

**Belle Knitting Mills, Inc. and Knitgoods Workers Union,
Local 155, UNITE, AFL-CIO**

Knitgoods Workers Union, Local 155, UNITE, AFL-CIO and Belle Knitting Mills, Inc. Cases 29-CA-20611, 29-CA-20621, 29-CA-20623, and 29-CB-10172

May 15, 2000

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS
HURTGEN AND BRAME

On February 11, 1999, Administrative Law Judge Robert T. Snyder issued the attached decision. Respondent Belle Knitting Mills, Inc., filed exceptions and a supporting brief, the Union and the General Counsel filed answering briefs, and the Respondent filed a reply brief.

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

The Board has considered the decision¹ and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,² and conclusions³ and to adopt the recommended Order as modified.

¹ On August 26, 1999, Case 29-RC-8728 in this proceeding was severed from the other cases at issue here and remanded to the Regional Director for Region 29 for further appropriate action.

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

In adopting the judge's finding that the Respondent unlawfully solicited complaints and grievances and impliedly promised that it would resolve them, we rely on the credited testimony of employee Charles Ventura (given through affidavit) that the Respondent's president and sole owner, Beatrice Wetcher, told employees at a meeting that if they needed anything they could go directly to her and they didn't need the Union to intervene. We also rely on Supervisor Ricardo Januario's testimony that Wetcher explicitly asked employees if they had any grievances. Member Brame relies only on Ventura's testimony in finding this violation.

In adopting the judge's finding that the Respondent threatened employees with plant closure and relocation, we rely on the credited testimony of Ventura that Wetcher told employees "if the Union came in, she would have to close down and Rafael would move it to Guatemala. She said that then everyone would remain without jobs." Since Wetcher's statement constitutes a direct threat of plant closure and relocation, it is unnecessary to pass on whether Wetcher also made a similar implied threat, as found by the judge.

In adopting the judge's finding that Wetcher, for antiunion reasons, required employees to produce immigration papers, we rely on the credited testimony of Ventura that Wetcher told employees who were concerned about not having "papers", that this "was not her problem . . . employees did not realize what it meant to bring in a Union and that asking for papers was just the first step."

We also note that the judge found inadequate Wetcher's disavowal of her unlawful requirement that employees produce immigration papers. No party has excepted to this finding.

Member Hurtgen finds nothing unlawful per se in an employer's request to employees to produce their immigration papers. However, Member Hurtgen finds the Respondent violated Sec. 8(a)(1) of the Act

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Belle Knitting Mills, Inc., Brooklyn, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

Substitute the following for paragraph 2(d).

"(d) Within 14 days after service by the Region, post at its facility in Brooklyn, New York, copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 29, 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 notice to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 16, 1996."

Sharon Chau, Esq., for the General Counsel in the California cases.

Joanna Piepgrass, Esq., for the General Counsel in the CB case.

Gerrold F. Goldberg, Esq. (Greenberg, Traurig, Hoffman, Lipoff, Rosen & Quentel, Esqs.), for the Respondent and the Employer.

Leila M. Maldonado, Esq., for the Charging Party and the Petitioner.

DECISION

STATEMENT OF THE CASE

ROBERT T. SNYDER, Administrative Law Judge. These consolidated cases were tried before me on October 8, 9, 10, November 19, 10, 21, and December 12, 1997, in Brooklyn, New York. The amended consolidated complaint in Cases 29-CA-20611, 29-CA-20621, and 29-CA-20623, alleges that Belle Knitting Mills, Inc. (Respondent Belle, Respondent, or Belle), engaged in

by suggesting to employees that a request for immigration papers was just the first step in bringing in a union.

Finally, the judge found that Reynaldo Polanco was a statutory employee, and not a supervisor, based on Polanco's credited testimony. Polanco testified that he was supervised by Supervisor Raphael (Juan) Hidalgo and Plant Manager Bill Randall. The judge found that the Respondent's failure to call Hidalgo and Randall warranted an adverse inference that their testimony would have been adverse to the Respondent. Member Hurtgen finds it unnecessary to rely on the adverse inference drawn by the judge.

³ The judge inadvertently failed to conform his recommended Order to our decision in *Indian Hills Care Center*, 321 NLRB 144 (1996), as modified by *Excel Container, Inc.*, 325 NLRB 17 (1997). We correct this omission here.

The judge also incorrectly stated that "higher pay is of no legal significance in establishing supervisory status." We note that a higher pay level constitutes a secondary indicium of supervisory status.

numerous violations of Section 8(a)(1) of the Act, including making unlawful threats to employees to discharge, layoff, close and relocate the plant, impose more onerous working conditions, and not recall them from layoff, promise them unspecified benefits, promise and grant them medical benefits, interrogate them, direct them to refrain from wearing union T-shirts, and solicit their complaints and grievances. By amendment granted at trial, Respondent is also alleged to have required its employees to produce immigration papers in violation of Section 8(a)(1). The consolidated complaint further alleges the failure to recall from layoff two named employees and the discharge of a third in violation of Section 8(a)(1) and (3) of the Act, the failure to recall one of the two employees from layoff also being alleged as a violation of Section 8(a)(1) and (4) of the Act.

The consolidated complaint, in Case 29-CB-10172, based on a charge filed by Belle, alleges that the Knitgoods Workers Union, Local 155, UNITE, AFL-CIO (the Union or the Petitioner), threatened employees of Belle that they would be reported to the Immigration and Naturalization Service, if they failed to vote for the Union, in violation of Section 8(b)(1)(A) of the Act.

The unfair labor practices described have been consolidated with the representation proceeding in Case 29-RC-8728, in which an election petition filed by the Union, pursuant to a Stipulated Election Agreement between the parties, resulted in an election by secret ballot conducted on March 6, 1997, lost by the Union by a vote of 222 to 46, with 4 void ballots and 9 challenged ones, followed by the Union filing of timely objections to conduct affecting the results of the election. In a Report On Objections issued by Alvin Blyer, Regional Director for Region 29 of the Board, on August 8, 1997, the Regional Director ordered consolidated with the instant consolidated unfair labor practice cases for hearing, ruling, and decision, Objections 1, 2, 3, and 4, which are substantially identical to certain of the allegations of unfair labor practice in the previously consolidated cases, including the allegations of discriminatory refusal to recall and discharge, providing a health insurance plan and other benefits, and threatening discharge and requiring employees to produce immigration papers. The Regional Director noted that other conduct alleged as violative of Section 8(a)(1) of the Act occurring during the critical period from filing of petition to election, appearing in the consolidated complaint, if established, would also constitute grounds for setting aside the election conducted on March 6.

Respondent Belle and the Union filed timely answers denying the conduct alleged against each of them and that they had committed any unfair labor practices, and Employer Belle also denied a number of the same allegations contained in Petitioner's Objections 1 through 4 in its response to the objections.

The parties were provided full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. Posttrial briefs have been filed by counsel for the General Counsel and by respective counsel for the Respondent Belle and the Union and have been carefully considered. On the entire record in these consolidated cases, including my observation of the witnesses and their demeanor, I make the following

FINDING OF FACT

I. JURISDICTION AND LABOR ORGANIZATION STATUS

Respondent Belle, a New York corporation, with its principal office and place of business located at 145 West Street, Brooklyn, New York (Brooklyn facility or facility), has been engaged at all material times, in the manufacture of Christmas decorations. During the past year, which period is representative of its annual

operations generally, Respondent Belle, in the course and conduct of its business operations described, manufactured, and sold Christmas decorations valued in excess of \$50,000 directly to employers located outside the State of New York. Respondent Belle admits, and I find, that all material times, it has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Respondent admits, and I also find, that at all material times the Union has been a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES AND OBJECTIONS

A. *The Alleged Violations in Cases 29-CA-20611, 29-CA-20621, and 29-CA-20623 and Objections 1 through 4*

Counsel for the General Counsel called as her first witness, and examined under Federal Rules of Evidence 611 (FRE), Beatrice Wetcher, president and sole owner of Respondent for the past year and a half, who had succeeded her father-in-law, Jack Wetcher, in those positions. Regarding medical insurance coverage for employees, Wetcher testified that in 1995 at a time when her father-in-law was still president she contacted by telephone a number of different health insurance companies to make inquiries regarding available plans for the Belle employees. Among the companies she contacted were U.S. Health Care, Fidelity, HIP (Health Insurance Plan Of Greater New York), and Blue Cross/Blue Shield. Information was forwarded to her and salesmen visited. She and her father-in-law decided at the time that Belle couldn't afford to implement any of the health plans presented.

Following an unsolicited visit to Belle by an HIP salesman, Glenn Sansone, on or about April 10, 1996, by letter dated April 30, 1996, Sansone wrote Wetcher advising he was preparing a formal proposal that would address her requirements for a health benefits plan and she should receive it in about a week. Wetcher had asked for a proposal with prices when Sansone told her he had plans with better rates then previously quoted. Sometime at the end of April, Wetcher received a multipage proposal from HIP, followed shortly by a rate sheet dated May 6, 1996, providing monthly rates for coverage for individual, two person, and family, under three options. Under the three options, the individual rate ran from \$130.94 to \$132.96, the two-person rate varied between \$246.17 to \$249.96, and the family rate was between \$363.24 and \$368.83. The sheet noted the rates were only good up to December 31, 1996.

After receiving and reviewing the proposal and rate sheet, Wetcher called Sansone and told him it was too expensive and she couldn't do it, she couldn't afford it.

Wetcher further testified that during the summer of 1996, during a period of time that the Union had already commenced and was engaged in an organizing campaign among Belle employees, some of the employees asked her about health insurance. She told them that most of the plans she found were too expensive and she was continuing to look. Whenever employees had made similar inquiries since 1995, she had told them the same thing.

Following the Union's filing of its petition for certification in Case 29-RC-8728 on December 6, 1996, a conference was called by the Board's Regional Office for December 16. At that conference, a Stipulated Election Agreement was executed by the parties. Upon her return to the facility in the afternoon Wetcher called a meeting of some employees to inform them that a Union was trying to organize the factory and there was going to be an election but she couldn't go into much further detail until she spoke to her lawyer and found out what she could say or not say.

Belle's lawyer, hired that day, had appeared with her at the election case conference that morning.

The next day, December 17, Wetcher called another meeting of employees at which she explained that she needed to prepare the *Excelsior* list of names and addresses of employees to supply to the Board in preparation for the election. She believed that at this meeting an employee asked about health insurance.

In response to this and other questions, Wetcher testified she told the employees that until she knew exactly what she was allowed to say and not allowed to say, she was not going to answer any questions.

Pursuant to the Stipulated Election Agreement, approved by the Regional Director on December 26, 1996, the election was scheduled for January 16, 1997.

A few days later, on December 20, when Respondent in accord with its practice closed the factory until early January, Sansone came by the facility to show Wetcher another, much cheaper, proposal. Wetcher said she couldn't deal with him because they were closing the factory and having a huge party. In any case, they were having a union election on January 16 and she did not feel comfortable doing anything with health care until this was resolved. Sansone told her the new rates would only be good until February 1. Wetcher replied that was fine. Depending on the result of the election she could be talking to him afterward.

On January 14, 1997, the Region canceled the election because of the blocking charge filed by the Union in Case. 29-CA-20611. In the charge in that case, filed on January 8, the Union alleged, inter alia, that in or about November 1996, the Employer Belle offered to grant benefits, including a health plan, to discourage union activity. (The charge also alleged the December 17 discharge of employee Reynaldo Polanco, and requiring employees since December 16 to produce immigration papers and threatening them with discharge in retaliation for union activity.) Notwithstanding the pendency of this charge, sometime in January 1997, the HIP sales representative, Sansone, appeared at the facility, Wetcher introduced him to the employees and Sansone spoke to them about the health plan which Respondent had adopted and agreed to provide to employees. Some employees signed up for the plan and some did not.

Reynaldo Polanco, the alleged discriminatee who testified for the General Counsel, disputed Wetcher's testimony and filled in additional exchanges which took place on December 16 or 17. According to Polanco, at a meeting Belle called of all of the day employees on the afternoon of December 16, Wetcher, whose words spoken in English were translated by either Supervisor Ricardo Januario or another employee, Sandra Luna, Wetcher's assistant, told them she had just come from court because the Union had gone there like a week ago and they showed her that they had a certain number of cards signed. And she didn't want to recognize the Union, she preferred to go to an election. And she came to court and they set a date for the election. She said that was the purpose of the meeting. People started asking questions. An employee named Angelo Guzman stood up and said, "[W]e are unhappy because the company offer things and they never do what they offer." The employee continued, "Bill¹ in the meeting he made five,

six months ago, offered health insurance, that you will come and you will discuss, and five, six months passes, we don't get a raise and we don't have health insurance yet." Wetcher responded, "[W]e will try to do something to make you happy."

Wetcher was later called as a witness for Respondent in the presentation of its defense. During a union re-cross-examination, Wetcher clarified earlier testimony she had given with respect to an employee comment made at a December 1996 or January 1997 meeting she had called during the preelection period to discuss union issues, dealing specifically with health insurance and the employees' need for a union. In this exchange Wetcher admitted that at such a meeting an employee had said that if the Company had health insurance for the employees, they wouldn't feel the need for a union. This comment made in the presence of a substantial number of employees clearly preceded Wetcher's decision later in January to enter an agreement with HIP to provide a plan of health insurance for her employees. Wetcher's decision, she was later to explain, was made after the election date of January 14, 1997, had been canceled and she was also aware that the particular plan offered by Sansone and the costs associated with it was only available through January.

In another direct conflict between them, Polanco noted that at the meeting on December 16 when other employees started asking questions about health insurance or other benefits, Wetcher said, "[T]his is not a meeting to discuss what you want. This is a meeting to tell you that I went to court and a date for an election was set up, and also to tell you that I have, they have asked me for an actual list of employees' addresses and their immigration papers." When the employees asked, what kind of papers, she said, "[A]ll the green cards, social security, birth certificate, whatever is proof of immigration." Then some employee stood up and said, "[H]ow about if I don't have my papers"? Wetcher replied, "I'm sorry, I got to let you go."

Polanco further testified that about 15 minutes after the meeting, as Wetcher was standing by the sample department area, he went over and asked her to whom he should give his papers because she had asked all employees for that information. Wetcher said he didn't have to give his papers. Polanco asked why, "[B]ecause I am an employee." She said, "[N]o, you are a supervisor and supervisors can't vote." He said, "[I]ts just for the people who can really vote," and she said, "[Y]es." Wetcher asked him if he wished to vote and Polanco said yes. Although the Union filed a charge on Polanco's behalf, in Case 29-CA-20611 alleging his December 17 discharge as a violation of the Act, and that charge later formed one of the bases for the consolidated complaint herein, Polanco did not appear to vote under challenge at the election ultimately held on March 6, 1997.

In the presentation of its own case, Respondent produced solicitations received by it from health insurers. One, dated March 28, 1996, and addressed to Jack Wetcher at Bill Knitting was from the Fidelity Group. It offered a traditional choice health plan with various components including flexibility for covered employees in choosing hospitals, physicians, and providers. The Fidelity sales manager offered to forward a rate quotation. Another received from Keith Sharon, a marketing representative for HIP other than Glenn Sansone, in early September 1996 provided rates for an HMO, copayment plan D, prepared August 16, 1996, but containing substantially the

thing that is needed for the manufacturing of the bow." (Tr. 893.) Wetcher also described Belle as Variety's jobber.

¹ The reference here is to Bill Randall, de facto respondent plant manager, but actually placed in the facility to direct its operations by Belle's sole customer and sole investor in its plant and equipment, and its distributor, Variety Accessories, Inc. As later explained by Wetcher, "[T]hey give me the materials, the boxes, the label, the UPC, every-

same rates as those quoted in the May 6, 1996 rate sheet Wetcher had previously received from HIP. A third, received shortly after September 30, 1996, was submitted by U.S. Health Care for a super value plan, but contained rates somewhat in excess of these which Belle had received from HIP. Interestingly, the proposal was prepared for a company described as "Belle Accessories, Inc." Wetcher decided to reject it without presenting it to her employees.

Wetcher went on in Respondent's presentation to discuss her adoption of a health plan in January 1997. She described the health plan Sansone of HIP presented to her on December 20, as good, but lacking hospital coverage. However, the rates were, in Wetcher's view, something she could afford and which she could split with her employees. Wetcher explained her decision not to provide the plan for her employees as being based on a concern that she wasn't about to go and offer health insurance without knowing what the outcome of the election was going to be. If there was no union there was no problem. If there was a union, obviously she had to talk to the union. By date of January 6, Sansone forwarded a letter reminding Wetcher that HIP will only hold the rates for this coverage for her employees up to February 1, 1997.

On January 13 or 14, 1997, when Wetcher learned that the election had been canceled, she contacted her lawyer in this proceeding, learned the election could be delayed between a few weeks and a couple of months, told him about the pendency of a decision on the HIP health plan, and received assurance she could proceed with adopting the plan. She immediately contacted Sansone and arranged for him to come in later that week on Friday, January 17, the day following the scheduled election date.

Other documents were produced by Respondent and offered into evidence by the General Counsel. One, a combined summary of benefits and application form was distributed by Sansone to employees with whom he met on January 17, 1997, after Wetcher had called them together, introduced him and then left while he did his presentation. The summary shows no charge for a variety of medical services, maternity, and routine foot care, and reasonable and customary charge coverage for emergency care (physician and specialist fees and ambulance), 80 percent of the customary charge for anesthesia, \$50 deductible and 80 percent reimbursement for prescription drugs, but no hospital coverage. There was also no catastrophic coverage. The monthly premiums were to be deducted, weekly, in proportionate amounts, from the employee's pay. Wetcher had agreed to pay \$35 per month for each covered employee and informed them of this fact on the 17th. Consequently, those employees who opted for two person or family coverage, were to bear a higher proportion of the monthly premium, although where the HIP plan was the primary coverage for an employed husband and wife her share of the premium would be \$70.

A March 1, 1997 monthly billing to Belle from HIP shows coverage for some 46 employees, with a monthly premium for individual coverage of \$67.03, for two-person coverage of \$133.46, and for family coverage of \$199.97. Of the employees covered, 36 elected individual, 8 elected two-person, and 2 took family coverage. The proportion above Belle's monthly contribution of \$35, already deducted from the employees' pay, was combined with Belle's contribution and Wetcher then forward's a check to HIP for the monthly premium. By September 1, 1997, the number of employees who elected to be covered had decreased by half, to 23, and the monthly premium for single coverage had increased to \$72.31, for two-person cover-

age, to \$144.59, and for family coverage, to \$216.90. Wetcher did not testify that Respondent increased its proportion of premium payments. Wetcher claimed that the drop in employee enrollment resulted from the fact that women covered by Medicaid for pregnancy benefits didn't want to continue to pay for duplicative HIP coverage as well. The September 1, 1997 HIP billing record, however, shows that at least half of the employees who opted to continue coverage were women, and Respondent did not provide any probative evidence to support Wetcher's conjecture as to the reason employees dropped out. Clearly, the lack of any hospital coverage coupled with the increase in premium, at least half of which employees had to pay, had to be significant factors in the major reduction, by half, in employee election of coverage.

Wetcher acknowledged that as early as December 1996 she was told that the premiums would increase effective July 1, 1997. This was another reason she claimed she wanted to implement the plan immediately in January 1997, so employees could enjoy the lower premium for at least 6 months.

Ricardo Januario, supervisor for the bow machine, departments 17 and 18, day and night shifts, from March 14, 1995, to July 12, 1997, testified that from the time the time he was hired he asked Wetcher about health care. Wetcher always replied in 1995 and into 1996 that she was looking into the matter but couldn't afford it at the time. He recalled a U.S. Health Care representative arriving at the facility with brochures in September or October 1995 and distributing them to employees. In January 1997, Wetcher asked him to translate for her at meetings held with employees on both shifts about the benefits they would receive, all the details, and the prices. While Januario denied Wetcher herself told employees they should abandon the Union because they had health insurance, he did not dispute Wetcher's own testimony that an employee had suggested shortly before the grant of insurance that if they received health insurance they wouldn't need the Union.

Another employee, Cesare Romero, testified on direct examination for the Government that he, along with employees, Bernarda Hernandez, Dilcia Ramirez, and Luz Suarez, had attended the representation case conference held the morning of December 16, at Region 29. During his cross-examination he recalled the meeting of employees called by Wetcher on December 17. He had not attended the meeting held on December 16. She reported that there would be an election held on January 16. A few days later, at another meeting called by Belle, some of the workers asked Wetcher which was the reason they have to bring green cards, immigration papers, or social security papers. They had given these papers when they started working for the company. According to Romero, Wetcher now clarified the point, and told the workers that what she meant was not about the papers, and that they would have to bring a bank account or a credit card or something that would show their current address because the judge had requested such a list and she had to update the addresses.

As to the Company's interest in arranging health insurance, Romero recalled that in June or July 1996, Bill Randall and another supervisor had told a group of employees upon their inquiry that when Wetcher, who was then in Europe for 2 or 3 weeks, returned to the facility, he, Randall, would talk to her about an affordable insurance for the employees. (This testimony tends to corroborate Polanco's testimony that an employee asked Wetcher on December 16 what happened to Bill Randall's 6-month-old promise of health insurance.) At this meeting, Jack Wetcher, Beatrice's father-in-law, in Spanish

asked the employees what they wanted and some of them responded they needed medical insurance, raises, and dining room improvements. Randall said he would check on salaries and piece rates. Romero's testimony, without contradiction as to this earlier meeting, is fully credited.

At a meeting held on January 9, 1997, Wetcher told the employees that to date she had not found less costly affordable insurance for the workers. She would further inform the employees if she found an insurance they could afford. According to Romero, the very next day, January 10, Wetcher called a meeting to inform the employees that she had contacted a representative of HIP. That representative, previously identified as Glenn Sansone, discussed different plans, but presented the least expensive one and the combination plan summary and application form and said he would be back the next 2 days to see who wanted to become members of the plan, and would also return the following Monday to see employees who had returned from vacations. Romero signed an application form that day. It was not produced. It is evident that Romero's recollection of these dates is probably not accurate. January 8 and 9 are Saturday and Sunday, respectively. It is far more likely that the first date when Wetcher told assembled employees of her adoption of the HIP health plan and had Sansone present its terms to, and sign up employees, was, as she testified, Friday, January 17, after the cancellation of the December 16 election.

Supervisor Ricardo Januario was emphatic that prior to December 1996, Belle had never held any meeting with the employees to find out what would be affordable to them. Wetcher did receive inquiries from different employees from time to time as to what had happened with health insurance. And she repeatedly responded that she was still looking and trying to find something affordable not only for the Company but the employees as well. But she did not inquire in these individual conversations what would be affordable to the employees.

Then employee, Charles Ventura, whose affidavit was received in evidence, over Respondent's objection, pursuant to Rule 804(a) and (b)(5) of the Federal Rules of Evidence, (F.R.E.), based on proof offered and received of prior notice and of his unavailability as a witness, swore that the same day Wetcher returned from the Labor Board, with Ricardo acting as interpreter, she told the employees that she needed a list of the employee addresses and proof of their identification. Some of the employees asked what would happen if they had no papers, Beatrice responded that it was not her problem. She said, that employees didn't realize what it meant to bring in a union and that asking for papers was just the first step. At the second meeting held about a week after the first, Wetcher said it was not necessary to bring in their papers, testimony consistent with Romero's recollection.

At the third meeting, Beatrice said that if we needed anything, we could go directly to her and we didn't need the Union to intervene. She said that "[W]e already had holidays, and vacation pay. She said that she didn't offer health benefits because she couldn't find one that was inexpensive and good. She said that with the Union in the shop, we would have to remain at our work areas because the Union was very strict."

At the fourth meeting Wetcher held with the workers shortly after the Company offered them health insurance, "she said we no longer needed the Union because we already have health insurance. She said that if we had the Union, we'd have to pay the Union and we'd end up paying more."

I credit Ventura's sworn statements. There are consistent with and corroborative of other testimony offered by the General Counsel witnesses and are compatible with the statements Wetcher admitted making to employees at the meetings she held to convince them to cease supporting the Union.

Joe Lombardo testified for the Government that he is the manager/secretary of the Union. Among other duties and responsibilities, he supervises business agents and organizers, and oversees organizing campaigns. Luis Acevedo, another witness for the Government, testified he is the organizing director of the Union and reports to Lombardo. He commenced an organizing campaign among Belle employees in mid-May 1996. The campaign became public, in mid-July, after the Union called its first meeting of employees. Meetings of employees continued periodically until a few days before the March 6, 1997 election. During the campaign, the number of employees who attended dropped off, although the largest number of attendees was more than 30.

By early December 1996, based upon its extensive and successful solicitation of employee execution of authorization cards, Lombardo was prepared to ask for union recognition and the commencement of bargaining. Early in the morning of December 5, 1996, at around 9 a.m., Lombardo and Acevedo visited the facility and met with Wetcher in her office. The Union officials each introduced themselves and Lombardo gave her a business card. He told her he represented a majority of her workers and that they had signed cards. Lombardo took out from his briefcase and gave Wetcher multiple pages of copies of the authorization cards the Union had obtained from employees. The cards had been photocopied with two on a page. Lombardo presented 72 pages in all; with two cards per sheet, the authorizations totaled 144. Dates of execution appearing on the cards covered the period from June to December 1996, and included signings in every one of these 7 months. Lombardo said he would like to sit down with her and ask her to sign a letter of recognition and bargain a contract covering hours, wages, and benefits for the workers.

Wetcher took the pile of photocopies, looked through it and said, "[Y]ou're not in the garment industry or apparel industry." Lombardo said, "I know, but we organize workers and cross many lines. She was looking at the copies and said, 'I recognize some of the people. But some of the people aren't mine. I don't recognize all the names.'" At some point in the conversation, Wetcher said, "I don't want to recognize you. I don't want to talk to you. I want you to go to the labor lawyer place." Lombardo said, "[Y]ou mean the NLRB," and she said, "[Y]eah, I think that's it." She made some comment about sharing the building with her landlord. Lombardo said, "[W]e have no intent of having our organizers or business agents in the building." Wetcher said, "[P]lease, do what you got to do, to the NLRB." Lombardo thanked her for her time and left. He left her the set of the cards he had handed her.

Lombardo noted that during the 5 or 6 minutes he estimates he was in the office, he saw Wetcher flip through half a dozen pages. The parties stipulated that if Luis Acevedo, the Union's organizing director, had been called to testify to the meeting with Wetcher he attended, he would have testified substantially as Lombardo had with respect to the events he described on this visit to Respondent's facility.

Luz Suarez testified that she started working for Belle on September 27, 1996. In the beginning she was assigned to work on a bow machine, where plastic bows and cardboard are placed inside a plastic, bowl shaped machine which spins it and seals it. Six or

seven women worked together as a team, taking turns first shaping the bows, and then placing them in the machinery. After about a month she worked on manually connecting loops to make bows, attaching wires and affixing a cardboard to them with staples, putting prices on, placing labels on completed bows, making boxes, and putting on UPC labels, even sweeping. She also worked on big bows that require affixing a glass stick in the back, shaping the bows and attaching them to a cardboard and then placing them in boxes for shipping. She also had experience relieving other employees working at a spooling machine on which long pieces of material used to make the bows, after being slit, are manually placed inside spools, stapled electrically, and turned by hand to roll into large spools which are stapled again, and then removed and set aside. Suarez also described the work on a ribbon machine as being similar to what she had described for other material on the spooling machine.

Suarez' hours were 4 p.m. to 12:30 a.m. Her supervisors were Julio Ortiz, Enrique Solis, or Ricardo Januario. Luz Suarez signed a union authorization card on November 6, 1996, the date appearing on the card received in evidence, although she believed she had done so in late November. She had been solicited by Julia Santos, an organizer for the Union who spent time organizing daily in the street outside the facility.

According to Suarez she was laid off one of the first few days of December 1997 under the following circumstances. About 3 days before her layoff, Ricardo Januario had informed the group of women employees who worked with her on the floor that they were going to be put to a test to see which of them work to their best potential and make the most bows. Those that produced the most would be retained and the others laid off. For 3 days Suarez and the others made bows by hand. After the 3 days, Ricardo called them to the cafeteria and laid off most of them, a group of about eight, keeping only two or three, telling the ones laid off that they didn't have the quantity or quality. But Suarez disputed the fairness of the test, testifying that they all checked each other's bows and were counting the bows produced. During the 3 days they had produced thousands. She also disputed Ricardo's characterization of her work, noting that both Julio and Enrique had told her she was a good worker. Julio had recently told her, "Oh, don't worry. On Christmas you'll get a good bonus." Ortiz did not deny such conversations with her and Enrique was not called as a witness. I credit Suarez on these exchanges.

When Ricardo let her go, he told the employees it was slow, that everything in the factory was slow, and that they would be called back as soon as they would get busy and had work for them. Julio mentioned that there was going to be a big shipment of work into the factory by January 1997. He told her, "Keep coming and calling and you're on our list as one of the better workers, Enrique has the list in the back." Suarez called a couple of times. She also went to the factory mostly every day. She first returned to the facility the day following her layoff in response to Julio's suggestion to return with another worker named Betsy while he would see what he could find for them to do. On this occasion, Julio told them there was no work. Although Suarez returned to the facility almost every day during the first few weeks following her layoff, Julio kept telling her there was nothing yet. On that day following her layoff, Suarez saw an employee Maria Hernandez, nicknamed "Tuna," doing floor work affixing labels, putting bows together, work more or less of the nature she had performed. They both had about the starting date. Among the six or seven

other employees she saw working on the floor that day were some Suarez believed started working after she did. When Suarez had earlier informed Tuna that she had signed a union card, Tuna responded that she would not sign one, she would not support the Union. That day, when Suarez asked Julio why Tuna was still there if they laid everybody off, he said, "[D]on't worry about it, I think Enrique hired her back."

Suarez attended the conference on the Representation Case 29-RC-8728 held at Region 29 of the Board on December 16, 1996. She appeared at the request of Union Agent Luis Acevedo. A few other employees also attended. She believed one was Cesare Romero. As earlier noted, Romero confirmed his attendance along with Luz Suarez and two other employees, Bernarda Hernandez and Dilcia Ramirez. Present at the conference for Respondent were Wetcher and her lawyer, Jerrold Goldberg, who represents Belle in these consolidated proceedings.

Suarez continued to return to the facility at Julio's urging, but Julio kept telling her there was nothing to do. Then, on January 8, 1997, Suarez' daughter told her that she had seen Tuna at her school which Tuna's son also attended, and Tuna told her to have her mother call the factory because they were hiring new people. As a result of this advice, Suarez called the factory, got Julio on the phone and asked him if there was any work available for her. Julio said, "[N]ot yet, there's nothing now, but call after January 16, after the election, the shipment should be coming in and they are going to hire people then."

After January 16, maybe a week or 2 later, Suarez went to the factory and asked Julio if there was work. Julio said, "[N]o", to which Suarez responded, "[W]ell, what is this. This is packed with people here. A lot of people or working here and there's a lot of us that are out on layoff." Was he going to hire her back." Suarez added, "[W]hy, if your saying you have no work for me, did you hire all these new people, I don't think that was right." Ortiz responded there was nothing that he could give her to do now because it was packed, there was nothing for her to do. When Suarez pressed him as to what happens to the people that are laid off, Ortiz said he wasn't the boss, he couldn't do anything about it. At this point Suarez said all right and she gave up returning to the facility to seek a return to work, and started looking elsewhere for work.

During her cross-examination by Respondent counsel, Suarez denied that she had been told by Respondent that the job was seasonal or how long it would last. She noted that among the floor workers like herself, only two Mexican ladies and Tuna, were not laid off at the time.

As for the bow making, Suarez acknowledged that she had not been paid by the piece while making them, although some bow makers did receive a price rate. At the time of Ricardo's testing of her and other floor workers, she was aware that some night-shift floor workers had already been laid off. At the time of her layoff, when Ricardo told the group he had a list of the people who did not do their bows the right way, the members of the group asked to see the list, and although Ricardo said he would show it whenever he was ready, he never did show it to them, and Suarez seriously doubted it existed. But Ricardo did tell them that people would start to be called back in January, some to be called back before others, the call backs would start slow but that definitely in January everybody was going to be called back because there was a big shipment.

Later in the day of her layoff, Suarez spoke with Julio Ortiz who told her not to worry, she was on a list of people who do good work, they would call her. He even took her telephone

number. He told her to keep trying and coming every day, and she did that, at about 3:30 to 4 p.m. After the first couple of weeks, Suarez started checking at the facility, just once in awhile. But she knew that Ortiz had her telephone number and he had told her he would call. Through the period of her layoff and her last visit or call to the factory, Suarez did not contact or speak with Beatrice Wetcher. But until Suarez appeared at the representation case conference she did not know who Beatrice Wetcher was. I credit Suarez on her exchanges relating to her layoff and promises of recall made by both *Januario* and *Ortiz*.

Now, Suarez acknowledged that she had become confused, in some of her earlier responses regarding her efforts to return to work at Belle, and, in fact, she had not returned to the facility after January 16 and that her last contact with Belle was her conversation with *Julio Ortiz* on January 8. But she had remained in New York at the same residence with the same telephone number for the remainder of January and thereafter. And, as Suarez testified in response to a question asked of her on cross-examination, as to whether she just gave up after January 8, "Yeah, yeah. They never called me back. I let—I sat back to see if they would call me back. They never did." (Tr. 241.) It was either on an earlier visit to the facility, probably during December or in her call to *Ortiz* on January 8 that she referred to a lot of people working and *Ortiz*, becoming defensive, said he could do nothing about the hiring and that he wasn't the boss. Suarez did note that with respect to *Ortiz*'s instruction to call after January 16, the date of the election, when a shipment would be coming in, the election was cancelled. Earlier noted was the fact that the election was not rescheduled from January 16 to March 6, 1997, until February 12, when the Union filed its request to proceed notwithstanding its charge in Case 29-CA-20611. While subject to some confusion as to dates, I am convinced that Suarez related her postlayoff conversations with *Ortiz* in a credible manner.

Respondent's payroll records also showed that Suarez was incorrect in placing her layoff in early December. It actually took place in mid-November, 1996.

Melvin Acosta, the other employee who is alleged to have been discriminatorily denied recall, testified that he began working for Belle in mid-September 1996 and, like *Luz Suarez*, was assigned to the floor department 14 on the shift from 4 p.m. to midnight under Supervisor *Julio Ortiz*. He prepared cartons, went to the warehouse to move the cartons and for some time, at *Julio*'s direction, worked on the bow machines.

According to *Acosta*, about mid-October, on the street outside the facility, he started to speak to the union representatives about once a week. Since his authorization card shows he signed and dated it on October 1, he probably began speaking to the union representatives in early October.

On December 16, 1996, between 3 and 4 p.m., *Julio Ortiz* told him in Spanish that at 4 p.m. there was going to be a meeting and every employee was going to be asked for papers. *Acosta* said he had his papers with him and asked where to bring them. *Acosta* mentioned he had his driver's license, social security [card], and birth certificate. *Julio* said to bring them upstairs and they would make copies. *Acosta* brought them to the office, they made copies and he went to the cafeteria for the meeting. The meeting did not begin and instead, he was called to the office by *Ortiz* and was given a green layoff slip. Also present in the office with him were *Luis Ramirez*, an employee named *Jimmy* (later identified as *Jaime Lopez*), and *Tuna*. *Ortiz* told them they were laid off for 2 weeks because the Company was slow. According to *Acosta*, *Ortiz* had

previously asked him for his telephone number and he had supplied it.

On January 2, 1997, *Acosta* called *Ortiz* at the facility and asked if the Company had started getting personnel. *Ortiz* told him no, but to call back in 2 weeks. On January 7, 1997, a Tuesday, at the facility, at 4 p.m. *Acosta* asked *Ortiz* when the Company was going to call him back. *Ortiz* replied, after the union election, the Company was going to call back the workers who had been there longer. *Acosta* asked what election and *Ortiz* said the Union election. *Acosta* asked why the Company was hiring new personnel. *Ortiz* denied this. Before that date *Acosta* had been at the facility and had seen a new receptionist handing out applications to new people at her desk outside the door to the personnel offices. *Acosta* had asked her when they were going to call the ones who got laid off. She answered no, that they were not going to call those employees, that the Company was hiring new personnel.

During the first week in February 1997, *Acosta* again visited the facility, saw *Ortiz*, and again asked when the Company was going to call him back to return to work. *Ortiz* replied that the Company was not going to call him back, because he had signed a union card. *Acosta* asked whether he was sure. *Ortiz* replied yes, he saw a letter that he read in the office that *Acosta* did sign a union card. On this occasion, *Acosta* looked into the factory at around 5:30 or 6 p.m. and saw *Tuna* doing packing work and affixing labels. He also saw five or six new employees who were packing, putting on labels, working on the machines that roll ribbons.

Acosta testified he had started to work for the Company 3 weeks before *Tuna* started. *Maria Hernandez*, a/k/a *Tuna*, later testified that she started with Belle in the second week of September 1996. He also recalled hearing *Tuna* say, in the presence of *Julio Ortiz*, that the members of the Union were in front of the Company, and that they were giving cards to the employees so they would sign for the Union. *Acosta* heard *Ortiz* reply that he didn't believe in the Union, and he left.

Acosta also testified that no supervisor ever complained about his work. *Ortiz* also never told him he would be laid off while he was employed and before receiving his green slip from *Ortiz*. While he learned from *Ortiz* that the Company would be closed during the Christmas holidays *Julio* also told him that while part of the work force is on vacation during that period, other employees are asked to stay to do inventory, and he would be one of them.

During *Acosta*'s cross-examination he clarified that on December 16 when *Julio Ortiz* asked if he had his papers with him, *Ortiz* did not ask for his green card, resident alien card, or proof of citizenship. When hired in September 1996, he had been asked for his work permit by the then-receptionist, *Jasmine*, and had informed her he was an American citizen and didn't need such papers.

When now asked if any employees voiced their union views in front of *Ortiz*, he responded that *Tuna* said in his presence she was against a Union. Earlier, an objection made by Respondent's counsel was sustained to an inquiry from counsel for the General Counsel as to whether *Acosta* had heard *Tuna* express her preference toward the Union. (Tr. 384, L. 18 to Tr. 385, L. 5.) *Acosta* was then permitted to relate *Tuna*'s report to *Ortiz* of union activity across the street from the factory. Respondent counsel's direct question of *Acosta* now elicited the answer to a question which he had earlier successfully precluded (Tr. 396, L. 6-10).

Thus, Respondent counsel's suggestion of a change in testimony by Acosta on this matter (Tr. 396, L. 11-14) is rejected.

As for Acosta's running of a bow machine, he explained that he had been given that assignment on the night shift for between 1 and 3 hours on three or four occasions.

Acosta did change his earlier testimony, to explain that he had dropped by the facility on Tuesday, January 7, after Ortiz told him to do so to see if they were hiring personnel during their telephone conversation on January 2. It was also on January 7, at 4 p.m. as he talked to Julio that he saw employees starting to work on the evening shift. He saw more than six people walk to the work area, moving boxes and organizing the jobs.

Acosta also denied, as had Suarez, that when he was hired in September, he had been told by Jasmine or Ortiz how long he would be working. He did not then know that Belle made Christmas bows, nor that it hired people for the fall reason, the busy season. Acosta also noted that in January or February, on his visits to the facility, besides Tuna, he also saw three other employees, two men, including Luis Ramirez, doing floor work, packing, and rolling ribbons.

Reynaldo Polanco testified that he began working for Belle on March 18, 1991, and was discharged on December 17, 1996. He described his job as sewing machine mechanic. He took care of the sewing machines which stitch ribbons, making sure they were working all the time and were in good working order.

In July 1996, Bill Randall was the overall manager of all of the departments, including fusing, bow machine, sewing machines, slitting machine, and warehouse. Randall hired, fired, and disciplined employees. In the summer of 1996, Polanco spoke to a woman organizer outside the factory, and signed a union authorization card, according to the date placed on it, on July 19.

At the first meeting called by Belle, about the union campaign, held in mid-July, at which maybe 200 employees were called to the cafeteria or lunchroom at about 1:30 p.m., Randall addressed the assembled group in English, with Ricardo translating into Spanish. He said he knew a union was trying to go there, and he wanted to let us know that if we have any feelings that the Company's wasn't treating the employees the way we expected, we could talk about it. Then some employees started complaining that they didn't have benefits, like maybe for insurance, and didn't get a raise for a long time, Randall said the same way that they were talking in the meeting, they could go up to his office and discuss it. He also said he spoke to Beatrice Wetcher, and they, the Company, was trying to find an insurance company, but she was on vacation, so when she came back, he would talk to her, and they would see what they could do. This testimony mirrors that of employee Cesare Romero about the genesis of the Respondent's serious and renewed interest in seeking to obtain health insurance for its employees in July 1996, after the onset of the Union's organizing campaign. Randall also said, as noted earlier by Romero, that he would review all the salaries and see what he could do regarding them.

At a second meeting Randall held a half hour after the first, this time with the seven employees in the sewing and slitting departments, in the course of individual departmental meetings he held that day. The employees were called into a conference room in the office. Randall again spoke English and the employees translated among themselves, Polanco, if not fluent in English, testified without the aid of an interpreter. Again, Randall asked if they weren't feeling happy, what were their problems. He started asking this of each employee, in turn. Each of the employees mentioned the lack of health insurance as a

problem, and a number of them on piece work said they did not agree with the price put on the pieces produced. When it was Polanco's turn, he pointed out the same problems as the others, and added all the employees were unhappy and they wanted a union. And he wanted a union too because he was part of the Company, he was an employee too. Randall responded that he couldn't be in the union because he was a supervisor. Polanco denied this, noting he was not getting paid for a supervisor and did not have the position of one. Randall insisted Polanco was a supervisor and could not be with a union.

When the meeting concluded, Randall asked Polanco to stay for 2 minutes, he wanted to talk to him. With the two of them alone, Randall said he knew Polanco was still with people with the Union and was telling people to sign cards. Polanco denied doing this. Randall said, "[Y]ou know you are a supervisor and you can not do that." Again, Polanco denied he was a supervisor. Randall said, "[Y]our doing a good job, you know, and I know you're not getting enough money. I will try to talk to the owner, and we will see what we can work out for you. Maybe we can get you something."

Then, later the same week, Polanco received a 70-cent-per hour raise. He described this as rare, because the usual raises were limited to 25 to 50 cents. Also, in this instance, Randall handed him his paycheck, although it was his direct supervisor, Raphael Hidalgo, who always handed him his check. When Randall handed him his check he said, "I got you a 70-cent raise and I hope you are still working the way you are, and keep helping Raphael as you are doing. And I want to always keep that area clean. You know, that means cleaning up the floors, pick up the garbage on the floor, pick up bag materials and throw [them] in the garbage, and sweeping the floors." He also told Polanco, "[T]he machines should be working all the time, you should take care of them whenever they need work."

The day following the conversation Polanco held with Wetcher on December 16, earlier reported, following her return from the Region and the meeting she held with employees, Wetcher called Polanco to the office over the loudspeaker. When Polanco arrived, they were alone. Wetcher had his timecard. She asked when he left the day before and arrived this morning. He told her and she wrote the times on this card. She said, "I am sorry to do this, it took me 2 months to make this decision, but I got to let you go." Polanco asked why. She said, "I heard but I wasn't sure that you were the guy telling the people to sign union cards." Polanco denied doing this, but Wetcher insisted he was leading the people to join the Union.

Polanco asked if this was the reason he was being fired. Wetcher replied yes, because he wasn't loyal to management. She said, he knew he was a supervisor. Polanco denied that status and said he had denied it to Bill Randall because he wasn't getting paid for it and he didn't have the rights a supervisor should have. Wetcher said, she wanted all supervisors behind her to fight against the Union, not to be with the Union, and she didn't want people telling the union representative that she asked her employees for immigration papers. She commented, "I am the President of the Company and I do what has to be done. I don't want people wearing union T-shirts in my factory." She told Polanco he would get his final pay in his next week's check, and she wanted him to leave the factory now. She added, "[I]n 1 month, the election is going to be January 16, if everything goes well, I might put you back in your position. Not because I want it, but because of your family, you got family her and they do a

good job. You got your father here, brother, wife and your cousin and they do a good job here.”

Polanco had worn a union T-shirt and cap to work a few weeks before, but had not seen Wetcher that day.

At the employee meeting held on January 9, 1997, at which, according to Cesare Romero, Wetcher discussed her inability to date to find affordable health insurance, Romero also noted that a female employee from the department of Anna Hidalgo asked Wetcher why Reynaldo Polanco had been fired. Wetcher replied that Polanco was a supervisor and she wasn't going to talk about it because he was a supervisor. And, he was not Union. He was unemployed from the Company.

Over the period of his employment, Polanco had received no warnings. He had received a recommendation letter from the manager who preceded Randall, a Pat Staganese. He had also received a bonus each year, close to Christmas, mostly \$50, but 1 year he received \$150. The last bonus he received was from Bill Randall earlier in December 1996.

With respect to Respondent's defense that Polanco was a supervisor, counsel for the General Counsel questioned him closely as to his job responsibilities and relationship with Belle and other employees. Polanco defined his function as seeing that the machines were working well all the time. This meant he had to be in the area checking the quality of the work produced, making sure the stitches were coming out right and the job was coming out good.

When Polanco first started work for Belle in 1991 he was assigned to the floor, spending time in packing and putting boxes on pallets. A year later he was assigned to sewing on the one machine. It was a merrow machine. Belle also employs multineedle sewing machines. Belle started bringing in other sewing machines, up to six. After a year of working on the machines, and watching, discussing, and learning how to do the repairs on them being done by an outside mechanic, Polanco became proficient enough to become the mechanic to repair and maintain them.

While employed by Belle, Polanco denied he ever transferred, suspended, laid off, promoted, fired, or rewarded employees. Although he recommended the hire of friends, he was personally aware that many other employees also recommended the hiring of friends and relatives. This occurred, among other times, when management or supervision advised employees they were hiring and suggested bringing in applicants they knew. Polanco also denied he ever recommended the transfer, suspension, layoff, promotion, firing, or rewarding of any employees.

Polanco described the manner in which work was assigned and performed on the merrow sewing machines. Supervisor Raphael Hidalgo, who also supervised slitting, in addition to regular sewing and merrow machines, received orders from the office, for sewing work on materials. If not already slit, the material is sent to the slitting department for slitting to the size desired. The order is then placed with the material for transfer to the machines where Polanco reviews the order with respect to the type, size, and amount so he can set up the machines accordingly. After setting up the machines, he runs a piece of material to see if the machines are in good working order. Hidalgo then tells the machine operators what to do. On the occasions Hidalgo is busy elsewhere, he will instruct Polanco to assign particular employees to particular sewing tasks. In the unusual case of a special order, with a delicate material, needing care, Polanco has suggested to Hidalgo, based on his experience, which machine and which operator is most suitable, and Hidalgo will then decide and inform him.

On the occasion that a machine malfunctions or an operator has completed the assignment on a particular order, Polanco will inform Hidalgo, who will reassign that operator while Polanco repairs the machine.

Polanco testified he did not tell operators what to do or reassign machines without speaking to and receiving approval from Hidalgo. Although Polanco checks the quality of the stitches, as a necessary check on the proper functioning of the machine and as to whether or not it requires an adjustment, Belle employs a quality control person who checks the entire piece, the quality of the stitches, the condition of the material worked on.

When Polanco finds stitches not coming out properly, he will inform Hidalgo and will be directed to check the machine. When more than one order comes in at the same time, Hidalgo informs Polanco which order is to take priority and Polanco will set up the requisite number of machines for that order and the balance for the next orders. Operators know, every day, which machines to operate, unless they are instructed otherwise by the supervisor.

When there are no machines to repair and Polanco's check shows the work is coming out right, he will report this to Hidalgo, who will assign him to help out on the floor, such as helping lift heavy rolls of plastic material for slitting and setting up the slitting blades. On occasion, Manager Randall has assigned Polanco to take a look at a spooling machine which is not working properly. There is another mechanic, Michael Persaud, who is in charge of fixing all other machines, the bow machines, spooling machines, slitting, and piercing machines. On occasion, Persaud has helped Polanco on sewing machine repairs.

Polanco estimated he spent 75 percent of his time repairing sewing machines, and the other 25 working on the floor helping other employees. Polanco stressed that the sewing machines, which are working 24 hours a day, have a lot of problems, and sometimes he is required to spend up to 2 or 3 hours on one repair. His work hours were 7:30 a.m. to 4 p.m., Monday through Friday. Persaud would stay until 10 p.m. Polanco made a point of having his machines in working order. Only if a sewing machine problem arose after he left, did Persaud assist.

On one occasion, 2 to 3 years ago, when a sewing machine operator didn't want to do the special order job to which she was assigned by Hidalgo, after Polanco informed Hidalgo the employee wouldn't do it, Hidalgo went and took the employee to the manager's office. Polanco was then called to explain what happened, and after doing so, was asked to write down on a disciplinary form how the operator had refused the job. Polanco wrote up the incident and submitted the form to the manager, who, along with Hidalgo, signed it. The manager then made the decision to suspend the operator for a period of time, without any recommendation from Polanco.

On another occasion, Polanco recalled the manager warning a merrow operator not to engage in certain impermissible conduct and then placing it on a warning notice. Polanco had no role in the matter. Particularly in the absence of either Hidalgo or Randall as witnesses, Polanco's testimony on these and all other matters on which he attributes actions or conduct to either supervisor, is credited.

Polanco sometimes worked overtime, but only after receiving permission to do so from the supervisor or manager. Polanco also needed the initials of his supervisor, Hidalgo, on his timecard, to receive the overtime pay. As to overtime for the merrow operators, the manager made the decision and had the supervisor inform them. When only three or four of the opera-

tors were needed Hidalgo asked for volunteers among them. Polanco never asked the operators on his own to work overtime. On one occasion he initialed the timecard of an operator, Nancy Barias, at the operator's request when the timeclock was not working. Polanco wrote the time and initialed it. At the time the payroll for that date was being prepared, the person in charge at the time, Supervisor Ricardo Januario, first confirmed with Polanco that he had initialed the time and then told him he could not do that. The manager had said you cannot sign cards, it should go to Raphael and he should sign.

When additional parts for the sewing machines were needed, Polanco prepared and signed purchase requisition forms, and then took them to the manager for his initialed authorization. After Manager Randall initialed his authorization he faxed it to the main office so the parts could be ordered. Persaud, the other mechanic, did not require the manager's written authorization, to order parts using the purchase requisition form.

Polanco did not have an office, desk, or telephone while employed by Belle. In contrast the supervisor of the shipping department, Donald Perez, the warehouse, Enrique Solis, and his wife, Aida Contello, supervisor of the sample department, each had a desk and telephone.

When employees asked for time off, they sought permission from their supervisor, who often checked with the manager. In his own case, when Polanco had to miss a day of work, he told Hidalgo, who sometimes told him to speak directly with Randall.

A system of employee evaluation was put in place during Polanco's tenure. The supervisor of each section or department did the evaluation of the employees. Polanco was evaluated in writing by Hidalgo in 1996, the evaluation was shared with him, signed by Hidalgo, and then forwarded to the office. Polanco did not evaluate employees with whom he worked. Because Hidalgo did not write well, he asked Polanco or another employee to write down an evaluation Hidalgo had prepared.

Polanco was aware that management held periodic meetings with managers and supervisors, particularly regarding production. Polanco denied he ever attended such meetings. Polanco was called to speak with management from time to time, as a mechanic, regarding problems on a machine, resulting in less production or because the operators might raise a concern about a machine not working properly.

During his cross-examination, Polanco testified that at the time he was separated from Belle in December 1996, there were four merrow sewing machine operators. By this time, Belle also had four slitting machine operators. Together these operations comprised the sewing department.

Polanco noted that in the summer of 1993, Respondent asked him to do the mechanic work at night, starting at 7 p.m., because of problems with the machines at night. He asked for premium pay for this assignment and stayed for about a month on that shift. He repaired machines for four operators. Each one had four machines. No supervisor was on the shift. Each operator prepared a nightly report sheet, detailing their work, quantity, date, and time. Polanco did not sign them.

Polanco denied he ever told Wetcher he was a supervisor, and therefore it didn't matter if he continued to support the Union. Polanco repeated in cross-examination his earlier direct testimony that, among other things, at the meeting with employees on December 16. Wetcher asked the employees to produce their addresses and immigration papers. Polanco did correct earlier testimony, noting that Wetcher had stated, at his exit interview on De-

ember 17, that she didn't like people wearing union T-shirts, instead of stating she didn't want them wearing the shirts.

Other employees who wore union T-shirts to work in the preelection period included Cesare Romero, Charles Ventura, and Angel Guzman. Romero ceased working for Belle on April 28, 1997. Ventura, who left on a vacation to his native country of Santo Domingo in the spring of 1997, was not reemployed on his belated return. As noted earlier, a portion of his pretrial affidavit was received in evidence.

Polanco denied emphatically, on cross-examination, as he had on direct, that he ever attended supervisor meetings. He knew they were being held when the names of the supervisors were called over the loudspeaker to go to the office. His wife, Aida Contello, Rafael Hidalgo, Enrique Solis, Ricardo Januario, Donald Perez, Maria Rueda, supervisor of bow making department, and Julio Ortiz, in the morning, would attend. Sometimes the only supervisors called were Solis, Perez, and Rueda.

Polanco described a common problem which arose within the merrow machine area. As the operators were being paid on a piece rate, they would sometimes move the handle which controls the speed at which the material is fed through rollers to where it is stitched, thereby speeding up the process and causing stitches to open. The operators' concern was with increasing the quantity of material produced and not its quality. When he, or Mary Porada, the quality control person, saw this speeding up resulted in open stitches, and they reported the problem to Hidalgo, he directed Polanco to check the machine. Hidalgo, himself, then informed the operator not to move or touch the handle. When an operator used a pliers to open the handle after Polanco had locked it, Polanco informed Hidalgo who then confronted and dealt with the guilty operator.

When the work of sewing the material on a particular order is completed, the supervisor, not Polanco, noted the completion on the sheet which accompanies the order, and the work is taken to the warehouse. Polanco again noted his responsibility to maintain the machines in good working order so the order could be completed within the time noted or contemplated. Only if the machines were not working properly did Polanco have to work overtime. His overtime was verified by Hidalgo, or Randall. This happened four or five times a month. As to sewing machine operators assigned overtime, this happened two to four times a week, up to 2 or 3 hours each time, during busy times. But Polanco never verified their overtime hours.

On special orders, Hidalgo usually followed his recommendations as to which operator would be better to perform that sewing work. Polanco did not participate in operator evaluations nor did he recommend personnel decisions regarding them, such as warnings, other disciplining, salary changes and the like.

At one point, in 1994 or 1995, Polanco had been assigned a beeper so the supervisor on night duty could contact him if the machines malfunctioned so he could provide advise on their repair by telephone. After Randall arrived and learned Polanco had been rarely contacted, he took the beeper away.

B. The Respondent's Defenses Offered to the Alleged Unfair Labor Practices

Ricardo Januario, supervisor in the bow machine departments, for the day and night shifts, departments 17 and 18, worked a regular shift from 7:30 a.m. to 4 p.m. but often started earlier and worked later, until 7 or 8 p.m. When he started in March 1995 these departments employed maybe 20. By the time he left Belle's employment in July 1997, there were be-

tween 70 and 100 employees in the two departments. Besides assigning work, he oversaw the mechanic Mike Persaud who changed the size of the machines for the needs of specific jobs, supervised and coordinated the receipt of material from the stock room and its slitting by the slitting department and transfer back to his departments. Only he could requisition and sign receipts for the materials. He also checked the proper labeling of boxes, and the quality of the products produced.

Januario described Juan Hidalgo as the supervisor of the slitting department and Reynaldo Polanco as supervisor of the merrow/sewing department. Januario observed Polanco across the work floor on a daily basis. He oversaw all the sewing machines, maintained, and repaired them. He assigned operators to another machine while he was engaged in repairs of the operator's machine. He checked on work of others, and was responsible for maintaining order in his work area, and reported problems with employees in his area to senior management.

Januario was in charge of payroll and personnel for the whole Company from October 1995 to May or June 1996. On overtime worked, as shown on the timecard, Januario swore he checked with Polanco "several times" to assure himself there was authorization for the time. This testimony conflicts with Polanco's, who maintained he did not approve or verify overtime hours. It is significant that Respondent did not call as a witness or explain its failure to call Hidalgo, the acknowledged supervisor, to whom Polanco testified he reported.

Respondent introduced into evidence a timecard of an employee Nancy Barias which, Polanco had earlier testified, he had initialed at the employee's request and then been directed by Januario not to do so in the future. For the week ending Friday, February 23, 1996, Polanco's initials appear next to a handwritten entry of a starting time on Monday that week of 7:30 a.m. All successive entries, except for the arrival time on Friday were made by the timeclock. This last entry was handwritten by Januario, at 7:30 a.m. and initialed by him. Januario explained that when he physically sees the employee he will enter the time at the employee's request if there is a problem with the operation of the timeclock. This is what he did on that Friday morning. In the case of the Monday morning entry, he could not personally verify the entry time of the employee and so asked employee Barias to have her supervisor verify and initial her time. Januario did not dispute Polanco's testimony that he told Polanco on the authority of the manager that he could not sign cards but they should be presented to Hidalgo. Respondent produced no other timecards, nor any overtime authorizations, initialed or approved by Polanco. In this conflict I credit Polanco on his interchange with Januario, and, further that he could not and did not approve overtime or verify work hours of employees with Januario or any other Supervisor.

Januario also testified that the merrow department employed as many as 15 to 20 operators during the busy portions of 1996. This conflicts with Wetcher's testimony that the merrow operators numbered four to five woman operators, apart from the slitting department, which employed a similar number. Polanco testified to four and four employees in mid-December 1996. Januario is clearly exaggerating the figures in an apparent attempt to create greater responsibilities for the employee who repaired and maintained the machines.

Januario, who stated he translated for Wetcher at all of the union-related meetings she called of employees, recalled that on December 16 she informed them of the union campaign, and denied she ever promised benefits to employees to abandon

union activities or threatened them with unspecified reprisals because they supported the Union. When employees sought to ask questions she refused to respond until she could consult with her lawyers. In the absence of any independent proof of his attendance, Polanco's denial, and in light of the poor impression Januario made as a credible witness, I do not credit him that Polanco was present at a meeting Wetcher called on December 16 of the supervisors on her return from the Labor Board to inform them of scheduling of an election on the Union's petition. It is also highly unlikely that Wetcher would have called a known union supporter and advocate to a meeting to inform supervisors of the results of the Union's campaign.

On December 17, Wetcher asked the employees for their addresses and telephone numbers and to supply a document, an "official paper" with proof of their name and address. He denied she asked for immigration forms or green cards or birth certificates or threatened to fire those who failed to produce such information. Januario claimed that during the 2 years he handled payroll, he got back 60 percent of the W-4 annual earnings forms he had mailed to the employees. He subsequently modified this conclusion during later testimony to clarify that the problem with accurate employee addresses was centered in the group of seasonal employees, who were basically excluded from the stipulated bargaining unit. The description to which the parties agreed in their Stipulated Election Agreement included all full-time and regular part-time production, maintenance, and shipping and receiving employees. The record showed that only a very small percentage of the seasonal employees laid off at the end of the season returned the following year and their names were not included on the *Excelsior* list provided by the Employer prepared for the week prior to December 26, 1996.

During the week of December 16 through 20, 1996, Wetcher called three or four meetings with day- and nightshift employees, "to update them with what the situation was" but never promised or threatened them. Januario denied she ever threatened to close and relocate the plant if they joined the Union.

When asked if Wetcher at any union related meetings she held in January 1997, asked people if they had complaints and impliedly promised to resolve them, Januario evaded a responsive answer, at least twice, and feigned a lack of understanding more than once. (Tr. pp. 626-628.) It is evident that Januario was misleading and not credible in his testimony here. Finally, Januario admitted that Wetcher asked people at the January meeting at which she announced the election was postponed, if they had any grievances. And the main issue that employees raised was the health issue.² Januario's testimony about Wetcher's prior consideration of the medical insurance or health care issue has been previously described.

Januario denied that Wetcher informed employees in January 1997, that they should abandon the Union and didn't need it because they now had health insurance. Januario acknowledged that on the occasion of the visit of the HIP representative in January 1997 to sign up employees for the plan, he was directed by Wetcher to translate for the employees on both shifts what the benefits were, all the details and the prices.

Januario also described the seasonal nature of the Respondent's business, which starts a gradual build up in late December/early January, and by July adds a third shift until October. Belle is most busy from June to October. Layoffs take place

² The transcript is ordered corrected at p. 629, L. 4, to change "how" to "health."

from the end of October to end of November, when deliveries for the Christmas season are completed.

Januario described Suarez and Acosta as seasonal workers. Januario, who was involved in hiring seasonal employees, testified he told them they were seasonal, they will work 1, 2, or 3 months until Belle delivered the goods, and then would be laid off. Januario did not testify that he hired Suarez or Acosta in September 1996 or spoke with them then about the seasonal nature of their employment. Both Suarez and Acosta denied being so informed on their hire and they are both credited. Januario noted that those among them who gave Belle the best quality and/or were preferred by their supervisor will be highly considered to be offered a permanent position in their old position, or in another job for which they would be trained. Suarez had testified that Supervisor Julio Ortiz had told her she was in a highly preferred category for recall. Acosta was not laid off until as late as mid-December, and swore Ortiz, who had previously obtained his phone number, informed him, along with three others, including Maria Hernandez (Tuna), they would be recalled in 2 weeks, and, on another occasion, that the more senior employees, would be recalled first.

Januario spoke to employees on their layoff in November, and told them to call about openings starting in mid-January. He also told them if he had their phone numbers he would call them to return then when all of the production plans were completed for the new year and he had the material delivered and in stock.

At the end of the season in 1996, Januario conducted a test of the floor workers to determine their suitability for recall for the new season, for the bow making departments, before Belle would hire new employees. He recalled that a number of them, were either kept on or were recalled early in 1997, for the night shift. Januario claimed union consideration played no role in his choices. The test was to make a bow and the criterion would be its quality. Suarez was one of the employees who took the test and her quality was not up to Belle's standards. Januario denied that he knew of Suarez' union adherence, or that Wetcher told him later that Suarez was at the NLRB on the day of the election case conference. I do not credit Januario's denial here.

When the group including Suarez was laid off, he told them to leave their phone numbers and addresses so they could keep in touch, and to call Belle every week or 10 days to find out if there was anything open. He didn't recall if Suarez did that.

Januario denied that any employees were supplied with beepers, but was not asked about the roles of the mechanics and the Company's need to maintain the machines in good repair on a 24-hour basis in the absence of any mechanic on the premises.

Januario recalled in particular that after a fire occurred in 1995 a meeting was held of male supervisors and Polanco attended. The meeting was called on a Saturday morning so that the supervisors could communicate better with each other since some had been unaware of the fire which occurred on a Friday night. Why female supervisors were excluded was not explained. Polanco credibly denied attendance at any supervisory meetings and he was not cross-examined about this one. Januario made particular reference to no other supervisors' meeting attended by Polanco except for the one held on December 16. From the circumstances described, the presence of a mechanic to improve internal communication in an emergency if machines required replacement or major overhaul is a reasonable explanation for Polanco's attendance as a mechanic at this particular meeting. Januario provided no details.

While Januario claimed that Polanco selected the merrow machine operator to make a sample, because he knew who was the best operator, Polanco had previously acknowledged that Hidalgo followed his recommendation in such cases and that testimony has been credited. Such a recommendation, however, could have been made by a senior or more experienced or expert operator, or, in this case, by a mechanic most familiar with operations of the machines and the operators, without endowing that mechanic with an indicia of supervisory status. It is also apparent Hidalgo himself would have been aware of the relative skills of the relatively few merrow operators. Respondent's failure to call him as a witness is also reiterated here.

It was during Januario's cross-examination by counsel for the General Counsel that he clarified his earlier testimony to note that the 60 percent of the employees whose W-4 earnings forms were returned to the Company because of incorrect addresses involved the seasonal employees, not the core employees. With the core or permanent employees there was no such problem. He was generally sure of the accuracy of their addresses.

Januario also acknowledged that he would not know if Polanco had previously cleared the assignment of a merrow machine operator to another machine when he was repairing that operator's machine over an extended period of time. All he saw was Polanco making the assignment during a lengthy repair.

By December 16, according to Januario, Wetcher had made very clear that she was opposed to a union representing her workers.

As to health insurance, although it was an issue about which employees had expressed concern throughout 1996, prior to December, Wetcher had not held meetings with employees to find out what would be affordable to them.

Januario also acknowledged that after May or June 1996, when he ceased being in charge of payroll, he also ceased his activity of seeking to evaluate and arrange openings for superior seasonal employees on their layoffs in November and early December each year. His testing of seasonal employees in November 1996, and offers to a few of them to remain at that time when most were laid off was done in his capacity as supervisor of bow machines, night and day shifts, departments 17 and 18. After May or June 1996, supervisors of other departments would approach Manager Randall or owner Wetcher as to retaining or recalling early, seasonal employees scheduled for layoffs in their departments.

Januario was paid at the rate of \$8 an hour when he left Belle's employment in 1997. Unlike nonsupervisory employees, neither he nor other supervisors needed prior approval from the plant manager to work overtime for which they were paid at time and a half of their hourly rate. In contrast, as Polanco testified, without contradiction, he required prior approval from Hidalgo or the manager to work overtime hours.

Januario also explained that on the occasion when employees Nancy Barias failed to punch her timecard on the morning of February 20, 1996, there was a large crush of employees all seeking to punch in by 7:30 a.m. that morning. The prior day, February 19, 1996, was President's Day, on which the facility was closed. Januario had not completed setting all the new timecards in the rack at the end of the prior week for Tuesday, February 20, the first workday of the next week. As he normally did, when employees would have been late starting work, he agreed to sign employees in who were waiting on line. He did so for many who asked. But he did not see Barias and that was why he asked her

supervisor to sign and initial for her. After May or June 1996, other supervisors performed this signing function at the beginning of the work week. Yet, Respondent never produced any timecards, with the time handwritten and initialed by Polanco, other than the one received in evidence he initialed for Barias under the circumstances previously described.

During his redirect examination, by Respondent counsel, in spite of his earlier testimony acknowledging that he did not know if Polanco received prior approval from Hidalgo before assigning an operator to another, functioning swing machine, in response to a question directed to that subject, in words which called for a yes or no answer, *Januario* now responded that he observed Polanco several times assign an operator to a different machine without asking Hidalgo first. *Januario* failed to provide any particulars or basis for this apparent change in testimony, and it is not credited. (Compare Tr. 739 with Tr. 779.)

Maria Hernandez, known as *Tuna*, testified that she started working for Belle in the second week of September 1996. She was assigned to work on the floor on the 4 p.m. to 12:30 a.m. shift and was told what to do by *Julio Ortiz*. Sometime in November 1996, *Ricardo Januario* informed *Tuna* and other female floor workers numbering 10 to 15 in all that they would be checked. According to *Hernandez*, *Luz Suarez* was not in this group. Those that did a good job, would stay, and the rest would be laid off, because work was slow. While the work was being checked, *Tuna* was sent home for 2 days, and then at the end of November she received a call from *Ricardo* to come back, that she had done a good job. On her return and until just before Christmas, she worked on the floor, then, after some training, at the bow machine and on the spool machine. After New Year 1997, she returned to Belle in *Julio Ortiz*' department, working on ribbons making bows.

Tuna denied ever hearing *Wetcher* or *Ortiz* make any threats of discharge or layoff because of support for the Union. *Tuna* took a union authorization card probably from *Julia Santos*, union organizer outside the facility, never signed it, but lied to *Santos* that she had, and then gave it to a fellow worker to return to *Santos*. When *Tuna* misled *Santos* that she had signed the card she also gave her a false name, *Carmen*, when asked by *Santos* for her name and address.

Tuna described a visit by *Santos* to her residence during the union campaign. On this occasion, *Santos*, who had learned *Hernandez*' true name, asked her to give three cards to other female employees, one a Mexican girl, because they were afraid to take the cards in the street outside the facility. *Tuna* took them and agreed to give them to the intended employees, but never did so, instead, throwing them in the garbage. As to one authorization card, signed by a fellow female employee of Puerto Rican extraction, *Carmen Colon*, *Tuna* agreed to give it to the union organizer when she passed by her on the way to work. *Colon*'s card was signed on November 15, 1996. Before doing so, she showed the card to Supervisor *Ortiz*. According to *Hernandez*, she did this for fun. I find that explanation incredible, and I also find that Respondent knew of *Maria Hernandez*' antiunion hostility when she was asked to return to Belle at the end of November and has continued in employment thereafter. Earlier testimony described *Hernandez*' disclosure to *Ortiz* of organizing activities outside the factory around the end of November.

On her cross-examination, *Hernandez* confirmed her opposition to the Union and that she did not sign a union card. She also confirmed that as a floor worker she was assigned many

different jobs, while also receiving some training on the spooling machine. When work on the spooling machine has been slow, she has also been assigned to making bows by hand, taking ribbon, forming the bows, stapling them to cardboard, adding legs, and then boxing them. *Hernandez* also provided three or four names of other floor workers who had previously started with her in September 1997 who were hired back at the end of January 1997.

Hernandez claimed she learned the job for which she was hired in September 1996, was temporary, from the secretary who gave out the application. She did not learn this from *Julio Ortiz* until she asked him and he confirmed the nature of the job.

Julio Ortiz testified for Respondent that for almost 6 years he had been supervisor for Belle on the 4 p.m. to 12:30 a.m. shift, supervising all around the facility. The office closes around 5 p.m., but all the machines continue to operate on this shift.

Ortiz recalled that 3 years before, in the fall of 1994, *Reynaldo Polanco* had worked the same night shift, for maybe 7 months, as supervisor of the merrrow and sewing machines. *Ortiz* saw *Polanco* assign work to operators and check their work, but did not much see him speaking to the operators about problems with their work. This testimony differs from that of *Polanco*, who credibly testified that in the summer of 1993 he was asked to work at night, starting at 7 p.m. because of problems which arose at night on sewing machines and he remained on that shift for about a month, during which time each operator prepared a nightly report sheet which he did not review or sign. I do not credit the implication arising from *Ortiz*' limited testimony that what he saw in *Polanco*'s interaction with night operators supports Respondent's claim that even 3 or 4 years prior to the relevant period, *Polanco* at that time exercised authority as a statutory supervisor.

Ortiz, like *Januario*, placed *Polanco* as being present at supervisory meetings called by Belle. He saw *Polanco* only at a few of these meetings, in particular one which was held the day following a fire, at the old facility prior to Belle's move to the present one. I have previously discounted the significance of *Polanco*'s attendance at this one meeting, if, indeed, he did attend, and just as with *Januario*'s testimony, *Ortiz*' even more limited testimony on this point, similarly lacking specificity, is not credited. *Ortiz*, contrary to *Januario*, could not recall any meeting that *Wetcher* held (of employees or supervisors) on December 16, apparently even among night-shift workers. He learned of an election being held, but not from *Wetcher*.

Ortiz recalled *Suarez* as an employee working under him doing floor work, putting UPC labels on boxes and making boxes. She was among the 25 odd temporary workers assigned to floor work. He also knew *Melvin Acosta* as a temporary floor worker in the fall of 1996. He did not participate in her layoff but gave *Acosta* his layoff slip. His understanding was that the temporary workers were laid off by December 22, when the facility shut down to January.

When asked if *Suarez* signed a union card, he responded significantly, he "didn't see the card with her name" (Tr. 858), leaving open the implication that he saw the names of other card signers. He denied having any discussions with *Suarez* about whether she would be rehired by the Company. Significantly, *Ortiz* was not asked and did respond to *Suarez*' specific and detailed testimony relating his view of her superior work performance and her standing to receive preference on recall to Belle in the new year following her lay off, which, according to *Suarez* he expressed to her more than once. I am convinced that *Suarez* had these conver-

sations with him and that his failure to deal with the specifics of his relationship with her in his direct testimony represent a misleading and disingenuous response to Suarez' claim of discrimination. Similarly, in relating that he did not see Suarez at the factory after January 1, 1997, Ortiz was not asked about, and thus did not dispute Suarez' recital of her visit to the facility in December and, in particular, her telephone call to him on January 8, after Suarez had been made aware that new people were being hired, during which she requested work, and Ortiz informed her that there was no work for her but to call after January 16, the scheduled date of the election.

As to Acosta, Ortiz acknowledged seeing him outside the factory in January. On this occasion, Acosta had come with his brother. He informed Ortiz that he had found a job, working with his brother in the city and had not asked to be hired back. Ortiz congratulated him, and did not see Acosta again.

When he handed Acosta his layoff slip, he told him Belle had no work. Acosta agreed and said he was going to go to unemployment. Nothing further was said. Ortiz' version of this conversation is not credited in the face of Acosta's more detailed version of the events of December 16, including Ortiz' request for his "papers" and later layoff of Acosta along with three others, including Maria Hernandez, for a 2 week period.

Julio Ortiz did admit being shown Carmen Colon's union authorization card by Hernandez. In so testifying he confirmed Respondent's knowledge of Hernandez' antiunion activity. Ortiz denied having any conversations with either Suarez or Acosta about supporting the Union.

During his cross-examination, Ortiz acknowledged that he had not worked with Polanco again after Polanco had been on the night shift 3 years ago. In a clarification, Ortiz noted that Polanco had only worked the night shift, from 12:30 to 7 a.m., for 3 months.

Ortiz testified it was not until 3 weeks before the election held on March 6, 1997 that Wetcher first spoke with him about the Union. Apparently prior to that date no one advised him what to say or not about the Union.

Ortiz also explained that on Acosta's last visit to the facility with his brother on January 7, 1997, he arrived at around 6:30 or 6:40 p.m., rang the bell, and Ortiz opened the locked door to talk to him. After telling him about his new job, and stating he was making good money, Acosta started talking about his family and his small child. He also sometimes did this when he was employed. They had worked together and had become friends at the facility. During this conversation, Acosta also told him the job was on 28th Street, that he was working with his brother, and that he was doing maintenance or something like that, starting work there the same night.

Although one or two employees are asked to stay on during the period of inventory when the facility closes at the end of the year over Christmas and New Year, Ortiz, did not select them, rather, the plant manager did. But he agreed that Acosta was a pretty good worker. Ortiz also denied that he was at the plant or that he spoke to any employee who may have called the facility to speak with him about coming back to work.

According to Ortiz, Suarez was laid off the same day as Acosta, on December 21 or 22, along with more than 20 other employees. Ortiz' recollection here is clearly in error.

Although he had heard rumors from employees about the Union trying to get inside, maybe 3 weeks before the election, he never replied to them. Neither did he ask any fellow supervisors about the Union.

Now, on redirect examination by Respondent counsel, Ortiz for the first time testified he had attended meetings held in December 1996, when Respondent counsel was present with supervisors. This contrasts with his earlier lack of recall on his attendance. He also knew the election had originally been scheduled to be held in January.

Acosta retook the witness stand as a rebuttal witness for the General Counsel, and reaffirmed that on January 7, 1997, between 1 and 4 p.m. he asked Ortiz when the Company would be calling him back to work. Ortiz told him the Company wasn't going to call him back yet, but would after the election was over. Acosta could not recall whether this conversation was in person or by phone, but he had earlier testified that he had called Ortiz on January 2, but had visited the facility on January 7 to ask Ortiz for work and was told he would be called back after the union election. I find Acosta's earlier testimony to be most accurate.

Acosta went on that he did not go to the facility accompanied by a brother. He has four brothers. One brother works in Manhattan, as an organizer for UNITE, the International Union involved in this proceeding. The UNITE office is located on 40th Street between 7th and 8th Avenues in the Borough of Manhattan, New York City. It will be recalled that in Acosta's earlier testimony he had described his visit to the facility in early February 1997, at which time Ortiz informed him the Company would not call him back because he had signed a union card, and he observed Tuna and some new employees performing floor work.

During his cross-examination, Acosta said he had started a job on or about March 25, 1997, at a printing house in Long Island City, city of New York, and had not worked before then. He had not applied for or received unemployment insurance benefits because his work history for Belle, for approximately 3 months, failed to qualify him for benefits.

He did tell Ortiz outside the factory he had gotten a job after he started work in March 1997. Acosta also again described another, earlier visit to the facility in either late January or early February 1997, to inquire about work when Ortiz told him there wasn't any work. While on this occasion Acosta now denied Ortiz said anything else, I attribute Acosta's response here to a failure to recall his earlier, more detailed and graphic testimony, during counsel for the General Counsel's presentation of her case-in-chief, and not to a deliberate attempt to reject his earlier recital. I am persuaded that under the circumstances, in which Acosta was recalled as a rebuttal witness for the narrow purpose of confronting Ortiz' description of his alleged waiver of reinstatement through a disclosure of a new job in early January 1997, Acosta was not focused on his earlier, unrelated direct testimony. Neither, on the occasion of Acosta's cross-examination during his appearance as a rebuttal witness, was he confronted with his earlier claimed testimony describing Ortiz' reliance on his union affiliation as grounds for denying him reinstatement or reemployment. The hearer of the facts was thus denied an opportunity to weigh Acosta's response and, accordingly is compelled to rely on other factors in determining Acosta's credibility, which is now affirmed.

I find that Ortiz seized on Acosta's March visit to the facility to inform him of his new job to create the fiction of an early January visit during which Acosta would have supposedly waived any claim to reinstatement. It is evident from Acosta's own more credible account that he had no job in January, and, indeed, continued to seek employment with Belle as late as early February 1997. Acosta's failure to relate, again, during

his rebuttal testimony, Ortiz' rejection of his renewed application for reemployment now on the grounds of his union activity, while troubling, fails to outweigh the sum of his earlier, full account of his work relationship with Ortiz, Ortiz' high opinion of his work and offer to retain him for inventory over the holiday closing, and then Ortiz' continued rejection of his application following the Union's election loss, without any rational basis, given Belle's employment of new employees ahead of Acosta. I credit Acosta's earlier, narrative account of his continued application to return to Belle and Ortiz' final rejection of him on the basis of his known union card signing. There is no question that Wetcher retained for the day a list of all employee, card signers that Union Agent Lombardo had left with her on December 5.

Sandra Luna testified for Respondent that she had been Wetcher's assistant and secretary since September 1994. She handles payroll, production bills, answers the phone, and deals with employees' problems. She also give out applications to prospective employees. She has generally informed applicants that October is the heaviest time, and when Belle usually hires. Luna later amended this to include September as a time of heavy hiring. If asked whether the job is permanent she says no, it usually runs for a couple of months. When employees are to be laid off, an effort is made to locate jobs in other departments and arrange transfers. A few who are laid off keep in touch at Belle's suggestion for later rehire.

Luna recalled attending an employees' meeting held on December 16, 1996, when Wetcher returned from the Labor Board. Wetcher took one portion of the workforce that could fit into the cafeteria—about 40—and she translated into Spanish Wetcher's remarks. Ricardo was not present. She, Luna, did not attend any meetings at which Ricardo translated. On this occasion Wetcher said she had just come from Court, and there was going to be an election. She had to hand in the list of names and addresses of employees. And she would like to give them proof of address, so she could verify the addresses. When employees asked what proof, she said, "[Y]ou can bring in your Con Ed [utility] bill, your telephone bill, even an envelope you received, anything that has your address on it."

Luna knew a few employees moved but without informing Belle of their change of address. Luna denied Wetcher asked for immigration papers or green cards. Neither was Luna aware of Wetcher asking employees on December 16 or 17 whether they supported the Union. Neither did she ever hear Wetcher tell employees during December 1996, that she would close the plant if they supported the Union.

It was Luna's testimony that Suarez never came in January, February, or March 1997, for rehire and neither did Acosta. But Suarez had personal and later telephone contact with Ortiz, and Acosta called and saw Ortiz into February 1997. And Luna was not aware if laid-off employees went into the factory to seek a return to work, rather than approaching Luna or the receptionist. The overwhelming weight of the evidence is that the Supervisors Ortiz and Januario asked laid-off workers to keep in contact with them, and asked employees to leave their telephone numbers for possible recall. In none of these interchanges did these supervisors ever suggest contacts with Wetcher, her assistant Luna, or even the receptionist, although Acosta did approach a receptionist on at least one occasion.

Luna explained that when Wetcher tells her she needs a certain number of new employees, she, Luna, will contact applicants, take necessary information and hire them. After she

leaves work at 4 p.m. the receptionist will receive applicants, call them to come in, and place them on the payroll. She did this with Suarez and Acosta.

In contrast to Januario, who denied there was any problem with maintenance of proper addresses for permanent employees, Luna claimed a problem with current up-to-date address for them. Luna first claimed "a few of them moved, but they never change the address" (Tr. 817). Later, on cross-examination, Luna described the problem as involving "a lot of employees" (Tr. 831). Luna's later conflicting testimony here is not credited.

Initially, Luna recalled rather firmly that Suarez was laid off in mid-December. Later, after reviewing the Automatic Data Processing, Inc. (ADP) master control report which is prepared on the basis of information from timecards supplied to it by Belle, Luna changed her testimony to conclude that Suarez was hired on September 23, 1996, and laid off on November 15, 1996, contrary to the date of December 5, 1996, alleged in the complaint. Luna entered the date into the computer, inputting the information which formed the basis for ADP's weekly payroll reports back to Belle for the dates in question. The layoff date for Melvin Acosta, appearing on the ADP payroll reports, is December 13, 1996. Counsel for the General Counsel chose not to change the date of Suarez' layoff alleged in the complaint in the light of the ADP records. This date, however, is not the date of the alleged discrimination against Suarez. In the case of both Suarez and Acosta what is alleged as the discriminatory act is the failure to recall, or offer to recall them since the date of their layoffs. In the case of Acosta, his testimony regarding the events which took place at the facility on Monday, December 16, 1996, is credited. Accordingly, the ADP record of his layoff on December 13 is not credited as the actual date of layoff, although it may be the last pay date listed. In the case of Suarez there is a disparity of 14 workdays between the ADP record and Suarez' recollection, and I find her recollection of the date of her layoff to be in error, and that the November 15, 1996 date to be the more reliable. It will be recalled that Suarez' recollection of her last visit to the facility changed significantly over the course of her testimony, without, however, in my judgment, undermining her credibility as a witness in the salient features of her testimony.

Finally, Beatrice Wetcher, president and sole owner of Belle, testified for Respondent. In May or June 1995, she started working with her father-in-law, who was then president and owner of Belle. On January 1, 1996, she succeeded him in these positions. By the end of the year 1995, Belle had completed a move of its facility from another location in Brooklyn, New York to its present location, also in Brooklyn. While 80 percent of its business is bows and ribbons for Christmas trade, 20 percent is production of similar items for other holidays. Wetcher described how Belle produces for a single client, Variety Accessories, Inc. which finances its operation and distributes its product under what she describes as a jobber and contractor relationship. The owner of Variety is Rafael Etzion. In addition to Belle, Variety employs another jobber (or manufacturer) in Guatemala. Previously, Variety had its own plant in Haiti.

In 1996, Variety, which maintains an office in Great Neck, New York, and a warehouse in New Jersey, to which the Belle produced products are shipped, had a studio department with three employees at Belle's facility where they create the bows, and the designs and patterns for the fabric. As earlier noted, Variety also maintains a plant manager and assistant at Belle's facility, described by Wetcher as liaison between Variety and Belle on timely

delivery of materials. Testimony previously reviewed, describes a much more significant role for the manager, Bill Randall, in the management and day-to-day operation of Belle's facility and in dealing with employees as to union-related issues, particularly in the absence of Wetcher from the facility.

Wetcher described approximately 20 separate departments, employing from 3 to between 100 and 200 employees, depending upon the time of year. The floor people, in departments 13 and 14 described as re-work, who fix bows, affix UPC labels, check quality, and perform other miscellaneous tasks, and where Suarez and Acosta were employed, fluctuates in size during the year between 5 and 50 to 60, on the day shift (13) and between 1 and 15 on the night shift (14). Wetcher describes the merrow/sewing department 2 as providing finishing touches and decorations on ribbons and other materials, some containing two or three combinations of colors, and employing four or five women, and the slitting department 3 where large master roles of material are cut or slit into small sizes for further processing in other departments, and employing four to five employees, both on a single day shift. Wetcher spoke of a night shift, for merrow operators but did not specify a department number for it, and, as earlier noted, Polanco did not work nights.

Wetcher described Reynaldo Polanco as the supervisor of the merrow department. She also described Mike Persaud as a supervisor in charge of all of the machines. As Wetcher described it, Polanco was an expert on the sewing machines and the women operators had been working with him for years. Polanco knew which machine was best for particular material, whether cotton, velvet, silk, or plastic, and which operator worked faster on a particular fabric. It was Polanco's job to get the order and to make sure it was done as quickly as possible. Wetcher had a personal involvement and concern when mistakes in stitching were made on expensive materials and on these occasions, sought an explanation from Polanco. Although Wetcher disclaimed interest in learning which employees performed individual jobs, when sewing mistakes were made on materials, Wetcher would not suspend or fire the operator, but she was aware that Polanco reassigned operators as punishment to complicated sewing of materials of multiple colors, such as creating American flag bows.

The merrow department had 10 to 15 machines. When an order could not be finished timely, Polanco would make certain operators work overtime or bring them in on Saturday or even Sunday, during August, as deadlines for delivery of finished products grew nearer.

Wetcher denied that Polanco needed Raphael Hidalgo's approval for working overtime, assigning overtime during the week or on weekends. This was especially so, when only merrow operations worked overtime and the slitting workers did not.

When asked about Polanco's responsibilities with regard to checking work and maintaining order in his department, Wetcher noted all supervisors have these responsibilities, with Polanco having the added one of making sure the sewing machines are cleaned and functioning perfectly for his own shift and in preparation for the night-shift operation. Wetcher did not distinguish this duty as usual to a mechanic in relation to the machinery or equipment under his control, that had only indirect relation to direction of employees. It will be recalled that with respect to those operator assignments and reassignments which his machine responsibilities made necessary, Polanco previously testified at length to the degree to which he was required to clear all such operator related dealings with superior Hidalgo. In this connec-

tion I deem Wetcher's conclusionary testimony relating to Polanco's independence from Hidalgo's supervisory authority and control as unpersuasive and lacking in specificity when the detailed testimony in this area supplied by Polanco remained untested and un rebutted by Hidalgo who, as previously noted, was not produced as a Respondent witness.

Wetcher acknowledged that she did not get involved in employee tardiness or absences, but claimed Polanco personally approved late arrivals or absences occasioned, for example, by visits to a doctor, but without producing any written proof of the exercise of this authority. As to vacations, while Polanco submitted employee requests for such leave (in all events, unpaid), it was either herself or her assistant who approved or disapproved them. In making such decisions, Wetcher sought Polanco's input as to the production needs of the department before making her decision.

Wetcher described two instances, when Polanco referred to himself as a supervisor, one in 1995 when he was approached by an organizer for another union outside the facility, in the presence of his wife, Janet Contello, supervisor of sample department, and Wetcher. The other occasion appeared to involve some bantering and the union incident involved an avoidance by Polanco of union involvement in the presence of the owner. I do not consider either significant or particularly relevant to the central issue of Polanco's work status.

At her exit interview with Polanco on December 17, when he disputed getting involved with the Union, Wetcher responded, "[Y]ou can't tell me that because I just had a meeting and you made a comment about the Union during the meeting. You were wearing a Union insignia or a hat, something with UNITE on it." She couldn't have a supervisor sending the wrong message to the employees, she needed a supervisor to explain to them why she was against the Union, and she couldn't imagine anybody wearing a UNITE T-shirt doing that. Although she agreed his work was excellent, and it was a difficult choice to make, it was not a good idea to have somebody who at least seems to be for the Union representing her interest.

Wetcher also attributed remarks to Polanco in which he acknowledged that as a supervisor he would not be allowed to vote in the election. I do not credit this testimony.

Wetcher noted that all of her employees recommend other people for employment and she tends to hire such people, after talking to them and determining where they can be fitted in. When supervisors recommend people she usually hires without really questioning or investigating because she trusts their recommendations. Although Wetcher noted half his family works for her, and she hired people he recommended, the record is unclear as to which family members, if any, Polanco recommended.

All Belle employees are paid hourly or by the piece, except for Wetcher herself, Maria Wada, supervisor of department 1, which hand makes bows, Enrique Solis, supervisor of department 8, the warehouse, and Ronaldo Perez, supervisor of department 10, shipping and receiving. While all other supervisors punch timecards, they don't need prior approval for overtime. It will be recalled that Polanco testified credibly that he did need and received such prior approval.

Wetcher claimed Juan Hidalgo was supervisor of only the slitting department 3, days and Polanco supervisor of merrow/sewing department 2. In 1995, Hidalgo was paid \$8 an hour after receiving a 25-cent increase, while Polanco was paid \$7.30 an hour after receiving a 50-cent increase. In 1996, Hidalgo was paid \$8.75 an hour, after receiving a 75-cent in-

crease, and Polanco was paid \$8 an hour after receiving a 70-cent increase. In 1995, Hidalgo was listed as being in department 3, in 1996 in department 99, set aside for supervisors. Polanco was in department 2 in 1995 and department 99 in 1996. As to annual bonuses, Hidalgo received \$250. In 1995 and \$400 in 1996. Polanco received \$300 in each of 1995 and 1996. His 1996 bonus was received a week before his discharge. This comparison is inconclusive but does show a lower salary by 75-cent-an-hour and lower annual bonus by \$100. for Polanco during the relevant period covered by this proceeding. And Polanco only received as much as \$8 an hour by virtue of an extraordinary large (for him) wage increase of 70 cents an hour, in July 1996, the circumstances surrounding which he has previously described, in a private discussion following a meeting called by Manager Randall at which he solicited employee complaints and Polanco had expressed support for the Union.

Of some additional significance here is the fact that in 1996, Michael (Mahendra) Persuad, Belle's mechanic, was paid \$16 an hour and received \$600 in bonus. Against these figures, Polanco's wage rate, half that of Persuad, shows an employee whose value as mechanic or even a highly experienced leader in the sewing department places him well above the hourly wages rates received by merrrow operators, by at least \$2 an hour above the highest paid merrrow operator, but which is at the lowest rate paid supervisors listed in department 99, with Hidalgo 75 cents an hour above him, as well Julio Ortiz, \$1.15 an hour above him, at \$9.25 per hour. It is well to note that but for Polanco's known union support, his hourly rate by December 1996 would have remained in the mid \$7 range.

Wetcher related the events early in the morning of December 5, 1996, when Union Agents Lombardo and Acevedo presented her with a bargaining demand and exhibited union authorization cards to her. Wetcher described the documents Lombardo pulled from his briefcase as quite a stack of cards, 2 by 2 on each page. She went through them like leafing through a deck of cards. Lombardo also took out another document, saying he had a contract here he would like to discuss. Wetcher told him she was sorry, she would not talk to him and wouldn't be discussing any contract today. If he was interested in organizing her Company, he would have to take her to the NLRB and get an election date. When Lombardo said that wasn't necessary, he had more than 52 percent, she replied she wouldn't take his word for it, and he would have to get the NLRB to tell her to have an election. At this point, Lombardo put back the document in his briefcase, took his coat and left. After he left, Wetcher realized he had left the cards on her desk. That day she took them back home with her and put them in the garbage room on her floor in her building, thereby disposing of them. Wetcher did not want to know who signed the cards and who didn't sign them. She didn't want to start a witch hunt in her factory. I credit Lombardo here that Wetcher commented in his presence about certain employees she did and did not recognize among the card signers as she flipped the pages.

During her only prior experience with the NLRB, she had accompanied her father-in-law to the Board's Regional Office at Region 29, sometime in 1995, when another union had filed a petition for an election, but without presenting cards to Belle. After an apparent private examination of the showing of interest against payroll, by the Board agent, he returned and told Wetcher and her father the petition had been withdrawn.

Wetcher denied that she looked through the cards to see what the names were; she has since looked at some of the cards

which were offered and received in evidence earlier in the trial. After discussing the matter with her father-in-law later the same day, Wetcher contacted her usual lawyer who recommended her present counsel who was retained, she believes, that day. Wetcher placed Luz Suarez, along with three current employees, among individuals who attended the December 16 Regional election conference. The employees were Dilcia Ramirez, Cesare Romero, and Bernarda Hernandez. In her presence the attending Board Attorney Sharon Chau or a union attorney consulted openly with Suarez to confirm the number of employees in the re-work department. An election was agreed on to be held on January 16, 1997.

On her return to the facility at noontime, Wetcher called all her supervisors into the conference room. She did not place Reynaldo Polanco at this meeting, contrary to the discredited testimony of Januario. She told them she had just gone to the NLRB, there was a union trying to organize the shop and obviously they had enough signatures to warrant an election in a month. She wanted them to get all their employees in the lunchroom. Because of the limited size of the room Wetcher met with departments in turn. As soon as she mentioned the Board agent asking her to make a list of all the people, and with their correct addresses, employees became upset and asked questions as to what information would be acceptable. Mention was made of telephone bills, paystubs, or mail addressed to and received by the employee.

In justification for seeking proof of residence, Wetcher declared that addresses on file were incorrect, and, in conflict with her own supervisor Januario, stated she had "an incredible amount of W-4 back every year." (Tr. 842.) It was Wetcher's own idea to get proof of addresses. She explained that Board Attorney Chau had asked for names and addresses of all people that were there the week before. By the second week of December, it is apparent that very few seasonal employees were still on the payroll. It is also clear that the eligible unit she had just agreed to for election purposes, excluded seasonal employees, which was limited to all full-time and regular part-time production, maintenance, and shipping and receiving employees.

Wetcher continued to hold those other meeting with groups of employees on December 16, the last held for nightshift employees. Polanco only attended the meeting which included his department. When asked at one meeting, whether a green card was acceptable as a document to establish the address, Wetcher said no, it had no address on it.

Wetcher could not recall any meeting she may have held with employees on December 17. On December 18, Respondent counsel Jerrold Goldberg addressed supervisors and Wetcher about the legal parameters of preelection conduct. The facility was closing on Friday, December 20 to early January. As Board Attorney Chau had sought the *Excelsior* list to be forwarded before the closing, Wetcher informed employees who approached her about turning in their identification papers on the 20th that it was too late, but she took no disciplinary action against them.

Wetcher, denied discussing their union membership activities with any employees, except for Polanco when she fired him. She denied directing any employees not to wear union T-shirts which she acknowledged were being worn by employees in the week in which the representation election agreement was signed. Wetcher was not asked, so did not specifically deny, Polanco's attribution of comments critical of wearing union

insignia. She acknowledged, however, joking with employees that it wasn't fair they didn't bring her a union T-shirt.

On either Thursday or Friday, December 19 or 20, she met again with groups of employees over the day to inform them that they could discuss the Union on their breaks, including lunchbreak, but she would not tolerate any union propaganda during work hours. When employees asked why she was against the Union, Wetcher now testified, incredibly, and contrary to her remarks to Polanco during his exit interview when she informed him she could not countenance a prounion position, that she told the employees at these meetings that she "was neither for or against." (Tr. 950.) She added, however, reverting to her true antiunion position, that she told them the idea of paying \$5 or \$10 [a] week in dues, to wind up getting what they already were getting was ridiculous. This admission is consistent with employee Ventura's sworn statements describing Wetcher's statements made at employee meetings during this period. Wetcher's unpersuasive and, indeed, incredible testimony denying her hostility to union organization of her work force, as well as Polanco's for more credible account of Wetcher's statements made in discussions with him and to employees at meetings conducted in his presence, lead me to credit Polanco wherever their testimony conflicts. In particular, I note here Polanco's testimony at his exit interview when Wetcher told him she didn't want him telling union people she had asked employees for immigration papers.

As for employee complaints, while Wetcher heard employees voice workplace complaints in December and January, and, indeed, appeared to encourage their being voiced during the union campaign, by taking notes and by explaining frankly that she would answer whatever questions they had at the meetings she called, she said she could not grant any benefits while the campaign was going on. I find that both Randall, earlier, and during the December to January period, Wetcher, encouraged employees to present their grievances and complaints and promised to resolve them. The starkest evidence of this, but not the only evidence, is in the area of health insurance, where employees voiced dissatisfaction with the lack of any health coverage and where Wetcher encouraged employee belief in Belle's desire to provide such coverage provided it was within Respondent's and the employees' financial means. While Wetcher may have privately decided to await the outcome of the election, she did not so inform the employees, but, rather, for example, when an employee admittedly had announced at a December or January meeting that providing health insurance would determine employee sentiment toward union representation, she responded that she "will try to do something to make you happy." This comment, attributed to Wetcher by Polanco, is credited. Wetcher's testimony that she responded "that had nothing to do with it" (Tr. 957) is not credited.

Wetcher also explained how the issue of plant closing come up during a January meeting held before the date of the originally scheduled election. Employees asked what would happen in the case of a strike. Wetcher replied she couldn't talk about that because for the moment there was no union. She also said she would never close the plant as long as her father-in-law was alive. Wetcher explained that when employees then asked about the consequences of a strike, one employee noted that Rafael having this factory in Guatemala would probably take all the work and send it to Guatemala. Wetcher testified her response was she couldn't tell what Rafael Etzion would do. All she could tell them was, as long as she was in charge, she

would do everything necessary to keep the factory open. The answer would, of course, have been completely unsatisfactory to the employees, who knew that Variety's decision about continued support for the jobber, whose financial and operational well being was completely dependent upon it, was crucial to Belle's continued existence. They also knew that Variety had a plant in Guatemala. Thus, Wetcher's refusal to provide any positive response to their question about Variety's intention was, in effect, tantamount to a veiled threat to close and to relocate its operation. Without a promise or assurance of Variety's continued necessary backing of its business, Wetcher's promise to continue operations was a hollow and deceptive promise at best. I find that Wetcher went further than her admission, and contrary to her denial of any threat to close, did, in accordance with Charles Ventura sworn affidavit received in evidence, threaten employees with a plant closure and a move by Rafael of Belle's operation to Guatemala if the employees continued to support the Union and brought it into the facility.

Wetcher testified also about the seasonal nature of her business. While Belle works all year round, from January to April are usually very slow months. May and June workers start to pick up, by July and August they are in full production, and in September and October they are working full tilt to meet a November 10 delivery for all of the goods for Christmas. November 1 to 15 is the time of the last delivery dates to stores. Other testimony established that Belle delivers its products to Variety's New Jersey warehouse.

According to Wetcher, approximately 5 to 10 percent of seasonal floor workers employed in departments 13 and 14 in 1995 and 1996 were rehired the following year. As Wetcher explained, if she knew employees from the year before, she was going to hire them rather than somebody she had never seen before. These rehired employees had asked for jobs and she needed extra hands in that department. It should also be recalled that, as Januario testified, and, for example, in the case of Maria Hernandez, slots were also found for seasonal employees to remain employed after November 15 or to be trained for, and reassigned to, other departments.

Usually, however, according to Wetcher rehires of floor workers in January or February are few, maybe one or two. This testimony appears to conflict with Wetcher's previous estimate of 5- to 10-percent rehires of seasonal floor workers and is not credited.

Wetcher knew Luz Suarez as a general helper who worked from September to November and was then laid off with a group of 40 or 50 women the same day. Suarez, whose testimony is credited, testified she was laid off with a group of eight employees on the date of her layoff. She did not know if Suarez was supporting the Union then. When asked if she was aware of Suarez' attempts to become reemployed, Wetcher denied any personal knowledge and claimed no supervisor or secretary or receptionist advised her of Suarez' interest. She did not direct any supervisor or manager of Belle not to recall her because of union activities and was unaware of any supervisor or manager telling Suarez this. She also denied showing any of the cards Lombardo had left with her to any supervisors or managers or informing them of the names of people who had signed cards. In fact, an employee she rehired in 1997, Luis Ramirez, told her after his rehire, that he had signed a union card.

At one meeting Wetcher had called of employees during the union campaign, a female employee had asked if there was a black list. Later, she asked that employee's supervisor what the

employee meant. The supervisor said she had been told that Wetcher had a list of everybody who signed in the Union. Wetcher told the supervisor, "[Y]ou can tell her that such a list does not exist." Whether Wetcher's response was true is open to serious question. There is no question that Wetcher had such a list on the morning of December 5, 1996, when Lombardo and Acevedo left her office. I have previously discredited Ortiz as a witness, in partial reliance on his devious and disparaging attempt to portray Acosta as a laid-off employee who gave up on any attempt to procure a return to Belle's employment early in January, and in reliance as well on his failure to acknowledge his strong encouragement of both Suarez' and Acosta's return to work after the holiday closing, and in the case of Acosta, during the closing while inventory was taken. Acosta's testimony attributing to Ortiz knowledge of Acosta's union card signing can only be based upon knowledge Ortiz received from Wetcher. That Ortiz refers to a letter he read in the office and not to a list of names affixed to union cards is inconsequential. What is significant is that Ortiz saw his name, and, of equal significance, that contrary to Wetcher's denial, she retained knowledge of that list and sought to use it against certain employees, even if, which I did not credit, she destroyed the list itself later on December 5. I am not persuaded that the female employee who related to her supervisor her knowledge of Wetcher's retention of a list of union card signers would have received this information from Lombardo. The employee's fear of a blacklist would far more likely have emanated from a supervisor such as Januario or Randall, who were motivated by an effort to limit employee union participation and blunt its organizing drive.

By virtue of these credibility resolutions, I also find that, contrary to Wetcher's denial, she knew Suarez had signed a union card on December 5, 1996. It is noteworthy that when Wetcher denied knowledge that Suarez had signed a card even by January or February 1997, she had to be reminded that Suarez appeared at the representation case conference on behalf of the Union on December 16, 1996. (Tr. 988.) I also find, contrary to Wetcher's denial, that she knew Melvin Acosta had signed a card and otherwise supported the Union before his layoff on December 16. At no time did Wetcher address Ortiz' offer to retain Acosta on the payroll during the shutdown or his promise to bring back Acosta, along with Luis Ramirez and Maria Hernandez within 2 weeks. Hernandez, a known antiunion adherent, and Luis Ramirez, who by admitting his union card signing to Wetcher evidenced a confidence that any earlier union support would be overlooked because of a change of heart, were both brought back to work early in 1997. Acosta was never recalled, before he obtained alternate employment at the end of March.

During Wetcher's testimony on behalf of Respondent, a document was offered and introduced in evidence detailing the names of various employees previously laid off, who were recalled to work in early 1997, along with the names of other employees who were newly hired in this period. As to those employees who were recalled, Wetcher testified that she relied on her supervisors to tell her of a need for additional employees and "then we would recall somebody that, you know, was laid off. Or somebody had been on a leave of absence, and have come back to work and get back their job." (Tr. 990.) Wetcher noted that she also needed the same amount of new hires and directed Sandra Luna or the receptionist to contact applicants, mostly for bow making. It was her intention not to recall any of those employees tested on bow making in November 1996

who were not then retained. Clearly, Luz Suarez, had not been informed she was not eligible for recall at the time of her layoff and her credited testimony shows that her supervisor, Ortiz, considered her a superior worker with skills and aptitude warranting recall. Clearly, also, without the support of the owner, Ortiz was not going to hire her back and because of Suarez' known union activity that support was lacking. It will be recalled that only during their last conversation did Ortiz for the first time inform Suarez when confronted with her claim of both others being recalled and new employees being hired, that the matter of her return was out of his hands.

In spite of Ortiz' advice to both Suarez and Acosta that there was no available work for them, Respondent hired as least 22 new employees between December 30, 1996, and February 6, 1997, at least 10 as bow makers, second shift, where employees do not make bows or operate bow machines, but rather attach "legs" to premade bows, 3 as spooling operators, and 5 for shipping or warehouse. Thus, even if Suarez, but not Acosta, was ineligible for recall as a bow machine operator, for which job four were rehired in this period, Suarez was available for these other jobs for which she was certainly eligible, had some limited experience and met minimum skill levels. Yet, neither was considered for, or offered, these jobs ahead of new hires, and in spite of Wetcher's claim to favor experienced seasonal workers over new ones.

Belle also recalled 12 noncard signers between January and February 18, 1997, as bow makers, cutter, spooling operator, and in quality control, without offering Suarez or Acosta the opportunity for such recall.

Wetcher contradicted both Januario and Maria Hernandez when she denied that Hernandez had been tested in November 1996, in bow making. Wetcher acknowledged that in that month Hernandez was switched to the spooling machine, but that until January 1997, or even later Hernandez was retained in the general working area. Why Hernandez was not laid off and was retained as a general floor worker doing general odds and ends around the factory, without having been subject to testing during a period during which almost all seasonal employees were laid off, was not explained by Wetcher. The most reasonable explanation, and the one which I infer from the weight of the evidence is that Wetcher learned fairly early in the union campaign that Hernandez could be counted on to oppose the Union, refrain from signing a card, or assisting its organizers, and disclose to her knowledge of organizing activities. It is evident that Hernandez was not the only such employee, but the facts surrounding her retention show the rewards available to employees who were prepared to emulate her, including Luis Ramirez.

During her cross-examination, Wetcher confirmed that the merrow department had 10 to 15 sewing machines, among the four to five operators. Each operator can handle three to four machines at a time, and they basically use the same machine everyday. Usually, when they come in the morning they'll go to the machine that they usually work on. All of the machines are not the same type and each performs the same functions, although some are newer than others. There is also a night shift for merrow operators. Work not completed at night is left next to the machine when the operator on that machine comes to work in the morning and the day operator picks up from where the night operator left off. Merrow operators are paid by the piece. The only repairs they are authorized to make on their own are to replace broken needles.

Wetcher testified that in Mike Persuad's absence, when a machine, such as a spooling machine broke down, it was not repaired by anyone else, such as Reynaldo Polanco, during Polanco's employment. Such testimony appears to contradict not only Polanco's but Januario's testimony, and is not believable, given Polanco's long standing functioning and expertise in Belle's operation and the uninterrupted production needs of Respondent.

Wetcher also testified on union cross-examination that if the need arose, Belle supervisors gave out warning notices to employees. Also, from time to time, supervisors provide evaluations of the employees under them, which include such matters as weighing employee reliability or tardiness. Supervisors also submit production reports, for example, in the bow machine department, listing by name, the production by style produced in that department by each employee for a given day. Yet, Wetcher acknowledged, Polanco had not ever evaluated any employee and she had no such evaluations in the office. Neither could she recall Polanco making any verbal reports to her concerning the work performance of merrow operations. Neither had Polanco ever submitted to her a warning about an employee. Polanco had submitted to her office, every morning, production reports, based on information written down and supplied to him by the operators, of the quantity of rolls of materials which were sewn and finished, and the styles of each such roll of materials the prior day, as these reports from the basis of their payment by the piece.

As to overtime assignments, while Wetcher acknowledged that the supervisors signed off on timecards when employees worked overtime, she initially could not answer whether Belle had in its possession any timecards initialed or signed off on by Polanco other than the one card of employee Nancy Barias. And later she agreed Belle had no such timecards. It is clear that the only such timecard in its possession and which it introduced was that of Barias. And that card did not deal with authorizing overtime, but, rather, with signing in one day on the morning shift.

Wetcher also commented that although she was familiar somewhat with unions previously and based on her experience with the abortive union effort to organize Belle in 1995, she was still unaware of the legal parameters of comments she could make to employees on December 16, when she addressed them that afternoon after returning from the Labor Board. It will be recalled that Wetcher had been accompanied by Respondent counsel when she attended the Board conference that morning and also testified she retained labor counsel on December 5 after the Union's demand for recognition that morning.

Wetcher disclosed that early in January 1997 Belle was employing 150 to 170 workers. Her regular work force varied between 100 and 170 employees, while seasonal employees laid off in November exceeded 100. One date that month, Wetcher let go 60 employees. As previously noted, the laid-off seasonal employees were not included in the *Excelsior* list supplied to Regional 29 of the Board as they had no expectation of recall. Nonetheless, some of the laid-off seasonal employees were recalled early in the new year in 1997.

Respondent offered a final witness to testify to Polanco's alleged supervisory status. Wanda Pechardo had previously worked for Belle in 1993. At that time, from April or May to August 1993, when Polanco changed shifts, she had operated merrow and Singer sewing machines on the shift from 7 p.m. to 7 a.m. under Polanco. She described her supervisor as being

Polanco. The then-manager, Pat Park, who worked in the office informed her that Polanco, who had come into the office and helped her fill out her application, was her supervisor. Polanco and the girls, the other machine operators, showed her what to do. Polanco also gave them their work at the beginning of the shift. It was always the same work, but if she had any questions, Reynaldo answered them for her. Reynaldo also picked up the operators' timecards.

Pechardo explained that unlike the Singer machine, which does sewing on the fabric alone, the merrow machine also sewed the corners or the edges of the fabric. At that time, in 1993 she operated the singer machine every night, and the merrow, one or two times a week. Polanco was already on duty when she arrived at work, and sometimes left work with the night operators who numbered four. He was in charge of closing the factory or turning over the factory to the day-shift personnel. If the operators had to leave early, before the end of their shift, Polanco locked up the plant.

Pechardo knew her assignments, the material she worked on was generally sitting by her machine, put there by Polanco, and it was always more or less the same type of work that she had to do, whether it was on the Singer or merrow machine.

Pechardo testified with the aid of a Spanish interpreter. During her cross-examination by union counsel, Pechardo was referred to an affidavit she had provided to Respondent counsel a month before her appearance as a witness on December 13, 1997. The English translation of her affidavit, taken in Spanish states, in part, "The first week I was hired, I was introduced by the manager Pat to my supervisor, Reynaldo Polanco. Polanco was the person who would be my supervisor." Now, during her testimony during union cross-examination of her, she stated as she had in her affidavit that in the office, Polanco helped her fill out her application. But, she now noted that, it was later that same week (after she was hired) Park introduced Reynaldo as her supervisor from 7 in the evening until 7 in the morning. I find that this testimony constitutes a clarification of her affidavit and is not in direct conflict with it, and, even it was, it constitutes a minor inconsistency insufficient to impeach her testimony.

However, comments about this testimony are in order. The period of time presented covered the time some 3 years prior to the events in this proceeding, when Polanco had been reassigned to the night shift to handle problems arising with the machines on that shift. During the relevant day-shift period in late 1996, not only was the plant manager on duty, but so were Hidalgo, and Januario, among others. Thus, any extra responsibilities Polanco undertook or assumed by virtue of his being the sole individual in his department with seniority and superior skills were not evident or assumed by him 3 years later. Further, the testimony does not spell out an assumption by Polanco of supervisory functions where he exercised supervisory authority with independent judgment on behalf of management and not in a routine manner. I am also inclined to credit Polanco's own description of his duties performed on the night shift. I thus conclude that Pechardo's testimony provides little aid in resolving the question of Polanco's status during the much more relevant time frame.

Analysis and Conclusions in CA Cases and Objections in Representation Case

Based upon the credibility resolutions I have made, I conclude that Wetcher engaged in the conduct interfering with, restraining, and coercing employees in the exercise of their Section 7 rights

alleged in the amended consolidated complaint. The pattern of conduct attributed to Wetcher in December 1996, had its antecedents in the prior summer. Although conduct engaged in at that time may be outside the 10(b) period, and certainly was not alleged as violations, it can be reviewed to shed light on the nature of Belle's unlawful activity within the 10(b) period, and, as well, during the critical period following the Union's filing of its representation petition on December 6, 1996.

In July 1996, prior owner Jack Wetcher and Manager Bill Randall met with employees after the union campaign had gotten under way to learn what work issues were bothering the employees and to seek to assure them that their wage and piece rate gripes would be studied and that on Beatrice Wetcher's return their protests over the lack of any health insurance protection would receive her highest priority.

I conclude that it was not until the union drive in mid-1996 that Belle renewed its efforts to obtain such insurance. While Wetcher had received proposals, as recently as April 1996, the costs were too high and I also conclude, the urgency was lacking. While the rates she received in December 1996, were lower, Wetcher was not prepared to act until two separate events transpired. One was the complaints voiced by two employees at December and January meetings attended by many of them. At the first, on her return from executing an election agreement, an employee complained that Randall's 6-month-old promise of health insurance was still unfulfilled. Wetcher said she would try to make him happy. At the second, either raised in December or January 1997, a second employee expressed the opinion that if the Company provided health insurance for the employees, employee need for the Union would evaporate. These comments could not have been made in a vacuum. Employee witnesses have shown how Wetcher sought to convince the workers to express their concerns and their complaints and sought to assure them that Belle was sympathetic and responsive. The most important issue was health care, and Wetcher now had the motive and the means to satisfy the most significant employee concern at a time when union representation of her work force was her most serious concern.

Since the election was scheduled to be held within weeks of these employee utterances, Wetcher could afford to wait for its results. But when Wetcher learned of its cancellation, she immediately chose to offer and grant a most significant employee benefit directly in the face of a union charge that her prior promise of such a benefit interfered with employee free choice. While Wetcher did not know how long the election would be delayed, her choice here, represents a risk taking of large proportions.

By offering, and then immediately the day following the election's cancellation, granting the benefits which most concerned her employees, Wetcher was demonstrating the Employer's power and authority to determine the conditions of their employment without any input from or consideration of the Union's status as the petitioner to represent her employees in such matters. Without coupling any mention of the union in her announcements or in the meetings she set up for her employees to meet with the HIP sales agent, Wetcher was nonetheless demonstrating to her workers that the Union's role was meaningless in setting their terms and conditions of employment.

Wetcher's illegal intent here is buttressed by the evidence that she was aware that the plan she was offering her employees lacked any hospital or catastrophic care, and that employees would have to share its costs, in some instances, the major costs, and which costs employees over time ceased to continue

to bear, and further, that the premium would increase by July 1997, and yet she was willing to implement this medical plan in the midst of a contested election campaign.

I have no hesitancy in concluding that the offer and grant of this benefit was reasonably calculated to impinge upon her employees' freedom of choice, *NLRB. v. Exchange Parts Co.*, 375 U.S. 405 (1964); *Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678 (1944); *Barnes & Noble Bookstores*, 237 NLRB 1246, 1251 (1978).

Respondent argues that its search for health insurance, pre-dating the organizing drive, privileges its promise, and grant of the benefit on January 17, 1997. However, Respondent never made a firm decision to offer such a plan, nor made a serious concerted effort to obtain one until the union drive was underway. Neither had employees been previously informed as a group as to Wetcher's efforts to obtain such coverage, nor had she sought to determine what coverages were most desired by the employees or what insurance they could jointly afford. The timing of Wetcher's announcement, coming as it did in the midst of a contested election campaign and shortly after employees had provided Wetcher with information assuring her of a strong and a probably successful weapon to defeat the union, permits, even warrants, an inference of improper motivation and improper interference with employee freedom of choice, to be drawn, particularly absent a showing of some legitimate business reason for acting at the time. See *Elston Electronics Corp.*, 292 NLRB 510 (1989), and *Litton Industrial Products*, 221 NLRB 700, 701 (1975), enf. denied 543 F.2d 1085 (4th Cir. 1976). I reject Respondent's claim that the time limitation on an offer of an inadequate health insurance plan provides such a legitimate business reason. That Wetcher herself understand the limited time offer of the HIP plan failed to provide cover for her conduct, was made abundantly clear in her comments to the employees made after offering the plan, that they no longer needed the Union because we already offered them health insurance. Thus, I conclude that Respondent has failed to show by objective evidence that it would have made the same grant or announcement of benefit had the union not been present.

By soliciting employee grievances during her December meeting with employees, and thereby implicitly offering to correct them, Wetcher was further demonstrating to her workers that they had no need for union representation. See *Forrest City Grocery Co.*, 306 NLRB 723, 729-730 (1992), and *Springfield Jewish Nursing Home*, 292 NLRB 1266, 1274-1275 (1989).

I conclude that Wetcher informed her workers early on her return from the election conference that she needed proof of residence to supply the Board and that proof would be satisfied by immigration documents. More than one credited witness referred to immigration papers, social security papers, and even green cards. For employees on the lowest rung of the economic ladder, foreign born and lacking citizenship, the mention of coming forward with such documents can be troubling indeed. Nothing in the Board's procedures requires proof of an address or residence. The record also shows that Belle had no problem in satisfying its *Excelsior* obligation from among its regular work force, and by December 16 very few seasonal workers who created the problem of maintaining up to date addresses with Belle were still employees. Thus, Wetcher's expressed concern was a fiction and shielded an effort to spread fear among her workers while ostensibly seeking to satisfy a neutral

governmental requirement. Accordingly, I conclude that Belle's requirement to produce immigration papers interfered with employee rights under Section 7 of the Act. Implicit in Wetcher's request for immigration papers is the threat that, without them, employees who may have concerns about their documented status could face possible arrest and deportation. Indeed, Polanco credibly attributed to Wetcher a response to an employee's inquiry as to what would happen if he didn't have his papers, that she was sorry, she would have to let him go. And Ventura corroborated Polanco when he noted that Wetcher also told concerned employees that employees didn't realize what it meant to bring in a union and that asking for papers was just the first step. Wetcher also expressed concern to Polanco about his reporting to the Union her directions to employees regarding immigration documents, during his exit interview on December 17.

Ortiz' December 16 demand to Acosta to produce "papers" and to bring the ones Acosta had, including his social security and birth certificate, to the office for copying, likewise interfered with Acosta's right to remain free of similar intimidation.

The law is clear that undocumented aliens fall within the statutory definition of "employee" under the Act. *Sure-Tan Inc. v. NLRB*, 467 U.S. 883 (1984). Similarly, any threat to report such employees to the Immigration and Naturalization Service because they selected the Union as their representative constitutes an act of intimidation and coercion under the Act. *Impressive Textiles*, 317 NLRB 8, 13 (1995); *CKE Enterprises*, 285 NLRB 975, 989 (1987).

The General Counsel witnesses agree that by the next meeting Wetcher called of employees in December to discuss the union campaign, she informed them that she was not seeking immigration documents but only proof of their resident address from such documents as a utility bill, or letter addressed to them and the like. Wetcher's change of position, however, without more, does not shield Belle from bearing the consequences of her unlawful intimidating conduct. As Board law make clear, a Respondent's disavowal of unlawful conduct, must be timely, unambiguous, specific in nature to the coercive conduct, and free from other proscribed conduct. There must also be adequate publication of the repudiation to the affected employees, no proscribed conduct must take place after the publication, and assurance must be given to the employees that their employer will not thereafter interfere with the exercise of their Section 7 rights. *Passavant Memorial Area Hospital*, 237 NLRB 138, 138-139 (1978). Belle's conduct here failed to satisfy any of these standards. See *Sam's Club*, 322 NLRB 8, 9 (1996).

I have previously found that Wetcher, both impliedly and directly, informed employees at a December 1996 meeting, that if the Union came in, she would close down. Rafael (Etzion) would move the operation to Guatemala where it presently operated, and the employees would lose their jobs. I have already noted in Wetcher's statement at a December meeting in response to an employee inquiry as to what would happen if she didn't have immigration papers, "that I'm sorry; I got to let you go." At this or another December meeting, Wetcher, again speaking about producing immigration documents, said the employees did not realize what it meant to bring in a union, asking for papers was just the first step.

In a meeting held in December or January, after soliciting employee grievances, Wetcher told employees that with the

Union in the shop, they would have to remain in their work areas because the Union was very strict.

Each of these statements constitutes an act of interference, with the Section 7 rights of employees. Threats of plant closure are among the most flagrant threats which an employer can make to adversely influence employee union involvement and commitment. See *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 611 fn. 31 (1969). They graphically demonstrate the futility of continued union support. *Almet, Inc.*, 305 NLRB 626 (1991); *Minnesota Boxed Meats*, 282 NLRB 1208 (1987). Each of the other statements manifests other acts of interference, by threatening unspecified acts of reprisal and promising more onerous working conditions.

I have previously described Respondent's solicitation of grievances which, as engaged in by Belle during a union campaign, constitutes an implied promise to remedy the grievances, *Gurley Refining Co.*, 285 NLRB 38 (1987), and to do so, in particular, if the employees abandon their union membership and support, *Columbus Mills*, 303 NLRB 223 (1991); *El Rancho Market*, 235 NLRB 468 (1978).

I have previously found that Wetcher questioned Polanco closely about his union involvement and expressed her strong antipathy to employees wearing union T-shirts in the facility. While both these activities would constitute independent violations of Section 8(a)(1) of the Act, I recognize that my conclusion on the merits of these complaint allegations is dependent upon my determination of Polanco's status as an employee under the Act. I conclude that he is a statutory employee and accordingly, also conclude that Respondent violated the Act in these two respects by virtue of Wetcher's inquiries and statements made during Polanco's exit interview.

As to Polanco's status, I conclude that at all times material he has been a statutory employee and not a supervisor as defined in Section 2 (11) of the Act. Under Section 2(11) a supervisor is defined as:

any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of merely routine or clerical nature, but requires the use of independent judgment.

As noted by Administrative Law Judge Jesse Kleiman with Board approval in *Chicago Metallic Corp.*, "In enacting Section 2(11); Congress emphasized its intention that only truly supervisory personnel vested with 'genuine management prerogatives' should be considered supervisors and not 'straw bosses, leadmen, set-up men and other minor supervisory employees,'" citing S. Rep. No. 105, 80th Cong., 1 § 4 (1947). 273 NLRB 1677, 1688 (1985), aff'd. in relevant part 794 F.2d 527 (9th Cir. 1986).

The Board has described its own duty in determining such status as deciding in each case whether a preponderance of the evidence shows that an employer has in fact delegated supervisory authority to each employee claimed to be a supervisor. Often the Board must differentiate between the exercise of independent judgment and the routine communication of instructions. In *McCullough Environmental Services*, 306 NLRB 565 (1992), the Board, in making this judgment, on remand of this issue from the U.S. Court of Appeals for the Fifth Circuit,

concluded, on facts close to those in the instant case, that the lead operators instructions to the operators were routine and did not involve the use of significant discretion. As the lead operators exercised little meaningful control over the operators performance, the Board held that they were not supervisors and reaffirmed its original Decision and Order in that case.

The Board has also noted that the mere inference of independent judgment without specific support in the record cannot be sustained. *Sears, Roebuck & Co.*, 304 NLRB 193 (1991); *Quadrex Environmental Co.*, 308 NLRB 101, 102 (1992).

It is evident that in spite of Respondent's general assertion, Polanco performed none of the functions set forth in the definition, with respect to either making personnel decisions regarding employees, or effectively recommending such action. When Respondent sought to place substantial reliance on Polanco's writing in a starting time and initialing it on an employee's timecard is establishing his authority to approve or effectively recommend an employee's worktime for receipt of wages, the facts showed no such authority, and indeed, resulted in a reprimand for exceeding his authority by taking the liberty to initial a card at the employee's request. No other timecard was produced and no other proof was offered of Polanco's approval of employee overtime, work reports, written warnings or evaluations, although Polanco himself referred to a number of specific instances of employee discipline in which he played a limited role, in one instance of communicating information only, without having any role in recommending or even advising on discipline.

Polanco's own testimony was detailed and straight forward in describing his function and much of his time spent as a mechanic, seeing to it that the sewing machines were in good working order around the clock. Polanco's control was over machines and equipment, and he had little or no authority over employees, what direction he gave employees were made with the approval and on the authority of the supervisor to whom he reported, Juan Hidalgo, and were uniformly routine in nature. The sewing operators were seasoned, experienced, technicians, operated the same machines daily, and knew their work tasks and went about them without any exercise of independent authority over them by the mechanic in their department.

That Polanco was called upon from time to time to report machine breakdowns and even their human causes did not elevate him as the authority who determined that any operators should be disciplined and how. Wetcher spoke of Polanco's authority to assign operators who acted carelessly or who caused machine stoppage to difficult assignments. And Januario described Polanco's ability to match fabric, machine, and operator. As to the former exercise of authority, Wetcher's testimony lacks any specificity and cannot be judged credible, and even Polanco agreed that Hidalgo as the supervisor of sewing and slitting accepted his recommendations as special assignments, which I conclude, derived largely from Polanco's lengthy familiarity with the fabric, machines, and operators as a skilled and experienced mechanic rather than from any exercise of supervisory authority on his part.

Significantly, two persons, one, Supervisor Hidalgo, and the other, Plant Manager Randall, who could have clarified this matter or who could have disputed Polanco's detailed account of his mechanical overseeing and limited lead role in his department, and both of whom were under Respondent's control, were not deposed by it as witnesses. The inference is accordingly warranted, and is drawn by me that the testimony of Hi-

dalgo and Randall would have been adverse to Respondent. *International Automated Machines*, 285 NLRB 1122 (1987), citing *2 Wigmore on Evidence* § 296 (1940); *McCormick on Evidence*, § 272 (3d ed. 1984). See *Greg Construction Co.*, 277 NLRB 1411 (1985).

While Belle contended Polanco checked the quality of the work of the operators, it is apparent that this information was part of, and incidental to, Polanco's primary responsibility to maintain the machines in good working order, and did not supersede the authority of Mary Porada, the quality control employee, who was responsible for checking the quality of the finished product.

As to certain secondary indicia of supervisory status, for example, Polanco's pay, attendance at supervisory meetings, and his own characterization of his status, they either supported Polanco's employee status (pay) were not established by a preponderance of the evidence (attendance) or were deemed not credible (self-evaluation). Significantly, the only employee Respondent called to testify to Polanco's alleged supervisory status, related events 3 years before under circumstances different from the events in 1996, and even so, were inconclusive. That Polanco was probably the highest authority in the plant on the night shift and assumed functions related to that status hardly establishes supervisory authority. *McCullough*, cited supra at 566. In any event, secondary indicia themselves are not controlling. *Bay Area Los Angeles Express*, 275 NLRB 1063, 1080 (1985), and *Memphis Furniture Mfg. Co.*, 232 NLRB 1018, 1020 (1977). And higher pay is of no legal significance in establishing supervisory status. *First Western Bldg. Services*, 309 NLRB 591 (1992). Since the receipt of his last raise was especially large, and given to him directly by the plant manager under circumstances showing it to have been a grant of benefit to influence Polanco to cease his union leadership role, his receipt of higher pay than operators in his department can surely be substantially discounted.

I conclude that the record fails to show that Polanco had authority to use independent judgment in performing supervisory functions in the interest of management, and thus was not a 2(11) supervisor under the Act. See *Ryder Truck Rental*, 326 NLRB 1386 (1998).

Having concluded that Polanco was at all times material an employee under the Act, not only did Respondent violate Section 8(a)(1) by Wetcher's interrogation of him about his union activities and her discouragement, an particular, of a union activity of wearing union T-shirts at the facility, but it is also clear that Polanco's discharge was a discriminatory act in violation of Section 8(a)(1) and (3) of the Act. *Victoria Partners*, 327 NLRB 54 (1998). Wetcher admitted that his strong union support, indeed, his leadership role among employees in this regard, was the substantial motivating factor in her decision to discharge him. By also expressing her high regard for Polanco's qualities as an employee, and that of his family member still employed, to the extent of stating he could probably return as an employee after an employer success in the representation election, Respondent has failed to show, that Polanco would have been discharged even if he had not engaged in protected activity. *Wright Line*, 251 NLRB 1083, 1089 (1980), enf. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267 (1994).

I also conclude that the General Counsel has shown by a preponderance of the evidence that Luz Suarez and Melvin Acosta were each discriminatorily denied recall to Belle be-

cause of their union membership and activity, and additionally in the case of Suarez, because she gave testimony under the Act.

Respondent's antiunion animus has been established strongly in the record. Wetcher's threats, promises, offers to resolve complaints and to provide health insurance and providing health insurance and the like all demonstrate the degree to which Belle was dedicated to squashing the union drive and retaining Belle as a union free jobber. Particularly reprehensible was her threat to close the facility and have all of the production performed for Variety in Guatemala. Such rigorous hostility left little room for dedicated union adherents in Belle's world.

It is apparent that both Suarez and Acosta were favored employees, that is favored by their immediate Supervisor Ortiz. Januario's biased, tailored, and implausible testimony shows he was prepared to do whatever was necessary to maintain Belle's union-free status. On the other hand, Ortiz' discomfort with his role in enforcing Wetcher's antagonistic policy was best illustrated in his avoidance of direct responses to both Suarez' and Acosta's entreaties to return them to work in the new year.

In the case of Suarez, the strong evidence of disparate treatment toward her and in favor of Maria Hernandez, a known antiunion employee, must be given its appropriate weight. I have also found that, contrary to her denial, Wetcher knew that Suarez and Acosta had signed union authorization cards. It is also apparent that the conduct of both Suarez and Acosta, among other employees, in consorting with union organizers on the street outside the facility were well known to Wetcher from her own witnessing of such events as well as the reports of Maria Hernandez, among other employees. It is well to recall here Wetcher's statement to Polanco at his exit interview that she had heard that he was signing up employees for the Union and leading the union organizing drive. Further, she knew that Suarez was a dedicated union advocate through her presence and assistance rendered to the Union at the December 16 election conference. I conclude that such conduct branded Suarez as an employee who would not be considered for recall during a time frame when Belle sought out new employees and brought back interested laid-off employees for jobs that Belle knew Suarez was capable of performing.

Respondent's treatment of both of them—denying their recall—stands in stark contrast to the degree to which their common supervisor deemed them superior workers who would surely be returned to Belle's payroll no later than mid-January. The first evidence of Acosta's loss of favor occurred when he was denied retention during the inventory closing in spite of Ortiz' promise to him. Ortiz clearly lied when he sought to fabricate an early January visit by Acosta to bid goodby and drop his interest in seeking recall. This fraudulent account is finally explained in Acosta's credible account of Ortiz' explanation of his discriminatory treatment on Acosta's last visit to the facility in February. Ortiz' statements at the time constitutes both an unlawful threat violative of Section 8(a)(1) as well as proof of Belle's unlawful motivation in denying Acosta his recall. While no such statement of explanation was made to Suarez it is clear that Belle's discriminatory motive applied to her as well.

Contrary to Ortiz' statements made to both Suarez and Acosta, the report Suarez received through Hernandez, the presence of new and old workers seen by Acosta on a visit to the facility, and the payroll records received in evidence, all support the conclusion that employees were recalled and newly hired for positions as bow machine operators, bow makers, and

spooling machine operators, and to perform related duties, including 12 recalled employees, none of whom had signed a union authorization card in the period January 1 to February 18, 1997.

Acosta similarly was denied recall to any of these departments, or to warehouse or shipping, even though many of these jobs required minimal training and new employees were hired instead, in spite of Wetcher's announced preference for experienced employees with prior service in Belle's employ.

I also thus conclude that Respondent has failed to demonstrate that either Suarez or Acosta would have been denied recall absent their engagement in protected activity. *Wright Line*, cited supra.

Finally, as to the 8(a)(4) allegation, Respondent Belle argues in its brief that Suarez' mere appearance at the NLRB hearing, without testifying, does not come within the purview of activity protected by that Section of the Act. Respondent relies, improperly, on *NLRB v. Scrivener*, 405 U.S. 117 (1972). That decision, to the contrary, stands for a broad and expansive reading and construction of Section 8(a)(4). As the Court reasoned, protecting employees during the investigative stage as well as in connection with the filing of a formal charge or the giving of formal testimony comports with the objective of that section. Thus, representation proceedings, which are of a nonadversarial character, receive the identical protection under Section 8(a)(4), see, e.g., *Specialty Steel Treating*, 279 NLRB 670 (1986). Complete freedom is necessary to prevent the Board's channels of information from being dried up by employer intimidation of prospective complainants and witnesses. *Scrivener*, supra at 121–122. Similarly, the Court noted that Board protection should not turn on the vagaries of the selection process or other events which have no relation to the need for protection. *Id.* at 2589. In accord: *Scranton Lace Co.*, 294 NLRB 249, 253 (1989). Here, the hearing turned into negotiations leading to a Stipulated Election Agreement. Suarez was thus not called on to testify for the petitioner, but her assistance rendered to the petitioner was noted nonetheless.

As previously noted, the Objections 1 through 4 were consolidated with the instant unfair labor practice proceeding. Each of the objections tracks allegations contained in the consolidated complaint. Objection 1 alleges the provision for the health insurance plan and other benefits to discourage union activities. Objection 2 alleges the discriminatory lay off and refusal to recall union activists, including Acosta and Suarez, in retaliation for their union activities. Objection 3 alleges the unlawful threats to discharge and to produce immigration papers. Objection 4 alleges the discriminatory discharge of Reynaldo Polanco. I have now found that Respondent has committed a series of unfair labor practices, among them several which are identical to the objections with which they have been consolidated. One change is that the consolidated complaint does not allege and I have not concluded that the layoffs of Suarez and Acosta violated the Act (in contrast to the refusal and failure to recall them).

Inasmuch as each of these unfair labor practices which track the objections occurred during the critical period after the filing of the petition on December 6, 1996, and prior to the holding of the election on March 6, 1997, Belle's conduct thus constitutes a fortiori objectionable conduct that warrants setting aside the election, *Gonzalez Packing Co.*, 304 NLRB 805 (1991); *Avecor, Inc.*, 296 NLRB 727, 745 (1989). Accordingly, I will recommend that Objections 1 through 4 be sustained, that the elec-

tion held on March 6, 1997, be set aside, and that a rerun election be directed.

C. The Alleged Violation in Case 29-CB-10172

Counsel for the General Counsel called two witnesses to testify to the allegation in paragraph 22 that the Respondent Union, by a presently unknown agent, threatened employees of Employer Belle that they would be reported to the Immigration and Naturalization Service (INS), if they failed to vote for the Union.

Eufrocina Balcazar, who testified with the assistance of a Spanish interpreter, has been at Belle making Christmas bows for 5 years, working from 7:30 a.m. to 4 p.m. She recalled seeing union representatives giving out union flyers during her work shift, starting in January 1997. She first saw a small woman with curly hair, and then two men and two women, including the one described. The other woman was young and had long hair. One man was short, chubby, and wore a black gabardine coat, and the other was tall and young.

On one occasion as she was leaving the factory and refused to take a flyer, they said if we didn't vote for the Union they will call Immigration. The person who said this was the small, chubby fellow. Balcazar was with other workers, Maria, Neireida, and Carmen. Balcazar responded, "[I]f they will call Immigration, we will still go back to work." Everyone spoke Spanish. Balcazar could not recognize any of the union organizers in the hearing room.

During her cross-examination, Balcazar clarified her earlier testimony to now explain that this statement she attributed to a union agent was made both in the morning and afternoon of the same day as she and other workers came to, and left, work. In the morning he was by himself and in the late afternoon he was standing with three other organizers.

In a prehearing affidavit executed by Balcazar on March 8, 1997, she swore that on the occasion of the alleged threat, as she walked towards the factory in the morning, two union agents were standing outside with flyers. Balcazar now explained that these two were at the corner of the street of the factory and the other two were on the other side. This event took place about 2 weeks before the election. It was when she approached the two at the corner that the threat was uttered by the short, chubby male between 35 to 40 years old, who was standing with a mature, very short, older woman with curly hair.

As to the alleged threat made to her on leaving work, in her affidavit, contrary to her testimony, Balcazar attributes the threat, "If you (plural) don't vote for the Union, Immigration will come," to the tall, slim, young union agent who was standing with the chubby agent and a female agent. Balcazar explained that this reference to the slim, young agent was in error, and was contrary to her statements made to the Board agent on March 8, but that because of her anxiety on that occasion she failed to note the error when the affidavit was read back to her in Spanish. It also appears that a misunderstanding may have resulted from Balcazar's speaking in Spanish and the use of a Board agent to translate her remarks into English for purposes of the affidavit.

Under further examination, Balcazar testified she refused to take the union flyers because she and her friends didn't want the Union to come over, because they had everything that the Union promised them. One of the things the Union promised, that she learned from talking with fellow employees, was to help undocumented aliens among the employees to get legal papers, which I understand to mean completing the appropriate

form of the Immigration and Naturalization Service and presenting to the Service the appropriate supporting documents to obtain legal residency status sufficient to continue legally in Belle's employ under the Immigration Reform and Control Act of 1986, Pub. L. No. 99-203, 100 Stat. 3359. See generally *A.P.R.A. Fuel Oil Buyers Group, Inc.*, 320 NLRB 408, 414-416 (1995), *enfd.* 134 F. 3d 50 (2d Cir. 1997).

Balcazar's understanding of the Union's supportive position in the area of immigration status, and aid to employees with immigration problems is corroborated in a union flyer dated January 7, 1997, introduced in evidence. The flyer, signed by Joseph Lombardo, the Union's manager-secretary, states, in relevant part, "The only requirement to be eligible to vote is that you are a worker at Belle Knitting Mills (even if you are on lay-off at the time of the election). No one will ask you for any papers," and "As a worker in the United States, you have the right to vote in a Union election regardless of your legal status."

Balcazar described herself as one of Belle's staff of core employees who received a December bonus and the unpaid 2-week Christmas to New Year time off each year and who automatically returned to work in January. She put their number at roughly 200. Among them were the three named employees who accompanied her when she was allegedly threatened 2 weeks before the election. None of these alleged witnesses were called by Respondent to corroborate Balcazar.

A second witness for the Government was Maria Perez, who had been a Belle employee for 6 years, and produces Christmas bows on the day shift. She testified without any order of sequestration, following Balcazar to the witness stand. Starting in January 1997 she saw two to four union representatives in front of the factory. One she described as a short mature, older woman with curly hair and long coat who also wore a hat in the cold weather. One man was tall, carrying glasses and wearing a long gabardine coat. The other man had medium color skin. Sometimes there were two women, other times a man and woman, and sometimes only a woman. The older woman with the hat told her that if they did not vote for the Union they would call Immigration. She also told her and other employees that if they voted for the Union she would increase their salary, give them better jobs, and so on. She asked if Perez would welcome the union agents to her house to talk more about the Union. The same woman also offered to help her with immigration papers.

This conversation Perez described was held twice, in Spanish, as she was coming from the factory in the afternoon, 8 and 2 days prior to the election. Perez also accepted a T-shirt, two caps, and also pins from the union organizer.

Perez mentioned two other workers who were present with her on both occasions when the alleged threat was uttered, Aleyda Lugo and Elizabeth Cedillo. Neither of them were called to testify for the Government. Perez could not identify any of the union organizers in the hearing room.

During her cross-examination, Perez changed her testimony, claiming now that she first saw union organizers outside the factory for the first time in February. When she first saw the older woman with the hat, that organizer asked if she would vote for the Union and if she would allow her to come to her house and talk about the Union. Perez explained that she gave her address and the organizer came to her house but she didn't receive her or let her in her house.³ While at home she had

³ The transcript is ordered corrected at p. 45, L. 21 by changing "did" to "didn't."

someone inform the organizer she was not at home. In essence, Perez admitted lying to the organizer. She never had any intention of receiving the organizer at her home.

After this incident at her home, the woman organizer continued to solicit her outside the factory. First denying that she spoke with the organizer, Perez almost immediately changed her testimony to state that she spoke with the organizer daily for maybe 10 minutes. (Tr. 47 and 48.) Balcazar also now acknowledged riding a bicycle every day to and from work, riding it out of the factory at the end of the day, and that neither Aleyda Lugo nor Elizabeth Cadillo have bicycles. As a consequence Perez now admitted she never left the factory with Lugo and Cedillo. Balcazar also now modified her earlier, direct testimony to note that the offer to help with immigration problems was conditional on the employees helping the Union win the election.

Perez now also changed her earlier testimony about the threat she had received to bring immigration if they didn't vote for the Union to now swear it was made 2 days before the election on March 6, 1997, and a month before, rather than 2 and 8 days before. Incredibly, Perez now also noted that in the earlier of the two conversations in which the threat was uttered by the older woman organizer wearing the hat, she also mentioned that she would help and assist Perez with immigration problems.

On her redirect examination by Respondent's counsel, Perez now could not remember on which of the two occasions the threat was uttered that Lugo and Cedillo were with her. She also did not know what time Lugo and Cedillo finished their day shift.

Although a subsequent redirect examination of the witness established that Perez did not mount her bicycle after leaving work until she was a block from the factory she still could not place Lugo and Cedillo in the immediate vicinity when the union organizer uttered her threat. These two employees were intentionally walking away and about 10 to 15 feet from where Perez and the organizer were standing. Even Perez did not always hear the remarks made by the organizer as she noted frankly she didn't want to listen to her and sometimes kept walking to get away as the organizer followed.

In its defense to the allegation, the Union called a number of witnesses. Union Manager/Secretary Lombardo named and described the group of union organizers, including five who were present in the hearing room. Not present were Nathan Goldstein, 62 years old, 6' tall and slim, but he does not wear glasses, and Julia Santos, 5' 1" or 2" tall, olive skinned, approximately 50 years of age with wavy hair. Lombardo testified that the only other female organizer at Belle was Marie Garcia, who was around 30 years old, short, and wore short bobbed hair. It thus appears that Julia Santos most nearly fits the description of the union organizer who allegedly threatened Perez and was allegedly present with the short, chubby agent when that agent allegedly threatened Balcazar.

Lombardo produced a Notice and Proof of Claim For Disability Benefits filed with the New York State Workers' Compensation Board and signed on March 3, 1997, by Julia Santos, claiming a muscle spasm in her cervical lumber area for which she was treated on February 10 and March 3, 1997, resulting in claimant being unable to work because of this disability on February 10, 1997, and with the date claimant would be able to return to work listed as April 10, 1997. The form contained an affirmation by a Dr. Jose A. Acevedo, who, in a separate

statement dated February 10, prepared on his letterhead listing his specialty as neurology, certified that Santos was under neurological treatment, and could not return to work until further notice. In a later Notice and Proof of Claim For Disability Benefits signed by Santos on April 7, 1997, Dr. Acevedo now listed the date Santos would be able to perform usual work, as undetermined.

According to Lombardo, Acevedo and Santos were the most regular of the union agents who solicited Belle employees starting in January 1997. At some point in time, when Santos went on disability, she ceased being a presence outside the facility. However, Lombardo, himself, was out of work for more than a month and a half, and up to 2 months, from his admission to a local hospital in January 16, and beyond his release on January 31, through all of February, and into half days on and off into March. As a result, he was personally unaware of Santos' whereabouts in February and March.

Another union agent, Manuel Rodriquez, assisted in leafletting the Company starting in July 1996. He returned on a few occasions, mainly, to provide transportation to the factory site for Julia Santos in his automobile, most likely in January and February. Rodriquez is 5' 10" tall, weighs 195 pounds and his hair is turning white. Rodriquez finally asserted under cross-examination by counsel for the General Counsel that he was at the Belle site 2 or 3 days before the election, but did not drop off Julia because she was already there in the morning. In so testifying, Rodriquez first denied he had dropped off Santos that morning and then answered to a question as to whether she was already there; "Yes, that day was in the morning." I find this answer somewhat ambiguous, and further, find, that Rodriquez' recollection may very well have been faulty as to Santos' presence outside the facility that morning, particular in light of Santos' later testimony that at the time because of a pinched nerve she was put on disability, and off the Union's payroll, could not walk and remained mainly in bed, and the trip by subway to the facility from her home in the Bronx required four separate subway trains and took an hour and a half to 2 hours one way.

Organizing Director Luis Acevedo, who described himself as 5' 2" tall and weighing 205 pounds in early 1997, recalled seeing Julia Santos outside the factory with him in January 1997, but not in February or March. The female organizer present in those 2 months was Maria Garcia, who came to help the Union from the UNITE Workers Center in Manhattan. He described Garcia as short, with white skin, a little bit heavy, and in her mid-thirties. Clearly her youth and other features excludes her as the female organizer who made the alleged threats. Based on Acevedo's appearance and self description he most nearly fits the male organizer described by Balcazar.

Acevedo explained that the Union—UNITE—has an immigration department in which members participate and where help is provided on immigration problems. Employees the Union seeks to organize are informed about this department. In Acevedo's experience, every employer whose work force the Union seeks to organize, employs lots of undocumented workers.

Acevedo denied he ever threatened to report workers to Immigration. He also confirmed he never saw Santos outside Belle in February or March 1997. Acevedo recalled the employee Balcazar refusing to stop to talk to the organizer and refusing to take a leaflet offered her. Acevedo denied ever telling her Immigration would come if the Union lost.

Acevedo recalled telephoning Santos at her home to find out how she was doing after she was sick. It was in the month of February, that he received a telephone call from Santos and, thereafter, she ceased reporting to the factory.

Acevedo was in charge of the Belle organizing campaign and was probably present outside the factory every workday, in the morning and afternoon. If he didn't go to the factory on a particular morning, no other organizer did either.

Zaida Paz, the Union's office manager, testified that Julia Santos was a former organizer for the Union. She ceased being on the Union's payroll at the end of February. According to the records Paz maintains, which were received in evidence, Santos took ill and was out on February 7 and then Paz received by hand a letter from her doctor stating her disability started on February 10. Dr. Acevedo's letter and Santos' two claims for disability benefits containing Dr. Acevedo's affirmations and statements of his objective findings and his patient's period of disability have been previously summarized. Based on telephone calls and documents she received, Paz prepared an individual employee record, produced from her office computer, starting in February and running through March, in which she entered daily, Santos' period of illness and sick leave. On Friday, February 7, Santos called, said she wasn't feeling good and would be taking a sick day.

In a separate record Paz maintain but did not produce, she recorded all the dates Santos was out sick until August 8, the last date of the 6-month period under New York Disability law from the date the illness commenced, for which her employer is responsible to pay disability benefits.

Paz noted that if she had any evidence that Santos was appearing as an organizer at the work site at Belle's facility, she would not have continued to note "I" for ill on the record she maintained. Paz also testified that she had no personal knowledge as to whether Santos went to Belle's facility at any time in February or March. On the employee attendance record, each workday from February 7 to and including February 28, the last workday in February, is notated "I". Paz also corroborated the earlier physical descriptions and age of Santos.

The Doctor's letter was submitted to Paz after she informed Santos such a letter was necessary in order for Santos to receive sick leave for a 3-day period. When the Doctor's letter indicated Santos would be unable to work for a longer period of time, Paz provided Santos with the Notice and Proof of Claim for disability benefits, form DB-450, so that she could have it affirmed and completed by her doctor. During its preparation, Paz received a telephone call from Doctor Acevedo's nurse asking for assistance in answering some questions on the form. As previously noted, Paz received two forms, the first dated and signed by Santos on March 3, and the second signed and dated April 7, changing the date of Santo's anticipated return to work from April 10, 1997, to an undetermined date.

As a consequence of Santos' filing of these forms, Paz continued to pay Santos disability benefits for the 6-month period ending August 8. The payments to Santos were made from a staff benefit fund which UNITE maintains for the staffs of its various local unions. Following Santos' last payment she received from the Union, Paz forwarded the various forms and documents to UNITE for reimbursement from the staff benefit fund.

In the week before disability benefits terminated on August 8, 1997, Santos informed Paz she was still sick and Paz advised her to apply for supplemental benefits under social security.

At the time of her illness, Santos has accumulated more than sufficient sick leave to receive sick pay through February and beyond. The reason the Union chose February 28, the last workday in February 1997, to terminate Santos' employment, was because the Union was retrenching and laying off staff, but because Santos had started employment in February 1989, the Union permitted her to continue in employment status beyond the end of 1996, for another 2 months through February 1997, so she could earn another full year of retirement benefits from the Union's retirement fund.

Julia Santos was subpoenaed by counsel for the General Counsel and appeared as a witness on the fifth day of hearing on November 20, 1997. In taking the witness stand I observed that she walked in a slow, hesitant, and gingerly manner. Permission was granted for examination of this witness, a paid organizer for the Union until her separation at the end of February 1997, under Section 611(c) F.R.E. Santos also testified through a Spanish-speaking interpreter.

Santos had worked as an organizer for different unions for 8 years, and for this Union for the last 2 years. Santos started working on the Belle organizing campaign in December 1996. She solicited employee signatures on authorization cards and handed out union leaflets, and later union T-shirts and visited employees in their homes in the first and second weeks in January. She worked closely with Luis Acevedo on the campaign but she spent more time at the facility than he did, being there practically all day long.

Sometimes Manuel Rodriquez drove her to the factory from his home in the Bronx and other days she took the subway train. She had to take four separate trains for 1-1/2 to 2 hours each way from the Bronx to the facility in Brooklyn. She also worked with Maria Garcia, the younger, smaller, pretty woman organizer, to visit workers and to hand out leaflets.

At the time of the campaign, December to February, Santos almost always wore a hat. She remained outside the Belle factory until the week before she got sick. Although organizers and staff would sign a sign-in sheet at the Union's offices before reporting to duty, she did not sign when she reported from her home directly to the worksite, which was apparently all, or almost all the time.

Santos denied telling employees that if they didn't vote for the Union, the Union would call immigration (authorities). Neither did she talk about immigration issues with them. As Santos explained, if she talked to a worker about immigration status, that person would fear her and would never sign a card or give her their address. She was there to sign up personnel, but not for them to fear her.

Santos also denied that she went to the Belle facility while she was receiving sick pay, between February 7 and 27, 1997. She could not go anywhere because she could not stand up and would fall down. Even if she attempted to go to work while she was telling the Union she was sick, she would lose the rights with the Union because of lying to them. Since leaving the Union's employ she has contacted Social Security for supplemental benefits and has been examined by different state doctors.

Santos described her salaried workweek as 35 hours, but that sometimes she worked longer hours, and sometimes shorter. She clearly exceeded her 35 hours when visiting employees at their homes. But she denied that she was at the Belle factory 2 days before the election. She couldn't be standing out there after she became sick. She didn't talk to any employees after February 10.

During her cross-examination by Belle counsel, Santos again denied that she ever discussed immigration issues with Belle employees she was attempting to organize. She knew of no other union agents doing so either. In Santos' judgment the Union's role in organizing is to give the people confidence, not to scare them. She added she would tell employees also that she was an immigrant and she knew how it feels to have immigration after you. She, herself, had been pursued by immigration authorities years ago between 1962 and 1963. And she would never seek to place workers in fear of immigration. But Santos later denied she knew anything about the Union's policy or practice of providing aid to employees on immigration problems. She was never in the office.

Santos denied during this examination that she even attempted to use the telephone to contact workers she had earlier solicited in the 2 to 3 weeks before the election. She now testified that she had become very sick and was in a critical state. She described her illness which commenced February 7 or 10 and has continued thereafter as a pinched nerve which causes severe pain from her neck all the way down her spine and part of her hip. She has constant pain because she can't take antibiotics to provide some relief. She was bed ridden. The only time she left her house was to take a cab to see her doctor, but that was very difficult for her.

After completing the union defense with Santos' testimony, the General Counsel called Beatrice Wetcher as a rebuttal witness. Wetcher testified that until December 17, 1996, union organizers would solicit and approach employees from inside the parking lot that stands between the street on one side of the factory building, West Street, and the front door entrance to the factory. After employees complained to her, Wetcher asked Lombardo during a telephone conversation between them on December 17 to refrain from using her private facility to organize her shop. She expected him to be on the other side of the street, otherwise she would call the police for trespassing. After December 17, the union organizers stood on West Street. Wetcher made one exception at least to the rule, when she permitted Santos, but not Acevedo or other organizers, to purchase food at the truckstand in the lot.

Santos and Luis Acevedo would be at the facility basically all the time, but there were other men helping out from time to time, as well as a woman giving out leaflets. Wetcher knew Acevedo from his having been introduced to her by Lombardo in her office on December 5. Some of the organizers would be up the street at the corner of West and India Street or further up India trying to catch the female employees on the way from or to the subway stop.

In the morning, when Wetcher arrived at 9 a.m. she saw Julia Santos at the little truck at the parking lot which sold breakfast food and where she got an orange juice. Wetcher greeted Santos and moved on. She knew Julia's name from employees who had called her by name outside the factory. And she knew Julia by sight from her participation in the 1995 organizing effort up to the present drive. On one occasion in 1996 she believed Santos had applied for a job.

Wetcher now testified that she said hello to who she believed to be Julia the Tuesday before the election. Wetcher had parked her car and went out to the truck to purchase an orange juice and Santos was wearing a hat and coat up to her neck. Wetcher remembered it as being 2 days before the election because she was aware of the rule prohibiting talking to the employees, either herself or the Union within 24 hours of the

election. She recalled telling Julia, it's cold but it's almost over. Wetcher than walked away.

During her cross-examination by union counsel, Wetcher said on the occasion 2 days before the election, she spoke to Santos in Spanish, and repeated the few remarks she uttered. Wetcher also now noted, contrary to earlier testimony given in the CA cases, that she hired an attorney the day that Lombardo came into her office. That date was December 5. Earlier, Wetcher testified she didn't employ an attorney until she received the Union's representation petition and a conference was scheduled.

Wetcher now noted that 2 days before the election she also saw Luis Acevedo in addition to Santos, on the street outside the factory. She saw Acevedo when she left the factory at 4 p.m. that day. There was also another woman organizer up the street going toward the subway, she believes may have been Maria Garcia, although she didn't know who she was.

Now Wetcher swore that she saw Santos outside the factory throughout the preelectionpreelection period, from December to early March, except for a 2- or 3-day period in January or February when there was a big snow storm.

Wetcher also testified that a week after the election she received a telephone call from someone identifying himself as being from the INS, asking to see INS form I-9 which aliens are required to present to their employer. After doing some checking she learned this call was a hoax, but a few weeks later she got a legitimate contact from an INS agent who came and collected all her I-9's, and still later informed her some were fake. Then, 2 to 3 weeks before her testimony in this case, INS agents came to the factory and took away a few employees. Wetcher later noted that INS agents had come to the factory some years ago in the mid-1980's when an INS rule change went into effect governing the kinds of record employers of aliens must keep.

The Union later called Julia Santos as a rebuttal witness. Santos testified that she did not see Wetcher after February 10, 1997, or in March 1997, because she was sick and home in bed.

During her cross-examination by Government counsel, Santos explained that she had seen Beatrice Wetcher previously at a distance at lunchtime at the truck refreshment stand, had learned from fellow employees that she was the owner of the factory, but had never had a conversation with her. She did not recall Wetcher driving out of the parking lot or waving to her. Neither did Wetcher ever greet her, and Santos questioned whether Wetcher knew who she was sufficient to say hello to her. Since Santos did not speak English, she also questioned whether they could have a conversation with each other.

Analysis and Conclusions in CB Case

The issue to be resolved here presents a stark choice between two contradictory factual presentations. On the one hand, two Spanish-speaking employees attribute threatening remarks to two unnamed organizers for the Union. On the other hand, the two union organizers who most closely resemble the persons alleged to have uttered the threats, deny having done so. There are, in addition to these witnesses, others, whose testimony was offered to corroborate or to undermine the credibility of the main witnesses.

Preliminarily, there is no question that if the threats contained in paragraph 22 of the consolidated complaint were made, they would constitute violations of Section 8(b)(1)(A) of the Act, as alleged. See *Cannery, Warehousemen, Food Processors Local*

748, 246 NLRB 758 (1979); *Westside Hospital*, 218 NLRB 96 (1975). Such pronouncements would surely tend to place employees in fear of the adverse consequences of such a disclosure, including deportation, even if the recipients of such threats were not themselves subject to such deportation. Such threats are the converse of those which I have previously found Respondent Belle engaged in when owner Wetcher told employees to produce their immigration papers to satisfy the Board *Excelsior* requirement. See *Impressive Textiles* and *CKE Enterprises*, previously cited. Furthermore, these persons making the threats have been sufficiently identified as agents for the Union. See *Cannery Warehousemen, Food Processors, Local 748*, supra.

I am not persuaded, however, upon the basis of the testimony presented, that counsel for the General Counsel has met her burden of proof that either Santos or Acevedo engaged in the conduct alleged.

While Enforcina Balcazar proved to be the stronger of the two main witnesses the Government presented, she, admittedly, had strong ties and sympathies to Belle by virtue of her status as a regular, full-time employee over a 5-year period, and she exhibited firm opposition to union representation. Unlike the other witness, Maria Perez, while she placed Santos together with Acevedo when the union agent meeting Acevedo's description made one of the two threats, she did not attribute any unlawful conduct to Santos. I am satisfied that the discrepancy between Balcazar's testimony and affidavit as to the identity of the agent who threatened her in the morning was satisfactorily explained by her and rehabilitates her testimony in this regard. I am not persuaded that Acevedo uttered the threats alleged or that Santos was present. Furthermore, I note Balcazar's reference to the Union's effort to assist undocumented aliens in achieving legal, employment status, an activity referred to by Acevedo himself and a position supported in the union leaflet received in evidence. I find it to be counterproductive and inconsistent with the Union's practices and policies for the Union to have sought to alienate a significant number of employees who they were seeking to convince of the Union's interest in their welfare and livelihood. It is apparent that any threat of the nature alleged made to a few employees was serious and would clearly have wide circulation among many of them. See *Crown Coach Corp.*, 284 NLRB 1010 (1987). For this added reason, I do not credit the two employees' accounts.

In particular, Maria Perez proved to be an unreliable witness, changing the date of the first of two threats from 8 days before the election to 30 days before, as well as changing the month she first saw union organizers outside the factory, and most significantly, noting that in one of the two conversations in which Santos threatened her, she offered to help her with immigration problems. Perez also finally, could not place her two fellow employee witnesses as present during either of the two threats made to her.

I am also convinced that an employee so hostile to the Union effort that she would cause a third person to lie to Santos about her whereabouts on the occasion of Santos' visit to her home, would lie in attributing threatening statements to the same organizer.

I find Acevedo's responses straightforward and his acknowledgment of union assistance offered in immigration problems to be open and candid, after initially denying having such conversations. Although not explained, it is probable that what Acevedo intended by his confusing answers was that he did not address particular employee problems but did make them aware of union assistance if they needed it. Such an interpretation would also accord with Santos' commonsense approach of avoiding any comment to employees about their status which

might place them in fear. I also do not discredit Santo's claim of ignorance of union assistance rendered in the area of immigration. She appears not to have spent time at union headquarters and her commonsense approach to employees appears to have been dogged and direct.

I am most persuaded by the strong evidence showing that because of her pinched nerve and adverse neurological condition resulting in severe pain, Santos was incapacitated and not part of the union organizing effort outside Belle from at least February 7 and throughout the remaining preelection period. That being the case, she could not have been outside the facility on the occasions Balcazar alleged, and Perez originally alleged, and it was problematical at best whether she was present on the alternate date, 30 days before the election, that Perez subsequently alleged. I have previously severely discounted organizer Rodriguez's almost offhand placement of Santos at the facility when he arrived 2 days before the election, and find that he was mistaken in his recollection. I have also previously discredited Beatrice Wetcher with respect to her accounts provided in the CA cases and find little credence in her testimony relating her observance of organizer Santos 2 days before the election, as well as on all days throughout the preelection period except for a 2- to 3-day snowstorm, particularly in the face of the credible evidence presented by Santos herself, the documentation of her successful disability claim, and the denials of Acevedo and others testifying for the Union that Santos did not participate in the campaign on and after February 7, 1997.

Based on the foregoing analysis, I now conclude that the General Counsel has not met its burden of proof on this allegation and I will recommend its dismissal.

CONCLUSIONS OF LAW

1. The Respondent, Belle Knitting Mills, Inc., is, and has been, at all times material, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Respondent Union, Knitgoods Workers Union, Local 155, UNITE, AFL-CIO, is, and has been at all times material, a labor organization within the meaning of Section 2(5) of the Act.

3. By threatening its employees with discharge, unspecified reprisals, layoff, plant closure and relocation, and loss of jobs, because they joined, supported, and assisted the Union and by threatening its employees with the imposition of more onerous and arduous working conditions to discourage them from selecting the Union as their collective-bargaining representative, and by promising its employees unspecified benefits and medical benefits and by granting its employees medical benefits to induce them to abandon their membership in, activities on behalf of and support for the Union, and by interrogating its employees concerning their membership in, activities on behalf of, and support for the Union, and by directing its employees to refrain from wearing union T-shirts, and by soliciting employee complaints and grievance, and impliedly promising them it would resolve their complaints and grievances to their satisfaction, and by requiring its employees to produce immigration papers, Respondent Belle has been interfering with, restraining, and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act, and has thereby been engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

4. By failing and refusing to recall, or offering to recall, employees Luz Suarez and Melvin Acosta from layoff, to their former positions of employment since the dates of their respective layoffs, because they joined, supported, or assisted the Union,

and in order to discourage employees from engaging in such activities or other concerted activities, Respondent Belle has been discriminatory in regard to the hire and tenure and terms and conditions of employment of its employees, thereby discouraging membership in a labor organization and engaging in unfair labor practices in violation of Section 8(a)(1) and (3) of the Act, and, additionally, in the case of Luz Suarez, Respondent Belle has been discriminating against its employees for giving testimony under the Act, thereby engaging in unfair labor practices in violation of Section 8(a)(1) and (4) of the Act.

5. By discharging employee Reynaldo Polanco and by thereafter failing and refusing to reinstate, or offer to reinstate him to his former position of employment, because he engaged in union activities in support of Knitgood Workers Union, Local 155, and in order to discourage employees from engaging in such activities, Respondent Belle has been discriminating in regard to the hire and tenure and terms and conditions of employment of its employees, thereby discouraging membership in a labor organization and engaging in unfair labor practices in violation of 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 Respondent Belle has engaged in certain unfair labor practices in violation of Sections 8(a)(1)(3) and (4) of the Act, I shall recommend that it cease and desist therefrom and take the following affirmative actions which are necessary to effectuate the policies of the Act.

I shall recommend that Respondent Belle offer Luz Suarez, Melvin Acosta, and Reynaldo Polanco reinstatement to their former positions, or, if no longer available, to substantially equivalent positions, without prejudice to their seniority and other rights and privileges, and make them whole for the loss of earnings and other benefits they may have suffered as a result of the Respondent Belle's unlawful discrimination against them. Such amounts shall be computed, in the case of Reynaldo Polanco, from the date of his discharge on December 17, 1996, until the date an offer had been made by Respondent Belle to reinstate him to his former position, and in the cases of Luz Suarez and Melvin Acosta, from the date or dates in January 1997 that is determined, during the compliance stage of this proceeding, to be the date or dates that each of them would have been recalled to their former positions of employment, until the date an offer had been made by Respondent Belle to reinstate them to their former positions. Such amounts shall be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest thereon computed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987).⁴ I shall also recommend that in accordance with the time restraints set forth in *Indian Hills Care Center*, 321 NLRB 144 (1996), Respondent Belle expunge from its files any references to the unlawful failures and refusal to recall Suarez and Acosta and to Polanco's unlawful discharge, and notify them in writing, that this has been done and these discriminatory acts taken against them will not be used against them in any way.

With respect to the consolidated representation proceeding in Case 29-RC-8728, as earlier noted, I will recommend that the Objections 1 through 4 filed by the Union to conduct affecting the

⁴ Under *New Horizons*, interest is computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. §. 6621.

results of the representation election conducted on March 6, 1997, be sustained, the election be set aside, and a rerun election be conducted.

On these finding of fact and conclusions of law and upon the entire record, and pursuant to Section (c) of the Act, I issue the following recommended⁵

ORDER

With respect to Cases 29-CA-20611, 29-CA-20621, and 29-CA-20623

The Respondent, Belle Knitting Mills, Inc., Brooklyn, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening its employees with discharge, unspecified reprisals, layoff, plant closure and relocation and loss of jobs because they joined, supported and assisted Knitgood Workers Union, Local 155, UNITE, AFL-CIO, or any other labor organization, threatening them with the imposition of more onerous and arduous working conditions to discourage them from selecting the Union or any other labor organization as their collective-bargaining representative, promising its employees unspecified benefits and medical benefits and granting them medical benefits to discourage employee membership in or other activity on behalf of the Union, directing its employees to refrain from wearing union T-shirts, interrogating them as to their union membership and activity, soliciting employee complaints and grievances, and impliedly promising them it would resolve them to their satisfaction, and requiring its employees to produce immigration papers.

(b) Discharging, failing and refusing to recall from layoff or otherwise discriminating against employees because they engaged in concerted, protected activities in support of Knitgood Workers Union, Local 155, or because they gave testimony under the Act.

(c) In any like or related manner interfacing 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) Offer Luz Suarez, Melvin Acosta, and Reynaldo Polanco immediate and full reinstatement to their former positions, of, if those position no longer exist, to substantially equivalent positions, without prejudice to their seniority and any other rights or privileges previously enjoyed, and make them whole for any loss of earnings and other benefits they may have suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(b) Within 14 days from the date of this Order, remove from its files any reference to the unlawful refusal to recall Suarez and Acosta and the unlawful discharge of Polanco, and notify them in writing that this has been done and that these discriminatory acts will not be used against them in any way.

(c) Preserve and, within 14 days of a request, make available to the Board to its agents for examination and copying, all payroll records, social security payment records, timecards, personnel

⁵ 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.

records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days after service by the Region, post at its Brooklyn, New York facility, copies of the attached notice marked "Appendix."⁶ Copies of the notice on forms provided by the Regional Director for Region 29, after being signed by the Respondent Employer's authorized representative, shall be posted by the Respondent Employer immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees, are customarily posted. Reasonable steps be taken by the Respondent Employer to ensure that the notices are not altered, defaced, or covered by any other material.

(e) 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 in Case 29-CB-10172, that the allegations contained in paragraphs 22 and 26 of the amended consolidated complaint be dismissed.

IT IS FURTHER ORDERED in Case 29-RC-8728, that Objections 1 through 4, filed by Knitgood Workers Union, Local 155, UNITE, AFL-CIO, to conduct affecting the results of the representation election conducted on March 6, 1997, be sustained, the election be set aside, and a rerun election be conducted.

APPENDIX

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

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

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT threaten our employees with discharge, unspecified reprisals, layoff, plant closure and relocation and loss of jobs, and the imposition of more onerous and arduous working conditions because they joined, supported and assisted Knitgood Workers Union, Local 155, UNITE, AFL-CIO, or any other labor organization, or to discourage them from selecting the Union or any other labor organization as their collective-bargaining representative, or promise our employers unspecified benefits and medical benefits and grant them medical benefits to discourage our employees' membership in or other activity on behalf of the Union, direct our employees to refrain from wearing union T-shirts, interrogate them as to their union membership and activity, solicit employee complaints and grievances, and impliedly promise to resolve them to their satisfaction, and require our employees to produce immigration papers.

WE WILL NOT discourage membership in the Union, or any other labor organization, by discharging, failing and refusing to recall from layoff, or otherwise discriminating against our employees because they engaged in concerted, protected activities in support of Knitgood Workers Union, Local 155, UNITE, AFL-CIO, or any other labor organization or because they gave testimony under the Act.

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

WE WILL NOT offer Luz Suarez, Melvin Acosta, and Reynaldo Polanco immediate and full reinstatement to their former jobs, or if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, with interest.

WE WILL NOT remove from our files any references to our unlawful refusal to recall Suarez and Acosta and our unlawful discharge of Polanco and notify them in writing that this has been done and that these discriminatory acts will not be used against them in any way.

BELLE KNITTING MILLS, INC.

⁶ 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."