The May Department Stores Company *and* New Furniture & Appliance Drivers, Warehousemen & Helpers Local 196, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Union-Petitioner. Cases 21–CA–9072, 21–CA–9195, 21–CA–9414, and 21–RC–11678

July 7, 1971

DECISION, ORDER, AND DIRECTION OF SECOND ELECTION

BY CHAIRMAN MILLER AND MEMBERS FANNING AND JENKINS

On February 16, 1971, Trial Examiner Stanley Gilbert issued his Decision in the above-entitled proceeding, finding that Respondent had engaged in and was engaged in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. He also found that Respondent had not engaged in certain other unfair labor practices alleged in the complaint and recommended dismissal of such allegations. The Trial Examiner further recommended that the election conducted on April 24, 1970, in Case 21–RC–11678 be set aside and that a new election be held. Thereafter, the General Counsel, Charging Party, and Respondent filed exceptions together with supporting briefs and the Respondent filed an answering brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with these cases to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions and briefs, and the entire record in these cases, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner as modified herein.[1]

The Trial Examiner finds that the Respondent did not violate Section 8(a)(1) when it placed into effect certain changes in the terms and conditions of employment affecting employees in the clerical unit 3 days before the election in that unit. General Counsel and Charging Party except to this finding. We find merit in their exception.

Several weeks before the April 24, 1970, election conducted in the clerical unit, Respondent met with small groups of office clerical employees. Among the topics discussed were the employee complaints about Saturday work and the poor scheduling of the lunch hours. On April 21, 1970, Respondent distributed a letter to the employees in which it referred to the discussions at these meetings and stated the following: (1) their question about the lunch hour had been settled by changing those in the 11:30 a.m. lunchtime to later periods and (2) action on eliminating Saturday work was going "nicely" and Respondent would adjust the Saturday schedule as quickly as it can assign and prepare the editorial staff required. The Trial Examiner credits testimony by Respondent's witnesses that the lunch hour schedule was contrary to the instructions to supervisors and that purpose of the change was to correct this action. He also credits testimony that Respondent had been working on a program of eliminating Saturday work and the announcement of the elimination thereof was in accordance with this program. Although noting that the timing of the announcement was suspicious, he concludes on that basis that he cannot find the changes would not have been made but for the pending election. In our opinion, the Trial Examiner has not sufficiently considered the timing of the announcement of the changes. Unlike the Trial Examiner we infer that the announcement of the changes was deliberately timed to interfere with the employee freedom of choice in the election. Nothing in the record indicates that prior to the Union's activities Respondent had contemplated that these changes were to be made at this particular time.[2] Respondent in fact indicates in its letter to the employees that the changes are being made as a result of discussion with employees in the clerical unit; discussions which were apparently precipitated by the Union's activity in seeking to organize those employees. Nor does the record reveal any legitimate business reason for timing the announcement of the changes to coincide with the election. Absent the showing of some legitimate reason for Respondent's timing of its announcement of the changes in the lunch hour and the future elimination of Saturday work, we conclude that the announcement interfered with the employees' freedom of choice in violation of Section 8(a)(1).

[1] Chairman Miller dissents from the majority's conclusion that Respondent violated Section 8(a)(1) and committed objectionable conduct by circulating a memorandum to its employees announcing that it would refuse to bargain in order to test a previous unit determination in a case involving warehouse employees. As it stated in its announcement, Respondent can only test the propriety of a Board certification through court review after a refusal-to-bargain procedure, which it has a legal right to do. Since Respondent's announcement was only an explanation of its legal position, of which it had previously notified the Union, was not an advance announcement of any opposition to collective bargaining, as such, and cannot be said to create an atmosphere of futility among the employees, the Chairman is of the view that such clear statements of legal positions are protected by Section 8(c) of the Act and, consequently, do not violate Section 8(a)(1) or constitute grounds for setting aside an election In other respects, the Chairman concurs with his colleagues

[2] In fact, even at the time of the announcement Respondent did not expect to make the change as to Saturday work until some future date.

AMENDED CONCLUSIONS OF LAW

1. Delete Conclusion of Law 10(e), reletter the remaining subparagraphs consecutively.

2. Add the following as Conclusion of Law 11.

Respondent violated Section 8(a)(1) of the Act by notifying its office clerical employees on or about April 21, 1970, of certain changes in their working conditions.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Trial Examiner as modified below and hereby orders that the Respondent, The May Department Stores Company, Los Angeles, California, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's recommended Order.

1. Renumber paragraph 1(g) as paragraph 1(h) and insert the following as paragraph 1(g):

"(g) Granting employees improved working conditions or benefits to induce them to refrain from engaging in union activities."

2. Substitute the attached notice for the Trial Examiner's notice.

IT IS FURTHER ORDERED that the election held in Case 21–RC–11678 on April 24, 1970, be, and it hereby is, set aside, and that the case be remanded to the Regional Director for Region 21 for the purpose of conducting a new election in the appropriate unit at such time as he deems the circumstances permit the free choice of a bargaining representative.

[Direction of Second Election[3] omitted from publication.]

[3] In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them *Excelsior Underwear Inc.*, 156 NLRB 1236; *N.L.R.B.* v *Wyman-Gordon Co.*, 394 U S. 759 Accordingly, it is hereby directed that an election eligibility list, containing the names and addresses of all the eligible voters, must be filed by the Employer with the Regional Director for Region 21 within 7 days after the date of issuance of the Notice of Second Election by the Regional Director The Regional Director shall make the list available to all parties to the election. No extension of time to file this list shall be granted by the Regional Director except in extraordinary circumstances Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed

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 having found, after a trial, that we violated the Federal law governing labor relations by certain acts of our conduct, we, in order to remedy said conduct, assure our employees that:

WE WILL NOT engage in unlawful surveillance of the union activities of our employees

WE WILL NOT give employees the impression that we are engaging in surveillance of their union activities.

WE WILL NOT unlawfully interrogate employees with respect to their union activities.

WE WILL NOT threaten employees with economic reprisal if the New Furniture & Appliance Drivers, Warehousemen & Helpers Local 196, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, or any other labor organization, be selected by them as their bargaining representative.

WE WILL NOT state to employees that we will not bargain with the aforesaid Union, or any other labor organization, even though the aforesaid Union, or other labor organization, has been certified by the National Labor Relations Board as their bargaining representative.

WE WILL NOT discriminatorily issue warning notices to our employees because they have engaged in union activities.

WE WILL NOT grant employees improved working conditions or benefits to induce them to refrain from engaging in union activities.

WE WILL NOT, in any like or related manner, interfere with the rights of employees guaranteed in Section 7 of the Act.

WE WILL remove from the personnel file of Jason Murray the warning notices (personnel comment slips) issued to him on April 23 and April 24, 1970, and expunge from his employment record any reference to said notices.

THE MAY
DEPARTMENT
STORES COMPANY
(Employer)

Dated By
(Representative) (Title)

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 Board's Office, Eastern Columbia Building, 849 South Broadway, Los Angeles, California 90014, Telephone 213–688–5200.

TRIAL EXAMINER'S DECISION

STATEMENT OF THE CASE

STANLEY GILBERT, Trial Examiner: Charges were filed by New Furniture & Appliance Drivers, Warehousemen & Helpers Local 196, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, hereinafter referred to as the Union, in Cases 21–CA–9072, 21–CA–9195, and 21–CA–9414. The charge in Case 21–CA–9072 was filed on March 18, 1970; in Case 21–CA–9195 on April 29, 1970; and in Case 21–CA–9414 on July 28, 1970. Based on said charges, a "consolidated amended complaint" was issued August 21, 1970. Said complaint, as amended during the course of the hearing,[1] alleges that The May Department Stores Company, hereinafter referred to as the Respondent or the Company, engaged in various acts constituting violations of Section 8(a)(1) and (3) of the Act. Respondent by its answer denies that it violated the Act in any of the respects alleged.

By order dated July 21, 1970, Case 21–RC–11678 was consolidated with Cases 21–CA–9072 and 21–CA–9195 for a hearing on certain of the Union's objections to an election conducted among a group of Respondent's employees on April 24, 1970.[2]

Pursuant to notice, a hearing was held in Los Angeles, California, on September 9, 10, 14, 15, 16, 17 and 18, 1970, before the duly designated Trial Examiner. Appearances were entered on behalf of all of the parties and briefs were received from them within the time designated therefor.

From the entire record in this proceeding and my observation of the witnesses as they testified, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE COMPANY

The Company is a corporation engaged in the operation of retail department stores on a nationwide basis, including the State of California. As part of its operation, it maintains a warehouse in Los Angeles, California, which is the particular facility involved in this proceeding. During the 12 months preceding the issuance of the complaint herein, which period is representative, the Company, in the course and conduct of its business operations, sold products valued in excess of $500,000 and received goods and services valued in excess of $50,000 directly from outside the State of California.

As is admitted by the Company, it is, and has been at all times material herein, an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

As is admitted by the Company, the Union is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

Background Information

As is indicated above, the unfair labor practices alleged herein relate to the warehouse which Respondent operates in Los Angeles, California, at which a considerable number of people are employed. It should be noted at the outset that the employees at said warehouse are divided into roughly three major groups which, for purposes of convenience, are designated as warehouse employees, office clerical employees, and workroom employees. The warehouse employees include those who physically handle the merchandise, check the merchandise, and mark the merchandise.[3] The record is not clear as to the various duties of the office clerical employees, but for the purposes of this Decision it does not appear necessary to make findings with respect thereto. The workroom employees include those people who engage in working on merchandise requiring repair or alteration, such as various aspects of the tailoring trade including the pressing of garments.

It appears that the Regional Director found that the warehouse employees constituted an appropriate bargaining unit exclusive of the employees in the office clerical group and in the workroom group. With respect to the warehouse employees unit, the parties stipulated as follows:

> (a) The Union herein filed a petition for an election in a unit of certain of Respondent's warehouse employees on November 5, 1969.
>
> (b) This petition was designated Case No. 21–RC–11512.
>
> (c) A hearing on the petition was held on December 10 and 26, 1969.
>
> (d) A Regional Director's Decision and Direction of Election in this matter issued on January 30, 1970.
>
> (e) Respondent, the Employer in said petition, filed a Request for Review and Stay of Election with the Board on February 9, 1970.
>
> (f) Request for Review and Stay of Election was denied on February 26, 1970.
>
> (g) An election was held at Respondent's warehouse facility on February 27, 1970.
>
> (h) The Union was certified [as the] bargaining representative on March 27, 1970.

Subsequent to the hearing in this proceeding, the Board issued its decision (186 NLRB No. 17) in which it found the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union as the representative of the employees in the warehouse unit.

It further appears that the Regional Director found that the office clerical employees constituted an appropriate collective-bargaining unit and with respect to said unit the parties stipulated as follows:

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[1] Said complaint was amended during the course of the hearing in several respects particularly by the withdrawal of paragraph 10 and paragraph 15 thereof.

[2] At the time of the issuance of the "consolidated amended complaint," August 21, 1970, the third unfair labor practice case, 21–CA–9414, was consolidated with the above-mentioned cases.

[3] To state it briefly, the primary task of the people who check merchandise, the "checkers," is to verify that the merchandise received is in accordance with the orders upon which they were shipped. The people who mark the merchandise, the "markers," prepare the retail price tickets to be affixed to the items of merchandise at the various retail stores in the Los Angeles area operated by the Respondent.

(a) The Union herein filed a petition for an election in a unit of certain of Respondent's office clerical employees on February 16, 1970.

(b) This petition was designated Case No. 21-RC-11678.

(c) A hearing on the petition was held on March 9, 1970.

(d) A Regional Director's Decision and Direction of Election in this matter issued on January 30, 1970.

(e) Respondent, the Employer in said petition, filed a Request for Review and Stay of Election with the Board on April 6, 1970.

(f) Request and Stay of Election was denied on April 17, 1970.

(g) An election was held at Respondent's warehouse facility on April 24, 1970.[4]

(h) The Union filed objections to the conduct of the election on April 29, 1970.[5]

The unlawful conduct alleged in the complaint spans a period from November 1969 to the latter part of July 1970, including allegations of surveillance, unlawful interrogation, creating the impression of surveillance, unlawful threats and other acts alleged to constitute violations of Section 8(a)(1) of the Act, as well as allegations of violations of Section 8(a)(3) of the Act by the discharge of and refusal to reinstate three employees (Sophie Patillo on January 22, 1970, Santiago Aranda on March 18, 1970, and George F. Philip on July 24, 1970).[6]

Set forth hereinbelow are the findings with respect to the contentions of the General Counsel (contained in his brief) as to the unfair labor practices committed by Respondent. Said findings are based upon the credited evidence as to the specific incidents considered in the context of the record as a whole.

The Surveillance

As alleged in paragraph 6 of the complaint, General Counsel contends that on eleven occasions ("on or about January 29, February 18, 23, 24, 25, 26, April 2, 13, 22, 23, and 30, 1970") Respondent violated Section 8(a)(1) of the Act by certain of its supervisors in keeping under surveillance the union activities of its employees as they and union organizers engaged in the distribution of handbills. The evidence in the record relating to this allegation is contained in a stipulation of the parties, the pertinent portions of which are as follows:

> 2. The Union has been engaging in an organizational campaign among certain employees of Respondent employed in its warehouse facility located on both the east and west side of Grand Avenue in Los Angeles, California.
>
> 3. In furtherance of its objective mentioned in paragraph (2) above, the Union, through its representatives, engaged in the activity of distributing handbills and other materials to employees of Respondent at Respondent's warehouse on January 29, February 18, 23, 24, 25, 26, April 2, 13, 22, 23, and 30, 1970.
>
> 4. On those occasions mentioned in paragraph (3) above, Union representatives ranging from five to seven in number arrived at Respondent's warehouse facility at approximately 3:45 p.m.
>
> 5. From one to two Union representatives positioned themselves in front of Respondent's warehouse building on the east side of Grand Avenue and from four to five representatives positioned themselves in front of Respondent's warehouse building on the west side of Grand Avenue.
>
> 6. Respondent has exits for its employees in both of its warehouse buildings.
>
> 7. Employees of Respondent leave work through these exits from 4:30 to 5:15 p.m., each afternoon.
>
> 8. The great majority of Respondent's employees work in the building on the west side of Grand Avenue and when they leave the building they walk along the sidewalk running parallel to the building in a northerly direction toward Respondent's parking lots. Those employees working in the building on the west side of Grand Avenue walk along the sidewalk in a similar direction.
>
> 9. While walking in this direction, the employees must pass truck loading docks which are located approximately 10 to 12 feet from the employee exits.
>
> 10. On the dates mentioned in paragraph (3) above, supervisors, within the meaning of the Act, ranging from three to seven in number and including Briggs, McFarlane, Ives, Starcer, Harkins, Gumpert, Sanchez, and others, shortly before the employees started leaving the building on the west side of Grand Avenue, took up positions in the truck loading dock mentioned in paragraph (9) above and stood either just inside the truck loading dock or on the sidewalk during the entire time the employees were leaving and the distribution of literature to employees was taking place. Similarly, on each occasion, from one to three supervisors within the meaning of the Act took up like positions on the sidewalk or the truck loading dock located at the same approximate distance from the employee exit in the building on the east side of Grand Avenue.While in these positions, the supervisors were in a position to and did observe the activity.
>
> 11. While engaging in distributions, the Union organizers took up positions halfway between the employee exits and the curbs to the street. This would place the Union organizers roughly 6 or 7 feet from Respondent's warehouse buildings and 10 feet from the exits which are recessed 3 feet inside the buildings.
>
> 12. On April 23, 1970, while the employees were leaving the exit to the building on the west side of Grand Avenue and while Union organizers were distributing handbills to employees, Supervisor Sanchez stood on the sidewalk, approximately 3 feet from the warehouse building and 10 feet from the employee exit. Sanchez stood in this position, facing the employee exit, for approximately 10 minutes during which time he was writing on a piece of paper.
>
> 13. On April 2, 1970, Union representative, Frank O'Leary, took pictures of the handbilling activity. These pictures, marked for identification General Counsel's Exhibit Nos. 2(a) to 2(f), are attached to this Stipulation and are made a part hereto. The blue portion of the building, which is the warehouse building on the west side of Grand Avenue, represented in these pictures is the employee exit. The open space in the building to the right in the picture of the employee exit is the truck loading dock. The group of individuals in the pictures,

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[4] The tally of ballots showed the following results.

Approximate number of eligible voters	64
Void ballots	0
Votes cast for Petitioner	19
Votes cast against participating labor organization	30
Valid votes counted	49
Challenged ballots	11
Valid votes counted plus challenged ballots	60

[5] The objections which were heard herein and findings as to the merits thereof are set forth hereinbelow in the section called "The Objections."

[6] The allegation of the unlawful discharge of Ernest Cerda was withdrawn

wearing suits and standing in the truck loading dock are several of the supervisors mentioned in paragraph (10) above and included in these pictures are, *inter alios,* Ives, Sanchez, and McFarlane. These pictures accurately represent the activities and the positions taken by the Union representatives and supervisors of Respondent during all the distributions mentioned in paragraph (3) above.[7]

14. Violence never occurred during the distributions mentioned in paragraph (3) above and Union representatives received no compalints from Respondent's employees regarding being forced to accept literature.

15. On April 22 and 23, 1970, employees of Respondent assisted Union representatives in the distribution of literature.

16. On eight occasions beginning on September 23, 1969, to December 18, 1969, the Union distributed literature at Respondent's warehouse facilities. Respondent's actions during these distributions were identical to that described above and these actions were the subject of a complaint in Cases Nos. 21-CA-8892 and 21-CA-8964 and a hearing before a Trial Examiner on February 17, 18, 19, 24, 25, and 26, 1970. The Board at 184 NLRB No. 102 found these actions to be in violation of Section 8(a)(1) of the Act.

Based upon the facts contained in the stipulations of the parties, it is concluded that Respondent did violate Section 8(a)(1) of the Act by engaging in surveillance as alleged in paragraph 6 of the complaint. It is noted that, although Respondent denied that it violated the Act by the conduct alleged in paragraph 6 of the complaint, it did not offer any evidence to explain the presence of the supervisors at the scene of the distribution of union literature, nor did it, in its extensive brief, offer any agrument in support of its denial of said paragraph.

Respondent's Conduct with Respect to Sophie Patillo[8]

In his brief, General Counsel states that the issues involving Patillo are whether Respondent violated Section 8(a)(1) of the Act by interrogating Patillo on or about November 21, and November 24, 1969, and by giving her the impression of surveillance of her union activities on or about November 24, 1969, and whether Respondent violated Section 8(a)(1) and (3) of the Act by laying her off on January 22, 1970, and refusing to recall her. It is noted, however, that the contentions and argument contained in his brief in a number of instances vary from his statement of the issues particularly with respect to dates and the nature of the unlawful conduct of Respondent.

Patillo entered the employ of Respondent in September of 1967 and throughout the course of her employment she was classified as a marker, one of the classifications in the unit of warehouse employees. On occasions, she worked in the invoice office as a document matcher and also as an invoice clerk.[9]

According to Patillo's uncontradicted and credited testimony, on or about November 18, 1969, one of her fellow employees asked her if she would permit a party for the Union to be held at her home to which she agreed and the date was set for the following Saturday, November 22. It further appears that she was reimbursed for the expense of the party.

Patillo testified that "20 minutes past 4:00" on November 21, 1969, a letter was handed to her personally by Supervisor Levi Ives, assistant to the Respondent's service building superintendent for receiving, checking, marking, and distributing, that he stood behind her while she read it and then walked away without saying anything, and that he distributed copies of the same letter to other girls in the area. She was unable to recall anything about the letter except that it contained words to the effect that "parties are fun to let off steam." She was positive as to the time and date of the incident. It appears that this testimony relates to the issue stated by General Counsel of whether Patillo was unlawfully interrogated on or about November 21, 1969. However, it is noted that later in his brief General Counsel argues not that it constituted unlawful interrogation but that it created the impression of surveillance of her union activity, and, while apparently agreeing with Ives' testimony that the incident occurred on or about November 6, General Counsel further argues that the party was held in late October or early November.

Ives admitted distributing a letter similar to the one described by Patillo which contained, *inter alia,* the following: "Parties are fun. Meetings can let off steam." The letter which contained said language was received in evidence and bears the date of November 6, 1969. Ives credibly testified that the November 6 letter was distributed by him to employees on or about that date, which was almost two weeks prior to the time when, according to Patillo's testimony, she agreed to hold the party. There is no evidence that a second letter containing the language about "parties" was distributed on or about November 21, 1969.[10] Ives candidly admitted that he learned about the party about a week before it was held. Patillo admitted that the November 6 letter could have been the one Ives handed to her.

It appears material, in resolving the issue with respect to Ives' conduct, to determine when the party in Patillo's home was held. In her testimony Patillo was positive that it was on November 22, although extensively questioned about it and permitted the aid of a calender. In his brief General Counsel argues that the party was held late in October or early in November as testified to by Ralph Molinar, an employee and one of General Counsel's witnesses. On the one hand, General Counsel states that three issues relating to Patillo involved incidents which occurred on or about November 21 and 24, and, on the other hand, he contends that the incidents occurred just prior to and just subsequent to the party and that the party was held in late October or early November. Again, on the one hand General Counsel states that an issue relating to Molinar involved an incident which occurred on or about November 26, and on the other hand he argues that Molinar's testimony should be credited that the party was held in late October or early November and that the incident occurred just a few days before the party.[11]

It would appear that Patillo's testimony as to the date of the party is more reliable than that of Molinar, and it is found that the party was held on November 22. It, therefore, follows that the letter to which Patillo referred in her testimony was given to her by Ives before the party had been arranged and,

[7] The transcript contains a further stipulation of the parties with respect to the pictures, such as identifying the persons appearing therein.

[8] Although she is also referred to in this proceeding as Marie, Maria, and Sophia, it appears from the transcript of her testimony that her first name is Sophie.

[9] Although these are apparently classifications in the office clerical unit, the record discloses that Respondent continued her in the classification of marker and it is of no materiality in this proceeding whether she was in one or the other unit.

[10] Other than Patillo no witness testified to a distribution of such a letter on or about November 21.

[11] The testimony with respect to said incident is set forth hereinbelow in a section of this Decision entitled "Respondent's Conduct With Respect to Ralph Molinar."

as a result, before Ives knew, or had reason to suspect, that she was going to permit a party for the Union to be held at her home. Consequently, it is concluded that neither of General Counsel's positions[12] with respect to Ives' conduct in giving the letter of November 6 to Patillo is of any merit. Said conduct (on or about November 6) could not have reasonably interfered with, restrained or coerced Patillo within the meaning of Section 8(a)(1) of the Act.[13]

Patillo testified to several incidents relating to the party which occurred subsequent to said party. According to her testimony, a few days after the party Adam Mielnick,[14] Respondent's supervisor of checking and marking on the second floor of Respondent's service building, and Charles Harkins, internal distribution manager, engaged in a conversation in the invoice office at a time when she and other employees were present. Her testimony as to the conversation is as follows:

> A. Mr. Harkins walked into the invoice office and he had a white sheet of paper and he says to Melnick, "Here, take this."
>
> So Melnick says, "Oh, is this a secret road map to a Union party?"
>
> And Harkins says, "How in the hell am I supposed to know?"

Mielnick was questioned about the incident and while he testified that he did not recall that it occurred he admitted that it could have.[15] Patillo's above testimony is credited.

Patillo testified to a subsequent conversation a few days later, also in the invoice office, between Mielnick and herself. Her testimony with respect thereto is as follows:

> A. Melnick said, "Why didn't you invite me to the party," and he says, "—the Union party."
>
> And I says—
>
> He says, "I like to go to parties where there are lots of free drinks."
>
> And I says, "Oh, is that why Mr. Ives and Mr. Harkins are mad at me?"
>
> And he says, "Oh, we all knew about it."

Again when Mielnick was questioned about the incident he testified that he did not recall whether it occurred, but it was possible that it had. Patillo's above testimony is credited.

Patillo further testified to a third incident which occurred about two weeks after the party and which involved a conversation between Ives and herself. Her testimony with regard to that conversation is as follows:

> A. Mr. Ives says, "I hear that you gave a Union party."
>
> And I says, "Yes."
>
> And he said, "Who was there?"
>
> And I says, "Lots of people."
>
> And he says, "Like who?"
>
> And I says, "Just lots of people."
>
> And he says, "How much did the Union pay you?"
>
> And I said, "Money."
>
> And so he said, "Well, we don't want you giving any more Union parties," and he walked away.
>
> Q. Now, what did you say, again, when Mr. Ives said–asked you how much the Union paid you?
>
> A. I said, "Money."
>
> Q. Money?
>
> A. Yes.
>
> Q. Did you specify how much?
>
> A. No.

Ives when questioned about the incident admitted having a conversation with Patillo at about the time she indicated relating to the party at her home. His testimony as to the content of the conversation is as follows:

> And I said to Sophie, I said, "I hear you had a big party over at your house."
>
> And she said, "Yes."
>
> I said, "Come on, now. You didn't invite me, Sophie. Why not?"
>
> And she said, "Oh, I don't think you would have enjoyed the party."
>
> I said, "I enjoy a party where there's good looking women and booze any time."
>
> And she said, "Well, this was a Union party."
>
> I said, "A Union party held at your house?"
>
> And she said, "Yes."
>
> I said, "How come it happened in your house, Sophie? How did you get straddled with that?"
>
> And she replied, "Well, they had tried to get a hall but evidently, they couldn't and at the last minute, they asked me if I'd have it at my house."
>
> And I said, "I hope they paid you what they would have paid for a hall."
>
> And she said, "They reimbursed me for my utilities and a few other little things." She said, "It wasn't much."
>
> And I said, "If that's all they gave you, you didn't charge them enough."
>
> And with that, I left and walked away.

He denied that he told her "not to have any more Union parties."

The only categorical denial in his testimony is of her testimony that he told her not to have any more union parties. Of the two, Ives was somewhat more impressive as a witness.[16] Consequently, Patillo's testimony is credited except for that portion which was denied by Ives.

Based on the above-credited testimony of Patillo as to the three incidents relating to the party, it is concluded that Respondent violated Section 8(a)(1) of the Act by creating the impression of surveillance of her union activity by Respondent's supervisors indicating that they had knowledge of the party, and that Respondent further violated Section 8(a)(1) by Ives unlawfully interrogating Patillo with respect to the party.

Patillo was terminated on January 22, 1970, and was never recalled by Respondent. In his brief, General Counsel states that one of the issues herein is whether or not Respondent violated Section 8(a)(3) and (1) of the Act by laying off and refusing to recall Patillo. Subsequently, in his argument, General Counsel contends that the failure to recall her violated Section 8(a)(3) and (1) of the Act without mentioning Respondent's conduct in laying her off. It is not clear whether the General Counsel by so doing concedes that the layoff was not discriminatorily motivated.

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[12] On the one hand, the issue is whether Ives' conduct constituted unlawful interrogation, and, on the other hand, the argument that it created the impression of surveillance of Patillo's union activity.

[13] It should not be construed from this conclusion that, had it been found that Ives engaged in said conduct just prior to the party, it would have been violative of the Act

[14] Although his name is somewhat differently spelled in the transcript, according to his testimony this is the correct spelling. The complaint was amended to conform to this spelling.

[15] Harkins was not called as a witness

[16] As set forth hereinbelow, Patillo was not an impressive witness with respect to the quality of her job performance

In addition to relying on Respondent's conduct related to the aforementioned union party at her home, General Counsel also relies upon testimony of Patillo with respect to two incidents which occurred within the month preceding her layoff. The first occurred around the middle of December and consisted of a conversation with Mielnick. Her testimony with regard thereto is as follows:

A. He handed me my pay check and he says, "This is your last pay check."

And I says, "Oh, I'm not surprised."

And he just laughed. He says, "I'm just kidding."

Q. Did he mention the Union party?

A. No, he didn't.

Q. Did he mention the Union, at all?

A. No, he didn't.

Mielnick denied this testimony. Patillo also testified to having had a conversation with Mielnick early in January. Her testimony with respect thereto (which was also denied by Mielnick) is as follows:

A. He said that, "We're going to have a big lay-off and in this way, we're able to get rid of everybody that we don't want."

Q. Did you say anything?

A. Yes, I did.

Q. Will you tell us what that was, please.

A. I says, "I guess I'm first on the list."

And he just laughed.

Patillo was a convincing witness in giving her above-quoted testimony. While Mielnick also appeared to be a convincing witness in denying said testimony, the Trial Examiner is of the opinion that it is more likely that Mielnick had forgotten the incidents than that Patillo had fabricated them. Consequently, the above-quoted testimony of Patillo is credited.

Patillo testified as follows as to the incident of her layoff on on January 22, 1970:

A. I was called into the office by Mr. Harkins and he said that the work was slow and, "We're going to have a lay-off and if you're not doing anything within six to eight weeks, you will be called back but you will lose all seniority."

The above testimony was uncontradicted and is credited.

It is Respondent's position that Patillo's layoff was motivated solely for economic reasons due to the seasonal reduction in the volume of merchandise handled by the warehouse from the middle of December through the first week in February and that Patillo was not recalled because of a decline in the quality of her job performance during the several months preceding the layoff.

Ives testified that there was a reduction in the amount of merchandise handled in the warehouse during the aforementioned period and that as a result he (Ives) reduced the number of markers. He further credibly testified that he worked from notes in effecting the reduction in force and his notes were received in evidence. It is concluded from his testimony and his notes that he laid off eight people during that period in order of their seniority, two employees around the second week of December 1969, four employees around the first of January 1970, and two more employees, including Patillo, on January 22. It appears that Helen Riosa, the other employee who was terminated at the same time as Patillo, had more seniority than Patillo.

Ives further testified that on January 19, 1970, he had a conversation with Harkins at which time the decision was made to lay off Patillo and not recall her. It is noted that the company record with respect to Patillo's termination indicates that she was "dismissed" because of the seasonal drop in the workload and that it was not recommended she be transferred or reemployed. Ives also testified that, of the eight aforesaid employees who were laid off, only three were recalled, that Riosa, who had more seniority than Patillo, was among the five who were not recalled, and that Riosa was not recalled because of her poor attendance record. The above-outlined testimony of Ives is credited.

Considerable testimony was elicited with respect to Patillo's work performance from Mielnick and Ives, particularly from the former. According to Mielnick, there was a drop in the quality of her work commencing that 2 months prior to her layoff. He testified that she made numerous mistakes, that he talked to her numerous times about her mistakes and that she admitted making them. He further testified that he asked her whether something was bothering her and that she denied that she had any problems. He further testified that he had a number of conversations with Harkins about Patillo's work performance and stated he could not understand why she was making so many mistakes and that it may be a personal problem. He also testified that he talked with Ives about Patillo's job performance sometime after Christmas. Ives also testified that he noted the deterioration in her work performance and that he spoke to her on one occasion about it.

Patillo was questioned about her work performance and her testimony with respect thereto appeared to be evasive. When she was first questioned as to whether she had any conversations about her work performance with Mielnick, she testified that he did not speak to her personally, but to a group of markers. When questioned again whether he spoke to her about that subject, she testified, "Well, he had no compliments for anyone. . . ."When questioned a third time, she denied again he ever said anything to her to indicate he was not satisfied with her work. Subsequently, upon further questioning, she testified that she had made mistakes, that she remembered that in December Mielnick discussed with her a mistake she had made and that, during the course of their conversation, she told Mielnick that she would try to do a better job. She further testified that she did not remember any further conversations about her mistakes. When questioned again, she stated they were not conversations about serious errors. Then she testified that she could have had conversations about errors or mistakes that she had made, but she could not remember them. She denied that she was asked whether she had any personal problems that might be affecting her work. The Trial Examiner is of the opinion that the above-outlined testimony of Mielnick and Ives with regard to Patillo's work performance should be credited,[17] and that Respondent was dissatisfied with the work performance of Patillo during the last 2 or 3 months of her employment.

Based upon the above-credited testimony and on the findings that there was a seasonal drop in the workload in the warehouse, that the layoff of eight markers was economically motivated, that only three of the eight employees were recalled, and that their recall was not based on seniority, it is concluded that the record will not support a finding that Patillo's termination was discriminatorily motivated or that the reason for the decision not to recall her was a pretext. In arriving at this conclusion, the Trial Examiner has not failed to consider the entire record as well as the conduct of Respondent toward her, particularly that which was found to be violative of Section 8(a)(1) of the Act, and which lends some color of validity to the General Counsel's argument that the failure to recall her was discriminatorily motivated. However, for the reasons indicated above, it is concluded that the General Counsel has not proved by a preponderance of evidence that either Patillo's termination or the failure to recall her was violative of Section 8(a)(3) and (1) of the Act.

[17] Among the reasons is the lack of forthrightness in Patillo's testimony as compared to that of Mielnick and Ives.

Respondent's conduct with respect to Ralph Molinar

For three years prior to the hearing, Molinar had been employed by Respondent as a checker. As stated hereinabove, there is confusion in General Counsel's brief as to the date of the incident involving Molinar which General Counsel contends constituted unlawful interrogation. Initially in his brief. General Counsel states that an issue herein is whether there was unlawful interrogation of Molinar "on or about November 26, 1969." Molinar testified that the incident occurred several days prior to the party at Patillo's home and that the party was held on a Saturday night in late October or early November. It was found hereinabove that the party was held on November 22. Consequently, it would appear that the incident to which Molinar testified must have occurred on or about November 19, 1969.[18] Molinar testified that he was seated in the cafeteria during a break and that Mielnick paused at his table and asked him "why he wasn't invited to the party," that he made no reply and that Mielnick then sat down at another table. Mielnick denied that the incident ever occurred.

Molinar's testimony is credited, in view of the fact that Mielnick admitted that he might have made a similar inquiry of Patillo and the Trial Examiner's impression that Molinar's testimony was not a fabrication. It is concluded that Mielnick's inquiry constituted an attempt to elicit a response from Molinar which would indicate whether he was involved in arranging the party, and, therefore, it constituted unlawful interrogation within the meaning of Section 8(a)(1) of the Act.

Respondent's conduct with respect to Louis Thomas

Thomas, employed by Respondent as a checker for 10 years, testified that at 7:50 a.m., on February 27, 1970, the day of the election in the warehouse unit of which he was a member, he was standing near the timeclock waiting to punch in when he was approached by Ives, who stated to him, "If the Union wins this election, you will probably get a cut in wages. You won't be making as much as you are now." Ives denied making the above-quoted statement and testified that he was in another part of the warehouse at the time Thomas testified the incident occurred. The Trial Examiner is of the opinion that Thomas' testimony was not a fabrication and that Ives must have been mistaken in his recollection. The above-quoted statement, without any explanation as to the basis for it, constitutes a threat of economic reprisal should the Union win the election, and is, therefore, a violation of Section 8(a)(1) of the Act.

Respondent's conduct with respect to Herbert Kelley

Kelley, employed as a stockman and a member of the warehouse unit, testified that a few days following the election in the warehouse unit (February 27, 1970) he had a conversation with his supervisor, Tony Starcer, divisional manager of storage, maintenance, and internal movement. Kelley's testimony with respect to the conversation is as follows:

> A. Well, I was sweeping the floor and he came by and asked me about some broken shelves in the stock area and I said I had seen them.
>
> He said, "Do you know that in other companies, that you could be fired or reprimanded for broken—damage to company property?"
>
> And I said, "Yes, sir."
>
> He said, "At some companies,"–I'm pretty sure he said Certified Grocers, that "if you make three or more mistakes in one day, you could be laid off or fired."
>
> Q. Yes?
>
> A. And I said, "I didn't know that."
>
> He also said that they had had a tour of Certified.
>
> I don't know if he meant he toured Certified or Certified toured us. I think it was Certified Grocers, made a tour with them or something and they asked him how many mistakes he allowed his people to make.
>
> He said, what did they mean.
>
> They said, "If they make three or four mistakes in our Company, they are discharged or reprimanded," I don't know, one or the other.
>
> I asked him what did he mean by that.
>
> He said, "If you make three mistakes. You have a minimum weight requirement, height, you have to be a certain size to work for them."
>
> I said, "I realize that."
>
> He said that, "If the Union got in, we might have to have something like that initiated here," and to watch what I did more carefully.
>
> And that's all.

Starcer admitted having a conversation with Kelley in which he discussed the matter of the broken shelves and mentioned that Certified Grocers followed the practice of reprimanding employees for mistakes and damages. He, in effect, denied the balance of Kelley's testimony. He did admit, however, that he had a discussion with the representatives of Certified Grocers about their height and weight requirements.

Kelley was the more convincing of the two witnesses and, therefore, his testimony is credited. Starcer's statement to Kelley as to implementing the same practices as were followed by Certified Grocers in the event the Union "got in" constituted a threat of reprisal in violation of Section 8(a)(1) of the Act.

Respondent's conduct with respect to Santiago Aranda

Aranda was employed by Respondent as a presser and spotter for eight years and nine months, and as such was one of the workroom employees, a group that was excluded from the warehouse employees unit and the office clerical employees unit. As the General Counsel correctly pointed out in his brief, there is no evidence in the record that the Union had, up to the time of the hearing, attempted to organize the workroom group of employees. It is noted, however, that the union organizers in passing out literature on various occasions to the employees leaving the warehouse handed literature to all employees including the workroom employees.[19]

Aranda was discharged on March 18, 1970. The General Counsel contends that his discharge was discriminatorily motivated and also that at the time of his termination he was unlawfully interrogated.

On the morning of February 27, 1970, the date of the election in the warehouse unit, Roland DiFiore, a workroom supervisor, stated, at a meeting of the employees in his department, that they were not to vote in the election which was to be held later that day. According to Aranda's uncontradicted and credited testimony, Aranda asked why the workroom employees would not be permitted to vote and DiFiore informed him that the Union did not "want" them.[20] Also, according to Aranda's uncontradicted and credited tes-

[18] In any event, the actual date of the incident is not material. The finding that it occurred several days prior to the party is sufficient in making a determination of the issue with respect to the incident.

[19] Ostensibly the union agents would have been unable to distinguish between workroom employees and the employees in the other two groups.

[20] It is noted that the unit sought by the Union in which the election was held on February 27 specifically excluded workroom employees, among others.

timony, DiFiore was present on occasions when he (Aranda) accepted literature from union organizers, but it is noted that Aranda further testified, on cross-examination, that his fellow workroom employees also accepted literature from union organizers on the same occasions.

Aranda testified to the incident of his termination on March 18, 1970. On direct examination, he testified that he was summoned by John DeCaro, Aranda's immediate supervisor, to DiFiore's office; that DiFiore told him that they did not need him any more, that he asked why he was terminated; that he was told he was "working too slow" and was only pressing five coats an hour, and that he replied that it was not true. Aranda further testified that he then asked to speak to Peter Sanchez, assistant workroom manager and DeCaro's and DiFiore's superior. The three of them then went to Sanchez' office. Aranda's testimony as to what occurred in Sanchez' office is as follows:

> A. Well, Mr. Sanchez said–
> I asked him why, why they fire me, why they do that to me, you know, they was angry to me after all these years working there, they saying that to me, you know.
> Q. This is what you told Mr. Sanchez?
> A. Yes.
> Q. Okay.
> What did he say?
> A. Well, he said that I was working too slow, that the May Company, they don't need me.
> And then, Mr. DiFiore said, "Are you trying to put that Union in here?"
> TRIAL EXAMINER: Are you what?
> THE WITNESS: Are you trying to put that Union in here.
> Q. (By Mr. Kobdish) This Union?
> A. Yes, that Union.
> Q. Okay.
> A. And then, I said, "That's my business."
> Q. All right.
> What did he say?
> A. And then, he said, "That's it. You're fired."

On cross-examination, he testified that he went to DiFiore's office and was told that he was terminated, that he asked DiFiore "Why they do that to me" and that DiFiore said that he was "trying to put the Union in there" and also that he was "telling the other people to slow up, not to work." Aranda was then asked to repeat what was said in DiFiore's office and this time he stated that when he asked why he was terminated DiFiore said that he was working too slow and was telling the other people not to work. In this version of what occurred in DiFiore's office, he made no mention of any reference to the Union and also testified that the subject of the Union was never mentioned in DiFiore's office. Then, on cross-examination, he testified that it was during the interview in Sanchez' office that DiFiore asked him if he was trying to get the Union in. His testimony with respect thereto is as follows:

> Mr. DiFiore, he was standing up, said, "Are you trying to get the Union here?"
> I turned around, said, "That's my business. That's not your business."
> He said, "That's it. You're fired."
> Q. Who said, "That's it. You're fired"?
> A. Mr. DiFiore.

Later, on cross-examination, he testified as follows with respect to DiFiore's inquiry and the Union:

> Then Mr. DiFiore said, "Well, are you trying to put the Union in here?"
> And I tell him, "That's not your business."
> TRIAL EXAMINER: He said to you, "Are you trying to put a Union in here?"
> THE WITNESS: That I was trying to.
> I said, "I am not trying to put no Union in here."
> TRIAL EXAMINER: Did he say, "Are you trying to get a Union in here?" or did he say, "You are trying to get a Union in here?"
> I did not catch it.
> THE WITNESS: "Are you trying to put a Union in here?"
> TRIAL EXAMINER: He asked you, "Are you trying to put a Union in here?"
> THE WITNESS: Yes.
> TRIAL EXAMINER: All right.
> THE WITNESS: And I said, "No."

Sanchez and DiFiore denied Aranda's testimony that DiFiore asked him whether he was trying to bring in the Union. In view of the inconsistencies and contradictions in Aranda's testimony,[21] the fact that Aranda admittedly engaged in no union activity, and that Respondent could not reasonably have suspected Aranda of being active on behalf of the Union,[22] it is concluded that the aforementioned denials of Aranda's testimony should be credited. Consequently, it is further concluded that Respondent did not unlawfully interrogate Aranda.

The General Counsel further argues, in effect, that Respondent's reasons for Aranda's discharge were pretexts. Respondent advanced three reasons for the discharge, that Aranda's production had decreased, that he had refused to do work which had been assigned to him and that he had harassed a fellow employee, Nickolas Ioannidis, by calling him a "crazy Greek" and telling him to slow down in his work.

There is some merit in General Counsel's contention that the testimony of Respondent's witnesses about Aranda's production was not substantiated by the figures they offered. It appears that even at the low hourly rate of production which they ascribed to Aranda, he would have been able to press all of the coats which were processed through him per week.[23] However, this, in light of all the circumstances, is not a sufficient basis to support a conclusion that the discharge was discriminatorily motivated.

As to the second reason, Aranda admitted that he refused to clean up his area when requested to do so.

The third reason was substantiated by employee Sylvia Kapon, who was an impressive witness in testifying that she reported to Respondent Aranda's harassment of Ioannidis. Ioannidis was a recent immigrant from Greece and, as was

[21] Aranda testified that DiFiore's inquiry was made in the second interview (in Sanchez office), then that it was made in the first interview (in DiFiore's office) and, again, that it was made in the second interview. Aranda also testified that he refused to answer DiFiore's question and then testified that he answered he was not trying to bring the Union in.

[22] The Trial Examiner is of the opinion that neither Aranda's acceptance of union literature when it was being distributed nor his inquiry as to why the workroom employees were not permitted to vote in the February 27 election affords a reasonable basis for finding that Respondent suspected him of activity on behalf of the Union It was apparent from his inquiry that he was not even aware of the fact that the Union wanted the workroom employees excluded from the warehouse workers unit.

[23] This, of course, does not take into consideration the possibility that at some periods there was a heavier flow of work than at others and thus at times he did not press coats as fast as was expected of him.

clearly demonstrated in the course of the hearing, had little knowledge of English. Kapon credibly testified that she had worked in the alterations workroom since 1958, that she was able to converse in Greek, that shortly before Aranda's discharge Ioannidis complained to her that Aranda had called him a "crazy Greek" and told him to slow down in his work, that he was considering quitting his job because of Aranda's actions, that she suggested that he discuss his problem with DiFiore, and that she acted as his interpreter in reporting his complaint about Aranda to DiFiore and DeCaro.

DiFiore and Sanchez credibly testified that DiFiore reported the matter to Sanchez and that Sanchez instructed DiFiore to prepare a personnel comment slip concerning the matter which Sanchez reviewed and signed on March 11, 1970. Sanchez credibly testified that he discussed the matter with his superiors and was instructed to prepare a statement of the complaints against Aranda for Ioannidis' signature. Kapon credibly testified that Sanchez handed her a statement of Ioannidis' complaints, that she translated it for Ioannidis, that Ioannidis said that the statement was correct and signed it. DiFiore credibly testified that Ioannidis stated in English, "It's true," after Kapon had finished translating the document for him.[24] The Trial Examiner is of the opinion that Respondent reasonably believed Ioannidis' complaint about Aranda was true.

It is concluded, based upon all the circumstances, that General Counsel has failed to prove by a preponderance of the evidence that Aranda's discharge was discriminatorily motivated. It does not appear that there is a sufficient basis for finding that Respondent had reason to believe or suspect Aranda was active on behalf of the Union or was a union adherent; nor does it appear that the reasons advanced by Respondent for Aranda's discharge were pretexts.

Respondent's announcement that it would not bargain with the Union

As aforementioned, the Union was certified by the Board on March 27, 1970, as the bargaining representative of the warehouse employees unit (based upon the results of the election in said unit on February 27, 1970). On April 15, 1970, Respondent circulated a memorandum to "All Service Building Personnel," including members of the office clerical employees unit, which stated as follows:

> Our lawyers have told us that the NLRB decision setting up the election of February 27th [in the warehouse employees unit] was incorrect under the law. That decision prevented many of you from voting. As you know, it was the union which argued that many of you should not be allowed to vote in that election.
>
> The established procedure for reviewing such NLRB decisions is to have the record reviewed by the United States Federal Court. To have the Court review the case, it is necessary for us to refuse to meet with the union when such a request is made.
>
> Therefore, the Company will not meet with the union to negotiate a contract for the materials handling unit [warehouse employees unit].
>
> Our attorneys have told the union about this decision.

It is noted that an election in the office clerical employees unit was scheduled on April 24, 1970, a little more than a week after the memorandum was distributed. It is further noted that a complaint was issued in Case 21–CA–9174 with respect to Respondent's refusal to bargain with the Union and that the Board issued its decision therein subsequent to the hearing in this proceeding in which it found that Respondent's refusal violated Section 8(a)(1) and (5) of the Act. *The May Department Stores Company,* 186 NLRB No. 17.

The General Counsel contends that the above-quoted memorandum violated Section 8(a)(1) of the Act and relies in support of said contention on *L. F. Strassheim Co.,* 171 NLRB No. 132. It is not clear whether the facts in the *Strassheim* case are of sufficient similarity to the facts in the instant case to require the finding urged by General Counsel that the memorandum would have been violative of Section 8(a)(1) of the Act, even if it had been distributed only to members of the warehouse employees unit. In the instant case, the Respondent gave an explanation for its refusal to bargain (that it was to test in court the validity of the certification) and it does not appear that such an explanation was given in the cited case.

It also appears to be necessary to make a determination whether distribution of the memorandum to the office clerical workers (as well as to the warehouse unit employees) constituted a violation of Section 8(a)(1) of the Act, with respect to its impact on the members of their unit since the memorandum was, in effect, a preelection statement.

With respect to the issuance of the memorandum to the members of the warehouse employees unit, it would appear that the statement that Respondent refused to bargain with the Union is violative of Section 8(a)(1) of the Act, even though it was accompanied by the explanation that the refusal was upon advice of counsel and in order to test in court the validity of the certification. It is well established that it is not a defense to an unfair labor practice that it was committed on the advice of counsel. It is also well established that a decision of the Board is final even though appealable and that continuation of the unfair labor practice during the pendency of the appeal is at the peril of the party committing such unfair labor practice. (As above indicated, it was found by the Board in 186 NLRB No. 17 that Respondent's refusal to bargain with the Union with respect to the warehouse employees unit was violative of Section 8(a)(1) and (5) of the Act.) Consequently, it would follow that announcing to the members of that unit that it would refuse to recognize and bargain with the Union (and thereby violate Section 8(a)(5) and (1) of the Act) constituted a violation of Section 8(a)(1) of the Act despite the explanation that it was taking such action upon advice of counsel and in order to test in court the validity of the certification. In arriving at this conclusion the Trial Examiner has considered the memorandum in context with the unfair labor practices found herein as well as Respondent's unfair labor practices found in the Board's Decision in 184 NLRB No. 102 (which occurred during the Union's attempt to organize warehouse employees prior to the election in said unit).

With respect to the distribution of the memorandum to the office clerical employees, it is inferred that from a reading of the memorandum the office clerical employees could reasonably assume that Respondent was implying it would take the same action of refusing to bargain with the Union, even if it should be certified as the representative of the employees in the office clerical unit. The Respondent, in its brief, cites *National Furniture Manufacturing Company, Inc.,* 106 NLRB 1300, and *Esquire, Inc.,* 107 NLRB 1238, which, *inter alia,* held, in effect, that preelection statement by the company or its attorney that it would not bargain with the union, even if it won the election, in order to obtain a court review of the Board Order to bargain with the union, did not constitute ground to set aside the election. However, it is noted that in *Dal-Tex Optical Company, Inc.,* 137 NLRB 1782, 1787, the Board to an extent which is not clear overruled *National*

[24] It is reasonable to assume that Ioannidis had acquired some rudimentary knowledge of English, sufficient to understand phrases such as "crazy Greek" and "work slow" and to verify what was told him in Greek by stating in English, "It's true."

Furniture Company, Inc., supra, and similar cases holding such preelection statements to be privileged under Section 8(c). Although it is not clear from the *Dal-Tex* Decision that an isolated preelection statement by a company that it would refuse to bargain with a union, even if it were certified, in order to test the validity of its certification would constitute a violation of Section 8(a)(1) of the Act or would be a sufficient ground to set aside the election, it appears that said Decision would support a finding that Respondent's implied statement in the memorandum to that effect, viewed in the context of the unfair labor practices found herein and the aforesaid unfair labor practices found in the Board's decision in 184 NLRB No. 102,[25] would reasonably tend to interfere with, restrain, and coerce the office clerical employees within the meaning of Section 8(a)(1) of the Act and would constitute ground to set aside the election in the office clerical employees unit. *The Lord Baltimore Press,* 142 NLRB 328.

The changes in working conditions

Several weeks prior to the election in the office clerical employees unit Respondent held meetings with small groups of office clerical employees, in the course of which they were invited to voice their opinions on their working conditions. It appears that among the topics discussed was the desire on the part of some of the clerical employees to eliminate Saturday work and early lunch hours. On April 21, 1970, two days prior to the election among the office clerical employees, Respondent distributed a letter to them which read as follows:

> I want to take a moment to say that I enjoyed the opportunity to meet with you the other week and discuss items of our mutual interest. Your free, personal and friendly response was most appreciated.
>
> Several things were discussed—some we are working on, others are new to us. So far, these actions have been taken—
>
> (a) Your question about a later lunch time for some of you has been settled; and, at this writing, the few people in the 11:30 A.M. lunch time have been changed to later periods.
>
> (b) You will remember that you asked about eliminating Saturday work, and I stated we are planning on using our off-shift people to cover for Saturdays (except for our regulars who may prefer Saturday work) thus providing a Monday through Friday work week. Action on this item is progressing nicely, and we will adjust the Saturday schedule as quickly as we can assign and prepare the staff.
>
> We will keep you advised—in the meantime, if you have a question, I am sure Messrs. Gumpert, Brooks and McKinney will be available to help you.

Andrew Briggs, general manager of the service building, who signed the above-quoted letter, credibly testified that such meetings had been held with employees in the past, that the change in the lunch hours was the result of an investigation which revealed that supervisors, contrary to instructions, had assigned some of the employees the early lunch hours and that the change was to correct said action taken by the supervisors. Briggs also credibly testified that for a considerable period of time Respondent had been working on a program of eliminating Saturday work and that the announcement of the elimination thereof was in accordance with this program. Consequently, although the timing of the changes casts some suspicion on the motive therefor, it cannot be concluded that the changes would not have been made but for the pending election, and, therefore, said changes are not found to have been violative of Section 8(a)(1) of the Act.

Respondent's conduct with respect to Jason Murray

Jason Murray had been in the employ of the Respondent as a checker since early 1967. By the Union's letter to Respondent dated October 31, 1969, Respondent was advised that Murray was among the six employees who were on the Union's organizing committee. It further appears that on April 22, 1970, Murray assisted in the distribution of union literature at Respondent's warehouse. On the following day, April 23, 1970, Murray was handed a personnel comment slip at a meeting with Supervisors Charles Harkins, internal distribution manager, and Levi Ives, assistant for receiving, marking and distribution. It appears that Harkins and Ives were among the supervisors who watched the union literature being distributed on April 22 as well as on April 23 (after Murray's meeting with them). The personnel comment slip stated that Murray had made a mistake by attaching the wrong-colored document to a shipment of merchandise to one of Respondent's stores which delayed the shipment by a day. According to Murray's credited testimony, said slip also contained a second paragraph which accused him of habitually and continually violating company rules since his employment. Murray further credibly testified that he refused to sign the slip, but stated that he would sign the first paragraph; that the slip was then destroyed and a second slip was prepared which contained the first paragraph with the added admonition that if the same mistake occurred again he would be dismissed; that he refused to sign the second slip; that a third slip was prepared which again contained the first paragraph with the added admonition that any future violations of the same type would lead to such disciplinary action as might be deemed appropriate; and that he signed the third slip.

After signing the slip, Ives and Harkins discussed his attendance record with him. Murray's credited testimony with respect to said discussion is as follows:

> A. It mainly was in concern to my Thursdays on which I am late every Thursday.
>
> I go to the hospital, at the request of the doctor, for a treatment to my son.
>
> A. Okay.
>
> What did Mr. Ives or Mr. Harkins say to you about this?
>
> A. Mr. Harkins asked me how long this was going to continue.
>
> I told him, as long as it was deemed necessary by the hospital that I be there.
>
> Q. All right.
>
> And did he say anything in response to that?
>
> A. I don't believe so.
>
> Q. Now, how long have you been going to the hospital?
>
> A. It's been approximately a year.

Murray explained in his testimony that his son is an emotional diabetic and that he was required by the hospital to be present while his son was being treated.

As stated hereinabove, Murray again distributed union literature at the end of the day on April 23 and on the following day (April 24) he was again interviewed by Ives and Harkins and given a personnel comment slip which, this time, reprimanded him for his attendance record. Respondent introduced into the record Murray's attendance record for 1969 and 1970. While the record does indicate that he was either tardy or absent a number of times for reasons which apparently were not related to his son's illness, the record does not

[25] It is noted there is considerable amount of communication between employees in the warehouse unit and employees in the office clerical unit

disclose what precipitated the interest at that particular time in his attendance record and which called for the issuance of the personnel comment slip with regard thereto. Murray's credited testimony as to what occurred after he was handed the personnel comment slip on April 24 is as follows:

> A. We again discussed my son's hospitalization and my attending there Thursdays.
>
> I mentioned to Mr. Harkins and Mr. Ives that they had a letter in their file or should have a letter in their file from the hospital stating that my attendance at the hospital, it was mandatory that I be there.
>
> Q. Did they say anything in response to that?
>
> A. They said, they hadn't received one.
>
> Q. Okay.
>
> Can you recall anything else being said at this meeting?
>
> A. Only that I would check into it again and find out why they didn't have the letter.

It appears that the Respondent did not have such a letter and that by letter dated July 30, 1970, the physician attending Murray's son informed the Respondent of the need for Murray's attendance at his son's treatment sessions. It does not appear that after April 24 any further personnel comment slips were issued to Murray or that he was reprimanded by Respondent for his attendance record.

While it appears that the mistake which was the subject of the first personnel comment slip (which he signed on April 23) was committed by Murray, according to his uncontradicted testimony the mistake occurred some 3 to 5 weeks prior to April 23. In view of the timing of the interviews on April 23 and 24 (the days immediately following Murray's participation in the distribution of union literature), the comparative remoteness of the mistake for which the first personnel comment slip was issued (some 3 to 5 weeks prior thereto) without any explanation for the time lapse, and also the lack of any explanation as to why at that particular time (on April 23 and 24) the Respondent became concerned with Murray's attendance record, it is concluded that the personnel comment slips and reprimands therein were motivated by his union activity and, consequently, that Respondent's conduct with regard thereto was violative of Section 8(a)(3) and (1) of the Act.

Respondent's Conduct With Respect to George Philp

In his brief General Counsel contends that Respondent engaged in conduct violative of Section 8(a)(1) of the Act with respect to George Philp by threatening him on or about February 27, 1970, and violated Section 8(a)(3) and (1) of the Act by issuing him a warning notice on April 21, 1970, and by discharging him on July 24, 1970.

Philp entered the employ of Respondent in August 1968 as a checker. After approximately eight months of employment, he was promoted to supervisor of checking and marking which position he retained from 6 to 8 weeks at which time he notified Ives of his intention to terminate his employment. According to Philp's uncontradicted and credited testimony, Ives stated to Philp that he did not want him to resign and asked him if he would reconsider, to which Philp replied that he would remain but not in the capacity of a supervisor. Accordingly, he was reassigned to his job of checker and Mielnick replaced him as supervisor of checking and marking.[26]

As above mentioned, the election in the warehouse employees unit (of which Philp was a member) was held on February 27, 1970. It appears that Philp was one of the two union observers and that the other observer was Ralph Molinar.[27]

Philp and Ives testified they had a conversation, about a week before the aforesaid election, in which Ives asked his opinion as to why the employees wanted a union and that in the course of their conversation Philp freely admitted that he intended to vote for the Union. It is noted that it is neither alleged, nor does General Counsel contend, that this incident affords a basis for a finding that Respondent engaged in conduct violative of Section 8(a)(1) of the Act. In any event, it does not appear that Ives' conduct in this conversation with Philp constituted "interference with, restraint or coercion" within the meaning of Section 8(a)(1) of the Act.

Philp testified that in the afternoon of February 27, after the election, he had a conversation with Mielnick. His testimony with respect to this conversation is as follows:

> A. Mr. Melnick said to me, "George, from now on, I want you to watch all your paper work as I have been warned to write up anything that goes wrong or to look for any mistakes."
>
> He said, "I am telling you this because I don't want to lose a good man because he has the nerve to vote for the Union."
>
> Q. What did you say?
>
> A. I said, "Thank you, Nick, but this is unfair, as a man has—"
>
> I believe I said, "—as a man has the right to vote whichever way he likes. That's up to the individual."

Philp further testified that this conversation was repeated two or three times during the week that followed. Mielnick denied that he ever had such a conversation with Philp and further testified that he had not "been instructed to write up Philp for any kind of errors." Mielnick further testified that at this time it was the practice for Harkins to prepare the personnel comment slips for errors among the checkers and markers. The issue here is not whether Mielnick had been so instructed, but whether he made the statement to Philp to which Philp testified. However, the fact that it was not the practice for him, but rather for Harkins, to write up personnel comment slips would have some bearing on whether or not he made the statements attributed to him by Philp. Such appears to be the fact. Mielnick's testimony as to said practice was uncontradicted and an examination of the personnel comment slips in the record relating to checkers and markers discloses that, for the most they were initiated by Harkins and none by Mielnick. Furthermore, Philp was not convincing in testifying to Mielnick's repetitive admonition (given several times in one week). Consequently, Mielnick's denial is credited, and it is concluded that General Counsel has not proved by a preponderance of the evidence the allegation that Philp was threatened on or about February 27, 1970.[28]

On April 21, 1970, in an interview with Harkins and Ives, Philp was handed a personnel comment slip which he refused to sign. The personnel comment slip referred to a mistake

[26] It is noted that this position is the lowest rung on the supervisory ladder relating to the checking and marking functions.

[27] There is no evidence in the record or contention by General Counsel that Respondent engaged in any conduct violative of the Act with respect to Molinar subsequent to the election. As noted hereinabove, Molinar's testimony was credited that in November of 1969 Mielnick unlawfully interrogated Molinar with respect to the union party held at Patillo's home. However, Molinar did not testify to any conduct directed against him which even tended to indicate any animosity toward him because he acted as one of the Union's observers.

[28] There is no evidence in the record, other than the above-outlined testimony of Philp of statements by Mielnick, which can be related to said allegation

which Philp made with respect to a shipment of lamp bases and shades and to a second error of attaching "marking envelopes" by tape instead of glue.

Philp testified that he refused to sign the slip and stated he had discovered his own error (the mistake with reference to the shipment of lamps and shades). In his testimony Philp did not deny that he committed the second error mentioned in the personnel comment slip, but explained that there was no glue available in the area and that he felt that it was urgent to get the cartons marked. It appears, with respect to this second error, that Respondent requires all marking tickets to be attached by glue rather than tape, since tickets which are taped to the cartons can be easily removed and might be used for fraudulent purposes (which cannot be done if the tickets are glued to the cartons). There appears to be no question that Philp failed to follow the required procedure as set forth in the personnel comment slip.

Considerable testimony is spread throughout the record with respect to the first error mentioned in the aforesaid personnel comment slip. It is undisputed that the shipment of lamp bases and shades was checked and marked by Philp; that the bases were packed two to a carton, and that each carton containing lamp bases had printed thereon in large letters the following:

FRAGILE

HANDLE WITH CARE

THIS CARTON CONTAINS 2 LAMPS

In checking the shipment Philp apparently assumed there was only one base in each carton. Consequently, he indicated on a related document (a copy of the shipping order) that only half the number of bases supposed to have been shipped were received, and he marked the cartons as if there were only one base in each carton. As a result, when the cartons were distributed to the 17 stores serviced by the warehouse, the stores received twice as many bases as shades. The dispute appears to be not whether he made such error but whether Philp discovered the error himself, as he claims, and corrected it.

Philp testified that, after he completed the work on the shipment, he mentioned to one of the checkers who formerly worked in the lamp department that he had a "shortage of lamps"; that said checker replied that sometimes the lamps are packed two in a box; that he (Philp) replied that he thought there was only one in box; and that the former checker said, "No. There could be two." Philp further testified that he then checked one of the cartons that were due to go up to storage in the warehouse (the other cartons apparently having been shipped to the stores) and that when he opened one of the cartons he discovered that there were two bases in the carton. According to Philp's testimony, he then told Mielnick of his blunder and Mielnick contacted the lamp buyer "who might have been in the warehouse at the time," and some time later Mielnick said to him, "Don't worry about it George. Forget it as it is all fixed." Mielnick denied this testimony by Philp relating to him. Mielnick's denial is credited.

It is clear that Philp's error was not corrected, inasmuch as the stores received twice as many bases as they were supposed to because of Philp's error in checking and marking. The General Counsel, in his brief, advances the argument that Mielnick "make good on his threat" contained in the statement that Philip testified Mielnick made to him on February 27, in that Mielnick "took no steps to correct this error [this mistake in checking and marking the lamp shipment] but rather waited until the shipment had been delivered to Respondent's stores and complaints were made regarding the shades." The Trial Examiner finds this argument incredible. Furthermore, it is noted that the so-called threat was supposed to have been made on February 27(the day of the election) and the error was made several days prior thereto. In addition, the testimony of Respondent's witnesses as to how the mistake was discovered is credited and there is no basis for inferring that Mielnick deliberately concealed Philp's error and failed to correct it.[29]

It is concluded that Philp did not discover the error himself and correct it, as he contended, but that the error was not discovered until the stores began to report the discrepancy in the shipment to them of twice as many bases as shades.

It is noted that although the error occurred on February 24 and was discovered shortly thereafter, the personnel comment slip relating to said error was not given to Philp until April 21. Apparently General Counsel contends that the personnel comment slip was issued because Respondent had knowledge of Philp's prounion attitude, because he acted as one of the union observers and because on April 2 Philp participated in the distribution of union literature in front of the warehouse. This last reason is predicated upon General Counsel's Exhibit 2(e) which is a picture taken during the distribution of union literature outside the warehouse on April 2. In said picture Philp is shown standing next to a union organizer who is holding a bundle of papers, apparently handbills. It cannot be determined from the picture whether or not Philp did assist in the distribution of handbills. It appears that he is holding only one piece of paper, rather than a bundle. It is noted that there is no mention in Philp's testimony that he engaged in such activity. In any event, there is no issue here with respect to Respondent's knowledge of Philp's adherence to the Union's cause.

Respondent introduced testimony to explain the delay in the issuance of the personnel comment slip. It appears that the complaint about Philp's error with respect to the lamp shipment was initiated on March 4 by Harkins and Ives and was processed through the personnel department which process was not concluded until shortly before the personnel comment slip was handed to Philp on April 21. The record clearly demonstrates that an error such as made by Philp with respect to the lamp shipment is considered by Respondent to be very serious and the Trial Examiner is of the opinion that it cannot be concluded that the personnel comment slip issued to Philp on April 21 would not have been issued but for his union adherence. Therefore, it is concluded that General Counsel has not proved by a preponderance of the evidence the allegation in the complaint that Respondent violated the Act by issuing Philp a warning notice on April 21, 1970.

It is noted that said personnel comment slip stated "that if such errors occur in the future he will be subject to discharge." Philp was discharged on July 24, 1970, for making a "similar error" to the error on the lamp shipment.

[29] Although it appears that Mielnick corrected one of the copies of the purchase order to reflect that the full shipment was received, it further appears that, nevertheless, a claim was made by a department of Respondent against the vendor for an incomplete shipment which claim was not withdrawn until a number of months after the shipment was received. It is clear that there was an omission on someone's part to notify said department that the copy of the purchase order filled in by Philp was incorrect in reflecting that the complete shipment had not been received However, the Trial Examiner is of the opinion that such omission was not a deliberate act done to magnify Philp's initial error, but rather that it was inadvertent It is not deemed credible that Respondent or members of its management would jeopardize either their positions or Respondent's relations with the lamp vendor in order to compound Philp's error in checking and marking the lamp shipment.

The error which precipitated Philp's discharge involved a shipment of "kiddie carriers." It is not disputed that the documents and marking on the cartons involved in the shipment indicated that on July 6, 1970, Philp checked and marked said shipment.

The shipment consisted of 21 cartons which were of various sizes and which contained varying quantities of carriers, and there was a considerable variation in both the sizes of the cartons and the number of items each contained. Each carton was clearly marked by the shipper stating, among other things, the number of carriers contained therein. It appears that the carriers in said 21 cartons constituted an amount in excess of the amount originally ordered by Respondent and that an additional purchase order was made out by the buyer to accept this excess shipment. It also appears that in making out the additional purchase order the buyer made the mistake of indicating that there were 21 items ordered (apparently reflecting the number of cartons) instead of indicating the much greater amount of items (carriers) contained in the cartons.

It is clear that the checker and marker, if he were performing his duties as he should have, would have noted the obvious discrepancy (between the number of items noted in the purchase order and the number contained in the carton) and would have checked the number of carriers, noted the correct number in the purchase order, and marked the cartons in accordance with the number of carriers actually contained in each carton. Instead, the purchase order reflected that the shipment was checked by Philp and that there were only 21 carriers in the shipment. Also, each carton was marked by Philp (to all appearances) as if there were one carrier therein. Although Philp admitted that the documents and the cartons bore his name and initials and were in his handwriting, thus indicating that he had checked and marked the shipment, he testified that he had no recollection of checking and marking it.

Apparently it is General Counsel's theory that, although the documents and cartons indicated that Philp checked and marked the shipment, someone else made the mistake in the checking and marking and that Philp placed his name and initials on the documents and cartons upon the instructions of a supervisor. Considerable testimony was elicited by the General Counsel as to the possibility of this having occurred, which testimony, at best, can only be characterized as speculative. However, it is clear from the record and from Philp's testimony that checkers and markers are held strictly accountable for their checking and marking, and it is inferred that it is unlikely that General Counsel's theory with respect to the kiddie carrier shipment has any merit, since it would appear reasonable to assume that if such were the case, Philp would have recalled receiving such instructions from a supervisor. In any event, there is nothing in the record to indicate that Respondent did not reasonably believe that it was Philp who made the error in checking and marking the shipment of kiddie carriers. Although Philp credibly testified that, during the interview when he was terminated, he denied making the error and asked to see the shipment which opportunity was denied him, the Trial Examiner considers this of no significance, for there is no basis for finding that Respondent had any reason to believe Philp's denial of responsibility for the error had any validity.

It is inferred that the errors with respect to the lamp shipment and the kiddie carrier shipment were the result of extreme and apparently inexcusable carelessness. The cartons containing the lamp bases were clearly marked as containing two lamps but despite this Philp noted in the purchase order that only one lamp per carton was received. The 21 kiddie carrier cartons not only were clearly marked as to the quantities contained therein, but also, since they were of various sizes, it should have been immediately apparent to anyone checking and marking the shipment that they did not contain a total of only 21 items all alike.

Although there is no evidence of others being discharged for similar errors,[30] there is also no evidence that employees who made similar errors were not discharged. Furthermore, there is credible testimony that errors such as made by Philp are a rarity.

The Trial Examiner is of the opinion that there is no basis for a finding that the reasons ascribed for Philp's discharge were mere pretexts or for a finding that he would not have been discharged but for his union activity. Consequently, it is concluded that the General Counsel has failed to prove by a preponderance of the evidence the allegation that Philp was discriminatorily discharged by Respondent in violation of Section 8(a)(3) and (1) of the Act.

The Objections to the Election (Held on April 24, 1970)

The aforesaid objections to the election are as follows:

1. Between the date of the filing of the petition and the day of the election the Employer kept under surveillance the union activities of its employees.
2. Between the date of the filing of the petition and the day of the election the Employer systematically required employees individually to attend meetings concerning the election in the offices of high management officials.
3. Between the date of the filing of the petition and the day of the election the Employer interrogated employees concerning their union membership, activites and sympathies, and the union membership, acitivities and sympathies of fellow employees.
6. Between the date of the filing of the petition and the day of the election the Employer threatened employees with reprisals in connection with their union membership, activities and sympathies.
8. On or about April 15, 1970, the Employer issued a handbill to the employees announcing that it would refuse to bargain with the Petitioner although it was the certified representative of the Employer's warehouse employees, and although the Charging Party had not as yet formally requested a meeting with the Employer for the purpose of negotiating a contract inasmuch as the Charging Party was still drafting contract proposals. The handbill was issued for the purpose of demonstrating to the employees involved in the instant election the futility of designating the Petitioner as their collective-bargaining representative.

With respect to Objection 1, it was found hereinabove that the Employer did engage in unlawful surveillance of the distribution of union handbills to the employees on a number of occasions subsequent to the filing of the petition for an election (on February 16, 1970) in the office clerical employees unit. Therefore, it is found that Objection 1 is meritorious.

With respect to Objection 2, during the course of the hearing in this proceeding the Union indicated that it wished to withdraw this objection. In any event, there is nothing in the record which would sustain this objection and it is, therefore, found that it is without merit.

With respect to Objection 3, there is no evidence in the record which has been found to sustain a conclusion that Respondent engaged in unlawful interrogation of its employees subsequent to February 16, 1970 (the date that the

[30] Although Respondent introduced evidence of employees who were discharged for errors and other conduct, there was little similarity between the reasons for their discharges and that of Philp

petition was filed for an election in the office clerical employees unit). Therefore, it is found that said objection is without merit.

With respect to Objection 6, it was found hereinabove that the Employer did threaten Louis Thomas, a checker, with economic reprisal should the Union win the election that day (February 27). It was further found hereinabove that at the end of February 1970 Respondent threatened Herbert Kelley, a member of the warehouse unit, with economic reprisal in the event the Union became the bargaining representative of the unit of warehouse employees. It was also found hereinabove that on April 23 and April 24, 1970, Respondent violated Section 8(a)(3) and (1) of the Act by issuing warning notices to Jason Murray, a member of the warehouse unit, for participating in the distribution of union literature on April 22 and April 23, the two days immediately preceding the election in the office clerical unit. Although it is not clear that the notice he received on April 24 was given to him prior to the election on that date, it is found that at least the warning notice issued to him on April 23 constituted a threat of economic reprisal for his union activity relating to the election on April 24. Although the above-mentioned threats of economic reprisals were against members of the warehouse unit, it appears there was a considerable amount of communication between employees in the warehouse unit and office clerical employees unit. Consequently, it is found that Objection 6 is meritorious.

With respect to Objection 8, it was found hereinabove that the Employer interfered with, restrained and coerced the employees in the office clerical unit within the meaning of Section 8(a)(1) of the Act by notifying said employees that it intended to refuse to bargain with the Union as the certified representative of the employees in the warehouse unit. Consequently, it is found that Objection 8 is meritorious.

It is concluded that the Company's conduct set forth in Objections 1, 6 and 8, which have been sustained, must reasonably have affected the results of the election held on April 24, 1970. Therefore, it will be recommended that said election be set aside and that Case 21–RC–11678 be remanded to the Regional Director for Region 21 to conduct a new election.

IV THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The unfair labor practices of the Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow thereof.

V THE REMEDY

It having been found that Respondent engaged in certain unfair labor practices, it will be recommended that Respondent be ordered to cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

It having been found that Respondent unlawfully issued warning notices to Jason Murray on April 23 and April 24, it will be recommended that Respondent be ordered to remove said notices from his personnel file and expunge from his employment record any notations to said warning notices.

It is noted that the Charging Party and the General Counsel asked for remedies herein beyond those conventionally ordered with respect to the types of unfair labor practices alleged herein. Many of the violations alleged herein were not found to have been sustained, and it appears that no purpose would be served to discuss the appropriateness of said requests for unusual remedies. It is deemed that the remedies normally prescribed for the types of unfair labor practices which were found to have been committed by the Respondent are adequate in the circumstances herein.

Upon the basis of the foregoing findings of fact and upon the entire record in this proceeding, I make the following:

CONCLUSIONS OF LAW

1. The Respondent is, and at all times material herein was, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent engaged in unlawful surveillance of the distribution of union literature to its employees on or about January 29, February 18, 23, 24, 25, 26, April 2, 13, 22, 23 and 30, 1970.

4. Respondent violated Section 8(a)(1) of the Act by giving its employee Sophie Patillo the impression that it was engaging in surveillance of her union activity and by interrogating her with respect thereto in the latter part of November 1969.

5. Respondent violated Section 8(a)(1) of the Act by unlawfully interrogating its employee Ralph Molinar on or about November 26, 1969.

6. Respondent violated Section 8(a)(1) of the Act by a statement made to Louis Thomas on February 27, 1970, which constituted a threat of economic reprisal should the Union win the election being held that day.

7. Respondent violated Section 8(a)(1) of the Act by a statement made to Herbert Kelley about the end of February 1970 which constituted a threat of economic reprisal in the event the Union became the bargaining representative of the employees in the warehouse unit.

8. Respondent violated Section 8(a)(1) of the Act by announcing to its employees on April 15, 1970, that it would not bargain with the Union as the certified bargaining representative of the employees in the warehouse unit.

9. Respondent violated Section 8(a) and (1) and (3) of the Act by issuing warning notices to its employee Jason Murray on April 23 and April 24, 1970.

10. The General Counsel failed to prove by a preponderance of the evidence the following allegations in the complaint:

(a) That Respondent violated Section 8(a)(3) and (1) of the Act by laying off Sophie Patillo and subsequently failing to recall her.

(b) That Respondent violated Section 8(a)(1) of the Act by threatening employee George Philp on or about February 27, 1970.

(c) That Respondent violated Section 8(a)(1) of the Act by interrogating Santiago Aranda on or about March 18, 1970.

(d) That Respondent violated Section 8(a)(3) and (1) of the Act by discharging Santiago Aranda on or about March 18, 1970.

(e) That Respondent violated Section 8(a)(1) of the Act by notifying its office clerical employees on or about April 21, 1970, of certain changes in their working conditions.

(f) That Respondent violated Section 8(a)(3) and (1) of the Act by issuing a warning notice to George Philp on April 21, 1970.

(g) That Respondent violated Section 8(a)(3) and (1) of the Act by discharging George Philp on July 24, 1970.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the followign recommended:[31]

ORDER

Respondent, The May Department Stores Company, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Engaging in unlawful surveillance of the union activities of its employees.

(b) Giving employees the impression that it is engaging in surveillance of their union activities.

(c) Unlawfully interrogating employees with respect to their union activities.

(d) Threatening employees with economic reprisal if the New Furniture & Appliance Drivers, Warehousemen & Helpers Local 196, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, or any other labor organization, be selected by them as their bargaining representative.

(e) Stating to employees that it will not bargain with the aforesaid Union, or any other labor organization, even though the aforesaid Union, or other labor organization, has been certified by the National Labor Relations Board as their bargaining representative.

(f) Discriminatorily issuing warning notices to its employees because they have engaged in union activities.

(g) In any like or related manner interfering with the rights of the employees guaranteed in Section 7 of the Act.

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

(a) Remove from the personnel file of Jason Murray the warning notices it issued to him on April 23 and April 24, 1970, and expunge from his employment record any reference to said notices.

(b) Post at its warehouse in Los Angeles, California, copies of the attached notice marked "Appendix."[32] Copies of the notice, on forms provided by the Regional Director for Region 21, after being duly signed by an authorized representative of Respondent, shall be posted by Respondent immediately upon receipt thereof and maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 21, in writing, within 20 days from the date of the receipt of this Decision, what steps the Respondent has taken to comply herewith.[33]

IT IS FURTHER ORDERED that the complaint be dismissed insofar as it alleges violations of the Act not specifically found herein.

IT IS FURTHER ORDERED that the election conducted on April 24, 1970, in Case 21–RC–11678, be, and it hereby is, set aside, and that said case be remanded to the Regional Director for Region 21 to conduct a new election at such time as he deems the circumstances permit the free choice of a bargaining representative.

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[31] In the event no exceptions are filed as provided by Sec 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[32] In the event that the Board's 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 be changed to read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[33] In the event that this recommended Order is adopted by the Board after exceptions have been filed, this provision shall be modified to read: "Notify the Regional Director for Region 21, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith."