Triana Industries, Inc. *and* Aluminum Workers International Union, AFL-CIO. Case 10-CA-12193

September 28, 1979

DECISION AND ORDER

BY MEMBERS JENKINS, MURPHY, AND TRUESDALE

On May 27, 1977, Administrative Law Judge James L. Rose issued the attached Decision in this proceeding. Thereafter, counsel for the General Counsel filed exceptions and a supporting brief, and Respondent submitted its brief to the Administrative Law Judge in support of that 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, and conclusions of the Administrative Law Judge as modified herein.

The Administrative Law Judge found, and we agree, that Respondent, as fully set forth in the attached Decision, reacted to its employees' organizational activities by engaging in violations of the Act. We find, contrary to the Administrative Law Judge, that Respondent also violated Section 8(a)(1) by the following conduct:

Forbidding Discussion of Wages

On May 9, Respondent's vice president and general manager, George Malone, during an orientation meeting of new employees, told these employees "not to go around asking the other employees how much they were making, because some of them were making more than others." The Administrative Law Judge, while finding that the statement was made, concluded that Respondent's statement did not violate Section 8(a)(1) because it did not raise to the level of a rule the breach of which would imply sanctions, adding that the statement did not occur during the time of organizational activity. We disagree.

It is axiomatic that an employer violates Section 8(a)(1) of the Act where it engages in conduct which has a natural tendency to restrain employees in the exercise of rights guaranteed them under Section 7 of the Act. Further, Section 7, which grants employees the unfettered right to engage in concerted activities for mutual aid and protection, encompasses the right of employees to ascertain what wage rates are paid by their employer, as wages are a vital term and condition of employment. Respondent's statement, by directing employees not to engage in such activity (and thus implying that the Employer does not look with favor upon employees who engage in such activity), clearly tends to inhibit employees in the exercise of their Section 7 rights. We further find it irrelevant that Respondent's statement did not occur during a period of organizational activity. An employer who restrains employees in the exercise of rights guaranteed them under Section 7 violates the Act no less because his employees have chosen to exercise those rights independent of union representation.[1] Furthermore, such discussion may be necessary as a precursor to seeking union assistance and is clearly concerted activity. Under these circumstances, we conclude that Respondent's statement prohibiting wage discussion among its employees violated Section 8(a)(1) of the Act.

Promises of Benefit

The Administrative Law Judge found that Respondent discussed with employees its efforts to obtain a credit union and certain benefits on their behalf, but concluded these statements were not promises of benefit in violation of Section 8(a)(1), but merely statements as to what efforts Respondent had made on behalf of the employees prior to the advent of the organizational campaign. We disagree.

On August 2, 1976, Respondent's officials, Foster, Malone, and Toney, conducted meetings with Respondent's employees. At these meetings, which were the same meetings during which Respondent had unlawfully threatened employees with plant closure and reprisal as discussed, *supra*, Foster and Toney promised employees a new break area, a microwave oven, a refrigerator, a table, and also spoke of its as yet unsuccessful attempts to secure a credit union for employees.

Contrary to the Administrative Law Judge, we find these statements to be unlawful promises of benefit in violation of Section 8(a)(1). Although these benefits may have been planned prior to the time Respondent first became aware of the existence of the union campaign, it is also clear that the rank-and-file employees had never been told by Respondent that these efforts were being made on their behalf before these meetings of August 2.[2] Accordingly, we conclude that the announced promises of a microwave oven, refrigerator, a table, a break area, and a credit union, coupled with a threat of plant closure and reprisal if the

[1] *Coosa Valley Convalescent Center*, 224 NLRB 1288, 1289 (1976).

[2] Although some employees were aware that Respondent was in the process of constructing an additional building, there is no indication that the employees were aware that Respondent had undertaken construction of the building to give its employees a break area.

Union came in, were for the purpose of dissuading Respondent's employees from supporting the Union or engaging in union activities and therefore were violative of Section 8(a)(1) of the Act.[3]

Soliciting Employees To Sign An Antiunion Petition

The Administrative Law Judge dismissed an allegation that Respondent solicited its employees to sign an antiunion petition, based on his finding that review of the record did not reveal any testimony establishing such an event. We disagree.

The Administrative Law Judge credited employee Rainey's testimony in its entirety. Based on her testimony, he found that Malone engaged in extensive unfair labor practices, as described, *supra*. Employee Rainey further testified that, in a meeting with Malone on August 5, Malone stated that he had seen that Rainey had not signed the antiunion petition being passed around that Rainey was not helping the people at all by not signing this petition. Since, as noted *supra*, the Administrative Law Judge credited employee Rainey's testimony in all respects, we conclude that the Administrative Law Judge's statement that the record contained no relevant evidence was inadvertent error. In light of the fact that Rainey's testimony was credited in all respects, we deem this portion also as being credited, and we find that Respondent's statement to Rainey constituted an implicit instruction or direction to Rainey to sign the antiunion petition and thus to abandon her support for the Union. Accordingly, we conclude that Respondent thereby solicited an employee to sign an antiunion petition in violation of Section 8(a)(1) of the Act.

THE REMEDY

It having been found that Respondent has committed certain unfair labor practices, we shall order that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the act. We shall order Respondent to offer Parceanur Burgess full reinstatement to her former position of employment or, if that job no longer exists, to a substantially equivalent job without prejudice to her seniority or any other rights and privileges previously enjoyed and that it make her whole for any loss of wages or benefits she may have suffered as a result of the discrimination against her. Backpay and interest thereon shall be computed in the manner prescribed by the Board in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB 651 (1977).[4]

With respect to the General Counsel's request for a bargaining order, the Administrative Law Judge found that the instant case was inappropriate for the issuance of such an order in the absence of a showing of majority status. For the reasons set forth in our opinion in *United Dairy Farmers Cooperative Association*, 242 NLRB 1026 (1979), we agree with the Administrative Law Judge's conclusion and decline to issue a bargaining order.[5]

CONCLUSIONS OF LAW

1. Triana Industries, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Aluminum Workers International Union, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. By discriminatorily discharging Pareanur Burgess on or about August 11, 1976, because of her union activities, Respondent has engaged in an unfair labor practice within the meaning of Section 8(a)(3) of the Act.

4. By the foregoing conduct, by coercively interrogating employees concerning their union activities, by threatening them with plant closure should they designate the Union, by engaging in surveillance of employees' activity on behalf of the Union, by soliciting employees to sign an antiunion petition and to influence others to reject the Union, by offering employees benefits in order to discourage union activity, by forbidding discussion of wages among employees, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

5. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that Respondent, Triana Industries, Inc., Triana, Alabama, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discharing or otherwise discriminating against employees because of their interest in or activity on behalf of the Union or any other labor organization.

(b) Interrogating employees concerning their interest in or activity on behalf of the Union or any other labor organization.

(c) Threatening employees with plant closure

[3] *Alvin Metals Company*, 212 NLRB 707 (1974).

[4] See, generally, Isis Plumbing & Heating Co., 138 NLRB 716 (1962).

[5] Member Jenkins does not rely on *United Dairy Farmers Cooperative Association*, *supra*.

should they designate the Union or any other labor organization as their bargaining representative.

(d) Engaging in surveillance or creating the impression of surveillance of employees' activity on behalf of the Union or any other labor organization.

(e) Soliciting employees to influence others to reject the Union or any other labor organization as their bargaining representative or offer to pay employees to do so.

(f) Offering employees benefits in order to discourage their interest in or activity on behalf of the Union or any other labor organization.

(g) Prohibiting employees from discussing their wages with fellow employees.

(h) Promising employees a credit union, microwave oven, refrigerator, a table, and the moving of employees to an air-conditioned area of the plant in order to induce them to abandon the Union.

(i) Soliciting employees to sign an antiunion petition.

(j) In any other 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 Parceanur Burgess immediate and full reinstatement to her former job or, if that job no longer exists, then to a substantially equivalent job without prejudice to her seniority or any other rights and privileges previously enjoyed, and make her whole for any loss of earnings and compensation she may have suffered because of the illegal discrimination against her in her employment, as herein found in the manner set forth in the Remedy section of this Decision.

(b) Preserve and, upon request, make available to the Board or its agents, for examination or 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.

(c) Post at each of its plants copies of the attached notice marked "Appendix."[6] Copies of said notice, on forms provided by the Regional Director for Region 10, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 10, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

IT IS FURTHER ORDERED that in all other respects the complaint be, and it hereby is, dismissed.

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 parties participated, the National Labor Relations Board has found that we have violated the National Labor Relations Act. We have been ordered to stop committing these unfair labor practices, to post this notice, and to abide by its terms and conditions.

Our employees have the right to join Aluminum Workers International Union, AFL-CIO, or any other labor organization, or to refrain from doing so.

WE WILL NOT discharge or otherwise discriminate against any of our employees because of their activity on behalf of Aluminum Workers International Union, AFL-CIO, or any other labor organization.

WE WILL NOT interfere with any of our employees' right to self-organization by: interrogating them concerning their union activity; threatening to close the plant if they do select the Union; engaging in surveillance or creating the impression of engaging in surveillance of our employees' union activity; attempting to have our employees influence others to be against the Union; offering our employees benefits including wage increases to be against the Union; prohibiting our employees from discussing wages with each other; soliciting them to sign an antiunion petition; and promising them benefits to dissuade them from supporting the Union.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL offer Parceanur Burgess immediate and full reinstatement to her former job or, if that job no longer exists, then to a substantially equivalent job without prejudice to her seniority or any other rights and privileges previously enjoyed, and WE WILL make her whole for any loss of earnings and compensation she may have suffered because of the illegal discrimination

[6] 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."

against her in her employment as herein found, plus interest.

TRIANA INDUSTRIES, INC.

DECISION

STATEMENT OF THE CASE

JAMES L. ROSE, Administrative Law Judge: This matter was tried before me in Huntsville, Alabama, on February 14, 15, and 16, 1977, upon the General Counsel's complaint which alleged, in general terms, that Respondent had engaged in certain activity violative of Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. Section 151 *et seq.;* and had terminated 56 employees in violation of Section 8(a)(3) of the Act. Although conceding that the labor organization involved had never been designated as their representative by a majority of employees, nevertheless the General Counsel asked for a bargaining order.

Respondent generally denied the allegations in the complaint, and affirmatively alleged that the termination of 55 employees on August 6, 1976,[1] was occasioned by business considerations and the one discharge on August 11 was for cause.

Upon the record as a whole, including my observation of the witnesses, briefs, and arguments of counsel, I hereby make the following:

I. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Respondent is principally a service company engaged in contract production of parts used by other area companies. In connection with this business, the Respondent annually performs services in excess of $50,000 for companies who in turn ship goods, products and materials valued in excess of $50,000 directly to customers outside the State of Alabama. Respondent stipulated, and I find, that it is an employer engaged in commerce within the meaning of Sections 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Aluminum Workers International Union, AFL-CIO (herein the Union) is an organization in which employees participate and which exists in part for the purpose of representing employees of employers engaged in commerce, including Respondent, in matters involving wages, hours, and other terms and conditions of employment. On the basis of the record, I find that the Union is, and at all times material herein has been, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

Respondent was established in 1972 principally through the efforts of the Association of Huntsville Area Companies (AHAC) which organization was interested in helping promote and establish "black" businesses. This organization contacted Clyde Foster, the president and part owner of Respondent, then and now the mayor of Triana. Visits were made to the major companies in the area, some of whom agreed to subcontract production work to Respondent once it was established.

Thus Triana Industries, Inc., began operations in October 1972 as a "black" business enterprise located in Triana, Alabama. Triana is a small, predominately "black" farming community near Huntsville with a population of 400 to 500 within the city limits but a police jurisdiction population of approximately 1,500. The educational level of Triana is approximately 6.3 years and it is sufficiently isolated that there is no public transportation from Triana to any nearby employment market. The unemployment rate was about 85 percent before Respondent began operations.

It appears from the record that Respondent's principal customer is G.T.E. Automatic Electric Incorporated (herein Automatic Electric) although work is also done for IBM, Chrysler, and in 1975, AVCO.

The three owners and officers of Respondent are Clyde Foster, president, George Malone, vice president and general manager, and Alonzo Toney, secretary-treasurer. Both Foster and Toney have full-time jobs elsewhere while Malone is a full-time employee of Respondent.

The Union's organizational campaign began in June with Freddie Abernathy, an international representative, contacting employees who in turn contacted other employees in an effort to get authorization cards signed. The General Counsel offered into evidence 69 authorization cards found to be valid. An additional five cards were offered; four of which I find were forged and one which the General Counsel withdrew for the same apparent reason.[2] Two cards were rejected, one was not offered, and two appeared to be signed by the same person. In any event, even if all the cards identified were counted, the total would be 78 or less than a majority of the 165 persons stipulated to be in the bargaining unit as of August 6. The organizational campaign yielded designation by a substantial number of employees, but less than a majority.

The General Counsel alleged that beginning in July Respondent embarked on a course of conduct designed to undermine the organizational efforts of the Union and in so doing committed violations of Section 8(a)(1) and (3) including interrogation, promises of benefits, threats, and the mass discharge of 55 employees on August 6. The General Counsel also alleged the discharge of a single employee on August 11 to be violative of Section 8(a)(3).

B. *The Alleged 8(a)(1) Activity*

The complaint alleges 28 separate violations of Sections 8(a)(1), many of which are overlapping and occurred at the same time. The allegations will be treated by category.

1. Interrogation

It is alleged that on four occasions in July, Malone interrogated certain employees concerning their activities on be-

[1] All dates are in 1976.

[2] The cards of Cassie Jones, Albertia Ross, Albertia Harris, Katherine Lacy, and Laura Everson were neither signed by them nor did they authorize anyone to sign on their behalf. This finding is based on their credited testimony.

half of the Union. Malone generally denied having engaged in such acts. However, I credit the testimony of Parceanur Burgess, Voilia Rainey, and Carl Fitcheard, all of whom appeared to be credible and straightforward witnesses, and whose reasonably detailed accounts appear more believable than Malone's conclusionary denial.

Burgess testified that Malone called her into his office and said that he wanted to discuss a raise for her. He asked if she was aware that a small group of people were trying to organize the Union and she stated that she was. Malone then asked her opinion, and she told him "I didn't have any comment other than I thought it might would benefit employees." Malone said it would not and that Respondent was not large enough to have a union nor could Automatic Electric pay union wages.

Similarly, Malone called Rainey into his office in late July and said that he was going to give her a 10-cent raise. He then asked what she knew about the Union. During this coversation he also said that "he was not going to have no union telling him what to do." He asked Rainey how she felt about the Union and asked her who was leading the organizational drive. Finally Malone asked Rainey to use her influence on the people to stop the union activity.

Also in the latter part of July, Malone called Carl Fitcheard into his office and asked what Fitcheard knew about the Union. Malone said he knew that Fitcheard was one who was trying to organize for the Union because people had told him so. He also asked Fitcheard how many people had signed union cards and asked if Fitcheard had done so. Malone talked generally about what he conceived to be the origin of unions and the fact that one would do no good.

Upon the credited testimony of these witnesses, I conclude that in the latter part of July after learning of the union activity, Malone did in fact embark upon the course of conduct to interrogate employees about it. This is clearly unlawful activity and clearly interferes with employees' rights guaranteed by Section 7 of the Act. Accordingly, I conclude that Malone violated Section 8(a)(1).

2. Threats

It was also alleged that in late July and early August, Malone and Foster threatened employees with closing the plant if they participated in union activity. Again Malone and Foster generally denied the alleged threats; however I credit the testimony of employees Rainey, Burgess, Mary Sue Harper, and Mary Jean Rogers, all of whom appeared to me to be straightforward witnesses, whereas Malone and Foster in this were unconvincing in their general denials.

At a meeting on August 2 called by the three owners (there were two meetings on August 2, one for each shift) Burgess testified that during his presentation Foster stated "if the Union came in there that they would have to close the doors." I find that this was not a prediction of economic consequences. Rather, in the context of this situation, the nature of the business, and particularly to unsophisticated employees, Foster's statement was an outright threat.

Rainey also testified about Foster's statements at the August 2 meeting. He had heard that employees were talking about a union but the people are not ready for one. He said they had a good thing going but "look like you all is trying to kill the goose that laid the golden egg." He also mentioned closing the plant and suggested that were the plant to close these particular employees would not be able to find employment elsewhere. I conclude that Foster's statement about the plant closing within the general context of talking about the Union and trying to dissuade employees from participating in union activity was an implied threat to do so.

Harper and Rogers both corroborate the testimony of Burgess and Rainey with regard to Foster's threat to close the plant.

Upon the mutually corroborative and generally credible testimony of these four employees, I conclude that during the course of this plant-wide meeting on April 2, Foster did threaten to close the plant should union activity continue in violation of Section 8(a)(1).

Rainey testified during her July 29 discussion with Malone, noted above, "He said that he didn't have but one thing in there that belonged to him and it was a splicing, or some kind of machine that he had there. And he said before he would have any union telling him what to do, he said that he would take the machine and put it in the trunk of his car and carry it home." I find that this is a threat to close the plant should union activity continue and was violative of Section 8(a)(1).

Harper testified to Malone's statements at the August 2 meeting. He asked who would find them another job should the employees lose the one they had. In the context of this situation, the three owners attempting to dissuade employees from union activity, I find that this amounted to a threat to close the plant should union activity continue and was violative of Section 8(a)(1).

3. Creation of impression of surveillance

It was stipulated that William Ragland is a supervisor within the meaning of Section 2(11) of the Act. Rainey testified that in July Ragland asked her if she had seen him at a fellow employee's house one time when the employees were having a union meeting. "He said did you see the company truck, and I said no, I didn't see the company truck. He said did you see Clyde (Foster) and I was sitting in the yard, I was sitting, you know, and I told him I didn't see Clyde and him sitting in no yard."

While Ragland denied this event, I conclude that throughout the hearing Rainey was a very straightforward and credible witness. Based upon their relative demeanor, I find that Rainey's version is more probably truthful than Ragland's general denial. I accordingly conclude that Ragland as a supervisor attempted to created the impression of surveillance through this discussion, and thereby violated Section 8(a)(1) of the Act.

4. Solicitation of employees

The allegation that Malone solicited employees to influence others to abandon the Union and offered them money to do so is based on his July discussion with Fitcheard, noted above. While Malone generally denied the conclusionary allegation, I believe that Fitcheard's recollection of that conversation is candid and straightforward. I therefore credit his detailed version over Malone's general denial.

In essence, after the discussion in Malone's office referred to above, Fitcheard went back to his table and then later went back to Malone's office. During this second trip Fitcheard reported what the other employees said and Malone "told me to get them together and tell them just—just tell them that wasn't no union coming in there. And he said if I do it, he would give me more money."

This I find to be an attempt by Malone to solicit employees to influence others to be against the Union and as such interfered with employees' right to self-organization free from interference, restraint or coercion by the employer. I conclude that by this action, Malone violated Section 8(a)(1) of the Act.

Similarly, in Malone's July discussion with Rainey, noted above, he asked her to use her influence with the people to be against the Union. While he did not offer her money, as he did Fitcheard, he nevertheless did, I find, attempt to interfere with employees' freedom of choice and did thereby violate Section 8(a)(1).

5. Soliciting employees to sign an antiunion petition

The complaint alleges that on or about August 5, Malone solicited employees to sign an antiunion petition. A review of the record does not reveal any testimony establishing such an event. Accordingly, I will recommend that this allegation be dismissed as not having been proved by preponderance of the credible evidence.

6. Promise of wage increases

During his discussion with Rainey, Malone promised her a 10-cent per hour wage increase. While such might be normally permissible, I conclude that in the context of his discussion, wherein he interrogated her concerning union activity and asked her to use her influence to dissuade others, the promised wage increase was an attempt to coerce her. It was, therefore, violative of Section 8(a)(1).

Rogers testified that during the August 2 meeting, Malone said something to the effect that all employees after they had been with the Company for 60 days got a raise. I find that this was a statement by Malone to employees advising them of the various benefits the Company already gave them. It was not a promise to employees of a wage increase should they abandon the union activity and was not therefore violative of Section 8(a)(1).

Similar to Rainey, Burgess was called in to Malone's office during which time he discussed a raise for her in the context interrogating her concerning union activity. As with Rainey, while this may normally have been permissible activity, given the context, I find that it was a promise of a benefit in violation of Section 8(a)(1).

In his discussion with Fitcheard, noted above, Malone asked how much of a wage increase the employees were attempting to get by the Union activity. Fitcheard replied 70 cents an hour. Malone told him to advise the people that "he wasn't going to give them nothing but a dime more." Given the general activity of Malone, this amounted to a promise of a benefit to employees should they abandon the union activity and was therefore violative of Section 8(a)(1).

7. Other allegations of 8(a)(1) activity by George Malone

Numerous other allegations of 8(a)(1) violations by Malone in the latter part of July and early August are set forth in paragraphs 14 and 15 of the complaint. While I believe these events occurred, at least in substance, they have generally been covered above, each having occurred during the various discussions Malone had with employees. These particular allegations are not substantively different from the allegations of 8(a)(1) activity already found. That is, I conclude that during the latter part of July, Malone embarked on a course of conduct wherein he interrogated employees, threatened them, promised them benefits, engaged in surveillance of their union activity, and attempted to get them to influence fellow employees to abandon union activity. Malone's general course of conduct was fairly extensive and was violative of Section 8(a)(1). The specific allegations set forth in paragraphs 14 and 15 are to a large extent redundant and need not be treated in detail.

8. Promises of benefits by Alonzo Toney

As noted above, on August 2 the three owners held two meetings with employees wherein they dicussed the ongoing union activity and during which time they advised employees concerning both benefits the Company had given them, and the futility of bargaining through labor organization.

During these meetings, Alonzo Toney discussed his efforts to obtain a credit union which is alleged to have been violative of Section 8(a)(1). While Toney admitted having told employees that he had attempted to get them associated with a credit union at the college where he works, I do not find that this was in any way violative of the Act. It is clear from the testimony that Toney made the attempt to secure the credit union prior to the time of any organizational activity. There is nothing unlawful for an employer to tell employees what efforts he has made on their behalf prior to the advent of organizational activity. I therefore conclude that Toney's comments at the August 2 meeting were not violative of the Act.

9. Promises of benefits at the August 2 meeting

It was also alleged that Foster promised a micro-wave oven, a refrigerator, and a table so that the employees could eat in an air conditioned portion of the plant.

While Foster did generally discuss these items at the August 2 meetings, I again conclude that such were not promises of benefits in violation of Section 8(a)(1). Prior to the advent of the organizational campaign, Respondent had undertaken to construct an additional building which when completed would include a break area and the break area would have a vending machine, a refrigerator and a microwave oven. Inasmuch as this began prior to the organizational campaign, it is clearly not a reaction to it. Respondent can tell employees what benefits it has undertaken on their behalf, and as such it was not violative of Section 8(a)(1). I will recommend that this allegation in the complaint be dismissed, nothing, however, that I have previously found that Respondent, through Malone, did promise employees benefits in violation of Section 8(a)(1).

10. Telling employees not to discuss their wages

It is alleged that on or about May 6, Malone prohibited employees from discussing their wages with fellow employees. Betty Bates testified that this occurred during an orientation meeting of new employees. Malone told them "Not to go around asking the other employees how much they were making, because some of them were making more than others."

This statement does not raise to the level of a rule the breach of which would imply sanctions. Rather it appears to be a caution by an employer based upon reason. I do not conclude from Bates' testimony, that the Respondent promulgated a rule prohibiting employees from engaging in protected activity, namely discussing wages, as was the situation in *Coosa Valley Convalescent Center*, 224 NLRB 1288 (1976), and *Jeannette Corporation*, 217 NLRB 653 (1975); enfd. 532 F.2d 916 (3d Cir. 1976). Nor did this occur during the time of the organizational activity. Accordingly, I will recommend that this allegation be dismissed.

C. *The August 6 Terminations*

The principal issue in this matter involves the August 6 terminations of 55 employees. The General Counsel alleges that Respondent sought to discriminate against employees because of their union activity in violation of Section 8(a)(3).

It is undisputed that Respondent had knowledge of the organizational activity at the time of the terminations. Indeed, on August 5, the day the owners decided to effectuate the terminations, Foster had received a letter from the Union demanding that Respondent recognize it as the employees' bargaining representative. And this demand was discussed on August 5 when the owners met and determined to terminate 55 employees. Given the reasonably extensive unfair labor practices engaged in by the manager, knowledge of the organizational activity, and the close timing of the terminations following receipt of the Union's demand letter, I conclude that the General Counsel made out a *prima facie* case of unlawful motivation. However, I further conclude that Respondent overcame the General Counsel's *prima facie* showing of a violation by demonstrating a substantial business reason for effecting the terminations on August 6. The General Counsel did not offer any proof to rebut either the necessity for terminations or their timing.

On August 6, Respondent had 165 employees in the bargaining unit of which 16 were students.[3] At this time, Respondent's principal customer was Automatic Eletric. The work done by Respondent for Automatic Electric represented, as far as one is able to determine from the record, something in the vicinity of two-thirds of its business.

In a letter dated May 27, Automatic Electric advised Respondent that it consistently increased the workload to a level requiring the employment of over an 100 people. On the basis of information Automatic Electric had at that time, it was anticipated that the workload would require in excess of an 100 people during the next 12 to 18 months. This letter followed the May 19 schedule of work to be done for Automatic Electric covering the period from the week-ending June 6 through the week-ending September 5.

Then on July 30 Respondent received another letter from Automatic Electric indicating that on review of its fourth quarter production plans, Automatic Electric planned to reduce the "workload at Triana at a level between 75 to 100 people in accordance with my letter to you on May 27, 1976. This reduction from 150 people that you now have will start the first of September, and we will work out a new schedule."[4]

On August 4 a new schedule was submitted to Respondent from Automatic Electric covering the period from the week ending August 22 through the week ending November 7. An analysis of this schedule does show a reduction, at least in the total number of parts to be manufactured, of about 3 percent.

On the afternoon of August 5, Malone got a call from Ed McPherson, the Automatic Electric supervisor of assembly subcontracting, to the effect that two parts, HD 570032-A and B, which were scheduled to go to zero by the week ending September 26 would be reduced to zero effective the next week; and two other parts, HD 660045-A and B were to be reduced substantially from the levels previously projected also beginning the next week. Production of part HD 660045-A was to be reduced from 42,000 to 24,500, its production having been scheduled to increase to 85,000 by the week ending September 26. Similarly, production of part HD 660045-B would go from 18,000 to 10,000. Production of this part had been scheduled to go to 25,000 the week ending August 29. McPherson confirmed these instructions by speed letter dated August 6.

Malone testified that it takes approximately 23 employees to produce 40,000 of part HD 570032-A in a week, and 36 to 37 to produce 40,000 of part HD 570032-B. Malone calculated that to stop or reduce production of the four parts would require a reduction in work force of approximately 60 people.

Malone testified that at the meeting of the three owners on the evening of August 5, they determined to terminate 55 employees rather than the 60 he calculated, in order to have 5 surplus employees to fill in for absences.

There is nothing in the record to suggest that Malone's testimony with regard to the instructions he received from Automatic Electric or the number of people required to be terminated should not be credited.

While the documentary evidence is not fully explained, and therefore is to some extent ambiguous, its total thrust tends to support Malone's testimony. Thus, the schedules show that Respondent manufactures 52 different parts for Automatic Electric. On these schedules some parts are not to be manufactured at all in a particular week, whereas production of others ranges from as few as 75 to as many as

[3] Respondent hires a number of students whose wages and FICA is paid by the various customers with Respondent making no profit from their production. They usually leave in September and for this reason were not involved in the termination.

[4] Unexplained is why the figure 100 employees is used in the May 27 letter and 150 is used in the July 30 letter. Since Automatic Electric is Respondent's major customer, and Respondent did have some 165 employees total, it would appear that the 150 figure more accurately reflects the employee requirement for Automatic Electric's work until the August 5 reduction. This is supported by Malone's testimony and the schedules.

85,000. Malone's testimony suggests that the number of employees required to manufacture any given number of these parts in a week varies, according to the part. Thus without explanation, analysis of the documentary evidence can at best give only gross indications of what the August 5 instructions meant in terms of reduced employee complement. Nevertheless, the August 5 communication reflected a 21 percent reduction beginning with the week ending August 15 from the May 19 schedule and a 20 percent reduction beginning with the week ending September 5 from the August 4 schedule. In short, the documentary evidence tends to support Malone's testimony that a substantial portion of its work for Automatic Electric was to be curtailed beginning with the week ending August 15.

Malone further testified that Respondent had to effect the terminations as of Friday, August 6, or else they would have employees at work Monday, August 9, with no work to perform. Again, Malone's testimony in this respect tends to be supported by the documentary evidence and the General Counsel brought forth no rebuttal evidence from which to conclude that either Malone was not being truthful or that the documentary evidence from Automatic Electric is not reliable.

In order to find that Respondent did not have a substantial business justification for terminating a substantial number of employees on August 6 would require me to conclude that the documentary evidence submitted by Respondent without objection from the General Counsel should not be credited. There is no basis on which to make such a finding. I therefore conclude that in fact Respondent had a business justification which it knew about on August 5 to terminate a substantial number of employees on August 6. The necessity for some kind of termination is further supported by the fact that Respondent's work force has remained low, 87 at the time of the hearing. I conclude that the necessity for the mass terminations occurred coincidentally with the demand for recognition and was not caused by it.

Nor do I find anything in the manner of these terminations which would justify an inference that employees were chosen for termination because of their union activity or otherwise to discourage union activity. Of Respondent's 165 employees, 55 were terminated on August 6. Twenty-six of those terminated had signed one of the 69 valid authorization cards whereas 29 has not. The remaining 43 employees who had signed valid authorization cards were not terminated. Respondent stated that it determined to make the terminations by seniority[5] which it apparently did, and in so doing more noncard signers than card signers were terminated; and, twice as many card signers remained as were terminated. Neither the method and manner of the terminations nor its effects imply a discriminatory motive.

It might be noted that in anticipation of the increased work to be contracted from Automatic Electric, Respondent had both built an additional building and had began hiring additional employees. Thus, those employees terminated on August 6 were hired between April 19 and August 4. Such tends to support Malone's testimony and the documentary evidence that Respondent's workload was increasing, but was substantially reduced on August 5.

Based upon the foregoing, I conclude that while the General Counsel did make out a *prima facie* case of unlawfully motivated terminations, the Respondent did in fact show a substantial business reason for effecting the terminations at the time indicated. Inasmuch as the General Counsel came forth with no evidence to rebut these facts, I conclude the General Counsel did not finally establish that the 55 terminations on August 6 were unlawful. I will recommend that this allegation be dismissed. *N.L.R.B.* v. *Great Dane Trailers, Inc.*, 388 U.S. 26 (1967).

Finally there is nothing in the record to support a finding that Respondent discriminatorily refused to recall any or all of the employees terminated on August 6.

D. *The Discharge of Parceanur Burgess*

Parceanur Burgess was discharged on or about August 11, allegedly because she had engaged in union activity and to discourage union activity. Respondent contends that it discharged her because she had been absent several days while taking care of a very ill daughter. Respondent contends that Burgess was discharged because of absenteeism.

Having credited Burgess' testimony with regard to her meeting with Malone in late July, I find that Malone did know that she was sympathetic to the Union. On reviewing Respondent's exhibit concerning her attendance record, I conclude that other than the weeks of August 7 and 14, her attendance was good. Nor does Respondent deny that her absence in August was excused. Respondent contends that it needed all available employees and that it had a right to discharge her for absenteeism.

The reason advanced by Respondent is clearly pretextuous. Respondent tolerated some absenteeism. Note, for instance, Malone's testimony that rather than terminating 60 employees on August 6 he terminated 55 so as to keep 5 employees in reserve to take care of absences. Given Respondent's tolerance of absenteeism, Burgess' credited testimony that she had permission and certainly a legitimate reason to be absent during this period, the fact that Respondent knew of her union sympathies, along with the other unlawful activities engaged in by Respondent, I infer that the real motive was to discourage union activity. *Shattuck Denn Mining Corporation, (Iron King Branch)* v. *N.L.R.B.* 362 F.2d 466 (9th Cir. 1966). The discharge of Burgess was therefore violative of Section 8(a)(3).

Finally, I conclude that the unfair labor practices found are unfair labor practices affecting commerce within the meaning of Section 2(6) and 2(7) of the Act.

REMEDY

It having been found that Respondent has committed certain unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. Respondent will be ordered to offer Parceanur Burgess full reinstatement to her former position of employment, or if that job no longer exists, to a substantially equivalent job without prejudice to her seniority or other rights and privileges and make her whole for any loss of wages or benefits that

[5] As indicated above students who had low seniority were retained because their tenure would shortly run out.

she may have suffered as a result of the discrimination against her in accordance with the formula set forth in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

The General Counsel also contends that only a bargaining order can remedy Respondent's substantial unfair labor practices notwithstanding that the Union was at no time designated by a majority of employees. It is argued that the unfair labor practices were so pervasive as to make it impossible for the Union ever to have been designated by a majority, but it would have been but for Respondent's egregious acts.

In addition, the General Counsel argues that a bargaining order ought to issue because of demeaning racial comments made by Foster at the August 2 meeting. While Foster's statements may have been gross and illadvised I cannot conclude that such would justify, much less require, a bargaining order, or that he committed an unfair labor practice by making the statements.

The General Counsel concedes that at no time did the Union represent a majority of employees in the bargaining unit. Nevertheless the General Counsel contends that, but for the unfair labor practices the Union would have been designated by a majority and therefore the only way to remedy the unfair labor practices is to order bargaining, citing *N.L.R.B.* v. *Gissel Packing Co., Inc.*, 395 U.S. 575 (1969).

While there is some dicta in *Gissel* to the effect that a bargaining order might be appropriate even though the union at no time had designations from a majority of employees, such was not the holding in *Gissel.* Nor has the Board ever so held. The Board has always required some demonstration, at one time or another, that the union in fact had been designated by a majority of employees as a predicate for a bargaining order. E.g., *Beasley Energy, Inc., d/b/a Peaker Run Coal Company, Ohio Division #1*, 228 NLRB 93 (1977).

It may well be that the Board will ultimately determine in an appropriate case that the only way to remedy a respondent's unfair labor practices would be to order it to bargain with a union that has not demonstrated its majority status. And this question has been specifically reserved. E.g., *Herbert Halperin Distributing Corporation*, 228 NLRB 239 (1977). However this is not, in my judgment, the appropriate case to do so.

The General Counsel states, but does not offer proof, that but for Respondent's unfair labor practices the Union would ultimately have been designated by a majority of employees. Such does not necessarily follow. The mere fact that an employer engages even in outrageous unfair labor practices does not imply that absent such unfair labor practices, a majority of employees would have designated the union. Most representation elections are conducted in an atmosphere free of coercion—where the "laboratory conditions" prevail. In many a majority of employees vote for no union. This experience suggests that the absence of coercive conduct does not mean that a majority of employees will designate a particular union. It follows, therefore, that the presence of coercive conduct does not necessarily mean that the coercive conduct prevented a majority of employees from designating the Union. The mere existence even of substantial unfair labor practices as here does not prove that the Union would have been designated by a majority. In short I cannot, on the record here, deem that the Union represented a majority. Accordingly, I reject the General Counsel's argument that a bargaining order ought to be entered in this case and recommend that it not.

[Recommended Order omitted from publication.]