Rossmore House *and* Hotel Employees and Restaurant Employees Union, Local 11, Hotel Employees and Restaurant Employees International Union, AFL-CIO. Cases 31-CA-12388 and 31-CA-12422

25 April 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN, HUNTER, AND DENNIS

On 31 March 1983 Administrative Law Judge James S. Jenson issued the attached Decision. The Respondent filed exceptions and a supporting brief.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions only to the extent consistent with this Decision and Order.

The judge found that 1 and 7 August 1982[2] the Respondent interrogated employee Warren Harvey in violation of Section 8(a)(1) of the Act. We disagree, and for the reasons set forth below, we overrule existing Board law supporting the judge's conclusions.[3]

The Respondent operates a residential retirement hotel that provides food and lodging to its guests. On 26 or 27 July employee Warren Harvey contacted union representatives and arranged for an employee meeting at his house 31 July. In the meantime Harvey distributed authorization cards to fellow employees. At the suggestion of a union representative, a mailgram was sent to the Respondent following the 31 July meeting; the mailgram stated that Harvey and another employee were forming a union organizing committee with knowledge that their activities were protected under the Act. The mailgram's purpose was to protect the rights of the organizing committee.

When the Respondent's manager, Tvenstrup, received the mailgram on the morning of 1 August he walked into the kitchen with the mailgram and approached Harvey. According to Tvenstrup's testimony,[4] he asked Harvey, "Is this true?" Harvey answered affirmatively, and Tvenstrup said, "Okay, thank you," and started walking away. Harvey said, "I am sorry; it is nothing personal," and Tvenstrup said "Okay," and proceeded to his office. Tvenstrup testified that he had been unaware of any union activity and did not believe the mailgram when he received it.

Harvey testified that Tvenstrup walked into the kitchen waving the mailgram. His version is as follows:

> He said, "What is this about a union?" . . . . I told him, "That's right about the union. We're going to have a union because of the lack of benefits, lack of insurance, lack of job security, vacations without pay" . . . . After I told him that, he said that Mr. and Mrs. Tsay were not going to like it and that they would fight it, have to fight it to the hilt, and I said, "Well, it's nothing personal. We just want better conditions." And he said, "Well, as manager, I will have to fight it too."

The next incident took place 7 August. According to Harvey's credited testimony, he was leaving the facility after work when the Respondent's owners, the Tsays, approached him. Mr Tsay stated, "The manager tells me you're trying to get a union in here," and asked why. Harvey replied that it was "because of the low pay, no benefits and lack of job security." Tsay then asked whether the Union charged a fee to join and, when Harvey said yes, Tsay said he would talk to the manager about it.

The judge found the Respondent's statements in both instances to be unlawful interrogations under Section 8(a)(1) of the Act, citing *Paceco*[5] and *Anaconda Co.*[6] In *Paceco*[7] the Board stated:

> [A]n interrogation of an employee's union sympathies or his reasons for supporting a union need not be uttered in the context of threats or promises in order to be coercive. The probing of such views, even addressed to employees who have openly declared their prounion sympathies, reasonably tends to interfere with the free exercise of employee rights under the Act, and, consequently, is coercive.

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[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In the absence of exceptions, we adopt pro forma the judge's findings that the discharge of Warren Harvey and the layoffs of Marvin Fox and Jonathan Fox did not violate Sec. 8(a)(3) and (1) of the Act.

[2] All dates are in 1982 unless otherwise indicated.

[3] *PPG Industries*, 251 NLRB 1146 (1980) (not cited by the judge); *Anaconda Co.*, 241 NLRB 1091 (1979); *Paceco*, 237 NLRB 399 (1978); *ITT Automotive Electrical Products Division*, 231 NLRB 878 (1977) (not cited by the judge).

[4] The judge stated that he was unable to conclude whether Tvenstrup's or Harvey's version of the conversation was the more accurate, but found that under either witness' testimony his conclusion would be the same.

[5] 237 NLRB 399 (1978), vacated in part and remanded in part 601 F.2d 180 (5th Cir. 1979), supp. dec. 247 NLRB 1405 (1980).

[6] 241 NLRB 1091.

[7] 237 NLRB at 399–400.

More recently, in *PPG Industries*,[8] the Board held that questions concerning union sympathies, even when addressed to open and active union supporters in the absence of threats or promises, are inherently coercive.

Before the line of cases culminating in the *PPG* decision,[9] the Board had declined to find violations in such circumstances. In *B. F. Goodrich Footwear Co.*,[10] the Board found no violation when a supervisor asked two employees who were open union partisans how they felt about the union. The Board noted that no other unlawful conduct occurred with respect to either employee and concluded that "the nature of the inquiry, in the total context of all the circumstances here, is [not] sufficient to establish the kind of interference, restraint, or coercion which we have found to constitute a violation of Section 8(a)(1) in quite different contexts." Similarly, in *Stumpf Motor Co.*,[11] the Board held that the respondent's asking "a self-proclaimed and known union adherent" what he thought of the union did not violate Section 8(a)(1), but was merely a conversation opener.

In *PPG*, however, the Board overruled *Stumpf* and *B. F. Goodrich*. The *PPG* Board stated, "The type of questioning at issue conveys an employer's displeasure with employees' union activity and thereby discourages such activity in the future. The coercive impact of these questions is not diminished by the employees' open union support or by the absence of attendant threats."[12]

We will no longer apply the *PPG* standard. We conclude that *PPG* improperly established a per se rule that completely disregarded the circumstances surrounding an alleged interrogation and ignored the reality of the workplace. Such a per se approach had been rejected by the Board 30 years ago[13] when it set forth the basic test for evaluating whether interrogations violate the Act: whether under all of the circumstances the interrogation reasonably tends to restrain, coerce, or interfere with rights guaranteed by the Act. Our view is consonant with that expressed by the Seventh Circuit Court of Appeals in *Midwest Stock Exchange v. NLRB*:[14]

> It is well established that interrogation of employees is not illegal per se. Section 8(a)(1) of the Act prohibits employers only from activity which in some manner tends to restrain, coerce or interfere with employee rights. To fall within the ambit of § 8(a)(1), either the words themselves or the context in which they are used must suggest an element of coercion or interference.

In *Graham Architectural Products v. NLRB*,[15] the Third Circuit recently adopted the same approach, as follows:

> In deciding whether questioning in individual cases amounts to the type of coercive interrogation that section 8(a)(1) proscribes, one must remember two general points. Because production supervisors and employees often work closely together, one can expect that during the course of the workday they will discuss a range of subjects of mutual interest, including ongoing unionization efforts. To hold that any instance of casual questioning concerning union sympathies violates the Act ignores the realities of the workplace. Moreover, as the United States Supreme Court recognized in *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 89 S.Ct. 1918, 23 L.Ed.2d 547 (1969), the First Amendment permits employers to communicate with their employees concerning an ongoing union organizing campaign "so long as the communications do not contain a threat of reprisal or force or promise of benefit." Id. at 618, 89 S.Ct. at 1942. This right is recognized in section 8(c) of the Act.[16] If section 8(a)(1) of the Act deprived the employers of any right to ask non-coercive questions of their employees during such a campaign, the Act would directly collide with the Constitution. What the Act proscribes is only those instances of true "interrogation" which tend to interfere with the employees' right to organize.

After careful consideration, we conclude, in agreement with Member Hunter's dissent in *Donnelly Mfg. Co.*,[17] that *PPG* improperly establishes a per se rule that completely disregards the circumstances surrounding an alleged interrogation[18] and ignores the reality of the workplace. Accordingly, we overrule *PPG* and similar cases[19] to the extent they find that an employer's questioning open and active union supporters about their union sentiments, in the absence of threats or promises, neces-

[8] 251 NLRB 1146.

[9] See cases cited in *PPG*, 251 NLRB at 1147 fn. 5, and in fn. 3 of this decision.

[10] 201 NLRB 353 (1973).

[11] 208 NLRB 431, 432 (1974).

[12] 251 NLRB at 1147.

[13] *Blue Flash Express*, 109 NLRB 591 (1954).

[14] 635 F.2d 1255, 1267 (7th Cir. 1980).

[15] 697 F.2d 534, 541 (3d Cir. 1983).

[16] Cf. *Eagle Comtronics*, 263 NLRB 515 (1982).

[17] 265 NLRB 1711 (1982).

[18] See also *Gossen Co. v. NLRB*, 719 F.2d 1354 (7th Cir. 1983).

[19] See cases cited in *PPG*, 251 NLRB 1147 fn. 5, and in fn. 3 of this decision.

sarily interferes with, restrains, or coerces employees in violation of Section 8(a)(1) of the Act.[20]

In this case, Harvey, an active union supporter, openly declared his union ties by means of a mailgram to the Respondent. We find no violation of Section 8(a)(1) of the Act under either version of the conversation between Tvenstrup and Harvey concerning the contents of the telegram and Tvenstrup's intention to oppose the Union. Nor do we find any violation regarding the second incident when the Respondent's owner asked Harvey why he wanted a union and whether the Union charged a fee.[21] Under the totality of the circumstances, we find the Respondent's questioning of Harvey to be noncoercive, and therefore we shall dismiss the complaint in its entirety.

ORDER

The complaint is dismissed.

MEMBER ZIMMERMAN, dissenting in part.

I dissent from the overruling of *PPG Industries.*[1] I reject my colleagues' claim that *PPG* established a per se rule that disregards the circumstances surrounding an alleged interrogation and ignores the "reality of the workplace." On the contrary, it is my colleagues who have established a per se rule by their decision in this case. They hold that, absent an accompanying threat of reprisal or promise of benefit, the interrogation of an open union adherent will not violate Section 8(a)(1). Unlike the *PPG* standard, this new per se rule gives no weight to the setting and nature of the interrogation. It ignores the reality that employers sometimes are subtle coercion during an organizing campaign and fails to recognize that even open union adherents may be intimidated by such coercion.

As a general rule, an employer's questioning of an employee concerning union sentiments is viewed as having a reasonable tendency to interfere with, restrain, or coerce the employee in exercising statutory rights. This presumption is based on a fundamental premise of the Act: the imbalance of power between an employer and an individual employee. Because the employer posesses virtually complete ecomomic power over an unrepresented employees, the Act seeks to prevent any conduct—such as inquiring as to an employee's union sympathies—which suggests that an employee's future treatment by management may be affected by his views on unionization.

In *PPG* an active and known union supporter was asked by his supervisor whether he would still be for the union if he had to do it over again. When the employee did not respond, the supervisor repeated this question twice, and also asked the employee whether he had had an opportunity to sign a petition for a new election. A different supervisor asked another open union adherent what she thought the union could do for employees. The same employee subsequently was asked by a third supervisor what she thought the union would accomplish. In addition, a fourth supervisor asked a third open union supporter why she was for the union. All these conversations took place at the employees' work stations.

The Board found (251 NLRB at 1147) that these interrogations constituted "probing into employees' union sentiments which, even when addressed to employees who have openly declared their union adherence, reasonable tend to coerce employees in the exercise of their Section 7 rights." The Board added that the questioning at issue conveyed the employer's displeasure with the employees' union activity and thereby discouraged such activity in the future.

I do not view *PPG* as setting forth a per se rule. Instead, I believe that the decision simply recognized that just because an employee is an open union adherent does not end the inquiry into the lawfulness of an emploeyr's interrogation of him. Such questioning necessarily calls upon an employee to defend his Section 7 right to support a union. In most cases, there is no justification for putting an employee in such a defensive position, particularly since these conversations serve no valid employer purpose. As was said by the administrative law judge who was affirmed by the Board in *Anaconda Co.*:[2]

> The only purposes for such questioning of employees are: (1) to ascertain their reasons for union support so that the employer may argue the lack of merit for their reasons or (2) to determine their reasons so that he may take cor-

[20] Our dissenting colleague mischaracterizes our holding here by stating that we will not weigh the setting and nature of interrogations involving open and active union supporters. Experience convinces us that there are myriad situations in which interrogations may arise. Our duty is to determine in each case whether, under the dictates of Sec. 8(a)(1), such interrogations violate the Act. Some factors which may be considered in analyzing alleged interrogations are: (1) the background; (2) the nature of the information sought; (3) the identity of the questioner; and (4) the place and method of interrogation. See *Bourne v. NLRB*, 332 F.2d 47 (2d Cir. 1964). These and other relevant factors are not to be mechanically applied in each case. Rather, they represent some areas of inquiry that may be considered in applying the *Blue Flash* test of whether under all the circumstances the interrogation reasonably tends to restrain, coerce, or interfere with rights guaranteed by the Act.

[21] Unlike our dissenting colleague, we find Tsay's parting statement to Harvey that he "would talk to the manager about it" did not alter the noncoercive context of the conversation and was not, under the circumstances, an implied threat or promise of benefit.

[1] 251 NLRB 1146 (1980).

[2] 241 NLRB 1091, 1094 (1979).

rective action, which is in itself an unlawful promise of benefits to refrain from supporting the union.

Nor has the Board applied *PPG* in a per se manner. In *Harrison Steel Castings Co.*[3] the Board relied on *PPG* to find that an employer violated the Act when a supervisor asked an employee why he was wearing a union insignia and whether "the Company had done anything to offend him." In finding the violation, however, the Board emphasized that the conversation was not isolated but had to be viewed in context witht the employer's other 8(a)(1) violations. Thus, it is clear that the Board's reliance on *PPG* in *Harrison Steel* involved an examination of all the surrounding circumstances. Further, in *Brown & Lambrecht Earth Movers*,[4] the Board found no violation in a supervisor's asking an employee why he wanted a union. The Board relied on the fact that the conversation was one of many between the supervisor and employee, most of which were initiated by the employee and often included solicitations of the other's union sentiments. (The Board noted that the supervisor himself was a union member.) Thus the Board decided that, even though the supervisor was the initiator of the conversation in question, the exchange was casual, was part of a larger dialogue between the parties, and did not manifest the kind of discouragement of union activities which *PPG* seeks to prevent.

Moreover, there is no basis for concluding that the Board ignored the circumstances surrounding the interrogations in the three cases preceding *PPG* which my colleagues also overrule today. In *Anaconda Co.*,[5] three active and known union supporters individually were asked by three different supervisors why they wanted, or what they thought of, the union; *Paceco*[6] involved three supervisors' separate questioning of two employees about their union adherence; and *ITT Automotive Electrical Products Division*[7] involved two separate instances of supervisory interrogation of employees regarding their wearing of union buttons.

My colleagues cite decisions by the Third and Seventh Circuits in support of their overruling of *PPG*. The circuit courts, however, have not universally rejected the *PPG* principle. In *TRW-United Greenfield Division v. NLRB*[8] the Fifth Circuit enforced the Board's finding coercive a supervisor's interrogation of an open union adherent. The court stated (at 418):

> That [the employee] publically exhibited his support of and leadership in the Union does not alter the suggestion of coercion. Although an employee has openly declared his support for the union, the employer is not thereby free to probe directly or indirectly into his reason for supporting the union *ITT Automotive Electrical Products Division*, 231 NLRB 878 (1977). "[S]uch probing tends to have a coercive effect upon employees, whether or not the employees have openly declared their support for a union." Id.; see also *Paceco, A Division of Freuhauf Corp.*, 237 NLRB 399, 400, *vacated on other grounds*, 601 F.2d 180. . . . [The employee] was knowledgeable and may well not have been coerced in this confrontation, which maintained a facade of friendliness. However, if an interrogation is coercive in nature it makes no difference that actual coercion was not achieved in the particular instance. See *Sturgis Newport Bus. Forms, Inc. v. NLRB*, 563 F.2d at 1256.

The court thus affirmed the Board's consistent position, repeatedly approved by the judiciary, that an employee's subjective state of mind is not probative evidence of employer restraint and coercion which is violative of Section 8(a)(1).[9]

My colleagues' suggestion that Section 8(c) of the Act supports their holding today is wholly without merit. It is well established that an employer, in questioning employeees as to union sentiments, is not expressing views, argument, or opinion within the meaning of Section 8(c), but rather has the purpose or ascertaining the views of the person being questioned.[10]

In sum, I do not view *PPG* as established a per se rule, but rather as setting forth a policy which best protects the statutory guarantee of employee free choice regarding unionization, whether the employees are open and active union supporters or not. Consistent with my view that *PPG* requires an examination of the surrounding circumstances, I would find, in agreement with my colleagues, that manager Tvenstrup's questioning of employee Harvey 1 August did not violate the Act. On that date, Tvenstrup received a mailgram from the Union advising that employee Harvey and others had formed an in-plant organizing committee. Ac-

[3] 262 NLRB 450 (1982).
[4] 267 NLRB 186 (1983).
[5] 241 NLRB 1091 (1979).
[6] 237 NLRB 399 (1978).
[7] 231 NLRB 878 (1977).
[8] 637 F.2d 410 (1981).

[9] See, e.g. *Fairleigh Dickinson University*, 723 F.2d 1468 (10th Cir. 1983).
[10] See, e.g., *Struksnes Construction Co.*, 165 NLRB 1062 fn. 8 (1967); *NLRB v. Lorben Corp.*, 345 F.2d 346 (2d Cir. 1965).

cording to Harvey's testimony,[11] that morning Tvenstrup, with mailgram in hand, walked up to him in the facility's kitchen and said, "What is this about a union?" Harvey replied, "That's right about the Union. We're going to have a union because of the lack of benefits, lack of insurance, lack of job security, vacations without pay." Tvenstrup responded that the Respondent's owners were not going to like it and that they would fight it to the hilt. Harvey remarked, "Well, it's nothing personal. We just want better conditions." Tvenstrup then stated, "Well, as manager, I will have to fight it too."[12]

This conversation reasonably can be construed as simply a spontaneous attempt to seek confirmation of the mailgram which Tvenstrup had just received from the Union. Although this iquiry indicated the Respondent's displeasure with Harvey's union involvement, it lacked the deliberation and certainty that characterized the persistent interrogations found unlawful in *PPG*. I therefore would reverse the judge and dismiss this allegation.

The 7 August exchange between owner Tsay and Harvey is, however, a different matter. On that day, Tsay stopped Harvey as he was leaving the facility after work and said to him, "The manager tells me you're trying to get a union in here," and asked Harvey why. Harvey answered that he was trying to get a union because of the "low pay, no benefits and lack of job security." Tsay then asked whether it was true that the Union charged a fee to join. When Harvey replied that it was, Tsay said he "would talk to the manager about it."

Unlike my colleagues, I would find that Tsay's questioning of Harvey was indeed violative of Section 8(a)(1). Tsay was the owner of the Company, not simply a supervisor as was Tvenstrup. Tsay already knew of the mailgram's authenticity, and his comments to Harvey came almost a week after the manager informed him of Harvey's role on the inplant organizing committee. Not only did Tsay acknowledge the fact of Harvey's union support, he made it clear that he had discussed the matter with Tvenstrup and he asked the employee why he was doing such a thing. Tsay's interrogation 7 August went further than Tvenstrup's innocent, spontaneous inquiry of 1 August, and implied possible reprisals (or promises of benefits) when he told Harvey that he "would talk to the manager about it."

My colleagues, however, attach no significance to any of these surrounding circumstances. For them it is enough that Harvey had openly demonstrated his union support to lead to the conclusion that he could not be coerced, restrained, or interfered with by question about his union sympathies, absent a blatant threat of reprisal or promise of benefit.[13] For the reasons stated above, I cannot subscribe to that position.

Accordingly, I perceive no need to overrule *PPG* in order to find that, in its context, Manager Tvenstrup's interrogation of employee Harvey was not unlawful. On the other hand, I would find that, under the circumstances, owner Tsay's questioning of Harvye violated the Act. I join in the majority's decision only insofar as it reverses the judge's finding of an 8(a)(1) violation in connection with the 1 August conversation and dismiss that complaint allegation.

[11] Tvenstrup and Harvey offered different accounts of what was said during this conversation. The judge could not decide which version was more accurate, but determined that under either account the words spoken by Tvenstrup were tantamount to asking Harvey if he was on the Union's inplant organizing committee, and that such questioning violated Sec. 8(a)(1). I also find that, in the circumstances of this case, there is no material difference between the two versions, but I would find no violation under either version.

[12] Tvenstrup's version of the incident is as follows: With the mailgram in his hand he walked up to Harvey and said, "Is this true?" After Harvey answered, "Yes," Tvenstrup replied, "Okay, thank you." As Tvenstrup walked away, Harvey said to him, "I am sorry, it is noting personal." The manager responded, "Okay," and then went to his office.

[13] There is no basis for the majority's suggestion that the Board's decision in *Blue Flash Express* 109 NLRB 591 (1954), excuses owner Tsay's interrogation here. *Blue Flash* involved an employer, faced with a union's claim of majority status, polling employees on whether they had signed union cards. Unlike here, in *Blue Flash* the employer communicated its purpose in questioning the employees—a purpose which was legitimate in nature—to the employees and assured them that no reprisal would take place. Tsay's interrogation had no valid purpose, and he gave no legitimate explanation to Harvey for his questioning nor any assurance against reprisal.

DECISION

STATEMENT OF THE CASE

JAMES S. JENSON, Administrative Law Judge. This matter was heard in Los Angeles, California, on October 26 and November 1 and 2, 1982.[1] The consolidated complaint issued on September 21 pursuant to a charge filed in Case 31-CA-12422 on August 26. The consolidated complaint alleges two incidents of unlawful interrogation and the unlawful layoff or discharge of three employees. The Respondent denies the unlawful interrogations and contends two of the alleged discriminatees were laid off for economic reasons and that the third was discharged for cause. All parties were afforded full opportunity to appear, to introduce evidence, and to examine and cross-examine witnesses. Briefs were filed by the General Counsel and the Respondent and have been carefully considered.

On the entire record in the case, including the demeanor of the witnesses, and having considered the posthearing briefs, I make the following

[1] All dates hereafter are in 1982 unless otherwise stated.

FINDINGS OF FACT

I. JURISDICTION

The Respondent denies the Board has jurisdiction over its operations. The Respondent, a sole proprietorship, is engaged in the operation of a retirement hotel in Los Angeles, California, providing food and lodging to its guests. The parties stipulated that the Respondent's gross receipts in the year 1982 exceeded $500,000. The parties further stipulated to the receipt in evidence of documents from certain of the Respondent's suppliers,[2] which disclose the following: (1) For the 4 weeks ending March 19, 1982, and through November 5, 1982, the Respondent's total estimated purchases from Glenco/Sysco Food Service Company, Maywood, California, totaled $30,545.26. Glenco/Sysco estimated 49 percent of said purchases, or $14,967.18 came from locations other than California.[3] (2) Within the 12-month period preceding November 2, 1982, the Respondent purchased from Lee Zeigler & Son Provisions, Inc., La Crescenta, California, petite bananas of the value of $1,974.55,[4] which said company purchased from Pacific Banana in Los Angeles. The bananas were imported by United Fruit Company from Panama, Costa Rica, Honduras, or Guatamala.[5] (3) While there has been no breakdown with respect to the actual amount purchased within the past 12-month period, the Respondent purchased cheeses from the Carnation Company, Los Angeles, California, during the period from August 1, 1981, through October 31, 1982, which were manufactured in Minnesota, totaling in excess of $1,100.[6]

Thus, it is clear that the Respondent's annual purchases of food products which move in interstate commerce far exceeds de minimis. See e.g., *Marty Levitt*, 171 NLRB 739 fn. 6 (1968). Accordingly, it is found that the Respondent's operations affect commerce within the meaning of Section 2(6) and (7) of the Act, and, as its annual gross revenues exceeds $500,000, that it will effectuate the policies of the Act to assert jurisdiction herein. *Penn-Keystone Realty Corp.*, 191 NLRB 800 (1971); *Parkview Gardens*, 166 NLRB 697 (1967).

II. THE LABOR ORGANIZATION INVOLVED

It was stipulated and is found that Hotel Employees and Restaurant Employees Union, Local 11, Hotel Employees and Restaurant Employees International Union, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III. ISSUES

1. Whether, on August 1 and 7, 1982, the Respondent's agents unlawfully interrogated an employee concerning his union activities, sympathies, and desires.

2. Whether, on August 5, 1982, the Respondent laid off Jonathan and Marvin Fox for engaging in union activities.

3. Whether, on August 18, 1982, the Respondent discharged Warren Harvey for engaging in union activities.

IV. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Setting*

The Respondent is engaged in the operation of a residential retirement hotel in Los Angeles, California. Shyr-Jim Tsay, an individual, purchased the hotel on January 5. While not definitely stated in the record, it appears that the monthly occupancy charge includes meals. At the time Tsay took over the operation, meals were served from the kitchen by waiters and waitresses. At the outset, Tsay concluded the costs associated with operating the hotel and restaurant were too high, and therefore engaged Ronald Tvenstrup, herein called Tvenstrup, and his wife Roddi, who specialized in hotel renovations and reorganizations, as managers to straighten out any problems. The Tvenstrups commenced on May 15 and immediately undertook an investigation into the operating costs of the hotel and restaurant facilities. They concluded that a number of cost-cutting measures were in order, including conversion of the restaurant to a buffet or cafeteria type operation where those hotel tenants who were physically capable would be served from a steam table instead of utilizing waiters and waitresses to serve each of the tables. After the conversion, a few waiters or waitresses would still be needed to serve those tenants who were not physically capable of getting their own food. The conversion was designed to reduce costs by decreasing the number of employees and eliminate food waste. The conversion from table service to buffet service was made the last week in July and resulted in the elimination of six waiters and waitresses on August 5. The General Counsel alleges that two of the waiters, Marvin and Jonathan Fox, were laid off because of their union interests. The General Counsel also alleges that Warren Harvey was unlawfully interrogated on two occasions in the first week of August and was unlawfully discharged on August 18 because of his union activities.

The parties stipulated that Tsay and Tvenstrup are the Respondent's agents, and the record so shows. Roddi Tvenstrup comanaged the operation along with her husband. Mary Moch is the supervisor and head cook of the kitchen department. The record establishes her statutory supervisory authority. Eura Dell Williams is the dining room supervisor on the morning shift, and Victoria Williams on the second shift which covers the evening meal. Neither Eura Dell Williams nor Victoria Williams is alleged to be a statutory supervisor, nor does the record establish that either is. It is well established that the title of supervisor does not make one a statutory supervisor. Harvey, who had been hired by Moch in 1981, worked the first shift covering breakfast and lunch 3 days a week, and the second shift which included dinner twice a week. He rotated with Fidel Diaz. Harvey testified that he had experience as a cook prior to being hired by Moch. Moch, however, testified that, contrary to Harvey's claim, she "found out later that he really was not a cook," in that he could not take a menu and prepare a meal properly. Consequently, she had to show him how,

[2] G.C. Exhs. 12-17.
[3] G.C. Exh. 13.
[4] G.C. Exh. 11.
[5] G.C. Exh. 12.
[6] G.C. Exh. 16.

and most of the time would prepare the meat in his place, leaving him to prepare vegetables and desserts. There was considerable testimony concerning the fact that several of the resident guests were vegetarians. Special meals were to be prepared for vegetarians on request, and they were to be served a baked potato with their dinner every night. Harvey was responsible for seeing that the special meals and baked potatoes were available for the vegetarians.

B. *Decision to Terminate Harvey*

Roddi Tvenstrup testified that in late May or early June, at the first supervisory meeting held with the new managers, she was informed that Harvey's cooking was "dreadful." She also testified she received complaints from waitresses that Harvey ignored their requests and was rude and mean and that they did not want to work with him.[7] Mrs. Tvenstrup testified that in June she personally complained to Harvey about the size of a baked potato and soggy vegetables which he had served one of the vegetarians and asked him to prepare a grilled cheese sandwich in their place. The following day the guest, Mrs. Blyfeld, informed Mrs. Tvenstrup that she had not received the sandwich, that she was very upset about it, and was "going to have to leave." Most of Harvey's problems stemmed from the fact he failed to make substitutes for the vegetarians. Mrs. Tvenstrup testified there were numerous complaints that Harvey failed to strain vegetables or salads when putting them on the same plate with sandwiches, resulting in the latter becoming soggy; that he served meat to a vegetarian, and when it was returned for another plate, he removed the meat but left the juice from the meat on the plate, which was apparently offensive to the vegetarian. He would only make up a new plate for a vegetarian if Mrs. Tvenstrup personally insisted on it. Victoria Williams testified that she told Harvey of complaints about his cooking, and that his response was "if they want to eat, eat it; if they don't, don't"; that he failed to save baked potatoes for the vegetarians and also neglected to keep them warm; that when she complained about the fact potatoes were cold, he responded he did not care; that he refused to prepare substitutes and refused to put out two salad dressings for the guests although he was supposed to. She reported Harvey's deficiencies to the Tvenstrups at four or five supervisory meetings.

Moch testified there were complaints about soggy food on the plates, and that Mrs. Tvenstrup asked her to speak to Harvey on two or three occasions in July. Consequently, she told Harvey to use a "slither spoon" to drain the juice. She testified that when he failed to keep baked potatoes in reserve for the vegetarians, she ordered that he bake 10 and later 20 potatoes so the vegetarians would be sure to get one. After the switch from table to cafeteria service, there were still complaints the baked potatoes were not reserved for the vegetarians. At a supervisory meeting on Thursday morning, July 29,[8] Moch was instructed to inform Harvey that, if he could not give the vegetarians what they wanted, that he would be terminated. About 10:30 that morning she told Harvey, in Eura Dell Williams' presence, that Tvenstrup had said that if he did not give the vegetarians what they wanted that he was going to be terminated. Harvey's response was to the effect that he did not care, that they could "take this little chicken job and shove it." Moch's testimony was corroborated by Eura Dell Williams.[9]

The night of July 29, Mrs. Blyfeld, a vegetarian, complained to Tvenstrup that she was unable to "get a meal here. And I am paying good money to stay in this hotel . . . . I just want to be fed," and stated she was sending in a 30-day notice of her intent to leave.[10] The following morning, Saturday, July 30, Mr. and Mrs Tvenstrup decided to discuss the matter with Eura Dell Williams and Moch at the end of the shift. Accordingly, about 2:30 p.m. that afternoon the Tvenstrups, Eura Dell Williams, Moch, and Terry Patterson met in the dining room. According to the mutually corrobative testimony, Mrs. Tvenstrup stated she was still having trouble with Harvey; Moch asked if Mrs. Tvenstrup wanted her to talk to Harvey again; and Mrs. Tvenstrup stated no, that she was going to have to let him go. Tvenstrup then told Patterson to go to the office and get out a termination slip, which she did, and which he filled out immediately.[11] He instructed Patterson to call Mr. Tsay to make arrangements for him to sign Harvey's final paycheck. Unable to reach Tsay, the only person authorized to sign checks, Tvenstrup decided to wait until Monday to terminate Harvey so that he could give Harvey his final paycheck at the same time.[12] Tvenstrup claimed no knowledge of any union organizing activities at the time the decision was made to terminated Harvey, nor did the General Counsel produce any evidence of prior knowledge.

C. *August 1 Interrogation*

Harvey testified he first contacted union representatives on or about July 26 or 27 and, pursuant to their request, arranged for an employee meeting at his house on Saturday, July 31.[13] According to him, between the meeting with the union representatives and the July 31 meeting at his house, he distributed authorization cards to fellow employees, over half of whom signed them. The July 31 meeting was attended by two union business representatives, Harvey and Jonathan and Craig Fox,

[7] Corroborated by waitress Novart (Nora) Kasbarian, who testified Harvey was uncooperative with respect to giving vegetarians substitute plates, removing unwanted items from plates, keeping baked potatoes hot and saving them for the vegetarians, and using only one kind of salad dressing instead of two. She testified she complained about these matters to supervisor of night waitresses Victoria Williams and to Mrs. Tvenstrup, both before and after the steam table was installed. Mrs. Tvenstrup, testified waitresses Shakhi Koloian, Hong Tran and Thanh Huyhn and Evening Supervisor Victoria Williams also complained about him.

[8] While Moch did not recall the date, I conclude from the testimony of others in attendance that the meeting was at 10 a.m. on July 29.

[9] While Harvey denied receiving any complaints, he acknowledged that Moch once told him "that in some areas I still needed some supervision."

[10] Mrs. Blyfeld left on October 30.

[11] R. Exh. 1.

[12] Tvenstrup testified he believed he was legally required to pay an employee in full at the time of termination.

[13] The decision to terminate Harvey, as has been shown, was made the afternoon of July 30.

both waiters.[14] One of the union representatives suggested sending a telegram to the Respondent in order to protect the rights of the organizing committee. Accordingly, the following mailgram was sent to the Respondent:

> Please be advised that Warren Harvey and Jonathan Fox and others have formed an inplant organizing committee. We have done so knowing that this is a protected activity under the National Labor Relations Act.
> Sincerely,
> Stephen Beck
> Hotel and Restaurant Employees Local 11
> 321 South Bixel St.
> Los Angeles, CA 90017

Tvenstrup received the mailgram about 9:30 a.m., Sunday, August 1. Harvey was working the breakfast-lunch shift. What transpired thereafter is in dispute. Tvenstrup testified that he had not heard of any union activity around the hotel, and did not believe the telegram. His account of what transpired thereafter is:

> I walked out to the kitchen. I had the telegram in my hand. And Warren was standing there. I walked up to him and I said, "Is this true?" And he said, "Yes." And I said, "Okay, thank you." And I turned around and walked away. As I walked away, Warren said to me, "I am sorry, it is nothing personal." And I said, "Okay." And then I went over to my office.

Harvey's version was that Tvenstrup walked into the kitchen waving the mailgram and: "He said, 'What is this about a union?' . . . . I told him, 'That's right about the union. We're going to have a union because of the lack of benefits, lack of insurance, lack of job security, vacations without pay' . . . . After I told him that, he said that Mr. and Mrs. Tsay were not going to like it and that they would fight it, have to fight it to the hilt, and I said, 'Well, it's nothing personal. We just want better conditions.' And he said, 'Well, as manager, I will have to fight it too.'" Tvenstrup specifically denied the statements attributed to him by Harvey.

Paragraph 6(a) of the complaint alleges, and the General Counsel argues, that Tvenstrup's inquiry regarding the mailgram constitutes unlawful interrogation. It is argued that "The statement by Tvenstrup which initiated the conversation begs a reply. Uttering a statement which demands reply constitutes an attempt to interrogate an employee and such interrogation is a violation of Section 8(a)(1) of the Act." The Respondent argues that no coercive statements were made, nor were any inquires made into Harvey's sentiments, and that the conversation was isolated, incidential, and trivial and therefore not unlawful.

While I am unable to conclude whether Tvenstrup's or Harvey's version is the more accurate, it seems clear to me that the words spoken by Tvenstrup under either witness' version were tantamount to asking Harvey if he was on the Union's inplant organizing committee. The wording of the mailgram was clear—Harvey and Jonathan Fox were indeed on the organizing committee. The question "Is this true" or "What is this about a union" could only be construed by Harvey to call for a defense of his adherence to the Union. In *Fruehauf Corp.*, 237 NLRB 399 (1978), the Board stated "an interrogation of an employee's union sympathies or his reasons for supporting a union need not be uttered in a context of threats or promises in order to be coercive. The probing of such views, even addressed to employees who have openly declared their prounion sympathies, reasonably tends to interfere with the free exercise of employees rights under the Act, and, consequently, is coercive . . . . An inquiry into an employee's views towards a union or unionization in general, even ostensibly questioned 'out of curiosity' and in the context of assurances against reprisals, reasonably tends to interfere with the free exercise of employees' Section 7 rights, regardless of the employee's subjective state of mind." Accordingly, I find that Tvenstrup's interrogation of Harvey violated Section 8(a)(1) of the Act as alleged in paragraph 6(a) of the complaint. *Anaconda Co.*, 241 NLRB 1091 (1979).

D. *August 7 Interrogation*

On Monday, August 2, Tvenstrup informed Tsay over the telephone about the mailgram he had received on Sunday. Tvenstrup testified that the mailgram "threw me into an area that I was unaware of and unsure of. And I decided to hold off on any action until I could seek out proper advice."[15] On Saturday, August 7, as Harvey was leaving the Respondent's facility after work, he was approached by Mrs. Tsay, who said her husband would like to talk to Harvey. There is a dispute as to what was said between the two men. Harvey, whom I credit, testified that Tsay opened the conversation by saying, "The manager tells me you're trying to get a union in here," and asked why. Harvey responded, "Yes, that he was trying to get a union because of the low pay, no benefits and lack of job security." According to Harvey, "He asked me, didn't the Union charge a fee to join, and I said, yes, and he said he would talk with the manager about it." Tsay acknowledged Tvenstrup had called him on August 2 that Harvey and Joanathan Fox had gone to the Union. He testified that on Saturday, August 7, as he and his wife were walking through the parking lot to the kitchen, he saw Harvey and told his wife, "Well, maybe we should talk to Warren." Mrs. Tsay apparently signaled for Harvey to come over. Tsay testified as follows:

> And then Warren come toward me. So on the way sitting down I saw him really nervous. He said, "I am sorry, Mr. Tsay. I don't mean I want to give you trouble." So then he started the conversation. And the reason he thought he had complained be-

[14] Marvin Fox, another brother, was also employed by the Respondent, but did not attend the meeting. Marvin is an alleged discriminatee.

[15] A representation petition in Case 31-RC-5366 was filed by the Union on Monday, August 2. A notice of representation hearing, together with a copy of the petition, was sent to the Respondent by certified mail on August 4, setting August 16 as the date for hearing. (G.C. Exh. 6.) The date the Respondent first became aware of the petition was not established.

> cause first thing the manager post a sign or a note in the kitchen saying that nobody could talk to me directly. If somebody talk to me, they could be dismissed. And he told me he feel very uncomfortable about it.
>
> And second he told me that about meal, we take two meals from his wages. And he talk to the Labor Department, even though he get two meals a day. But during one shift we only could deduct one meal. So he wanted some money back.
>
> And third thing he complains, he said he figured that they don't have any more benefits, like health insurance, to let them feel more comfortable working in the Rossmore House.
>
> So after that I told him, "Okay," I told him, "I will talk to the manager and find out what is going on here." . . . then we split up.[16]

He further testified that, about 2 weeks earlier, Tvenstrup had said he was having trouble in the kitchen with Harvey and was going to fire him, and "So that day by accident, I thought, well, maybe I should talk to Warren, what is the reason that management wants to fire him." Tsay was not a convincing witness, and his testimony on cross-examination regarding the conversation with Harvey was both vague and confusing. Inasmuch as Tsay was the owner and the one who initiated the meeting, I find it more logical that he opened the conversation as Harvey claimed rather than taking a passive role as he, Tsay, claimed. Accordingly, I credit Harvey's version of the conversation over Tsay's and find that Tsay questioned him about his interest in the Union in violation of Section 8(a)(1) as alleged in paragraph 6(b) of the complaint. *Anaconda Co.*, supra *Fruehauf Corp.*, supra.

E. *August 5 Terminations*

As noted heretofore, the Respondent converted its dining room from table service to buffet service the last week in July, as one of several measures intended to reduce its operating costs. As a consequence of the conversion, on a regular payday, August 5, six food service employees were issued "Notice of Termination of Employment" forms reciting that they were "laid off—lack of work . . . due to the conversion from table service to buffet."[17] Jonathan and Marvin Fox, both waiters and both of whom are alleged discriminatees, were among the six. The others were waitress Susie Koloian and waiters Jeff Rowlands, Martin Coria, and Brian Favorite. The General Counsel does not contend their layoffs were unlawful. Jonathan Fox, who had attended the July 31 meeting at Harvey's house, was named along with Harvey in the Union's mailgram notifying the Respondent of the inplant organizing committee. Jonathan testified that he spoke to other employees in support of the Union and distributed authorization cards to six or seven. Jonathan's brother Craig also attended the meeting at Harvey's house.[18] Jonathan testified that Eura Dell Williams told both him and Craig, about 2 weeks prior to the August 5 layoff, that the changeover to buffet style was being made in order to save money and would result in "laying off certain employees . . . that they would keep the better workers and fire those that are insufficient." According to him, Williams stated neither he nor Craig had anything to worry about. While Craig Fox was called as a witness by the General Counsel, his testimony was limited to the issue of jurisdiction. Further, while Eura Dell Williams was characterized as the supervisor of working waitresses who attended weekly supervisory meetings, the record fails to affirmatively establish, as noted infra, that she possesses authority which would make her a statutory supervisory. Accordingly, I attach little significance to the fact she may have told Jonathan that neither he nor Craig had anything to worry about.[19] At the most, the conversation elicits the information that the impending layoff was known by the employees at least a week prior to the commencement of any union organizing activity, and that its purpose was to save the Respondent money by cutting down on the number of waiters and waitresses, as the Respondent contends. Marvin Fox testified that his union activity was limited to signing an authorization card about 10 days prior to his layoff, and to talking to two maids about the Union. There is no evidence the Respondent was aware of either activity.

Tvenstrup testified that the determination as to which employees would be terminated:

> . . . was made over a period of time—after getting employee evaluations from all of my supervisors as to their thoughts about their employees, and after personal observations of all of the employees, after looking at their backgrounds as far as their need for their job was concerned, if they had a family to support, or something of that nature, if they needed the job to support themselves, and other recommendations.

Seniority was not a factor. Both Jonathan and Marvin Fox were part-time employees and neither had a family to support. Craig Fox, on the other hand, was a full-time employee with a wife and child and was therefore not laid off. Another consideration in selecting Jonathan and Marvin was the fact Tvenstrup had found them, along with another employee, Vincent Thompson, in the game room and could smell the order of marijuana smoke. Tvenstrup therefore concluded they had been smoking it on the premises. They were warned at the time that they would be terminated immediately if it happened again. Thompson had apologized whereas the Fox brothers had laughed when reprimanded. Thompson, whom Tvenstrup characterized as a a very good employee, was not laid off in August. While Jonathan denied Tvenstrup had even warned him about smoking marijuana in the game

[16] On June 18, the Tvenstrups circulated a memo stating, in effect, that no one was permitted to "give out the name or phone number of the *owner*." (R. Exh. 2.)

[17] The Respondent had reduced its total employee complement from 50 to 39 employees.

[18] Craig Johnson was terminated on September 10 for having violated a company rule against changing the time recorded on his timecard by the timeclock. His termination is not alleged to be lawful.

[19] As noted, Craig was not laid off on August 5.

room, he acknowledged he did not "all the time." Although a witness for the General Counsel, Martin's testimony did not cover that incident. I am convinced that Tvenstrup was telling the truth and therefore credit his testimony over that of Jonathan. Moch testified that one of the cost-cutting practices instituted in the dining room was to stop the practice of pouring orange juice before the guests were seated at the breakfast table. This eliminated wasting juice already poured for those who wanted something else. Contrary to instructions, Moch testified, Jonathan continued to pour and place orange juice on the tables prior to the arrival of the guests. Tvenstrup testified the cost-cutting measures which were instituted in the dining room resulted in a two-thirds overall reduction in the cost of operating it.

The General Counsel argues that Jonathan and Marvin Fox were terminated shortly after the Respodnent learned of their union activities and that the reasons given by the Respondent for their terminations are pretextual.

It is clear that the dining room was converted from table to buffet service for economy reasons and that prior to the advent of the Union the employees were aware that the change would result in terminations. It is equally clear that Tvenstrup became aware of Jonathan's involvement with the Union upon receipt of the mailgram on August 1. There is, however, no evidence that the Respondent had any knowledge of Marvin's interest in the Union. If I am to assume that knowledge of Marvin's union interest is to be imputed to the Respondent by virtue of his relationship to Jonathan, then the same imputation would be applicable to Craig Fox, who was not laid off on August 5. The fact that Craig was not laid off with his brothers gives support to the Respondent's contention that economic need, i.e., whether the employee had a family to support and was a full-time employee, was indeed a factor considered in determining who would be laid off. Neither Jonathan nor Marvin had families to support, and both were part-time employees. Both had been reprimanded for smoking marijuana on the premises. Four other employees were also laid off on August 5. The Respondent has established the layoffs were economically motivated. In short, the General Counsel has failed to establish by a preponderance of the evidence that Jonathan and Marvin Fox were discriminatorily laid off as alleged in paragraphs 6(a) and (b) of the complaint.

F. *August 18 Termination*

As noted infra, on receipt of the mailgram on August 1, Tvenstrup decided to "hold off on any action until I could seek out proper advice." Thereafter, as I have found, both he and Tsay unlawfully interrogated Harvey regarding his union interest. Apparently concluding he was on safe ground, on August 18, at the conclusion of Harvey's shift, Tvenstrup terminated him. The notice of termination of employment of that date, General Counsel's Exhibit 5, lists the reasons for discharge as (1) failed to follow orders, (2) insubordination, and (3) not qualified. The August 18 termination notice is identical to the one completed by Tvenstrup on July 30. According to Harvey, he told Tvenstrup that the reasons for termination were not true, and that Tvenstrup did not give him any examples of his deficiencies.[20]

The General Counsel argues that the Respondent had knowledge of Harvey's union activity after August 1, the date the mailgram was received, and that the testimony established "a general aura of animus" and hostility, which leads to the the conclusion that the reasons advanced by the Respondent for his discharge are pretextual. The Respondent contends that the Tvenstrups were made aware of problems associated with Harvey's work from the time they took over management of the facility, including deficiencies in food preparation and serving, his rudeness toward and inavility to get along with the waitresses, and later his failure to comply with instructions which resulted in numerous complaints by the vegetarians and ultimatly to one guest serving notice that she would move out of the Respondent's facility. The Respondent also points to the fact that Moch had warned Harvey that he would be terminated if he could not prepare meals properly for the vegetarians, but that the warning went unheeded. Consequently, on the afternoon of July 30, prior to knowledge of any union activity on the part of any of the Respondent's employees, a decision was made to terminate Harvey. The Respondent contends that Harvey was not terminated on that date because Tsay was not available to sign his final paycheck, and it was therefore decided to wait until the following Monday, when Tsay would be available to sign the check, to effectuate the discharge. Prior to Monday, however, the mailgram arrived notifying the Respondent of Harvey's involvement with the Union, leading Tvenstrup to delay any further action pending advice.

The question is whether Harvey was discharged for his union interest and activity, or for an unprotected reason. There record is replete with testimony that Harvey was not the faultless employee that the General Counsel seeks to portray him. Moch testified that, when she hired Harvey, he claimed to be a cook. She concluded otherwise after she found he could not prepare a meal properly, and the preparation of meat dishes consequently fell on her. At Mrs. Tvenstrup's direction, she also spoke to Harvey on several occasions regarding his service and treatment of vegetarians and warned him that he would be terminated. Eura Dell Williams was present and corroborated one such warning. Victoria Williams also testified concerning complaints about Harvey's food and that she reported the complaints to both Harvey and the Tvenstrups. Waitress Novart Kasbarian, who characterized Harvey as "mean and rude," also testified to guests' complaints about his food preparation and service, and his noncooperative response thereto. She carried her complaints to both Victoria Williams and Mrs. Tvenstrup. Finally, the fact that the decision to terminate Harvey was made on July 30, the 1 day before the union meeting at his house, and 2 days before anyone from Respondent became aware that Harvey was involved with

[20] Harvey was a witness at the representation hearing on August 16. His testimony covers five transcript pages and was limited to commerce information. No representative of the Respondent appeared at the hearing, nor was it alleged or shown that the Respondent knew that Harvey testified. The instant case does not allege an 8(a)(4) violation.

the Union, has been established through the testimony of both Mr. and Mrs. Tvenstrup, Eura Dell Williams, Moch, and Patterson, all of whom were present when the decision was made.[21] Having concluded that the election to terminate was made prior to knowledge of the Union, and for other than union interest and activities, I do not find it untoward that Tvenstrup delayed carrying out the decision to terminate, after being informed of Harvey's union involvement, until he was able to get advice. The decision having been made prior to knowledge of union activity, and having herein concluded that Harvey's termination was not related to the Union, I conclude and find that the Respondent's reasons for his termination are not pretextual as the General Counsel argues, and that the General Counsel has failed to prove by a preponderance of the evidence that Harvey was unlawfully terminated as alleged in paragraph 7(c) of the complaint. Accordingly, I recommend dismissal of paragraph 7(c).

[21] The General Counsel does not contest the fact that the Respondent's first knowledge of union activity was the mailgram received on August 1.

CONCLUSIONS OF LAW

1. The Respondent is 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. By interrogating an employee concerning his union activities, sympathies, and desires, the Respondent engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

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

[Recommended Order omitted from publication.]