 4.01.

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

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

(a) Within 14 days from the date of this Order, offer James Boyd, Wilfredo Bermudez, Jacob Grimberg, and Jose Landeros 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 James Boyd, Wilfredo Bermudez, Jacob Grimberg, Jose Landeros, Vincent Curreri, Russell Cobleigh, and Joann Romersa 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.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges or suspensions and within 3 days thereafter notify employees James Boyd, Wilfredo Bermudez, Jacob Grimberg, Jose Landeros, Vincent Curreri, Russell Cobleigh, and Joann Romersa in writing that this has been done and that the discharges or suspensions will not be used against them in any way.

(d) Furnish the Union with the requested information concerning its current complement of employees.

²⁰These three occasions are evidently the basis for the judge's finding that after July 11, the Respondent permitted union representatives to enter the premises without being required to sign a copy of art. 4.01. Ceasing the signing requirement is, of course, consistent with the Respondent's announcement that art. 4.01 was eliminated as of August 20.

(e) On request, bargain in good faith with the Union as the collective-bargaining representative of unit employees.

(f) Reinstate article 4.01 that it unilaterally eliminated following its unlawful bargaining impasse of August 20, 1991.

(g) Accord all striking employees, from the date of the strike, the rights of and privileges of unfair labor practice strikers, including, on their application, offering strikers immediate and full reinstatement to their former jobs or, if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed, discharging, if necessary, any replacements hired after the start of the strike, and make such employees whole, with interest, for any loss of earnings or other benefits resulting from any failure to reinstate them within 5 days of their unconditional request to return.²¹

(h) Preserve and, within 14 days of a 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.

(i) Within 14 days after service by the Region, post at the Respondent's facility copies of the attached notice marked "Appendix."²² Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure 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 July 16, 1991.

(j) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX

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

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

Section 7 of the Act gives employees these rights.

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

WE WILL NOT threaten to discharge employees who wear union buttons on behalf of Local Joint Executive Board of Las Vegas, Culinary Workers Union, Local 226, and Bartenders Union, Local 165, affiliated with Hotel Employees and Restaurant Employees International Union, AFL-CIO.

WE WILL NOT tell employees that their union activity are being watched or threaten them with unspecified reprisals for engaging in union activity.

WE WILL NOT engage in surveillance of employees' union activities without justification.

WE WILL NOT discharge employees because they have engaged in union activities.

WE WILL NOT suspend employees because they have engaged in union activities.

WE WILL NOT fail to furnish the Union with requested information concerning the current complement of our employees.

WE WILL NOT refuse to bargain in good faith with the Union as the exclusive collective-bargaining representative of an appropriate unit of our employees, by unilaterally announcing and implementing any changes in unit employees' terms and conditions of employment, unless we have reached impasse in good-faith collective bargaining with the Union.

WE WILL NOT refuse to bargain in good faith with the Union over the Respondent's August 7 access pro-

²¹ Interest is to be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Any such employees for whom employment is not immediately available shall be placed on a preferential hiring list for employment as positions become available and before other persons are hired for such work. Priority for placement on such a list shall be determined by seniority or some other non-discriminatory test. See *Central Management Co.*, 314 NLRB 763, 773 (1994). Finally, if the Respondent ignores or rejects, or has already rejected, any unconditional offer to return to work, unduly delays its response to such an offer, or attaches unlawful conditions to its offer of reinstatement, the 5-day period serves no useful purpose and backpay will commence as of the unconditional offer to return to work. See *Central Management Co.*, supra at fn. 29, citing *Newport News Shipbuilding*, 236 NLRB 1637, 1638 (1978), enf'd, 602 F.2d 73 (4th Cir. 1979).

²² 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."

posal and thereafter unilaterally eliminate article 4.01 of the implemented February 1990 offer.

WE WILL NOT deny access to our premises to union representatives because they refuse to sign a copy of article 4.01.

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

WE WILL, within 14 days from the date of the Board's Order, offer James Boyd, Wilfredo Bermudez, Jacob Grimberg, and Jose Landeros 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 James Boyd, Wilfredo Bermudez, Jacob Grimberg, Jose Landeros, Vincent Curreri, Russell Cobleigh, and Joann Romersa whole for any loss of earnings and other benefits resulting from their discharges or suspensions, 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 or suspensions of James Boyd, Wilfredo Bermudez, Jacob Grimberg, Jose Landeros, Vincent Curreri, Russell Cobleigh, and Joann Romersa, and WE WILL notify each of them in writing that this has been done and that the discharges and suspensions will not be used against them in any way.

WE WILL furnish the Union with information regarding the current complement of unit employees.

WE WILL, on request, bargain in good faith with the Union as the collective-bargaining representative of the unit employees.

WE WILL reinstate article 4.01 that we unilaterally eliminated following our unlawful bargaining impasse of August 20, 1991.

WE WILL, from the date of the strike, reinstate on request all striking employees to their former jobs or, if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed, discharging, if necessary, any replacements hired after the start of the strike, and make such employees whole, with interest, for any loss of earnings or other benefits resulting from any failure to reinstate them on unconditional request.

UNBELIEVABLE, INC. D/B/A FRONTIER
HOTEL & CASINO

Lewis S. Harris, Esq., for the General Counsel
Joel I. Keiler, Esq. (Ammerman & Keiler), of Reston, Virginia, for the Respondent.
Michael A. Taylor, Esq. and Celeste M. Wasielewski, Esq. (Ogletree, Deakins, Nash, Smoak & Stewart), of Washington, D.C., for the Respondent.

Barry S. Jellison, Esq. (Davis, Cowell & Bowe), of San Francisco, California, for the Charging Party.

DECISION

STATEMENT OF THE CASE

GERALD A. WACKNOV, Administrative Law Judge. Pursuant to notice, a hearing in this matter was held before me in Las Vegas, Nevada, on various days between January 4, 1993, and June 22, 1994. The hearing was closed by order dated October 18, 1994. The initial charge was filed by Local Joint Executive Board of Las Vegas, Culinary Workers Union Local 226, and Bartenders Union, Local 165, affiliated with Hotel Employees and Restaurant Employees International Union, AFL-CIO (jointly the Union) on July 16, 1991, and the final charge was filed by the Union on July 15, 1992. The final complaint was issued on August 14, 1992. By Order dated August 20, 1992, the Regional Director for Region 28 of the National Labor Relations Board (the Board) consolidated the various complaints for the purpose of hearing. The consolidated complaint alleges violation of Section 8(a)(1), (3), and (5) of the National Labor Relations Act by Unbelievable, Inc. d/b/a Frontier Hotel & Casino (Frontier, the hotel, and/or the Respondent). The Respondent's answers to the various complaints deny that the Respondent has violated the Act as alleged.

The parties were afforded a full opportunity to be heard, to call, examine and cross-examine witnesses, and to introduce relevant evidence. Since the close of the hearing, briefs have been received from counsel for the General Counsel, counsel for the Union, and counsel for the Respondent. On the entire record,¹ and based on my observation of the witnesses and consideration of the briefs submitted, I make the following:

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a Nevada corporation, operates a hotel and gaming casino at its facility in Las Vegas, Nevada. In the course and conduct of its business operations the Respondent annually purchases and receives goods and materials valued in excess of \$50,000 directly from points outside the State of Nevada, and annually derives gross revenues in excess of \$500,000. It is admitted, and I find, that the Respondent is now, and at all times material has been, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

It is admitted, and I find, that the Union is, and at all times material has been, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. The Issues

The principal issues in this proceeding are whether the Respondent has engaged in violations of Section 8(a)(1), (3),

¹ The General Counsel's motion to correct the transcript is granted, and the transcript is corrected accordingly.

and (5) of the Act by interfering with employees' rights to engage in union activity, by suspending and discharging employees for engaging in such activity, and by making unilateral changes, and engaging in surface bargaining, and by failing to provide the Union with certain requested information; further, whether a strike commenced by the Union on September 21, 1991, is and continues to be an unfair labor practice strike as alleged in the complaint, or an economic strike, as contended by the Respondent.

B. *The Facts*

1. Background

Respondent's current owners purchased the Frontier Hotel & Casino from the Summa Corporation in July 1988, during the term of a current collective-bargaining agreement between the Union and Summa Corporation. The collective-bargaining agreement expired on June 1, 1989. Negotiations between the Union and the Respondent for a successor agreement were not successful, and in February 1990 the Respondent implemented the terms and conditions of its final offer to the Union.

Thereafter, the Union filed unfair labor practice charges against the Respondent which resulted in an unfair labor practice hearing held in March 1991.² Since about May, the Union engaged in a campaign to solicit the Respondent's current employees to join and become active in the Union. Some 35 union committee leaders were appointed to conduct such activities, namely, attempting to sign employees up for the union, distributing leaflets and union buttons, engaging in union rallies, and encouraging employees to support the strike which appeared to be imminent.

From February 1990, until August 7, a period of some 18 months, there were no further negotiations between the parties. The August 7 meeting was not productive, and on September 21, during the pendency of the aforementioned unfair labor practice proceeding, the Union commenced a strike against the Respondent. Thereafter, on December 7, 1992, the Board issued its decision finding that the Respondent had engaged in and was engaging in certain violations of Section 8(a)(1) and (5) of the Act.³

The complaint allegations in the instant matter occurred within the time frame between June 1991 and July 1992.

2. The 8(a)(1) and (3) allegations; suspensions and discharges

(a) *The discharge of James Boyd*

James Boyd began working for the Respondent in 1986. He was terminated on August 13. He was a food server in the restaurant. He was a member of the union committee, wore various union buttons identifying him as an active union adherent and union "committee leader,"⁴ and engaged in various activities on behalf of the Union, including distributing leaflets and buttons and obtaining employees' signa-

tures on a union signup sheet. He engaged in these activities openly, before work, after work, and on his breaktime in the Helps Hall, a room where employees ate their meals and took their breaks.

On Thursday, August 8, there was an incident in the restaurant: Several parties in the coffeeshop complained that their water tasted like bleach or chlorine. As a result of these complaints, Boyd was suspended on Sunday, August 11 (he was not scheduled to work on Friday or Saturday), by Food and Beverage Manager Vern Berggren and Supervisor Phyllis Ames, pending investigation for allegedly failing to notify a supervisor about hazardous materials in the water. As a waiter, Boyd did not always serve water, as this was primarily the duty of the busboys. Further, he had in fact notified his Supervisor Ames about the matter as soon as he learned that there were customer complaints and then discovered that there was a bottle of bleach in a serving area where such cleaning products were prohibited.

After being suspended, Boyd phoned Supervisor Ames on the evening of August 11, and was told that he was suspended because of the aforementioned incident that had happened Thursday night. Boyd replied that he had notified her of the problem with the drinking water, and asked why he was suspended. Ames told him that he had been suspended because "I had been there the longest and had the most stuff in my file." He asked her if anyone else had been suspended, and she said no.

Boyd had a meeting with Human Resources Director John Patton on August 13. Patton notified him that he was terminated for unsatisfactory job performance. He said the customers had been very vocal in complaining about the incident, and that caused the Respondent to look into Boyd's file; as a result of this, Boyd was being discharged for unsatisfactory job performance. Heidi Hughes, a union representative who accompanied Boyd to this meeting with Patton, asked if the discharge had anything to do with Boyd's union activity. Patton, according to Boyd, sarcastically responded that it may have, but he wasn't aware of it. Patton gave Boyd a copy of his employment history, along with a termination notice. The termination notice states that Boyd was being terminated for violation of "House Rule #30: Unsatisfactory job performance as determined by employer."⁵

Union Representative Hughes testified that during the discharge meeting, at which Supervisor Ames and Human Resources Director Patton were present, Hughes asked why Boyd had been suspended. Patton said that he assumed she had heard about the bleach in the water incident, but stated that the Respondent was not accusing Boyd of putting bleach in the water and added "we don't know if he did it or not." Boyd then said that two other servers had the same complaints about funny tasting water from customers at their stations. Patton said, according to Hughes, "It's not really an issue of the bleach in the water," but that he had been told to terminate Boyd for what was in his personnel file. Hughes asked if the termination was for Boyd's union activity, and

² All dates or time periods hereinafter are within 1991 unless otherwise noted.

³ *Frontier Hotel & Casino*, 309 NLRB 761 (1992).

⁴ On July 31, the Union sent a list to the Respondent with the names of all employee negotiating committee members. The list contains 41 names.

⁵ Whether this and other house rules had been unilaterally implemented is a matter of contention between the parties. The General Counsel takes the position that the rules were unilaterally implemented, as found in the prior Board decision, and that therefore the Respondent may not rely upon them to justify any discipline of employees. The Respondent takes the position that such rules have historically been in effect.

Patton said, "Maybe. I don't know who's who around here. I'm just doing what I've been told." He further stated that the Respondent's attorney, Joel Keiler, is the one who directed him to terminate Boyd.

Patton denied that he said, during the termination interview, that he was discharging Boyd at the direction of Keiler, or anything to that effect. Rather, Patton testified that Boyd was discharged simply because of his adverse employment history which was discovered upon reviewing Boyd's file as a result of his suspension.

The record shows that Boyd's personnel file contained a list of some 20 prior rule infractions or disciplinary incidents, beginning in 1986 when Boyd was first hired by the Respondent's predecessor. The last incident occurred on June 13, just 2 months prior to Boyd's discharge, and was a warning notice for arriving late to work. At that time, according to the testimony of Patton, Boyd's past infractions would customarily have been reviewed by the department manager, and the list of Boyd's infractions would have been updated at that time.

On October 8, Patton caused a fax to be sent to Gary Prochnow, an agent of the Board, who was investigating certain charges filed by the Union here. The fax consisted of five pages, including the fax transmittal sheet, and is a report from Security Officer Huggins regarding "Unknown Substance in the Water." The report details the investigation of the matter by security officers, and contains the names of employees who waited on various tables. The report states:

Lt. Luethy contacted John Elardi who told him to tell Vern [Berggren] to write up the people involved in the tables. Fred Koklas, Tracy Green, Tony Lima, and James Boyd are the employees to be written up. . . . The waiter and busgirl at tables 31 and 32 are not members of the culinary union. Fred says that he will never and Tracy had threats and a rock thrown through her window since she refused to sign the union sheets. James Boyd is very pro union and has been seen passing out union propaganda around the kitchen areas and in the parking lots. He is also a figure who tries to get people to join the union. Vern [Berggren, the Food and Beverage Manager] said all four would receive written warnings and James [Boyd] would be suspended pending investigation because of his previous write ups.

Board Agent Prochnow testified in this proceeding that he received such a fax from Patton shortly after conferring with him by telephone and being advised that Patton was going to be faxing him some material. Patton denied that he had such a phone conversation with Prochnow or faxed him the document, but admitted that at the time of Boyd's discharge he was conversant with the information contained in the document.

(b) *The discharge of Terry Lemley*

Terry Lemley was a cocktail waitress from March 1987 until she was terminated on June 24, by Food and Beverage Manager Berggren. She was a committee leader and openly engaged in various activities on behalf of the Union. On one occasion her supervisor, Mark Everett, told her that the union "Committee Leader" button she was wearing was too big.

Lemley had been suspended on June 18, for failing to report to work on June 16. The corrective counseling notice she received states that she violated "House Rule #15: Failure to report to work as scheduled without prior authorization and/or just cause. Specifically: On the above date you called in at 11:58 p.m. when your scheduled to work at 1:50 a.m., not giving us the required four (4) hour notice." Lemley was given a 3-day suspension for this infraction, and returned to work on June 24. On that date she gave a doctor's excuse to her supervisor, Mark Everett, and told him that she didn't think it was fair that she received the warning notice, Everett, according to Lemley, said that he would remove it from her file. She told him that other people were not being disciplined for the same thing. He didn't answer; he just walked away.

Lemley worked the entire shift on the night of June 24. During the shift she had occasion to throw away several broken or chipped glasses that she had picked up in the pit and in the slot area; according to Lemley two glasses were broken, one glass was chipped, and one glass was cracked. In accordance with her customary practice, she put them on a tray with the good glasses she had collected, carried the tray back to the bar, put the good glasses in the dishwasher, and discarded the other glasses in the trash.

Lemley observed that James Clark, the casino supervisor, was sitting at the end of the bar, and that another cocktail waitress, Lilo Distler, was with sitting with Clark. After Lemley discarded the broken glasses, Distler approached Lemley and related that Clark had observed that Lemley had discarded a whole tray of good glasses, and that she had been instructed by Clark to tell Lemley not to do it again.

Lemley reported to work the next night and was not allowed to punch in. She was taken to an office in the Helps Hall, and Everett asked her to sign a blank suspension form. She refused, telling him that she would not sign anything that was blank, but then did sign the form. Everett said that he wasn't supposed to tell her, but he had a written report that she threw a whole tray of glasses away. She said that was not true; that she had thrown only four damaged glasses away. Everett told her to contact Berggren about the matter the following day, and two security officers escorted her to the time office where she was required to turn in her badge.

Lemley and a union representative, Sam Savilli, met with Berggren and Patton that afternoon. Lemley said that she believed they were trying to fire her for her union activity, and she didn't think that was fair. Berggren said that she had thrown away good glasses at 4 a.m. in the morning. Lemley replied that the glasses were damaged, that she had a good record as an employee, and that on several occasions Everett said that the graveyard shift ran smoothly. Also, she said that Diane Beringer, another cocktail waitress, had been accused of throwing away a tray full of glasses and had not been terminated but had just been suspended for 5 days. Lemley was told by Berggren that she had other suspensions in her file and therefore would be terminated.⁶ She was handed a preprepared termination slip. She asked Union Representative Savilli if she should sign it and he said yes. Savilli told Pat-

⁶ Lemley had received an earlier suspension, in addition to the June 17 suspension, for not calling in on time, and had received a written warning for being rude and discourteous and offensive and intimidating toward supervisors, employees, guests, and customers.

ton that charges would be brought against the Frontier. Lemley said that she knew the reason that they were doing this was because of a union meeting that she had arranged with the bar department employees for June 20. Her termination notice is as follows: "Violation of House Rule #24: Willful destruction or misuse resulting in damage to any hotel property or the property of another employee, guest, or customer. House Rule #30: Poor job performance."

Lemley participated in the strike which commenced on September 21. On about October 15, 1992, in the evening, she had a conversation with Tom Elardi, one of the Respondent's owners. This occurred as she was engaging in picketing the Respondent's premises. Union Representative Heidi Hughes was also present. Elardi asked where Union Representative Joe Daugherty was, and Lemley said that he was somewhere on the line. She said something about "this labor board thing," and added that she thought she was going to prevail and win her unfair labor practice charge which had been brought against the Respondent as a result of her termination. Elardi said, according to Lemley, that "it didn't matter, because he was going to appeal it 14 more times, and he was not going to sign a union contract until the Union paid him back all the money he had lost during the strike."

James Clark is Casino Shift Manager. Clark testified that in June, he was sitting at the bar about 20 feet away from Lemley who was on duty at her cocktail service station. Clark was talking with Lilo Distler, another cocktail waitress.⁷ Clark observed Lemley throwing glasses from her tray into the garbage can, and instructed Distler to tell Lemley that she had better "knock it off." Distler replied that Lemley did this sort of thing all the time; then Distler went over to Lemley to relay Clark's admonition. Clark testified that Lemley had between 5 and 10 glasses on the tray; he was not able to see whether they were chipped or not from 20 feet away. He was not personally friendly with Lemley, and knew that she was in the Union but did not know that she was a committee leader. The next day Clark reported the incident to Lemley's supervisor, Mike Heberlein. He was asked to write out a report and did so. He knew that Lemley was in the Union but did not know she was a committee person. Clark testified that everyone had problems with Lemley and that people didn't get along with her because of her demeanor, her attitude, and her very foul mouth.⁸ However, he testified that he did not expect any disciplinary action to be taken against Lemley.

Tom Covington, a bartender, was hired in April. Covington testified that he worked the graveyard shift with Lemley and that sometime prior to June 19, he observed Lemley as follows: "She was upset about her station being in a mess, and she came in one day screaming, 'Fuck this place,' and that the girls were leaving her station in a mess, and she took a tray full of good glasses and threw them in the trash can." Covington, being a relatively new employee, did not report the incident as he didn't want to cause any trouble for himself. Lemley, according to Covington, was attempting to get

employees to sign a paper for the union, and asked him to sign the paper. He didn't. He volunteered to testify in this proceeding because he felt it was wrong for Lemley to maintain that she was discharged because of her union activity rather than for throwing good glasses away. Covington did not go on strike and is opposed to the Union.

(c) *The discharge of Wilfredo Bermudez*

Wilfredo Bermudez has been employed since 1974, and was discharged on September 3. He was a waiter in the restaurant. He was a very active committee leader, and engaged in extensive union activity, including the solicitation of signatures on a "Frontier Strike Benefits Sign-Up" sheet. Bermudez testified that it was his "goal" to sign up bartender Phil Curry. Initially, according to Bermudez, Curry said that he would sign at a later time and that he would join the anticipated strike after he received some medical attention, but, according to Bermudez, "he was stalling."

Bermudez testified that he happened to be passing by the bar during his shift on September 3, when Curry stopped him and said that he was not feeling well and might go home early. Bermudez claims that he told Curry that he would count his own tips, and would pay Curry the \$5 that he usually gave Curry as a tip. Then, according to Bermudez, Curry said, "Why don't you give me the paper that you have? I'm going to sign." Bermudez gave him the strike signup sheet that that he had in his pocket. Curry, according to Bermudez, unfolded it, turned it around, and held it up to the security camera that was apparently focused on the bar area. Bermudez says he became "enraged" and asked why Curry did that. Apparently, Curry did not reply, but merely kept the paper and would not give it back to Bermudez. Then Bermudez, who was on duty throughout this incident, went back to the floor to take care of his tables.

Several minutes later Bermudez was asked to turn in his checks that he had from his current customers, and to accompany three security guards to the security office. Mike Heberlein, Bermudez' supervisor, entered the room, showed Bermudez the strike signup form that Heberlein had apparently obtained from Curry, and asked if Bermudez had given it to Curry. Bermudez said that Curry had asked for it. Heberlein seemed surprised at this response, and asked Bermudez to fill out an incident report. Bermudez states on the report the following:

Bartender Phillip [sic] asked me for that paper to sign and I gave [sic] to hi—Whether he wanted to read it, to sign it right then and there it was up to him.

Heberlein instructed Bermudez to remain in the room and returned with a suspension notice. The notice states that Bermudez was suspended pending investigation. Bermudez was told to come back the next day and meet with Berggren.

Bermudez immediately went to the union hall and returned with Union Representative Hughes. They met with Berggren, Patton, and Mike Klug, the chief of security. Berggren, according to Bermudez, was very upset, and handed Hughes a copy of Curry's statement. Berggren said that he didn't care whether Bermudez claimed any constitutional right to free speech, and that he was not going to allow Bermudez to harass his employees during working hours. Bermudez said that he was not harassing anyone, and again said that Curry had

⁷ Distler was also a union committee leader, and was sitting in the courtroom during the testimony of Clark. She was not called as a witness by the General Counsel.

⁸ As noted, Lemley had previously been issued a corrective counseling notice for being rude and discourteous and offensive and intimidating towards supervisors, other employees, guests, and customer.

asked for the paper and that he had not offered it to Curry. Berggren then told Bermudez that he was fired. Then, according to Bermudez, Security Chief Klug said, "Wilfred, you are a hell of a good worker, hell of a good worker . . . I'm sorry that this happened, but that's the instruction we have from Mr. Keiler, the attorney." Bermudez was given a termination notice stating that he was terminated for violating "House Rule #30: Unsatisfactory job performance as determined by the Employer, and House Rule #29 and House Rule #28." House Rule 28 prohibits "Rude, discourteous, offensive, intimidating, or abusive language or conduct toward supervisors, other employees, guests or customers." House Rule 29 prohibits "Harassment, in any form, at any time, of another employee, guest or customer."

Bermudez testified that he became emotional, and said that he was a company man and for 17 years had not caused any trouble. But, according to Bermudez, Berggren was "really upset." Hughes maintained, according to Bermudez, that Bermudez was an organizer of the workers and had been singled out for firing. Berggren said that because he was engaging in union activities on working time he had violated the rules.

Hughes testified that during the grievance meeting in Patton's office, Berggren stated, "I don't care who's passing out [what] or who's signing up people with whom, but you can't harass our employees." Bermudez explained that Curry had asked for the strike signup sheet and he gave it to him. Berggren said, "Well, Phil [Curry] pointed you out as the person who was harassing them [sic]." Patton then said that he was going to have to terminate Bermudez, and Bermudez said that, "You have to live with your own consciences." Berggren said, "I'd like to put my arm around you and take you back, but I have 500 employees that I have to worry about, not just you." Klug said Bermudez was "a hell of a waiter." Hughes did not corroborate Bermudez' testimony that Security Chief Klug said, during the meeting, that the discharge of Bermudez had been directed by Attorney Keiler.

On cross-examination, on reading Bermudez' affidavit, it was brought out that Bermudez considered himself to be the person with the most seniority, and as such, the leader of the prounion group of waiters. Bermudez admitted that during approximately the last 2 weeks of his employment it had been decided by Bermudez and the other prounion waiters to cease tipping Curry the customary amount of \$5 per shift per person in retaliation for his not joining the union cause. Bermudez told Curry this, and testified that this caused Curry to lose approximately \$50 to \$80 per shift. It does not appear that the Respondent was aware of this conduct at the time Bermudez was discharged. Thus, the following is contained in Bermudez' affidavit:

I spoke with Currie [sic] one on one, and told him that I knew he worked hard and was a good bartender. I explained that there was a faction among the waiters, one faction didn't want to tip him because he was going to stay on during a strike, and the other faction felt it wasn't fair not to tip Currie [sic] because he was good. My goal was to sign him up. . . . From around August 20th, 1991, to September 3rd, 1991, I stuck with the other waiters and had not tipped Currie.

Also, Bermudez testified that, "We tip him [Curry] all the time and there was a time that we had to make a decision whether to continue or not because he—the Union waiters were saying not to pay him anymore and, finally, by that time, then he was—it was final that we don't tip him." This decision to refrain from the custom of tipping Curry occurred within the last few days before Bermudez was fired.

Patton testified that during the discharge conversation, Klug did not bring up Attorney Keiler's name in any way. Bermudez, according to Patton, was discharged for harassing Curry. Neither Curry nor Heiberlein currently work for the Respondent, and they did not testify in this proceeding.

(d) *The discharge of Jacob Grimberg*

Jacob Grimberg began working for the Frontier in 1978 and was terminated on August 29. He was 1 of approximately 30 bartenders employed at the Frontier. He was a union committee leader and engaged in extensive union activity.

On August 27 and 28, Grimberg distributed information in the Helps Hall about a scheduled strike vote, and obtained signatures on the strike signup sheet. On August 29, at the end of his shift, Grimberg was told by Everett to see Berggren. Berggren asked if Grimberg's signature appeared on a comp slip. Berggren handed the slip to Grimberg, who acknowledged that he had signed it. Berggren asked why the comp ticket had not been voided, and Grimberg said that he had simply forgotten to void the ticket and, further, that he was not aware that he was required to either void the slip or have it voided by a bar manager. Berggren then accused Grimberg of stealing. Grimberg said that he had not been stealing, that the comp ticket was in the envelope, and that a bartender could not profit by taking money out of the cash register on a comp ticket (apparently because this would show up as cash discrepancy). Berggren again accused Grimberg of stealing, and said that he was going to have to terminate him. Grimberg asked if he was being terminated simply because he did not get a comp ticket voided, and Berggren said yes. Grimberg then stated that he didn't think it was the comp ticket, and that, "I think it was just the union matter, and that's why you're getting rid of me after fourteen years." Berggren said he didn't care what Grimberg thought, and asked him to sign his termination slip. Grimberg refused. Then he was escorted from the premises.

Grimberg testified that the situation with the comp ticket occurred as follows: Pursuant to Berggren's standing instructions, it was customary for Grimberg to comp two women for drinks who worked in the Respondent's accounting department. On August 28, these two women came to the bar after work and Grimberg wrote out a comp ticket as he usually did for them. According to Grimberg, both Berggren and Everett were standing behind the two women, who were seated at the bar; they left after he brought the women their drinks. After he had prepared the comp ticket, the women proceeded to tell him that they no longer had comp privileges, and gave him \$5 for the drinks. He picked up the \$5, rang a cash receipt for \$4, and handed them a dollar change with the receipt. He took the comp ticket which he had previously rung up in the register, signed it (comp tickets were required to have a signature), and put it behind the bar. The bar got very busy. Grimberg neglected to make a notation on

the ticket that it was supposed to be voided, and he placed it in the cash register envelope at the end of his shift.

The record evidence indicates that Grimberg's Board affidavit does not state that he was accused of stealing. According to the representation of Attorney Keiler, at the hearing, Grimberg "never was accused of stealing. He couldn't steal, and didn't steal, and the import of that paragraph in the affidavit that he just read was that he got reprimanded and fired for violating a rule . . . at no time did the company accuse him of stealing."

Beverage Manager Everett testified that he was present when Grimberg was discharged on August 29, but that he had nothing to do with the discharge. The conversation took place in Berggren's office. Berggren said that Grimberg was being discharged for signing a comp slip for a guest who in fact was not comped, but rather paid cash. Grimberg said that he was being discharged, because of his union activity, and Berggren replied that it had nothing to do with the Union. Grimberg refused to sign the termination slip and was escorted from the premises. Everett did not know about Grimberg's union activities but merely knew he was in the Union and that he wore a union button. Everett did not deny that he was present when the incident with the two women occurred. Nor did he contradict the testimony of Grimberg regarding the incident, or offer any rationale to substantiate the Respondent's alleged belief that Grimberg had done something which warranted his discharge.

(e) *The discharge of Jose Landeros*

Jose Landeros began working for the hotel in December 1983, and was terminated in June. He was a waiter in the restaurant. Landeros was a committee leader for the Union. He distributed buttons and solicited employees to sign the strike signup sheet. He wore various union buttons including a committee leader button.

On June 18, some friends came to dine at the restaurant. Landeros did not wait on them. According to Landeros, Berggren directed the chef, David Rambola, to ask Landeros about the check for that particular table. Landeros explained to the chef that he didn't have the check as he was not serving that table. Shortly thereafter, Berggren directly asked Landeros the same question, and Landeros gave him the same answer. Berggren followed Landeros, who was busy and apparently continued working, and once again asked about the check. Berggren then asked Landeros to find out whose table it was. By that time Landeros had learned that it was Roman Siluntis' table, and he related this to Berggren. Berggren then got the check and confirmed that it was not for a table served by Landeros; after that he remained in the restaurant and kept looking at Landeros' checks at the cash register.

A few days later, on June 21, Landeros overheard Supervisor Diaz talking to the chef, Joe Aguirre. Aguirre requested that Diaz hire one of his friends. Diaz replied that he would like to do so, but first he would have to fire Landeros. Diaz pointed at Landeros who was nearby and had obviously overheard the conversation, and both Diaz and Aguirre looked at him and laughed.

Landeros related an incident that he believed was unusual on the day before his suspension. At about 1:30 p.m. the restaurant was relatively empty; there were three or four parties in the restaurant, and one of them was being waited on by

Landeros. A customer came in and sat by himself in the back of the restaurant. He asked the busboy what the special was. Landeros came over and the individual again asked what the special was. Landeros told him it was a fajita special. The customer wanted a different special, and Landeros said that they were not serving that particular special that day. Then the customer ordered just chips and salsa; he ate a few chips, and left. He paid the check for \$1.59.

On the following morning, June 26, two security officers approached Landeros and asked him to accompany them to Berggren's office. Berggren told Landeros that he was being suspended, pending investigation, for stealing, and that Berggren didn't like it. Berggren said that he had instructed an employee to check Landeros' station, and it had been discovered that food he had served, namely a fajita special and a 45-ounce margarita, had not been paid for. Landeros said, "With all due respect, sir, that is too much food for one person." Berggren asked him to sign something, said that he was being suspended for 2 days pending investigation, and escorted him out.

Landeros immediately filed a grievance, and he and Union Representative Heidi Hughes went to meet with Patton. Patton asked what the problem was. They explained, and Patton said that he didn't know anything about it and asked them to come back the next day. They returned the next day and spoke with both Berggren and Patton. Berggren stated that Landeros was being fired for stealing, and explained that Landeros had given away the fajita special and the margarita. Landeros refused to sign the termination slip, which states that Landeros was being terminated for the following reasons: "House Rule #23: Except when authorized by management, giving any person, or causing any person to receive company property, including food & beverage, without proper charge or payment . . . and House Rule #30: Unsatisfactory job performance."

Landeros testified that he never gave food away without charging for it, and, in fact, stated that this could not be done because everything is computerized.

Patton testified that he had terminated Landeros in 1989 for walking off the job, but reinstated Landeros when the union business agent handling that grievance told him that Landeros was a single parent and needed the job very badly. Regarding the instant matter, Patton testified that Landeros was observed by the hostess on duty giving away food to people who were apparently friends of his. Patton testified that such conduct was considered to be theft. According to Patton, Berggren had a copy of a statement that was written by the hostess at the time of Landeros' suspension. Apparently relying on the statement, which was not produced by the Respondent, Landeros was discharged. The Respondent produced no evidence to substantiate or corroborate the testimony of Patton.

(f) *The suspension of Vincent Curreri*

Vincent Curreri began working for the hotel in November 1989, and worked until the strike began on September 21. He was a casino porter. His supervisors were Bart Fagan and Larry Espinueva. Apparently, they are no longer working for the Respondent. In June he engaged in the same union activity as the other aforementioned employees. He became a negotiating committee member, signed people up on the signup sheet, passed out union buttons, and took part in other union

events. He was not as active some of the other people. He openly engaged in these union activities either in the Helps Hall or off the Respondent's property.

Currier testified that several unusual things happened on September 4. After clocking in, but prior to the beginning of the shift, he was talking to employees about including their names on the strike sign-up sheet. He approached employee Otto Danville, and Danville said he wasn't going to sign up, and "had had it" with the Union. Currier asked if Danville wanted a slip of paper with the phone number of the Union in the event he had any questions; Danville said that he didn't want the phone number. Currier then went to eat breakfast.

At lunch he went back to the Helps Hall. He showed a list of employees to two women and asked whether they had signed up for strike benefits. One of them looked at the list and noted that her name was on it. She said that she had not signed up yet. Currier, wanting to insure that she had the opportunity to sign up for strike benefits, asked her if she was interested. She said no. Then he asked the other employee, and she also said no. Currier testified that he said, "What are you, chicken, just give me your name," or words to that effect. She refused to give Currier her name, and Currier walked away. He said to both of them, "You know you're only hurting all of us if you stay in." One of them said, "No, I'm only hurting myself if I stay in."

Shortly thereafter he received a call on his portable radio that he was wanted at the security office. Patton told Currier that he was being suspended for harassing people and pressuring them to support the Union by signing up on the strike benefit forms. Currier asked if he was being suspended for talking to the two employees during breaktime, and Patton said, "Yes, they've got rights." Patton asked him to sign a blank corrective counseling notice. Currier signed it, and Patton instructed him to return at a later date.

Currier was suspended on Thursday and Friday. Several days later Currier and Union Representative Heidi Hughes met with Patton. Patton said, apologetically, that he was sorry he yelled at Currier during the initial meeting, as it was not like him to yell at people or harass them. Patton said that Currier could return to work the following day, and explained that the two employees had one version of the events and Currier had given another version; however, the 2-day suspension would remain on his record.

Currier would fill in for Supervisor Espinueva on Espinueva's days off. According to Patton, Currier was considered to be an assistant supervisor. On the days he filled in, he assigned tasks to other porters who were on duty, and had authority to discipline by giving warnings; also, he could suspend employees pending investigation of work infractions, and could recommend the discharge of employees. Essentially, according to Patton, Currier had the same authority as Supervisor Espinueva.

Marcella Perine is a floor person in the slot department. She has worked for the hotel for 3 years. Perine testified that she was sitting in the Helps Hall with two of her coworkers, Pam Zoheas and Sherry Steinberg. Currier approached them with a piece of paper with their names on it and asked if they intended to go out on strike. They said no, that they were not interested. Currier, according to Perine, would not leave them alone and started calling them "f---king bitches" while they were trying to eat their lunch. Perine immediately

told her supervisor about Currier's conduct, and wrote out a statement. Perine admitted that she is entirely opposed to the Union, and she did not go out on strike. The statement that she wrote out states as follows:

I was eating lunch, talking to Pam. Vince [Currier] came up to us to see if we was [sic] going to walk out with the union. I said no. He asked Pam, she said no. Then he started harassing us. I am trying to be nice about this, but no more. This will stop.

Pam Zoheas did not testify in this proceeding. The statement she wrote out on September 4 states as follows:

In 9/4/91 a porter named Vincent stop [sic] by Marcella & my table and asked Marcella if her name was on the paper he [Vincent] showed her. She agreed & then he asked if she wanted to strike & she [Marcella] said no. Then Vincent gave her a number to call in case she and any question. Then Vincent came over to me and asked if my name was on the list. I said no then Vincent asked me my name and I told him [Vincent] no. Then Vincent said I was only hurting them. This took place [sic] 1 p.m. before I came back down.

Currier testified on rebuttal that he would oversee the shift at times when Supervisor Espinueva was absent. Currier and the other porters knew what they were supposed to do and had preassigned work. On the days he filled in for Espinueva, Currier would record the names of the porters as they came in, and would turn this information in to the time office. He carried a two-way radio and took care of any emergency calls such as, for example, wet areas in the elevator or broken glass, and would assign this work to other porters. If no one was available, he would do the work himself. He was never told that he had any authority to take any action with respect to employees' conduct, and was never given any job description of his duties. After Espinueva left the Respondent's employment, Currier was asked whether he wanted the supervisor's job, and he declined, stating that he wanted to remain in the Union. Currier was hourly paid, and Espinueva was salaried. Further, he did not attend any supervisors' meetings.

(g) *The suspension of Russell Cobleigh*

Russell Cobleigh Jr. began working for the hotel on August 8, 1990, and worked until September 17, when he was suspended. He was hired as a barback, and after a period of time he moved up to the position of bartender. He engaged in various union activities; he was a committee leader, and was on the negotiating committee. He did not distribute union literature, but passed out buttons and talked to people about the Union in the Helps Hall. He solicited employees to sign the strike benefits form.

Cobleigh attempted to go to work on September 17, and was informed by his supervisor, Mitch, that he was being suspended for violation of hotel rule 29. This rule prohibits "Harassment, in any form, at any time, of another employee, guest or customer." Then he was escorted off the property.

Cobleigh phoned Berggren the following day to try to find out why he was suspended. Berggren said, according to Cobleigh, that there were two people who claimed that Cobleigh had threatened them "directly or indirectly."

Cobleigh said he thought he might know the identity of one of the employees, because he had stopped tipping a barback, Tom, about a week or so prior to that date. Berggren told Cobleigh to come in the following day, September 19.

Cobleigh and Union Business Representative Steve Janowitz met with Berggren the following day. Cobleigh again said that he had stopped tipping Tom because he was a lousy barback; he was slow and all the waitresses had uncomplimentary things to say about him. Berggren accused Cobleigh of threatening employees, and Cobleigh denied that he threatened anyone. Berggren said that he would look into the matter, and asked if Cobleigh knew what a "Blue Max" was. Cobleigh said that he had no idea. Berggren told him to call back the next day. Apparently Berggren did not confirm or deny that "Tom" had complained about Cobleigh.

Cobleigh called Berggren the next day, September 20, and Berggren said he believed there had been a misunderstanding. He said that Cobleigh's shift was already covered for that night and that therefore Cobleigh would be paid for the shift and should return to work the following day, after which shift he could walk out with the rest of the people who were going to strike on the evening of September 21.

However, Union Representative Heidi Hughes testified that she spoke to Patton about the matter on September 21, prior to Cobleigh's scheduled shift, and Patton stated that the incident was still under investigation. Therefore, Hughes told Cobleigh not to return to work on September 21. Thus, Cobleigh was suspended for 5 days (September 17-21), and went out on strike on the evening of September 21.

Patton testified that Cobleigh was suspended for harassing an employee by the name of Russell Phillips, who no longer works for the Respondent. Phillips did not testify in this proceeding.

(h) *The suspension of Joann Romersa*

Joann Romersa worked for the hotel from about 1989 until the day of the strike. She was a cocktail waitress and worked a relief break shift. Her supervisor was Mark Everett. She was a union committee leader and engaged in various forms of union activity.

On September 11, Romersa was directed to Patton's office. Patton, Berggren, and Everett were present. Berggren explained that she had violated a rule regarding union solicitation on working time. Romersa explained that while she was on duty she had given union literature to an employee who was about to take her break, that she did not know this was against the rules, and that she would not do this in the future. Patton said that if she did get caught engaging in this activity on working time she could be in big trouble. She agreed that she wouldn't do it, and received a written warning.

Romersa reported to work on September 20, and Berggren told her that she was suspended. At first he refused to tell her the reason for the suspension, and then said that she had threatened a coworker. Romersa denied that she had threatened anybody. She went out on strike the next day, September 21.

By letter from Patton dated September 28, Romersa was advised that that her suspension was over and that she could return to work. The letter states that "after reviewing the incidents leading to Ms. Romersa's suspension it has been decided to reinstate Romersa immediately with the time lost to

service as a disciplinary action." She was out on strike at that time, and did not return to work.

Diane Murphy, a cocktail waitress, testified that she had many conversations with Romersa regarding the upcoming strike, and that such conversations "always involved threat." About 3 weeks prior to the strike Romersa told her that, "Well, you know, you'll be sorry and we'll get you and you won't be safe and all kinds of weird things like that." Murphy did not join the Union and refused to go out on strike; she is not opposed to the Union and is not for the Union. Her supervisors told her to write out a voluntary statement about the foregoing incident with Romersa; she did so and submitted it to Supervisor Everett and security. At the hearing the Respondent's attorney refused to turn over this and other statements to the General Counsel.⁹

Sheronaton Carter, a cocktail waitress, testified that Romersa approached her a week or so before the strike began, and said that "they were going to burn my house down and burn my trees down." Carter testified that she and Romersa had an "ongoing battle" regarding the Union. According to Carter, Romersa has threatened to burn her house down several times, and also said that she would spray paint her house. She also told Carter not to eat the food in the Helps Hall, as it could be contaminated. Such threats, according to Carter, had occurred from the day she was hired some 3 years earlier. However, the union advocates could not intimidate her as she let them know up front where she stood. As noted above, the statement that Carter provided the Respondent was not produced at the hearing.

Romersa specifically denied making the statements attributed to her by Carter and Murphy.

Mark Everett testified that he received complaints from Carter through his assistant, Mike Heberlein, who is no longer employed by the Respondent. However, he never saw the statement that Carter had allegedly written; as far as he knows, anything in writing would have been passed on to Berggren, who was then the food and beverage manager.

Patton testified generally with regard to the various suspensions that occurred immediately prior to the strike as follows: "We had employees that were harassing other employees, getting them to sign petitions, go out on strike, or threatening if they didn't go out. And as this progressed on and on into September, it became worse perhaps each day." Patton explained that this was as an extremely hectic time. Regarding the suspension of Romersa, he simply decided to suspend Romersa pending investigation. However, Patton did not present testimony regarding the specific events that precipitated Romersa's suspension. Further, he stated that he has not searched for the statement from Carter, and does not know whether the statement still exists; however, he did see such a statement the day prior to the strike. He had no explanation for the whereabouts of the statement, but testified that things were very hectic immediately prior to the strike as the Respondent was attempting to hire a large number of replacement employees. He did not specifically testify that the statement had been lost.

⁹ Counsel was advised that the failure to turn over this or similar documents would result in a presumption against the credibility of the Respondent's witnesses.

3. The 8(a)(1) allegations

Thomas Saunders has been employed since June 1988, as a bartender. He worked until September 21, when he went out on strike. He was a union committee leader, and he engaged in approximately the same union activities as the aforementioned union activists. On August 4, he participated in leafleting at the bottom of the stairs of the employee entrance to the Respondent's hotel. Several other union members were also leafleting, including Terry Lemley, Joe Daugherty, and Heidi Hughes. As he was leafleting, a security guard, Ed Schergens, was leaving the premises. Schergens walked down the stairs and said, "Tom, you're the first to get nailed." Saunders did not say anything and did not try to give him a leaflet. Schergens continued walking toward his car. Saunders testified that he did not know who Schergens was at that time. According to Saunders, the other four individuals who were leafleting overheard Schergens' remark.

Schergens testified that he has been a security officer for 3 years. He does not know an employee named Thomas Saunders. He did not speak to any employee who was passing out leaflets, and never told any employee, "You're going to be the first to get nailed," or words to that effect.

Neither Lemley, Daugherty, nor Hughes, each of whom testified in this proceeding, corroborated the testimony of Saunders.

Patricia Fisher worked for the Respondent from November 1990 until the strike began on September 21. She was a casino porter on the graveyard shift. Her supervisor was Bart Fagan. She was a union committee leader, and engaged in the activities described above. She circulated a petition and distributed buttons in support of the Union in the locker room, in the health spa, and out in the parking lot. Fisher stated that it was customary for supervisors and security officers to be present in the Helps Hall when union activity was being conducted, as the Helps Hall is an area customarily utilized by everyone.

On the evening of June 11, Fisher was circulating the union petition that obtained about 15 signatures in the Helps Hall before her shift began. Bart Fagan, her supervisor, was present in the Helps Hall while she was circulating the petition. About 15 or 20 minutes into her shift Fagan approached her, put both arms on her shoulder, and said that he was going to give her a piece of advice. He told her, "That as long as I was bringing in that union shit into the casino it would cause me trouble; and that he could not help me after that; and that the union couldn't do shit either." Fisher did not reply.

On August 3, for a period of about an hour and a half, she engaged in leafleting at the bottom of the steps of the employee entrance which leads to the time office where employees clock in for work. Several other individuals were leafleting, namely, Terry Lemley, Lilo Distler, and James Boyd. Also, several union representatives were present. They were all passing out leaflets. Fisher testified that she observed two uniformed security officers on the loading dock, and they remained there during the entire time that she was there; they appeared to be merely observing the leafletters. A little while later a pickup truck, with the wording "Frontier" on the side, drove by them several times and parked by the employee gate entrance to the parking lot. It is not uncommon to see a security vehicle circulating in the public

parking lot. This surveillance lasted about 40 minutes, after which time the pickup parked. Further, she observed security officers on the roof of the building. Also, video security cameras were focused on the leafletters. Normally, the cameras rotate and scan the entire parking lot, but on this occasion they were stationary. Fisher testified that she had never before observed guards on the loading dock, or on the roof, or security officers patrolling in a vehicle in front of the employee entrance. However, it was common to see such vehicles circulating in the public parking lot.

On August 21, Fisher arrived at work early and began passing out union leaflets in the locker room where employees change into their uniforms. She placed the leaflets on the bench for other porters who were about to come to work, and engaged one porter, Gina, in a conversation. A security officer, Tami Henderson, who was changing clothes at the end of her shift, was leaving the room during the time when Fisher was engaged in this activity. On exiting, Henderson grabbed the leaflets that Fisher had placed on the bench, and threw them in the trash. Fisher thought that Henderson had left the area and, while continuing to speak with Gina, she placed several additional leaflets on the bench. Fisher noticed a shadow on the other side of a partition, but didn't pay too much attention because she was speaking to Gina in Spanish, and she knew that Henderson could not understand her. At this point, Henderson came back in, grabbed the leaflets, told Fisher that she was not allowed to bring such literature onto the property, and threw the leaflets away. Fisher didn't say anything. Fisher testified that after the August 21 incident she continued to bring union literature onto the property and into the locker room, but she did it more discreetly.

Tami Henderson is a security officer for the hotel, and has been employed there for 3 years. Henderson testified that in August or September she recalled an incident with leaflets in the ladies' locker room. According to Henderson, leaflets had been placed all over the benches and on the floor, and she picked them up and threw them away. She said nothing to Fisher, and did not lurk around trying to overhear any conversation between Fisher and any other employee. Further, she did not come back in to the room and collect more leaflets and throw them away. She only policed the area one time.

On about July 24, employee Jacob Grimberg had a conversation with a security guard by the name of "Craig," who approached him and said that he wanted to talk to him. Craig started "bad-rapping" the Union, and said in no uncertain terms that unions are a thing of the past, that Margaret Elardi would never sign a union contract, that the employees were "spinning their wheels," and that they should not go out on strike. Craig said that Grimberg was "crazy for going out on strike."

Employee Vincent Curreri testified that on the morning of June 13 he had a conversation with his supervisor, Larry Espinueva, in an equipment room just outside of the Helps Hall. Curreri had been wearing a union button at work and was wearing the button when Espinueva engaged him in a conversation. Espinueva asked him if he was going out on strike, and Curreri replied that if there was a strike and people walked out he would go out with them. Espinueva asked, "Well, you're going out next week on strike, aren't you?" Curreri replied that he wasn't privy to that information. Espinueva asked how many employees were going out on

strike, and Curreri replied that he couldn't speak for everyone, but as far as he knew, all the protesters were going out. Espinueva said something to the effect that, "Well, I'll have to get thirty porters to go out and replace them if they all go out on strike." Then the conversation turned to work-related matters. Espinueva did not say anything about the petition that Curreri had recently been circulating.

Also, according to Curreri, later that day, Espinueva asked him, "What is that you're wearing?" Curreri, who was wearing the union button on his collar, said that it was an official union button. Espinueva then asked, "Do you know security is watching the people wearing those buttons?" Curreri asked if Espinueva wanted him to take the button off, and Espinueva replied, "No, you don't have to take it off if you don't want to." Nevertheless, Curreri testified that he voluntarily removed the button, because he felt his job was in jeopardy and he did not want to get into trouble.

Marcial Delgado was a busboy in the restaurant. Delgado testified that he overheard Restaurant Supervisor Jose Diaz talking with another individual whom Delgado believes was a former "manager or something." Diaz said that, "Anybody who he sees wearing those buttons was going to get anything, any little kind or sort of little thing to get them fired for any little purpose, if he seen somebody wearing the button."

Sometime in August, employee Joann Romersa had a conversation with a security guard, Julius Woods, in the helps hall. She had a union petition out on the table, and Woods told her to put it away as she could be suspended or fired for engaging in such activity in the helps hall, and would get into trouble unless she confined this activity to the parking lot. Romersa said she believed she had every right to do what she was doing, and that she was going to continue to do it in the helps hall. After this conversation she continued engaging in similar activity in the helps hall, and simply disregarded Woods' admonition.

Julius Woods, a security officer, has been employed by the hotel for 20 years. Woods denied that he told Romersa or any other employee not to pass out leaflets in the helps hall. However, he was instructed by his supervisor, Lieutenant Kirk Luethe, to report union activity in the helps hall or anywhere else.

4. The 8(a)(5) allegations

(a) *The cash discrepancy rule*

Pat Benzenbower is president and business agent of Bartenders Local 165. Around mid-August he had a conversation at the Union's office with Dave Stellman, a bartender at the Frontier. Stellman had with him a copy of the new cash discrepancy rule instituted by the Respondent. Stellman told Benzenbower that he had been given that document to sign and return to the hotel. Benzenbower had never seen such rules before; he had never been asked to bargain about them; and he had never been notified that they were being instituted. In fact, Benzenbower did not know that any cash discrepancy rules had ever been in effect at the hotel. The rules are complex, and provide for progressive disciplinary action, from written warning, to suspension, to termination, in accordance with a detailed schedule of shortages in relation to the number of infractions: In essence, the greater the amount

of the shortage, the sooner that termination will result. The rules apply to any employee who handles cash.

On August 23, Benzenbower wrote to the Respondent grieving the new rules under the grievance and arbitration provisions of the expired contract. Human Resources Manager Patton contacted him by phone and stopped by the Union's office regarding the matter. A board of adjustment meeting was held around September 1 at the Union's office. At this meeting Patton said that the position of the hotel remained the same, namely, that the Respondent would enforce these rules. By letter dated September 5, Benzenbower requested that the matter be taken to arbitration. The Respondent has not responded to this request. This, according to Benzenbower, is 1 of 15 arbitration cases that the Respondent has refused to address as a result of the expiration of the prior contract which contained an arbitration provision.

Employee Jacob Grimberg testified that on about July 18 Bar Manager Mark Everett approached him and asked him to read and sign a copy of the aforementioned cash discrepancy rule document. Grimberg signed it and told Everett that this was a change from the customary past practice regarding cash discrepancies, namely, the employees would simply make up the difference out of their own pockets and no warnings would be given. According to Grimberg, "There was no rule regarding discipline, no warning slip, no nothing."

On August 11, Grimberg was called to the office. Bar Manager Michael Heberlein told Grimberg that he had been short the previous day in the amount of \$19.25, and that he would be given a warning slip. Heberlein said that he was sorry that he had to do this. One week later, on August 18, Grimberg was notified that he was short \$49 and was being suspended for 3 days pursuant to the cash discrepancy rule.

Despite Grimberg's foregoing testimony to the contrary, however, the record evidence shows that on about January 23, a written warning was issued to Grimberg for "Violation of House Rule #30, unsatisfactory job performance as determined by the Employer. Specifically: For the first twenty-three days of January your cash turn in was \$29.50 short. Further violations may result in stronger disciplinary actions." Further, bartender Russell Cobleigh received a warning notice for violation of house rule #30 for being short in the amount of \$32.50 during the first 16 days of January. He did not file a grievance over the matter.

In addition, the record shows that on December 13, 1990, Carmello Byrd, a cashier, was issued a corrective counseling notice for having cash shortages on December 3, 8, and 12, in the amounts of \$19.90, \$19.99, and \$19.84, respectively. The notice states that, "Further such action may result in and up to suspension and or termination." There is a memo attached to this notice entitled "Frontier Hotel & Gambling Hall Cash Discrepancy Rule." The memo was signed by Byrd. The rule is contained in a one-page document which lists cash discrepancy infractions in order of amount of shortage, and the action that will be taken (from written warning to termination) if such infractions occur within specified time periods. For example, the rule provides that the second infraction within a period of 30 calendar days may result in a 3-day suspension.

Patton testified that on July 1, 1990, the Respondent "re-distributed" revised rules and regulations to the employees which prohibit 63 "forms of behavior or violation of estab-

lished procedure." The preface to the rules contains the following statement: "Employees violating one or more of these rules or procedures shall be subject to immediate discipline, up to and including termination. In addition, each department may have rules and procedures which you will be expected to follow." These rules do not include a cash discrepancy rule. According to Patton the cash discrepancy rule became effective in July 1988, and have continued to the present date with some modifications. The modifications were made by Jim LaMont, a slot department supervisor.

According to Patton, there were several sets of cash discrepancy rules that were all similar, but may have varied between departments. Patton testified that sometime in 1990 he asked LaMont to obtain the rules from each department, and "to modify them, bring them all in line to where they were pretty much the same." He did not consult or negotiate with the Union regarding the rule, as it was only modified using the same standards as had always been in effect, and was not essentially changed. Thus, Patton agrees that there were modifications to the cash discrepancy rule that were placed in effect for beverage department employees.¹⁰

(b) *Conditions imposed on union representatives*

Union Representative Hughes testified that on July 11 she and another union representative attempted to visit the Respondent's premises for union business. It was customary for union representatives to obtain identification badges at the employee time office prior to proceeding to the floor of the premises, and on this occasion they were advised that they would each be required to acknowledge, in writing, their familiarity with article 4.01 of the implemented document, which contains the same language as was embodied in the expired contract. Article 4.01 is as follows:

Authorized representatives of the Union shall be permitted to visit the Employer's establishment to see that this Agreement is being enforced and to collect Union dues, assessments and initiation fees, provided that such visits by Union representatives shall not interfere with the conduct of the Employer's business or with the performance of work by employees during their working hours. Union representatives may be required to wear identification badges in non-public areas.

Hughes called Joe Daugherty, her supervisor, and explained what had happened. Hughes testified that this requirement was highly irregular, as no other employer had ever required union representatives to sign such a paper. They refused to sign, and left the premises. Thereafter, Hughes phoned Patton. She was unable to reach him for about a week. When she did reach him, Patton told her that he would have to check with Attorney Keiler and Tom Elardi about the matter. However, Patton never did get back to her.

Patton testified that he told security "that due to the numerous complaints we'd been having about the Business Agents on the property that I wanted to talk to them before they came on the property and asked them to abide by the

contract." He was unavailable when Hughes and the other representative arrived at the hotel on July 11, and told security to make a copy of the provision and type on the bottom of it that "I agree to abide by the above while on the Frontier property." Patton instructed security that if they refused to sign the paper, they should not be permitted to come on to the property. None of the representatives signed the document. However, the record indicates that various union representatives were permitted on the property thereafter, and the General Counsel did not introduce any specific evidence to show that union representatives were excluded from the premises after July 11, as a result of their refusal to acknowledge their familiarity with article 4.01.

(c) *The failure to provide information*

At a negotiating session on June 4, 1992,¹¹ the Union presented the Respondent with a written request "which is necessary to fully assess your proposal to the Union of June 3 [1992]."¹² The Union, in its letter, requested the following information:

1. A list of all present bargaining unit employees showing their date of hire, their job classification, and their present hourly rate of pay.
2. A complete description of the health and welfare plan you proposed yesterday, including but not limited to the complete plan(s) of benefits; the amount which employees must pay in order to participate, for themselves and/or dependents; eligibility requirements; whether the plan(s) are self-insured, and if so, who administers the plan(s), and if not who insures and/or administers the plan(s); the cost to the company of the plan(s), including a full description of the actual costs, including but not limited to whether there is any rebate provision or other mechanism which would affect the costs.

Regarding the request for a list of the names, hire dates, job classifications, and hourly rates of pay of the bargaining unit employees, Tom Elardi testified that the Respondent simply was refusing to provide this information as it was fearful of retaliation by the Union against its current employees, as the Union and its International are gangster-ridden and violent organizations. Regarding the request for a complete description of the Respondent's current health and welfare plan, the record indicates that in fact, the Respondent's independent insurance consultant, Steven Kawa, did furnish this information, belatedly, to the Union.

(d) *The surface bargaining allegation*

There is no contention herein that the Respondent engaged in surface or bad-faith bargaining prior to February 1990 at which time the Respondent implemented its final offer.

Thereafter, the parties did not meet until August 7, after an 18-month hiatus. This meeting was requested by the Respondent for a particular purpose, as stated in Attorney Keiler's letter to the Union dated July 23. The letter is as follows:

¹¹ This letter is inadvertently dated June 4, 1994.

¹² The parties met on June 3 and 4, 1992, as discussed, *infra*.

¹⁰ The complaint alleges only a unilateral change in the rule as applied to beverage department employees. Thus, although the rule was apparently modified for all employees, its application, for purposes of the instant proceeding, is limited to beverage department employees.

This is the third time since April 8, 1991, that I have written to you or Jim Arnold about setting a date to negotiate. The Frontier wants to negotiate to eliminate 4.01 from the expired contract and to formalize the elimination of the pension plan.

In both prior letters, I proposed dates for negotiations. You rejected my dates. You did not propose any dates for your availability. If you do not propose dates for negotiations in response to this letter, I will not write a fourth time to beg you to meet. Instead, the Frontier will unilaterally eliminate 4.01 and will use as a fall-back argument for eliminating the pension plan, your refusal to meet.

The parties met, pursuant to this request of the Respondent, on August 7. At the outset of the meeting the Respondent submitted the following written proposal:

1. Eliminate Section 4.01 from expired contract. Result will be no Union business agent visitation.
2. Eliminate all pension language. Result will be that if pension has not already been eliminated, it will certainly be eliminated as of August 7, 1991.

Both of the above items were then in the process of being litigated. Thus, a prior Board complaint had been issued and a hearing held before an administrative law judge in a related case, in which it was alleged that the Respondent had, *inter alia*, unilaterally discontinued contributions to the pension fund prior to bargaining about the matter, and had unilaterally expelled union representatives from the premises in violation of article 4.01 of the implemented document, *supra*, permitting such visitation by union representatives.¹³

There was discussion regarding these items. The Respondent took the position that it wanted to entirely prohibit union visitation for processing grievances and other purposes because the Respondent believed that business agents were engaging in improper activities on the premises and it wanted to avoid the problem by simply banning all union representatives from the property for any reason. Thus, pursuant to questioning by John Wilhelm, the Union's chief negotiator, it was stated by the Respondent that union representatives would no longer be able to investigate potential grievances on the premises; grievance meetings between the Respondent and the Union would no longer be held on the premises; and union representatives would no longer be permitted to consult with employees in the cafeteria or anywhere else on the premises. Wilhelm pointed out that this issue was the subject of a current Board proceeding, and thus it was difficult to bargain on the subject; in addition, the Union disagreed with the proposal substantively.

Regarding the pension matter, the Respondent took the position that it had not unilaterally discontinued the pension contributions in violation of the Act, as alleged in the case that was then pending; and further, that in the event it was found to have engaged in such unlawful conduct, it was putting this matter on the table in order to insure that there would be no further liability after August 7. The Union stat-

ed that unless the Respondent would agree that it had unilaterally discontinued the pension contributions, as alleged in the then-current Board proceeding, it was not in a position to negotiate regarding pension contributions subsequent to August 7.

The Union stated that it was prepared to go through the Respondent's February 1990 implemented final offer on an item-by-item basis. Keiler said it was too late to do so at this late date, and that the Union should have done that prior to February 1990, when the offer was implemented. Wilhelm asked why the Respondent had substituted a "drastically inferior" health and welfare plan for the union plan, and Keiler answered that the Respondent's current plan was cheaper. Wilhelm asked why the Respondent had implemented lower wages and other reduced benefits, and Keiler's gave similar responses. Wilhelm stated that the Union needed some time to consider the two proposals advanced by Keiler and wanted to continue the meeting later that day; Keiler replied that there was no need to come back, and that the Union could respond by letter.

Thereafter, the strike commenced on September 21.

The next meeting was held 9 months later on June 3, 1992. Wilhelm testified that the meeting came about after a number of the pickets reported that Tom Elardi had been coming out to the picket line and expressing his view that there should be further negotiations. As a result, the Union wrote to the Respondent requesting a meeting.

The meeting began on June 3, and continued over to June 4. According to Wilhelm, there were two major areas of discussion. The first one had to do with health and welfare. The Respondent was asking for additional information from the Union regarding its health and welfare plan, in order to be able to have its insurance consultant, Steven Kawa, who was present at the meeting, "shop" the plan with other insurance carriers. Thus, the Respondent was attempting to ascertain what it would cost the Respondent to provide a comparable plan to the union fund plan. There was lengthy discussion on this issue, and Wilhelm said that the Union would provide as much information as it could.

The second matter was a discussion of the Respondent's written proposal that had been provided to the Union at the meeting. According to Wilhelm, this proposal contained a number of items that were "significantly worse" for the employees than the Respondent's implemented proposal. Thus, the guaranteed workweek language was completely removed, and the wages were lowered still further. Wilhelm asked Keiler to explain why the proposal was regressive, and Keiler replied that Wilhelm could read, and that he had no explanation to offer. Keiler, according to Wilhelm, was not interested in discussing the rationale or justification for the regressive items in this proposal. However, according to Wilhelm, Keiler stated that the new proposal was less expensive for the Respondent, and it had been determined that it could obtain sufficient employees at the new lower wages.

Wilhelm then stated that the Union was insistent on the strip contract, particularly those portions of the strip contract pertaining to the "major issues," namely, health and welfare, pension, and wages, and that it would be receptive to any specific business problems advanced by the Respondent in justification for modifying the strip contract in other respects to fit the Respondent's situation. Wilhelm testified that he

¹³These and other allegations were later found to have merit. Thus, Administrative Law Judge James Kennedy issued his decision in the matter on December 19, 1991, and the Board Decision and Order affirming the decision, as noted above, was issued on December 7, 1992.

made an attempt to engage Keiler or Elardi in dialogue about their proposals or the Union's proposals and got nowhere.

The parties met the following morning. Wilhelm, who had had an opportunity to review the Respondent's proposal, again asked for the Respondent's rationale in proposing regressive benefits, namely, deleting the pension plan, proposing a deficient health and welfare plan, providing for, in effect, at-will employment by defining "just cause" as "unsatisfactory job performance in the opinion of the Employer," proposing even lower wages than what were contained in the implemented proposal, proposing to preclude any access whatsoever to the premises by union representatives, eliminating seniority, and making other regressive proposals. The Respondent replied, in effect, that such proposals were in the best interests of the Respondent.

Wilhelm stated that the Union had a comprehensive counterproposal, which was, according to Wilhelm, "substantially the same in most respects as the rest of our contracts on the Strip." After some discussion, Elardi said, according to Wilhelm, that he wasn't prepared to sign anything resembling a strip contract but that "he regarded the biggest stumbling block as the health and welfare issue and that he wanted additional information about the health and welfare issue." Wilhelm offered to provide additional information regarding the welfare fund, and reiterated his invitation to Elardi to visit the welfare fund office for the purpose of asking whatever questions he wanted to ask. At this point Wilhelm had delivered across the table the written request for information, supra, requesting a list of unit employees and their rates of pay, and further requesting detailed information regarding the Respondent's current medical plan. According to Wilhelm, "It was a long and somewhat tumultuous meeting."

In response to Wilhelm's offer, Elardi, Kawa, and a representative of a health care organization visited the welfare fund office in Las Vegas on June 23, 1992. They met with Wilhelm and Jane Gordon, regional director of the fund. The Respondent's representatives asked many questions, and after the meeting various documents were provided to the Respondent pertaining to the fund and the health and welfare benefits.

On July 29, 1992, apparently at the request of Robert Miller, the Governor of Nevada, another meeting was held. The Governor was present, together with Frank McDonald, the Nevada Labor Commissioner, and another aide. The Governor acted as facilitator, and hoped to encourage discussion between the parties because he believed that the continuation of the strike was a bad thing for Nevada. Elardi said that the principal stumbling block was the health and welfare issue, and that he wanted information from the Union which would enable him to "shop" the insurance plan among other insurance carriers and obtain quotes on a plan that would be at least equal to the Union's plan. Then there ensued a lengthy discussion between Kawa, for the Respondent, and Gerald Feder, counsel for the welfare fund, on behalf of the Union. The Governor inquired of Elardi how long it would take him to obtain bids on the health and welfare plan, and Elardi said that it would take 5 or 6 weeks after the necessary information was obtained.

Then the Governor suggested that the parties talk about other issues, and Elardi, according to Wilhelm, "said that he didn't feel able to talk about other issues because he regarded the welfare issue as the main issue." The Governor

suggested that the parties talk about the items that had been agreed on, and this caused Keiler and Wilhelm to mutually agree that, in fact, nothing had been agreed on. Finally, the Governor suggested that the parties talk about the other areas of disagreement, and Elardi said, in effect, that further discussions would not be productive until the health and welfare issue had been "resolved." Elardi then proposed, according to Wilhelm, that "as a gesture of good faith he would put on the table the proposal that he would agree to the Union's welfare plan if he couldn't find an adequate alternative."

Wilhelm responded that it would be impossible to get another insurer to supply the same benefits that the Union supplies, as the Union's plan has comparatively low eligibility threshold requirements, portability among employer-signatories to the plan, and the continuation of coverage during a labor dispute. Thus, Wilhelm pointed out that although the Respondent had not made any contribution to the Union's plan since early 1990, the fund had continued to provide coverage for the employees enmeshed in the labor dispute.

The Governor expressed his hope that the parties would get back together soon, and the meeting ended. There have been no further negotiating sessions upon which the parties rely in support of their respective positions.¹⁴

Elardi testified that he made the following proposal at the July 29, 1992 meeting:

Listen, this has always been the key issue with us. Here is what I'm willing to do so we can get on with the negotiations and we can break the log jam. I will supply the same benefit structure that is in the Union health and welfare benefits. . . . I don't know what those benefits are. I'm going to need a copy of the plan document. . . . I will take the plan document. I will then get the plan document priced out—with weighted insurers—Blue Cross, Prudential, Allstate—there's many carriers that we would consider substantial carriers, and . . . if their price is cheaper, I'm going to supply the exact benefit, but I'll supply it with somebody else, and if I can't beat the Union's price, I will put on the table—I'll supply it here with you, we could put this issue to bed, and we can go on and do the rest of the negotiations.

Elardi testified that on each and every occasion when the parties met the Union has consistently given the Respondent the option to "sign, sell, or shut down," and that it remained insistent from the very outset of negotiations that the Re-

¹⁴ Extensive record evidence was introduced through various witnesses with regard to a subsequent meeting between the parties which occurred in Denver, Colorado, on October 5, 1992. The General Counsel and the Union have maintained throughout this proceeding that this meeting was not a bargaining meeting; and further, that a prior written confidentiality document, executed by the parties, establishes that the meeting was to be confidential and that any discussion therein was not to be used by any party in any subsequent legal proceeding. The Respondent, having successfully argued at the hearing that the discussion during this meeting contained relevant and necessary evidence, was permitted to adduce such evidence. However, the Respondent, in its brief, does not mention or appear to rely on the Denver meeting in support of its argument that the Respondent has not engaged in surface bargaining. Accordingly, I have omitted any discussion of the Denver meeting in this decision. In addition, I find that the contents of the Denver meeting would have no bearing on the conclusion reached here.

spondent must enter into the strip contract. Further, that any modifications to the strip contract that the Union offered to negotiate were superficial and insignificant; for example, the Union's willingness to delete the "showroom" provisions of the strip contract was no concession, as the Respondent had no showroom. Elardi testified that the admittedly regressive proposal put forth to the Union on June 3 was designed to move the Union from its recalcitrant position,¹⁵ and that the Respondent was willing to enter into a contract "today" if the Union would agree to the terms. Finally, Elardi said that the Respondent never got back to the Union with a proposed health and welfare plan as he had intended because the Respondent has never received the necessary information to price the plan. Kawa, who has been working on this matter for months and testified at length about the intricacies of the matter and the difficulties encountered, confirmed that despite the voluminous information obtained about the Union's plan, the various insurers he approached said that the information was insufficient, and for this reason he has been unable to get a quote from any insurer.

(e) *The strike*

Wilhelm testified that on September 19, two strike vote meetings were held and a total of approximately 500 members voted on the matter. Wilhelm read a lengthy 12-page speech to the members at each meeting. In essence, Wilhelm reviewed the past and current state of negotiations, and the past and current alleged unfair labor practices, including alleged unlawful discharges in which it was believed the Respondent had engaged and was continuing to engage. In his speech he told the employees that they did not need to worry about being permanently replaced, "because we are confident, because of [Margaret Elardi's] illegal behavior, that this will be an unfair labor practice strike." At the conclusion of the speech Wilhelm exhorted the members to vote yes, "if we really mean it when we say: SETTLE, SHUT DOWN, or SELL."

5. Analysis and conclusions

(a) *The 8(a)(3) allegations*¹⁶

The Respondent's position regarding the discharge of James Boyd is that on being suspended for some reason relating to the foul-water incident, it was determined that Boyd had a lengthy history of work infractions as reflected in his

¹⁵There is no evidence that these proposals were unilaterally implemented. Moreover, regressive proposals are not per se indicia of surface bargaining. *Reichhold Chemicals*, 288 NLRB 69 (1988).

¹⁶In addition to the contention that the discharges and suspensions of the employees are violative of Sec. 8(a)(3) of the Act, it is also contended that they are violative of Sec. 8(a)(5) of the Act as a result of the Respondent's reliance on alleged unilaterally implemented house rules. Thus, the General Counsel and the Union take the position that such house rules, having been unlawfully implemented as arguably found in the prior Board decision, may not be utilized by the Respondent in support of employee discipline. The various rules utilized by the Respondent in effectuating the discharges or suspensions of the employees here are typically conventional and common-sense rules that are inherently applicable to a variety of situations which any employer may encounter vis-a-vis its employees. Moreover, under the circumstances, it appears unnecessary to resolve this issue here.

personnel file, and the Respondent discharged him solely for such past conduct rather than for suspected involvement in the water incident or because of his union activity.

I do not credit Patton's denial, and find that he did send the foregoing fax to the regional office, in which Boyd was singled out in a security report as being "very pro union and has been seen passing out union propaganda around the kitchen areas and in the parking lots. He is also a figure who tries to get people to join the union."¹⁷ Boyd's personnel file had been updated on or about June 13, just 2 months prior to his discharge, and the Respondent has offered no explanation for not discharging Boyd at that point. Two months later, having no further warnings, Boyd was then allegedly discharged for past conduct. This scenario, which the Respondent advances, is entirely implausible and when coupled with the Respondent's security report, which singles Boyd out for his very activist union role, clearly indicates that the discharge was occasioned by such union activity. Moreover, I credit the testimony of Union Representative Hughes and find that during the discharge meeting Patton indicated in response to a contention that Boyd was discharged for his union activity, that "maybe" that was true as Patton was just following the instructions of Attorney Keiler and didn't really have a choice in the matter.

Accordingly, I find that Boyd was unlawfully suspended on August 11, and that he was unlawfully discharged on August 13, because of his union activity, in violation of Section 8(a)(3) and (1) of the Act.¹⁸

Regarding the discharge of Terry Lemley, I credit the testimony of Casino Shift Manger Clark and employee Covington. Lemley had just returned from a 3-day suspension, and this was her first night back on the job. I do not credit her denials, and find that she threw away a tray of good glasses, as reported by Clark. In this regard, the record shows that an active union adherent, who was present during the incident and during the hearing here, was not called as a witness to corroborate Lemley's testimony. Given the fact that Lemley had been previously suspended and appeared to have a deficient work record, her participation as one of the many union activists is not sufficient to overcome the Respondent's reasonable response to a deliberate act of property destruction. I shall dismiss this allegation of the complaint.

Wilfredo Bermudez, a known union activist, was allegedly discharged for harassing another employee while attempting to convince him to join and support the union cause. Bermudez denied that he harassed Curry in any respect. The Respondent has failed to provide any evidence of the nature of such alleged harassment. Accordingly, I find that the General Counsel's evidence has established a prima facie case, and that the Respondent has failed to rebut such evidence by demonstrating that the union activity in which Bermudez engaged was unprotected and warranted his discharge. I therefore find that by suspending and discharging Bermudez on

¹⁷This security report is strong evidence that the extent of the union activity of all the Respondent's employees was carefully monitored, even though such union activity was engaged in openly and in full view of security officers and supervisors.

¹⁸The rationale and analysis as set forth in *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982), *affd.* in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), has been applied to all the 8(a)(3) allegations.

September 3, the Respondent has violated Section 8(a)(1) and (3) of the Act, as alleged.

Jacob Grimberg was a known union activist, and was allegedly discharged for either failing to get a comp slip in the amount of \$4 voided by a supervisor or for neglecting to void it himself. The Respondent, other than making it clear that in no way was Grimberg discharged for stealing, has not provided any clear evidence regarding the precise reason for Grimberg's discharge, and, absent any evidence to the contrary, it appears highly unlikely that a long-term employee would be discharged for such innocuous conduct. Accordingly, I find that the Respondent has failed to rebut the prima facie case presented by the General Counsel, and I conclude that Grimberg was discharged on August 29 in violation of Section 8(a)(3) of the Act.

Jose Landeros was a union activist and was discharged for allegedly giving away food to a customer without charging the customer for the food. Landeros denied that he did this, and the Respondent has provided no evidence to the contrary. Moreover, the Respondent has failed to furnish the statement by the restaurant hostess on which it apparently relied. Accordingly, as the General Counsel has presented a prima facie case, and the Respondent has failed to rebut it, I find that Landeros was suspended on June 26, and thereafter discharged in violation of Section 8(a)(1) and (3) of the Act, as alleged.

Vincent Curreri was suspended on September 4, for 2 days, for allegedly harassing people and pressuring them to support the Union by signing up on the strike benefit forms. Patton later told Curreri that his suspension would remain in his personnel file even though he was not able to decide whether Curreri's account of the events or the versions given by witnesses to the alleged harassment should be credited. I do not credit the testimony of Marcella Perine to the effect that Curreri referred to her and other women who refused to join the Union cause as "f—king bitches." Perine's written report of the incident does not contain this language. Further, the written report of Pam Zoheas, who did not testify but who was apparently with Perine at the time of the incident, does not corroborate Perine's testimony. Also, it is clear that the report by Zoheas does not allege that Curreri did anything other than simply request that the women support the union cause. I credit the testimony of Curreri and find that he engaged in no form of harassment. Moreover, it is clear from Curreri's testimony that although he filled in for Supervisor Espinueva during his days off Curreri possessed no supervisory authority as alleged by the Respondent. Accordingly, I find that the 2-day suspension of Curreri was unwarranted, and that by such conduct the Respondent has violated Section 8(a)(1) and (3) of the Act, as alleged.

Russell Cobleigh testified that he did not harass anyone while attempting to encourage them to support the Union, and the Respondent has presented no evidence to the contrary. Rather, it appears that, on investigation, the Respondent attributed the suspension to a "misunderstanding." I, therefore, find that by suspending Cobleigh for engaging in lawful union activity for what amounted to a period of 5 days, the Respondent has violated Section 8(a)(1) and (3) of the Act.

Joann Romersa was suspended on September 20, for allegedly threatening employees. I do not credit the testimony of either employee who testified that Romersa had threatened

them. The testimony of Diane Murphy is not credited because the Respondent's counsel refused to turn over Murphy's report of the incident for purposes of cross-examination. The testimony of Sheronatonod Carter was singularly unimpressive and, moreover, Respondent's counsel also refused to turn over this report for purposes of cross-examination. I rely on the presumption that the aforementioned reports do not corroborate the witnesses' testimony. I find that by suspending Romersa for engaging in lawful union activity on September 20 the Respondent has violated Section 8(a)(1) and (3) of the Act.

(b) *The 8(a)(1) allegations*

Security Officer Schergens testified that he did not say to employee Thomas Saunders on August 4, who was leafletting at the employee entrance to the Respondent's premises, that "Tom" would be the "first to get nailed." Schergens said that he did not know Saunders, and Saunders confirmed that he did not know Schergens. There is no record evidence establishing how Schergens might have known Saunders' first name. Moreover, although other witnesses were present, according to Saunders, they did not corroborate his testimony. I shall dismiss this allegation of the complaint.

I credit the testimony of Patricia Fisher and find that on June 11, Supervisor Bart Fagan told her, "That as long as I was bringing in that union shit into the casino it would cause me trouble; and that he could not help me after that; and that the union couldn't do shit either." This statement constitutes a threat in violation of Section 8(a)(1) of the Act.

I credit the testimony of employee Fisher and find that on August 3 the employees and union representatives who were leafletting near the employee entrance to the premises were kept under surveillance by security officers stationed at the loading dock and on the roof. Moreover, security officers repeatedly drove by the site, and video cameras were focused only on the leafletters and did not rotate in order to scan the entire parking lot as was customarily the case. The Respondent has presented no evidence to show that it had a valid reason for engaging in such surveillance. Accordingly, I find that by keeping employees' union activities under surveillance in this instance, without proper justification, the Respondent has violated Section 8(a)(1) of the Act. See *F. W. Woolworth Co.*, 310 NLRB 1197 (1993); *Great Plains Coca-Cola Bottling Co.*, 311 NLRB 509, 514 (1993); and *Waco, Inc.*, 273 NLRB 746, 747 (1984).

I find that whatever occurred on August 21 between employee Fisher and Security Officer Henderson, the clear and understood policy of the Respondent was to permit the employees to engage in union activity in nonworking areas. This they did freely and frequently, and in significant numbers, and there is no pattern of such or similar conduct by the Respondent. Moreover, Fisher did not discontinue such activity because of anything that Henderson may have related to her. Fisher knew what her rights were and continued to exercise them. I shall dismiss this allegation of the complaint.

I find that the July 24 statement by the Security Officer, "Craig," to employee Grimberg was clearly a statement of Craig's personal opinion that unions were a thing of the past and that the union activity of the employees, including their right to strike, would be unproductive and would not cause the Respondent to sign a union contract and, moreover, that

the Respondent would never sign a contract. There is no evidence that the Respondent caused, authorized, or ratified Craig, either directly or indirectly, to make such remarks, and there is no pattern of such statements by the Respondent or its agents. Moreover, from the nature of the conversation, Grimberg should have reasonably understood Craig to be merely expressing his personal beliefs about the matter. I shall dismiss this allegation of the complaint.

I find that, contrary to Curreri's testimony, the two conversations between Curreri and Supervisor Espinueva occurred on different dates. I find that on about June 13, Espinueva told Curreri that security was watching the employees who were wearing union buttons, and this warning caused Curreri to remove the button he was wearing. I find that such an implicit warning of possible adverse consequences constitutes a threat of unspecified reprisal for engaging in union activity, and it is, therefore, violative of Section 8(a)(1) of the Act.

Regarding the second conversation between Curreri and Supervisor Espinueva, I find that, from its context, it occurred immediately prior to the strike, that it contained no threats, and that Espinueva was merely attempting to find out how many porters would have to be hired to replace the porters who might engage in the strike. Therefore, I shall dismiss this allegation of the complaint.

I credit the testimony of Marcial Delgado, and find that Restaurant Supervisor Jose Diaz, talking with another individual whom Delgado believes was a former "manager or something," said that, "Anybody who he sees wearing those buttons was going to get anything, any little kind or sort of little thing to get them fired for any little purpose, if he seen somebody wearing the button." However, there is no evidence that Diaz intended any employees to overhear this statement; rather, according to Delgado, it was made to a former "manager or something." I shall dismiss this allegation of the complaint.

Regarding the August conversation that employee Joann Romersa claims she had with Security Officer Julius Woods, it appears that Romersa was well acquainted with her right to engage in union activity in the helps hall, that she argued with Woods about her right to engage in this activity, that she did not heed Wood's alleged admonition, and that she and numerous other employees continued thereafter to engage in such activity. Accordingly, I find that Romersa knew that Woods was mistaken, and did not take seriously Wood's alleged admonition that she would get into trouble or be suspended or fired for doing what she had a lawful right to do. Accordingly, I shall dismiss this allegation of the complaint.

(c) *The 8(a)(5) allegations*

The complaint alleges that on or about July 18, 1991, the Respondent instituted a new disciplinary policy with respect to cash handling for beverage department employees. The apparent contention of the General Counsel is that prior to July 18 beverage department employees who had a shortage in their receipts were simply required to make up the difference out of their own pocket, and there was no disciplinary action taken; the new policy, however, allegedly imposed progressive discipline for such shortages. In support of the allegation the General Counsel's witness, Jacob Grimberg, a bartender, testified that prior to July 18, "There was no rule regarding discipline, no warning slip, no nothing." This is patently in-

correct, as the record demonstrates that on about January 23, a written warning was issued to Grimberg for "Violation of House Rule #30, unsatisfactory job performance as determined by the Employer. Specifically: For the first twenty-three days of January your cash turn in was \$29.50 short. Further violations may result in stronger disciplinary actions." Further, as noted above, bartender Russell Cobleigh received a similar warning notice in January for a similar infraction. The record is unclear regarding any further contentions of the General Counsel with regard to this matter, and the briefs of the General Counsel and the Charging Party do not provide any clarification. As the record evidence does not appear to support this allegation of the complaint, it is dismissed.

Regarding the July 11 incident concerning the Respondent's demand that two union business representatives sign a copy of article 4.01 of the agreement, the record evidence appears to corroborate Patton's testimony that on July 11 he merely wanted to explain to the union representatives what he believed to be their obligations under article 4.01. However, because of his unavailability at the time the business agents attempted to visit the premises, they were requested to sign a copy of the article, thus acknowledging that they would abide by its restrictions, namely, that they "shall not interfere with the conduct of the Employer's business or with the performance of work by employees during their working hours." This seems to be a reasonable and nonburdensome request under the circumstances. Moreover, the record shows that union representatives were permitted access to the Respondent's premises thereafter, even though they had not signed the document. I am mindful of the fact that the eviction of business agents from the premises was then the subject of a Board proceeding. Nevertheless, on July 11, the business agents were denied access only after refusing to acknowledge, in writing, an agreed-upon restriction to their visitation rights, and it appears that this was no more burdensome than, for example, having the business agents pick up a visitors badge from the security office before entering the premises, as was the custom. I shall dismiss this allegation of the complaint.

It is clear that the Union is entitled to a list of the current employees, together with their classifications and wage rates. The Respondent never replied to the Union's request, and the record here contains no evidence in support of the rationale furnished by Elardi at the hearing for the refusal to provide such information, namely, that the Respondent was fearful for the safety of its employees. If the Respondent had a genuine concern in this regard, it could have communicated this concern to the Union with the proposal that it would furnish the requested information with the exception of the employee's names. In the absence of any attempt by the Respondent to resolve the matter, I find that the alleged concern for the safety of the employees was not the motive for the refusal to provide the information. Accordingly, I find that by such conduct the Respondent has violated Section 8(a)(5) of the Act. *Circuit-Wise, Inc.*, 308 NLRB 1091, 1096-1098 (1992); *New England Telephone Co.*, 309 NLRB 558, 561 (1992).¹⁹

¹⁹The Respondent has submitted, in addition to its brief, a brief in a related case before another administrative law judge, in which case the Respondent presented evidence of union picket line mis-

As noted above, in February 1990 after an extended period of bargaining, the Respondent implemented its "last, best, and final offer," and placed into effect wages and benefits that were significantly inferior to those contained in the strip contract. This implies that as of February 1990 the parties had reached a lawful impasse. This, in turn, presupposes that the impasse resulted from good-faith bargaining. Now it is alleged that after a bargaining hiatus of some 18 months, the Respondent commenced to engage in surface or bad-faith bargaining on August 7, when it proposed to take away all visitation rights from union representatives, and further proposed, on June 3, 1992, yet more regressive wages and benefits. Elardi admittedly understood that the June 3, 1992 proposals were totally unacceptable to the Union, and testified, in effect, that he was merely interested in getting the Union to the bargaining table in order to explore whether, after a long hiatus during which the Respondent had demonstrated that it was not about to sell, shut down, or accept the strip contract, the Union was willing to show some movement.²⁰ Such negotiations were unproductive and only demonstrated that the Union was not interested in modifying the essential provisions of the strip contract, and that the Respondent was not willing to move from its insistence that the strip contract was unacceptable.

Regarding the regressive proposals put forth by the Respondent on June 3, there is no evidence that the Respondent implemented such proposals; thus it appears that perhaps the Respondent was merely trying to induce some movement from the Union. Moreover, it would be difficult to conclude that these June 3 proposals were designed to frustrate agreement on a collective-bargaining contract, as it is clear that the agreement had been frustrated since February 1990, by the recalcitrance of both parties. Thus, the Respondent was not fearful on June 3, 1992, that the Union might accept its implemented proposals, and, to insure that no contract would be reached, felt it necessary to propose still more regressive proposals. If the Respondent's purpose was simply to engage in surface bargaining in order to frustrate an agreement, it simply needed to do nothing.

Surface bargaining implies that the party engaged in surface bargaining evidences the ulterior motive of going through the formalities of bargaining without a good-faith intent to reach an agreement. If the Respondent wanted to engage in surface bargaining, that is, to avoid an agreement with the Union, its best tactic, after the August 7 meeting (which was ostensibly for the purpose of "bargaining away" union visitation and the pension provision), was to do nothing and avoid further bargaining. Instead, it was the Respondent, according to Wilhelm, that made overtures for the

conduct toward patrons and employees. No such evidence was introduced in the instant case. The Union has filed a motion to strike those portions of the Respondent's above-mentioned briefs that refer to such picket line misconduct, as being beyond the scope of the evidence presented at the instant hearing. The Union's motion is granted. However, the Respondent may raise this matter on compliance in the event that, after bargaining with the Union, accommodation between the parties cannot be reached.

²⁰ It is interesting to note that the surface bargaining allegation, which is contained in the complaint dated July 9, 1992, alleges specific indicia of surface bargaining, but does not specifically allege that the Respondent's June 3, 1992 proposal is evidence of surface bargaining.

June 3, 1992 bargaining session, and it was the Respondent that went to the expense of retaining an independent insurance consultant who, it is clear from abundant record evidence, expended untold hours and expense in attempting to untangle the complex web of union fund material in order to come up with a competitive health and welfare proposal, which, according to Elardi, was of primary concern and could have precipitated positive movement on other issues. Such conduct by the Respondent does not constitute evidence of surface bargaining; rather, it appears that the Respondent was attempting to "test the water" and find out if the Union might be inclined to move off its position or whether it would perhaps be receptive to any new ideas such as agreeing to health and welfare benefits essentially the same as those embodied in the Union's plan. Nor does it appear that the Respondent has attempted to seek union decertification after some 5 years of contention between the parties, during which the Respondent has not "settled" on the strip contract, or shut down or sold its business enterprise and, moreover, has continued operating with a full complement of employees who apparently are not committed to the Union. This, also, constitutes evidence that the Respondent is not attempting to avoid reaching an accommodation with the Union. Moreover, the Union has never attempted to test the good faith of the Respondent by proposing anything less than the essential features of the strip contract. This is the same issue which precipitated the lawful impasse and implementation of February 1990 and it is continuing to date.

The foregoing progression of events does not rationally lend itself to the result, as alleged, that the Respondent has approached bargaining on August 7, and thereafter, with an intention not to reach agreement. To test the Respondent's good faith, the Union is obliged, under the circumstances herein, to move from its adamant position that the essential elements of the strip contract are, in effect, nonnegotiable. Of course, the Union need not do this; but there is no more reason for the Respondent to move from its position than for the Union to do so. Absent the Union's willingness to show a significant degree of flexibility in this area, a surface bargaining theory, in my opinion, simply is untenable. Both parties have amply demonstrated that they are anxious to reach agreement, but are exercising their right to agree on terms which they deem to be satisfactory. Accordingly, I conclude that the evidence fails to show that the Respondent has engaged in surface bargaining as alleged, and I shall dismiss this allegation of the complaint.

(d) *The nature of the strike*

It is clear, and I find, that the strike which commenced on September 21, and has continued for nearly 5 years, was an unfair labor practice strike from the outset. Thus, prior to the strike vote, the Union made it crystal clear to its members that the strike, in significant part, would be for the purpose of protesting the Respondent's prior and unremedied unfair labor practices as found by the Board in its above-cited decision, as well as the current significant unfair labor practices, which include the unlawful discharge of employees, as found here. The Respondent's argument that this finding is premature, as the strike is continuing and there has been no showing to date that the Respondent has hired permanent replacements, is without merit. This finding will assist the parties and help avoid the possibility of future litigation by es-

establishing applicable ground rules should the strike end or should strikers desire to return to work. *American Art Industries*, 166 NLRB 943 (1967); *Crystal Springs Shirt Corp.*, 245 NLRB 882, 885 (1979).

CONCLUSIONS OF LAW

1. The Respondent 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. The Respondent has violated Section 8(a)(1) of the Act by the various instances of coercive conduct found here.
4. The Respondent has violated Section 8(a)(3) and (1) of the Act by discharging and/or suspending employees because of their interest in and activities on behalf of the Union, as found here.
5. The Respondent has violated Section 8(a)(5) and (1) of the Act by engaging in the unilateral conduct and failure to furnish information as found here.
6. The strike, which commenced on September 21, 1991, has been and continues to be an unfair labor practice strike.
7. Except for the violations found here, the remaining complaint allegations are dismissed.
8. The unfair practices set forth in paragraphs 3, 4, and 5 above constitute unfair labor practices within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondent has violated Section 8(a)(1), (3), and (5) of the Act, I recommend that it be required to cease and desist therefrom and from in any other

manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed by Section 7 of the Act. Moreover, the Respondent shall be required to post an appropriate notice, attached as "Appendix."

Having found that the Respondent unlawfully discharged and/or suspended employees James Boyd, Wilfredo Bermudez, Jacob Grimberg, Jose Landeros, Vincent Curreri, Russell Cobleigh, and Joann Romersa, I recommend that it offer to those named employees who were discharged immediate and full reinstatement to their former positions of employment without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings and benefits they may have suffered by reason of the Respondent's discrimination against them. Moreover, with regard to those named employees who were suspended, I recommend that the Respondent make them whole for any loss of earnings or benefits they may have suffered by reason of the Respondent's discrimination against them. Backpay is to be computed in accordance with the Board's decision in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Further, I recommend that the Respondent remove from its files any reference to the unlawful discharges and suspensions and notify the employees that it has done so and that it will not use the discharges or suspensions against them in any way.

Further, it is recommended that the Respondent, upon request, furnish the Union with the requested information pertaining to its current complement of employees.

[Recommended Order omitted from publication.]