

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

THE KROGER COMPANY

Case Nos. 9-CA-39712
9-RC-17712

and

UNITED FOOD AND COMMERCIAL WORKERS UNION
LOCAL 1059, AFL-CIO

*Eric J., Gill, Esq., for the General Counsel.
Michael J. Underwood and Frank Wobst, Esqs.,
(Porter, Wright, Morris & Arthur),
Columbus, Ohio, for the Respondent.
Leonard S. Sigall and Steven D. Stone, Esqs.,
Reynoldsburg, Ohio, for the Charging Party.*

DECISION

Statement of the Case

ARTHUR J. AMCHAN, Administrative Law Judge. This case was tried in Columbus, Ohio on March 6 and 7, 2003. At issue are an unfair labor practice charge filed by the Union, the United Food and Commercial Workers (UFCW) Local 1059, the Union's objections to a representation election conducted at the Kroger Refill Center in suburban Columbus, on October 31, 2002, and the Union's challenges to the ballots of five individuals who attempted to vote in that election.

The charge was filed October 28, 2002 and the complaint was issued January 17, 2003. In the unfair labor practice case, the General Counsel alleges that Respondent, the Kroger Company, by its facility manager, Michael Griffin, violated Section 8(a)(1) of the Act by threatening and/or interrogating three employees on separate occasions during an election campaign. On February 18, 2003, the unfair labor practice case was consolidated for hearing with the Union's challenge to five ballots and its objections to the October 31, 2002 election. These objections are identical to the alleged Section 8(a)(1) violations.

Fourteen of the employees whose ballots were counted voted in favor of the Union and ten voted against being represented by Local 1059. The Union challenged the ballots of Michelle Spencer, Estella Clary, Kimberly Harris, Erin Spetnagel and Theresa Streich. If four of the challenges are rejected, these ballots could determine the outcome of the election. The Union contends that Spencer, Clary, Harris and Spetnagel are "office clerical employees" excluded from the bargaining unit by the stipulated election agreement.¹ The Union contends

¹ The Union also alleged that Spetnagel should be excluded from the bargaining unit on the grounds that she is in effect Facility Manager Michael Griffin's personal secretary and therefore a confidential employee. The Union appears to have abandoned this argument in its brief and

that Streich is ineligible to vote because she is a supervisor within the meaning of Section 2(11) of the Act.

5 On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, Respondent and the Charging Party, I make the following

Findings of Fact

10 I. Jurisdiction

15 Respondent, The Kroger Company, maintains a facility in Groveport, Ohio, a suburb of Columbus, from which it refills patient prescriptions for Kroger retail pharmacies throughout the State of Ohio. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union, UFCW Local 1059, is a labor organization within the meaning of Section 2(5) of the Act.

20 II. The challenged ballots

25 On September 27, 2002, the Union filed a petition to represent all regular full-time and part-time employees at the Kroger Refill Center in Groveport. The Regional Director approved a stipulated election agreement on October 7, for the following bargaining unit:

30 All regular full-time and part-time employees employed by the Employer at its Kroger Refill Center, 2250 Spiegel Drive, Groveport, Ohio facility, but excluding all managers, office clerical employees, pharmacists, pharmacist-interns, and all guards and supervisors as defined in the Act.

35 *The Employees in the Failed Claims Office*

40 Respondent's facility is essentially a large open area in which employees stand around an 80-foot oval-shaped conveyor filling prescriptions. Since June 2002, the facility has run two shifts; the first from 7:30-3:30 Monday-Friday and the second Monday-Thursday, and Sunday from 3:30 p.m. to midnight. Theresa Streich is the second shift co-coordinator and is responsible for overseeing production work during that shift. Respondent has three daily shipping times, 9:00 a.m., noon and midnight. The pace of work just prior to the noon and midnight shipments is "hectic."

45 There are several offices on the periphery of the conveyor, including that of Michael Griffin, the facility manager, and the "Failed Claims Office." Michelle Spencer, Estella Clary, Kimberly Harris and Erin Spetnagel work at desks inside the failed claims office. The door to this office, which is only a few feet from the production line, is always kept open. All five of the employees whose ballots were challenged park in the same parking lot as production employees and they use the same break room. All the employees working on the conveyor line and those working in the Failed Claims Office have the title "pharmacy technician." There are three levels of pharmacy technicians in the facility and all five of the individuals whose ballots were challenged are level 3 technicians, the highest level. A few technicians who work exclusively on the conveyor line are also level 3 pharmacy technicians.

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in any event has failed to prove this allegation.

Estella Clary

5 Estella Clary works on the first shift and her primary responsibility is the processing of "failed claims." These are prescriptions that cannot be filled initially due to problems such as an incorrect patient social security numbers, drug interaction concerns, insurance problems or being ordered for refill too soon. Clary spends most of her workday making computer entries at her desk to resolve these problems so that the prescriptions can be filled.

10 However, Clary also spends some of her time on the production floor and did so in October 2002. She replenishes a bottling machine with empty prescription bottles and fixes a machine that prints prescription labels. On a daily basis, between 11:15 and noon, Clary leaves her office and assists production employees in preparing for the noon shipment. She may also work on the production floor just prior to leaving work at 3:30 p.m.

15 *Kimberly Harris*

20 Kimberly Harris performs Clary's job on the second shift. She generates reports on "failed claims" and makes data entries on the computer to enable many of flawed prescriptions to be filled. Harris comes out on the production floor to put slips into the bags for each retail store for those prescriptions that cannot be filled. Harris did not testify in this proceeding and there is very little reliable evidence as to what other tasks Harris performed during October 2002.

25 *Erin Spetnagel*

Erin Spetnagel works on the first shift and her primary responsibility is to answer the phones. She does this almost her entire work shift except for a period of 20-30 minutes just prior to the noon shipment. At this time, Spetnagel comes out of the office and assists in putting the "pink slips" into shipments to the retail stores.² These slips explain why certain prescriptions cannot be filled. There is no credible evidence that Spetnagel did any other production work in October 2002.³

35 ² I credit the testimony of Tina Levitt and Sandra Moore that Spetnagel only comes out on the production floor to put the pink slips with the shipments to the individual stores.

³ Spetnagel did not testify. I decline to credit Mike Griffin's testimony as to Spetnagel's duties, because, for one thing, his testimony regarding the amount of time Spetnagel spends answering telephone calls was inconsistent.

40 On cross examination by the Union's counsel, Griffin testified:

Q. All right. Let's talk some more about Erin. Erin is assigned to take all the phone calls, right?

45 A. Yes, she's the first person to answer the phone.

Q. You have hundreds of phone calls a day, don't you?

A. Yes.

50 Q. Literally, hundreds of phone calls a day and you said she answers the phone because you wanted the other ones working full-time on failed claims, isn't that correct?

Continued

Michelle Spencer

Michelle Spencer is Respondent's inventory clerk. She works 8 a.m. to 4:30 p.m. Monday-Friday and 3:30-Midnight on Sunday.⁴ Spencer orders drugs from Kroger's supplier and orders supplies, which enable the production employees to perform their tasks. She regularly leaves the failed claims office to look for drugs on shelves near the conveyor line. Spencer often assists production employees in bringing shipments from Kroger's drug supplier from the warehouse into Respondent's production area. For at least 15 minutes a day, Spencer helps conveyor line employees pack drugs just before the noon shipment.

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A. Which, in turn, is actual production.

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Q. ...But, your testimony was that you wanted Erin handling the phones full-time so that the others in the office could work full time on failed claims, right? That was your testimony?

A. Yes.

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Tr. 179-80.

When led by Respondent's counsel on redirect examination, he said something quite different:

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Q. What is Erin Spetnagel's primary duty, is it Failed Claims?

A. Yes, that's her primary duty.

Q. She doesn't spend more time on the phone than she does on failed claims, does she?

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A. I would say not.

Q. She's not on the phone all day, is she?

40

A. No.

Tr. 211-12.

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His testimony generally indicates a desire to lump Spetnagel's duties with those of the other employees in the failed claims office when in fact her duties were quite different. Finally, Griffin's testimony is ambiguous at times as to whether he is describing Spetnagel's duties in October 2002, which are relevant to this case, or her duties after the election. All employees in the failed claims office began spending more time on the production floor after the election. To the extent that Norma Hickman's testimony stands for the proposition that Spetnagel performs tasks other than distributing pink slips on the production floor, it is unclear if Hickman is testifying about October 2002 or afterwards.

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⁴ Spencer is not scheduled to work Fridays, but normally does so.

Theresa Streich

Theresa Streich is a level 3 pharmacy technician. In June 2002, when Respondent instituted a second shift, it created a position titled "second shift coordinator." Streich was given that position and is paid an extra \$1.50 per hour as a result. As second shift coordinator, Streich is the person primarily responsible for production operations on the second shift. Streich works from 3:30 p.m. to midnight and is essentially in charge after facility manager Michael Griffin leaves the facility between 3:30 and 5:30 p.m. While there is a pharmacist on duty on the second shift, this pharmacist rarely, if ever, gets involved with the direction of employees on the conveyor line.

Streich draws up work schedules, moves employees from one station to another as needed, adjusts timecards and approves any variations from a production employees' normal break time. When scheduling employees at a particular work station, Streich considers their relative skill levels (Tr. 159). She submits her work schedules to Mike Griffin for review. Facility Manager Griffin told second shift employees that when Streich tells them to do something, it is as if Griffin himself were speaking.

When a pharmacy technician seeks to move from level 1 to level 2, they must pass a practical examination. Streich is the person who observes the individual and decides whether they can perform the tasks that entitle them to a promotion. She also determines whether they are sufficiently "hard working" to merit such a promotion.

Theresa Streich also screens and interviews job applicants for positions on the second shift. She evaluates the applicant's work history and qualifications. Streich determines whether to interview applicants and whether to recommend them to Griffin or Paula Race in Kroger's human resources department for a position. If Streich determines an applicant should not be interviewed, they are effectively excluded from Respondent's hiring process. Employees that are interviewed by Streich and recommended for hire are not interviewed again by Griffin, Race or anyone else.

*Analysis**The "Failed Claims Office" Employees*

In *Caesar's Tahoe*, 337 NLRB No. 170 (2002), the Board adopted the test enunciated in *Associated Milk Producers, Inc. v. NLRB*, 193 F. 3d 539 (D.C. Cir. 1999). This a three-prong analysis for resolving determinative challenged ballots in cases involving stipulated bargaining units.⁵ The Board first determines whether the stipulation is ambiguous. If the objective intent of the parties is expressed in clear and unambiguous terms in the stipulation, the Board simply enforces the agreement. If, however, the stipulation is ambiguous, the Board must seek to determine the parties' intent through normal methods of contract interpretation, including the examination of extrinsic evidence. If the parties' intent still cannot be discerned, then the Board determines the bargaining unit by employing its normal community-of-interest test.

⁵ *Scholastic Magazines*, 192 NLRB 461 (1971) and *Avon Products*, 250 NLRB 1479 (1980), relied upon by Respondent at pages 14-15 of its brief, have limited relevance to the instant case. Those cases did not involve stipulated election agreements. In the instant case, the parties agreed that "office clericals" were to be excluded from the bargaining unit. Thus, the issue herein, whether any employee at the refill center is an "office clerical," is somewhat different than the issues confronted by Board in *Scholastic Magazine* and *Avon Products*.

In the instant case, the stipulation is unambiguous insofar as it excludes “office clerical employees” from the bargaining unit. It is ambiguous as to whether the “failed claims” employees fall within that category. The only extrinsic evidence of the parties’ intent is the fact that if all four “failed claims” employees fall outside of the “office clerical” category, the stipulation excludes none of the employees at the Kroger Refill Center as “office clericals.” One would think that a classification of employees that does not exist at the refill center would not be explicitly excluded from the bargaining unit.

Respondent points out that there are not any guards employed by the refill center, although one works at the Kroger warehouse next door.⁶ Guards are also explicitly excluded from the bargaining unit. The Union, however, distinguishes the exclusion of guards from the exclusion of office clericals by the fact that Section 9(b)(3) of the Act prevents the Board from certifying a bargaining unit which includes guards and non-guards. Thus, it suggests that while the exclusion of guards in the description of the bargaining unit is superfluous, the exclusion of office clericals must be accorded some meaning by the exclusion of some employees at the refill center from the bargaining unit.

In a somewhat analogous context, the Board in *Kalustyans*, 332 NLRB No. 73 (2000) rejected a union’s challenge to the ballots of three employees. In that case, the union argued that the three were office clerical employees, who were excluded by the stipulated election agreement rather than shipping clerks, who were included. In deciding that the parties’ intent was to include the three in the unit, the Board relied, at least in part, on the fact that if the three employees were not shipping clerks, there would be no shipping clerks in the bargaining unit. However, I do not discern in *Kalustyans* a holding that the exclusion of a category of employees in a stipulated election agreement is evidence of the parties’ intent to exclude at least one employee from the bargaining unit, as being a member of that category.

With regard to the third prong of the Board’s test, community-of-interest concepts, the Board has long drawn a distinction between “plant clericals” and “office clericals.” “The indispensable and conclusive element is that the asserted plant clericals ‘perform functions closely allied to the production process or to the daily operations of the production facilities at which they work.’” *Caesar’s Tahoe* at page 3, quoting *Fisher Controls Co.*, 192 NLRB 514 (1971).

Applying this standard to the tasks performed by Estella Clary on the first shift and Kimberly Harris on the second, I conclude that these two employees are clearly “plant clericals.” The clerical tasks they perform are allied to the production process in that their efforts enable the “failed claims” to proceed to the production line. Clary also performs production work on a daily basis—particularly in the 45 minutes prior to the noon shipment.⁷

The tasks of Michelle Spencer, the inventory clerk, and Erin Spetnagel are less closely allied to the filling of prescriptions. Yet, Spencer is the employee who makes certain that the medications and supplies necessary to fill the prescriptions are available in the refill center. Spetnagel, on the other hand, is the clerical employee who spends the most time within the

⁶ This guard patrols a parking lot used by refill center employees. Additionally, Michael Griffin called this guard when something was stolen from the refill center.

⁷ Harris did not testify; however, I assume that she helps out in the production area just prior to the midnight shipment. I make this assumption because the record indicates that Harris has to complete the “failed claims report” by 10 p.m.

walls of the office, acting essentially as a receptionist, and interacts least with the production employees.

5 In *Hamilton Halter Co.*, 270 NLRB 331 (1984) the Board recognized that the “distinction drawn between office clericals and plant clericals is not always clear.” In that case the Board found two employees to be “plant clericals” because their primary function, the transcription of sales order forms to facilitate production was a function closely associated with production. The Board also found it significant in this regard that the two maintained inventories, ordered supplies and assisted shop employees in loading and unloading trucks. By analogy to the reasoning in *Hamilton Halter*, Spencer is a “plant clerical.”

15 Resolving the status of Spetnagel is more difficult since the Board precedent appears to be less clear. In *Dunham’s Athleisure Corp.*, 311 NLRB 175, 176 (1993), the Board found that two employees to be “office clericals” despite the fact that they “sporadically” performed work in the warehouse. It found that the limited contact that these two had with bargaining unit employees distinguished their situation from other cases in which the Board held that employees were “plant clericals.”

20 Similarly, the Board in *Cook Composites & Polymers Co.*, 313 NLRB 1105, 1108 (1994) found that two manufacturing data entry operators were “office clericals” and thus excluded them from a production unit.

25 Clericals, whose principal functions and duties relate to the general office itself, are office clericals, who do not have a close community of interest with a production unit. This is true even if those clericals spend as much as 25 percent of their time in the production area and have daily contact with production personnel.

30 *Id.* at p. 1108.

In *Cook Composites*, the Board distinguished *Hamilton Halter Co.*, *supra*, on the grounds that the clerical employees in *Hamilton* performed a significant degree of production work. It also relied on the fact that *Cook Composites* ran a full production shift at night and had no manufacturing data operators assigned to that shift. Similarly, in the instant case, there appears to be no employee whose performs Spetnagel’s tasks on the second shift.

40 There are, however, many factors in *Cook Composites* that distinguish the manufacturing data entry operators, found to be “office clericals,” from Spetnagel. They were located in a different building from the production employees, although they went to the production area several times a day. The *Cook Composite* clericals used a different parking lot from other unit employees, did not frequent the same lunchroom, did not wear the production employees’ uniform and did not punch a timeclock. Finally, Facility Manager Michael Griffin, who also supervises the production employees on the first shift, supervises Spetnagel. The data entry operators in *Cook Composites* had a different supervisor than the employees in the production unit.

50 In *Cook Composites*, the Board relied upon *Container Research Corporation*, 188 NLRB 586, 587 (1971) in which the Board found a cost coordinator and a materials coordinator to be “office clericals.” In that case, the Board found that the employees had only “incidental contact” with production and maintenance employees and appears to draw the distinction between office clericals and plant clericals on the basis of an employee’s “principal functions and duties.” In *Container Research*, the Board found the cost coordinator to be an office clerical despite the

fact that she spent 25 percent of her time in the production area and had daily contact with production and maintenance personnel.

In *Brown & Root*, 314 NLRB 19 (1994) the Board found three document control clerks to be “plant clericals” in part because they had daily contact with unit employees and because their primary function is directly related to construction work and these duties provide daily assistance to unit employees. Of course, the work of any clerical employee in any production facility assists production employees in some regard. It appears that the issue in these cases is how directly related are a clerical employee’s tasks to those of bargaining unit employees. I conclude that Spetnagel’s duties are only tangentially related and that she is therefore an “office clerical” ineligible to vote.⁸ Spetnagel spends virtually all her time answering the phone in the office and goes out on the production floor only to put slips into the shipments explaining to the retail pharmacies why certain prescriptions did not go through the production process.⁹

Is Theresa Streich a supervisor within the meaning of the Act?

Section 2(11) of the Act, defines “supervisor” as “any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.”

Pursuant to Section 2(3) of the Act, a “supervisor,” as defined in Section 2(11), is not an employee whose rights to engage in union or protected concerted activity are protected by the Act. A party seeking to exclude an individual from the category of an “employee” has the burden of establishing supervisory authority. The exercise of independent judgment with respect to any one of the factors set forth in section 2(11) establishes that an individual is a supervisor. However, not all decision-making constitutes the independent judgment necessary to establish that an individual is a statutory supervisor. The fact that an individual gives direction to other employees without first checking with a higher authority, does not necessarily make one a supervisor. For example, an individual does not necessarily become a supervisor in situations in which his authority to direct employees emanates solely from his skill or experience, *Southern Bleachery and Print Works, Inc.*, 115 NLRB 787, 791 (1956), enfd. 257 F. 2d 235, 239 (4th Cir. 1958). Moreover, the exercise of supervisory authority on an irregular and sporadic basis is not sufficient to establish supervisory status, *Browne of Houston*, 280 NLRB 1222, 1225 (1986).

Streich’s supervision of the production line on the second shift does not necessarily make her a statutory supervisor. There are numerous cases in which an employee in charge of the employer’s workforce at a specific location has not been deemed to be a supervisor due to the routine nature of the employee’s oversight functions, e.g., *Azusa Ranch Market*, 321 NLRB 811 (1996). On the other hand, Streich’s authority to interview and to recommend whether or not to hire job applicants establishes her supervisory status. There is also a close question of

⁸ I conclude that Spetnagel’s physical proximity to Estella Clary and Michelle Spencer does not make her a “plant clerical.” Although, there may have been some degree of crossover in their duties, the record indicates that in October 2002, Clary spent almost all her day resolving failed claims and Spetnagel spent almost all day answering the telephone. There was no similarity between Spetnagel’s duties and those of Spencer.

⁹ At least some of these prescriptions are then filled by Kroger’s retail pharmacies.

whether she is a “supervisor” by virtue of her authority to schedule employees at specific workstations. The issue before me is whether Streich uses “independent judgment” in effectively recommending whether or not to hire job applicants and/or in effectively recommending the assignment of employees to their workstations.

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Streich testified that in deciding whether to interview an applicant:

A. ...I get the most qualified first and then I go back to the other ones.

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Q. Okay. Is there a set of guidelines or is there something in writing that you follow in writing that you follow in making these decisions on whether or not you’re going to interview these people or do you use your judgment based on your past experience?

A. I use my judgment.

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Tr. 282-83.

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The Board defines the power to effectively recommend as meaning “that the recommended action is taken with *no* independent investigation by superiors,” *ITT Corp.*, 265 NLRB 1480, 1481 (1982), *Wesco Electrical Company*, 232 NLRB 479 (1982). Applicants interviewed by Streich were hired for second shift positions without being interviewed by Michael Griffin or anyone else. Griffin testified at Tr. 161-62, without giving any specific examples, that he may occasionally decide not to hire someone who Streich recommends. However, he never decides to hire someone that Streich does not recommend hiring.¹⁰ Indeed, Streich is a supervisor simply on the basis of her power to effectively recommend against the hiring of a job applicant, *HS Lordships*, 274 NLRB 1167, 173 (1985).¹¹

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Finally, due to the inconsistencies between Griffin’s testimony at Tr. 161-62 and Streich’s testimony at Tr. 278-79 and 282-83, I find Griffin’s testimony regarding Streich’s role in the hiring process to be incredible. I conclude that insofar as this record is concerned, Kroger hires any applicant for a second shift position who Streich recommends for hire.

Streich testified that when scheduling employees at a particular work station, she:

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...goes by the seniority and the knowledge of what they know at the Refill Center because the ones that have been there longer know more of what to do there so I base it on their knowledge of what they know.

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Tr. 274.

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¹⁰ In this respect, Streich differs from Doyle Womack, who was found not to be a statutory supervisor in *Browne of Houston*, 280 NLRB 1222,1225 (1986). Womack’s superior subsequently interviewed applicants interviewed by Womack before they were hired.

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¹¹ The cases relied upon by Respondent, for the proposition that Streich did not effectively recommend the hiring of employees, are distinguishable from the instant case. In *Anamag*, 284 NLRB 621, 623 (1987) and *Kenosha News Publishing Co.*, 264 NLRB 270, 271 (1982), as well as a similar case, *Tree-Free Fiber Co.*, 328 NLRB 389,391 (1999), management screened out applicants it did not want to hire before seeking the opinion of the non-supervisory employees. In contrast, Streich screened out unsuitable applicants for Griffin and Race.

Mike Griffin testified that Streich “decides who goes in what station based on their abilities to perform those job duties at that station.” (Tr. 159). Griffin occasionally changes Streich’s work schedule.

5 ...I see a name of a person that’s in a certain spot that I feel wouldn’t be appropriate for a busy day, or appropriate for that position. I will ask her to redo it. That doesn’t happen a lot, but it happens.

Tr. 160.

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This testimony indicates that Streich uses some degree of independent judgment in deciding which employees work at which work stations on the second shift. Thus, she has far more discretion than Antonio Hernandez, who was found not to be a supervisor in *Valley Mart Supermarkets*, 264 NLRB 156, 161 (1983). Even though Mike Griffin has, on occasion, changed Streich’s schedule, I find that Streich uses independent judgment in effectively recommending the scheduling of employees.¹²

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II. Alleged Unfair Labor Practices/ Union’s Objections to the Election

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The allegations of the Complaint and the Union’s objections to the election involve the same incidents. Essentially the issue before me is whether I believe three bargaining unit employees, or facility manager Michael Griffin’s denial of their testimony.

Complaint paragraph 5/ Objection # 1

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Tammy Wright testified that Mike Griffin called her into his office on October 8, 2002 and asked her if she would work on the first shift during the following week. At the time Wright was working second shift. Wright told Griffin that she would be willing to work both shifts if Theresa Streich would allow her leave early on the second. Griffin then said he would talk to Streich.

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Then, according to Wright, Griffin asked her what she thought of this “union stuff.” Wright responded that employees needed someone to talk to. Griffin said they could talk to him. Wright replied that Griffin always sent her back to Streich, who was the source of her problems. Griffin said that if Wright came to him again, he and Wright would discuss Wright’s problem with Streich together.

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Wright then mentioned that she had forgotten to clock out the previous night. According to Wright, Griffin said, that’s all right, I can let it go, “but if a union were here, I’d have to give you a write up.”

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Griffin testified as follows: Wright came into his office to discuss working first shift. She complained about Streich. When Griffin told Wright he’d like her to try again to resolve her

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¹² If Streich’s work schedules were not subject to any review, her exercise of judgment in drawing up these schedules would clearly make her a supervisor. However, Board precedent is not that clear as to whether any degree of review of the schedule will negate such status. I believe that where, as in the instant case, her recommendations are generally accepted with a cursory review, that her exercise of independent judgment makes her a supervisor. In any event, her exercise of independent judgment regarding hiring decisions establishes her supervisory status regardless of whether she is a supervisor by virtue of her authority to schedule employees at different workstations.

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problems with Streich on her own, she volunteered that this was why she supported the Union. Griffin concedes he was not aware of Wright's support for the Union previously.

5 Griffin confirms that Wright mentioned failing to clock out. However, he testified that he merely told her that he had flexibility in dealing with such transgressions. He denied telling Wright that he'd have to write her up if there was a union at the refill center.

10 I credit Wright's account. On cross-examination, Wright testified that she told Griffin that she was upset over the fact that the Union had filed a charge over the incident. Wright gave the impression of wanting to please everyone and I sense that she would have hedged her testimony not to make Griffin look bad if she could have done so. I also credit Wright's testimony, as opposed to Griffin's, due to Griffin's lack of candor when testifying about Erin Spetnagel's and Theresa Streich's duties.

15 Moreover, Wright's testimony is consistent with the testimony of Corina Culbertson (her sister) and Sandra Moore regarding similar incidents. In this record only Moore appears to have been a vociferous advocate for the Union. I find it unlikely that all three accounts are fabricated. I find that the conversation transpired as testified to by Wright.

20 *Applicable legal principles*

25 Not every inquiry by management regarding union sympathy is a violation of Section 8(a)(1). The Board applies a "totality-of-the-circumstances" test, *Rossmore House*, 269 NLRB 1176 (1984). Among the relevant factors are the presence or absence of employer hostility to the Union, whether the employer appears to be seeking information on which to base disciplinary action, the position of the questioner in the employer's hierarchy, the place and method of interrogation and the truthfulness of the employee's reply, *Medicare Associates, Inc.*, 330 NLRB 935, 939 (2000). However, these factors are not to be mechanically applied and each factor need not be evaluated. They are merely useful starting points for assessing the
30 "totality of the circumstances."

35 In the instant case, I start my analysis with the proposition that an employee is entitled to keep from his or her employer, his or her views on unionization so that the employee may exercise a full and free choice as to whether to select the Union or not, *Id.*, at 942. The fact that Mike Griffin, the facility manager, inquired as to the union sympathies of Wright, an employee who had not revealed her views to Kroger previously, in the midst of election campaign, is enough to convince me that his inquiry violated the Act in interfering with Wright's free choice.

40 I also find that Griffin violated the Act in telling Wright that if employees selected the Union as their bargaining representative he would have to "write her up" for failing to clock out. An employer may accurately describe to employees the results of unionization, such as the inability to deal directly with the employee without the involvement of the union, *Insight Communications Co.*, 330 NLRB 431, 458 (2000). An employer may also describe the collective bargaining process to employees, including the fact that the results of bargaining may result in changes in the way the employer's establishment operates. However, when an
45 employer, categorically states, as did Michael Griffin, that discipline will be enforced more stringently if a union selected, without referring to the possibility of gains and losses through the collective bargaining process, the statement violates Section 8(a)(1), *Fieldcrest Cannon, Inc.*, 318 NLRB 470, 495 (1995); *United Artists Theatre*, 277 NLRB 115, 121 (1985).

50 Griffin's statement is a threat of unilateral action and coerced employees in the exercise of their Section 7 rights. He would not have violated the Act if he had explained that numerous

working conditions, including the enforcement of Respondent's workrules, could change for better, for worse, or not at all, through the collective bargaining process. However, without this or a similar gloss, his statement would reasonably lead an employee to conclude that Kroger intended to tighten up on enforcement of its workrules in the event of a union electoral victory and that the one had better vote against the Union if they wanted to receive the same sort of leniency that employees enjoyed without a union, *Medicare Associates, Inc.*, 330 NLRB 935, 943 (2000).

Complaint paragraph 6/objection 2

Corina Culbertson testified that on October 10, 2002, Griffin came to her work station to tell her that she had filled a prescription improperly. Later, according to Culbertson, Griffin told her that if the facility had a union, he would have to write her up. However, without a union he could be lenient. Griffin denies making this statement. For the same reasons that I credited Tammy Wright, I credit Culbertson.

Complaint paragraph 7/objection 3

Sandra Moore testified that on October 11, 2002, she clocked in late after a break. When Griffin walked by she told him that she had done so. According to Moore, Griffin said that so long as she didn't abuse her break time, he wouldn't take any disciplinary action. She also testified that Griffin left her location and then returned a few seconds later. At that time, he told her that although he could overlook her clocking in late, if the facility was unionized, he would have to write her up.

Griffin contradicts the account of Moore, who is an active union supporter and who had demonstrated her support for the Union openly prior to October 11. He testified that he told Moore that he didn't have a problem with her clocking in late because she did not have a history of doing so. Then Griffin testified that he told Moore that with the flexibility he had currently in the facility, he could use his discretion in dealing with her clocking in late.

I credit Moore, not only due to the consistency of her testimony with that of Culbertson and Wright, but because I see no reason for Griffin to discuss his "flexibility" unless he was trying to contrast his discretion with the situation that would exist if employees chose to be represented by the Union. Griffin did not testify that he explained to Moore how his flexibility could be lost through the collective bargaining process. His comments would thus tend to leave an employee with the impression that Kroger intended to punish employees, if they chose the Union, by unilaterally tightening up on its enforcement of workrules.

Conclusions of Law

The Unfair Labor Practices

Based on the credibility determinations above, I conclude that Respondent, by Michael Griffin, coercively interrogated Tammy Wright on October 8, 2002 and threatened Wright, Culbertson and Moore, as alleged, with a stricter administration of discipline if employees selected the Union as their collective bargaining representative. In doing so, Respondent violated Section 8(a)(1) of the Act as alleged.

Challenged Ballots/Objections to the Election

I recommend that the challenges to the ballots of Estella Clary, Michelle Spencer and Kimberly Harris be overruled. Additionally, I recommend that the challenge to the ballot of Erin Spetnagel be sustained on the grounds that she is an office clerical employee and that the challenge to the ballot of Theresa Streich be sustained on the grounds that she is a supervisor within the meaning of Section 2(11) of the Act. Even if the ballots of Estella Clary, Michelle Spencer and Kimberly Harris are counted as having voted against representation by the Union, fourteen votes will have been cast in favor of such representation and thirteen against representation. Therefore, if these recommendations are adopted by the Board, the Union, United Food and Commercial Workers Union, Local 1059, should be certified as the exclusive bargaining representative of the following employees at the Kroger Refill Center in Groveport, Ohio.

All regular full-time and part-time employees employed by the Employer at its Kroger Refill Center, 2250 Spiegel Drive, Groveport, Ohio facility, but excluding all managers, office clerical employees, pharmacists, pharmacist-interns, and all guards and supervisors as defined in the Act.

In the event that my ruling on the challenged ballots is reversed and the Union fails to receive a majority of the valid ballots cast, I recommend that Board order a new election. The Board's policy is to set aside an election whenever an unfair labor practice occurs during the critical period between the filing of the representation petition and the election. There is a limited exception to this policy, however, in situations where the misconduct is de minimis with respect to affecting the results of an election, *Video Tape Co.*, 288 NLRB 646 n.2, 665 (1989). Since several employees were affected by the violations herein and under the Union's worst-case scenario, it can only lose the election by a single vote [if all five challenged ballots are counted and all five employees vote against union representation], the violations cannot be deemed de minimis. Therefore, if the Union does not prevail on the challenges to at least two of the ballots, I conclude that its objections have sufficient merit to set aside the election of October 31, 2002.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹³

ORDER

The Respondent, The Kroger Company, Groveport, Ohio, its officers, agents, successors, and assigns, shall

¹³ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

1. Cease and desist from

(a) Coercively interrogating any employee about union support or union activities.

5 (b) Threatening employees that the administration of discipline will be stricter if they chose a union as their collective bargaining representative.

(c) 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.

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

(a) Within 14 days after service by the Region, post at its facility in Groveport, Ohio, copies of the attached notice marked "Appendix."¹⁴ Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 8, 2002.

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

30 It is ALSO ORDERED that Case No. 9-RC-17712 be severed and remanded to the Regional Director, who shall certify the election results.

Dated, Washington, D.C. May 14, 2003.

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Arthur J. Amchan
Administrative Law Judge

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14 If this Order is enforced by a Judgment of the 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."

50

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 coercively question you about your union support or activities.

WE WILL NOT threaten to administer discipline more strictly if you choose a union as your collective bargaining representative.

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.

THE KROGER COMPANY

(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov.

550 Main Street, Federal Office Building, Room 3003, Cincinnati, OH 45202-3271

(513) 684-3686, Hours: 8:30 a.m. to 5 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (513) 684-3663.