

**Boardwalk Motors and International Association of  
Machinists and Aerospace Workers, Peninsula  
Lodge No. 1414, AFL-CIO. Case 20-CA-26507**

February 26, 1999

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS  
HURTGEN AND BRAME

On May 29, 1997, Administrative Law Judge David G. Heilbrun issued the attached decision. The Charging Party filed an exception and a supporting brief, and the Respondent filed a brief in opposition.

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

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

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Boardwalk Motors, Redwood City, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

*Kathleen C. Schneider and Lucille L. Rosen, Esqs.*, for the General Counsel.

*Joseph P. Ryan (Littler, Mendelson, Fastiff, Tichy & Mathiason, P.C.)*, of San Francisco, California, for the Respondent.

*David A. Rosenfeld (Van Bourg, Weinberg, Roger & Rosenfeld)*, of Oakland, California, for the Charging Party.

DECISION

STATEMENT OF THE CASE

DAVID G. HEILBRUN, Administrative Law Judge. This case was tried in San Mateo, California, on May 9 and 10, 1996. The charge was filed by International Association of Machinists and Aerospace Workers (IAM), Peninsula Lodge No. 1414, the Union, on January 13, 1995 (amended, February 10, 1995),<sup>1</sup> and the complaint issued March 30, 1995.

The primary issues are whether Boardwalk Motors, Respondent, unlawfully solicited, threatened, and interrogated its employees by various verbalisms, then caused the termination of an employee because he assisted the Union and to discourage other employees from so assisting. Such alleged conduct is asserted in the complaint to be in violation of Section 8(a)(1) and (3) of the National Labor Relations Act.

On the entire record, including my observation of witnesses, and after considering briefs filed by the General Counsel

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

<sup>1</sup> All dates and named months hereafter are in 1994, unless otherwise indicated.

(joined in by the Charging Party) and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a corporation, engages in the retail sale of automobiles at its facility in Redwood City, California, where in the conduct of its business operations it annually derives gross revenues in excess of \$500,000, while purchasing and receiving goods valued in excess of \$5000 which originated outside the State of California. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Union is a labor organization within the meaning of Section 2(5).

II. ALLEGED UNFAIR LABOR PRACTICES

*A. Summary*

Respondent handles the cars of several domestic and foreign automakers. Service work for these various car lines is done in workbays that are physically separated. The two largest workbays are those for Jeep/Eagle (plus Chrysler/Plymouth) and Volkswagen/Lotus, which between them take up most of the service department's floor area.

Respondent has had lengthy collective-bargaining relations with the Union for its service department. A proposed new contract was signed by the parties in September 1993, and made conditionally effective on any ratification from that time until October 15, 1997. However ratification did not actually occur until late 1994. The recognition clause of this now effective contract covers only service technicians and service advisors in its literal terminology.

Certain management changes occurred in late summer 1994, followed by increasing attention of the parties to resolving their yet unratified contract. In the course of this several discussions were carried out by new management personnel with Anthony Matthew Mattos, a 7-year service department employee and the union steward for Jeep/Eagle service operations. Mattos had just been officially elevated to a vacant shop foreman job as this was happening.

Mattos became increasingly annoyed and resentful about these approaches. Then, virtually on the eve of an expected ratification vote, he quit and walked off the premises. Within hours Mattos reconsidered his action, and sought to acquire back his job with help from the Union. The parties disagree as to whether any communication to such effect was made by the Union or received by Respondent. Mattos has not worked for Respondent since the day he quit, and, insofar as is known, his former position of shop foreman has not been directly filled.

*B. Sufficiency and Relationship of the Charge, as Amended, as a Predicate to this Complaint*

The hearing commenced with consideration of Respondent presenting a written motion to dismiss. This motion was based on a contention that the complaint was unsupported by any specific factual allegation of an underlying unfair labor practice charge. This, in Respondent's view, deprived the General Counsel of a valid basis to proceed, and amounted to an absence of jurisdiction for this litigation.

Counsel for the General Counsel and the Charging Party each argued in response that the charge, as amended, was sufficient to support such allegations as the complaint contained,

and particularly that of Mattos having been unlawfully terminated even though he was not named in a charge.

I denied the motion to dismiss, at the same time inviting counsel for Respondent to renew it when briefing the case. This was done by Respondent, with extensive briefing devoted to the point in particular reliance on *Redd-I, Inc.*, 290 NLRB 1115 (1988), *G. W. Galloway Co. v. NLRB*, 856 F.2d 275 (D.C. Cir. 1988), *Nickles Bakery*, 296 NLRB 927 (1989), and *Lotus Suites, Inc. v. NLRB*, 32 F.3d 588 (D.C. Cir. 1994). The General Counsel anticipated this revival of the point, and also devoted a considerable portion of its brief to counter arguments made on the basis of assertedly controlling authority.

Some background is also present that enlarges on literal phrasings of the charge, amended charge and complaint. In the precomplaint phase of investigating the charge and amended charge, the assigned Board agent twice wrote to Respondent's counsel inviting the presentation of evidence relating to the case.

These letters, dated February 9 and 27, 1995, respectively, referred to claimed verbalisms of employer agents during the week-long period November 9–16, and to desired information about the job titled shop foreman. In a separate vein a precomplaint letter from Respondent Attorney J. Richard Thesing to the investigating Board agent, dated March 23, 1995, responds to a proposed settlement of the case, but expresses “confus[ion]” as to why Mattos is named in the course of dealings.

Section 10(b) of the Act reads, in part and without regard to its proviso creating a statute of limitations, that whenever an unfair labor practice is charged the Board shall have the power to issue “a complaint stating the charges in that respect, and containing a notice of hearing . . . .” It is well to understand that the “charges” (in that respect) just quoted refer to those allegations expressed in the complaint, not whatever phrasings were made by a charging party as initiator of Board processes. This well-settled notion of how *notice* of specific accusatory claims are made, was once described in its most fundamental sense as follows:

The complaint, much like a pleading in a proceeding before a court, is designed to notify the adverse party of the claims that are to be adjudicated so that he may prepare his case, and to set a standard of relevance which shall govern the proceedings at the hearing.

The *charge* has a lesser function. It is not designed to give notice to the person complained of or to limit the hearings or to restrict the scope of the final order.

[T]he function [serves to draw the Board's attention to a cause] . . . .

not abstractly or in an area not within the jurisdiction of the Board, but by alleging that some person has engaged in or is engaging in one of the unfair labor practices defined in Section 8(a) . . . of the Act. *Doubs v. Int'l Longshoremen's Assn.*, 241 F.2d 278, 283–284 (2d Cir. 1957).

The tension between charge and complaint is hardly a new one in development of procedural jurisprudence for litigation before the Board. In *National Licorice Co. v. NLRB*, 309 U.S. 350 (1950), the Supreme Court wrote:

Whatever restrictions the requirements of a charge may be thought to place upon subsequent proceedings by the Board, we can find no warrant in the language or purposes of the Act

for saying that it precludes the Board from dealing adequately with unfair labor practices which are related to those alleged in the charge and which grow out of them while the proceeding is pending before the Board. [309 U.S., above at 369.]

Respondent correctly points out here that this theme does not give the Board *carte blanche* to expand the charge as it might please, but latitude in keeping with the statute is allowed. In *Labor Board v. Fant Milling Co.*, 360 U.S. 301 (1959), the several pertinent principles coalesced. The Supreme Court wrote first that a charge “is not to be measured by the standards applicable to a pleading in a private lawsuit.” 360 U.S., above at 307. Its purpose instead is “merely to set in motion the machinery of an inquiry.” *Id.* (citing *Labor Board v. Indiana & Michigan Electric Co.*, 318 U.S. 9, 18 (1943)). The *Fant Milling* opinion continued as follows:

To confine the Board in its inquiry and in framing the complaint to the specific matters alleged in the charge would reduce the statutory machinery to a vehicle for the vindication of private rights. This would be alien to the basic purpose of the Act.

. . . .

Once its jurisdiction is invoked the Board must be left free to make full inquiry under its broad investigatory power in order properly to discharge the duty of protecting public rights which Congress has imposed upon it. There can be no justification for confining such an inquiry to the precise particularizations of a charge. [360 U.S. above at 307–308.]

The Board decided *Redd-I* against this background of authority, focusing on its “traditional” test for what in a charge is “closely related” to an eventual complaint. It is important to recognize that the procedural issue in *Redd-I* arose in the context of subject matter in a charge once withdrawn and sought to be revived. Neither that situation nor instances where a proposed complaint amendment is arguably “closely related” to a complaint while also arguably “time-barred” under Section 10(b) of the Act are involved in this technical issue. See generally *Exber, Inc. v. NLRB*, 390 F.2d 127 (9th Cir. 1968), affg. *El Cortez Hotel*, 160 NLRB 1442 (1966); and *NLRB v. Dinion Coil Co.*, 201 F.2d 484 (2d Cir. 1952). Notably the court in *Exber, Inc.* added two useful conditions in applying the “closely related” test; namely, that the allegation under scrutiny (1) be “not inconsistent” with the charge, and (2) that it “clarifies” while properly relating back to the charge.

The Board chose *Redd-I* to refine considerable past judicial expression about “closely related” as a concept, and adopted three “look[s]” as factors to consider when applying the traditional test. While laden with attention to the claimed untimeliness of an attempted complaint amendment in *Redd-I*, the factors are nonetheless significant here. As paraphrased they are:

First, the allegations are “of the same class” as otherwise charged, meaning of the same legal theory and usually the same section of the Act. Second, the question of whether “the same factual situation or sequence of events” needs examination. Third, pondering should treat whether a respondent would raise the same or similar defenses to the expanded allegation; meaning whether it is reasonably likely that similar evidence would be preserved and prepared for use in defending the brace of allegations. [*Redd-I*, above at 1118.]

A line of cases preceding *Redd-I* had decided the import of printed language appearing on then-charge form NLRB-401 (now 501). In *Clark Equipment Co.*, 278 NLRB 498 (1986), the issue was whether allegations of independent 8(a)(1) violations could be made in a complaint, where the original and amended charge of the proceeding contained only descriptive claims of 8(a)(3) and (5) conduct. The Board directly disposed of this issue by holding that such independent 8(a)(1) violations, although “dependent solely” on printed language of the charge form, were sufficient and the complaint was valid in such regard. The printing on which the Board relied read:

By the above and other acts, the above-named employer has interfered with, restrained and coerced employees in the exercise of rights guaranteed in Section 7 of the Act.

Shortly after *Clark Equipment* came out the Board decided an even narrower issue about matters specified in a charge, as to whether they closely related to a subsequent complaint. This holding, *G. W. Galloway Co.*, 281 NLRB 262 (1986), turned precisely on construing printed “customary [and] standard . . . other acts” language of a charge form. The Board permitted consideration of a complaint alleging only the 8(a)(1) conduct of “threaten[ing] employees with termination” for striking, while above preprinted wording the charge had raised only the claimed discriminatory discharge of an employee under Section 8(a)(3) (and derivatively under Section 8(a)(1)).

When the employer petitioned for review of this holding a court of appeals held “other acts” preprinted on a charge form was “boiler-plate”; not sufficient to satisfy the *Fant Milling* rule of litigating only matters which amounted to sharing “a significant factual relationship” between allegations in the charge and those in the complaint. *G. W. Galloway Co. v. NLRB*, above at 282. The court had traced legislative history and past judicial interpretations germane to the point, concluding from this that reliance on the preprinted language was unavailing and that a “necessary connection between the incident alleged in the charge and that averred in the complaint” had not been established. *Id.* at 282. This court also expressly noted (1) that while the employee’s discharge and the incipient strike (about which the alleged threats of termination were made by that employer’s president) occurred only 1 day apart this did not give them “common features,” and (2) there was no indication from the case, or any contention made by the Board, that the striking employees were concerned about the discharge, or even aware of it. On this basis the Board’s order was set aside.

*Nickles Bakery* was presented to the Board for decision on Cross-Motions for Summary Judgment. It involved the pure question of whether an 8(a)(3) charge (alleged discriminatory action against the charging party, an individual) could be enlarged on because of typical preprinted charge form language reading “By these and other acts . . .” What had resulted was a complaint alleging only maintenance of an unlawful no-solicitation rule, thus invoking Section 8(a)(1) as the formally alleged violation. As a matter of doctrine the Board reexamined its own precedent in light of both *Galloway* (as decided by the court of appeals) and *Redd-I*. On doing so the Board found no sufficient basis to continue exempting 8(a)(1) complaint allegations from the traditional “closely related” test. Rather the Board would thereafter require a “factual nexus” between the charge and complaint allegations, equally so with 8(a)(1) allegations as with all others arising under Section 8(a). The

Board expressly overruled its decisions to the contrary, and stated a dual rationale for the action.

Reasons for the shift were (1) the mandate embodied in Section 10(b) that the Board “not originate complaints on its own initiative” (citing *Galloway v. NLRB*, above at 280), and (2) the administrative requirement that charges contain a “clear and concise statement” of facts was seen as having become virtually meaningless. In addition the Board noted two other harmonizing factors, one being that a charging party’s entitlement to file any new or amended charge remained unimpeded. Secondly, that the General Counsel’s own Casehandling Manual provided that when an unamended charge was too narrow any complaint issued on such a charge should cover only matter related to its narrow specifications. Procedurally, *Nickles Bakery* was actually remanded because the General Counsel was asserting the indistinct possibility of an adequately related factual nexus.

In *Embassy Suites Resort*, 309 NLRB 1313 (1992), a divided Board found a violation under then-applicable precedent. There the *Nickles Bakery* case was distinguished as having a “sole difference” of significance to the Board. In *Embassy Suites* the charging party, a labor organization, had typed in broad language having general reference to Section 8(a)(3) and (1), respectively. The resultant complaint alleged only 8(a)(1) violations; these of a variety constituting creation of the impression of surveillance, plus threats to withhold a wage increase and reduce employee amenities. The Board held that typing in even a generalized and concededly unspecific claim of unfair labor practices elevated the charge to one generated by the charging party and not merely based on the agency’s own preprinted language.

The Board’s enforcement effort in *Embassy Suites Resort* was roundly rejected by the court of appeals, more pointedly so than that which had failed in *Galloway v. NLRB*. The court found *Embassy Suites* to be untenable, and that “boilerplate” allegations of 8(a)(1) violations by the employer were “utterly lacking in factual specificity.” The court closed its own opinion in *Lotus Suites, Inc. v. NLRB* as follows:

To allow the Board to issue a complaint based upon a charge containing only a boilerplate § 8(a)(1) allegation, however, unbounded by any specific facts, is “tantamount to allowing the Board to enlarge its jurisdiction beyond that given it by Congress.” (citing *Galloway v. NLRB*, above at 279). Because the Board has failed to (nor could it) establish a sufficient factual connection between the general terms of the charge and the specific allegations of the complaint, the Board’s order must be set aside. [32 F.3d, above at 592.]

Turning to the case at hand, its threshold issue calls for application of doctrine just discussed. There is no practical distinction between the Union’s original charge and that filed a month later as first amended charge. Each charge listed Section 8(a)(1), (3), and (5) as those portions of the Act involved, and each devoted an entry as basis of the charge to language appropriate to the respective subsections (in the order of Sec. 8(a)(1), (5), and (3)). However the complaint did not allege any 8(a)(5) violation, so the issue is confined to whether *Matto’s* termination may now be brought for adjudication. Excluding what was composed by the Union as a referencing statement under Section 8(a)(5), the charge and amended charge read identically as follows:

Within the last six months preceding the filing of this charge, the above-named employer, by and through its

agent, has restrained and coerced employees in the exercise of their rights guaranteed by Section 7, by various means including, but not limited to, threats, inducements, interrogations, harassment, surveillance, and other similar and/or related acts.

Within the last six months preceding the filing of this charge, the above-named employer has discriminated against its employees on account of their Union and/or protected activities.

All allegedly unlawful conduct was compressed into what I find to be the 1-week period of November 9–16. As shall be detailed below, Respondent was pressing for a favorable resolution of its longstanding, if not festering, bargaining stalemate respecting employee ratification of what had been agreed on by negotiators a year previously. It embarked on a three-way approach. This simultaneously (1) flirted with an involvement in spurring decertification of the Union, (2) proposed to slyly educate bargaining unit members about how, when and why its final contract offer would soon be implemented, and (3) reconcilably girded for an uncertain outcome to the imminently expected ratification vote. In his testimony about exposure to these tactics, Mattos arguably supported the notion of threats, said explicitly that he felt “harass[ed],” and generally saw himself as the chief target of management’s collateral attentions during that eventful week.

I believe from this that on a full exposition of facts the requirements of both *Nickles Bakery* and *Redd-I* have been met. In compliance with *Nickles* both a legal and factual nexus is present as between the charge and complaint. The Union alleged “discrimination” against employees, one of which was Mattos. Further, his termination from employment, if found to be unlawfully caused by the employer, constitutes a derivative violation of Section 8(a)(1), which the charge plainly states has been “various[ly]” violated by specifically described conduct, given in illustration but not in limitation. As a factual matter Mattos was keyed on by Respondent, and a major amount of the alleged 8(a)(1) conduct just sapped his stability as a 7-year employee with high-profile union steward status to the point that he impulsively acted out a verbal quitting of employment. Yet it is that very quitting which the General Counsel has alleged to be unlawful, by pleading in the complaint how this was “caused” by Respondent, and relatedly explaining in an opening statement to the hearing that the quit was physically and mentally distressing, brought Mattos “total frustration,” and caused intolerable “intimidation.” In sum, this end of Mattos’ long employment with Respondent was a stark phenomenon “necessarily enmeshed” in the allegations of specific and categorically recognizable forms of 8(a)(1) conduct. See *Transport America*, 320 NLRB 882, 889 (1996); Cf. *Nippondenso Mfg. U.S.A.*, 299 NLRB 545 (1990).

The three-prong test of *Redd-I* is also satisfied. A related class of violations is involved, all turning on legal theory that Respondent was unlawfully attempting to rid itself from, or seriously weaken, the Union. Further, this first prong of *Redd-I* is concerned with timeliness aspects of a proceeding, and that factor as it arises under Section 10(b) is not present here. Cf. *Prestige Ford*, 320 NLRB 1172 (1996). Second, the factual situation and sequence of events is squeezed into early to mid-November, when Respondent was most active in pressing its objective. Third, the interrelationship of events is such that Respondent would reasonably have anticipated evidence consisting of testimony from its management personnel and struc-

turing of documentary material, this in expectation of how to prepare a defense to accusations of general encroachment on Section 7 rights and employee-specific discrimination in a small bargaining unit of two dozen or so employees. See *Ree-bie Storage & Moving Co.*, 313 NLRB 510 (1993); *Whitewood Maintenance Co.*, 292 NLRB 1159, 1169–1170 (1989).

As Respondent commends be done, I have reviewed the order granting partial dismissal, rendered August 28, 1995, by Administrative Law Judge Jay R. Pollack in *Towne Ford, Inc.*, Case 20–CA–26250. However, I do not find it “strikingly similar” to the threshold issue here, nor that it supports Respondent’s general contentions in this case resting on Section 10(b) of the Act.

Judge Pollack dismissed an 8(a)(5) allegation contained in the complaint of one case which had been consolidated for hearing with another. The charge underlying this dismissal (from Case 20–CA–26250) was one in which no 8(a)(5) allegation had been made, nor was that section of the Act even listed in the preamble to a requisite “clear and concise statement” as basis for the charge. Indeed he found, citing *Redd-I*, *Nickles Bakery*, *Galloway v. NLRB*, and *Lotus Suites v. NLRB*, that the complaint was devoid of a charge against that employer of either “generally [or in a specific way] refus[ing] to bargain.” Here, in contrast, there is at least an express invocation of Section 8(a)(3) by unfair labor practice category, and a composed basis of the charge in which “discrimination”—the conduct by an employer sought to be prevented by the Act—is stated. In essence, I view Judge Pollack’s partial dismissal as a reflection of what the underlying charge in his case lacked, versus the necessity of interpreting and applying what an underlying charge does contain in reference to a stated section of the Act.

Accordingly, I reaffirm my denial of Respondent’s motion to dismiss, as made on grounds that the Board is without jurisdiction to bring this case. I do not in any manner rely on Attorney Thesing’s letter dated March 23, 1995, in development of this ruling.

### C. Evidence

The contract bargaining that took over a year to settle was dormant for two long periods of time. However, the refined version of a proposed new contract was finally submitted for ratification by service department employees in late summer 1994. They rejected it. There were two additional bargaining sessions after this rejection. Then Respondent’s attorney and principal negotiator, Thesing, wrote on November 10 to Don Barbe, the Union’s business representative and its principal negotiator, advising of an intention to implement the employer’s final offer effective November 16. This letter also confirmed a minor refinement to content of the conditional agreement, and that Barbe was understood as willing to recommend the final offer to bargaining unit members.

Respondent had hired Frank Haverkamp on September 6 as director of service operations for all car lines. Haverkamp reported to Jamie Kopf, who he identified as Respondent’s president. He then soon hired Ed Lockett to be service manager for Jeep/Eagle. By late September Lockett was settling into place there, while Allen Katz and Gordon Douglas functioned as service manager for Volkswagen/Lotus and Mitsubishi, respectively. Haverkamp testified to seeing the dealership in disarray for several reasons. There were various forms of friction within the business, and, insofar as the service department was concerned, internal conflicts among its employees rooted in the

yet-unratified union contract. His familiarizing first 2 weeks on the job included interviewing all technicians (journeymen auto mechanics) to learn their strong and weak points. His contact during this phase for discussion with Mattos was their having lunch together. Mattos recalled Haverkamp saying he was unconcerned whether “the shop was going to be a union shop or nonunion.”

In this overall familiarizing process Haverkamp came to believe Mattos possessed apparent leadership traits, technical ability, past valuable training, and a favorable employment record. He appointed Mattos to the vacant shop foreman job for Jeep/Eagle (including Chrysler/Plymouth) effective October 3, with a \$2.19-per-hour pay increase accompanying this change. The Jeep/Eagle service operations had about 10 to 12 mechanics at the time.

Events critical to the case began to happen around early November. Mattos testified that in the first part of that month, on a date I fix as November 9 or 10, Haverkamp approached his work stall in the afternoon to ask if Mattos would attempt circulating a decertification petition among his fellow employees for signature. Mattos was negative toward the idea, and asked why it even came up after Haverkamp had earlier voiced no opposition to the Union remaining in place. According to Mattos, Haverkamp answered nonsensically that he would have 10 good employees quit if the shop went union. Haverkamp added then that employees in the shop could save \$600 a year by not paying union dues. Mattos responded that these “were a lot of older guys” who wanted a union contract for job security as “protection against management.” Mattos testified that this conversation ended by Haverkamp ridiculing the union contract as so full of loopholes that any seeming protection against management’s disapproval (not even for “sneezing”) was like an illusion. He assertedly closed saying the imminent choice for employees was a union but no job security or a nonunion setting of “one big happy family.”

Mattos testified that a few days later he was called into Haverkamp’s office with Lockett present. They displayed the pending contract proposal, stating it provided that a shop foreman would be nonunion. In fact, a footnote to the bargaining unit definition of full-time and part-time service technicians and service advisors fixed “five recognized supervisory employees” as director of service operations, director of customer service, assistant customer service manager, shop foreman and dispatcher. Mattos was pressed to resign from the Union to achieve the evident desire of management that he do so. Mattos refused, saying he was still the steward for a contract under negotiation.

That afternoon Haverkamp approached Mattos in his shop area work station, where mechanic David Porter was also present. Haverkamp asked Porter whether he would sign a decertification petition if Mattos did so. Porter answered that he would not. Haverkamp retorted how it didn’t matter because Porter was a good mechanic who didn’t have to worry about losing a job, but continued adherence to an ineffectual union was a waste of money.

On the morning of November 15 a copy of Thesing’s November 10 letter was distributed among employees of the service department. Haverkamp soon approached Mattos asking what employees thought about it. Mattos had received no feedback at that point; however, he soon telephoned to Barbe and at least learned the Union planned a meeting that night at its hall. Mattos testified that in late morning Haverkamp repeated his

earlier question, which Mattos answered inconsequentially, except telling Haverkamp of the union meeting being arranged for after work.

This meeting did take place in early evening, where Barbe advised the employees present that he was uncertain of any “legal” effect to the letter. Mattos testified that the following morning Haverkamp called him in to be questioned about the meeting. Mattos told him the result was simply that the Union would soon have a ratification meeting “on the memo and on the contract.” Still later that morning Mattos encountered Lockett, who also asked him what was going on about the contract and negotiations. The two were at, or gravitated into, Lockett’s office, and Mattos closed the door so he could vent more privately. He testified to carrying on a 10- to 15-minute conversation with Lockett, animated by his sense that management was seeking “to blow the Union out.” Mattos told Lockett of instances appearing to him as favoritism toward “nonunion mechanic[s].” This was evidenced by tolerance of deficiencies in that group even when it reached a “fraudulent” proportion, while summarily firing certain newly hired mechanics. Mattos recalled Lockett answering that Kopf (termed company “owner” by Mattos) was tiring of how a labor contract resolution had dragged out, which could soon mean our “heads [would] roll and it could cost you your job.”

At midday on November 16 Respondent provided an hour-long lunch of pizza and refreshments for service department employees, with Kopf and Haverkamp in attendance. This event also provided management the opportunity to treat it as a meeting, address employees, solicit questions about the pending contract, and express their need to have good, well-trained mechanics. In the course of this Haverkamp held out Mattos as an excellent example of an employee with extensive technical training and ability, that would make it a sore loss to the dealership if he left Respondent’s employ.

About 1:30 p.m. that afternoon Haverkamp called Mattos into his office to again ask about a resignation from the Union. Mattos answered the same as before, refusing to do this because of his capacity as the shop steward. Haverkamp then postulated a strike the next day, asking whether Mattos would “cross the picket line [or] walk.” When Mattos answered he would walk a picket line, Haverkamp said he would “run this by” Kopf and get back. In less than 2 hours Mattos was back in Haverkamp’s office with Lockett also present. Mattos testified they gave him the ultimatum of withdrawing from the Union or they would take away his foreman’s pay. He asked why they pressed this because a ratification vote was still in the offing, and they had even just openly praised him for good technical ability. Mattos’ testimony on the question of whether he went on to say anything more is:

I told them that I was sick and tired of, you know, the games that they were playing. I’d go home at night, I’d have dreams about that place, you know, I was, you know, I’d go home, I’d, you know, you have dreams about your workplace, of all the tension and all the, you know, frustration. I told them I was sick and tired of this place, I’d have headaches, you know, that kind of stuff.

And told them, you know what, I just told them, I told them to f—k off and I quit.

He then left Haverkamp’s office, locked his toolbox, and drove away intending to reach Barbe immediately. They soon met by chance at a Redwood City McDonald’s restaurant, with

Barbe terming Mattos as looking “wild eyed” to suggest something unsettling had just happened. They went to the union hall where Barbe saw Mattos as still “very excited at the time, very nervous and wide-eyed and going all over.” Mattos had related events that led to his quitting. After discussion Barbe agreed to write a letter seeking a return to this employment for Mattos. Barbe testified that he composed such a letter (addressed to Kopf), signed it the morning of November 17, and left instructions at his office that it be immediately faxed and mailed. This communication began with reference to Mattos being repeatedly called into a management office on November 16. The following are excerpts from the letter’s continuation:

Matt, unfortunately, was convinced that management was forcing him to make a decision that he should not have to make and chose not to interfere or get caught between management and the employees. Based on what he considered to be harassment and an ultimatum, he felt the only recourse that he had was to resign from Boardwalk. . . . However, by the end of the day, he had reconsidered his resignation and authorized me to write this communication offering to return to work if in fact Boardwalk is willing to reinstate him.

Barbe was not answered, and Haverkamp testified that he had never seen the letter of November 17 until it was admitted in evidence at this hearing.

Respondent’s version of events in November is carried in the testimony of Haverkamp and Lockett. On the initiating contact between November 10 and 15, Haverkamp testified that its context was approaches he had experienced from several service department personnel who wished to end representation by the Union. Haverkamp termed it an off the record conversation concerning Mattos’ “feeling about the Union,” and his response that smoothing of employee morale hinged on getting “union issues resolved.” Haverkamp denied making reference to \$600 in union dues, or by hyperbole saying that merely sneezing could get a person fired. He did recall discussion of the protection/job security subject, about which he referred to “grounds for termination” based on the pending contract of failure to maintain manufacturers’ customer satisfaction index (CSI) levels or 100-percent service production on a consistent basis. As respecting a decertification petition, Haverkamp testified (in the aggregate) that both Mattos and Porter had declined to sign one on his inquiry.

Haverkamp recalled the next major conversation with Mattos relative to the Union, the contract, or to negotiations occurred on November 15, when notice of implementation (the Thesing letter) was distributed throughout the shop. He called Mattos into his office to ask what the feelings were about this among employees. Haverkamp recalled Mattos saying only that it was not “alarm[ing],” but some verbiage was too legalese-like for everyone to understand.

Haverkamp next testified that the group lunch on November 16 fulfilled a written announcement to service technicians, informing it would be held to answer questions about contract implementation. Haverkamp was then told by Kopf that the implementation taking place that day meant discussion was needed with shop foremen. This was to be about withdrawing from the Union, because their jobs were becoming “a non-bargaining position.” Haverkamp asked Mattos to come into his office, where Lockett was also present. He placed the start of this meeting as about 2:30 p.m. He presented the choice to Mattos of resigning from either a shop steward or a shop fore-

man capacity, but denied that any mention of his pay was associated to the choice. Haverkamp recalled Mattos being reconciled to choosing the “withdrawal card,” but not until after a ratification vote. He told Mattos this was “not an option,” and was then “stunned” by a verbal outpouring described this way:

He said that I’ve been having nightmares about the place; you guys have been messing with me, and, you know, putting all kinds of pressures on me left and right, and this and that, and I can’t take this bullshit anymore—f—k this place, I’m out of here.

After Mattos then walked out of his office, Haverkamp immediately prepared a memorandum to employees advising that Mattos had resigned. He also completed a routine personnel change form documenting the resignation, and contemporaneously prepared notes of the incident. The only significant detail contained in these notes was phrasing that the final offer implementation was effective “at the start of the days business” (on November 16). Lockett remembered only bits and pieces of the episode beyond its general tenor. Additionally, Lockett denied ever having a closed door meeting in his office with Mattos.

At the time of his promotion, Mattos was being paid the technician specialist hourly rate of \$21.95 specified in the pending contract. He later received a written shop foreman job description. It listed eight functions for that position. Four of these pertained to contact with regular shop technicians (or applicants), as this might affect a determination of supervisory status under Section 2(11) of the Act. These were:

1. Provide the most current and time productive methods of training to all technicians.
6. Assign technicians to areas to clean and maintain in shop, machine room and grounds outside building.
7. Assist each and all technicians on troublesome repairs.
8. Interview (technical) job applicants for technician positions, and make effective recommendations for hiring.

Mattos testified that the job description stated, by his apparent interpretation, a responsibility of the shop foreman to discipline employees. However, he was not personally inclined to accept this as a responsibility, and there is no other evidence that he administered discipline during his brief tenure. As shop foreman, Mattos considered that he reported directly to the dispatcher. However when better customer dealings would result, he also reported about problem cars directly to Lockett. A practical difference from his former job was spending more time to help other mechanics when they experienced problems with a car. He estimated that variably 50 percent of his workday was devoted to mechanical work actually dispatched to him. The balance of this typical time, also variable, was spent helping other mechanics and general trouble-shooting.

Sandy Pereira, Mattos’ predecessor, testified that during his years as shop foreman for Respondent he never did any actual hiring, but instead only talked to applicants a few times to learn about their experience. He would then usually speak with the service manager about the applicant, expressing only what he found as to their technical abilities. Pereira got his basic work assignments from a dispatcher, or any service manager who at the time was his own supervisor. He denied ever engaging in typical supervisory functions of (1) discharging employees, (2)

regularly distributing work, (3) authorizing overtime, (4) imposing discipline, or (5) rendering an annual appraisal or any evaluation. Pereira did have a role in distributing work only insofar as helping a dispatcher or the service manager choose a certain technician based on aptitude or mechanical specialty. Pereira used the word "trouble-shooter" to describe how his work differed from mechanics. This entailed handling repair comebacks, and the more demanding mechanical diagnosis for cars with strange problems. In Pereira's view these duties, requiring higher competence plus hopping between mechanics needing help were the distinguishing features of his role titled shop foreman.

Mike Genardini testified that he had a typically progressive 4-year career with Respondent of apprentice, technician, and dispatcher, although he had gone back to technician at the actual time of terminating in September. This winding up covered about the final 3 months of his employment, and had some overlap with Mattos' time as acting shop foreman. Genardini twice summarized his observation of Mattos doing his own work and helping other technicians as being quite similar to what Pereira had done before him.

Robert Silvernail testified as Respondent's witness. After an earlier 3-year span of employment as journeyman technician for Respondent, Silvernail returned in 1991. He described his rehire into Volkswagen line servicing as being shop foreman there with the benefits but not the duties. The regular shop foreman left around late 1993 or early 1994. This permitted Silvernail to assume the shop foreman duties about which he testified. His overview of the job was expressed as follows:

I have many duties. I repair cars. I assist journeymen in the diagnosis and repair of cars, Volkswagen Motors. I train apprentices. I approve vacation times. I repair shop equipment. I interview applicants, job applicants (later intimated as only one). And generally that's it.

In greater detail, Silvernail recalled that at a busy time in December 1993 he had changed the work schedule of most Volkswagen technicians by adding hours to their shift for a full week. In dealing with this same heavy workload Silvernail also transferred a technician in from another department. When this demonstrated that the person had European car experience, Silvernail then arranged for his permanent assignment under close supervision. As intermittent matters Silvernail has assigned technicians to clean up duty or to road test with a customer. As to the one applicant Silvernail interviewed, he recommended against hiring him because of insufficient technical ability, and Service Manager Katz did not do so. Silvernail has periodically recommended technicians for a particular training class, which is then approved at the final discretion of Katz. On two occasions Silvernail recommended apprentices for a wage increase ahead of the program schedule, and this was approved. He also once recommended a maintenance employee for the apprentice program, and through his joint decision with management the person was entered.

#### *D. Credibility*

Pereira displayed seemingly good memory, and with no apparent bias. He was direct in presentation, maintaining eye contact and facial countenance that inspired my belief in his veracity. I credit his testimony in full.

Genardini was somewhat clipped in his offerings, and tellingly hesitant at times. I believe he lacked an accurate memory for details, and generally give little weight to his testimony.

Mattos presented somewhat stiffly, or by nervously pausing sometimes to grope at framing answers. My sense, however, is that this trait was manifested to achieve detailed accuracy. I saw no intention to fabricate his testimony, which was notably consistent over quite a length. Respondent argues vigorously that Mattos should be disbelieved for several reasons. Most prominent as among these in my opinion is Mattos' self-contradiction concerning when his notes of events were made. His notes as supposedly written contemporaneously with conversations at work over the November 9-16 period appear altered, if not actually even artificially constructed. I have carefully considered this unworthy discrepancy, and the other factors raised by Respondent. The process leaves me convinced that Mattos succumbed to one pointed departure from truth, but not that this or other factors should overcome his persuasive demeanor in the critical performance from a witness stand. My resultant judgment is to credit him in all material regards.

Barbe had excellent demeanor, and strove palpably to answer honestly. He seemed to place accuracy above partisan goals. Barbe was assured in voice tone and mannerisms, while being impressively reflective to sharpen answers for better meaning. I confidently credit this witness.

Silvernail was unimpressive and created doubt as to his grasp of true facts. His style of expression imparted mostly generalizations, and only vaguely conveyed how his claimed supervisory duties were accomplished. He had poor witness mannerisms, and I am unconvinced that any significant weight should be given to his testimony.

Haverkamp seemed overly suave and self-assured, to the point that I believe he elevated perception over reality. There were inconsistencies in his renditions, and I look behind his sophisticated demeanor to believe that he made partisan slantings. I credit him in limited manner, and not at all where contradicted by Mattos.

Lockett had average demeanor, but seemed loose with facts and tending to answer from convenience not genuine recall. Notwithstanding this frailty, I credit his testimony except where directly contradicted by Mattos.

#### *E. Discussion*

##### 1. Supervisory issue

The statutory language of Section 2(11) lists supervisory powers in the disjunctive. It is not necessary that an individual possess all these powers to be deemed a supervisor. Instead, possession of any one of them is sufficient for supervisory status to be conferred consistent with the Act. This disjunctive listing of supervisory indicia does not alter the essential conjunctive requirement that a supervisor must exercise independent judgment in performing any enumerated function. Only individuals showing genuine management-like traits should be considered a supervisor within meaning of the Act, as opposed to those being "straw bosses, leadmen . . . [or] other minor supervisory" persons. The status of persons at issue under Section 2(11) of the Act is determined by their duties and not a title or official job classification. In contrast the exercise of some supervisory authority that is merely routine, clerical, perfunctory, or sporadic does not qualify an individual to be held as a statutory supervisor. Rather, the test must be what significance there is to judgments made and directions given. Consequently,

an individual does not become a supervisor simply by giving some instructions or minor orders to other employees. Relatedly, a person is not deemed supervisory from having greater skills, higher job responsibilities, or more duties than fellow employees. The Board must judge whether an alleged supervisor's job involved something more than routine communication of instructions between management and employees, but without a showing that significant discretion was being exercised. The Board's duty is to not construe statutory language too broadly, because an individual held to be a supervisor is denied employee rights that are protected under the Act. *Chicago Metallic Corp.*, 273 NLRB 1677, 1689 (1985); *North Shore Weeklies, Inc.*, 317 NLRB 1128, 1130 (1995).

In *Groves Truck & Trailer*, 281 NLRB 1194 (1986), the Board emphasized a factor that shall apply here. This is to expressly note how the Act specifies that possession of authority to act independently is determinative, rather than requiring instances of exercising that authority. Furthermore, the burden of proving that an individual is a supervisor is on the party alleging such status. *Azusa Ranch Market*, 321 NLRB 811, 812 (1996).

Such fundamental principles are applied in cases that I find useful to the determination here. In *Shen Automotive Dealership Group*, 321 NLRB 586 (1996), a service advisor and repair shop dispatcher, using the title "service manager" on his business card, assigned work to mechanics and took calls reporting a work absence. He had never administered discipline, authorized time off, or participated in pay and benefit matters. The Board considered his job involved nothing more than routine assigning without any exercise of independent judgment.

In *Vincent M. Ippolito, Inc.*, 313 NLRB 715, 718-719 (1994), the shop foreman of a garbage disposal firm was hourly paid, receiving the highest rate as among several mechanics employed there. This was accorded because he had the most experience as among such mechanics. This greater experience was utilized when he explained to other employees how to do a job, or worked with them on certain ones. Otherwise he handled the most difficult jobs himself. The Board adopted a conclusion that this shop foreman was not a supervisor within the meaning of Section 2(11).

In *Sears, Roebuck & Co.*, 304 NLRB 193, 197 (1991), a lead mechanic reported to a checklist manager in charge of an auto center's back shop. This lead mechanic spent a substantial amount of his time assisting mechanics with difficult problems. He also recalled assignments and passed out work to the mechanics. The Board found an insufficiency of evidence to show that the lead mechanic truly exercised independent judgment in making back shop assignments.

I contrast the illustrative holdings of *Shen Automotive, Ippolito*, and *Sears, Roebuck with Contractors Cargo Co., Inc.*, 218 NLRB 549 (1975), where the leadman, also sometimes termed the shop supervisor, of a vehicle repair shop assigned all work, transferred employees between jobs and scheduled overtime, while himself working variable daily amounts of time with the tools. However, management ordinarily followed this person's recommendations as to workweek changes and lay-offs. On these facts the Board found him to be a supervisor as defined in the Act.

The situation with Mattos is more akin to his being an experienced leadman, and only expected to facilitate the work of employees closely around him. I have essentially discounted Silvermail's overstated description of a shop foreman's function

in one of Respondent's service bays, and believe that the much more limited role testified to by Pereira is closer to the truth. This was the position which Mattos informally assumed after Pereira left, as observed by Genardini in testimony which I credit. The flurry of management changes that accompanied Haverkamp's arrival had little effect on how Jeep/Eagle service operations were actually carried out. The roughly one dozen technicians of this department were already subject to oversight by a full-time service manager, and Mattos has not been shown to have imparted any primary indicators of supervisory status as defined in Section 2(11).

His written job description was weighted with nonpersonnel responsibilities, such as concerned tool inventories and shop equipment. Lockett's belief as to Mattos' responsibilities similarly emphasized aspects of equipment, parts availability, spot trouble-shooting, technical services bulletins, and even curing outdoor vehicle congestion around the dealer premises. As another matter of characterization, Haverkamp termed Mattos his "liaison" to activities within the shop.

In the specific instance where a rank-and-file wage rate matter was involved, Mattos merely relayed to Lockett, the new service manager at the time, that Technician Jose Morales had asked for a pay review. Although Lockett knew at least that passage of a full year was ordinary policy before a review, his inquiry to Mattos about any special deservingness of Morales brought only a comment that he had not been there that long and the matter was dropped. Lockett also solicited opinions from Mattos about useful manufacturer's training classes, but he was equivocal as to what weight such opinions were given. Finally, Lockett testified that Mattos had a responsibility as to progress of apprentices, but this was couched in no more meaningful terms than oversight, monitoring, or the routine-seeming placement of an apprentice with a certain mechanic.

That the parties voluntarily included a job classification called shop foreman in their new collective-bargaining agreement is inconsequential to the determination. Rather it is that during the mere 2 months or so of informal and official functioning as such a shop foreman, Mattos did not perform, nor did any regular technician in his work area so testify, any duties involving nonroutine dominion over other employees by the use of independent judgment in his dealings with them. On this basis, I hold that Mattos was not a statutory supervisor within meaning of the Act.

In reaching this conclusion, I have considered the authorities cited by Respondent in support of its contrary contention. These are *Ribbon Sumyoo Corp.*, 308 NLRB 956 (1992); *DST Industries*, 310 NLRB 957 (1993); and *T. K. Harvin & Sons*, 316 NLRB 510 (1995). I find both *Ribbon Sumyoo* and *Harvin & Sons* to be fact-intensive cases concerning supervisory issues, and readily distinguishable from the situation here.

*DST Industries* operated a complex manufacturing facility, where it engaged in designing, displaying, and marketing automobile prototypes, trucks, and vans for the automotive industry. As among four persons whose status was claimed to be nonsupervisory, one was the location manager for a distant Los Angeles facility, and solely responsible for carrying out business goals there. The other three were working leaders and a floor manager for fiberglass, truck maintenance, and body shop operations at Michigan headquarters. The two working leaders were each found to have (1) signed off on timecards, (2) approved vacation requests, (3) granted employees permission to leave work early, and (4) effectively recommended the layoff

of surplus employees. This was seen by the Board as responsibly assigning and directing work in their departments by use of discretion, authority, and the exercise of independent judgment. Respecting the body shop floor manager over his employment of short duration, he effected the layoff of an employee without prior approval, assigned and checked employees' work, granted a request to leave work early, rarely performed bargaining unit work himself, and regularly filled in for the high-ranking body shop manager. On these findings the Board found all individuals at issue in *DST Industries* to be supervisors within meaning of the Act. This holding provides no persuasive support for Respondent's contentions here.

## 2. The 8(a)(1) allegations

The General Counsel has alleged unlawful verbalisms constituting solicitation to withdraw support of the Union, plus various threats and interrogation. I deal with these by association to those portions of the complaint where the allegations are stated.

In paragraph 6(a) the allegation of solicitation is based on Haverkamp's conversation with Mattos at his workplace on November 9 or 10. From credited evidence I find that Haverkamp boldly proposed that Mattos sponsor a decertification petition. An employer's action is strictly limited in this regard. Other than ministerial aid it may not instigate or facilitate such a proceeding, and particularly when there has been no unsolicited inquiry about it. The decision whether to prepare and file a decertification petition is solely within the province of employees. *Harding Glass Co.*, 316 NLRB 985 (1995). I find the allegation of paragraph 6(a) to be supported by sufficient proof.

In paragraph 6(b) the same discussion is involved. Here Haverkamp's utterance about sneezing being a dischargeable offense is all that could imply the alleged threat of reduced job security. I decline to elevate this snide remark to an unfair labor practice. Rather, it was only more in the nature of a personal opinion, expressed by an employer's agent about how a labor contract might be construed. The choice of this term was made in obvious jest, a factor drawing down still more from any significance. I recommend dismissal of this allegation.

Complaint paragraph 7(a) alleges the same conduct as in 6(a), but separated only by time. This refers to the episode on or about November 14, when Haverkamp conversed with both Mattos and Porter. Here a second blatant attempt at drumming up employees to sponsor a decertification petition was done. This is a direct repetition of unlawful employer action as found in reference to paragraph 6(a), above.

Paragraph 7(b) alleges unlawful interrogation was also committed by Haverkamp on this occasion. Here, the General Counsel contends that Haverkamp's surrounding remarks established impermissible inquiry made under coercive circumstances. This consideration of a total context is done in terms of *Rossmore House*, 269 NLRB 1176, 1177 (1984). Here the episode was a fleeting one. To the extent that Porter, not known as an open supporter of the Union, was questioned, and without assurances that no reprisals would flow, this allegation also has merit. See *Gondorf, Field, Black & Co.*, 318 NLRB 996, 1005 (1995).

Complaint paragraph 8 refers to Haverkamp's private talk with Mattos on November 15. I cannot find an unlawfulness in what was done here. Mattos was, after all, both the union steward and frequent participant in the bargaining sessions. Any group or resistant reaction to the employer's implementation is

a matter of fair informational exchange between these parties to collective bargaining. I dismiss this allegation, inasmuch as it only refers to the passing inquiries made by Haverkamp on the day before implementation.

Complaint paragraph 9 contains three allegations. In paragraph 9(a) it is alleged that Respondent threatened its employees if a contract ratification was delayed. This was the menacing remark by Lockett that Respondent's highest official's dismay over slow contract progress could result in a person losing their job. An employer may not startle employees into a fear that their own collective and reasonably paced consideration of when to accept a contract renewal should also be a unilaterally judged condition of their continued employment. This is a singularly severe intrusion on basic Section 7 rights. I find there has been a violation of the Act in this regard.

Paragraph 9(b) alleges the interrogation of Mattos regarding whether he would cross a picket line or not. Such questioning is really another form of inquiring about the choice Respondent sought that he make in the context of it implementing new terms and conditions of employment based on a bargaining impasse. Cf. *Providence Hospital*, 285 NLRB 320, 326 (1987). As more fully developed in treatment of the complaint allegation following this one, I am not convinced a violation has been proven. I recommend dismissal of this portion of the complaint.

Paragraph 9(c) concerns the choice which Mattos termed an ultimatum to him. On the surface that is what it looks to be. Furthermore, it can well be said Respondent should have awaited a ratification vote, that which was then known to be only a scant few days away.

However this would improperly analyze the situation as it really stood. Respondent had an ample background in the summer contract rejection, two subsequent bargaining sessions, and sufficient passage of idle time to legitimately believe an impasse in the negotiations had occurred. In this sense Respondent was on firm ground in pressing Mattos to continue as the supervisory figure it wanted him to be, or to return to the bargaining unit where an applicable hourly pay rate was less than he had been making as the designated shop foreman. The fact that this position might not have been a statutory supervisor is not controlling; instead it is more pertinent that Respondent should be permitted to rely on the negotiated language (embodied in the impasse) that removed Mattos' classification from the bargaining unit. If ratification were to occur only days after the "ultimatum" to Mattos, this would simply solidify Respondent's desire to draw all shop foremen into the ambit of management. It should not be ignored that this was actually part of a larger business objective insofar as service operations were concerned, with increasingly greater emphasis on needed skill and productivity from the rank-and-file technicians themselves. This, again looking to the potential labor contract, is seen in the contractual power to fast promote an apprentice to be journeyman specialist, the annual wage increase expressly established for this higher skill, and the employer's entitlement to "provide above-scale compensation" at its discretion. For these reasons, I recommend a dismissal of the allegation set forth in paragraph 9(c).

## 3. Mattos' termination

The issue here is whether Mattos was driven to blurt out an announcement of quitting and then angrily leave employer

premises, because intolerable mental pressures generated mostly by Haverkamp had reached a crescendo.

The Board's basic case authority for constructive discharge cases, as this issue plainly constitutes, is *Crystal Princeton Refining Co.*, 222 NLRB 1068 (1976). That case defined two elements which must be proven to establish a violation resting on Section 8(a)(3) of the Act. These are:

First, the burdens imposed on the employee must cause, and be intended to cause, a change in his working conditions so difficult or unpleasant as to force him to resign. Second, it must be shown that those burdens were imposed because of the employee's union activities.

Id. at 1069. I do not find from the evidence that Mattos was faced with such requisite degree of provocation that his impulsive quitting, understandable in one sense as it might have been, was an action attributable to Respondent. Further, while I reject the implications that Barbe did not promptly and effectively seek his reemployment, this was a matter neither pleaded nor fairly litigated.

The essential fallacy in the General Counsel's case is that Mattos held to an untenable view of his position with Respondent. He equated his steward capacity with a feature of employment, rather than an adjunct based on his voluntary service to the bargaining unit. This is best shown in the testimony of Barbe, who attributes a postquit statement to Mattos that he didn't want "to change jobs." What Respondent was demanding, and it had reached the point on November 16 that it was entitled to have the choice made, was vacating a shop foreman role which had become operationally a part of management or reverting to a technician specialist with no effect on Mattos' service as a steward. The urgency of the moment was, after all, not about any actual decertification or continuation of recognition extended to the Union, but instead only a question of contract renewal. While Respondent's several reminders that a choice need be made, including reference to lower pay again in keeping with contract terms either as implemented or ratified, may have been disturbing, they do not in my view constitute the causation of why Mattos quit. He had, after all, just been highly praised in front of the assembled shop only hours before the impetuous action took place.

The principal issue in this case of constructive discharge turns on whether circumstances had become so unbearable that Mattos' abrupt cessation of his employment was essentially an involuntary act. As discussed above the untoward questioning of Mattos by Respondent's agents carried worrisome concerns for a rank-and-file employee who was not inclined to submit to such pressures. Mattos had an evident pride in, and desire for continuation in, his occupation as shop foreman. The mixed loyalties of being a mentor-type technician, while simultaneously serving his Union as shop steward were especially conflicting to his personal nature. This was compounded by his employer's desire to eliminate the prized status of being shop foreman in its latest collective-bargaining proposals relative to scope of the bargaining unit.

Perhaps Mattos was overly sensitive or rigid in his desire to continue arrangements of the past. However it is a matter of balancing whether he should pay a heavy penalty for not adapting to the employer's hard-line implementation of a new employment terms and conditions configuration affecting him, against heavy-handedness of the employer's conduct. I believe that realities of the workplace and illustrative views of the

Board found in constructive discharge cases favors Respondent in this balancing process.

In *White-Evans Service Co.*, 285 NLRB 81, 82 (1987), the Board applied earlier doctrine, relevant to the issue here, to the effect that resigning in the face of distasteful prospects relating to employment may be premature and, therefore, not a constructive discharge. See also *Gerig's Dump Trucking*, 320 NLRB 1017, 1023-1024 (1996); *Aero Industries*, 314 NLRB 741, 742-743 (1994); and *Groves Truck & Trailer*, 281 NLRB above at 1195-1196. On the bases above, I recommend that the 8(a)(3) allegation of the case be dismissed.

The General Counsel posits an alternative theory in support of the contention that Mattos was victim of an unlawfully contrived termination. This, based on *Columbia Engineers International*, 249 NLRB 1023 (1980); and *J. J. Security, Inc.*, 252 NLRB 1290 (1980), is to the effect that an employer cannot lawfully require the choice by a person between continuing in employment or foregoing Section 7 rights. I find cases cited in this regard to be distinguishable, and the General Counsel's alternative theory not of appropriate application here. The context of this case is a running bargaining dispute, with institutional interests as between the chief adversaries. This differs radically from the situation in *Columbia Engineers* and *J. J. Security*, where hiring hall dynamics and the residual of an economic strike, respectively, were involved.

#### CONCLUSIONS OF LAW

1. By its unlawful conduct described below, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.
2. By soliciting its employees to withdraw their support from the Union, Respondent violated Section 8(a)(1) of the Act.
3. By interrogating its employees regarding why they supported a union, Respondent violated Section 8(a)(1) of the Act.
4. By threatening to terminate its employees if a contract ratification vote was delayed, Respondent violated Section 8(a)(1) of the Act.
5. Respondent has not otherwise violated the Act as alleged in the complaint.

#### REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, a recommended remedy of conventional notice posting shall be made, to inform employees of Respondent's obligation to avoid intrusion on their rights under the Act.

#### Disposition

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>2</sup>

#### ORDER

The Respondent, Boardwalk Motors, Redwood City, California, its officers, agents, successors, and assigns, shall

<sup>2</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

## 1. Cease and desist from

(a) Soliciting its employees to withdraw their support from the Union.

(b) Interrogating its employees regarding why they supported a union.

(c) Threatening to terminate its employees if a contract ratification vote was delayed.

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

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

(a) Within 14 days after service by the Region, post at its facility in Redwood City, California, copies of the attached notice marked "Appendix."<sup>3</sup> Copies of the notice, on forms provided by the Regional Director for Region 20, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

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<sup>3</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(b) 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 complaint is dismissed insofar as it alleges violations of the Act not specifically found.

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.

WE WILL NOT solicit our employees to withdraw support from International Association of Machinists and Aerospace Workers, Peninsula Lodge No. 1414, AFL-CIO.

WE WILL NOT interrogate our employees regarding why they have supported a union.

WE WILL NOT threaten our employees with termination if, at a future time, a contract ratification vote should be delayed.

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.

BOARDWALK MOTORS