

United States Service Industries, Inc. and Service Employees International Union, Local 82, AFL-CIO. Cases 5-CA-25403, 5-CA-25582, and 5-CA-25813

October 24, 1997

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX AND HIGGINS

On November 6, 1996, Administrative Law Judge Lowell Goerlich issued the attached decision. The General Counsel, the Charging Party, and the Respondent filed exceptions and supporting briefs.¹ The General Counsel filed a motion to strike the Respondent's exceptions and supporting brief, and the Respondent filed a motion to strike the motion of counsel for the General Counsel.² The General Counsel filed an opposition to motion to strike the motion of counsel for the General Counsel, and the Respondent filed a reply to the General Counsel's opposition. The General Counsel and the Respondent filed answering briefs, and the General Counsel filed a reply brief.

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

The Respondent provides janitorial services to offices and buildings in Washington, D.C., and adjacent areas in Maryland and Virginia. As with prior cases involving this Respondent, it is alleged here that the Respondent has interfered with its employees' exercise of their basic Section 7 rights.⁴ At issue here are a consolidated complaint (Cases 5-CA-25403 and 5-CA-25582) alleging numerous violations of Section 8(a)(3)

and (1) of the Act at six separate buildings as well as violations that were not confined to a specific facility, and an additional complaint (Case 5-CA-25813) alleging a separate violation of Section 8(a)(1). The judge dismissed some allegations and found merit in others. As discussed below, we affirm the judge in part, reverse in part, and remand certain issues for further appropriate action.⁵

A. The Complaint Allegations the Judge Dismissed

1. The judge dismissed significant portions of the consolidated complaint, specifically paragraphs 5, 15, and 16, without addressing them on the merits.⁶ The judge found that these allegations are time-barred by Section 10(b) of the Act because there was no proof of service of the original charge or first amended charge in Case 5-CA-25403. The Respondent admits proper service of the second amended charge on October 19, 1995. The judge found that the allegations of paragraphs 5, 15, and 16 are time-barred because they relate to conduct which occurred before April 19, 1995, more than 6 months prior to the service of the second amended charge. We disagree.

The consolidated complaint alleges, and the Respondent's answer denies, that the original charge in Case 5-CA-25403 was served on the Respondent by certified mail on June 9, 1995, and that the first amended charge in Case 5-CA-25403 was served on the Respondent by certified mail on June 29, 1995. In support of these allegations, the General Counsel offered at the hearing, and the judge received, affidavits of service by Board agents certifying that they served the Respondent with copies of the original and amended charges in the above case on June 9, 1995, and June 29, 1995, respectively, "by postpaid certified mail." The affidavits are signed and sworn to, and there is no evidence disputing their authenticity. Under Board precedent, these affidavits are sufficient by themselves to establish service of the original and amended charges in Case 5-CA-25403. *Electrical Workers IBEW Local 11 (Anco Electrical)*, 273 NLRB 183, 191 (1984).⁷ In addition, with respect to the

¹ By letter of January 31, 1996, the General Counsel filed separately a copy of p. 50 of his supporting brief which had been omitted from the original brief, and the Respondent filed a response to p. 50 of the brief of counsel for the General Counsel.

² We deny the General Counsel's motion to strike the Respondent's exceptions because we find that, although the Respondent's exceptions and brief are not in strict conformance with Rule 102.46, they are in substantial compliance with the Board's Rules. However, we shall consider the arguments in the briefs only to the extent that they are supported by the record. Because we have denied the General Counsel's motion, the Respondent's motion is moot.

³ The General Counsel, the Charging Party, and the Respondent 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.

⁴ Earlier cases are reported at 319 NLRB 231 (1995), *enfd. mem.* 107 F.3d 923 (D.C. Cir. 1997); 315 NLRB 285 (1994), *enfd. mem.* 72 F.3d 920 (D.C. Cir. 1995); and 314 NLRB 30 (1994), *enfd. mem.* 80 F.3d 558 (D.C. Cir. 1996).

⁵ Several issues are remanded because the judge made no findings on them.

⁶ Par. 5 of the consolidated complaint alleges that the Respondent committed 12 separate violations of Sec. 8(a)(3) and (1) of the Act, including issuing 6 unlawful warnings to employee Maria Treminio, reducing her working hours, unlawfully transferring her, and ultimately discharging her. Par. 15 alleges that the Respondent discriminated against employees whom the United States District Court for the District of Columbia ordered the Respondent to reinstate, by requiring them to fill out new job applications. Par. 16 alleges that the Respondent unlawfully refused to allow Juan Bolanos to work from about January 12 to 23, 1995.

⁷ In reaching a contrary result, the judge cited *Westbrook Bowl*, 274 NLRB 1009 (1985), *revd.* and remanded *sub nom. Service Employees Local 399 v. NLRB*, 798 F.2d 1245 (9th Cir. 1986), without

amended charge, the record contains a post office return receipt showing that this charge was delivered to the Respondent on June 30, 1995.⁸

In view of all the above, we find that the original and amended charges in Case 5-CA-25403 were properly served on the Respondent. We therefore reverse the judge's finding that complaint paragraphs 5, 15, and 16 are time-barred, and we shall remand these allegations to the judge for findings on the merits.⁹

2. The judge found, and we agree, that employees Saturnina Contreras, Teresa Avalos, and Ricardo Ortiz were not constructively discharged, and that the relevant complaint allegations should be dismissed.

3. At the hearing, the General Counsel moved to amend the complaint to allege that on or about August 11 and 14, 1995, the Respondent issued written warnings to Ricardo Ortiz, in violation of Section 8(a)(3) and (1) of the Act. The judge denied the General Counsel's motion to amend the complaint. We disagree with the judge's ruling.

Initially, the judge ruled that he would grant the General Counsel's motion if the General Counsel first recalled Ortiz as a witness, stating that counsel for the Respondent should have an opportunity to cross-examine him. Thereafter, the General Counsel recalled Ortiz, who testified on direct examination that he had never before seen either of the two warnings. Counsel for the Respondent announced that he had "no questions on cross" and argued to the judge that the motion to amend should be denied on the ground that Ortiz could not possibly have been coerced by warnings that he had never seen. The judge then reversed himself and denied the motion to amend the complaint, stating: "I am denying it because there is no proof that the witness ever received the warnings, which I am admitting in evidence as a part of his file."

In accordance with the General Counsel's exceptions, we find that the judge erred in denying the motion to amend the complaint with respect to the August 11 and 14 warnings.¹⁰ First, it is clear that the Respondent's counsel had full opportunity to cross-examine Ortiz with respect to the subject matter of the proposed amendment. In fact, the judge required the General Counsel to recall Ortiz for the specific purpose of allowing the Respondent to cross-examine him. Sec-

acknowledging that the case was overruled by *Buckeye Plastic Molding*, 299 NLRB 1053 (1990). In any event, contrary to the judge's statement, the service of the charges in the instant case was not "like" the service of the charges in *Westbrook Bowl* because in that case, unlike here, the charges were mailed to an incorrect address.

⁸There is no post office return receipt for the original charge.

⁹The judge found, and we agree, that service of the charge in Case 5-CA-25582 was proper. We also note that the record contains an affidavit of service for this charge.

¹⁰We deny, as untimely, the General Counsel's request, made for the first time in his exceptions, that the complaint also be amended to include an August 10, 1995 warning. In light of the fact that the General Counsel's motion to amend at the hearing was limited to the August 11 and 14 warnings, the Respondent could have reasonably concluded that the legality of the August 10 warning was not in issue.

ond, there is no contention that the complaint amendment lacks a sufficient basis in the charges filed in this case. Indeed, counsel for the Respondent stated on the record that "[a]t no time did we complain that the amendment did not relate to an existing charge" and that Section 10(b) "isn't the issue." Third, contrary to the position of the judge and the Respondent, it is well established that employee knowledge of the employer's conduct is not an indispensable element of an unfair labor practice finding. See *NLRB v. Grower-Shipper Veg. Assn.*, 122 F.2d 368, 376 (9th Cir. 1941). Accordingly, for all these reasons, we reverse the judge, grant the General Counsel's motion to amend the complaint, and remand these allegations for findings on the merits.¹¹

4(a). The judge dismissed the complaint allegation that Milagros del Carmen Sorto was discriminatorily discharged, finding instead that Sorto walked off the job and never again returned to employment. Because of an apparent conflict between the credited testimony and the documentary evidence, we shall remand this allegation to the judge for further consideration.

Sorto was hired by the Respondent in February 1995 and was last employed at 1776 Massachusetts Avenue, N.W., where her hours were from 6 to 10 p.m. From June 5 to June 14, 1995, she was the only employee from her building who went on strike. Sorto returned to work on June 14 wearing a red union T-shirt. The Respondent's records reveal that she was discharged on June 15, the day after she returned from the strike.

The judge appears to have credited the testimony of the Respondent's manager, Robin Allen, that she discharged Sorto on June 15 because on that date "she walked off the job leaving the job undone. Did not inform the supervisor that she did not complete the job." Allen also testified that Sorto "just walked out" and "never showed up" so that Allen was not able to notify Sorto of her discharge.

Sorto's termination report, however, which Allen authored, does not state that Sorto walked off the job on June 15.¹² Instead, the report states that on June 15 Sorto worked for 2 hours and contains the following notation: "dismiss refuse to follow instruction." Under "discharge for cause," the report refers to conduct that occurred on June 14, not June 15: "Milgro Sorto came

¹¹Member Higgins agrees that the judge, having permitted testimony, should have permitted the amendment of the complaint. However, he does not now pass on the issue of whether a warning, unknown to the employee, can reasonably be said to coerce the employee.

¹²Similarly, Sorto's personnel file, as explained by the Respondent's list of "termination codes," does not indicate that Sorto walked off the job ("Code 15"), but states the reason for the discharge as "other" ("Code 42").

to work on 6/14/95 and [did] not finish her job, [did] not clean handicap restroom.” The report also reflects that Sorto worked her full 4-hour shift on June 14. The “comments” section of the report actually tends to corroborates Sorto’s testimony that when she returned to work on June 14, she was not allowed to start work for approximately an hour due to the late arrival of her supervisor and that her failure to complete her assignments on June 14 was due to this delay in reinstating her after her participation in the strike.¹³

In sum, the judge appears to have credited Allen’s testimony that Sorto was discharged for “walk[ing] off the job” on June 15. The Respondent’s own records, however, indicate that Sorto was discharged for “not finish[ing] her job” on June 14. Further, if Sorto’s testimony were credited, it would support a finding that it was the Respondent’s tardy reinstatement of Sorto, after she engaged in protected strike activity, that was the reason she did not “finish her job” on June 14. Accordingly, we shall remand the Sorto discharge allegation to the judge for consideration of the apparent conflict between Allen’s credited testimony and the Respondent’s records. On remand, the judge should take into account all the relevant record evidence and analyze the discharge allegation under the framework the Board set forth in *Wright Line*.¹⁴

4(b). The complaint also alleges that on about May 31, 1995, the Respondent discriminatorily issued a warning to Sorto, and that on about June 15, 1995, the Respondent through Allen told employees that they could not wear union buttons. With respect to the “union button” allegation, the judge has set out the conflicting testimony, i.e., Sorto’s claim that Allen told her to take off her union button and Allen’s denial, but he made no credibility findings concerning the conflicting testimony or findings as to whether an unfair labor practice was committed. Similarly, with respect to the warning, the judge quoted Allen’s testimony that Sorto refused to follow instructions, but he made no clear credibility determination and failed to analyze the legality of the warning. Accordingly, we shall also remand these allegations to the administrative law judge for further consideration.

B. *The Unfair Labor Practices Which the Judge Found*

1(a). The judge found, and we agree, that the Respondent violated Section 8(a)(3) by discharging Isabel Villatoro. In light of the argument the Respondent advances in its exceptions, however, we find that further explanation is warranted.

¹³ The judge did not clearly credit or discredit this testimony.

¹⁴ 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

Villatoro was employed by the Respondent from about February to August 7, 1995, when she was terminated. She worked from Monday to Friday.

Villatoro was a union adherent and the only employee from her building to participate in a strike on about June 12, 1995. According to her uncontradicted testimony, when she returned to work after striking for 1 day, the Respondent’s agent, Avilio Torres, told her that “if you’re out for three days on the strike, if you miss three days, you will be fired,” and that “the person who goes out on strike for the union, we give him more work . . . [a]nd we harass them.”¹⁵ Villatoro further testified that Torres told her to discard her union button and “throw it in the garbage.”

Villatoro was discharged on Monday, August 7, after being absent the preceding Thursday and Friday, August 3 and 4. The Respondent’s policy was that an employee would be terminated if absent three times without a valid excuse. It is undisputed that Villatoro was absent on August 3 and 4, but the parties disagree over whether she had a valid excuse.

The General Counsel has shown that Villatoro engaged in union activity and that the Respondent had knowledge of that activity. The Respondent’s union animus has been demonstrated by its agent’s, Torres, statements to Villatoro and by the numerous unfair labor practices it committed in this and the previous three cases cited in footnote 4, *supra*. Thus, the General Counsel has presented a strong case that antiunion sentiment was a motivating factor in Villatoro’s termination.

Therefore, under *Wright Line*, the burden shifts to the Respondent to show that Villatoro would have been discharged even in the absence of her protected activities.¹⁶ Villatoro’s termination report, signed by Operations Manager Garcia, states the cause of discharge as “tardiness/absenteeism.” The “comments” section emphasizes that Villatoro “hasn’t shown up three times without a valid excuse.” The obvious problem with this defense is that even assuming *arguendo* that Villatoro had unexcused absences on August 3 and 4, she still would not have violated the

¹⁵ Torres’ supervisory status is in dispute. We find insufficient evidence to establish that he was a supervisor within the meaning of Sec. 2(11) of the Act. We find, however, that the record establishes that the Respondent placed Torres in a position where employees, particularly Villatoro, could reasonably believe that he was acting for and on behalf of management. Thus, the record shows that on Villatoro’s first day of work Operations Manager Garcia told her that Torres was her supervisor. In addition, the Respondent gave Torres authority to assign work and to sign employee warnings. Torres also inspected and corrected Villatoro’s work. Accordingly, we conclude that Torres was the Respondent’s agent and that his actions are attributable to the Respondent.

¹⁶ In view of the General Counsel’s strong case, under *Wright Line*, the Respondent’s burden here is substantial. See *La Conexion Familiar & Sprint Corp.*, 322 NLRB 774, 778 (1996); *Federal Screw Works*, 310 NLRB 1131, 1140 (1993).

Respondent's three-unexcused-absence rule.¹⁷ Thus, the judge found, and we agree, that in discharging Villatoro "Garcia departed from the rule."

In its exceptions, the Respondent argues that although it has a three-unexcused-absence rule, "it was not the reason for Villatoro's discharge." Instead, the Respondent argues that before Villatoro had engaged in any union activities she had been warned that if she were absent one more time she would be discharged. Therefore, according to the Respondent, after her two absences on August 3 and 4, she was lawfully discharged in accordance with the prior warning, "not [on the basis of] the rule cited by the ALJ." The difficulty with this position is that it conflicts with the Respondent's own termination report, which clearly relies on the three-unexcused-absence rule, rather than the "prior warning" rationale, as the justification for Villatoro's discharge. It is well established that such shifting of defenses weakens the employer's case, because it raises the inference that the employer is "grasping for reasons" to justify an unlawful discharge. *Royal Development Co. v. NLRB*, 703 F.2d 363, 372 (9th Cir. 1983).

Accordingly, we find, in agreement with the judge, that the Respondent has not satisfied its *Wright Line* burden, and we adopt his conclusion that the Respondent violated Section 8(a)(3) and (1) by discharging Villatoro.

1(b). The complaint also alleges that following Villatoro's participation in the strike Torres engaged in closer supervision of her work in violation of Section 8(a)(1) of the Act. Although the judge appears to have credited Villatoro's testimony to this effect, the judge made no finding on this complaint allegation. We shall, therefore, remand this allegation to the judge for explicit findings.

2. The judge found, and we agree, that the Respondent discriminated against employees who participated in a strike from June 6 to about June 13, 1995, by transferring them on about July 31, 1995, from a facility in Washington, D.C., to a facility in Rosslyn, Virginia, thereby increasing their commuting time and costs, and reducing their working hours.

Eight strikers, all of whom lived in the District of Columbia or Maryland, were employed at 401 M Street, S.W., when the Respondent's night cleaning contract at that location was terminated. The strikers were all transferred to Rosslyn, but nonstrikers were retained on the day shift at 401 M Street. After the transfer, the day shift doubled in size from about 20 to about 40 employees.

The judge found, and we agree, that a motive to discriminate against the strikers is manifested by the Re-

spondent's retention of only nonstrikers at 401 M Street, and the transfer of all strikers to Rosslyn with a reduction of hours and an increase in travel time and costs, even though the Respondent had enough jobs available for them on the day shift at the M Street location. We further agree with the judge that the Respondent has offered no credible explanation for transferring all strikers to less desirable jobs when jobs in the same building from which they were transferred were available. Accordingly, we agree with the judge that the Respondent has violated Section 8(a)(3).¹⁸

The judge further found, however, that Maria Teresa Avalos, who chose to go to Rosslyn, rather than transfer to another building in the District of Columbia, was not a victim of discrimination. We disagree. As the judge has found, the discrimination occurred when the Respondent transferred all the strikers and did not allow them to remain in the M Street facility on the day shift as it did with the nonstrikers. Thus, Avalos, like the other strikers, was discriminated against when the Respondent denied her the opportunity to remain in the M Street facility on the day shift. We shall, therefore, reverse the judge as to Avalos and shall include her name in the Order with those who are to be offered jobs on the day shift at 401 M Street, S.W., Washington, D.C.

3. The judge found, and we agree, that the Respondent violated Section 8(a)(1) when Herman Romero, in the presence of Project Manager Giovanni Fallas, instructed employees wearing union T-shirts to take them off.¹⁹ Fallas, by his silence, condoned the instruction, and the employees removed the T-shirts.

The Respondent admits that Romero made the remark, but contends that it was rescinded when Vice President of Operations Richard Gallaher instructed Antonio Dominguez to tell the employees that they could wear the T-shirts. The Respondent did not call Dominguez to testify, and there is no evidence to establish whether Dominguez did as he was instructed or to which employees, if any, he imparted this information.

Under certain circumstances an employer may relieve itself of liability for unlawful conduct by repudiating the conduct. To be effective, however, such repudiation must be "timely," "unambiguous," "specific in nature to the coercive conduct," and "free from other proscribed illegal conduct." There must be adequate publication of the repudiation to the employees involved, and there must be no proscribed conduct on the employer's part after the publication. Finally, the

¹⁷Of course, the day Villatoro was on strike cannot be counted as an unexcused absence, because participation in a strike is protected by Sec. 7 and Sec. 13 of the National Labor Relations Act.

¹⁸We leave to compliance the issue of the effect, if any, that the resignations of Ricardo Ortiz and Maria Teresa Avalos, and the departure from the country of Saturnina Contreras and Victoriano Flores, should have on their right to reinstatement to the day shift at the 401 M Street location. See *Dauman Pallet, Inc.*, 314 NLRB 185, 187 (1994); *Goodman Investment Co.*, 292 NLRB 340 (1989).

¹⁹The Respondent has stipulated that Fallas is a supervisor.

repudiation should give assurance to employees that in the future their employer will not interfere with the exercise of their Section 7 rights. *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978).

Applying the *Passavant* standards here, it is clear that even accepting Gallaher's testimony as true, there is insufficient evidence to show repudiation. As noted above, the Respondent has presented no evidence to establish that Dominguez did as he was instructed or to which employees, if any, he imparted this information. Hence, there is no showing that there was the requisite adequate publication of the repudiation to the employees involved. Even assuming arguendo that Dominguez imparted the information to the employees involved, there is no evidence as to when this occurred and hence no evidence that any such publication was timely. Further, a simple statement by Dominguez that employees could wear the T-shirts would not be an unambiguous countermand of an order given by Romero and condoned by Fallas where, as here, there is no indication that Dominguez referred to that order. Finally, the Respondent does not even claim that it assured employees that it would not interfere with their Section 7 rights, and there is abundant evidence that the Respondent in fact continued to interfere with those rights. We thus agree with the judge that the Respondent violated Section 8(a)(1) by Romero's directive, and we further find that the Respondent did not effectively rescind that order.

4. The judge found, and we agree, for the reasons set forth by the judge, that the Respondent violated Section 8(a)(1) by Operations Manager Gilbert Bonilla's threatening employees with loss of jobs.

C. Request for Sanctions Against Respondent's Attorney and Motion to Discipline

The General Counsel has excepted to the judge's decision not to "exercise jurisdiction" over the General Counsel's request that the Respondent's counsel, Joel I. Keiler, be sanctioned and disciplined for aggravated misconduct at the hearing. This aspect of the proceeding shall be severed and considered separately by the Board.

D. The Remedy

The General Counsel and the Charging Party have excepted to the judge's failure to provide a broad cease-and-desist order. In *United States Service Industries*, 315 NLRB, supra at 286, and in *United States Service Industries*, supra, 319 NLRB at 231, we found that a broad remedial order was warranted because the Respondent demonstrated a proclivity to violate the Act and exhibited a general disregard for the employees' fundamental statutory rights. In this case, we have found that the Respondent has continued to violate the Act by, inter alia, discharging a union adherent, trans-

ferring eight returned strikers to less desirable jobs, and threatening employees with job loss. Accordingly, we shall modify the judge's recommended Order and substitute broad cease-and-desist language.²⁰

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, United States Service Industries, Inc., Washington, D.C., its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Cease and desist from

(a) Discouraging union or concerted activities of its employees or their membership in Service Employees International Union, Local 82, AFL-CIO, or any other labor organization, by unlawfully and discriminatorily discharging its employees or discriminating against them in any manner in respect to their hire and tenure of employment or conditions of employment.

(b) Unlawfully directing employees to remove union T-shirts.

(c) Unlawfully transferring returned strikers, thereby increasing their commuting time and costs, and reducing their working hours, in order to discourage union activities.

(d) Unlawfully threatening loss of jobs in order to discourage union activities.

(e) In any other manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed 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 Isabel Villatoro full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

(b) Make Isabel Villatoro whole for any loss of earnings and other benefits suffered as a result of the discrimination against her, in the manner set forth in the remedy section of the judge's decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful dis-

²⁰ Consistent with our most recent decision involving this Respondent, we find that, in order to effectuate the purposes and policies of the Act, the broad order shall apply "to all of Respondent Employer's current worksites and any new worksites where the Employer may be engaged to perform cleaning services during the 60-day posting period." 319 NLRB at 259. Similarly, the notice shall "be posted at all of the Employer's current worksites and any new worksites acquired within the 60-day posting period in the metropolitan Washington D.C. area." Id.

We deny the General Counsel's request for attorneys' fees on the ground that the Respondent's defenses were not frivolous within the meaning of *Frontier Hotel & Casino*, 318 NLRB 857 (1995), enf. denied in part 118 F.3d 795 (D.C. Cir. 1997).

charge of Isabel Villatoro, and within 3 days thereafter notify her in writing that this has been done and that the discharge will not be used against her in any way.

(d) Within 14 days from the date of this Order, offer the following returned strikers:

Maria Teresa Avalos
 Enrique Hernandez
 Ricardo Ortiz
 Marina Reyes
 Saturnina Contreras
 Victoriano Flores
 Ana Esmeralda Funes
 Rudy Alvaro

jobs on the day shift at 401 M Street, S.W., Washington, D.C., or, if those jobs no longer exist, to substantially equivalent positions in Washington, D.C., without prejudice to their seniority or any other rights or privileges previously enjoyed.

(e) Make the above-named returned strikers whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the judge's decision.

(f) Within 14 days from the date of this Order, remove from its files any reference to the unlawful transfers, and within 3 days thereafter notify the above-named returned strikers in writing that this has been done and that the transfers will not be used against them in any way.

(g) 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.

(h) Within 14 days after service by the Region, post at all of its current worksites in the Metropolitan Washington, D.C. area and any new worksites acquired there within the 60-day posting period copies of the attached notice marked "Appendix."²¹ Copies of the notice, in both English and Spanish, on forms provided by the Regional Director for Region 5, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Re-

²¹ 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."

spondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 5, 1995.

(i) 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.

IT IS FURTHER ORDERED that the record in this proceeding be reopened and the allegations of paragraphs 5, 15, and 16 of the consolidated complaint which the judge dismissed as barred by Section 10(b): the allegation relating to warnings placed in Ricardo Ortiz' personnel file; the allegations relating to the unlawful reprimand and termination of Milagros del Carmen Sorto; the allegation relating to the Respondent, through Robin Allen, telling employees at 1776 Massachusetts Avenue that they could not wear union buttons; and the allegation relating to the closer supervision of Isabel Villatoro, be remanded to Judge Lowell Goerlich for further appropriate action in accordance with this Decision and Order.²²

IT IS FURTHER ORDERED that the General Counsel's request for sanctions against the Respondent's attorney, Joel I. Keiler, and motion to discipline are severed and will be considered separately by the Board.

²² Because the Board has been advised that Judge Goerlich has retired from the Agency, the Board requests that the chief administrative law judge ascertain the availability of Judge Goerlich. In the event that Judge Goerlich is not available, the case is remanded to the chief administrative law judge who may designate another administrative law judge in accordance with Sec. 102.36 of the Board's Rules.

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 discourage union or concerted activities of our employees or their membership in Service Employees International Union, Local 82, AFL-CIO, or any other labor organization, by unlawfully and discriminatorily discharging our employees or discriminating against them in any manner in respect to their hire and tenure of employment or conditions of employment.

WE WILL NOT unlawfully direct employees to remove union T-shirts.

WE WILL NOT unlawfully threaten employees with loss of jobs to discourage union activities.

WE WILL NOT unlawfully transfer returned strikers thereby increasing their commuting time and costs and reducing their working hours in order to discourage their union activities.

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

WE WILL, within 14 days from the date of the Board's Order, offer Isabel Villatoro full reinstatement to her former job or, if such job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights and privileges previously enjoyed.

WE WILL make Isabel Villatoro whole for any loss of earnings and other benefits as a result of the action against her, with interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to Isabel Villatoro's discharge and WE WILL, within 3 days thereafter, notify her in writing that this has been done and that the discharge will not be used against her in any way.

WE WILL, within 14 days of the date of the Board's Order, offer the following named returned strikers,

Maria Teresa Avalos
 Enrique Hernandez
 Ricardo Ortiz
 Marina Reyes
 Saturnina Contreras
 Victoriano Flores
 Ana Esmeralda Funes
 Rudy Alvaro

whom we unlawfully transferred from 401 M Street, S.W., Washington, D.C., to Rosslyn, Virginia, on about July 31, 1995, jobs on the day shift at 401 M Street, S.W., Washington, D.C., or, if those jobs no longer exist, to substantially equivalent positions in Washington, D.C., without prejudice to their seniority or any other rights and privileges previously enjoyed.

WE WILL make the above-named returned strikers whole for any loss of earnings and other benefits which they may have suffered by reason of their transfer, with interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful transfers of the above-named returned strikers, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the transfers will not be used against them in any way.

UNITED STATES SERVICE INDUSTRIES,
 INC.

Cindy Ramirez Holman, Esq. and *Eric Fine, Esq.*, for the General Counsel.

Joel Keiler, Esq., of Reston, Virginia, for the Respondent.

Eunice Harris Washington, Esq., of Washington, D.C., for the Charging Party.

DECISION

STATEMENT OF THE CASE

LOWELL GOERLICH, Administrative Law Judge. The original charge in Case 5-CA-25403 was filed by Service Employees International Union, Local 82, AFL-CIO (the Union) on June 5, 1995, and a copy of it was mailed to Respondent United States Service Industries, Inc. by certified mail June 9, 1995. The first amended charge in Case 5-CA-25403 (which was identical to the original charge in content) was filed by the Union on June 20, 1995, and a copy of it was mailed to the Respondent by certified mail in October 1995. The second amended charge in Case 5-CA-25403 was filed by the Union on October 19, 1995, and a copy of it was properly served by certified mail on the Respondent on the same day. (The charge incorporated the allegations contained in the original and first amended charges.)¹

The charge in Case 5-CA-25582 was filed by the Union on August 23, 1995, and a copy of it was properly served by registered mail on the Respondent on September 8, 1995.²

¹ The Respondent claims that there was not a proper proof of service of the original and first amended charges on the Respondent in that there was no evidence offered of returned receipts of the mailing. The Respondent further argues that the charges are time-barred by Sec. 10(b) of the Act.

The Respondent admits proper service of the second amended charge which was served on October 19, 1995. Thus, if the Respondent is correct, any allegations in the consolidated complaint citing incidents which occurred prior to April 19, 1995, must be dismissed. The Respondent cites *Westbrook Bowl*, 274 NLRB 1009 (1985), which holds that a like service was improper. Thus, allegations in the consolidated complaint of incidents occurring prior to April 19, 1995, must be dismissed. Id. Since the incidents which are described in pars. 5a-5l, 15, and 16 are alleged to have occurred from December 7, 1994, through February 3, 1995. Pars. 5, 15, and 16 are dismissed in their entirety.

² The Respondent claims that there was not proper service of this charge on the Respondent. Proof in respect to service of this charge shows that it was sent by certified mail to the Respondent, addressed to James Matthews, United States Service Industries, Inc., 1424 K Street, N.W., Washington, D.C. 20005. This was the same address to which the second amended charge in Case 5-CA-25403 (of which service the Respondent did not contest) was sent. Apparently the certified mail was refused. The service of the charge was proper. See *Powell & Hunt Coal Co.*, 293 NLRB 842 (1989); *National Automatic Sprinklers*, 307 NLRB 481 (1992); and *Michigan Expediting Service*, 282 NLRB 210 (1986).

The charge in Case 5-CA-25813 was filed by the Union on December 4, 1995, and a copy was properly served by certified mail on the Respondent on December 14.

An order consolidating cases, consolidated complaint and notice of hearing was issued in Cases 5-CA-25403 and 5-CA-25582 on February 2, 1996. A complaint and notice of hearing was issued in Case 5-CA-25813 on March 5, 1996. An order consolidating cases and setting hearing date in Cases 5-CA-25403, 5-CA-25582, and 5-CA-25813 was issued on May 6, 1996. The complaints charged the Respondent with violations of the National Labor Relations Act (the Act).

The Respondent filed timely answers denying that it had engaged in the unfair labor practices alleged.

The cases came on for hearing at Washington, D.C., on June 17-21 and July 1, 2, and 8, 1996. Each party was afforded a full opportunity to be heard, to call, to examine and cross-examine witnesses, to argue orally on the record, to submit proposed findings of facts and conclusions, and to file briefs. All briefs have been carefully considered.

On the entire record in this case³ and from my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT,⁴ CONCLUSIONS, AND REASONS THEREFOR

I. BUSINESS OF THE RESPONDENT

At all material times the Respondent, a Delaware corporation, with an office and place of business in Washington, D.C. (the Respondent's main facility), has been engaged in the business of providing full service janitorial services to offices and buildings in Washington, D.C., and adjacent areas in Maryland and Virginia.

During the preceding 12 months, a representative period, the Respondent, in conducting its business operations described above, derived gross revenues in excess of \$1 million and purchased and received goods and supplies valued in excess of \$5000 directly from points located outside the District of Columbia.

At all material times the Respondent has been engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The Union is now, and has been at all times material, a labor organization within the meaning of Section 2(5) of the Act.

³Requests of the General Counsel and the Respondent for correction of the transcripts are granted and the transcript is corrected accordingly.

⁴The facts found here are based on the record as a whole and on the observation of the witnesses. The credibility resolutions here have been derived from a review of the entire testimonial record and exhibits, with due regard to the logic of probability, the demeanor of the witnesses, and the teachings of *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962). As to those witnesses testifying in contradiction to the findings here, their testimony has been discredited either as having been in conflict with the testimony of credible witnesses or because it was in and of itself incredible and unworthy of belief.

All testimony has been reviewed and weighed in the light of the entire record. No testimony has been precluded.

III. THE UNFAIR LABOR PRACTICES

A series of unfair labor practice complaints issued against the Respondent in Cases 5-CA-23629, 5-CA-23724, 5-CA-24030, 5-CA-24168, 5-CA-24291, and 5-CA-24547, during the period of time from December 23, 1993, to August 10, 1994, which were consolidated for trial in a case in which the Board subsequently issued its opinion and order in *United States Service Industries*, 319 NLRB 231 (1995). The Respondent was found guilty of unfair labor practices.

On November 3, 1994, pursuant to the unfair labor practices alleged in the complaints described above, the United States District Court for the District of Columbia in the case of *Louis J. D'Amico v. United States Service Industries, Inc.*, Civil Action No. 94-1795, issued an order granting a temporary injunction requiring the Respondent, in pertinent part, to offer interim reinstatement to employees Juan Bolanos, Maria Ester Terminio, Augustin Barrero, and Carlos Ipanaque to their former positions, without prejudice to their former seniority or other rights and privileges, displacing, if necessary, other persons hired or reassigned by the Respondent as their replacements or, if those positions no longer exist, to substantially equivalent positions.

A. The Termination of Saturnina Contreras

The General Counsel asserts that Saturnina Contreras was a constructive discharge.

Contreras cleaned bathrooms at M Street, S.W. in Washington, D.C., commencing on May 9, 1995. Her working hours were from 9:30 p.m. to 6 a.m., 9 hours. She worked from Monday to Friday. She testified that her supervisor was Sixto.⁵

On occasion Contreras met with union representatives outside the building where she worked. She went on strike on May 15, 1995, and returned to work shortly thereafter.

On July 31, 1995, a meeting of the employees was held by Supervisor Jose Barahona. According to Contreras, Barahona told the employees that the contract for the building had been finished and that Esmeraldi, Victoriano Flores, Ricardo, and Contreras were being transferred to Rosslyn, Virginia. He also said that those who would be going to Rosslyn would work fewer hours, starting from 11 p.m. and finishing at 7 a.m. Contreras stated that she did not go to Rosslyn, "Because I was going to be working fewer hours over there and I was going to spend more money on transportation."

On cross-examination, it was revealed that Contreras did not take the transfer because she "had to go to El Salvador" where she remained for 6 months. Contreras testified, "I received a notification from El Salvador that I had to go to El Salvador to bring my visa back from over there. . . . I was going to bring back my residency." Her husband, Victoriano Flores, went with Contreras to El Salvador.

In the case of *Red Arrow Freight Lines*, 289 NLRB 227 (1988), the Board stated:

In order to prove that an employee was constructively discharged, the General Counsel must establish that the burdens imposed on the employee "must cause, and be intended to cause, a change in working conditions so difficult or unpleasant as to force [the employee] to resign" and that the burdens were imposed because of the em-

⁵He was unable to be identified in the record.

ployee's union activity. *Crystal Princeton Refining Co.*, 222 NLRB 1068, 1069 (1976).

The General Counsel has not met this burden. Contreras quit to go to El Salvador. The allegations in the consolidated complaint are dismissed as to Contreras.

B. *The Termination of Maria Teresa Avalos*

The General Counsel asserts that Maria Teresa Avalos was also a constructive discharge.

Avalos started working for the Respondent on April 31, 1994, in a building located at 401 4th and M Streets, S.W., Washington, D.C., from 9:30 p.m. to 7 a.m., which was later changed to 10:30 p.m. to 6 a.m. She cleaned offices. She was paid \$6 an hour.

Avalos, along with other employees, engaged in a strike for 2 days after which she returned to work at the same building. She had contacted Supervisor Jose Barahona who told her to come back to work "but not to continue with the Union."

Thereafter, Barahona met with around 12 employees in Avalos' group at 2 a.m. He advised the employees that they were being transferred to Virginia. He said "[t]hat those who wanted would go to Virginia and those of us could stay in a building. I do not remember where." Three employees were told to stay in the building. None of these individuals had participated in the strike. Avalos told Barahona that she "would rather go to Rosslyn [Virginia]." She accepted the job because "I needed the job and I did not want to remain in a building in Washington . . . because it was a woman supervisor and she was very demanding. She assigned a lot of work to me." (Avalos had worked there before for 1 day.)

Avalos went to Rosslyn for only 1 day, "[b]ecause I would finish very late and I had very short time to go to Wheaton where I had four hours." Her hours at Rosslyn were from "11:00 to 6:30" at night. At Wheaton her hours were from 7 to 11 a.m. Avalos testified, "I would finish, get out of my work at USSI and go to Wheaton. . . . I was better off in Wheaton compared with the job at USSI." Avalos had been working at Wheaton "about 6 months" at which time her hours at USSI were from 10:30 p.m. to 6 a.m. It took Avalos about 15 minutes to go from her home to Wheaton and about 15 minutes to go to Rosslyn.

The General Counsel bases his claim that Avalos was a constructive discharge because she was transferred to Rosslyn where the hours were such that she could not meet the hours assigned to her in Wheaton where she was also working. There is no credible evidence that the Respondent knew of her alleged problem or sent her to Rosslyn because of her union activities. In fact, she was offered a choice of jobs; she chose Rosslyn apparently because she thought it would be less arduous. I find no disparate treatment of Avalos or intent to offer her a job "so difficult or unpleasant as to force her to resign." See *Red Arrow Freight Line*, supra. In fact, the Employer had offered her a choice. She could have stayed in Washington where she had been working.

The allegations in the consolidated complaint in respect to Avalos are dismissed.

C. *The Termination of Ricardo Ortiz*

The General Counsel claims that Ricardo Ortiz was also a constructive discharge.

Ortiz started working for the Respondent on or about May 31, 1995, at 401 M Street, S.W. Ortiz picked up garbage. His hours were from 9:30 p.m. to 6:30 a.m. Ortiz met with union representatives outside the building where he worked. He also went on strike. When he returned to work after the strike he was wearing a red union T-shirt. He returned to 401 M Street, S.W. Thereafter, Supervisor Jose Barahona convened the employees at 401 M Street, S.W. According to Ortiz, Barahona told the employees that there would be no more work in the building and that the employees would be transferred to different buildings. He added that some would be transferred to a building "close by" and that Teresa, Septonino, Victoriano, and Alberto would be transferred to a building in Rosslyn. Ortiz stated, "He said that at the building the work would be from four to five hours. And that we would be working days." Only those who had been on strike were transferred to Rosslyn. According to Ortiz' timecard, he worked 7 days at Rosslyn and quit. His hours were 7:30 p.m. to 7 a.m. Ortiz testified that he quit—"too much work." Ortiz testified that he went out on strike "because the working conditions [at M street] were so terrible, and you were asked to do too much work in to short of time." Ortiz further testified that the conditions at Rosslyn were "just as bad" as they were at M Street, S.W.

It is clear that Ortiz quit because he didn't like his work assignments which were not unlike the ones he struck against at M Street, S.W. I find no constructive discharge here. See *Crystal Princeton Refining Co.*, supra.

The allegations in the consolidated complaint as to Ortiz are dismissed.

D. *The Termination of Milagros del Carmen Sorto*

According to Milagros del Carmen Sorto she commenced employment with the Respondent February 23, 1995.

Her last place of employment was 1776 Connecticut Avenue. Her working hours were "6 to 10 at night." She testified, "I would take out the garbage and dust and vacuum. And a private bathroom." Her supervisor was "Josephina." Sorto went on strike; she was the only one from her building on strike. When Sorto returned to work after the strike she was wearing a red union T-shirt. According to Sorto on the day she returned to work she was assigned her old job. She was able to do all of it except a private bathroom. Sorto looked for the supervisor to tell her that she was unable to do the bathroom. The next day Sorto was told to help vacuum another floor. She said she could not because she was sick. Allen gave Sorto a verbal reprimand telling her that supervisor's orders were to be obeyed. Sorto responded that she had been sick.

According to Sorto, on the third day of her employment she wore a red union T-shirt and a union button on top of the "overshirt." Supervisor Robin Allen told Sorto to take the union button off; that she was to wear the "I.D. on that side." "She took off my button and put the I.D. there."

Robin Allen, the Respondent's manager, testified that she fired Sorto. She denied that she had told employees to not wear union buttons. She testified that she gave Sorto a warning slip "letting her know how it is important to be sure that

you work behind locked doors and make sure the lights are turned off when you finish.” The warning notice is dated May 17, 1995. Allen gave Sorto a second warning notice on May 30, 1995, “[b]ecause Ms. Santos [sic] refuses to follow instructions. She wouldn’t vacuum properly. She wouldn’t dust properly. Her whole attitude had changed.” Allen gave Sorto another warning notice dated June 15, 1995, because “she wasn’t completing her job, she wasn’t doing her job properly.” Allen discharged Sorto on June 15, 1995, because “Ms. Santos [sic] did not complete her job and she walked off the job leaving the job undone. Did not inform the supervisor that she did not complete the job.”

Allen also testified that all employees are required to wear a “cobbler”⁶ to let people know who are employees. It was that which she called to Sorto’s attention not a ban on a union button. According to Allen, it was her sole decision to discharge Sorto, “She just walked out. She didn’t inform anyone.” According to Allen she was informed by a supervisor that she couldn’t find Sorto and that the restrooms “wasn’t done.” “I came over there . . . I helped the supervisor do the job and I told her that if Ms. Santos [sic] ever show up here, tell her to come to the office to see me.” Santos [sic] “never showed up.”

It appears that Sorto walked off the job and never again returned to employment. Thus, I cannot find that her separation from employment was the result of discrimination. Allegations in the consolidated complaint in respect to Sorto are dismissed.

E. The Termination of Isabel Villatoro

Isabel Villatoro returned to work for the Respondent on February 2, 1995. She worked at 2120 L Street, N.W., Washington, D.C. She described her job: “I worked vacuuming, taking out the trash, I also worked in four bathrooms. I cleaned the walls. I took the garbage down stairs.” She worked on floors four and five. Avilio Torres was her supervisor; the operations manager was Fernando Garcia.

Villatoro was a union partisan and went on strike and joined in strike activities. She was the only striker from her building. She was out on strike for 1 day after which she returned to her job. According to Villatoro, when she returned from the strike Torres told her “the person who goes out on strike for the union, we give him more work . . . and we harass them.” (Torres did not testify.) Torres changed her to the sixth and seventh floors. Torres also told Villatoro that she should discard her union button and “throw it in the garbage.” Villatoro also wore a union T-shirt. Garcia told Villatoro if she wanted to wear the T-shirt she should wear it under the uniform. According to Villatoro, Torres inspected her work more often after she returned from strike.

Villatoro was fired on August 7, 1995, by Torres who told her “that Fernando Garcia told me that I was fired for not having called, and for not having come.” Villatoro was absent Thursday and Friday because she was sick. According to Villatoro she tried to call Avilio whom she was unable to reach. She then tried Garcia. She was able to reach his answering machine on which she left a message relating that

she was not coming to work because she was sick. She made calls on both Thursday and Friday.

Before Villatoro went on strike, Garcia had told her that if she missed one more day she would be fired. There is nothing in her affidavit about a call on Thursday. There is nothing in the affidavit about the union button. Villatoro testified that after she had read the affidavit she told counsel for General Counsel that it was not complete. Garcia testified that he told Villatoro that if she was absent one more time she would be fired and that she did not call in on Thursday but called in on Friday. Garcia testified that he fired Villatoro because he told her that if she continued “not showing up” he would fire her. However, he also testified that the rule was that “after three times without excuse, a valid excuse a person is fired.” Here, Garcia departed from the rule in that Villatoro was not absent three times and she had a valid excuse, sickness.

By the General Counsel having established a prima face case, it was incumbent on the Respondent to show that Villatoro would have been discharged even if she had not been engaged in union or protected activities. *Wright Line*, 251 NLRB 1083 (1980). The Respondent’s defense is that Villatoro’s discharge was lawful. It has been held that an employer may discharge for a good reason, a bad reason, or no reason at all as long as it is not discriminating. Under the circumstances of this case, the discharge appears to have been discriminatory and would not have taken place if Villatoro had not been a union partisan. Thus, I find that by Villatoro’s discharge the Respondent violated Section 8(a)(1) and (3) of the Act.

F. Alleged Unlawful Transfer and Discrimination Against Returned Strikers

The General Counsel contends that the Respondent discriminated against employees who participated in a strike from June 6 to about June 13, 1995, by transferring them on or about July 11, 1995, from the 401 M Street, S.W., Washington, D.C. location to another facility in Rosslyn, Virginia, by increasing their commuting time and costs and reducing their working hours.

By letter dated June 6, 1995, 11 of the 27 employees assigned to the night shift at 401 M Street, S.W. informed the Respondent that they were going on strike. Thereafter, they engaged in a strike for varying periods of time. All returned to work. On July 31, 1995, Operations Manager Barahona advised the 16 night-shift employees employed at 401 M Street, S.W. that the Respondent was eliminating the night shift at the facility and was transferring employees to Rosslyn, Virginia. Some would remain at 401 M Street, S.W. Eight strikers⁷ were transferred to Rosslyn. All nonstrikers were retained on the first shift at 401 M Street, S.W. except for nonstrikers Oscar Reyes and Alberto Portillo. The working hours at Rosslyn were 1 hour less than at 401 M Street,

⁷ The strikers names were:

Enrique Hernandez
 Maria Avalos
 Ricardo Ortiz
 Marina Reyes
 Saturnia Contreras
 Victoriano Flores
 Ana Esmeralda Funes
 Rudy Alvaro

⁶ “Its a thing that you wear that is saying who you work for, so when you are in the building, the tenants know who the person is on the floor, knowing that they work for a cleaning company.”

S.W. After the transfer, the day shift at 401 M Street, S.W. doubled in size from about 20 employees assigned to work during the payroll period ending July 31, 1995, to about 40 employees assigned to work during the payroll period ending August 15. All strikers lived in Washington, D.C.

According to Avalos, three employees who were nonunion were told to stay on 401 M Street, S.W.—Erika Villata, a striker and a union leader, was transferred to Rosslyn on about June 25, 1995. On August 1, she was transferred back to 401 M Street, S.W. The General Counsel asserts that by separating Villata from the rest of the strikers at Rosslyn the Respondent diminished and impaired the Union's organizational efforts.

Motive to discriminate against the strikers is manifested by the Respondent's retention of only nonstrikers at 401 M Street, S.W. and the transfer of *all* strikers to Rosslyn with a reduction of hours and an increase in travel time and costs to their jobs. Although the Respondent had sufficient jobs available for them on the first shift at 401 M Street, S.W. It is reasonable to infer that it was not just coincidental that all the strikers were chosen to be transferred to less attractive jobs while nonstrikers were retained in the more attractive jobs by an employer whose union animus is well established. Cf. *Fluor Daniel, Inc.*, 304 NLRB 970 (1991). As above noted, all known union members were transferred. While it was theoretically possible that the Respondent could have fortuitously selected for transfer all returned strikers, common sense and the laws of mathematical probability indicate that this was highly unlikely. See *Ventre Packing Co.*, 163 NLRB 540, 541 (1967).

The Respondent has offered no credible explanation for its choosing all the strikers for less desirable jobs. Cf. *Wright Line*, supra. Thus, by transferring all strikers to less desirable jobs when jobs in the same building from which they were transferred were available, the Respondent violated Section 8(a)(1) and (3) of the Act.

G. Bar Against Wearing Union T-shirts

Herman Romero⁸ informed employees wearing union T-shirts to take them off. Project Manager Giovanni Fallas was present when such instruction was given and by his silence condoned the instruction. The employees removed the T-shirts.

By Romero's instruction to employees to remove union T-shirts, the Respondent violated Section 8(a)(1) of the Act.

H. The Alleged 8(a)(1) Statements of Gilberto Bonilla

The General Counsel claims that Operations Manager Gilberto Bonilla threatened employees with termination and building closure to wit.

Bonilla asked the employee to cooperate with the Company, stating that he was forced to work with the Union once and he had not been satisfied. Bonilla then threatened employees by stating that before negotiating with the Union he preferred to give back the building and that Bonilla told the employees not to feel forced to talk to the Union because all they wanted was dues. Bonilla then threatened employees by telling them that USSI preferred to turn in the building rather

than accept a union contract and that if they turned in the building employees would be left with out a job and he had no vacancies or jobs in another building but as time went by he would try to find employees a place in other buildings.

I find that the General Counsel's claim is well taken that, by his remarks, Bonilla threatened the employees with loss of jobs if they continued union affection and thereby the Respondent violated Section 8(a)(1) of the Act.

I. Jurisdiction Question

The Respondent's claim that portions of the amended complaint which allege activity that would violate the 10(j) injunction should be dismissed is not well taken. *NLRB v. John S. Swift & Co.*, 302 F.2d 342 (7th Cir. 1962).

J. Alleged Counsel Misconduct

Both counsel for the General Counsel and the Respondent have raised what appears to be questions in respect to counsel misconduct. The Respondent claims alleged misconduct on the part of counsel for the General Counsel and the Charging Party's counsel, whereas the counsel for the General Counsel claims alleged misconduct on the part of the Respondent's counsel. (See R. Br. pp. 16 and 17, to the administrative law judge and pp. 61, 62, 63, 64, 65 and 66, memorandum to the administrative law judge on behalf of the General Counsel, respectively.)

In the Board's Statements of Procedure Section 101.11 in respect to the administrative law judge's decision it is stated:

Sec. 101.11 *Administrative law judge's decision.*—(a) At the conclusion of the hearing the administrative law judge prepares a decision stating findings of fact and conclusions, as well as the reasons for the determinations on all material issues, and making recommendations as to action which should be taken in the case. The administrative law judge may recommend dismissal or sustain the complaint, in whole or in part, and recommend that the respondent cease and desist from the unlawful acts found and take action to remedy their effects.

It is clear from this statement that it is not anticipated nor directed that the administrative law judge incorporate in the decision matters touching the misconduct of counsel. The decision is confined to the material issues. Misconduct of counsel has no bearing on the resolution of the material issues. Moreover, the Board's Rules have provided for the way in which misconduct of counsel shall be treated. The Board's Rules and Regulations, Section 102.44, provides:

Sec. 102.44 *Misconduct at hearing before an administrative law judge or the Board; refusal of witness to answer questions.*—(a) Misconduct at any hearing before an administrative law judge or before the Board shall be ground for summary exclusion from the hearing.

(b) Such misconduct of an aggravated character, when engaged in by an attorney or other representative of a party, shall be ground for suspension or disbarment by the Board from further practice before it after due notice and hearing.

(c) The refusal of a witness at any such hearing to answer any question which has been ruled to be proper

⁸It is immaterial whether Romero is a conceded supervisor since a project manager was present.

shall, in the discretion of the administrative law judge, be ground for striking all testimony previously given by such witness on related matters.

From the Rules it is clear that the administrative law judge's involvement in matters of counsel misconduct is exclusion from the hearing. The administrative law judge is not concerned with what occurs after the hearing is closed or the nature of the sanction in respect to counsel misconduct. Under the Rules that is reserved to the Board. Thus, I do not exercise jurisdiction in the premises. Nevertheless, I note that I did not exclude any counsel from the hearing. Moreover, there was a fair, full, and a complete presentation of the issues at the hearing by all parties before me; nor has this decision been tainted or influenced by the alleged misconduct of counsel.

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, and it will effectuate the purposes of the Act to exercise jurisdiction.

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

3. By interfering with, restraining, and coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act, the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

4. By unlawfully discharging Isabel Villatoro on August 7, 1995, the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act.

5. By unlawfully transferring employees from 401 M Street, S.W., Washington, D.C., to Rosslyn, Virginia, on or about July 31, 1995, the Respondent has violated Section 8(a)(1) and (3) of the Act.

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

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. Having also found the Respondent unlawfully discharged Isabel Villatoro, I recommend that the Respondent remedy such unlawful discharge. In accordance with Board policy, I recommend that the Respondent offer Isabel Villatoro immediate and full reinstatement to her former position or, if such position no longer exists, to a substantially equivalent position, without prejudice to her seniority or any rights or privileges previously enjoyed, dismissing, if necessary, any employees hired on or since the date of her discharge to fill the position, and make her whole for any loss of earnings she may have suffered by reason of the Respondent's acts detailed here, by payment to her of a sum of money equal to the amount she would have earned from the date of her unlawful discharge to the date of a valid offer of reinstatement, less her net interim earnings during such periods, with interest thereon to be computed on a quarterly basis in the manner established by the Board in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and with interest to be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

In regard to those employees who were unlawfully transferred from 401 M Street, S.W., Washington, D.C., to Rosslyn, Virginia, on or about July 31, 1995, the Respondent shall offer them available jobs in Washington, D.C., equivalent to those which they held at 401 M Street, S.W. before they were transferred and in conformity with the Board's policy, make them whole⁹ for any loss of earnings which they may have suffered by reason of their unlawful transfer with interest.

[Recommended Order omitted from publication.]

⁹While strikers Contreras and Ortiz were discriminated against along with the other strikers no loss of earnings would have accrued to them after they voluntarily ceased employment with the Respondent. Avalos, who chose to go to Rosslyn, was not discriminated against.