Amber Foods, Inc. and United Farm Workers of America, AFL–CIO. Cases 32–CA–18139–1, 32–CA–18302–1, and 32–CA–18303–1

November 22, 2002

DECISION AND ORDER

BY MEMBERS LIEBMAN, COWEN, AND BARTLETT

On April 23, 2001, Administrative Law Judge James L. Rose issued the attached decision. The Respondent filed exceptions, a supporting brief, and an answering brief. The General Counsel filed cross-exceptions and a supporting brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions only to the extent consistent with this Decision and Order, and to adopt the recommended Order as modified and set forth in full below.[2]

The complaint in this case alleges that the Respondent committed numerous violations of Section 8(a)(1) and (3) in response to the Union's organizational campaign. In his decision, the judge found merit in some, but not all of the allegations of the complaint. As indicated above, both the Respondent and the General Counsel have filed exceptions to the judge's decision. For the reasons set forth below, we affirm the judge's decision in part and reverse in part.

I. BACKGROUND

The Respondent operates a fruit processing facility in Dinuba, California, where it employs approximately 60 employees as fruit cutters. In November 1999, several of the Respondent's employees obtained information about the Union. Between November 1999 and March 2000,[3] a number of employees signed authorization cards and became members of the Union.

On March 31, eight employees went to the Union's office to complain about working conditions at the Respondent's facility. Based on his credibility resolutions, the judge found that on March 31, Union Representative Sandra Ching phoned the Respondent's owner, William Bernstein, to inform him of his employees' complaints. Thus, the judge concluded that the Respondent knew generally of the employees' union activity as of March 31. At that time, however, the Respondent did not know specifically which employees had contacted the Union.

II. UNFAIR LABOR PRACTICE FINDINGS TO WHICH NO EXCEPTIONS WERE FILED

No exceptions were filed to the following findings of the judge:

> The Respondent violated Section 8(a)(1) by telling employees not to speak with other employees who were involved in union activities; by telling employees that they would not be receiving a mid-year bonus because of their union activities; by soliciting grievances from employees and promising to remedy them; by threatening employees with stricter application of rules, discharge, and plant closure; and by videotaping employees while they were picketing the Respondent.
>
> The Respondent violated Section 8(a)(3) and (1) by increasing the number of sick days to which its employees were entitled and by taking disciplinary action against the following employees: Maria Torres, Angelica Luna, Maria Guadalupe Mendez, Misael Islas, Esther Marroquin, Maria Barrea, Evelia Sosa, Elva Ruiz, and Maria Chavez.

[1] 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), enfd. 188 F.2d 362 (1951). We have carefully examined the record and find no basis for reversing the findings.

As set forth in his separate opinion, Member Cowen would reverse the judge's decision to credit the testimony of Carmen Munoz concerning her warnings and suspensions.

[2] The judge found that the Respondent violated Sec. 8(a)(1) by telling employees they would not receive a mid-year bonus because of their union activities. The judge, however, inadvertently failed to include in his recommended Order a provision that the Respondent is to cease and desist from making such statements. We shall modify the judge's recommended Order accordingly.

We shall also modify the judge's recommended Order to include, in accordance with his May 22, 2001 errata, a provision requiring the Respondent to pay employees the mid-year bonus for 2000 that they would have received but for the Respondent's discrimination against them, with interest.

In light of the fact that the Respondent's employees are Spanish-speaking, we shall modify the recommended Order to provide that the Respondent post the attached notice to employees in both English and Spanish.

The judge has used the broad "in any other manner" cease-and-desist language in his recommended Order. We have considered the case in light of the standard set forth in *Hickmott Foods*, 242 NLRB 1357 (1979), and have concluded that the narrow "in any like or related manner" language is appropriate.

We shall also modify the judge's recommended Order in accordance with our recent decision in *Ferguson Electric Co.*, 335 NLRB 142 (2001), and with our decisions in *Indian Hills Care Center*, 321 NLRB 144 (1996); and *Excel Container*, 325 NLRB 17 (1997).

We shall substitute a new notice in accordance with our recent decision in *Ishikawa Gasket America, Inc.*, 337 NLRB 175 (2001).

[3] All subsequent dates are in 2000 unless indicated otherwise.

III. FINDINGS OF THE JUDGE TO WHICH EXCEPTIONS WERE FILED

A. Findings Adopted by the Board

The judge found that the Respondent violated Section 8(a)(3) and (1) by granting a wage increase effective April 7, shortly after the Respondent learned of its employees' union activities, and by withholding the employees' midyear bonus. The Respondent has excepted to these findings. We find no merit in the Respondent's exceptions, and we adopt the judge's findings.[4]

The judge also found that the Respondent did not violate Section 8(a)(3) and (1) by warning employee Concepcion Sandoval and refusing to permit her to return to work. The General Counsel has excepted to these findings. We find no merit in the General Counsel's exceptions, and we adopt the judge's findings.[5]

B. Findings Warranting Further Discussion

1. Maria Chavez

There is no exception to the judge's finding that the Respondent violated Section 8(a)(3) of the Act on April 12, by issuing written warnings to several employees, including Maria Chavez. The General Counsel excepts to the judge's failure to address the complaint allegations that two additional warnings the Respondent gave to Chavez were also unlawful. We find merit in the General Counsel's exception.[6]

Maria Chavez signed a union authorization card on May 4. On or about May 17, Chavez and other employees engaged in picketing at the Respondent's facility. There is no exception to the judge's finding that the Respondent unlawfully videotaped those employees. On May 31, Chavez received a warning for allegedly peeling pineapple too slowly. On or about June 20, the Respondent placed in Chavez' personnel file a warning for allegedly peeling melon too slowly.

Applying *Wright Line*, we find that the General Counsel has established that antiunion animus was a motivating factor in the decision to issue the May 31 and June 20 warnings to Chavez. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp*., 462 U.S. 393 (1983); *Manno Electric*, 321 NLRB 278, 280 fn. 12 (1996). Thus, the record shows that Chavez actively supported the Union, and that the Respondent knew of her participation in union activities because the Respondent videotaped its employees' picketing activities. In addition, the record shows that the Respondent demonstrated its hostility to the Union and to those employees who, like Chavez, supported the Union, as evidenced by the unlawful warning it issued to Chavez and others on April 12.

We also find that the Respondent has failed to show that it would have issued these warnings to Chavez even in the absence of her union activities. The judge discredited the Respondent's *Wright Line* defense to these allegations by crediting Chavez' testimony denying that she peeled fruit too slowly on May 31 and June 20, and discrediting the testimony of Chavez' supervisor, Consuelo Mora, to the contrary.[7] We find, accordingly, that the Respondent violated the Act by issuing warnings to Maria Chavez on May 31 and June 20.

2. Genoveva Alvarez

The judge found that the Respondent violated the Act by issuing disciplinary warnings to and discharging Genoveva Alvarez because she engaged in union activity. The Respondent excepts to these findings, claiming that there is no evidence to support the judge's finding that the Respondent knew of Alvarez' activity on behalf of the Union. We agree with the Respondent and reverse the judge.[8]

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[4] However, in adopting the judge's finding with respect to the midyear bonus, we rely only on the first two paragraphs of his analysis in sec. III,B,2,b, of his decision.

[5] The General Counsel has also excepted to the judge's dismissal of the complaint allegation that the Respondent violated Sec. 8(a)(1) by the conduct of alleged agent Sylvia Duarte in threatening to close the plant. Members Cowen and Bartlett agree with the judge that Duarte was not shown to be an agent of the Respondent, and that the statements made by Duarte during the course of a prayer meeting which she conducted on the Respondent's premises did not violate Sec. 8(a)(1).

Member Liebman finds it unnecessary to pass on the judge's dismissal of this complaint allegation because the finding of an additional plant closure threat would be cumulative and would not affect the Order.

[6] As set forth in his separate opinion, Member Cowen dissents on this issue.

[7] Because the judge made no specfic findings as to these complaint allegations, there might appear to be an unresolved credibility conflict between Chavez' denial that the two incidents occurred and Mora's insistence that they did. We find, however, that the judge implicitly resolved this conflict when he stated, in fn. 2 of his decision, that "their testimony concerning the unfair labor practice allegations is generally credible." The word "their" refers to eight employees named earlier in the footnote, Maria Chavez being one of those named employees. We find, accordingly, that the judge credited Chavez' testimony concerning these two alleged incidents and that, contrary to the Respondent, they did not occur.

Contrary to our dissenting colleague's contention, the judge's failure to make explicit credibility resolutions does not bar the Board from addressing these complaint allegations. It is well established that explicit credibility resolutions are unnecessary where a judge has implicitly resolved conflicts in the testimony. See *American Coal Co*., 337 NLRB 1044 fn. 2 (2002).

[8] As set forth in her separate opinion, Member Liebman dissents on this issue.

Alvarez signed a union authorization card in November 1999, and solicited fellow employees to sign cards. She was among the group of employees who went to the Union on March 31, to complain about the Respondent. The Respondent issued warnings to Alvarez between April 4 and 20, for eating candy in the production room, talking out loud at her worktable, and "displaying a terrible attitude." The Respondent discharged her on April 20, for "refus[ing] to accept responsibility for her actions."

The judge determined that "whether the Respondent actually knew specifically that Alvarez and others were union supporters is not fatal to the General Counsel's case," citing *Pacific FM, Inc*., 332 NLRB 771 fn. 6 (2000), in which the Board stated that the knowledge requirement is satisfied if there is proof that an employer "suspects discriminatees of union activity." The judge concluded that because the Respondent's owner, William Bernstein, knew that "a substantial number" of employees had gone to the Union, "the knowledge requirement as to specific discriminatees [including Alvarez] has been satisfied."

For the reasons stated below, we do not agree with the judge.

In order to prove that an employee's discharge violates the Act, the General Counsel has the burden, under the Board's *Wright Line* analysis, to show, inter alia, that the employee engaged in union activities and that the respondent knew of those activities. E.g., *Avondale Industries*, 329 NLRB 1064, 1067 (1999). Here, the General Counsel has shown that Alvarez actively engaged in union activities. There is, however, no record evidence that the Respondent knew of Alvarez' union activities. Thus, there is no evidence that the Respondent knew when she signed a union authorization card, nor is there any evidence that the Respondent knew that she distributed cards in the lunchroom and the parking lot.[9] There is also no evidence that the Respondent knew the identity of any of the women who went to the Union on March 31.

Furthermore, there is not a scintilla of record evidence that the Respondent believed or, at the very least, even *suspected* that Alvarez was engaged in union activity at the time she was warned and discharged, although the Respondent knew generally, by March 31, that its employees had contacted the Union.[10] Therefore, this case is distinguishable from *Pacific FM, Inc*., supra, on which the judge relied. In that case, there was evidence that the employer had interrogated the discriminatee about her union activities and had heard her make prounion comments at a captive-audience meeting. The Board stated that "based on this evidence, we find that the [r]espondent knew of (or at least suspected) [the discriminatee's] prounion sympathies." *Pacific FM, Inc.*, supra. In the instant case, there is no similar evidence to support a finding that the Respondent suspected Alvarez of supporting the Union.

In sum, we find, contrary to the judge, that the record is insufficient to support a finding that the Respondent knew, believed, or even suspected, that Genoveva Alvarez had engaged in union activities.[11] We find, therefore, that the Respondent did not violate the Act by issuing disciplinary warnings to and discharging Genoveva Alvarez. *Tomatek, Inc*., 333 NLRB 1350, 1355 (2001) ("it is axiomatic that the employer could not have been 'motivated' by the employees' protected activity if the employer did not know about any such activity").

3. Carmen Munoz

The judge found that the Respondent violated the Act by issuing a series of disciplinary warnings and suspen-

[9] Indeed, the judge specifically credited the testimony of Supervisor Consuelo Mora that she did not overhear employees discussing the Union in the lunchroom.

[10] Cf. *United States Service Industries*, 314 NLRB 30, 31 (1994) (an employer's belief that an employee engaged in protected concerted activity held sufficient to satisfy the "knowledge" requirement), enfd. mem. 80 F.3d 558 (D.C. Cir. 1996); *Desert Pines Golf Club*, 334 NLRB 265, 275 (2001) (if disciplinary action is motivated by suspected union activity, "that suspicion is sufficient to satisfy the *Wright Line* requirement that the General Counsel prove knowledge of union activity").

[11] The Board has inferred knowledge where the reasons given for the discipline were plainly false or pretextual. *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966). Here, however, the evidence does not support such an inference. Thus, for example, the record shows that the Respondent (a company engaged in food processing) has a rule specifically prohibiting the conduct for which Alvarez was allegedly disciplined on April 4 (eating in the production area), and the judge did not clearly credit Alvarez's denial that she engaged in such misconduct.

Nor does the record otherwise support an inference of knowledge. We cannot agree with our dissenting colleague that knowledge of Alvarez' union activities as of April 4, can be inferred from the Respondent's issuance of an unrelated warning to Maria Torres on April 4. Although the Respondent has not excepted to the judge's finding that the Torres warning violated Sec. 8(a)(3), we cannot close our eyes to the fact that the record does not show that the Respondent even knew of Torres' union activity at that time. Thus, the Torres warning provides no basis for inferring that the Respondent knew of Alvarez' union activity. While the Respondent's subsequent unfair labor practices demonstrated its antiunion animus, even our dissenting colleague concedes that they are not controlling with respect to the separate requirement of knowledge. Under all the circumstances, the most that can be said about the timing of the discipline is that it arouses some suspicions. "Mere suspicions, however, cannot substitute for actual or circumstantial proof." *Mack's Supermarkets*, 288 NLRB 1082, 1101 (1988).

sions to Carmen Munoz. For the reasons stated below, we agree with the judge.[12]

Carmen Munoz has been employed by the Respondent since 1988. She has no record of any disciplinary action taken against her prior to the advent of union activity at the Respondent's facility. Munoz signed a union authorization card on March 18, solicited fellow employees to sign cards, and participated in picketing at the Respondent's facility on May 17.

The Respondent disciplined Munoz on seven occasions between April 12 and November 7. For the reasons stated below, we find that the Respondent violated the Act in each instance.

a. April 12 warning and suspension

On April 12, William Bernstein held a meeting for all employees. At the end of the meeting, he called out the names of employees who were to stay after the meeting because he wished to speak with them. Munoz, who testified that she was one of the employees who was directed to remain to speak with Bernstein, remained as she was told to do. Bernstein, however, vigorously insisted that Munoz leave, which she did. Bernstein proceeded to speak with a group of employees who were warned for working too slowly. (There is no exception to the judge's finding that these warnings violated Sec. 8(a)(3) of the Act.) Munoz was warned for allegedly leaving the lunchroom in a disorderly fashion and suspended for 5 days for allegedly "failing to follow direct instructions" given to her by William Bernstein.

Applying the Board's *Wright Line* analysis, we find that the General Counsel has shown that antiunion animus was a motivating factor in the Respondent's decision to warn and suspend Munoz. By April 12, the date of her warning and suspension, the Respondent had general knowledge of its employees' union activities and had expressed its hostility towards unionization by committing several unfair labor practices in violation of Section 8(a)(1) and (3), including unlawfully warning employees just before suspending Munoz. Although there is no direct evidence that the Respondent knew of Munoz' union activities on April 12, we find that it is reasonable to infer such knowledge based on the false reasons advanced by the Respondent for the discipline.

The Respondent argues that Munoz was suspended because of her insistence that she remain after the general employee meeting to participate in a matter that did not concern her. Credited testimony establishes, however, that William Bernstein had, in fact, asked Carmen Munoz to stay after the general meeting. Munoz, a long-term employee with no prior disciplinary record, was, in effect, suspended for doing precisely what she had been asked to do. The Board has long held that "when the asserted reasons for a [suspension] fail to withstand examination, the Board may infer that there is another reason—an unlawful one which the employer seeks to conceal—for the [suspension]." *Emergency One, Inc*., 306 NLRB 800, 807–808 (1992), citing *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966). That is the situation here. The same is true for the April 12 warning for disorderly conduct, i.e., there is simply no credible evidence that Munoz engaged in the activity of which she was accused. Thus, we conclude that "the absence of any legitimate basis" for Munoz' warning and suspension "may form part of the proof of the General Counsel's case." *Wright Line*, supra, 251 NLRB at 1088 fn. 12.

Under *Wright Line*, the burden shifts to the Respondent to establish that Munoz would have been warned and suspended even in the absence of her union activities. However, as discussed above, the credited testimony shows that the reasons the Respondent advanced for the warning and suspension are false. Accordingly, we find that the Respondent did not meet its *Wright Line* burden.

For these reasons, we adopt the judge's finding that on April 12 the Respondent warned and suspended Munoz in violation of Section 8(a)(3) and (1).[13]

b. May 31 warning, and June 8, June 27, and August 31 suspensions

The Respondent issued a written warning to Munoz on May 31 for "plucking grapes very, very slowly," and for raising her voice and arguing with her supervisors. On June 8, she was suspended for 2 days for "refus[ing] to wash [her] hands properly." On June 27, she was suspended for 3 days for "walking around and wasting time while returning to your work station as follows: Taking three times as long as the other[] employees to wash your hands, putting on your apron, walking to your work station. In the process, you distracted other employees and

[12] As set forth in his separate opinion, Member Cowen dissents on this issue.

[13] Our dissenting colleague argues that the judge erred in crediting Munoz' testimony regarding the April 12 warning and suspension. In fn. 7 of his decision, the judge explicitly stated that while he did not credit Munoz' testimony concerning the dates on the authorization cards she solicited, "on the matters of warnings and suspensions, I did find her the more credible witness." As stated in fn. 1 supra, the judge's credibility resolutions are not contrary to the clear preponderance of all of the relevant evidence. Furthermore, as Chief Judge Learned Hand stated in *NLRB v. Universal Camera Corp.*, 179 F.2d 749, 754 (2d Cir. 1950), revd. on other grounds 340 U.S. 474 (1951), "nothing is more common in all kinds of judicial decisions than to believe some and not all" of a witness' testimony. Accordingly, we find no merit in our dissenting colleague's contention.

took them away from their jobs." On August 31, Munoz was suspended for 5 days for "not washing [her] hands properly."

We find that, in each of the instances described above, the General Counsel has established, pursuant to applicable *Wright Line* principles, that the Respondent's animus against Munoz' union activities was a motivating factor in the decision to discipline her. By the time of the May 31 warning, the Respondent had direct knowledge that Munoz supported the Union, because she picketed the Respondent's facility on May 17, and the Respondent unlawfully videotaped its employees who engaged in picketing. The Respondent's animus against the Union is amply demonstrated by the number and variety of unfair labor practices it committed beginning April 4.

By contrast, the Respondent completely failed to rebut the General Counsel's case. Regarding each of the disciplinary incidents described above, Munoz denied that she had engaged in the conduct for which she was disciplined. The judge credited her testimony and discredited the testimony of her supervisor regarding the acts which formed the basis for her suspensions. The Respondent's *Wright Line* defense has been discredited in each instance. We find, accordingly, that the Respondent violated Section 8(a)(3) and (1) of the Act by warning and suspending Munoz on the occasions described above.

c. October 5 suspension

On October 5, the Respondent suspended Munoz for 4 days because she had been "talking too much and not paying attention to the size of fruit [she was] cutting." The General Counsel has established, for the reasons previously noted, that antiunion animus was a motivating factor in the Respondent's decision to suspend Munoz. The Respondent, however, failed to introduce any evidence to substantiate its discipline of Munoz, and, thus, has failed to meet its burden to rebut the General Counsel's case. We find, therefore, that the October 5 suspension was unlawful.

d. November 7 suspension

The Respondent suspended Munoz on November 7, because she was "not at [her] workstation and ready to work on time." The General Counsel, again for reasons previously stated, has established that animus against Munoz' union activities was a motivating factor in the decision to suspend her. The Respondent proffered no evidence to rebut the General Counsel's case, but merely requests that the Board discredit Munoz' testimony. We find no reason to discredit Munoz, and, accordingly, conclude that the Respondent has failed to meet its *Wright Line* burden. Therefore, the Respondent violated Section 8(a)(3) and (1) of the Act by suspending Munoz on November 7.

4. Maria Alvarez

The judge found that the Respondent unlawfully suspended Maria Alavarez on April 6 and unlawfully discharged her on April 12. The Respondent excepts to these findings, claiming that it lacked knowledge of her union activities and that, in any event, the suspension and discharge were justified. We agree with the Respondent that it lawfully suspended and discharged Maria Alvarez, and we reverse the judge.[14]

In September 1999, and again in January 2000, the Respondent suspended Maria Alvarez for not being at her workstation on time and changing her workstation without permission. These suspensions occurred prior to the date on which the Respondent first learned of its employees' union activity, and there is no evidence or contention that the suspensions were unlawful. Nevertheless, the judge found that the Respondent violated Section 8(a)(3) and (1) by suspending Alvarez on April 6, when she was once again late reporting to her workstation. We are willing to assume, arguendo, that the General Counsel established a prima facie case that Alvarez' union activity was a motivating factor in her April 6 suspension. However, we find that the evidence clearly establishes that the Respondent would have taken the same action even in the absence of that union activity. Accordingly, this allegation of the complaint will be dismissed.

Initially, we observe that the judge did not question the Respondent's contention that Alvarez was, in fact, late reporting to her work station. The judge also failed to justify his decision to fault the Respondent for suspending Alvarez for this infraction when the evidence is clear that it took the same action in response to similar infractions prior to Alvarez' union activity. Instead, the judge based his finding that the suspension was unlawful on the timing of the suspension in relation to the advent of the Union's organizing efforts and a statement by William Bernstein which the judge apparently viewed as linking Alvarez' suspension to her union activity.[15] Neither of these findings is supported by the evidence.

There is nothing suspicious about the timing of the April 6 suspension in the circumstances of this case.

[14] As set forth in her separate opinion, Member Liebman dissents on this issue.

[15] The judge relied on what he viewed as "shifting" reasons given by the Respondent for its actions as a basis for finding that the suspension was unlawful. The record, however, does not support the judge's characterization. We see no real variance between the written reasons for the suspension and the testimony the Respondent presented at the hearing, as they each refer to the same kind of disruptive behavior.

While it is true that the Respondent first learned of the employees' union activity on March 31, it is also true, as noted above, that Alvarez had previously committed the same infraction, and the Respondent had previously suspended her for those violations. The Respondent's continuation of its consistent practice of enforcing this rule, a practice which predates any knowledge on the Respondent's part of any union activity, does not support a finding that the April 6 suspension was unlawful. To the contrary, it strongly suggests that Alvarez' union activity had no effect on the Respondent's actions.

The remaining factor cited by the judge also is not sufficient to support a finding of a violation. According to the credited testimony, during a meeting of all employees on April 6, William Bernstein stated that "somebody from the union office had called him, that a group of women had gone to the union office to complain that they were not permitted to eat outside and about other treatments that they were also receiving, bad treatment, . . . one of those women from that group, she no longer works here." This statement may be pertinent to the General Counsel's prima facie case and, as stated above, we assume arguendo that a prima facie case was successfully established. However, it says nothing about whether the Respondent would have taken the same action even in the absence of Alvarez' union activity. In light of the undisputed evidence that she had been consistently subjected to the same discipline for the same misconduct in the past, it seems clear to us, and we find, that the Respondent has satisfied its burden under *Wright Line*.[16]

The Respondent's April 6 suspension letter directed Alvarez to meet with Daryll Bernstein on April 11. Following that meeting, at which Alvarez refused to accept responsibility for her infraction of the Respondent's work rules, the Respondent discharged Alvarez. According to Daryll Bernstein's testimony, Alvarez became angry and aggressive with her to the point that she felt it would not be safe for Alvarez to be put back to work. The judge provided no rationale whatsoever for his conclusion that the discharge was unlawful. He did not address, much less discredit, Daryll Bernstein's testimony about the meeting that led to Alvarez' discharge. In these circumstances, and noting the undisputed evidence that Alvarez had committed the same infraction in the past and the lack of any dispute that she committed the same infraction on April 6, we find no basis on which to conclude that the subsequent discharge of Alvarez was unlawful, and we therefore dismiss this allegation as well.

[16] Inasmuch as it is undisputed that Alvarez was late reporting to her work station on April 6, that the suspension was proximate in time to her misconduct, and that she had been previously disciplined for similar misconduct prior to the union campaign, we cannot agree with our dissenting colleague that the legitimate reasons the Respondent proffers for the suspension can be summarily dismissed as mere pretexts.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, Amber Foods, Inc., Dinuba, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Telling employees not to speak to other employees who are involved in union activities.

(b) Soliciting grievances from employees and impliedly promising to remedy them.

(c) Threatening employees with more strict application of rules, discharge, or plant closure if they continue to engage in activity on behalf of the Union.

(d) Engaging in surveillance of employees' union activity by videotaping their picketing.

(e) Granting employees benefits in order to discourage their activity on behalf of the Union.

(f) Telling employees they would not receive a midyear bonus because of their union activities.

(g) Denying employees an established benefit in order to discourage their activity on behalf of the Union.

(h) Giving employees disciplinary warnings in order to discourage their activity on behalf of the Union.

(i) Suspending employees in order to discourage their activity on behalf of the Union.

(j) Discharging or otherwise discriminating against employees in order to discourage their activity on behalf of the Union.

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

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

(a) Within 14 days from the date of this Order, offer Misael Islas, Maria Guadalupe Mendez, Esther Marroquin, and Maria Torres full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Misael Islas, Angelica Luna, Maria Guadalupe Mendez, Esther Marroquin, Carmen Munoz, Evelia Sosa, and Maria Torres whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of the decision.

(c) Pay to all employees the midyear bonus for 2000 that they would have received but for the discrimination

against them, with interest computed in the manner set forth in the remedy section of the decision.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges, suspensions and warnings, and within 3 days thereafter notify the employees in writing that this has been done and that the discharges, suspensions and warnings will not be used against them in any way.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its facility in Dinuba, California, copies of the attached notice marked "Appendix."[17] Copies of the notice, in English and in Spanish, on forms provided by the Regional Director for Region 32, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in this 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 April 4, 2000.

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

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations not specifically found.

MEMBER LIEBMAN, concurring in part and dissenting in part.

I agree with the majority decision in most respects. Contrary to my colleagues, however, I would adopt the judge's findings that the Respondent violated Section 8(a)(3) and (1) of the Act by repeatedly warning and ultimately discharging Genoveva Alvarez, and by suspending and discharging Maria Alvarez.

1. Genoveva Alvarez

As my colleagues recognize, Genoveva Alvarez was a leading union adherent. She signed a union authorization card, and she solicited fellow employees to sign cards in the lunchroom and the parking lot. She was among the group of employees who went to the Union on March 31, 2000, to complain about the Respondent. On the same day, a union representative telephoned the Respondent's owner and informed him of his employees' complaints. Just 4 days later, the Respondent issued Alvarez the first of a series of disciplinary warnings, which culminated in her discharge on April 20.

My colleagues find, and I agree, that when the Respondent disciplined Alvarez on April 4, it knew generally of the employees' union activity. Although there is no direct evidence that, on April 4, the Respondent knew specifically of Alvarez' prounion sympathies, "the element of knowledge may be shown by circumstantial evidence from which a reasonable inference may be drawn." *Abbey's Transportation Services v. NLRB*, 837 F.2d 575, 579 (2d Cir. 1988). Here, the judge reasonably inferred knowledge based on the following factors.

First, the Respondent committed another unfair labor practice simultaneously with its discipline of Alvarez. Thus, the judge found that on April 4, the Respondent unlawfully warned Maria Torres because of her union activity. Although the Respondent has not excepted to this finding, the violation remains and lends its "aroma to the context in which the contested issues are considered." *Rock-Tenn Co. v. NLRB*, 69 F.3d 803, 808 (7th Cir. 1995).

Second, the judge found that during the course of the union campaign the Respondent exhibited strong antiunion animus as manifested by its multiple unfair labor practices, including numerous unlawful warnings, suspensions, and discharges. Although "not in themselves dispositive," the Respondent's other unlawful acts "provide powerful support" for a finding of knowledge. *Abbey's Transportation*, supra, 837 F.2d at 580.

Third, the judge properly relied on the timing of the discipline, occurring just days after the advent of the union activity. The timing suggests that the Respondent was moving quickly to eliminate one of the leading union proponents.

Based on these factors, I would find that an inference of knowledge is warranted. The same factors can also be relied on to establish unlawful motivation. *Abbey's Transportation*, supra, 837 F.2d at 579–580 (employer knowledge and antiunion motivation may be proved by

[17] 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."

the same type of evidence). Therefore, I would find that the General Counsel satisfied his *Wright Line* burden of showing that Alvarez' union activity was a motivating factor in the Respondent's decision to warn and discharge her.[1]

Essentially for the reasons stated by the judge, I would find that the Respondent failed to meet its *Wright Line* burden of establishing that it would have taken the same actions against Alvarez even in the absence of her union activity. Accordingly, I would affirm the judge's unfair labor practice findings with respect to Genoveva Alvarez.

2. Maria Alvarez

This is one of those rare cases where there is direct evidence of unlawful motivation. Maria Alvarez signed an authorization card on November 10, 1999, solicited other employees to sign cards, and was among the group of employees who went to the Union on March 31, 2000, to register complaints against the Respondent. On April 6, the Respondent suspended her, and on April 12, it discharged her.

According to the credited testimony, at a meeting of all employees on April 6, after Alvarez had been suspended, the Respondent's owner, William Bernstein, stated that "a group of women had gone to the union office to complain" about working conditions and that "one of those women from that group . . . no longer works here." The record shows that Maria Alvarez was the only employee suspended on April 6, and therefore must have been the one referred to by Bernstein.

In my view, Bernstein's statement is an outright confession of unlawful motivation that eliminates any question whether Alvarez was suspended for a legitimate reason. On April 6, Bernstein was not concerned about Alvarez' job performance. The only factor of significance to him at that time was that Alvarez was "one of those woman" who complained to the Union. Therefore, in agreement with the judge, I would reject as pretextual the Respondent's claim now that Alvarez was actually suspended for misconduct. Inasmuch as her discharge was inextricably intertwined with her unlawful suspension (the Respondent claimed that she was "unwilling to admit" that she had "done anything wrong"), I would find it unlawful as well.

MEMBER COWEN, dissenting in part.

Contrary to my colleagues, the General Counsel has not established that the disciplinary warnings issued to employee Carmen Munoz, and the May 31 and June 20, 2000 warnings given to Maria Chavez, were unlawful. Accordingly, I dissent from the majority's decision to find these violations.

1. Carmen Munoz

Carmen Munoz supported the union organizing drive at the Respondent's plant by signing a union authorization card on March 18, 2000, soliciting fellow employees to sign cards, and participating in picketing at the Respondent's facility on May 17, 2000.[1] At the hearing, Munoz was called by the General Counsel to authenticate the authorization cards. She testified, inter alia, that she witnessed the signers date the 21 cards she solicited. The judge, however, found that this testimony was "at least questionable if not outright false." Based on testimony by an expert document examiner, the judge concluded that most of the cards were undated when signed, with the dates subsequently being filled in by someone other than the card signer.

On April 12, the Respondent issued Munoz a warning and 5-day suspension for failing to leave the lunchroom when directed to do so by the Respondent's co-owner, William Bernstein.[2] It is undisputed that, after a meeting for all employees, William Bernstein called out the names of 12 employees who were to remain so that he could speak to them about working too slowly.[3] Munoz testified that she also remained behind because she thought she was told to do so. She acknowledged, however, that William Bernstein repeatedly told her to leave before she complied with his directions. William Bernstein testified that he never asked Munoz to remain behind with the 12 other employees. Those 12 employees all worked in the same area, the cantaloupe table, while Munoz worked in another area. The 12 employees received warnings on April 12, for working too slowly. Munoz did not receive one of the warnings.

Under the Board's decision in *Wright Line*,[4] in all cases alleging violations of Section 8(a)(3) or violations of Section 8(a)(1) turning on employer motivation, the General Counsel must first prove that protected conduct was "a 'motivating factor'" in the employer's decision. Once this is established, the burden shifts to the employer to demonstrate that it would have taken the same action even in the absence of the protected conduct. And

[1] *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

[1] Unless otherwise noted, all dates hereafter are in 2000.

[2] William Bernstein's wife, Daryll Bernstein, is the Respondent's other coowner.

[3] There are no exceptions to the judge's finding that the warnings to these employees for working too slowly were unlawful.

[4] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 399–403 (1983), overruled in part on other grounds, *Director, Office of Workers Compensation Programs, Dept. of Labor v. Greenwich Collieries*, 512 U.S. 267, 276–278 (1994).

it is well that, "[I]n the absence of a showing of antiunion motivation, an employer may discharge an employee for a good reason, a bad reason, or for no reason at all. Whether other persons would consider the reasons assigned for a discharge to be justified or fair is not the test of legality under Section 8(a)(3)."[5]

My colleagues find that a violation of Section 8(a)(3) and (1) has been made out under this standard. In reaching this conclusion, they rely exclusively on the judge's decision to credit Munoz' testimony that William Bernstein told her to stay and then immediately thereafter told her to leave. My colleagues uncritically adopt this credibility resolution despite the judge's prior finding that Munoz' testimony concerning the authorization cards was "at least questionable, if not outright false."[6] This credibility resolution is the sole basis for the majority's finding that the April 12 warning and suspension were unlawful. The majority acknowledges there is no evidence that the Respondent was aware of Munoz' union activities, an essential element of the General Counsel's case, but then infers such knowledge from their finding that the Respondent's stated reason for disciplining Munoz—her insubordination—was, in their words, false. They again rely on this credibility resolution as the sole basis for their conclusion that the Respondent has not rebutted the General Counsel's prima facie case by showing that it would have taken the same action in the absence of Munoz' union activity, i.e. that the reason given by the Respondent for the warning and suspension were false.

In reality, of course, it was Munoz, not William Bernstein, who gave false testimony in this case. As the judge acknowledged, her testimony concerning the dating of the authorization cards was both unambiguous and untrue. The judge did not merely find that the conflicting testimony of other witnesses was more credible; he found that Munoz' testimony on this issue was false. In these circumstances, there is no justification for crediting the disputed testimony that Munoz provided concerning the circumstances of her warning and suspension. This is particularly true in light of the inherent improbability of Munoz' version of events: that she was told to stay for a meeting at which 12 other employees received a warning for working slowly, even though she did not receive one of those warnings, and that she was then immediately, and inexplicably, told to leave the meeting. Accordingly, I would discredit Munoz' testimony concerning the events of April 12, and find that the General Counsel has failed to prove that the warning and suspension were unlawful.[7]

2. Maria Chavez

Nor would I consider the allegations that the Respondent violated the Act by warnings given to employee Maria Chavez on May 31 and June 20, 2000. As my colleagues note, the judge made no specific findings on these incidents. Indeed, it appears that these additional allegations were added to the case by amendments to the complaint at the hearing. In such circumstances, these amendments must be carefully scrutinized to ensure that the Respondent was afforded its due process rights. Here, as my colleagues also note, employee Chavez denied that the two incidents for which she was warned actually occurred. In contrast, her supervisor, Consuelo Mora, insisted that they did occur. Since he did not discuss these incidents, the judge obviously made no credibility resolutions regarding the witnesses' testimony on these incidents and I reject my colleagues' attempts to do so. While it is true, as my colleagues state, that the judge found that a number of employees, including Chavez, were "generally credible" as to the unfair labor practice allegations, he did not find them invariably credible. Moreover, on at least one other issue, the judge credited Mora as to her "specific denial that she in fact overheard employees discussing the Union." Using my colleagues' barometer, I note that the judge never found her "generally incredible." In such circumstances, it is patently unfair to the Respondent to consider these issues, and to make credibility resolutions in

[5] *Borin Packaging Co.,* 208 NLRB 280, 281 (1974). Accord: *Radio Officers v. NLRB (A. H. Bull Steamship Co.),* 347 U.S. 17, 42–43 (1954) "only such discrimination as encourages or discourages membership in a labor organization is proscribed" by Sec. 8(a)(3).

[6] The majority, however, does not rely on other factors cited by the judge in finding that the April 12 warning was unlawful. Thus, the judge based his finding that Munoz was, at first asked to stay with the other employees in part on the fact that the Respondent prepared a written warning for Munoz for not leaving the lunchroom in an orderly way. That warning, however, was obviously prepared after the incident and thus has no bearing on whether Munoz' testimony that she was told to stay at first was truthful. The judge also found that the warning was unlawful in part because a 5-day suspension was an "extreme" response to "what was obviously a misunderstanding." In reaching this conclusion, the judge improperly substituted his business judgment for the Respondent's. See *Borin Packaging Co.,* supra. The majority properly does not rely on these clearly erroneous elements of the judge's analysis. However, my colleagues fail to justify their decision to affirm the judge's finding of a violation despite these errors.

[7] I would reach the same conclusion with respect to the other warnings issued to Munoz, which the majority finds were unlawful. I acknowledge that Munoz picketed the Respondent's facility on May 17, which provides a basis for finding that the Respondent knew of her union activity at the time of the subsequent warnings. However, the majority's conclusion that the Respondent did not show that it would have issued these warnings to Munoz, even in the absence of her union activity, is based solely on the unfounded conclusion that Munoz was a credible witness with respect to these events. I would not credit Munoz with respect to any of these incidents, and I would therefore dismiss the relevant complaint allegations.

doing so, and I dissent from my colleagues' findings of violations in these warnings.

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 Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT tell you not to speak to other employees who are involved in union activities.

WE WILL NOT solicit grievances from you and impliedly promise to remedy them.

WE WILL NOT threaten you with more strict application of rules, discharge, or plant closure if you continue to engage in activity on behalf of the Union.

WE WILL NOT engage in surveillance of your union activity by photographing your picketing.

WE WILL NOT tell you that you will not receive a midyear bonus because of your union activities.

WE WILL NOT grant you benefits in order to discourage your activity on behalf of the Union.

WE WILL NOT deny you an established benefit in order to discourage your activity on behalf of the Union.

WE WILL NOT give you disciplinary warnings in order to discourage your activity on behalf of the Union.

WE WILL NOT suspend you in order to discourage your activity on behalf of the Union.

WE WILL NOT discharge or otherwise discriminate against you in order to discourage your activity on behalf of the Union.

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

WE WILL, within 14 days from the date of the Board's Order, offer Misael Islas, Maria Guadalupe Mendez, Esther Marroquin, and Maria Torres full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Misael Islas, Angelica Luna, Maria Guadalupe Mendez, Esther Marroquin, Carmen Munoz, Evelia Sosa, and Maria Torres whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, less any net interim earnings, plus interest.

WE WILL pay to all employees the midyear bonus for 2000 that you would have received but for the discrimination against you, with interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges, suspensions and warnings of Maria Barrea, Maria Chavez, Misael Islas, Anjelica Luna, Maria Guadalupe Mendez, Esther Marroquin, Carmen Munoz, Elva Ruiz, Evelia Sosa, and Maria Torres, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discharges, suspensions, and warnings will not be used against them in any way.

AMBER FOODS, INC.

Gary M. Connaughton and *Amy L. Berbower, Esqs.,* for the General Counsel.

Cal B. Watkins Jr. and *Jason C. Parkin, Esqs.,* of Fresno, California, for the Respondent.

Mario Martinez, Esq., of Salinas, California, for the Charging Party.

DECISION

STATEMENT OF THE CASE

JAMES L. ROSE, Administrative Law Judge. This matter was tried before me on various dates between December 11, 2000, and January 23, 2001, at Visalia, California, on the General Counsel's complaint which alleged that the Respondent committed certain violations of Section 8(a)(1) and (3) of the National Labor Relations Act. The Respondent generally denied that it committed any violations of the Act.

On the record as a whole, including my observation of the witnesses, briefs, and arguments of counsel, I make the following findings of fact, conclusions of law, and recommended Order.

I. JURISDICTION

The Respondent is a corporation engaged in the processing and nonretail distribution of fruit products from a facility in Dinuba, California, in connection with which it annually provides goods or services valued in excess of $50,000 directly to customers located outside the State of California. The Respondent admits, and I conclude that it is an employer engaged in interstate commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

United Farm Workers of America, AFL–CIO (the Union) is admitted to be, and I find is, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. The Fact

The Respondent is a corporation owned by husband and wife William and Daryll Bernstein. Since 1988 they have been engaged in the business of processing fresh cut fruit sections and fresh cut fruit salads for sale to hotels and restaurants. The bulk of the Respondent's employees are women who cut the fruit. Depending on production needs, the Respondent employs about 60 fruit cutters, though it has the capacity to have 72, 12 at each of 6 tables.

The Bernsteins also own a similar facility in Toronto, Canada, and split their time between Canada and California. They speak no Spanish, which is the first language of most of their California employees. To communicate with these employees, the Bernsteins rely on the office secretary or supervisor.

In November 1999, several employees of the Respondent visited the Union's office in Parlier, California, to get information about the Union. Between then and March 31, 2000,[1] authorization cards were signed by employees and several of them became members of the Union.[2] Then on March 31, 2 days after the Respondent's new plant opened, eight of the fruit cutters came to the Union's office with complaints about how the Respondent was treating them. At about 1 p.m. that day, then Union Representative Sandra Ching called the Dinuba facility and asked to speak to one of the Respondent's owners. Secretary Norma Caquias took the call and said she would have one of the owners call, which, according to Ching, occurred within an hour.

William Bernstein denied learning of this call on March 31, and testified that the first contact he had with the Union was on April 4, from his office in Canada, offering a telephone company printout showing two calls to the Union's office that day. The Respondent offered no documentary evidence disputing that he had in fact returned Ching's call on March 31. He claims that he and Daryll drove to the Los Angeles airport on March 31, leaving Dinuba about 10 a.m. for the 4-hour drive; thus, he did not have time to return the call and still make the 3:20 p.m. flight. Counsel for the General Counsel notes that in an earlier affidavit, Bernstein stated that they left Dinuba between 7 and 8 a.m.

I credit Ching over Bernstein. While he no doubt had a lengthy conversation with a union representative on April 4, such does not negate a call on March 31. Further, Caquias was called as a witness by the Respondent but was not asked about the call from Ching, which implies that she would not have supported the Respondent's contention that there was no call on March 31. The significance of this, as will be seen below, concerns company knowledge of the employees' union activity. I find that the Respondent knew of such, at least in a general way, by March 31, and I reject the Respondent's argument that the Bernsteins had no idea of any union activity until May 8 nor which employees were involved until the picketing began on May 17.

The complaint alleges that beginning in early April the Respondent engaged in numerous acts violative of Section 8(a)(1) and disciplined several union activists with warnings, suspensions, and discharge in violation of Section 8(a)(3). These allegations will be treated in seriatim as they appear in the complaint.

B. Analysis and Concluding Findings

1. The 8(a)(1) allegations

a. May 2 by Steven Lund

In paragraph 6(a) it is alleged that Plant Manager Steven Lund violated Section 8(a)(1) by telling "an employee not to speak with other employees who were involved in Union activities." This allegation is apparently based on the testimony of Misael Islas. Islas testified that when Lund suspended him on May 2, he asked why and Lund told him "the reason we giving you this letter and suspending you is because somebody saw you talking to Genoveva and Maria Alvarez outside in the parking lot." Lund told him the reason he could not talk to them was "because they don't work here no more." Lund denied the general substance of Islas' testimony.

Though Islas' testimony was somewhat difficult to follow, I conclude that in fact Lund did make the statement attributed to him in the course of suspending Islas, which not only shows a discriminatory motive but tends to interfere with employees' exercise of their Section 7 rights. Accordingly, I conclude that the allegations in paragraph 6(a) have been established.

b. May 8 by William Bernstein

It is alleged that on May 8, Bernstein solicited grievances from employees and impliedly promised to remedy them. This occurred when after a meeting of employees at which Bernstein spoke, Maria Mendez asked him about 2 sick days, which they discussed, then he "asked me if I could make out a letter giving any suggestions to better things."

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[1] All dates hereafter are in 2000, unless otherwise indicated.

[2] When signed, most of the cards were undated, with the dates subsequently being filled in by someone other than the card signer. A questioned document examiner testified that the dates on 39 cards show a common authorship. Counsel for the Respondent argues that Carmen Munoz, Angelica Luna, Misael Islas, Maria Chavez, Maria Barrea, Maria Alvarez, Sandra Arevalo, and Avelia Sosa gave false testimony about who put in the dates on cards they signed or witnesses and therefore they should be discredited. Except for Munoz, I am not convinced the testimony of these witnesses is false. Marroquin, for instance, testified that Maria Alvarez wrote the date on the card she signed (one of those with common authorship), then said, "I don't remember because there were so many cards." Chavez testified that she dated six of the cards showing common authorship. She was not asked about the others. Barrera testified that card signers dated their cards. Luna was not asked. Munoz did unequivocally testify that she saw the signer date the 21 cards she solicited. All these witnesses testified through an interpreter, none were particularly sophisticated, and their testimony on cross-examination, except for Munoz, was ambiguous. I have considered this in evaluating the credibility of these witnesses and conclude that even in the case of Munoz, the testimony about dates on the cards does not necessarily mean that their testimony on the unfair labor practice allegations is false. From the overall facts of this matter, their demeanor and the Bernstein's lack of credibility, I conclude that their testimony concerning the unfair labor practice allegations is generally credible. Since the purpose of this proceeding is primarily to vindicate public rights, I am disinclined to reject out of hand the testimony of these individuals under some kind of "clean hands" theory.

Citing *Ichikoh Mfg.*, 312 NLRB 1022 (1993), the General Counsel argues that this was unlawful. Counsel for the Respondent contends it was not unlawful because the conversation was initiated by the employee. I agree with the General Counsel that Bernstein's request amounted to unlawful solicitation of grievances and the implied promise to rectify them in violation of Section 8(a)(1).

It is also alleged that at a subsequent employee meeting on May 8, Bernstein said, "that things were going to change with a Union in that the rules would be stricter and Respondent's attorney would have to be in charge of everything." Such is the essence of Maria Mendez' testimony, which Bernstein denied. Further, counsel for the Respondent contends that for Bernstein to have made such a statement makes no sense since he did not hire an attorney until May 12.

I discredit Bernstein's denial and conclude that he made a statement to employees in substance as testified to by Mendez and thereby threatened employees in violation of Section 8(a)(1).

c. May 15 by Steven Lund

It is alleged that on May 15, Lund violated the Act by photographing employees' union activity. On May 17, employees began picketing the Respondent's plant, and the Respondent admits that it videotaped the picketing, because it had been instructed to do so by its workmen's compensation insurance carrier. I reject the Respondent's argument. "The Board has long held that absent proper justification, the photographing of employees engaged in protected concerted activities violates the Act because it has a tendency to intimidate." *F. W. Woolworth Co.*, 310 NLRB 1197 (1993). I conclude that Bernstein's uncorroborated and generalized statement that some employees filed workmen's compensation claims is not proper justification. Accordingly, I conclude that the Respondent violated Section 8(a)(1) as alleged in paragraph 6(d).

d. May 18 by William Bernstein

It is alleged that on May 18, Bernstein threatened to discharge employees because of their union activity. This is based on the testimony of Concepcion Sandoval, denied by Bernstein. During the course of a discussion they had regarding the picketing, Bernstein "asked me that if I knew that inside there there were a lot of bad people. I told him no, that I did not believe so. He said that he was going to lay all those people off. He did tell me. Now he's denying it, but it's true." When asked what she understood "inside there" to be referring to, she answered, "Oh, well, those of us that were in the Union."

I credit Sandoval over Bernstein, and conclude that he made the statements attributed to him. Such, I conclude, was an unlawful threat in violation of Section 8(a)(1) of the Act.

e. May by Yolanda Pueblas

Yolanda Pueblas is a forewoman who, on an unknown date in May, is alleged to have "told employees that the Respondent's facility would close if they continued to support the Union." While the Respondent argues that she does not have sufficient supervisory authority that her comments should be attributable to the Respondent, she was alleged and admitted to be a supervisor and an agent of the Respondent. Thus regardless of her low-level status as a supervisor, I conclude that her statements concerning possible plant closing would be binding on the Respondent.

Virginia Yanez testified without contradiction (though Pueblas was in fact called as a witness) that among other things, Pueblas said, "that she was seeing is, well, like the problems that were going to be coming, like the plant might be closing, that a lot of people depended on that job." This, I conclude, amounts to a threat of plant closure should employees be successful with their union campaign. The Respondent thus violated Section 8(a)(1).

f. June 27 by Jane Does

Employee Clementina Hernandez asked and received permission to bring several nonemployees to the plant before work on June 27 in order to hold a prayer meeting. Hernandez credibly testified that she arrived at the plant about 5:30 a.m. that day and the prayer meeting started about 15 minutes later. The meeting went into worktime "five, ten minutes, or something like that."

The principal speaker at the meeting was nonemployee Sylvia Duarte. During the course of the meeting, according to the undisputed testimony of Cecilia Segura, Duarte said, "that she was there because God had sent her. She said that we should ask God that the plant not be closed because it was about to close down. She said that she was asking on behalf of all of us because everybody was disunited and that you could see the devil there. And she said that 1-day prior, she had passed by the street of the plant and that she had seen blood splattered on the street. She also said that a woman had told her that all of us were disunited, that some were with the Union and others for the company, and that she was asking God that all of us could become united."

The General Counsel does not contend that the prayer meeting conducted by nonemployees was itself unlawful. Rather, It is alleged that Duarte threatened plant closure and interfered with employees Section 7 rights by stating that their union activity "was evidence of Satanic possession and that they should hug the owner and beg for forgiveness." Citing *Southern Pride Catfish*, 331 NLRB 618 (2000), the General Counsel argues that Duarte, and the other nonemployees who attended the prayer meeting, were agents of the Respondent. I disagree.

The facts here significantly differ from *Southern Pride Catfish.* There, a local pastor (some of whose congregation worked for the company) asked permission to speak against the union campaign and did so 10 times, on each occasion being introduced by the human resources director or other management official. The pastor's statements that the plant would close were not repudiated and were found an unlawful threat attributable to the company.

Duarte was not introduced by any management person. Daryll Bernstein was present, but she does not understand Spanish. A couple weeks later, on learning of the substance of Duarte's remarks, Bernstein wrote a memo to employees that they had no intention of closing the plant. Following the meeting, at Duarte's request, Bernstein gave her a tour of the new plant. Such does not make Duarte an agent. Finally, there had been other prayer meetings at the plant and in the parking lot.

On these facts I do not believe that employees would reasonably conclude that statements by a nonemployee were orchestrated by the Respondent and I will recommend that paragraph 6(g) be dismissed.

g. August by Daryll Bernstein

It is alleged that during a meeting of employees in August, Daryll Bernstein "told employees they would not be receiving a midyear bonus because of their Union activities." Admittedly, at an employee meeting in August, when asked about the midyear bonus which employees usually received, Bernstein said, "no, there wouldn't be a summer bonus, because of the monies that were spent in the new facility, and I also said that we had to hire lawyers because of the union issue."

Bernstein clearly related to employees a loss of benefit with their union activity and such violated Section 8(a)(1). Accordingly, I conclude that the allegation in paragraph 6(h) has been established.

2. Granting and withholding benefits

a. Wage increase of April 7

On April 7, the 38 employees at the top rate of $6.75 per hour received a wage increase to $7. The General Counsel argues that such was necessarily in response to the employees' incipient organizational campaign and was therefore violative of the Act. The Respondent argues that the raise was contemplated as early as the fall of 1999, and was made effective on March 27, though employees were not told about it until receiving it on their paychecks April 7. Not telling employees, according to Williams Bernstein, was to "surprise" them. I discount Bernstein's unsupported, self-serving and otherwise generally incredible testimony. I conclude that in fact, giving most of the employees a 25-cent-an-hour wage increase on April 7, was to discourage their union activity.

Though I conclude that Bernstein's first contact with the Union occurred on March 31, even accepting his contention that it was not until April 4, the wage increase occurred after he learned of the employee's union activity.[3] There is simply no evidence, other than Bernstein's incredible testimony, that the wage increase was set at any time before April 7. Surely the Respondent's business practices are not so cavalier that there would be no record of instructions about raising the employees' hourly wage by 25 cents. Yet the Respondent offered no evidence other than Bernstein's testimony.

I conclude that granting most of the work force a wage increase just after learning of the employees' interest in the Union was violative of Section 8(a)(3).

b. Failure to pay a midyear bonus

For some time the Respondent had a practice of giving employees two bonuses a year—one in the summer and one at Christmas time. As noted above, when asked in August about the midyear bonus, Daryll Bernstein told employees there would be no midyear bonus because of the cost of the new building and attorney fees associated with combating the employees' union activity.

Counsel for the Respondent correctly states that if it can be shown that any adverse action against employees would have occurred even in the absence of union activity, then that action is not violative of the Act. Thus, counsel argues, since the decision not to give a bonus was made before there was any known union activity and resulted from the costs of the new building, failure to give it was not unlawful. Again, to accept this argument would require crediting William Bernstein's self-serving testimony, which I decline to do. As stated above, I found him a generally incredible witness.

Further, counsel's argument ignores Daryll Bernstein's admission that not giving the bonus was based, in part at least, on the cost of attorneys to deal with the employees' union activity. Accordingly, I conclude that changing an established practice and refusing to give employees a midyear bonus was to retaliate against them for their union activity and was violative of Section 8(a)(3) of the Act.

c. Increase in sick days

At the hearing, the complaint was amended to add the allegation that on or about May 8, the Respondent changed its rules to increase the number of sick days for employees with more than 10 years service. There appears to be no question that in fact the new rules, published on or about May 8, added sick leave days for certain employees. This was a grant of benefit shortly after advent of the union activity and I therefore conclude it was violative of Section 8(a)(3).

3. Warnings, suspensions, and discharges

There are alleged 43 separate violations of Section 8(a)(3), all occurring subsequent to the Respondent learning of the employees' interest in the Union, almost all of which I find occurred. I conclude that the Respondent engaged in a comprehensive campaign to discourage this activity. Most of the alleged unlawful discipline of employees is based on the subjective evaluation of events purportedly observed by agents of the Respondent; e.g., an employee was working too slowly, or talking too loudly. Further, before the union activity, there is evidence of only two written disciplines to an employee (to Misael Islas on May 15 and August 20, 1999), and two suspensions (Maria Alavarez in September 1999 and in January). Absent evidence to the contrary, I conclude that before the advent of union activity, the Respondent corrected its employees without formal warnings and suspensions. Nor is there any history of discharging employees for work related problems. Finally, many of the warnings were not in fact given to the accused employee, but were simply put in that employee's personal file. Such indicates less interest in correcting the employee's work than to build a record to justify future adverse action. From all these factors, I infer that the discipline of employees was motivated by their interest in the Union.

a. Genoveva Alvarez

It is alleged that the Respondent issued verbal disciplinary warnings to Genoveva Alvarez on April 4, 6, 12, 13,14, and 17;

[3] Counsel for the Respondent repeatedly states that "Amber did not know the Union was organizing it employees until May 8, 2000," notwithstanding Bernstein's admission that he had two calls with an agent of the Union April 4. I reject counsel's assertion.

and, on April 20 discharged her, all in violation of Section 8(a)(3) of the Act.

Alverez was hired in 1997 as a fruit cutter. Although counsel for the Respondent alluded to previous warnings in 1999, there is no evidence that she was disciplined until after the union activity began, and specifically, not until after the Respondent learned of the union activity.

The Respondent's principal defense to these allegations is that there is no proof that her specific activity on behalf of the Union was known. The General Counsel argues company knowledge based on inference—that she and others discussed the Union in the lunchroom and such must have been overheard by their supervisor, Consuelo Mora. Given that the lunchroom is a noisy place, I find it difficult to infer that anyone's talk could be heard at nearby tables. I credit Mora's specific denial that she in fact overheard employees discussing the Union; however, Mora did not deny that she knew of the union activity in general.

Nevertheless, I conclude that with the advent of union activity, the Respondent undertook a campaign of intimidation which included warnings to any employee for trivial infractions of rules which had not previously been matters of concern. At least there is no record that the infractions for which Alverez was given discipline had ever warranted discipline before. Further, the warnings given Alverez have limited, or no, factual support. Thus, whether the Respondent actually knew specifically that Alverez and others were union supporters is not fatal to the General Counsel's case. In *Pacific FM, Inc.*, 332 NLRB 771 fn. 6 (2000), the Board said, quoting from *Respond First Aid*, 299 NLRB 167, 169 fn. 13 (1990), "The Board and courts have long held that when the General Counsel proves an employer suspects discriminatees of union activities, the knowledge requirement is satisfied." Since Bernstein knew that a substantial number of production employees had gone to the Union, I conclude that the knowledge requirement as to specific discriminatees has been satisfied.

On April 4, Alverez was given a "Verbal Warning" (which are in writing) by secretary Norma Caquias, who testified she had no discipline authority, which stated, "You have been seen eaten [sic] candy in the production room." Alverez denied doing so. Caquias was not questioned concerning this alleged event; however, she was questioned concerning a purported similar occurrence which resulted in a "Written Warning" on April 13, signed by William Bernstein: "You were observed on 4–13–00 putting a piece of food in your mouth, then entering the production area. At the time you began work you signed papers stating no food or drinks to be consumed in the production room. In addition, you are will [sic] aware that no eating is allowed in the production room."

Even if Alverez was observed putting food in her mouth in the lunchroom and then proceeding to the production area, it is more likely than not she would have completed eating the food before beginning production. Absent union activity it is highly unlikely that the Respondent would have disciplined Alverez on these facts.

On April 6, Alverez was given a "Verbal Warning" signed by Caquias: "You have been talking out loud at your work station, disrupting other fellow employees yelling out loud this is a verbal warning. Further discipline will be taken if this continues." Not only is this general and subjective, the evidentiary support for it is questionable. Supervisor Consuelo Mora testified that on the day in question Alverez was "screaming" and when talking to a fellow employee (which is allowed) she stopped cutting. Even if this occurred as testified to by Mora, the offense was so trivial that I infer that absent the union activity she would not have been given a formal disciplinary action.

On April 14, William Bernstein gave Alverez two disciplinary letters, as he styled them. Though unclear in the record it appears that these were the warnings of April 6 and 13.[4] According to Bernstein, Alverez made giving her these disciplines very difficult and he so stated on a separate "Verbal Warning" dated April 17, in which he concluded that "she displayed a terrible attitude when and after you (Caquias) read the letters to her. As a result, we are concerned about allowing her to continue to work at Amber Foods."

I do not credit Bernstein's testimony concerning the attitude of Alverez on April 14, nor the statements in his written warning. Caquias, who was present (according to a note on the warning) was not asked about this event, which I conclude indicates she would not have credibly supported Bernstein's version.

Finally, on April 20, Bernstein signed a "Written Warning" typed in Spanish, which was apparently translated from an English version, partly typed and partly in handwriting:

> (Typed) Your attitude since we have moved into 301 No. M street has been very very negative. We are suspending you on April 24th and 25th, to give you a chance to think about whether or not you want to change.
>
> (Hand written) Except for the past few days, Genoeva has been untruthful during our meeting and unwilling to accept the truth.
>
> Refused to sign—(unreadable) Refuses to accept responsibility for her actions. As a result she is terminated.

Undoubtedly there was some conflict when Bernstein was giving Alverez the warnings, since she denied that she committed the acts for which she had been accused. And this was compounded by the fact that Bernstein speaks no Spanish and Alverez speaks no English. Since I conclude that the warnings given Alverez were inspired by the employees' union activity, the discharge flowing from them was unlawful, notwithstanding that Bernstein may have generated conflict when discussing these matters with Alverez. Accordingly, I conclude that her discharge on April 20, was violative of Section 8(a)(3).

b. Maria Torres

It is alleged that Maria Torres was given verbal warnings on April 4, 17, and 19; written warnings on April 5, 12 (along with others at her table), and 19; suspended on May 3 and discharged on May 8, all in violation of Section 8(a)(3).

In Torres' personal file is a "Verbal Warning" dated April 4,which states: "You are talking and not working when you are at your work station." This was signed by Caquias and wit-

[4] I find no evidence of a warning given Alverez on April 12, as alleged in par. 6(g).

nessed by Mora, though Mora testified that she saw the infraction. Similarly, in Torres file is a "Written Warning" dated April 5, again signed by Caquias and witnessed by Mora stating, "You are continuing to talk and not work when at the cutting table." Torres testified that she was not given these warnings, a fact which is not disputed. She did testify that about this time Mora moved her to a different cutting table. She also testified, without dispute, that before April, she had never been disciplined in any way.

Talking is not prohibited. Of course employees are suppose to work when working, but Mora's statements on the April 4 and 5 warnings are scarcely proof that Torres was not cutting fruit at a satisfactory pace. And if she was not, this is the kind of thing supervisors are suppose to correct on the spot, rather than writing a formal discipline and not telling the employee. Since Torres was not confronted about her alleged wrongs, I conclude that the warnings were simply put in her personal file because of the union activity.

On April 12, after a general meeting of employees, William Bernstein kept the 12 employees who had been working on the cantaloupe table the day before and gave them each a "Written Warning" for slow work. At this meeting Torres acted as the interpreter, she being the only one present who could read and speak both English and Spanish.

Bernstein gave Torres the "Written Warning" in Spanish to read to the others. In it he used the phrase, "usted corto muy cerda." (In the English version, the phrase is "you cut very slowly.") Torres testified that she did not comprehend the use of cerda, which means "pig."[5] Regardless of how it was that seeming to refer to employees as "pigs" came to be in the warning read to them on April 12, and given them subsequently, there was a discussion, the upshot of which was the employees considered that they had been insulted.[6] Further, according to Torres, Bernstein stated that only three or four employees were cutting slowly, so she told him that they should be disciplined and not the whole table.

The Respondent offered no documentary or other objective evidence that in fact there was any slowdown of work on April 11. Thus, I conclude that the written warnings given to Torres and others on April 12, were violative of Section 8(a)(3).

Torres participation in the meeting, as interpreter and spokesperson, resulted in a "Verbal Warning" dated April 17, given to her, along with other warnings on April 18 or 19: "On April 11 we discovered that Maria Torres has a terrible attitude problem. When her and I spoke with the entire group working at the poorly performing cantaloupe table, she did not want to hear any criticism to resolve the problem. She kept repeating that 'she was insulted' over and over again." I conclude that this does not reflect a legitimate cause for discipline, but was violative of Section 8(a)(3).

On April 19, Torres was given a "Verbal Warning" reading: "Your attitude was negative when asked to cut the fruit properly today." That day she was given a "Written Warning" stating: "Further to the letter of April 12, today you were playing games by cutting the pineapple too small and then too large." Torres admitted she had difficulty with the pineapple that day—that the pineapples were hard and difficult to cut. Other than Torres' admission, there is no objective factual basis for these warnings. Indeed, Bernstein even admitted that pineapple is the most difficult to cut.

Then on May 3, Torres was suspended for 2 days by Lund, the suspension stating:

> You were observed today (May 3, 2000) improperly cutting cantaloupe as previously discussed. Your performance in cantaloupe was not acceptable and caused problems with production levels being low.
>
> You have been warned and talked to about you [sic] inability to perform you [sic] job properly.
>
> You must schedule an appt. & meet with the owners prior to returning to work.

Though Lund's title is "production manager" he has no authority to issue suspensions or discipline employees nor does he have any authority over the production area. Yet he suspended Torres on the general basis that she was not cutting cantaloupe to specifications. Precisely what those specifications are and what she was supposed to have done he did not say. I conclude there insufficient evidence to support a rational basis for suspending Torres, from which I infer the true motive was the Respondent's antiunion animus. *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466 (9th Cir. 1966).

Then on May 8, William Bernstein discharged Torres stating, in part, "that she could no longer be trusted because she was not willing to deal with her attitude and bad work habits." The "attitude" problem clearly relates to the April 12 confrontation wherein Torres was the interpreter and spokesperson for the employees accused of working slowly, during which she contested his accusations and told him they were insulted. The alleged work problems have not been shown to have any basis in fact, from which I infer that such was not the Respondent's true motive. Speaking on behalf of employees in such a situation is clearly protected, concerted activity. Beyond that, I conclude that the Respondent's ultimate termination of Torres, as with the disciplines and suspension, was motivated by the employees' union activity and was violative of Section 8(a)(3).

c. Maria Alvarez

It is alleged that on April 6, the Respondent suspended Maria Alvarez and on April 12, discharged her in violation of the Act. The Respondent argues that in September 1999 Alverez was suspended for moving to a different spot on the production

[5] Bernstein testified there was no written document given or shown employees on April 12, an assertion I discredit. Rather I credit the employee witnesses who testified concerning this meeting that in fact Bernstein had the Spanish version and gave it to Torres to read to the others. Bernstein claims not to have been aware that the Spanish word for "pig" was used until the hearing began in December, and assertion I find incredible. I further find incredible the testimony of Caquias that the word "cerda" came from a computer translation program she uses. She testified that she is the translator of documents for Bernstein, though she cannot write Spanish.

[6] William Bernstein admits that at the opening of the new facility it was reported to him that employees were putting too much food on their plates and he told them not to eat like "pigs," claiming to be unaware that such would be insulting. And when he learned it was, he claims, he apologized.

table without permission and in January she was suspended for being late to work and again for changing her workstation without permission. Thus, the Respondent argues, when on April 6, Alverez was late to work and then caused disruption, she was suspended. The Respondent contends it did not know of her union activity.

In fact Alverez was one of the employees who went to the union hall which resulted in the union agent calling William Bernstein. At a meeting of all employees on April 6, after Alverez had been suspended, according to Esther Marroquin, Bernstein "mentioned that somebody from the union office had called him, that a group of women had gone to the union office to complain that they were not permitted to eat outside and about other treatments that they were also receiving, bad treatment, that also the crew leader that she was not doing right by them. And then he said one of those—one of those women from that group, she no longer works here." Similarly, Torres credibly testified that at this meeting, Bernstein said "that he had a call from the Union saying that some of the ladies wanted to go outside and have their lunch, but that that lady no longer worked here."

I conclude that not only did Bernstein know of the union activity in general, but somehow he knew of (or suspected) that Alverez was one of the instigators.

The April 6 suspension of Alverez stated: "You have been causing problem in the production area. Talking not doing your job this has been going on reapeatly [sic] in the past several days. Suspension indefently [sic]. To return to work you need to make an appointment with Daryll Bernstein on Tuesday April 11th to discuss matter." Then on April 12, she was discharged because "You are unwilling to admit that you have done anything wrong." And, "Doing what you want whenever you want is primary problem."

Daryll Bernstein testified that Alverez was suspended on April 6, because she was not at her work station and because she caused disruption. These are different reasons than set forth in the notice of suspension. These shifting reasons, along with the timing of her suspension with the Respondent learning of the union activity, and William Bernstein's comment that one of women who went to the Union was no longer employed, lead to the conclusion that Alverez was suspended and discharged in violation of the Act.

d. April 12 warnings

In addition to Maria Torres, the Respondent issued written warnings on April 12, to Angelica Luna, Maria Barrera, Maria Chavez, Esther Marroquin, Maria Guadalupe Mendez, and Elva Ruiz. The alleged slowdown for which these employees were disciplined is based on the testimony of Daryll Bernstein. She testified that "(t)he 12 ladies were cutting cantaloupe and at quality control there was not enough cantaloupe on the belt, so we knew there was problem at the table." She testified that she stationed herself at the quality control and observed what she referred to as a slow down, but she did not, as was her usual practice, go to the employees and tell them to speed up. Later in her testimony, she said there were eight employees on the cantaloupe table until later in the day when it was determined to have them work overtime. Then four more employees were added to the table. Her testimony concerning some kind of slowdown was not corroborated.

She testified that she observed five of the employees working slowly; however all 12 on the table were called in and given the written warning. Daryll could not explain this, saying only that "Bill called the 12 people in," notwithstanding that he had not observed the alleged slowdown.

Maria Ruiz, a witness called by the Respondent, testified that she was assigned to the melon table late on April 11. When she arrived, there "there were a lot of melons, there were melons to be cut, there were melons there, but I don't know what was going on." She further testified that after arriving, production at that table was normal and "nobody went there to tell us that the production was slow."

I conclude that Bernstein's testimony is too vague, general and inherently contradictory to support a reasonable conclusion that in fact the employees on the cantaloupe table were working slowly at any time on April 11. Since the discipline of these employees occurred shortly after the Respondent learned of employees' union activity, with animus demonstrated by other violations of the Act, I conclude that these warnings were violative of Section 8(a)(3).

e. Angelica Luna

In addition to receiving a "Written Warning" on April 12, as one of cantaloupe table employees, the complaint was amended to allege as violations subsequent warnings to Angelica Luna, and her suspension on August 25. As with the others, I conclude that the April 12 warning was a violation of Section 8(a)(3).

A "Written Warning" dated April 13, stated that on April 11, Luna was observed flushing a toilet with her foot, an action which she denies. Yolanda Pueblas testified that she saw Luna flush the toilet in this way, asked her why, and Luna said "because that's the way I do it." Pueblas reported this to her supervisor and ultimately, William Bernstein gave Luna the "Written Warning."

Although I tend to credit Pueblas, and conclude that the event happened as she testified, I also conclude that this was one more example of the Respondent giving discipline to employees to discourage their union activity. The Respondent did not explain why this was a discipline offense, nor is the reason obvious. Employees routinely walk into the toilet facility wearing their sneakers, they wash their hands several times a day and wear gloves.

On June 16, Luna was given a "Written Warning" for "peeling honeydew melon very, very slowly." Luna testified that she had not seen this warning before it was shown her at the hearing. The Respondent offered no evidence that in fact the warning was given Luna, though Mora testified that she witnessed Luna cutting the melon slowly and she prepared the "Written Warning." Why Mora would write a discipline and not give it to the employee was unexplained. I can only conclude that the alleged poor performance was less important to the Respondent than keeping a paper record for subsequent use.

The subsequent event was August 25, when Luna was suspended for 3 days. The purported basis for the suspension included the previous warnings and the assertion that she was

talking to a fellow employee, who was then unable to do her work. Mora's testimony is, again, a subjective evaluation without any corroboration. Further, unquestionably employees are allowed to talk to one another. I therefore conclude that the suspension of Luna on August 25, was violative of Section 8(a)(3).

f. Carmen Munoz

Carmen Munoz has worked for the Respondent since 1988 (apparently since the outset of the business). Until the union activity began, she had received no form of discipline. From April 12 through November 7, she was suspended six times for various alleged infractions. On April 12, she was suspended for 5 days "(f)or failing to follow direct instructions by the owner." The basis for this suspension, according to William Bernstein, was the refusal of Munoz to leave the lunchroom on April 12 when he asked her to do so. She had been present for the general employee meeting, then when the others left and the 12 employees on the cantaloupe table were told to stay, Munoz also stayed, testifying that she thought she was told to do so. In fact, the Respondent had prepared a "Written Warning" for Munoz because she did not leave the lunchroom that day in an orderly way.

Bernstein claims he told her to leave the room twice before sending for Norma to tell her in Spanish. And, according to Bernstein, she again refused, but then did leave. For this he suspended her 5 days. Since the Respondent in fact was going to give her a "Written Warning" I credit Munoz[7] that she had been told to stay after the general meeting. In any event, a 5-day suspension for what was obviously a misunderstanding is so extreme that I infer the real reason was the employee's union interest.

Similarly, the "Written Warning" for leaving the lunchroom improperly, I conclude, was unlawfully given. There is simply no objective evidence that Munoz did anything justifying discipline.

On May 31, she was given a "Written Warning" for "plucking grapes very, very slowly." And, "you raised your voice and argued with your supervisors, unnecessarily." The factual basis for this discipline is the subjective and general testimony of Mora, whom I do not credit. I do credit Munoz' testimony that may of the grapes that day were rotten, which did result in reduced production. Munoz was a long-term employee without any record of discipline and she was one of the employees who began picketing the Respondent's facility on May 18. Based on her known union activity, the union activity in general, and her otherwise long record as a competent employee, I conclude that the basis for the warning on May 31, is bogus and was violative of Section 8(a)(3).

The second suspension of Munoz was on June 8. "[I]n lieu of, the original verbal warning and suspension notice given" to Munoz on June 7, the Respondent put in her file a "Statement of Event" which purports to record the Respondent's interview of her concerning the proper way employees are to wash their hands. Implicit is the assertion that Munoz did not wash her hands properly, but the statement does not actually accuse her of not doing so. Munoz credibly testified that she in fact always washed her hands properly. I conclude that the basis for this suspension was not as asserted by the Respondent but, rather, was a further attempt to discourage Munoz' union activity.

On June 27, Munoz refused to attend the prayer meeting. That day she received another suspension. The substance of this suspension was her "[t]aking three times as long as the others [sic] employees to wash your hands, putting on your apron, walking to your work station. In the process, you distracted other employees and took them away from their jobs." Again, the factual support for this assertion of employee misconduct is weak and in the face of Munoz' credible denial, I conclude is not supported. I conclude that once again the Respondent sought through a suspension to discourage Munoz' union activity.

She was next suspended on August 31, for 5 days for purportedly "not washing your hands properly." There is no doubt that washing hands properly is important to the Respondent's operation; however, there is also no doubt that Munoz knew how to do so and had never been disciplined for such failure during her 12 years of employment, that is, until the union activity began. I simply do not credit the Respondent's witnesses about Munoz' purported failure in the face of these facts and her denial. I conclude that the suspension was violative of the Act.

On October 5, she was given another "Verbal Warning" which included a 4-day suspension for "talking too much and not paying attention to the size of fruit you were cutting." The basis for this warning and suspension is subjective, not corroborated and in any event, is the type of thing that supervisors correct when occurring. I conclude this suspension was given to discourage union activity and was violative of the Act.

Finally, Munoz was suspended 1 day on November 7, for not being at her workstation on time. Munoz testified that after a break she went for new gloves and the person from whom she got the gloves delayed somewhat causing her to get to her table a little after the last whistle had blown. While she was in fact late reporting to her workstation, the delay was minimal and, I conclude, the violation so trivial that absent union activity, would not have been cause for discipline. Accordingly, I conclude that the Respondent violated Section 8(a)(3).

g. Maria Guadalupe Mendez

A "Written Warning" dated April 5, was placed in the personal file of Maria Guadalupe Mendez, but was not given to her. It stated that she had been late returning to her table after a break. Then on April 12, she was one of the ones on the cantaloupe table who was given a warning. It is alleged that on April 27, she was unlawfully suspended for 1 day, the suspension reading: "You were not at your work station on time. You continually take extra time to go to your work station after break." Mendez denied that she was in fact late in returning to work that day. Mora testified that Mendez was late, but did not offer any detail nor any corroborating evidence. I credit Mendez over Mora, and conclude that Mendez was not in fact

[7] As noted above, the testimony of Munoz concerning the dates on cards she solicited was at least questionable, if not outright false. Nevertheless, on the matters of warnings and suspensions, I did find her the more credible witness.

late, or if she was, that it was minimal. I conclude that she was disciplined and suspended in violation of Section 8(a)(3).

At the end of the workday on May 8, following receipt of a FAX from the Union demanding recognition, William Bernstein had a meeting of all employees, the substance of which is outlined above. During this meeting, according to Bernstein, Mendez interrupted him 3 times. Thus, after the meeting he called her to his office and asked her if she was happy working for the Respondent and then he asked if she would be happier working at a fruit packing plant, to which, according to him, she said yes. So he told her to leave. Counsel for the Respondent stated, "She was fired because she said she would be happier working somewhere else."

Even if Bernstein's version is accurate, he had no reasonable basis for discharging Mendez. On the day he received a demand from the Union, and then held a meeting during which certain violations of Section 8(a)(1) occurred, he discharged one of the employees who spoke up at the meeting. I conclude that the real reason for the discharge of Mendez was to discourage union activity and was violative of Section 8(a)(3).

h. Misael Islas

Misael Islas worked for the Respondent 8 years as a machine operator and forklift driver. On May 2, he was suspended for 3 days. William Bernstein testified that "the primary reason being that he was upsetting one of his fellow employees by telling him and showing him that he made more money than him, and by telling him that he got his health insurance paid for." The Board has held that discussing salaries is an inherently concerted activity protected by Section 7 of the Act. *Automatic Screw Products, Co.*, 306 NLRB 1072 (1992). Therefore, discipline of one for doing so is violative of Section 8(a)(1) and, I conclude, in the context of an organizational campaign, also violative of Section 8(a)(3).

The suspension notice stated that Islas had to report to the Bernsteins on May 8. He did so, and according to his testimony, was told by Daryll Bernstein that he was fired, "because I keep doing the things the way I want." The handwritten portion of the discharge notice, dated May 2, stated, "Due to Misael's unwillingness to admit that he had not stopped being abusive to the machinery on a regular basis. Due to his refusal to admit this fact when he was seen doing so by one of the owners and by the manager, he is *dismissed* and not allowed to return to work at Amber Foods."

The Respondent contends that Islas had been a problem employee for some time, noting that he had been given a "Letter of Caution" on May 15, 1999, because "1) You do not do the work you used to do. 2) You refuse to talk to the head lady. 3) (lined out). 4) You now show a disagreeable attitude." And on August 20, 1999, he received a "Verbal Warning" for driving the forklift recklessly. On this warning, "It was agreed that you will continue to drive quickly but you will honk the horn more times in order to give more notice."

The alleged reckless driving of the May 2 warning and ultimate discharge was pushing pallets along the floor rather than lifting them, an offense which makes no sense and which Islas credibly denied. I do not believe the past record of Islas, or the events testified to by Bernstein were the basis for his discharge. I conclude that he was discharged because of the known union activity, and his participation by showing a fellow employee his paycheck. I conclude that Islas was discharged in violation of Section 8(a)(3) of the Act.

i. Esther Marroquin

Esther Marroquin began working for the Respondent in January 1997. On April 12, as one of the ladies on the cantaloupe table, she received a warning, which I have already concluded was discriminatorily given. Other than that, she had not received any criticism of her work.

On May 8, after the Respondent received the demand FAX from the Union, Marroquin was discharged, along with other employees. The "Notice of Suspension and Termination" was dated May 3, but the meeting with her was held on May 8. The notice states: "You were observed not performing you [sic] job properly by working too slow on the canteloupe [sic] thereby causing production to slow down. You must speed up your production. 2nd time. Consuelo had come to Steve asking for help because she could not handle it. Unfortunately, you refused to admit that what you did was wrong & you refused to correct this problem. As a result, you have been dismissed permanently from Amber Foods. (Meeting held May 8/00)"

There is no evidence that Marroquin did anything which reasonably would merit discharge. William Bernstein simply testified that on May 8, he met with her and Torres, told them "what they had been doing wrong, and that we couldn't have this sort of thing happening any longer. They denied they had been doing anything wrong, and as a result, I wound up terminating them."

The Respondent offered no evidence that prior to the union activity it had ever discharged an employee for denying an assertion of wrongdoing. Given the unreasonableness of Marroquin's discharge, at the time of the employees' activity on behalf of the Union, I conclude it was unlawful.

j. Concepcion Sandoval

Concepcion Sandoval began working as a fruit cutter for the Respondent in February 1997. In July 1999 she developed contact dermatitis in both hands for which she was treated with pills and crème and she quit cutting pineapples.

On May 18, she was given a "Verbal Warning" reading: "You have not been washing your hands with soap and water when entering the production room, as you have been instructed to do since March 27, 2000." Although Sandoval testified that she had not seen the warning, she did not dispute its substance—that she had not been washing her hands with soap and water. Putting a warning in an employee's personnel file without giving that employee notice of the alleged offense tends to suggest a discriminatory rather than a lawful motive. Here, however, I conclude this was less a discipline problem than memorializing the ongoing situation with Sandoval's skin condition. I therefore conclude this warning was not issued in violation of Section 8(a)(3) as alleged.

Her physician's work status report of May 19, stated she was "Discharged-No further treatment" and she could "Return to Regular Work." William Bernstein testified that he dictated a letter on May 18, which was read to Sandoval and, he believes,

was transmitted to her physician detailing the hand-washing requirements of the job. He stated in the letter: "Please be advised that Mrs. C. Sandoval is required to wash her hands many times per day with soap and water when entering our food production area. Due to her skin condition, she has told us that she has not been using soap. Both Mrs. Sandoval and her employer require medical information and authorization as to her status."

On May 19, Dr. Robert D. Wendel, wrote, in part, "As you are aware, this patient has been provided with every consideration relative to appropriate treatment and work accommodation, but symptoms have reoccurred with a return to her 'usual and customary' work duties, which necessitate repetitive washing of her hands. Therefore, Ms. Sandovol is permanently precluded, on a prophylactic basis, from any work duties which necessitate the washing of her hands with soap and water on a frequent basis."

Based on this report, the Respondent has refused to allow Sandoval to return to work. Counsel for the Union demanded accommodation under the Americans with Disabilities Act, but this was denied by the Respondent on grounds that it had no reasonable accommodation.

Because Sandoval was one of the employees picketing on May 17, the General Counsel and the Union contend that the physician's May 19 report is bogus, and was influenced by his economic relationship with Bernstein. I reject this argument. It does not appear that in fact Sandoval has been cured of the skin condition. Further, it does appear that the Respondent's requirement that employees wash their hands with soap and water frequently is valid. Thus regardless of Sandoval's known union activity, I conclude that she cannot do her job as required and the Respondent's refusal to continue her as a fruit cutter was not unlawful.

While the General Counsel states that there are other jobs she could do not requiring frequent hand washing, there is no evidence that such is the case, as least for one Sandoval's training and experience. Accordingly, I conclude that the Respondent did not violate the Act with regard to Sandoval and I will recommend that paragraph 8(o) be dismissed.

k. Maria Barrea

The complaint was amended to allege that Maria Barrea received a "Written Warning" on June 20, in addition to the one she received on May 12, as one of the group on the cantaloupe table.

The English version of the June 20 warning reads in material part: "You are receiving a verbal warning for the following behavior/Action: On June 16, 2000, in the morning, your supervisor observed you chopping pineapple into tidbits and then into very large pieces. As a result, some of the pineapple in the fruit salad did not conform to our usual 1 inch standard size chunk. This is unacceptable."

This, and the Spanish version, was put into Barrea's personal file, but she was not told this had been done or that she done anything wrong on June 16. Mora testified to having observed Barrea on June 16, and to writing the warning. But she did not confront Barrea, from which I infer that the warning was put into her file to build a record against a known union activist rather than to correct a work problem. I conclude that the June 20 warning was violative of Section 8(a)(3).

l. Evelia Sosa

The complaint was amended at the hearing to add a paragraph 8(q) to the effect that on May 12, 22, and 31, Evelia Sosa received disciplinary warnings. And, it is alleged that she was unlawfully suspended on November 7.

Sosa worked for the Respondent as a fruit cutter 8 or 9 years. She "had had no problems for several years" until receiving the "Verbal Warning" on May 12. The warning states: "You were acting aggressive. You were throwing the cantaloupe on the belt. Normally you gently put the fruit on the belt. We are concerned about the quality of the fruit salad." Not in the warning was Mora's observation that Sosa had thrown a melon onto the belt which bounced off and hit another employee. There is no corroboration for this and I discount it.

Sosa agrees that she was working fast that day in order to make up for slow work by a fellow employee. The Respondent argues that she was aggressive, indeed angry, because her son, Misael Islas had been discharged. No doubt employers have the right to supervise their employees, even during an organizational campaign, and do not have to accept poor work. Nevertheless, nature of the complaint against Sosa and the lack of any demonstrable harm to the product suggest that this was a warning given because of the employees' union activity.

She was given another "Verbal Warning" on May 25, because "you have engaged in an intentional slowdown causing sever problems to our production, during the assignment you were given on grapefruit this morning." This warning was signed by Lund, but he did not testify concerning the events leading to it. In receiving the warning, Sosa testified that Mora told her she was cutting too slowly and "I told her that in order to be able to work fast I needed a good knife, because the knife was not al all sharp." The Respondent contends this is a bogus excuse, since employees can always call for a new knife.

From all the testimony, it does appear that Sosa may have been working slower on May 25, than usual. Similarly, though there is no English translation of the May 31 warning, it appears it was also given because Sosa was thought to have been working too slowly. Certainly she could legitimately be corrected for doing so. However, absent the union activity, I conclude this is the sort of thing which would have been handled without a formal discipline. I conclude these warnings were given in violation of Section 8(a)(3).

Finally, on November 7, she was given a "Verbal Warning" and 1-day suspension for not being at her workstation on time. Sosa testified that, as with Carmen Munoz, she was late returning to her workstation because she went for a new glove to replace the one that was torn and the person dispensing them took a couple minutes longer than usual. The infraction was so trivial that I conclude that absent the union activity Sosa would not have been suspended. Accordingly, I conclude that the Respondent violated Section 8(a)(3).

REMEDY[8]

Having found that the Respondent has engaged in certain unfair labor practices, I conclude that it should be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act, including offering Maria Alvarez, Genoveva Alvarez, Misael Islas, Maria Guadalupe Mendez, Esther Marroquin, and Maria Torres, reinstatement to their former jobs, or if those jobs no longer exist, to substantially equivalent positions of employment, and make them whole for any loss of earnings and other benefits they may have suffered, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). The Respondent will also be ordered to make whole the following employees who were unlawfully suspended: Maria Alvarez, Angelica Luna, Carmen Munoz, Maria Guadalupe Mendez, Esther Marroquin, Maria Torres, and Evelia Sosa.

[Recommended Order omitted from publication.]

[8] Apparently because of the unreliable testimony concerning the card dating, the General Counsel withdrew the allegation that a majority of employees had designated the Union as their bargaining representative and withdrew the proposed remedy of a bargaining order.