M K Laboratories, Inc. *and* **Jeanette Medina.** Case 39-CA-55

April 14, 1982

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On January 12, 1981, Administrative Law Judge Henry L. Jalette issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief. Respondent filed exceptions and a supporting brief as well as a brief in support of the remainder of the Administrative Law Judge's Decision.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge only to the extent consistent herewith.

The Administrative Law Judge found, *inter alia*, that the evidence was insufficient to sustain the allegations that Respondent violated Section 8(a)(3) by discharging employee Jeanette Medina because of her union activities and Section 8(a)(5) by refusing to meet with the certified bargaining representative of its employees unless Medina ceased acting as its designated agent. Accordingly, the Administrative Law Judge recommended that the complaint as to these two allegations be dismissed. The General Counsel has filed exceptions to the above findings which, for reasons hereinafter set forth, we find meritorious.

I. THE DISCHARGE OF EMPLOYEE MEDINA

The Administrative Law Judge held that Respondent lawfully discharged Medina for chronic and excessive absenteeism. He found no evidence that Medina's elevation, just prior to the discharge, from the position of departmental steward to that of chief steward was of any "concern" to Respondent. He further found that neither the hostile reactions of two management officials to her efforts as steward nor Respondent's refusal to permit two employees to attend Medina's unemployment compensation hearing constituted animus directed at employees exercising their Section 7 rights.

We disagree with the Administrative Law Judge's conclusion that the discharge did not violate Section 8(a)(3) of the Act. The circumstances of the discharge as to timing, animus, and disparate treatment fully warrant the inference that Respondent, who unquestionably knew both of Medina's past union activity as steward and of the increased contractual authority she would have possessed as chief steward, discharged her for reasons proscribed by the Act.

As described more fully by the Administrative Law Judge, Medina was an assertive advocate of employee concerns about working conditions on the production line from at least the date of her election as steward in April 1979 until her discharge on December 9, 1979. According to the undisputed testimony of employee witnesses, previous stewards had not been nearly as active as Medina. Her complaints to management concerning production line staffing, line speeds, and adherence to contractual provisions concerning work assignments incurred Foreman Prendergast's ire on several occasions and Vice President Ferrante's once.[2] Medina was discharged after her election as chief steward and just before she was installed in that office. Contrary to the findings of the Administrative Law Judge, the collective-bargaining agreement in evidence shows that the chief steward's responsibilities and authority exceeded that of a departmental steward, particularly in the area of grievance handling beyond the first stage.

There is no dispute that Medina's activities as steward were protected under the Act. Respondent denies, however, that any part of its reason for discharging Medina was related to either her activities as steward or any concern about how she might exercise her additional authority as chief steward. Respondent asserts that its sole reason for discharging Medina was her deficient attendance record.

The timing of the discharge, first of all, constitutes probative evidence of Respondent's unlawful motive. As noted, Respondent's officials were often angered by Medina's protected efforts on behalf of

[1] We agree with the Administrative Law Judge that Respondent violated Sec. 8(a)(1) of the Act on February 13, 1980, by refusing to permit employees Margaret Scibek and Carol Jablonski to attend an unemployment compensation hearing involving Jeanette Medina and by threatening them with discipline without having a business justification for the refusal. Respondent excepts to the Administrative Law Judge's finding that Manager of Employee Relations Lawrence Healy failed to check with Production Manager Chester Trzaski as to whether Scibek and Jablonski were needed on the production line that day. The record reveals, as contended by Respondent, that Healy thought he had had a brief telephone conversation with Trzaski before denying the two employees permission to leave for the hearing. However, as noted by the General Counsel, the existence of this conversation was not corroborated by Trzaski who did testify. Further, Healy did not testify as to what Trzaski may have told him concerning production needs that day. Thus, since the record does not contain evidence that Respondent did, in fact, have a legitimate business reason for denying the employees' request to attend the hearing, we affirm the Administrative Law Judge's finding of the 8(a)(1) violations.

[2] For example, Medina, unlike her predecessors, actually checked the timing of the line on several occasions and once shut it down because of a safety problem involving broken glass after the foreman said he did not have time to correct it.

the production line employees. Because the discharge occurred just before Medina would have been able to exercise enhanced authority over contract enforcement matters, we infer that while Respondent had demonstrated a willingness to tolerate Medina as steward, despite her absenteeism, the imminent prospect of her new union office precipitated the discharge.

The Administrative Law Judge found Respondent's denial of permission to two employees to attend Medina's unemployment compensation hearing, coupled with a threat of discipline,[3] to be a violation of Section 8(a)(1). However, for purposes of ruling on the 8(a)(3) allegations, he characterized the 8(a)(1) violation not as union animus but rather as only a "misconception of the statutory rights of employees." We disagree. The Board has viewed independent 8(a)(1) violations such as these as relevant grounds for imputing union animus to a respondent. See *Haynes Industries, Inc.*, 232 NLRB 1092 (1977), and *Penasquitos Village, Inc.; Penasquitos Gardens, Inc.; Penasquitos Hills, Inc.; and San Diego Leisure Life Village*, 217 NLRB 878 (1975).

Finally, we come to the issue of Respondent's asserted ground for the discharge—the attendance record of Medina. The General Counsel does not dispute the record as presented by Respondent but does argue that Medina was subjected to disparate treatment with respect to the discipline meted out to employees with similarly bad attendance records.

Respondent's policy concerning absenteeism provides that each employee absent in excess of 10 percent in any one quarter is counseled during the succeeding quarter. For each quarter thereafter in which an employee exceeds the 10-percent level he or she is subject to progressively more severe discipline beginning with a written warning and proceeding through suspension ultimately to discharge. Respondent concedes that the quarterly reports serve only as a guide to management officials and, in fact, that absenteeism data is often reviewed and disciplinary decisions made more frequently than on a quarterly basis.

As found by the Administrative Law Judge, however, discipline was not automatically imposed in each case surfaced by the quarterly reports. Employee Relations Manager Healy exercised considerable discretion in evaluating each case. He considered factors, in addition to the raw data, such as length of service, reasons for the absences, length of each absence, frequency, and departmental manpower needs. These criteria and their relative weights were apparently not made explicit or codified at any time into a rule made known to the employees or the Union. Only after the initial disciplinary actions were taken was the Union even informed that there was a general policy of progressive discipline for continued quarterly absenteeism rates over 10 percent.

We find that the discharge of Medina constituted disparate treatment by Respondent. This is clear when the degree of discipline accorded her is compared with that received by other employees with similarly severe attendance problems. First, Respondent's personnel records show that four employees had a higher rate of absenteeism in 1979 than did Medina. However, two of them, Reyes and Boileau, received no discipline at all and three of them, Boileau, Pierce, and Croteau, were eventually "counseled into resignation" by Respondent.[4] Such resignations clearly provide an advantage in seeking new employment to those employees over an employee like Medina who is discharged outright. Medina alone among those employees with poor attendance records was not given this face-saving opportunity.

Further, no employee other than Medina has been discharged for absenteeism *alone* since Respondent instituted its 10-percent-per-quarter rule. Though Respondent contends that O'Neil and Gerard were discharged under the rule along with Medina, Healy testified that O'Neil's discharge was also based on her problems with alcoholism and disruptive behavior in the workplace and that Gerard, unlike Medina, combined his high absenteeism with frequent tardiness and failure to even call in when absent.

As summarized by the Administrative Law Judge, Healy offered extenuating circumstances associated with poor attendance records of several employees as his reasons for having imposed discipline less severe than the discharge given Medina. Healy did not evaluate the reasons for Medina's absences, particularly the medical ones, as he had for others such as Croteau, Olszewski, and Szamotula.[5]

In conclusion, we find that Respondent, through the inconsistent application of its vague and imprecise absenteeism rule, treated Medina, the employee most active in attempting to enforce the collective-bargaining agreement on behalf of the Union, more harshly than employees with similarly bad records. The reason advanced for the discharge was, in our view, pretextual. In light of that, as well as the timing of the discharge and Respondent's union

[3] See fn. 1, *supra*.

[4] The Administrative Law Judge found only that Croteau had resigned. Healy testified, however, that Croteau had been counseled into resignation.

[5] Healy testified that, since in Medina's case his concern was only for frequency of absence and "prognosis for improvement," the evaluation of her absences "as illness or not illness was really irrelevant."

animus, we find that the discharge was for a discriminatory reason and violated Section 8(a)(3) of the Act.

II. RESPONDENT'S REFUSAL TO RECOGNIZE MEDINA AS CHIEF STEWARD

Medina filed a grievance over her December 7, 1979, discharge which went to a third-step hearing on December 13. At the outset of the hearing, Medina identified herself as both the grievant and the chief steward. Ferrante told her that, since she was no longer an employee, Respondent would not recognize her as the chief steward.

The Administrative Law Judge dismissed the allegation that the refusal to acknowledge Medina's representative status was a violation of Section 8(a)(5) of the Act. He did so because the grievance hearing was in fact held with Medina in attendance. This conclusion was reached in spite of his finding that the Union had a right to have anyone it wished act as chief steward and that it had not waived that right.

Respondent contends that the contractual references to the position of steward combined with the past practices of the parties indicate that a nonemployee cannot serve as a steward. Since, Respondent argues, Medina's discharge was lawful, any refusal to recognize her as chief steward is also lawful.

We disagree with the Administrative Law Judge and find that Respondent violated Section 8(a)(5). Regardless of the merits of Respondent's interpretation of the contractual provisions as to stewards, we find that Respondent "acted at its peril" in claiming that Medina could no longer act as chief steward following her discharge. *Gates Rubber, Inc.*, 199 NLRB 739 (1972). Since we have found that Medina's discharge was violative of the Act, it follows that she retained at all times her status as an employee and therefore Respondent was obligated to recognize her as the Union's chief steward at her own grievance hearing. Respondent's refusal to do so constituted a refusal to bargain collectively with the representative of its employees in violation of Section 8(a)(5) of the Act.

THE AMENDED REMEDY

Having found that Respondent has engaged in unfair labor practices in violation of Section 8(a)(1), (3), and (5) of the Act, it is necessary to augment the 8(a)(1) remedy recommended by the Administrative Law Judge in order to effectuate fully the purposes of the Act.

We shall additionally order Respondent to cease and desist from engaging in the unfair labor practices found herein and to reinstate Jeanette Medina to her former job or, if such job no longer exists, to a substantially equivalent position, without prejudice to her seniority or other rights and privileges previously enjoyed, and we shall order Respondent to make Medina whole for any loss of earnings she may have suffered because of the discrimination practiced against her by payment to her of a sum equal to that she normally would have earned from the date of the discrimination to the date Respondent offers her reinstatement, less her net earnings during that period. Backpay shall be computed in the manner set forth in *F. W. Woolworth Company*, 90 NLRB 289 (1950), with interest as prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1977).[6]

AMENDED CONCLUSIONS OF LAW

Substitute the following for Conclusions of Law 4 and 5:

"4. Respondent violated Section 8(a)(3) and (1) of the Act by discharging Jeanette Medina on December 7, 1979.

"5. Respondent violated Section 8(a)(5) and (1) of the Act by refusing, on December 13, 1979, to recognize Jeanette Medina as chief steward of the above-named Union."

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, M K Laboratories, Inc., Fairfield, Connecticut, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to grant employees time off to attend an unemployment compensation hearing of a fellow employee and threatening employees with disciplinary action if they take time off where there is no business justification for the refusal.

(b) Refusing to recognize the chief steward of the Union as the bargaining representative of its employees.

(c) Discharging or otherwise discriminating against any employee for the purpose of discouraging employees from engaging in union activity.

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

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

(a) Offer Jeanette Medina immediate and full reinstatement to her former job or, if that job no

[6] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962). In accordance with his dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980), Member Jenkins would award interest on the backpay due based on the formula set forth therein.

longer exists, to a substantially equivalent position, without prejudice to her seniority or other rights and privileges previously enjoyed, and make her whole for any loss of pay which she may have incurred by reason of Respondent's discrimination against her in the manner described in "The Amended Remedy" section of this Decision.

(b) Upon request, recognize for collective-bargaining purposes the Union's chosen representatives, including Jeanette Medina as chief steward.

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its Fairfield, Connecticut, plant copies of the attached notice marked "Appendix."[7] Copies of said notice, on forms provided by the Officer-in-Charge for Subregion 39, after being duly signed by Respondent's representative, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Officer-in-Charge for Subregion 39, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

MEMBER ZIMMERMAN, concurring[8] in part and dissenting in part:

Contrary to my colleagues, I agree with the Administrative Law Judge's finding that Respondent did not unlawfully discharge employee Medina because she had been elevated from steward to chief steward. I am not persuaded by my colleagues' argument that she was disparately treated when she was discharged in accordance with Respondent's policy concerning employees whose quarterly absentee rate exceeded 10 percent. The evidence is insufficient to show that Medina was singled out to be discharged. I agree with the Administrative Law Judge's finding that Respondent has proffered plausible reasons why other employees with high absentee rates had not been discharged.[9] Inasmuch as even the majority concedes that Respondent had shown a willingness to tolerate Medina's activist role as steward, I find no basis for inferring that Respondent would not tolerate her as chief steward. The majority's conclusion that her continued presence as an employee became intolerable to Respondent as chief steward, because she would have had increased responsibility and contractual authority, is based on pure speculation.

Finally, I conclude that Respondent's refusal to permit two employees to attend Medina's unemployment compensation hearing is insufficient to show a discriminatory motive behind her discharge. Whatever element of animus may be read into this refusal, it cannot reasonably be extended to a period before the unemployment compensation hearing. Respondent's reason for denying permission to these employees may just as well have been to protect what it perceived to be its interests in that hearing. In any event, I view the Administrative Law Judge's conclusion that the refusal was due to Respondent's misconception of the employees' statutory rights to be a reasonable one under the circumstances of this case. Accordingly, I would dismiss the allegation of the complaint relative to Medina's discharge.

Since I conclude that Medina's discharge was not unlawful, I would also dismiss the 8(a)(5) allegation based on Respondent's refusal to recognize Medina as chief steward at her grievance hearing. She was not an employee at the time, and I would therefore find merit in Respondent's assertion that she had lost the right to hold that position under the terms of the contract. Assuming *arguendo*, however, that she had the right to act as chief steward at her grievance meeting, I agree with the Administrative Law Judge that the issue is too inconsequential under the circumstances to warrant finding a violation.

[7] In the event that 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."

[8] I concur with my colleagues' finding that Respondent violated Sec. 8(a)(1) by refusing to permit two employees to attend Medina's unemployment compensation hearing.

[9] In finding disparate treatment the majority notes Respondent gave other employees facing discharge the opportunity to resign, and that others who were discharged were not terminated for absenteeism alone. Such distinctions are insufficient to establish the unlawful inference drawn by my colleagues. With respect to the employees who resigned, the record does not show why they were counseled to resign and Medina was not. A possible reason for the difference was that Respondent might have believed that such counseling would have been futile in Medina's case. As for the employees who were discharged because of more than one reason, I fail to see how this shows disparate treatment.

APPENDIX

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

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

WE WILL NOT refuse to grant time off to employees to attend unemployment compensation hearings of fellow employees, nor threaten employees with disciplinary action if they take time off, where there is no business justification for our refusal.

WE WILL NOT refuse to recognize Jeanette Medina as the chief steward of Local 263, International Chemical Workers Union.

WE WILL NOT discharge or otherwise discriminate against employees for the purpose of discouraging them from engaging in union activity.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act, as amended.

WE WILL, upon request, recognize Jeanette Medina as the chief steward of Local 263, International Chemical Workers Union.

WE WILL offer Jeanette Medina immediate and full reinstatement to her former job or, if such job no longer exists, to a substantially equivalent position, without prejudice to her seniority or other rights and privileges previously enjoyed, and WE WILL make her whole for any loss of earnings suffered by reason of her unlawful discharge, with interest.

M K LABORATORIES, INC.

DECISION

STATEMENT OF THE CASE

HENRY L. JALETTE, Administrative Law Judge: This proceeding involves allegations that the above-named Respondent violated Section 8(a)(1) of the Act by denying employees permission to leave work to attend the unemployment compensation hearing of a fellow employee, Section 8(a)(1) and (3) of the Act by discharging Jeanette Medina, the Charging Party, and Section 8(a)(1) and (5) of the Act by refusing to meet with the International Chemical Workers Union, Local 263, the certified bargaining representative of its employees, unless Jeanette Medina ceased to act as the Union's designated agent. The proceeding was initiated by a charge filed by Medina on November 20, 1979. The charge was amended on January 16, 1980, and complaint issued on February 29, 1980. On June 17, 1980, Medina filed a second amended charge and on June 20, 1980, an amendment to the complaint was issued. On June 23 and 24, 1980, hearing was held in Bridgeport, Connecticut.

Upon the entire record, including my observation of the witnesses, and after consideration of the briefs of the parties, I hereby make the following:

FINDINGS OF FACT

I. THE FACTS

Respondent, a Connecticut corporation, has an office and place of business in Fairfield, Connecticut, where it is engaged in the manufacture and sale of pharmaceuticals, health and beauty aids, and related products.[1] Since 1945, the Union has been the certified representative of Respondent's employees in a production and maintenance unit.

Jeanette Medina was employed by Respondent in March 1976. At the time herein relevant, she was employed as a molder in the wet line and finishing department. In the spring of 1979, Medina was appointed steward in her department. According to Medina, nearly every day during the summer of 1979 she had to approach supervision in her capacity as steward to complain about understaffing on the production line. She often timed lines and on one occasion stopped a line because the bottles that were being filled were breaking. She complained that bottles that were being supplied to the line were being delivered packed upside down increasing the work of the line workers. She insisted on compliance with an agreement between the Union and the Company that line workers temporarily sent to another department when their line was down would return to that line when it was reactivated. She insisted that when there was no work in an employee's present job the employee be assigned work in her original classification.

According to Medina, several times Foreman Ray Prendergast called her a pain in the ass. On one occasion she had asked that another employee be added to a line because the product kept piling up. Vice President of Operations John Ferrante did not agree and, at one point, when she had asked that the line be held up, he told Foreman Prendergast to "get her the hell off the line."

In November, Medina was elected chief stewardess.

On December 16, 1977, Medina had received a written warning for unsatisfactory attendance that calendar year. A grievance was filed in protest thereof on the ground her absences were due to medical problems. The grievance was denied.

On October 18, 1978, Medina had received another written warning for absenteeism and early departures.

[1] Jurisdiction is not in issue. Respondent admits it meets the Board's $50,00 direct outflow standard for the assertion of jurisdiction.

On May 15, 1979, Medina received a 3-day suspension for absenteeism. A grievance was filed over the suspension. The grievance was denied.

On December 7, 1979, Medina was discharged for absenteeism.

On December 11, 1979, she filed a grievance claiming her absenteeism was used as a pretext to discharge her because of her activities on behalf of the Union, in particular, her election as chief stewardess.

On December 13, 1979, a grievance meeting was held. At this meeting the participants were asked to identify themselves and to indicate the reason for their being there. Medina identified herself not only as the aggrieved employee, but as chief stewardess. Ferrante told her he would not recognize her as chief stewardess because she was no longer an employee. The matter was discussed back and forth to the point that the union representatives told the Company they would not proceed with the meeting, but proceed to an NLRB hearing. According to Margaret Scibek, at that point Respondent agreed to hold the meeting with Medina present, but Scibek, who was present as stewardess and spokesperson for Medina, testified she did not know whether in doing so Respondent was recognizing Medina as chief stewardess. The meeting was held and Medina's discharge was discussed.

On February 13, stewardess Scibek and Acting President Carol Jablonski requested permission to leave work to attend an unemployment compensation hearing involving Medina. Lawrence Healy, manager of employee relations, denied their request on the ground he needed them on the line. He told them if they left they would face disciplinary action. They remained at work.

II. ANALYSIS AND CONCLUSIONS

A. *The Discharge of Medina*

The activities of Medina as union steward have been described briefly above and there is no contention here that such activities were not protected. The issue is whether Respondent was motivated by such activities in discharging her. I conclude that the General Counsel has failed to make a *prima facie* showing sufficient to support the inference that Medina's activities as steward, or her election as chief steward, motivated Respondent in discharging her.

The asserted reason for Medina's discharge is chronic and excessive absenteeism. The facts relative to such absenteeism are not in dispute; rather, the General Counsel contends that Medina was treated differently from other employees with similar absentee records and that such disparate treatment supports an inference of unlawful motivation.

Since the fall of 1977, Respondent had generated quarterly absentee reports as an aid to control absenteeism. Listed on such reports were all employees with absentee rates in excess of 10 percent of the worktime during the quarter. Such employees were subject to progressive discipline beginning with counseling (not itself regarded as discipline), written warnings, suspension, and ending, if not corrected, with discharge. However, the policy in this regard was not rigidly applied. According to Lawrence Healy, manager of employee relations and the individual who administered the policy, application of the policy took into consideration individual cases and involved the exercise of discretion. For example, Healy considered factors such as length of service, reason for the absence, whether they were of long or short duration, and their frequency.

According to Production Manager Chester Trazski, on December 5, 1979, after a production meeting, he asked Healy what he was going to do about absenteeism. Healy testified that he sat down and reviewed the records at his disposal for all employees and on the basis of such review decided to discharge Medina. As noted earlier, Medina had received two written warnings and a 3-day suspension because of her absenteeism. According to Healy, his review of Medina's record revealed that her absences were frequent and sporadic and relatively unabated since her suspension. He noted that her absences had occurred frequently on Mondays and Fridays and before holidays. He concluded that there was no likelihood of her improvement and that she should be discharged.

As noted earlier, there is no dispute about Medina's absences. The General Counsel contends that the record shows disparate treatment of Medina. To begin with, the General Counsel adverts to the fact that the principal absence of Medina in the period after her suspension was an absence of 10 days for illness for which she was compensated under Respondent's insurance program. As I understand Respondent, however, this circumstance did not enter into its decision. What mattered was the frequency of the absences and their causes. In Medina's case, it was never a single cause (e.g., broken arm), but a variety of illnesses such as viral infections or gastro-intestinal disorders. Her 10-day absence in October was due to an illness of that type with symptoms of sore throat, nausea, and weakness, the very type of illness for which there is no guarantee against recurrence. As I understand Healy's testimony, this was precisely the reasoning behind his decision.

The record indicates that three other employees had been suspended with Medina in May whose absenteeism had continued to a degree but who were not discharged. Helen Dunham, for example, had been absent 10 days since her suspension. Healy did not discharge her because he viewed her record as a slight improvement and she had been employed 15 years. Diane Frisbie had shown significant improvement (5 days absent since her suspension). Lucille Szamotula's attendance was a little bit better since her suspension so that Healy saw a glimmer of improvement. Furthermore, he believed that the reasons for her illness (not specified in the record) warranted her 10 absences, and her overall record was not as chronically bad nor for as long as Medina's. (G.C. Exh. 9(a) through (d) supports such assessment.)

The General Counsel adverts to the attendance records of other employees in support of her contention of disparate enforcement of the absentee policy. Thus, Diane Croteau is shown to have been absent well in excess of 10 percent in every quarter of 1979, yet she received no discipline until November 27, 1979, when she received a written warning. The record reveals, howev-

er, that Croteau's absenteeism had not exceeded 10 percent in prior years, except 1977 when it was 11 percent (Medina's was 23 percent that year). Healy said she had severe allergy and emotional problems. In any event, Croteau had resigned on December 4, prior to the decision to discharge Medina.

Barbara Olszewski also had an absentee record in excess of 10 percent and was not discharged. However, such a high degree of absenteeism was limited to 1979 and Healy testified a couple of things had taken place in her life which caused her absenteeism.

Damares Reyes had a bad attendance record and was not discharged. According to Healy, her absences were related to a workmen's compensation issue then pending.

Michael Boileau had a poor attendance record and was not disciplined. According to Healy, Boileau had a chronic illness (Chrom's disease). Moreover, he was employed in shipping and receiving and his absences did not impact on production the way the absences of wet line employees did.

Vivian Podpolucha had been counseled about attendance in 1978, had received a written warning in May 1979, and had not shown any significant improvement as of December. Yet, she was not discharged. Healy had no explanation.

In short, except in Podpolucha's case, Healy offered an explanation for the treatment accorded each employee which on its face was plausible. If his testimony is credited, even with Podpolucha's case unexplained, the contention of disparate enforcement is shown to lack any substance. I credit Healy. I recognize that the judgments he made were not in all cases measurable, but his explanations of them were plausible.

Rejection of this contention of disparate treatment weakens considerably the allegation of unlawful motivation in Medina's discharge. Of course, there are other circumstances to be considered such as timing and animus. Insofar as timing is concerned, it appears, according to the General Counsel's theory, the catalyst was Medina's election to the position of chief steward. However, there is not a scintilla of evidence that this circumstance was a matter of concern for Respondent. Nor does the record disclose that the chief steward could be more of a pain to Respondent than a steward.

What of animus? There is the evidence of Foreman Prendergast's observations that Medina was a pain. This proves little, especially when the record fails to disclose that Prendergast played any part in the decision to discharge Medina. There is the evidence that on one occasion Vice President Ferrante told a supervisor to get Medina "the hell off" the production line. I do not know what that proves except that he was irritated perhaps angry, because she was disrupting production. There is no indication he, or anyone else, ever spoke to Medina, much less admonished her, about the incident.

More troubling than the foregoing is Respondent's conduct after Medina's discharge in objecting to meeting with her as chief steward and in denying permission to Margaret Scibek and Carol Jablinski to attend Medina's unemployment compensation hearing. In my judgment, such conduct represented a misconception of the statutory rights of employees rather than an animus toward employees for exercising Section 7 rights.

In short, I do not deem the circumstances of the case discussed above sufficient to overcome Medina's record of absenteeism. Accordingly, I shall recommend dismissal of the allegation of the complaint relative to her discharge.

B. *The Refusal To Bargain*

The complaint alleges that since on or about December 13, 1979, Respondent has failed and refused to meet and bargain with the Union as the exclusive collective-bargaining representative of its employees unless and until Jeanette Medina ceased to act as the Union's designated agent for such purposes. As drafted, the complaint allegation has no merit. Except for the incident of the grievance meeting on December 13, there is no evidence that Respondent has refused to meet with the Union unless and until Medina ceased to act as the Union's designated agent.

The only issue, therefore, is whether Respondent violated Section 8(a)(5) and (1) of the Act by its conduct on December 13. In my judgment, the issue is of too little moment to receive extensive analysis. I conclude that the Union had the right to have anyone it chose to act as chief steward and that it did not waive that right. However, inasmuch as the meeting of December 13 was in fact held between Respondent and the Union and that Medina was present, whether as grievant or chief stewardess is unclear, a finding that Respondent violated the Act by its objections to her presence as chief stewardess is not warranted.

C. *The Refusal To Grant Time Off From Work to Employees To Attend an Unemployment Compensation Hearing*

It is clear that employees, acting in concert, have a right under Section 7 of the Act to attend unemployment compensation hearings involving the discharge of a fellow employee. *Supreme Optical Company, Inc.*, 235 NLRB 1432 (1978). It is equally clear that this is not an absolute right, but is rather a right to be balanced against the employer's interest in efficiently operating his business. *Supreme Optical Company, Inc., supra*, footnote 9. In the instant case, Respondent offered no evidence that its refusal of permission to Scibek and Jablonski was attributable to business considerations. It is true that in refusing them permission Healy asserted that they were needed for production; however, this was not shown to be the fact. As a matter of fact, Healy is not involved in production and there is no showing that he had the faintest idea what the production needs were that day. It is clear that he did not even bother to check. In these circumstances, the mere assertion of production needs as the basis of the refusal is insufficient to warrant depriving employees the Section 7 right to attend the unemployment compensation hearing in aid of Medina. Accordingly, I find that Respondent violated Section 8(a)(1) of the Act by refusing to grant permission to Scibek and Jablonski to attend the unemployment compensation hearing. I also find that Healy's remarks relative to disci-

pline if they went to the hearing constituted unlawful threats.

THE REMEDY

Having found that Respondent unlawfully denied employees time off to attend an unemployment compensation hearing on behalf of a fellow employee and threatened employees with disciplinary action, I shall recommend that Respondent cease and desist from such conduct and that it take certain affirmative action designed to effectuate the policies of the Act.

CONCLUSIONS OF LAW

1. M K Laboratories, Incorporated, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. International Chemical Workers Union, Local 263, is a labor organization within the meaning of Section 2(5) of the Act.

3. By refusing to grant employees time off to attend an unemployment compensation hearing on behalf of a fellow employee and threatening them with discipline if they took time off, where there was no business justification for the refusal, Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Sections 8(a)(1) and 2(6) and (7) of the Act.

4. The General Counsel has failed to make a *prima facie* showing that the discharge of Jeanette Medina was motivated by her protected activities.

5. The General Counsel has failed to adduce evidence sufficient to warrant a finding that Respondent has refused to meet and bargain with the Union unless and until Jeanette Medina ceased to act as the Union's designated agent.

[Recommended Order omitted from publication.]