Victor's Cafe 52, Inc. *and* Hotel and Restaurant Employees Local 100, AFL–CIO *and* Leonardo B. Luberta. Cases 2–CA–25886, 2–CA–26131, 2–CA–26152, 2–CA–26386, 2–CA–26390, and 2–CA–26409

June 18, 1996

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND COHEN

On May 18, 1994, Administrative Law Judge Joel P. Biblowitz issued the attached decision. The General Counsel filed exceptions and a supporting brief and a brief in support of the judge's decision, and the Respondent filed exceptions and a supporting brief and an answering brief to the General Counsel's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order as modified and set forth in full below.[3]

[1] The General Counsel and the Respondent have 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.

We further find that the judge implicitly credited employee Hernandez' testimony that the Respondent's agent, Ray O'Campo, threatened to fire waiters who went on strike. In support of this, we rely on the judge's conclusion of law that the Respondent violated Sec. 8(a)(1) by ''(d) threatening to fire employees who engaged in [the protected concerted conduct of engaging in] a strike.''

In adopting the judge's finding that O'Campo was the Respondent's agent with respect to his threat that the Respondent would fire strikers, we are not, as the Respondent contends, applying any rule of per se agency for the position of restaurant maitre d'. Rather, we find apparent authority on the basis of the evidence that the Respondent had placed O'Campo in a position in which he was the usual conduit for communicating management's views and directives to employees, from the time of their hiring through their daily accomplishment of their tasks. See *Great American Products*, 312 NLRB 962, 962–963 (1993).

The Respondent excepts to the judge's statement at fn. 4 of his decision that employee Gary Ramirez Cid, ''apparently never returned'' to work. In fact, Cid was reinstated to his prior position. This correction does not affect the result.

[2] Although the judge did not cite *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), his analysis of those issues turning on employer motivation is fully consistent with the principles set forth in that case. See *Limestone Apparel Corp.*, 255 NLRB 722 (1981).

[3] The Respondent contends, inter alia, that discriminatees Baute and Ruiz are undocumented aliens and are thus not entitled to reinstatement and backpay. We leave to compliance a determination of reinstatement and backpay in accordance with the Board's decision in *A.P.R.A. Fuel Oil Buyers Group*, 320 NLRB 408 (1995).

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, Victor's Cafe 52, Inc., New York, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating its employees regarding their membership in, or support for, the Union.

(b) Creating the impression that its employees' union activities were under surveillance by the Respondent.

(c) Threatening to close the facility if the employees choose to be represented by the Union.

(d) Threatening to fire employees who engaged in a strike.

(e) Demanding that its employees produce documentation to establish that they are legally in the United States and are entitled to work, in retaliation for their union activity.

(f) Discharging employees because they engaged in union activities in order to discourage employees from engaging in such activities.

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

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

(a) Within 14 days from the date of this Order, offer to Raimundo Alexis Baute, Victor Ramirez Ruiz, and Humberto Hernandez full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Baute, Ruiz, and Hernandez whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges, and within 3 days thereafter notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in New York, New York, copies of the

We shall modify the recommended Order to conform with the violations found and our decision in *Indian Hills Care Center*, 321 NLRB 144 (1996). We have substituted a new notice to conform with the changes in the Order.

attached notice marked ''Appendix.''[4] Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 17, 1993.

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

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

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

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

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
>
> To form, join, or assist any union
>
> To bargain collectively through representatives of their own choice
>
> To act together for other mutual aid or protection
>
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT create an impression among our employees that we are engaging in surveillance of their activities on behalf of Hotel and Restaurant Employees Local 100, AFL–CIO or any other labor organization.

WE WILL NOT interrogate our employees regarding their membership in, or support for, the Union.

WE WILL NOT threaten to close the restaurant should our employees choose to be represented by the Union.

WE WILL NOT threaten to fire our employees for engaging in a lawful strike.

WE WILL NOT demand that our employees produce documentation to prove that they are legally in the United States and are entitled to work, when such demand is in retaliation for their union activities.

WE WILL NOT discharge our employees because they engage in union activity in order to discourage employees from engaging in such activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer to Raimundo Alexis Baute, Victor Ramirez Ruiz, and Humberto Hernandez full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Baute, Ruiz, and Hernandez whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to these terminations, and WE WILL notify these employees, in writing, that this has been done and that evidence of this unlawful action will not be used as a basis for future action against them.

VICTOR'S CAFE 52, INC.

Margit Reiner, Esq., for the General Counsel.
Stanley Israel, Esq. (Israel & Bray), for the Respondent.

DECISION

STATEMENT OF THE CASE

JOEL P. BIBLOWITZ, Administrative Law Judge. This case was heard by me in New York, New York, on October 6, 7, and 8 and December 6 and 7, 1993. The second amended consolidated complaint, which issued on May 26, 1993, was based on unfair labor practice charges filed by Hotel Employees and Restaurant Employees Union Local 100, AFL–CIO (the Union), on July 27[1] and October 16 and 28, 1992, and March 4 and 8, 1993, and an unfair labor practice charge filed by Leonardo Luberta on March 17, 1993. The complaint alleges that Victor's Cafe 52, Inc. (the Respondent) violated Section 8(a)(1) of the Act by numerous acts of threats, interrogations, the creation of an impression of surveillance of the employees' union activities, and the promise of benefits if the employees abandoned their support for the Union. These activities are alleged to have been engaged in by Respondent's agents, Victor Del Corral, president; Clara

[1] Unless indicated otherwise, all dates referred to relate to the year 1992.

Chaumont, manager; Ray O'Campo, maitre d'; and Marcella Hechevarria, assistant manager, between July and September. It is also alleged that the Respondent violated Section 8(a)(1) and (3) of the Act by discharging Victor Ramirez Ruiz on about July 14 and Raimundo Alexis Baute on about July 15. Further, it is alleged that Respondent violated Section 8(a)(1) and (3) of the Act by reducing the hours of employment of, and assigning less remunerative shifts and working locations to, Luberta and failed to restore these conditions of employment and benefits, which caused the termination of Luberta. Finally, the complaint alleges that the Respondent harassed Humberto Hernandez between September and November, criticized his work, falsely accused him of selling drugs and demanded his resignation, threatened that his job performance would be more closely supervised, refused to permit him to perform a personal errand during his shift even though this was generally permitted, witheld payment to him of his tips unless he signed a meal check and, on December 25, discharged him, all in violation of Section 8(a)(1) and (3) of the Act.[2]

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a New York corporation with an office and place of business in New York, New York (the facility), has been engaged in the operation of a restaurant selling food and beverages to the public. Annually the Respondent derives gross revenue in excess of $500,000 and receives at its facility goods and materials valued in excess of $500 directly from suppliers located outside the State of New York. Respondent admits, and I find, that it has been engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION STATUS

Respondent admits, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE FACTS

The Union began organizing the Respondent's employees in about June. Meetings were held at the Union's office and union authorization cards were signed at these meetings. In addition, Hernandez and Luberta, who signed cards for the Union, spoke to other of the Respondent's employees about the benefits of the Union. When they spoke to the employees they did it ''where I knew no one else would be around.'' The other alleged discriminatees, Baute and Ruiz, also signed cards for the Union.

William Granfield, organizer for the Union, testified that on about July 10, he and Noel Rodriguez, business agent, met at the facility with Victor Del Corral, Respondent's president. Rodriguez and Del Corral knew each other because Del Corral had recognized the Union at a restaurant that he had owned in New York City. They told Del Corral that the Union had authorization cards from a majority of his employees at the facility and they wanted the Respondent to recognize the Union as the representative of these employees; they offered him a recognition agreement. Del Corral said that he had no problem with the Union, but he needed more time because his business was going through a slow period. He also said that he wanted to have the recognition agreement translated into Spanish and wanted to have an opportunity to speak to his lawyers. As they were preparing to leave, Del Corral asked why his employees were interested in a union, and they said that the employees felt that they were being mistreated by the manager, Clara Chaumont. Del Corral said that he would speak to his employees to see what was on their minds, and Granfield warned him not to talk to them; once a recognition request was made, he should not question them, threaten them or offer them improvements in their working conditions. As the meeting ended, Del Corral said that he would like to have a neutral person examine the authorization cards.

The parties next met at the facility on July 13. Present on this occasion was Granfield and Vincent Ciribella, a trustee of the Union, and Del Corral, Chaumont, and Tamas Revai, Respondent's accountant. Granfield testified that Ciribella said that the Union wanted recognition based on a check of its authorization cards. Del Corral said that he was not opposed to recognition, but needed more time because business was slow. Ciribella said that if there was recognition, there would be a period of time before negotiations were completed. Del Corral agreed to a card check, but asked who would be the person who checked on the number and authenticity of the cards and Ciribella said that it could be anybody that all the parties agreed on. The parties agreed on Eric Schmertz, Esquire, and went to his office. Schmertz met with the Respondent's representatives and then told the union representatives that they had agreed to a card check and that if it resulted in the Union having cards from a majority of the employees at the facility, the Respondent would sign a recognition agreement. The Respondent's representatives left to return to the facility to get their payroll records for Schmertz to use to check the number and authenticity of the cards. After they returned, Schmertz began to compare the authorization cards with Respondent's records. Initially, Schmertz reported that Respondent's payroll records indicated that there were 51 eligible employees. Ciribella questioned this number and, after reviewing these documents, Respondent removed 3 of these records and determined that there were 48 eligible employees. After comparing the authorization cards with the Respondent's tax forms, Schmertz announced that the Union had 23 valid authorization cards from the unit employees. In addition, he had four authorization cards that he could not authenticate: two because he felt that the signatures on the cards did not match the signatures on Respondent's records. He could not authenticate the other two cards because the names did not appear on Respondent's payroll records. Because that resulted in the Union having 23 cards out of a unit of 48 employees, he could not say that the Union represented a majority of the employees. Because there was no way of settling the matter of the two cards whose signatures did not match the signatures on the Respondent's records, Schmertz attempted to work with the par-

[2] At the hearing, counsel for the General Counsel withdrew the 8(a)(1) and (3) allegation contained in par. 15 of the complaint involving the discharge of Gary Ramirez Cid. In a motion to withdraw complaint allegations, attached to her brief, counsel for the General Counsel also moved to withdraw the threat of discharge allegation in par. 8(b), the interrogation allegation in par. 10, and the allegation contained in par. 12(b) that it would be futile to select the Union. I received no opposition to this motion and the motion is granted.

ties by settling the situation of the two cards that did not appear on Respondent's payroll. He asked the union representatives if they had any objection to him showing the cards to the Respondent, and Ciribella said that they would not object, and he handed the two cards to Respondent's representatives. These two cards were signed by Raimundo Alexis Baute and Juan Pardo.[3] Respondent's representatives conferred and said that they had no knowledge of who these two individuals were. Schmertz then said that because the Union had only 23 cards out of 48, he could not declare that the Union had authorization cards from a majority of the employees in the unit, and that concluded the meeting.

Chaumont testified that when they were shown these two cards, neither she, Del Corral, nor Revai knew who these two individuals were. She called the restaurant that Respondent operates in Miami, but they too didn't know who they were. Then ''someone said maybe it's Alex,'' and when he came to work the following day, she found out that it was him. Baute had been employed at the facility as a dishwasher and expediter since about May, but because Chaumont felt sorry for him, he was being paid in cash and off the books, and she knew him only as ''Alex.''

There are numerous allegations of 8(a)(1) activity by Chaumont, Del Corral, O'Campo, and Hechavarria; the Respondent denies that the latter two are supervisors within the meaning of the Act. This activity is alleged to have begun shortly after the Respondent's representatives returned to the facility after the card count.

Hernandez testified that later in the day of the card count, Del Corral and Chaumont sat at one of his tables. At that time, Del Corral told him that he had seen the Union's authorization cards and that Hernandez was not one of the card signers. Chaumont apologized to him saying that she originally thought that he signed a card for the Union. Hernandez said that he didn't sign anything. Del Corral did not testify. Chaumont testified that she never told Hernandez that she knew that he had not signed a card for the Union and she was never present with Del Corral when he told Hernandez that he had seen all the union cards and knew that he had not signed one. In fact, they had only seen Baute's and Pardo's cards. She testified to a situation that occurred a few days after the card check. At that time, Hernandez came to her office and told her that he did not join the Union. He showed her his wife's card for her medical coverage and said that he didn't need the Union and he was willing to help her wherever he could.

Luberta testified that a couple of days after Del Corral and the union representatives met at the facility, while he was at one of the tables, Chaumont approached him and asked him, ''why we were doing this?'' He said that he didn't know what she was talking about, and she said, ''Why are you trying to bring the Union in?'' He said that he didn't know anything about the Union and she said that she knew who the leaders were and knew who signed cards for the Union. Chaumont testified that she never had any conversation with Luberta about the Union; not whether he was active for the Union or whether he joined the Union. Hernandez testified that at about this time, while he was at one of the tables at the facility, he asked O'Campo why they had hired so many new waiters. O'Campo said that ''it was because in case that we went on strike that they were going to fire the people who were eating shit at the restaurant.'' He testified that ''eating shit'' is a Cuban expression to signify somebody whose ideas are different from yours. O'Campo testified that he never spoke to any employees (including Hernandez) about the Union and never threatened to fire anybody because of their support for the Union. Hernandez testified that at about the end of July, the Respondent took away some of his lunch shifts. (This is not alleged as an unfair labor practice.) When he asked Chaumont why they did it, she said that it was to give the work to the new people and it was because of the Union. Ruiz testified that about about this time, while he was alone at a table at the facility, Chaumont approached him and asked him if he had signed anything for the Union; he said that he didn't know anything about it. She asked him if he knew anything about the Union and he said that he didn't. She then asked him how long he had been employed at the facility and he said 4 or 5 weeks. Chaumont testified that she never asked Ruiz if he signed a union card or joined the Union.

Luberta testified that there was a staff meeting in the kitchen at the facility about 11 a.m. on September 18. The kitchen staff, including the waiters and busboys, were present, as were Chaumont, Hechavarria, and Del Corral, who did the talking. He said that the Union had asked for recognition and had filed charges with the Board. He wasn't going to speak to them about the Union very much, but he wanted them to know that before he would allow the Union to come to the facility he would close the restaurant and everybody would lose their jobs. Hernandez testified that he attended a meeting of employees in the kitchen about 8 p.m. on that day. He testified that Chaumont said that they would not negotiate until ''Alex, the Complaint was taken away. It was withdrew [sic] from the court.'' Presumably, this refers to the first unfair labor practice charge filed by the Union in this matter on July 27, which alleges that Baute and others were unlawfully discharged. She then said that anything they had to say regarding the Union should be directed to the Board agent handling the matter. Del Corral said that he was not going to accept the Union and was going to close down the business. He also said that he knew who the union leader was and pointed to Hernandez. Chaumont testified that there were two staff meetings on a day in September, one about 2 p.m. and another at about 5:30 p.m. The kitchen employees, waiters, and busboys were present; only Chaumont and Del Corral were present for the Respondent. About 15 employees attended each meeting. In the early meeting, Del Corral said that charges had been filed with the Labor Board and, therefore, he was not allowed to speak to them about problems that they had. He said that Chaumont would give them the name and telephone number of the Board agent who was investigating the unfair labor practice charge. Chaumont repeated that she would post the name and telephone number of the Board agent, and she posted it in the kitchen that afternoon. At the second meeting, Del Corral made the same statement that he had made at the first meeting. Before she could say anything, someone (she cannot remember who) said something that she could not recall, but

[3] These two employees were not included in the 48 authenticated unit employees so, if Schmertz had authenticated the cards of Baute and Pardo, the Union would have had 25 authenticated cards out of a unit of 50 employees; still not a majority.

> then, all of a sudden, Victor got very upset, and he said . . . to all the employees there, not to forget that he was the owner of the restaurant and that he would close the restaurant if the Union was to come in.

She testified that she did not make a statement at either of these meetings that there would be no negotiations unless the Board charges were withdrawn, and does not recall whether Luberta's and Hernandez' names were mentioned at these meetings.

Luberta testified that later that day, he asked Hechavarria whether Del Corral would really close the restaurant, and she said that he would close it and that now that they knew who the union leaders were, they would get rid of them and open up at a later date with new employees.

Ruiz began working at the facility on June 23 as a busboy. He signed an authorization card for the Union on June 28; Hernandez gave him the card in the locker room of the facility. He signed it at that time and returned it to Hernandez. Ruiz testified that a few days after Chaumont asked him whether he had signed anything for the Union, as discussed above, she called him into her office and told him that he had to bring her his ''work documents,'' which presumably means his immigration papers. He said that he would bring them in the afternoon, and she told him that he could not work until he gave her the papers. That was the first time that he was asked for papers since he was hired by Respondent, when O'Campo asked him for his papers and he showed him his residency card. On the following day, Ruiz returned to Chaumont's office and showed her his residency card; she made a photocopy of the card and said that she would check on it. He said that he would like to know when he could return to work and left. About 3 or 4 days later Ruiz called the facility; O'Campo answered the phone and Ruiz asked if he knew anything about his job and O'Campo said that he didn't. He then asked to speak to Chaumont, but O'Campo said that she wasn't there. Two or three days later he called again; this time he spoke to Hechavarria. He asked to speak to Chaumont, but Hechavarria said that she was busy and could not answer the phone. She also said that she did not know anything about his job. Shortly after this call Ruiz went to the facility to pick up his final paycheck. He asked Chaumont about his job and she said that his papers were wrong. He asked how the papers could be wrong when he had used the papers to go to Mexico, which was not true. Chaumont told him to go to Immigration and get valid papers and then return to the facility; he never went back to Immigration. He returned to the facility on one other occasion, about a week later, to empty his locker. When he told O'Campo of his purpose, O'Campo told him to remove everything, because another employee was going to use the locker. He never returned to the facility after that. Chaumont testified that until the hearing here, she was not aware that Ruiz had signed a card for the Union or that he had attended union meetings. She testified that on July 15 she told Ruiz to bring in his immigration papers and that he could not work at the facility until he did so, and he said he would do it.[4]

Baute[5] began working at the facility in about March. Chaumont testified that shortly prior to that time, the chef at the facility told her that a friend of his had a nephew who had just arrived from Russia and was looking for a job. She told him to have Baute come to the facility to speak to her. When he came to see Chaumont, he told her that he came from Russia and needed a job so that he could get enough money to bring his family to the United States. She told him to leave his telephone number and she would see what she could do for him. About a week or two later, she called him and told him that the only job she could offer him was as a dishwasher; he accepted the job and began working. He had no social security card, nor did he have an I-9 form from Immigration or any other required documents. (She testified that he was the only employee whom she hired without seeing these documents.) In addition, he was paid off the books, in cash. Chaumont testified that she hired Baute under these circumstances, because she felt bad for him. He was an engineer in Russia and she wanted to help him because she remembered the difficult time that her mother had when she first came to the United States. After he worked for about a month or two as a dishwasher, a position as expediter[6] became available; realizing that Baute could learn and perform this job, she transferred him to this position. She testified that even after he became the expediter and until he ceased working for Respondent on about July 15, she received no immigration papers from him and paid him off the books in cash. During this entire period, and until shortly after the card count, she knew him only as ''Alex.'' After the card count, and she made the connection between ''Raimundo Alexis Baute'' and ''Alex,'' Chaumont told Revai the circumstances of Baute's employment and that he had no immigration papers and was being paid cash off the books. Revai told her that ''there was no way I could have someone working in the restaurant without a social security number and off the books.'' On July 14, when Baute reported for work, she told him that she needed his social security number and the proper immigration papers. That was the first time she asked him to produce any immigration papers. He told her that he had a letter for an appointment with Immigration and that he would bring her the letter. Chaumont then called Revai and told him of Baute's response. Revai told her that she had to terminate him because she could not retain him simply on the basis of a letter with an appointment with Immigration. ''When he got all his papers straightened out, he would be able to come back to work for us.'' On July 15, she told Baute that he couldn't continue to work at the facility until

[4] There was limited testimony about another alleged discriminatee, Gary Ramirez Cid, who did not appear at the hearing here and whose allegations were withdrawn by counsel for the General Counsel. On July 15, Chaumont also told him to bring in his immigration papers and, pending receipt of those papers, he could not work at the facility. He apparently never returned.

[5] The hearing here commenced on October 6. Baute was supposed to testify at that time, but counsel for the General Counsel stated that he was unable to leave Russia, where he was visiting his wife, due to political upheavals that were occurring there. The hearing resumed on December 6 at which time Baute was again scheduled to testify. When we resumed, counsel for the General Counsel stated that Baute returned to Russia 2 days earlier to be with his wife who was ill, and requested another adjournment of this matter so that he could testify. Because of the prior adjournment, and the uncertainty involved, I denied that request and he did not testify.

[6] An expediter is an intermediary between the chef and the waiters. He announces the orders to the chef and prepares the plates for final delivery to the waiter.

he straightened out his situation with Immigration. About 2 or 3 weeks later Baute called Chaumont and told her that he had his immigration papers straightened out and asked if he could return to work. She told him that the expediter position was filled, but she had a position of dishwasher that he could have. He said that he wasn't interested. She never heard from him again.

Chaumont and Revai testified about Respondent's policy regarding employees' Immigration status. Chaumont testified that, prior to July, when employees were hired, they were asked for the residence cards and social security cards. It was then the Respondent's policy that employees who did not have these required documents had 90 days to acquire them. Revai had told her that this should be Respondent's policy. About a week before the card check, Revai told her that some of the employees' files did not have the proper Immigration documents; this resulted in her speaking to Ruiz, Cid, and Baute. Pursuant to subpoena, Respondent turned over to General Counsel Immigration I-9 forms from its files. Those in evidence are dated in 1983, 1988, 1990, and April 1992. Chaumont testified that at the beginning of 1992, Revai spoke to her about keeping those files up to date. However, she failed to do so and as of July 13 she had no I-9s in the files. When they returned to the facility on that day after the card check Revai again told her to check all the files to be sure that they contained the required forms. At that time, she began getting I-9 forms from the employees and signed and backdated the forms she received (including those mentioned above) to state that they were signed at the earlier times. Chaumont was questioned by counsel for Respondent about the 90-day rule that she had testified about. Since she also testified that her files had not required immigration forms prior to mid-July, what did this 90-day rule apply to? She then testified that this was the 90-day probationary period for all new employees and had nothing to do with immigration forms.

Revai testified that he checks Respondent's records once or twice a year for the required immigration papers; as a Spanish restaurant, the Respondent is more subject to risks in this area. In about 1991 he spoke to Chaumont and told her to check her files to be sure that all the employees had the required forms. In about April or May, in checking through Respondent's employees' files and seeing that they were still deficient in this regard, he reminded Chaumont to take care of it. She said that she was busy, but that she would do it.

Luberta began working at the facility as a waiter in about March. He testified that shortly after Chaumont questioned him about why he was trying to bring the Union in, as discussed above, in about mid-July, he took a 4-day vacation. When he returned to work, he found that his scheduled shifts at work had been reduced. Previously, he was working from 10 to 12 shifts a week; lunches or dinners are each considered a shift.[7] After the change was made, apparently toward the end of July, he was working four or five lunch shifts and one dinner shift. This remained as his schedule until he left Respondent's employ in September. He testified that at about this time Respondent hired about three new waiters although the facility was not short of staff during this period. However, of the three waiters that Luberta named, one had worked at the facility and then returned at about this time, and another had been employed at the facility and then at a restaurant under the same name and ownership as the facility in Miami, Florida. At about this time, he approached O'Campo at the facility and asked him why his dinner shifts (the more lucrative shift) were taken away from him when employees with less seniority were working better shifts. O'Campo answered: ''Well, you wanted the Union, didn't you?'' Luberta walked away rather than answer. O'Campo testified that he never discussed the Union with Luberta. A few days later Luberta asked Chaumont about the change in his shifts; he told her that he was having problems with his girlfriend and couldn't afford to pay his bills because of the reduction in shifts. She said that she couldn't do anything for him at that time. Luberta asked for a few days off in order to attempt to straighten out his problems with his girlfriend and she gave him the days off. Other than those days off, he may have been absent from work because he was sick on 1 or 2 days between that time and September 23; he was available to work on all other days. Luberta testified that sometime in August he told Chaumont that he was going to attend school during the day, so he would not be able to work as many lunch shifts, but he was available for more dinner shifts. About a week later he told Chaumont to forget what he had said; he did not have the money required, so he would not be attending school.

Chaumont testified that in August, Luberta was scheduled to work a lunch shift. When he had not arrived for work by 12:15 p.m., she had one of the waiters call him; he lived in the building in which the facility is located. When there was no answer, he left a message for Luberta. About a half hour later Luberta called and asked if he could come speak to Chaumont. He came to her office ''very upset'' and crying. He told her that he was having a lot of personal problems with his girlfriend and was drinking heavily and taking drugs. Luberta testified that he never told Chaumont that he had a drug or alcohol problem or that these were the cause of his problem with his girlfriend. She testified further that he asked for some time off in order to see a psychiatrist. At his request, Chaumont wrote out such a request: ''As of today, August 6, 1992, I will [sic] like to have a few days off, due to personal problems (until Tues. August 11, 1992)'' and Luberta signed the note. Luberta testified that after he told Chaumont about the problems that he was having with his girlfriend, Chaumont recommended that he take off for a few days to straighten things out. She testified that at about the end of August Luberta told her that he needed to have his shifts changed because he was going to enroll in school. She subsequently learned that he did not enroll in school. On September 23, Luberta had a double shift scheduled for lunch and dinner. He worked the lunch shift and left at about 3 p.m.; he was supposed to return by 5 p.m. for the dinner shift, but he never did. She had O'Campo call his apartment, but he did not answer. Shortly thereafter, as she was leaving the facility, she met Luberta, who was walking out of the building, apparently from his apartment. She asked him why he wasn't working and why he didn't call her. He said that he was not going to work, because his brother found him an-

[7] Luberta testified that his earning on a lunch shift, including tips, was about $20 to $40, while the correspondeng figure for a dinner shift was about $150. He estimated that prior to this change in his shifts he was grossing between $800 and $1000 a week. After the change, he was earning about $250 a week.

other job. She asked if that meant that he was resigning his employment with the Respondent and he said yes. Respondent's records, as sent to New York State Unemployment Department, and as supplemented by Chaumont's testimony, establish the following net weekly earnings by Luberta for the weeks ending:

May 29	$215
June 5	175
June 12	200
June 19	305
June 26	682
July 2	355
July 13	380
July 20	455
July 27	223
August 3	192
August 8	385
August 14	244
August 21	147
September 2	481
September 8	183
September 11	211
September 18	354
September 25	254[8]

Luberta testified that he worked the lunch shift on September 23. On that day, O'Campo ''was like riding me,'' criticizing everything that he did. In addition, at that meal, O'Campo assigned him to a poor station (far from the main entrance) and directed only one table of customers to his station resulting in lower tips than he would normally receive. He testified that with the loss of dinner shifts over the prior month and not being given enough tables to serve when he was working, he would not be able to pay his rent and other bills. After the lunch shift had been concluded, he called his family and told them of his difficult financial situation. They suggested that he live with them until he straightened out his finances and his brother said that he would get him a job. As he was leaving his apartment at about 5 that day, he met Chaumont, who asked him why he wasn't at work. He told her that he could no longer afford to work since his schedule had been cut. That he had fallen too far behind in his bills. O'Campo testified that the lunch business on September 23 was slow. On that day he did not treat Luberta differently than any other waiter and did not give him fewer customers than he gave to the other waiters. Chaumont testified that when Luberta told her that he was quitting that day, he did not complain about the way that O'Campo was treating him.

Hernandez had been employed by Respondent as a waiter since about 1988. There are a number of 8(a)(1) and (3) allegations regarding him. It is alleged that in about late September, Respondent orally criticized his work performance; on about November 23, they refused to permit him to perform a personal errand during his shift even though other employees were regularly permitted to do so, and on the following day, threatened that his job performance would be more closely supervised and falsely accused Hernandez of selling drugs and demanded that he resign; on about December 12, witheld payment of his tips unless he signed a meal check for a musician employed by Respondent; and discharged him on about December 23, all, allegedly, because of his support for the Union.

Hernandez testified that after Del Corral's meetings with the employees on about July 18, Chaumont and O'Campo began to complain about his work. He gave two examples of these complaints. Once, after he set the table, ''they'' said that the knife was not properly set. The other example he testified about is too difficult to understand. He testified that he never received such complaints before the Union came to the facility.

The next allegation involves an incident that occurred shortly before midnight on November 23. Hernandez testified that he was feeling ill about 10:30 p.m. and needed pills for his ''nervous disorder.'' He had left the pills at home, but had a prescription for these pills, and shortly before midnight he received O'Campo's permission to go to the pharmacy at the corner to fill the prescription. He went to the pharmacy at the corner of Eighth Avenue and 52d Street, but it was closed. He had never previously been in that pharmacy and had never seen that store, or any other pharmacy in the area, open at midnight. When he returned to the facility, Chaumont asked him what he was doing outside, and he said that he went to fill a presciption and showed her the presciption. She accused him of going outside to buy illegal drugs and told him to leave for the day, which he did. Counsel for the General Counsel introduced into evidence a note on a doctor's prescription pad dated November 10. Where readable, it states: ''To whom it may concern. Mr. Hernandez presently suffers from . . . disorder.'' Chaumont testified that she had just returned to the facility about midnight and saw Hernandez coming into the facility through the bar entrance. The facility has two entrances; the restaurant entrance is closer to Broadway, and the bar entrance is closer to Eighth Avenue. She asked O'Campo where Hernandez was coming from, and he said that he didn't know, so she called Hernandez and asked him. Hernandez said that he went to fill a prescription for his wife, and showed her the prescription. She asked didn't he know that no pharmacies in the area were open so late, and he said that he didn't know it. She testified that there is no pharmacy at the corner of 52d Street and Eighth Avenue; there is a cosmetic store at that location, but it closes at 9 p.m. Hernandez testified that on the following day he was called to Chaumont's office. She said that she had given his name to the police because he was selling drugs and she asked him to quit; he refused and denied selling drugs. He told her that she could fire him if she wished, but that he would not quit. She told him to return to work, but ''to be careful. That she was going to be behind me all the time.'' Chaumont testified that on that day, at about 5, Hernandez came to her office and said that he wanted to clear up a problem. That there were rumors that he was selling and using drugs, but the reason he went out on the prior evening was to fill a prescription for his wife. She told him that he was working long enough at the facility to know that there was no pharmacy in the area open that late and that the pharmacy that he claims he went to did not exist. She did not accuse him of selling or using drugs and did not say that she reported him to the police because of it.

Respondent employs musicians to perform at the facility. As part of their remuneration, they are entitled to a free meal at the facility. On about the evening of December 12, they

[8] The changing payroll dates were not explained.

sat at one of Hernandez' tables. They ordered food and he wrote up a check for them as he would have done for a paying customer. Hernandez testified that he had previously waited on musicians on about 10 occasions, but had never written a check for them; he did it on this occasion because Chaumont had previously told him that she would be behind him, watching him, and he wanted to protect himself. He was afraid that Respondent would claim that he took food without authorization. When he was ready to leave, he asked O'Campo to close out his account so he could get his tips for the evening. O'Campo told Hernandez that he had to first see Chaumont. He went to Chaumont's office and she asked him why he wrote the check to the musicians. Chaumont wrote a narrative on the check in question, dated December 17, stating that she asked him why, after serving musicians for years without giving them a check, he now gave these musicians a check and he answered that he didn't know. She asked him to sign the check (and statement) and he refused. She told him that unless he signed the check, she would not pay him for his credit card meals served, which meant that he would not be paid the tips for the meals charged to credit cards. He again refused. On the following day he signed the check and was given the amount due to him. Chaumont testified that the musicians can sit at any table at the facility and they are waited on by the waiter at that station. The waiters never give these musicians a check for the food served. On the night in question, they were preparing to close out the register for the evening when they saw that there was one account open; it was Hernandez' check to the musicians. Normally, a waiter would take their order and have it approved by O'Campo rather than opening an account for the order, which Hernandez did on that evening. O'Campo told Chaumont of the situation and she asked Hernandez why he gave them a check; he said that he didn't know, he just did it. She then wrote the facts on the check and asked him to sign it so that she could close out the account, but he refused. She testified that Hernandez may have said that he was refusing to sign, because he knew that she was watching him or was out to get him. On the following day, Hernandez signed the check, and got his tips. There was no discipline involved in this incident.

A note from Hernandez' file that was written by Chaumont, dated December 14, states: ''Today I was told by a co-worker [Nizia Gomez] that Humberto Hernandez was screaming in the kitchen that now he was going to join and support the union because he was tired of the rules of the house.''

The final incident, resulting in Hernandez' discharge, occurred about midnight on Christmas Eve. There was general agreement among the witnesses that the waiters are allowed to drink wine or soft drinks while eating their dinner between shifts, but that they are not allowed to drink liquor. The facility has two bars: a bar in the dining room where patrons can sit and have drinks, and a service bar, located in the kitchen, where the waiters get the drinks for patrons at the tables. Hernandez testified that about midnight on that evening he went to the service bar in the kitchen, poured some Roses' lime juice from a bottle and mixed it with club soda from the soda gun. The service bartender was not there at the time. As he began walking with the drink to leave the kitchen to sit at a table in the dining room, Chaumont approached him, grabbed the drink he had, and screamed that he was drinking an alcoholic drink. He said that it was not alcohol, that he could not drink alcohol, because he was on medication. She threw the glass to the floor, breaking it and told him to go home, which he did. She also told him to call her on Monday, December 28. Chaumont testified that this incident occurred shortly before midnight on Christmas Eve. The restaurant was still open and about 15 of the 70 tables were still occupied. She was by the grill in the kitchen and saw Hernandez walk into the kitchen and go behind the service bar. She then saw him take a bottle of Johnny Walker scotch and pour some scotch from the bottle into a glass. She approached him and asked if it was for himself or a customer and he said that it was for him. He had the bottle of Roses' lime juice in his hand and he poured some into the glass, and with the soda gun added club soda. She asked for the glass, and he gave it to her. She smelled the contents and said, ''You have alcohol.'' He denied it. She said, ''Well, I can smell it'' and poured the contents down the drain of the sink by the service bar. She told him, ''You know that you can't drink while you're in the restaurant.'' She told him to close up for the night and gave him his tips and told him to call on Monday. She wrote down that he was being suspended. She testified that she made no definite decision at that time as to whether he should be fired because she wanted to first discuss the matter with Del Corral. On Saturday, December 26, she told Del Corral (who was in Miami at the time) of this incident and he told her to tell Hernandez, when he called, to set up an appointment to see him when he returned to New York.

Hernandez testified that he called the facility on Monday, December 28, and spoke to O'Campo, who told him that Chaumont was not there, and that he should call again later in the day. When he called later in the day he was again told that Chaumont was not there and that he should call the following day, which he did. At that time he called in the morning and spoke to Hechavarria. He asked her if he was on the schedule to work, and she said that she did not know, but that she would find out. He called again in the afternoon and spoke to O'Campo. Hernandez asked him whether he was on the schedule to work and O'Campo said that he did not know, but that he would find out what was going on. On the following morning, he called and spoke to Hechavarria; he asked her the same question as the prior day and got an identical response. He called again in the evening, spoke to O'Campo, asked the same question as he did the prior day and got an identical answer. He never called again (''I thought I had done enough'') and never received a call from Respondent. Although he was not at home all the time, he has an answering machine, and there was no message from Respondent's representatives. Chaumont testified that she spoke to Hernandez on Monday, December 28, and told him that Del Corral would be returning on the following day and that he should call her to make an appointment to see him. As to why she did not set up the appointment at that time with Hernandez to meet with Del Corral, she testified: ''I didn't know what time on Tuesday Victor was getting in and I didn't think, you know, I needed to set up an appointment right there and then.'' On either Tuesday or Wednesday, Hernandez called at a time when Chaumont was not at the facility and left two telephone numbers at which he could be reached at. She attempted to call him at these numbers, but there was no answer and no answering machine response.

She also asked O'Campo to call him at these telephone numbers, but he also got no answer.

It is alleged that Hechavarria (who did not testify) and O'Campo are supervisors within the meaning of the Act. The facility employs about 45 people and is open 7 days a week. There are about 40 tables, in 6 sections. The evidence establishes that neither Hechavarria nor O'Campo had the authority to hire, transfer, suspend, lay off, promote, discipline, or discharge employees. Only Chaumont had this authority. Chaumont is the general manager of the facility. She testified that she is present at the facility for up to 16 hours a day; sometimes from 9 a.m. to midnight. She sometimes takes off Sundays. Her job ''entails that the restaurant runs the way the owners want the restaurant to run. I have the overall control of the whole restaurant.'' She assigns work and disciplines employees. She testified that Hechavarria is her secretary. Her job involves 2 or 3 hours a day of being a hostess in the dining room, seating the customers, and giving them menus. She did this for the lunch shift, and O'Campo did this for the dinner shift beginning about 5 p.m. The remainder of the day she did typing and other secretarial work and attempted to solicit parties for the facility, for which she received a commission, which is in addition to her salary of $150 a week. In addition, she prepares and sends out the rent bills for the two buildings owned by Respondent, and she receives calls from employees at the facility saying either that they would not be coming in or were coming in late. O'Campo and the chef also accept these calls from employees. She then gives these messages to Chaumont. If an employee wanted a day or days off, he had to speak to Chaumont. Hechavarria's only responsibility as far as the waiters and busboys was ''to oversee that everything was being done correctly.'' She had no responsibility for the kitchen employees. If a job applicant came to the facility, Hechavarria gave them applications. Chaumont testified that when she is not at the facility, Hechavarria and O'Campo are her ''eyes and ears, so they have to supervise the floor and make sure that everything is running well and that all the customers are satisfied.''

When the customers complain to O'Campo or Hechavarria, they discuss the situation with the waiter to attempt to resolve the problem.

Luberta testified that Hechavarria was the assistant manager of the facility. If he needed time off he spoke to her during the day and to O'Campo in the evening. He was initially interviewed by Hechavarria, who referred his employment application to Chaumont, who interviewed and hired him.

Chaumont prepared a memorandum, dated May 19, entitled: ''Ray-Marcela Supervisor-Key Front House Personel.'' It states, inter alia:

1. Maintain proper personnel records.
2. Create effective lines of communication.
3. Instructing sales staff—''Pre-meal meeting.''
4. Record complaints on daily log.
5. Make a list of things you have to check before beginning shift . . . ending shift.
6. Greeting your customers at the door.
7. Don't hide from the customer.
8. Service is poor and slow.
9. I delegate to you to supervise the floor and to let me know the wrong as well as the good the staff is doing.
10. I want ideas.

O'Campo is the maitre d' who works the dinner shift. He earned about $220 a week, plus tips he received from the customers. He testified that his principal job is to show the customers to a table. He does not have the authority to change an employee's station or hours; only Chaumont can do that. When Chaumont is away from the facility, she keeps in touch by telephone. If an employee asked to change his day off he could not make that decision. Only Chaumont had the authority to make that, or other important, decisions. Luberta testified that when he wanted time off, in the absence of Chaumont, he asked Hechavarria or O'Campo. O'Campo assigned waiters to their stations and changed assignments when a waiter did not come to work. On some days when work was slow, O'Campo told him to go home early. The range of dining room employees was from 4 on a very slow shift to 16 on a busy shift. Hernandez testified that he was interviewed by O'Campo, who called him to say that he was hired. O'Campo and Chaumont assigned the waiters to their stations; if a waiter did not appear for work, O'Campo usually assigned someone to cover his station. On one occasion he called the facility and told O'Campo that he wasn't feeling well and couldn't come in; O'Campo said: ''It was fine.'' Ruiz testified that Chaumont interviewed him for employment and assigned him to the tables to cover. In her absence, O'Campo made these assignments. Chaumont testified that O'Campo's duties are to answer the phone, take reservations, seat people, and walk around the floor to be sure that the customers are satisfied. He does not assign waiters or busboys to particular stations; only she does that. Received into evidence was a job description, written by O'Campo, of his job. It states that he receives and seats people, takes care of the floor, arranges the menus, and makes sure that service is good, answers the telephone, and helps the cashier when necessary.

IV. ANALYSIS

Credibility is, obviously, an important part of this case and Chaumont was obviously an important witness for Respondent. Simply stated, she was not a very credible witness. Her testimony sometimes changed, for example her testimony of Respondent's alleged 90-day rule, and sometimes differed with the testimony of other of Respondent's witnesses, such as Revai's testimony regarding Respondent's policy on policing its employees' compliance with the Immigration rules. In addition, her testimony was often simply not believable; for example, she testified that she offered to reinstate Baute as a dishwasher, but he refused the offer. However, Baute was so desperate to work 4 months earlier that he accepted this position; why didn't he accept it on this occasion? She also testified that Luberta confided in her in early August that he was drinking heavily and taking drugs; it seems unlikely that an employee would make such an admission to an employer, especially when it is alleged to have taken place about 10 days after the Union filed an unfair labor practice charge alleging that four fellow employees (including Baute and Ruiz) were fired in violation of the Act. On the other hand, Luberta and Hernandez were not very credible either. Luberta could

not answer a question directly; much of his testimony consisted of explanations that were not asked for. Some of Hernandez' testimony also did not ''ring true.'' For example, in the November 23 incident, he testified that he left about midnight to go to the pharmacy on the corner to get a prescription filled. Hernandez had been employed at the facility for 4 years, working early and late shifts. It is difficult to believe that he was not aware by November 23 that no pharmacy was open at that late hour.

It is alleged that O'Campo and Hechavarria were each supervisors within the meaning of Section 2(11) of the Act. Initially I find that neither one had the authority to hire, fire, discipline, nor take any of the other actions specified in Section 2(11) of the Act. I find Hernandez' testimony that O'Campo interviewed him and subsequently called him to say that he was hired, inadequate to establish that O'Campo had the authority to hire employees. Rather, I find from my observation of Chaumont, that she did not relinquish power easily, certainly not the power to hire or fire. She was at the facility 6 or 7 days a week and liked to maintain control. The issue then is whether O'Campo or Hechavarria responsibly directed the work of the employees and, in that direction, exercised independent judgment, or whether these responsibilities were ''of a routine nature.'' *Maremount Corp*., 239 NLRB 240 (1979). As the court stated in *NLRB v. Security Guard Service*, 384 F.2d 143, 147 (5th Cir. 1967): ''Moreover, the statutory words 'responsibility to direct' are not weak or jejune but import active vigor and potential vitality.'' Hechavarria was principally a secretarial employee who typed Chaumont's letters, sent out rent bills for buildings owned by Respondent and arranged parties or banquets at the facility, for which she received a commission in addition to her $150 a week salary. The only possible evidence that she had some supervisory authority is that she was the hostess at the restaurant for 2 or 3 hours a day during the lunch shift. However, there is no evidence that during this period she responsibly directed the work of the dining room employees. I therefore find that she is not a supervisor or agent of Respondent within the meaning of the Act.

O'Campo is the maitre d' at the facility who was paid $220 a week, plus tips that he received from the patrons. The waiters did not share their tips with him. As stated above, my observation of Chaumont, and the credible evidence here, establishes that she is the ''boss'' at the facility and does not delegate authority generously. Because I have previously found that he does not have the power to hire or fire or effectively recommend such, if O'Campo is a statutory supervisor, it is because he responsibly directs the work of the dining room staff at the facility. I credit the testimony of Ruiz, Hernandez, and Luberta that O'Campo had the authority, and did, change waiters' work stations in Chaumont's absence. However, it appears to me that this did not necessitate the exercise of independent judgment. Unlike a situation in some manufacturing plants where different tasks require different skills that must be matched with the different skills possessed by the employees, I cannot imagine that waiting on a table in one corner of a restaurant requires a different skill than waiting on a table in the opposite corner. Therefore, the assignment of waiters to these tables appears to require no independent judgment of the waiters' skills. The fact that O'Campo also receives calls from employees if they are sick or cannot report for work for any other reason does not indicate that he possesses any supervisory indicia. The chef also receives these calls and often the only response required is ''okay,'' or ''fine'' as O'Campo responded to Hernandez.

The evidence establishes that Chaumont is not always at the facility; rather, she is almost always there. She testified that she sometimes takes off on Sundays (generally, a slow day for restaurants in urban areas), but, on those days, communicates with O'Campo and Hechavarria by phone. The fact that an employee occasionally substitutes for a statutory supervisor is not sufficient to establish supervisory status. *Latas de Aluminio Reynolds*, 276 NLRB 1313 (1985). As Administrative Law Judge William Cates stated in *Mack's Supermarkets*, 288 NLRB 1082 at 1088 (1988): ''to become a statutory supervisor by substituting for one the substituting employee must possess the full extent of the supervisory authority that the substituted-for supervisor possessed.'' O'Campo did not possess this authority. I therefore find that the General Counsel has failed to establish that O'Campo is a supervisor within the meaning of Section 2(11) of the Act.

Counsel for the General Counsel, in her brief, argues that should I find that O'Campo was not a supervisor, I should find that his threats violate the Act as he was acting as an agent for Respondent. In *Sears Roebuck de Puerto Rico*, 284 NLRB 258 (1987), the Board stated:

> The Board has long held that where an employer places an employee in a position where employees could reasonably believe that the employee spoke on behalf of management, the employer has vested the employee with apparent authority to act as the employer's agent, and the employee's actions are attributable to the employer. Whether the specific acts performed were actually authorized or subsequently ratified is not controlling.

Although I have found that O'Campo did not possess the indicia of supervisory authority as set forth in Section 2(11) of the Act, I find that the employees at the facility could reasonably believe that he spoke on behalf of management. He assigned the dining room employees to stations at the facility and interviewed employees for employment, even if he did not make the final determination. In addition, the testimony regarding the 8(a)(1) allegations involving O'Campo supports the finding that he was an agent of Respondent. Luberta testified (and I credit his testimony over O'Campo) that in mid-July he asked O'Campo why Respondent hired so many new waiters and subsequently asked O'Campo why his dinner shifts were taken away from him when employees with less seniority were working better shifts. Regardless of O'Campo's response, these question illustrate what is a reasonable conclusion: as the maitre d' at the facility, whose authority is surpassed only by Chaumont, the employees could reasonably believe that he spoke on behalf of Respondent, and I therefore find that he was its agent, speaking on behalf of Respondent.

Although I did not find Hernandez to be a model of credibility, as described above, I would generally credit his testimony over Chaumont. I therefore find that shortly after the card count, with Del Corral and Chaumont sitting at one of his tables, after Del Corral told him that he had seen the Union's authorization cards and saw that he was not one of

the card signers, Chaumont apologized to him and said that she originally thought that he signed a card. By these statements Respondent created the impression that they were aware of his union activities, which would restrain or coerce an employee in the exercise of his Section 7 rights. I therefore find that Chaumont's statement violated Section 8(a)(1) of the Act.

I also credit Luberta's testimony over that of Chaumont and find that a few days after the union representatives met with Del Corral and Chaumont at the facility, Chaumont asked him ''why we were doing this?'' When he denied knowledge of the subject, she was more specific: ''Why are you trying to bring the Union in?'' She also told him that she knew who the union leaders were and who signed the union cards. I also credit Ruiz' testimony that about this time Chaumont came to one of his tables and asked if he had signed anything for the Union and if he knew anything about the Union. He answered no to both questions. I find that both of these conversations constitute unlawful interrogations, and the creation of the impression that the employees' union activity was under surveillance, in violation of Section 8(a)(1) of the Act.

On about September 18, Del Corral and Chaumont met with the employees in two meetings. Luberta, Hernandez, and Chaumont all agree that at one, or both, of these meetings Del Corral told the employees that he would close the restaurant before he would allow the Union to represent the employees. This is clearly an unlawful threat to close in violation of Section 8(a)(1) of the Act. *NLRB v. Gissel Packing Co*., 395 U.S. 575 (1969). It is further alleged that, at this same meeting, Chaumont promised its employees unspecified benefits if the NLRB charge against Respondent was dropped and the employees abandoned their support for the Union. The only evidence supporting this allegation is Hernandez' testimony that, at this meeting, Chaumont said that Respondent would not negotiate until ''Alex, the Complaint was taken away. It was withdrew from the court.'' I do not credit this testimony. It is highly unlikely that an employer would tell his employees that if they had any questions they should contact the Board agent, whose telephone number he then supplied, and also told them that unless the unfair labor practice charge was withdrawn, he would not negotiate with the Union. In addition, there was no other testimony supporting this allegation. Although Del Corral threatened to close the facility in that same discussion, I credit Chaumont's testimony that it was an unplanned statement. My observation of Chaumont was that her actions were more deliberate. I therefore recommend that this allegation be dismissed. I also discredit Hernandez' testimony that Del Corral said that he knew who the union leader was and pointed to Hernandez. As stated above, it is highly unlikely that an employer would give his employees the telephone number of the Board agent and then make this statement. I believe that this alleged statement can be distinguished from Del Corral's threat to close, and I therefore recommend that this allegation be dismissed.

The remaining testimony involves the 8(a)(1) and (3) allegations regarding Ruiz, Baute, Luberta, and Hernandez. Respondent defends that Baute and Ruiz were terminated because they could not provide the proper immigration papers to establish that they were allowed to work. Additionally, as regards Baute and Ruiz, there is an allegation that by demanding that they produce the Immigration documentation, Respondent, by Chaumont, retaliated against its employees for supporting the Union, in violation of Section 8(a)(1) of the Act. The evidence establishes that within a day to about a week after the card check, Respondent told Baute and Ruiz that they had to provide proof that they were permitted to be and work in this country. Normally, such a request would be not only lawful, but required by law. In the instant matter, however, I find that these requests to Baute and Ruiz were not generated by Respondent's intention to comply with the immigration statutes, but rather to retaliate against their employees for supporting the Union. Chaumont and Revai's testimony about Respondent's policy in this regard is so confusing and contradictory that this conclusion is inescapable. The credible evidence is that prior to July 13, Respondent did not demand documents from its employees to establish that they were permitted to work in this country. It was only after learning that the Union had obtained signed authorization cards from about 25 of its employees did it begin following the immigration laws. Further supporting the General Counsel's case here, one of the two cards that they were shown was signed by Baute. When they realized that he was Alex, who had worked for them for about 4 months, they then, for the first time, demanded to see his immigration papers, apparently, knowing that he had none. Because of the timing of these requests (within a day or a few days of the card check), the fact that Respondent had not checked these documents in the past, and as I discredit the testimony of Chaumont and Revai on this subject, I find that by demanding that Ruiz and Baute produce these documents, Respondent violated Section 8(a)(1) of the Act. *Del Rey Tortilleria, Inc*., 272 NLRB 1106 (1984).

Baute began working for Respondent in about March as a dishwasher. He, apparently, had none of the required documents from the Immigration Department that would have made his employment lawful, and Respondent demanded none. Two months later he was promoted to the position of expediter. During the entire period of his employment with Respondent he was paid in cash, off the books. This situation changed the day after the card check, when Respondent learned that Baute was one of the card signers. On that day, Chaumont demanded to see his social security card and immigration papers. Respondent's defense, for this otherwise obvious case, is that after suddenly discovering who Raimundo Alexis Baute was, Chaumont told Revai that Baute had no immigration papers and was being paid off the books and in cash. Revai's response allegedly was that ''there was no way'' that situation could continue. Considering the numerous 8(a)(1) violations already found evidencing a clear union animus, together with the timing here, this defense can best be described as transparent. As stated above, although employers are legally obligated to be sure that their employees are properly documented, they cannot use the Immigration statutes as a means of discriminating against its employees because of their union activities. That is precisely what Respondent did with Baute. I therefore find that by discharging Baute on about July 15, Respondent violated Section 8(a)(1) and (3) of the Act.

Ruiz began working for Respondent on June 23. Like all the other employees at the facility, he had never been asked for the required immigration documentation, at least until the card check on July 13. Within a day or two after that,

Chaumont asked him if he signed anything for the Union or knew anything about the Union and he said that he didn't. On about the next day, she told him (as well as Baute and Gary Ramirez Cid) that he had to bring her his work documents, and that he could not work at the facility until he did so. As stated above, although the purported reason for this request is admirable, and required by law, I find that the evidence establishes that it was employed as a pretext to fire certain employees who Respondent felt might be union supporters, or as a means of scaring off other employees from signing union cards and putting the Union ''over the top'' with majority status. I found Chaumont's testimony usually incredible, especially her testimony on the subject of the employees' immigration status. As stated above, she testified that she backdated the I-9 forms; in addition, her testimony about the alleged 90-day period was confused and totally incredible. Most importantly, I didn't believe Chaumont and Revai's testimony as it relates to the discharges of Ruiz and Baute. Chaumont testified that about a week before the card check Revai told her that some of the employees files didn't have the proper Immigration documents and this resulted in her speaking to Baute, Gary Ramirez Cid, and Ruiz. I might have believed this testimony if she had demanded these documents from them prior to learning of the union activity. Another infirmity in this testimony is that she testified that Revai said that some of the files lacked the required Immigration documents; in reality all, or almost all, lacked these documents. Apparently, for a few years prior to July 13, Chaumont and Respondent had done nothing to enforce the immigration laws at the facility. It was not until July 13, after learning that the Union had authorization cards from almost a majority of its employees, that it demanded to see these documents, at least from some of its employees. Respondent's bad faith is further established by its haste in these demands. Chaumont told both Baute and Ruiz to get the required documentation, and that they could not work until they showed her the papers. Respondent had not enforced the provisions of these laws for years; what would have been the harm of giving the employees a day or two to acquire the forms? I find this too establishes Respondent's bad faith. I therefore find that the evidence establishes that Respondent demanded Ruiz' immigration papers, and fired him when he could not supply them, in retaliation for the union activity at the facility, and to attempt to stymie that activity, in violation of Section 8(a)(1) and (3) of the Act.

Luberta testified that he began working for Respondent in about March; Respondent's records establish that he began in late May, and I so find. There are two 8(a)(1) and (3) allegations involving Luberta, that his hours and shifts were reduced and never reinstated, and that this change caused him to quit. Respondent submitted Luberta's weekly earnings to the New York State Unemployment Department. Although the payroll dates do not always follow precisely, these records establish that his average weekly earnings until the week ending July 13 was approximately $312. His average weekly earnings from that date through September 25 was $300.[9] This is not a significant difference and may be explained by the fact that he took a 4-day vacation in July after the card count and took off 5 days in early August to take care of his personal problems, or may be the result of the fact that the restaurant business in a large city like New York is slow during the summer. Additionally, as stated above, I have discredited Luberta's testimony that when he asked O'Campo why shifts were taken away from him, O'Campo told him: ''Well, you wanted the Union didn't you?'' Respondent's agents were pretty open in their antiunion statements. However, I find it difficult to believe that O'Campo would make such an obvious statement, especially when it was allegedly made shortly after the Union filed a substantial unfair labor practice charge against Respondent. Finding no substantial difference between Luberta's pre- and post-July 13 earnings, and with other possible explanations for the minor reduction in earnings, I shall recommend that this allegation be dismissed.

It is next alleged that by reducing Luberta's hours and shifts, Respondent caused the termination of Luberta. Another way of stating it is that he was constructively discharged. In *Crystal Princeton Refining Co.*, 222 NLRB 1068 at 1069 (1976), the Board stated:

> There are two elements which must be proven to establish a ''constructive discharge.'' First, the burdens imposed upon the employee must cause, and be intended to cause, a change in his working conditions so difficult or unpleasant as to force him to resign. Second, it must be shown that those burdens were imposed because of the employees' union activities.

I find that neither of these elements have been satisfied by General Counsel. The change in his earnings was almost nonexistent, and may be entirely attributable to other factors. In addition, there is no evidence linking this ''change'' to Luberta's union activities. I therefore recommend that this allegation be dismissed.

There are a number of 8(a)(1) and (3) allegations regarding Hernandez: that in late September his work performance was criticized; that on November 23, he was not permitted to perform a personal errand that employees were regularly allowed to perform and on the following day was accused of selling drugs and was threatened that his job performance would be more closely supervised; on December 12 and 13, withheld payment to him of his tips for the night unless he signed the musician's meal check; and on about December 25, discharged him. Initially, I find that the only credible evidence to establish that Respondent knew of Hernandez' support for the Union was Chaumont's note that on December 14, a fellow employee told her that ''Hernandez was screaming in the kitchen that now he was going to join and support the Union because he was tired of the rules of the house.'' The wording in this note written by Chaumont, that now he was going to ''join and support the Union,'' supports my belief that prior to this incident, Respondent was unaware of his support for the Union. I have previously found that Respondent created the impression of surveillance, in violation of Section 8(a)(1) of the Act when, after the card count, Del Corral told him that he had seen the authorization cards and that he, Hernandez, was not one of the card signers;

[9] Because of the nature of Respondent's figures, these figures are not precise. In arriving at the earlier figure, I used his total earnings through July 13 ($2312) and divided this number by the number of weeks he worked during this period (7.4). For the latter period, his earnings from July 14 through September 25 was $3129, was divided by the number of weeks during this period (10.4).

Chaumont apologized to him, saying that she thought that he had signed a card. Therefore, on day 1 of this situation, Respondent stated that they believed that he did not sign a union card, and there is no credible evidence that until December 14, Respondent thought differently. Hernandez testified to other situations which I find to be insignificant or incredible. He testified that shortly after the card count, he asked O'Campo why the facility had hired so many new waiters, and O'Campo said that in case the employees went on strike, Respondent was going to fire the striking employees. This statement does not evidence that Respondent then believed that Hernandez was a union supporter. In addition, I do not credit Hernandez' testimony about two statements allegedly made to him, one by Chaumont and the other by Del Corral. He testified that about the end of July, when he asked Chaumont why some lunch shifts had been taken away from him, she said that it ''was to give the schedule to the new people . . . because of the Union.'' I find it improbable that a savvy, tough business person such as Chaumont would make such an obvious admission to an employee, and therefore discredit this testimony. I have also discredited his testimony that at the September 18 meeting that Del Corral and Chaumont had with the employees, Del Corral said that he knew who the union leader was and pointed to Hernandez.

The initial allegation that in late September Respondent unlawfully criticized his work performance is supported only by his testimony that an unidentified person once told him that his table setting was not proper because the knife was not properly set. Needless to say, I would recommend that this allegation be dismissed. The next allegation involves the pharmacy incident on the night of November 23. As stated above, I do not find credible Hernandez' testimony about this incident principally because having worked at the facility for 4 years, he would have been aware whether there was a pharmacy on the corner that was open at midnight. That he was outside at midnight would warrant Chaumont being suspicious of his whereabouts. Whether she accused him of selling drugs, or that she would be watching him more carefully, I need not find because such statements appear to have been warranted considering his activities on that evening, as well as the fact that there was no credible evidence that Respondent was aware of his union activities at that time. I therefore recommend that the allegations regarding the events of November 23 and 24 be dismissed.

The next allegation involves the incident on about December 13, when Hernandez gave a check to a musician, in violation of Respondent's practice and, as a result, did not receive his tips until the following day. I would also recommend that this allegation be dismissed. It was not until a day or two later that Chaumont was told that he said that he was going to support and join the Union. In addition, giving a check to a musician was in contravention of Respondent's practices and did complicate Chaumont's procedure of closing out the computer for the evening. Finally, Hernandez was told that he would get his tips if he signed a statement that Chaumont had written on the check in question; this statement appeared to truthfully recite the facts of the incident, but he refused to sign it until the following day, when he received his tips. Respondent appears to have done nothing wrong, and I therefore recommend the dismissal of this allegation.

The final allegation is that Respondent unlawfully fired Hernandez on about December 25. This involves the situation on Christmas Eve when Chaumont accused Hernandez of drinking liquor, admittedly, against the Respondent's rules, when Hernandez claims he was drinking Roses' lime juice and club soda. The ultimate question to be decided is whether this was a spontaneous act by a supervisor who the evidence establishes is a difficult and demanding boss, or whether it was a calculated effort by her to fire Hernandez who, she had learned 10 days earlier, had decided to join and support the Union. This requires that I find whether his drink contained Johnny Walker Scotch or whether it was simply Roses' lime juice and club soda. As if that credibility determination were not difficult enough, it involves two witnesses whom I found to be not generally credible. In addition, there is an aspect of each one's testimony on this incident that I find incredible. Hernandez testified that, when Chaumont saw him with the drink, she threw the glass and contents to the floor, breaking the glass. Chaumont's testimony on this incident is more credible; taking the drink and pouring it down the sink did not require a major cleanup in the kitchen. On the other hand, I found Chaumont's testimony about her December 28 telephone conversation with Hernandez to be suspect. She knew that Del Corral was returning the next day and could easily have arranged an appointment for Hernandez on that day or the next day, but did not do so. With some difficulty, I credit Hernandez' testimony about this incident. Although I found that his actions on the night of November 23 were suspect and deserved the reaction he received from Chaumont, that incident may have taught him to be more prudent and less likely to violate Respondent's rules in such an obvious manner. Additionally, Chaumont had learned 10 days earlier that Hernandez said that he was going to join the Union. Considering Respondent's animus in July in response to its employees' union activities, firing Hernandez for a nonexistent violation would not have been unique for it. I therefor credit Hernandez' testimony that he was drinking Roses' Lime Juice and Club Soda when Chaumont stopped him, and that she used this incident as a pretext to fire him, in violation of Section 8(a)(1) and (3) of the Act.

CONCLUSIONS OF LAW

1. The Respondent has been engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

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

3. The Respondent violated Section 8(a)(1) by engaging in the following activity:

(a) Creating the impression that its employees' union activities were under surveillance by the Respondent.

(b) Interrogating its employees regarding their membership in, or support for, the Union.

(c) Threatening to close the facility if the employees chose the Union to represent them.

(d) Threatening to fire employees who engaged in the protected concerted conduct of engaging in a strike.

(e) Threatening employees that they must produce documentation that they are legally in the United States and are entitled to work.

4. The Respondent violated Section 8(a)(1) and (3) of the Act by terminating the employment of Victor Ramirez Ruiz, Raimundo Alexis Baute, and Humberto Hernandez.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. Having found that Respondent unlawfully terminated Ruiz, Baute, and Hernandez, I shall recommend that Respondent be ordered to offer each of them reinstatement to their former positions of employment or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and to expunge from its files any reference to these terminations. I shall also recommend that Repondent be ordered to make them whole for any loss they suffered as a result of the discrimination against them. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

[Recommended Order omitted from publication.]