New Process Company *and* United Food and Commercial Workers International Union, Local 1, AFL–CIO–CLC. Cases 6–CA–13933, 6–CA–14403, 6–CA–14578, 6–CA–14597, 6–CA–14697, 6–CA–15995, and 6–RC–8922

July 29, 1988

DECISION, ORDER, AND DIRECTION OF SECOND ELECTION

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN AND BABSON

On February 6, 1984, Administrative Law Judge Marvin Roth issued the attached decision.[1] The Respondent filed exceptions and a supporting brief, the Charging Party filed cross-exceptions and a supporting brief, and the General Counsel filed a brief in opposition to the Respondent's exceptions.[2]

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,[3] and conclusions only to the extent consistent with this Decision and Order.

I.

This case concerns the conduct of the Respondent and the Charging Party during a lengthy union organizing campaign that culminated in an election that the Charging Party lost by a vote of 1049 to 231.[4] In his decision, the judge found that the Respondent, New Process Company (NPC), committed a number of violations of Section 8(a)(1), (3), and (4) of the National Labor Relations Act, and he sustained several of the Charging Party's objections to the election and directed that a new election be held. The judge also dismissed a number of alleged violations and overruled many of the Charging Party's election objections. NPC excepts to all the violations that were found and all the objections that were sustained. The Charging Party, the United Food and Commercial Workers International Union Local 1 (UFCW or the Union), excepts to the judge's denial of the UFCW's request for reimbursement of its organizational expenses and to the findings on which the denial was predicated. No party excepts to the judge's disposition of any of the alleged violations that he dismissed or any of the election objections that he overruled.

On the basis of NPC's exceptions, we reverse, for reasons stated below, the judge's conclusions that NPC committed unfair labor practices by not granting nonemployee union organizers access to its property. We adopt the judge's conclusion that NPC violated Section 8(a)(3) and (1) by refusing to reinstate former employees Freeda Carr and Nancy Race.[5] We also adopt the judge's conclusions that NPC violated Section 8(a)(1), (3), and in some instances (4), by refusing to recommend for rehire and refusing to rehire the six former employees who are the subject of Case 6–CA–15995. Additionally, except in the few instances discussed below, we adopt the judge's disposition of the remaining violations and objections to which NPC excepted,[6] and we adopt the judge's recommendation that the election be set aside and a new election ordered.[7] We have not considered, and ex-

[1] On February 21, 1984, Judge Roth issued an errata correcting par. 2(h) of the recommended Order and correcting the decision number.

[2] The Respondent has requested oral argument. In support of its request, the Respondent also submitted a supplemental letter and a portion of a union newsletter. The request for oral argument is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

[3] The Respondent in its brief initially states that it does not take issue with the judge's credibility findings. Later, however, it challenges the judge's credibility findings concerning certain testimony of the Respondent's assistant vice president Stark, Supervisor Gern, and employee Hockenberry. 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.

[4] There were also 81 challenged ballots and 3 void ballots.

[5] As appropriate affirmative relief may be ordered on the basis of the 8(a)(3) and (1) violations, we find it unnecessary to pass on the judge's conclusion that the refusal to reinstate Carr and Race also violated Sec. 8(a)(4).

[6] In adopting the judge's conclusion that Supervisor Nick Pollock unlawfully interrogated Alan LaCava and other employees, we reject NPC's contention that the judge's resolution of this issue is contrary to our decision in *Rossmore House*, 269 NLRB 1176 (1984). Unlike that case, it was not shown here that the employees questioned by Pollock other than LaCava openly supported the Union. Moreover, unlike *Rossmore House*, Pollock's questions concerned the employees' union activities rather than union sentiments.

[7] The judge held that the critical period began on the date of the filing of the initial election petition, October 27, 1980, although this petition was withdrawn on December 22, 1980, a second election petition was filed on January 2, 1981, and the election was held on June 9, 1981. NPC excepts to the critical period found by the judge. The judge, however, found no unfair labor practices or other objectionable conduct to have occurred between October 27, 1980, and January 2, 1981, except for NPC's refusal to rehire Barbara Morgan, which occurred both before and after January 2, 1981. Thus, we need not consider whether the judge was correct in determining that the critical period began on the date that the first petition was filed, rather than the date that the second petition was filed.

Although we reverse some of the judge's findings of unfair labor practices and other objectionable conduct that were alleged to have occurred during the critical period, we find that the allegations of objectionable conduct that we sustain warrant setting aside the election, even assuming that the critical period did not begin until the Union filed its second election petition. These instances of objectionable conduct are as follows: (1) Supervisor Mary Bloom's warning to Warren employees Sheila Mack and Dawn Dickson for copying the names of employees from timecards in the timecard rack; (2) Supervisor Kerry Gern's written warning to Irvine employee Joan Hockenberry for similar conduct; (3) Gern's warning to Hockenberry to stop "union arguing" after she answered another employee's questions about the Union while continuing to do her work; (4) NPC's informing Carr that she was denied access to NPC's property

Continued

press no views concerning, the judge's findings and conclusions about which no party filed exceptions. See Section 102.46(b) and (h) of the Board's Rules and Regulations, 29 CFR § 102.46(b) and (h).

II.

The General Counsel's allegation that NPC violated Section 8(a)(1) by refusing to allow nonemployee union organizers access to NPC's property concerns only NPC's Irvine Distribution Center facility (Irvine), at which approximately 538 bargaining unit members were employed. No similar allegation was made concerning NPC's Warren facility, 7 miles from Irvine, at which approximately 917 unit members were employed.[8] Irvine is located on a large tract of land owned by NPC adjacent to U.S. Highway 62 in a semirural area of northwestern Pennsylvania. The access roads connecting the Irvine facility to the highway are on NPC property. On October 6, 1980, two union organizers and three former NPC employees attempted to distribute union literature to employees along a sidewalk that leads from the main building exit to a parking lot at Irvine. NPC Vice President John Carter told one of the organizers that they were on private property and requested them to leave, which they did. The next day the same group plus an additional organizer returned and were ordered to leave by a Pennsylvania state trooper, who was present at NPC's request. The three organizers left but returned shortly and distributed leaflets to employees leaving the plant. At the request of NPC, the trooper charged the organizers with criminal trespass. The organizers did not return thereafter. Subsequently, on February 26, 1981, during the pendency of the election petition, the UFCW wrote Carter requesting that NPC allow the Union to handbill the employees at Irvine or provide the Union a list of the names and addresses of those employees. NPC did not reply to the request.

After conducting an extensive review of the Union's organizing efforts, the judge concluded that, despite conscientious efforts, the Union did not have a viable means of communication with Irvine employees other than entering Irvine premises for the purposes of distributing literature and talking to the employees. He therefore concluded that NPC violated Section 8(a)(1) by excluding nonemployee union organizers from its premises. We do not agree.

Subsequent to the judge's decision, the Board issued its decision in *Fairmont Hotel*, 282 NLRB 139 (1986). In *Fairmont*, the Board reviewed *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956), and its progeny, and determined that in cases involving conflicts between Section 7 rights and property rights, the Board's task is "first to weigh the relative strength of each party's claim." The Board found:

> If the property owner's claim is a strong one, while the Section 7 right at issue is clearly a less compelling one, the property right will prevail. If the property claim is a tenuous one, and the Section 7 right is clearly more compelling, then the Section 7 right will prevail. Only in those cases where the respective claims are relatively equal in strength will effective alternative means of communication become determinative. [*Fairmont Hotel*, supra at 142.]

The Board also set forth some of the factors that may affect the relative strength or weakness of an asserted property right or Section 7 right. Applying those factors here, we find that NPC has a strong property right at Irvine. NPC is engaged in the mail order retail sale of merchandise, primarily clothing. Irvine is essentially a warehouse operation engaged in the storage, inspection, packing, and shipping of merchandise. NPC has retail outlets for direct sales at three other locations but not at Irvine. As Irvine is set back from the highway on a large tract of land devoted exclusively to NPC's business and to which retail customers are not invited, NPC has a strong property right at Irvine.

We also find that the Section 7 right at issue is quite strong. The right of workers to organize freely for the purpose of collective bargaining is a very strong Section 7 right, one found by the Supreme Court to be "at the very core of the purpose for which the NLRB was enacted."[9] Here, the union organizers sought access to the plant exterior at Irvine, a facility of NPC, the targeted employer,

unless she first received permission to enter; and (5) NPC's refusal to rehire Barbara Morgan. Although Morgan first applied for reemployment in December 1980, she went to NPC and updated her application a week or two later, and she thereafter contacted NPC three or four times about being rehired. We thus conclude that her efforts to obtain reemployment continued into the period between the Union's filing of its second election petition on January 2, 1981, and the date of the election, June 9, 1981.

We additionally adopt the judge's conclusion that issuance of a bargaining order is not warranted. The judge's discussion of the bargaining order issue, however, has been superceded by our decision in *Gourmet Foods*, 270 NLRB 578 (1984).

[8] Union organizers and prounion employees distributed literature to employees on the sidewalk directly in front of the Warren facility, which was located on a downtown street. Sixty-three percent of the bargaining unit members were employed at the Warren facility.

[9] *Sears, Roebuck & Co. v. San Diego County District Council of Carpenters*, 436 U.S. 180, 206 fn. 42 (1978); see *G. W. Gladders Towing Co.*, 287 NLRB 186 (1987); *SCNO Barge Lines*, 287 NLRB 169 (1987); *Emery Realty*, 286 NLRB 372 (1987).

in furtherance of this paramount right of employees to organize.[10]

We thus find that both the property and Section 7 rights at issue are strong and, thus, relatively equal. Accordingly, we deem it necessary to consider whether reasonable alternative means by which the Union could have communicated its message were available.[11]

In considering this question, it is instructive to review the Supreme Court's decision in *Babcock & Wilcox*, supra, the seminal case involving the accommodation of property rights and Section 7 rights. In *Babcock & Wilcox*, union organizers sought access to privately owned parking lots at an industrial site so that they could organize the employees. As both rights claimed were important ones, the Court carefully reviewed the facts before it to ascertain if there were some way that the Section 7 right in issue could be effectuated without requiring trespassory access. The Court concluded that access to the employees could be obtained in the adjacent town or at the employees' homes. Therefore, access to Babcock & Wilcox's private property was denied. The Court specifically acknowledged that in rare circumstances the accommodation principle may require trespassory organizational activities, citing *NLRB v. Lake Superior Lumber Corp.*,[12] a case invalidating restrictions placed on access to employees living and working at an isolated lumber camp. In *Sears, Roebuck & Co. v. San Diego County District Council of Carpenters*,[13] the Court again acknowledged the existence of such rare circumstances, citing *Lake Superior Lumber*, and also *NLRB v. S & H Grossinger's*,[14] a decision ordering union access to employees living and working on the premises of a resort hotel. Therefore, had *Babcock & Wilcox* involved a company town, for example, where all or a majority of the employees in question both lived and worked, the Court might well have struck the balance differently. But, clearly, on the facts before it in *Babcock & Wilcox*, the Court implicitly found the obvious additional burden or cost of organizing in the town, on the street, and at the employees' homes was not sufficient to overcome the private character of the property right at stake.

On the record before us here, the General Counsel has not demonstrated the existence of "unique obstacles to nontrespassory methods of communication with the employees"[15] such as were present in *Lake Superior Lumber*, supra, or *Grossinger's*, supra. Thus, the record shows that the UFCW conducted an extensive organizing campaign among NPC's employees. It established an internal organizing committee at Irvine and Warren that numbered between 75 and 80 employees, although the size of the committee varied over the course of the campaign. A number of the committee members, including Freeda Carr, Kay Davis, Donna Fehlman, Joan Hockenberry, and Alan LaCava, distributed union literature to employees at Irvine in front of the building between shifts or in the cafeteria at lunchtime. Union representatives made about 1000 house calls at the homes of employees. The Union also compiled a list of the names and addresses of 800 employees and sent between 12 and 15 mailings to employees. The Union held regular weekly meetings in a motel meeting room and held a large meeting in a school auditorium shortly before the election. The Union for a time broadcast commercials on a Warren radio station and later did the same on a radio station in Jamestown, New York, 24 miles from Warren.

As detailed by the judge in section IV,A,8 of his decision, the UFCW did encounter obstacles in its organizing efforts. There was a 15- to 20-percent annual turnover rate among NPC's employees, some of the employees' homes were widely scattered over a rural area, the Warren newspaper declined to run UFCW ads, the Warren radio station discontinued UFCW ads, and the UFCW had difficulties arranging for a large meeting hall. Nevertheless, despite these impediments, the Union was able to communicate with the employees through the various means described above. Although the judge also emphasized NPC's unlawful interference with employee organizing activity as impeding organizational efforts, we note that some prounion employees nevertheless passed out literature in the cafeteria and in front of the building at Irvine, and a larger number wore union T-shirts or other union paraphernalia to work. Additionally, the great majority of violations committed by NPC occurred prior to the start of the lengthy critical period, which the judge found to extend from October 27, 1980, to the election on June 9, 1981. Moreover, as detailed below, some of the actions that the judge determined to be unlawful interference we do not find to be such.

Thus, we find that there were channels of communication available to the Union through which, with reasonable efforts, it could reach its intended

[10] *Fairmont Hotel*, supra at fn. 18.

[11] In accordance with his concurring opinion in *Fairmont Hotel*, Chairman Stephens finds it unnecessary to engage in any balancing of rights before reaching the question of alternative means. He agrees, however, with his colleagues' analysis of the availability of reasonable alternative means of communication and he agrees that the denial of access at issue here did not violate the Act.

[12] 167 F.2d 147 (6th Cir. 1948).

[13] Supra, 436 U.S. at 205 fn. 41.

[14] 372 F.2d 26 (2d Cir. 1967), enfg. as modified 156 NLRB 233 (1965).

[15] *Sears*, 436 U.S. at 205 fn. 41.

audience with its message. The Union emphasizes that it was not, in many cases, able to have its message conveyed personally by its professional organizers, as it would have preferred, and instead had to rely on prounion employees, leaflets, mailings, and radio commercials, as well as home visits by organizers, to spread its message. As the Section 7 right and property right at issue here are relatively equal, however, the Union possessed no right to have its organizers come onto NPC premises in person to deliver its message as long as there were other available channels of communication through which, with reasonable efforts, it could reach its intended audience.

The judge, in section IV,B,6 of his decision, also found NPC's failure to grant access in response to the Union's request of May 7, 1981, constituted a violation on the basis of the Board's decision in *Montgomery Ward & Co.*, 145 NLRB 846 (1964). That decision held that a nonunion employer, which was engaged in retail sales, and thereby could lawfully maintain a privileged broad no-solicitation rule as to sales areas, violated Section 8(a)(1) by imposing an unlawfully broad rule banning union solicitation in nonworking areas during nonworking time and at the same time denying the union an opportunity to enter the employer's premises to respond to antiunion speeches the employer made to its employees. *Montgomery Ward* is not applicable here, however, because unlike the employer in that case, NPC did not generally prohibit employees from engaging in union solicitation in nonworking areas during nonworking times. Although we adopt the judge's finding of a violation concerning NPC's no-solicitation policy, this violation is based on the discriminatory nature of that policy, rather than overbreadth. Accordingly, union access to NPC's premises was not mandated under *Montgomery Ward.*

III.

We also reverse the judge's decision on certain other matters. A statement made by NPC representatives to assembled groups of employees during the week prior to the election was found by the judge in section IV,B,5,a of his decision to imply that if the employees decided in favor of union representation, NPC's policy of allowing employees to have direct access to management would end. Assuming arguendo that this statement implied what the judge found it to imply, on the basis of our decision in *Tri-Cast*, 274 NLRB 377 (1985), we nevertheless dismiss the allegation that this statement constituted a threat in violation of Section 8(a)(1). In *Tri-Cast*, which addressed a similar but more explicit employer statement of the consequences of unionization, we held there is no threat in a statement that explains to employees that, when they select a union to represent them, the relationship between the employees and the employer will not be as it was before. That holding is dispositive of the alleged violation here.

Other statements made by NPC spokesmen to assembled groups of employees during the first week of June 1981 were found by the judge to constitute threats. Statements were made to the effect that the Union was likely to seek a contract provision requiring union membership as a condition of employment, and, under such a provision, if employees for any reason then lost their union membership, they would also lose their jobs. In section IV,B,5,a of his decision, the judge found that these statements constituted threats of loss of job security. We disagree. The statements were an inaccurate account of the law, but they did not amount to a threat that the employees would be fired if they voted for the Union or that unionization would result in the employees' losing their jobs. Moreover, the possibility of job loss was predicated on the Union's first terminating the employees' union membership, an event beyond the control of NPC. In *Metropolitan Life Insurance Co.*, 266 NLRB 507 (1983), the Board held unobjectionable an employer's election campaign statement that employees who continued to work during a strike could be fined by the union, even if they were not members of the union. That the statement constituted a misrepresentation of the law did not warrant finding it to be objectionable conduct. The Board did not discuss whether the statement constituted an unlawful threat, but in finding the statement unobjectionable the Board implicitly rejected such a view. We find similarly that NPC's statements here, although a misrepresentation of the law, did not constitute objectionable conduct or an unlawful threat. We therefore dismiss the allegation that they violated Section 8(a)(1). See *John W. Galbreath & Co.*, 288 NLRB 876 (1988). In section IV,B,5,b of his decision, the judge similarly found statements that a union member could be fined for writing an antiunion letter and that an employee could be fined or expelled from the Union for filing a decertification petition to constitute threats of loss of job security. Again, we reverse the judge and find these statements not be threats but, as most, misrepresentations, and, therefore, not objectionable conduct under *Metropolitan Life.*[16]

[16] In agreement with the judge, Member Johansen would find violative of Sec. 8(a)(1) NPC's election campaign statements that the Union would be likely to seek a contract provision requiring union membership and if employees for any reason then were expelled from the Union, they

Continued

IV.

In affirming the judge's remaining findings of violations or objectionable conduct, we make certain modifications to the judge's rationale, as follows. In adopting the judge's conclusion in section IV,A,4 of his decision that NPC violated Section 8(a)(1) by increasing the amount of supervision on the night shift at its Warren facility, we note the NPC's explanation for the increase in supervision is unconvincing.[17] We find particularly unpersuasive the testimony of NPC Assistant Vice President George Stark that starting in the summer of 1980 the night-shift supervisors at Warren, who were all experienced supervisors, began asking Stark numerous questions about "how they were to do this and how they were to do that," which necessitated assigning day-shift supervisors to assist and advise the night-shift supervisors. Stark failed to explain why the experienced night supervisors' sudden need for assistance happened to coincide with the onset of the union organizing effort.

In adopting the conclusion in section IV,A,5,f of the judge's decision that NPC violated Section 8(a)(1) and (3) by issuing to employee Vivian Newton a written warning after Newton requested employee Chris Nuhfer to show her Nuhfer's union authorization card while at work, we note that at the time Newton made the request she was not neglecting her work, as her work tasks were completed at that point. Indeed, the phrase "rather than doing her work" was deleted from her warning in order to reflect this fact. Moreover, the language of the warning did not assert Newton was impeding Nuhfer's work. Rather, the conduct for which Newton received a warning was characterized as "conducting union organizing business while on Company time." We, therefore, adopt the judge's finding that the issuance of the warning constituted an unfair labor practice. See *Gemco*, 271 NLRB 1190 (1984) (prohibition of solicitation on "company time" found unlawful).[18]

As we have concluded that NPC has committed certain unfair labor practices, we issue the following remedial order.

ORDER

The National Labor Relations Board orders that the Respondent, New Process Company, Warren, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discouraging membership in United Food and Commercial Workers International Union, Local 1, AFL–CIO–CLC, or any other labor organization, by discriminatorily refusing to reinstate, recommend for rehire, or rehire employees; by discriminatorily transferring employees; disciplining them because of their union activities; segregating them at work; conspicuously or closely observing them or scrutinizing them at work; prohibiting them from talking at work; or in any other manner discriminating against employees in regard to their hire or tenure of employment or any term or condition of employment.

(b) Refusing to reinstate, recommend for rehire, or rehire employees, or otherwise discriminating against them because they give testimony or are subpoenaed to testify under the National Labor Relations Act.

---

would lose their jobs. Coupled with these statements, NPC enumerated all the offenses listed in the Union's constitution for which a member could be expelled. To be lawful, predictions of the consequences of unionization "must be carefully phrased on the basis of objective fact to convey an employer's belief as to the demonstrably probable consequences beyond his control." *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969). Although NPC's prediction that the Union would seek a contractual union-shop provision may have been objectively probable and beyond NPC's control, NPC's further statement that if employees for any reason were expelled from the Union they would lose their job was not. Contracts cannot lawfully provide that expulsion from a union for any reason requires termination of employment; employment may be conditioned only on payment of union dues and fees. *NLRB v. General Motors Corp.*, 373 U.S. 734 (1963). Thus, NPC's statement about employee job loss was premised on a prediction that NPC and the Union would agree to an illegal contract clause and that NPC would discharge employees pursuant to this clause, a prediction of events neither objectively probable nor beyond NPC's control. As the judge noted, the statements here are unlike the employer misstatement of law at issue in *Daniel Construction Co.*, 257 NLRB 1276 (1981), which was found not to violate Sec. 8(a)(1) because it contained "no express threat that the employer by its own action would impose dire consequences, such as discharge on the employees and no implicit threat to the employees' rights." There, in response to an employee question, the employer's manager stated that the employee would have to join the union if the union won the election. Nothing was said regarding the consequences if the employee failed to join the union. In the present case, by contrast, NPC specifically raised the prospect of discharge, a "dire consequence," if employees lost union membership. Cf. *SMI of Worcester*, 271 NLRB 1508, 1524 (1984) (statement that, if requested by union, employer would discharge employee who refused to sign union membership application found to violate Sec. 8(a)(1)). Similarly, the statements at issue here are unlike the employer misstatement of law found unobjectionable in *Metropolitan Life Insurance Co.*, 266 NLRB 507 (1983), as the statement there merely threatened nonunion members with union fines, not the "dire consequence" of discharge, if they worked during a strike; moreover, the threatened union fines there were beyond the employer's control. Accordingly, Member Johansen would find NPC's statement that employees would lose their jobs if expelled from the Union to violate Sec. 8(a)(1).

[17] In adopting the judge's decision on this issue, we do not rely on his statement that, in increasing supervision, NPC used eight or nine additional supervisors to cover the night shift. As the judge noted in the paragraph that preceded the one containing this statement, these additional supervisors covered the night shift on a rotating basis. Normally only one additional supervisor at a time served on the night shift.

[18] In addition, in adopting the judge's conclusion in sec. IV,A,5,c of his decision that NPC's policy concerning display of prounion and antiunion signs on "heisters," or forklift trucks, was an unfair labor practice, we rely solely on NPC's discriminatory implementation of this policy. We do not adopt, in the context of this case, the judge's statements that NPC could not prohibit the signs simply because they were taped onto NPC property and that prohibiting the display of both prounion and antiunion signs violated the Act.

(c) Interrogating employees concerning their union activities or those of their fellow employees.

(d) Threatening employees with lack of equal or fair opportunity for advancement or benefit, or other more onerous terms and conditions of employment, if they designate or select the Union or any other labor organization as their bargaining representative.

(e) Threatening employees with management disapproval or other reprisal because of their union activities.

(f) Wiping dirt or grease on union T-shirts or other union insignia worn by employees.

(g) Threatening to destroy union literature or paraphernalia.

(h) Confiscating union literature in nonworking areas.

(i) Maintaining or enforcing any policy which prohibits employees from union solicitation or talking about the Union or union business at times when the employees are properly not engaged in performing their work tasks, or which prohibits such activity while permitting other forms of solicitation or conversation.

(j) Prohibiting displays of union signs while permitting display of antiunion signs.

(k) Denying employees access to its bulletin boards to post prounion or related material, or removing such material from its bulletin boards, while permitting posting of other nonwork literature.

(l) Engaging in surveillance of union activities, or increasing supervision in order to engage in surveillance of employees because of their union activities.

(m) Prohibiting off-duty employees, including employees who have been discriminatorily denied reinstatement, from entering or remaining on outside nonwork areas of the Respondent's premises for the purpose of engaging in union solicitation or distribution of union literature.

(n) Prohibiting employees from copying names from timecard racks for lawful organizational purposes at times when the employees are properly not engaged in performing their work tasks, or disciplining employees because they engage in such activity.

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

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

(a) Offer Freeda Carr and Nancy Race immediate and 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, and make them 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 judge's decision.

(b) Offer Pamela Damon, Rhonda Gross, Barbara Morgan, Debra Nuhfer, Floyd Monticue, and Rebecca Stuart Walton immediate and full employment, in a nondiscriminatory manner, to positions for which they are qualified, without prejudice to their seniority or other rights and privileges to which they would be entitled absent the discrimination against them, and make them whole for losses they suffered by reason of the discrimination against them, in the manner and to the extent set forth in the remedy section of the judge's decision.

(c) Remove from its files the negative or qualified reemployment recommendations for Freeda Carr, Nancy Race, Pamela Damon, Rhonda Gross, Barbara Morgan, Debra Nuhfer, Floyd Monticue, and Rebecca Stuart Walton, and notify each of them in writing that this has been done and that such recommendations will not be used as a basis for further personnel actions against them.

(d) Revoke, and expunge from its files, the written warnings which were given to Vivian Newton in October 1980, and to Joan Hockenberry in February 1981, and any references to the oral warnings which were given in January 1981, to Hockenberry, Sheila Mack, and Dawn Dickson, and notify each of them in writing that this has been done and that such warnings will not be used as a basis for future personnel actions against them.

(e) Preserve and, on 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.

(f) Post at its plants in Warren and Irvine, Pennsylvania, copies of the attached notice marked "Appendix."[19] Copies of the notice, on forms provided by the Regional Director for Region 6, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt 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 Re-

[19] 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."

spondent to ensure that the notices are not altered, defaced, or covered by any other material.

[Direction of Second Election omitted from publication.]

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 discourage membership in United Food and Commercial Workers International Union, Local 1, AFL–CIO–CLC, or any other labor organization, by discriminatorily refusing to reinstate, recommend for rehire, or rehire you, by discriminatorily transferring you, disciplining you because of your union activities, segregating you at work, conspicuously or closely observing or scrutinizing you at work, prohibiting you from talking at work, or in any other manner discriminating against you in regard to your hire or tenure of employment or any term or condition of employment.

WE WILL NOT refuse to reinstate, recommend for rehire, or rehire you, or otherwise discriminate against you because you give testimony or are subpoenaed to testify under the National Labor Relations Act.

WE WILL NOT interrogate you concerning your union activities or those of your fellow employees.

WE WILL NOT threaten you with lack of equal or fair opportunity for advancement or benefit or other more onerous terms and conditions of employment if you select Local 1 or any other labor organization as your bargaining representative.

WE WILL NOT threaten you with management disapproval or other reprisal because of your union activities.

WE WILL NOT wipe dirt or grease on union T-shirts or other union insignia worn by employees.

WE WILL NOT threaten to destroy union literature or paraphernalia.

WE WILL NOT confiscate union literature in nonworking areas.

WE WILL NOT maintain or enforce any policy which prohibits you from union solicitation or talking about the Union or union business at times when you are properly not engaged in performing your work tasks, or which prohibits such activity while permitting other forms of solicitation or conversation.

WE WILL NOT prohibit display of union signs while permitting display of antiunion signs.

WE WILL NOT deny you access to our bulletin boards to post prounion or related material, or remove such material from our bulletin boards, while permitting posting of other nonwork literature.

WE WILL NOT engage in surveillance of union activities or increase supervision in order to engage in surveillance of you because of your union activities.

WE WILL NOT prohibit off-duty employees, including employees who have been discriminatorily denied reinstatement, from entering or remaining on outside nonworking areas of our premises for the purpose of engaging in union solicitation or distribution of union literature.

WE WILL NOT prohibit you from copying names from timecard racks for lawful organizational purposes at times when you are properly not engaged in performing your work tasks, or discipline you because you engage in such activity.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of your right to engage in union or concerted activities, or to refrain therefrom.

WE WILL offer Freeda Carr and Nancy Race immediate and 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, and WE WILL make them whole for any loss of earnings and other benefits resulting from the discrimination against them, plus interest.

WE WILL offer Pamela Damon, Rhonda Gross, Barbara Morgan, Debra Nuhfer, Floyd Monticue, and Rebecca Stuart Walton immediate and full employment, in a nondiscriminatory manner, to positions for which they are qualified, without prejudice to their seniority or other rights and privileges to which they would be entitled absent the discrimination against them, and make them whole for losses they suffered by reason of the discrimination against them, with interest.

WE WILL remove from our files the negative or qualified reemployment recommendations for Freeda Carr, Nancy Race, Pamela Damon, Rhonda

Gross, Barbara Morgan, Debra Nuhfer, Floyd Monticue, and Rebecca Stuart Walton, and notify each of them in writing that this had been done and that such recommendations will not be used as a basis for future personnel actions against them.

WE WILL revoke, and expunge from our files, the written warnings which were given to Vivian Newton in October 1980, and to Joan Hockenberry in February 1981, and any references to the oral warnings which were given in January 1981, to Joan Hockenberry, Shelia Mack, and Dawn Dickson, and notify each of them in writing that this has been done and that such warnings will not be used as a basis for future personnel actions against them.

NEW PROCESS COMPANY

Charles H. Saul, Thomas R. Davies, and *Stanley R. Zawatski, Esqs.*, for the General Counsel.

Joseph D. Luksch and *Michael Zeller, Esqs.*, of New York, New York, for the Respondent Employer.

Nicholas R. Santangelo and *Gene M. J. Szuflita, Esqs.*, of New York, New York, for the Charging Party Petitioner.

DECISION

STATEMENT OF THE CASE

MARVIN ROTH, Administrative Law Judge. These consolidated cases were heard at Warren, Pennsylvania, on October 18 through 22, December 6 through 10, 14, and 15, 1982, and as reopened on April 27, 1983. The charges and amended charges were filed by United Food and Commercial Workers International Union, Local 1, AFL–CIO–CLC (the Union) as follows: Case 6–CA–13933 on October 15, 1980, and as amended on October 7, 1982; Case 6–CA–14403 on April 2, 1981; Case 6–CA–14578 on May 19, 1981; Case 6–CA–14597 on May 26, 1981; Case 6–CA–14697 on July 7, 1981; and Case 6–CA–15995 on December 10, 1982. The consolidated complaint in Cases 6–CA–13933, 6–CA–14403, 6–CA–14578, 6–CA–14697, which issued on June 28, 1982, and was amended at the hearing, and the complaint in Case 6–CA–15995, which issued on February 15, 1983, and was consolidated with the other cases on motion of the General Counsel by my order of February 25, 1983, and was also amended at the hearing, allege that New Process Company (Respondent or the Company) violated Section 8(a)(1), (3), and (4) of the National Labor Relations Act. The complaints do *not* allege that the Company violated Section 8(a)(5) of the Act. The Company's answers deny the commission of the alleged unfair labor practices, and further assert by way of affirmative defense, in sum, that certain allegations of the complaint were the subject of charges on which the Regional Director and/or the General Counsel declined to proceed, and that certain allegations of the complaint in Case 6–CA–15995 are time-barred under Section 10(b) of the Act. I have heretofore ruled on some of these affirmative defenses.

Pursuant to a Decision and Direction of Election issued by the Regional Director on May 1, 1981, an election was conducted on June 9, 1981, among the employees in the following appropriate unit:

> All full-time and regular part-time Mailing Department, Order Handling Department and Merchandise Handling Department employees, including pallet tally clerks, inventory control clerks, hold up release clerks, receiving clerks, order preparation clerks, order distribution clerks, cancel desk clerks, invoice lookup clerks, and returns section records clerks, maintenance employees and maintenance clerks, Accounting deposit clerks, computer operators, Data Processing operations clerks, and Marketing Department merchandise inspectors employed by the Company at its Hickory Street and Bell Building, Warren, Pennsylvania, and Irvine, Pennsylvania, facilities; excluding other Marketing Department employees, other Financial, Employee, Plant Services Department employees, computer programmers, office clerical employees, confidential employees, seasonal employees, janitor/watchmen and other guards, professional employees and supervisors as defined in the Act.

The tally of ballots showed that of approximately 1425 eligible voters, 231 voted for the Union, 1049 voted against the Union, and there were 3 void ballots. The 81 challenged ballots were insufficient in number to affect the results of the election. The Union filed timely objections to the conduct of the election, numbered 1 through 17, but subsequently withdrew Objection 11 (alleged omission of names of employees from the voter eligibility list). On August 3, 1982, the Regional Director issued his order directing hearing on objections and notice of hearing finding that the objections raised "substantial and material issues with respect to the election," which warranted a formal hearing, and that "some of the issues involved in these objections" were encompassed by the outstanding unfair labor practice complaint. The Regional Director did not otherwise make specific findings concerning the objections, although, as will be discussed, the objections were so broadly worded as to encompass virtually every form of potentially objectionable conduct, including the subject matter of allegations on which the Regional Director and/or the General Counsel declined to proceed by way of unfair labor practice complaint. The Regional Director ordered that the unfair labor practice and representation cases be consolidated for the purposes of hearing, ruling, and decision by an administrative law judge, and that after decision by an administrative law judge, the representation case be transferred to and continued before the Board.

All parties were afforded full opportunity to participate, to present relevant evidence, to argue orally, and to file briefs. On the entire record in this case,[1] and from

[1] Certain errors in the transcript have been noted and corrected.

my observation of the demeanor of the witnesses and of the Company's plant premises, and having considered the briefs submitted by the General Counsel, the Union, and the Company, I make the following

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

The Company, a Delaware corporation with its principal offices at Warren, Pennsylvania, is engaged in the mail order retail sale of merchandise, primarily clothing.[2] The Company maintains plants at Warren and Irvine, Pennsylvania, and it is these facilities that are involved in the present proceeding. The Company's Warren plant, where the executive offices are located, is principally engaged in the processing of orders and distribution of sales and advertising literature. The Irvine plant, known as the Irvine Distribution Center (IDC), is essentially a warehouse operation that is engaged in the storage, packing, shipping, inspection, and processing of returns of merchandise. In the operation of its business, the Company annually derives gross revenues in excess of $500,000, and annually ships from its Pennsylvania facilities merchandise valued in excess of $5000 directly to points outside of Pennsylvania. I find, as the Company admits, that it is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

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

III. AN OVERVIEW OF THE CASE AND THE ISSUES PRESENTED

In light of some of the issues presented in this case, it is necessary at the outset to review the context in which the alleged unfair labor practices and objectionable conduct occurred. In February 1980 the Union commenced an organizational compaign among the Company's employees. During the period from February 1980 through June 1981, there were, within the unit eventually found appropriate by the Regional Director, approximately 917 employees at Warren and approximately 538 employees at the Irvine Distribution Center, which is located about 7 miles from the Warren plant. On October 15, 1980,[3] the Union filed its initial charge in Case 6-CA-13933, alleging that the Company violated Section 8(a)(1) and (3) of the Act, inter alia, by discriminatorily transferring union adherents Freeda Carr and Nancy Race from the housewares department to less desirable work in the returns department, thereby causing them to quit (i.e., constructively discharging them). The charge was served on the Company on October 16. By letter dated January 30, the Regional Director informed the parties that he was declining to proceed on several aspects of the charge, including the matter of Carr and Race. By letter dated January 29, 1982, the General Counsel sustained the Regional Director's refusal to proceed on the allegation of constructive discharge, but concluded that a hearing was warranted insofar as the charge alleged that the Company unlawfully refused to reinstate Carr and Race when they offered to return to work in the returns departments. However, the Regional Director declined to proceed on an allegation (in Case 6-CA-14403) that the Company unlawfully refused to rehire Carr as a clerk-typist on February 16, 1981, and this determination was sustained on appeal to the General Counsel.

In the meantime, on October 27, 1980, the Union filed a petition for an election (Case 6-RC-8874) among the merchandise handlers and maintenance employees at IDC (i.e., a unit substantially comprising the Irvine, but not the Warren, plant). The Regional Director determined that a larger unit would be appropriate. The Union then requested leave to amend the petition to define a substantially larger unit, but the request was denied because the Company indicated that it was willing to proceed to an election in the original petitioned-for unit. At this point, the Union requested leave to withdraw its entire petition, and such leave was granted on December 22. On January 2 the Union filed its second (and present) election petition. This time, the Union sought a unit at both plants, comprising about 900 employees, but still proposed to exclude the order handling department, which contained a substantial number of the Warren employees. The Union contended that they were office clericals. A hearing was held beginning on February 4, 1981. On May 5 the Regional Director issued a Decision and Direction of Election, finding that the order handlers were properly included in an appropriate unit, and directing an election, contingent on the Union making an adequate showing of interest in the appropriate unit. The Union indicated that it was willing to proceed to an election in any unit found appropriate, and notwithstanding its pending unfair labor practice charges. As indicated, the Union lost the election that was held on June 9.

The complaints in this case contain some 44 subparagraphs, each alleging separate acts of unfair labor practice conduct. The complaint allegations may be grouped into four general categories. The first, and most numerous group consists of alleged acts of intimidation, coercion, and interference directed against employee union adherents (e.g., discriminatory restrictions on union solicitation and distribution, discriminatory restrictions on union adherents, threats, interrogation, disciplinary warnings, surveillance, harassment, and ostracizing and segregating union adherents). As will be discussed, many of these allegations involve supervisory surveillance and restrictions on employees at times when the employees were engaged at work or normally expected to be engaged at work. The second category involves the alleged unlawful exclusion of union organizers from the IDC premises, and the Company's alleged unlawful refusal to afford the Union an opportunity to respond to statements made to employees by the Company in captive audience meetings. The Union contends that in any event, such access is warranted as a remedy for the Company's al-

[2] The Company maintains retail outlets for direct sales at Warren, Starbrick, and Erie, Pennsylvania. However, the vast majority of the Company's sales are processed by mail order.

[3] All dates are for the period from July 1, 1980, through June 30, 1981, unless otherwise indicated.

leged unfair labor practices. The third category involves alleged threats and misrepresentations contained in speeches or other statements by company officials and supervisors. The fourth category consists of the Company's alleged discriminatory refusal to rehire and/or recommend for rehire eight employees who quit and subsequently reapplied for employment, because they supported the Union, filed charges, and/or were subpoenaed to testify for the Union in the representation proceeding. The eight employees are Freeda Carr and Nancy Race, who were named in the original consolidated complaint, and Pamela Damon, Rhonda Gross, Barbara Morgan, Debra Nuhfer, Floyd Monticue, and Rebecca Stuart Walton, who were subsequently named in the complaint in Case 6–CA–15995. The complaint does not allege that any employee was discriminatorily terminated, either constructively or otherwise. The Union contends that by way of remedy for the alleged unfair labor practices, the Company should be ordered to bargain with the Union; or in the alternative, that a rerun election should be held with the Union given access to nonworking areas, equal time at captive audience meetings, an opportunity for preelection speeches, a list of employees' addresses and telephone numbers, and reimbursement for the Union's organizational expenses.[4]

With respect to the election proceeding, the Union contends that the critical period for determining objectionable conduct should begin with the filing of the first election petition on October 27. I agree. In *Monroe Tube Co.*, 220 NLRB 302 (1975), revd. on other grounds 545 F.2d 1320 (2d Cir. 1976), involving a similar situation, the Board held that "where the first [withdrawn] petition was filed a short time prior to the filing of the second petition and a petition was on file at the time that unlawful conduct took place, we deem it proper to begin the critical period at the filing of the first petition and to evaluate conduct occurring from that date until the election." (220 NLRB at 305.) The present case meets both conditions set forth in *Monroe Tube*. The first petition was filed shortly before the second, during the same organizational campaign, and remained on file until December 22. There is no allegation of objectionable conduct during the brief hiatus between December 22 and January 2, when the second petition was filed. However, the Company is alleged to have engaged in objectionable conduct during the period when the first petition was on file. Therefore *Monroe Tube* is applicable. With regard to the substance of the objections, I have (as I indicated at the hearing) declined to consider any grounds for objection that, if meritorious, would also constitute unfair labor practice conduct, but on which the Regional Director (unless reversed by the General Counsel) declined to proceed by way of complaint. See *Times Square Stores Corp.*, 79 NLRB 361, 365 (1948); *Martinolich Ship Repair Co.*, 111 NLRB 761, 762 (1955). As the Board pointed out in *Martinolich*: "Under established practice, the Board dismisses pro forma objections to an election which are mere reiterations of unfair labor practice charges which have been dismissed." Moreover, sound administrative practice requires that the order directing hearing on objections be interpreted in a manner that is consistent with the disposition of the unfair labor practice charges. It makes no sense to interpret the order as one directing a hearing on matters on which the Regional Director, with the approval of the General Counsel, declined to proceed by way of complaint. The Regional Director who issued the order was not the same individual who initially passed on the unfair labor practice charges. However, the Regional Director is not simply an individual, it is an office, and the actions of one Regional Director should be interpreted in a manner that is consistent with the actions of his predecessor, particularly when the earlier actions have been sustained by the General Counsel.

[4] At the hearing, the Union also requested reimbursement for its costs incurred in connection with the present unfair labor practice litigation. However, in its brief (Br. 15, 19), the Union abandoned this request.

IV. THE ALLEGED UNFAIR LABOR PRACTICES AND OBJECTIONS TO THE CONDUCT OF THE ELECTION

A. *Alleged Violations of Section 8(a)(1), (3), and (4) of the Act prior to October 27, 1980*

1. Threats and interrogation by Nick Pollock

Nick Pollock was, at all times material, receiving dock crew chief at IDC. He directed the work of unloading deliveries, and assigned warehouse employees to such work as needed. Pollock reported to the supervisor of the warehouse, who in turn reported to John Carter, vice president in charge of merchandising, who was in overall charge at IDC. In its answer to the consolidated complaint, the Company initially denied that Pollock was a supervisor. However, during the hearing the Company admitted that Pollock was a supervisor within the meaning of the Act. Pollock was still in the Company's employ at the time of the present hearing.

Alan LaCava was a forklift operator in the warehouse. Pollock was not LaCava's immediate supervisor. However, LaCava was required to obey Pollock's work orders. LaCava was one of the first union activists. On February 1, 1980, the Union informed the Company by mailgram that LaCava was a member of its employee organizing committee. LaCava testified that he distributed union literature in the plant cafeteria and in front of the plant after work, and that he brought the literature to the plant in his lunch bag. LaCava made no effort to conceal his union activity, and like other prounion employees, he wore a union T-shirt in the plant. Crew Chief Pollock knew that LaCava was a union adherent. LaCava testified that on several occasions early in the organizing campaign, Pollock asked him whether he had union literature in his bag. LaCava would answer that he did. LaCava further testified that on several occasions early in the campaign, when Pollock observed employees in conversation, he would ask whether they were having a union meeting, or while cupping his ear, comment that "I'm not supposed to be listening." LaCava's testimony does not indicate that the employees were either at work or expected to be at work during these conversations. According to LaCava, the employees "laughed off" these incidents. On direct examination, LaCava also testified that in the spring of 1980, Pollock told him that

"Mr. Blair" (i.e., Company President Jack Blair) told him that if the Union ever came in to New Process he would shut the doors. However, in his investigatory affidavit to the Regional Office, LaCava testified that Pollock made such a statement to him in May 1979, during the course of another organizational campaign by a different union. No other witnesses testified concerning these incidents. In particular, Crew Chief Pollock was not presented as a witness. Company witnesses testified without contradiction that President Blair has not been at IDC since 1973. The General Counsel presented in evidence a photograph of the Company's 25-year club, taken in the summer of 1980, showing Pollock standing next to Blair. No other evidence was presented that would indicate what if any other contact Pollock might have had with Blair.

In light of LaCava's affidavit, I find that the alleged threat of plant closure, if made at all, was made in May 1979. Therefore, the pertinent allegation of the complaint is precluded by the time limitation of Section 10(b) of the Act, and for this reason, I am recommending that paragraph 7(a) of the complaint be dismissed. The cutoff date for 10(b) purposes is April 16, 1980. LaCava's references to a timeframe early in the campaign could have referred to times after April 16, 1980. The time limitation of Section 10(b) is an affirmative defense, and the respondent has the burden at least of coming forward with evidence to establish that defense. Here, the Company did not present evidence that would demonstrate that the alleged interrogation either did not or could not have taken place on or after April 16, 1980. Therefore, the alleged interrogation is properly before me for consideration on its merits. I credit the uncontroverted testimony of LaCava. I find, on consideration of such testimony, that the Company, by Pollock, violated Section 8(a)(1) of the Act by interrogating LaCava and his fellow employees concerning their actual or ostensible union activities. Pollock had no legitimate reason for questioning the employees, and he did not give them any assurance against reprisal. Moreover, as will be discussed, the interrogation was followed by other unlawful conduct. LaCava's lunch bag was his personal property. LaCava did not testify that he regarded Pollock's repeated questioning in this regard as a joke. Indeed, it is evident from LaCava's testimony that he felt obligated to answer Pollock's question. Concerning the ostensible "union meeting," Pollock's repeated questioning was addressed to several employees. While some of the employees may have regarded the questioning as funny, it does not follow that every employee who heard Pollock would feel the same way. Therefore, Pollock's questioning of the employees constituted unlawful interrogation.

2. Threats of abuse and physical abuse by maintenance supervisors

During the summer of 1980, Randy McWilliams and Charles Martin were supervisors of mechanics at the Warren plant. McWilliams subsequently quit his job. Martin was discharged in November 1980, allegedly for falsifying timecards for employees.[5] Vivian Newton, Barbara Wilson, Diane Savugot, and Barbara Morgan worked on the second shift (which normally operated from 5:30 to 10:30 p.m.) in the mailing department at Warren. All four joined the Union, became members of the organizing committee, and wore union T-shirts at work. Newton, Wilson, and Savugot testified without contradiction concerning incidents involving Martin and McWilliams, which occurred about August 1980. Newton testified that when Martin saw her wearing a union T-shirt, he said that they were told that if they saw any union literature or anything around they were to rip it up, and he made a gesture as if to rip her shirt. Newton further testified that she did not take Martin seriously. Wilson and Savugot testified in sum that on several occasions McWilliams would wipe his greasy hands on their T-shirts, leaving marks, that he did the same to Morgan, and that he did this in the presence of other employees. Management learned of these actions by McWilliams, but he was not disciplined. The employees did not complain directly to the Company. However, they did complain to the Union, which protested to the Company on their behalf.

I credit the uncontroverted testimony of Newton, Wilson, and Savugot. Newton may not have believed that Martin would actually tear her shirt. However, Newton could reasonably believe that the Company intended to destroy or remove union literature or paraphernalia. As will be discussed, there is additional evidence that the Company did engage in such conduct. I find that the Company, by Martin, interfered with employee rights in violation of Section 8(a)(1), by threatening to destroy union literature or paraphernalia whenever and wherever it was found. I further find that Martin's statement may properly be considered as evidence with respect to other allegations, discussed below. It is immaterial that Martin was subsequently discharged, or that he may have been personally sympathetic to the Union. Martin was a supervisor who was purporting to inform an employee concerning company policy; and he was not discharged because of what he told Newton.[6] I further find that the Company violated Section 8(a)(1) by engaging in physical abuse of union adherents, when Supervisor McWilliams repeatedly wiped his greasy hands on the union T-shirts of female employees. See and compare *General Electric Co.*, 255 NLRB 673, 688 (1981). It is immaterial that the employees did not complain directly to their supervisors. As indicated, the employees complained to the Union, which protested on their behalf. It is evident that the employees took McWilliams' conduct seriously.

[5] The Union subsequently filed an unfair labor practice charge alleging that Martin was discharged in violation of Sec. 8(a)(3) of the Act. The Regional Director declined to proceed on the charge because of his supervisory status, and also because of insufficient evidence of unlawful motivation.

[6] The complaint also alleges (par. 7(i)) that about October 1980, Supervisor Rick Arthur threatened employees with unspecified reprisals if they wore union T-shirts. No evidence was presented in support of this allegation. Therefore, I am recommending that the allegation be dismissed.

3. Isolating and ostracizing union adherents, related threats, and stricter work conditions

During the summer of 1980, Jerry Selini was stock department supervisor at IDC. Subsequently Selini replaced Rick Arthur as supervisor of the housewares department. Alan LaCava testified that on a couple of occasions, Selini told him that "we had better watch ourselves because the supervisors were watching us." LaCava further testified that Selini also told him, in August, that the supervisors were not to associate with forklift operators Jerry Stewart and Jeff Atkins because they wore union T-shirts. According to LaCava, until that time Stewart and Atkins regularly played whiffle ball at the lunchbreak with four supervisors (Selini, Ken Bastow, Kerry Gern, and Jim Hagg). However, the supervisors failed to show up for the game that day, and there were no more whiffle ball games. Stewart and Atkins were not presented as witnesses, and LaCava was the only General Counsel witness to testify concerning this matter. Selini, who was presented as a company witness, categorically denied saying that supervisors could not associate with prounion employees or that the employees should be careful because supervisors were watching them. However, Selini testified that in the fall of 1980, he asked LaCava "if he wasn't concerned what some other people might think of what he was doing," referring to LaCava's union activity. Selini testified that he began playing whiffle ball with Stewart and Atkins in the fall of 1980, stopped in late November when the weather got bad, resumed in 1981, and continued through the time of the election. Selini testified that he never discussed the matter with Vice President Carter. Carter testified that he never instructed supervisors not to associate with prounion employees. However, Carter and Stock Replenishment Supervisor Randall Chase testified in sum that Chase told Carter that he did not wish to be seen playing whiffle ball with employees wearing union T-shirts, that Carter told him that it was on his own time, and therefore his own decision, and that thereafter, without saying anything to the employees, he stopped playing whiffle ball with Stewart and Atkins. According to Chase, four other supervisors stopped playing whiffle ball for the same reason.

I credit the testimony of Supervisor Selini, who impressed me as a generally credible witness. In contrast, LaCava sometimes displayed a tendency to accommodate his version of the events to the needs of the present litigation. It is also evident that LaCava, who was not himself one of the whiffle ball players, did not have accurate knowledge of the course of those games. Nevertheless the General Counsel did not call Stewart and Atkins, the employees who were involved in the games, as witnesses. Therefore, I find that Selini did not tell LaCava that the employees should watch themselves because the supervisors were watching them, or that the supervisors could not associate with prounion employees. However, on the basis of Selini's testimony, I find that the Company by Selini violated Section 8(a)(1) by asking LaCava if he was concerned what some other people might think of his union activity. Selini did not indicate that he was referring only to the attitude of other employees. Therefore, LaCava could reasonably infer that Selini was conveying a message that LaCava was incurring the displeasure of management by actively supporting the Union. Such statements carry with them the implied threat of employer reprisal, and constitute unwarranted and unlawful interference with Section 7 rights. See and compare *Wilker Bros. Co.*, 236 NLRB 1371, 1372 (1978), enfd. in pertinent part 652 F.2d 660 (6th Cir. 1981); *Appletree Chevrolet*, 237 NLRB 867, 872–873 (1978), enfd. in pertinent part 608 F.2d 988 (4th Cir. 1979); *Goshen Litho, Inc.*, 199 NLRB 769, 772 (1972). I further find, on the basis of the credited testimony of the company witnesses, that the Company did not violate the Act when certain of its supervisors personally decided that they did not wish to play whiffle ball with employees who wore union T-shirts. This was personal activity in which the supervisors participated on their own free time. The supervisors did not act on behalf of the Company either when they played whiffle ball or when they ceased playing whiffle ball. Moreover, there is no credible evidence that the employees had reason to believe that the supervisors were acting pursuant to company instructions or policy. For these reasons, I also reject the Union's alternative theory that the Company acted unlawfully because the supervisors avoided associating with prounion employees; but later demonstrated common cause with antiunion employees. Therefore, I am recommending that paragraphs 7(d) and 10(a) of the consolidated complaint be dismissed.

The complaint alleges (par. 9(a)) that about August 1980, at Warren, the Company segregated machine operators based on the wearing of union T-shirts. Frances Work was employed as a Nester machine operator in the mailing department. Fred Rulander was her immediate supervisor. The employees were assigned in teams of three, with each team operating two machines. Work testified that her normal team included, besides herself, Joan Fredericks and Carol Anderson. Union meetings were normally held on Tuesday evenings, at the Holiday Inn in Warren. Work testified that on Tuesdays, some employees, including herself and Fredericks but not Anderson, wore union T-shirts to work. Work testified that on these occasions, Anderson would be replaced on the team by Joan Abbey who wore a union T-shirt, and that this pattern continued until one of them stopped wearing a union T-shirt, whereupon Anderson remained on the team regardless of whether the others wore union T-shirts. Barbara Wilson and Diane Savugot, who as indicated, worked in the mailing department, testified concerning a similar pattern in their area. Jane Guthrie was their immediate supervisor. Wilson and Savugot testified, in sum, that beginning in August, employees wearing union T-shirts invariably found themselves all working in the same area, which was located near the supervisors' office. According to Wilson and Savugot, it seemed that whenever they looked up from their work, a supervisor would be staring at them. Joanne McMeans, another mailing department employee, testified that after she began distributing union literature in July, Supervisors Pauline Stec and Helen Littlefield would constantly stare at her, and would follow her to the bathroom and to the water fountain. Barbara Wilson testified that Assistant

Supervisor Lorraine Roblesky would follow her to the restroom.

Assistant Vice President for Mailing George Stark, who was in overall charge of the mailing department, testified as a company witness. Stark denied that the Company intentionally segregated employees who wore union T-shirts, but he admitted that in fact such isolation took place about August 1980. Stark testified that the Company had a practice of honoring employee requests to work or not to work with other specific employees. According to Stark, in August 1980 some employees requested of their supervisors (Stec, Littlefield, and Jane Guthrie) that they not be assigned to work with employees who were "haranging them or whatever; talking to them constantly about their beliefs." Stark testified that eventually Stec complained to him that there were so many such requests that it was causing production problems, and she asked what she should do. According to Stark, he said that the Company could not have such production problems, and that she should tell the employees to work out their personal problems themselves. Stark testified that thereafter Stec made assignments on the basis of production efficiency. However, Stark admitted that the union adherents were assigned to an area near Steck's office. The credibility of Stark's explanation is undermined by the fact that it is substantially based on his own hearsay testimony. The Company failed to produce as witnesses any of the supervisors who were directly involved, or any of the employees who allegedly requested that they not be assigned to work with union adherents. (At the time of the present hearing, Littlefield, Guthrie, and Rulander were still employed as supervisors and Stec was working as a machine operator.) Moreover, the uncontroverted testimony of Frances Work demonstrated a pattern of work assignment that was obviously intentional on the part of management, and did not come about as the result of employee requests. Additionally, as has been and will be discussed, other evidence indicates a policy on the part of management to be extremely solicitous of complaints of alleged harassment by union adherents, while tolerating harassment of union adherents by supervisors and antiunion employees. I do not credit Stark's explanation. I find in light of the present and other evidence that will be discussed, that the Company intentionally segregated union adherents at their workplace in order to limit communication between active union adherents and other employees, create a feeling of isolation among the union adherents, and create antagonism between the union adherents and their fellow employees. The Company thereby violated Section 8(a)(1) and (3) of the Act. *Lowery Trucking Co.*, 200 NLRB 672, 677 (1972); *Daylight Grocery Co.*, 147 NLRB 733, 738 (1964), enfd. 345 F.2d 239 (5th Cir. 1965). The matter of alleged surveillance will be deferred at this point, pending discussion of other evidence concerning surveillance.

The consolidated complaint alleges (pars. 8(e), 9(b), and 9(c)), that the Company violated Section 8(a)(1) by discriminatorily rescinding previously granted permission to employees to read books when work was slow, and violated Section 8(a)(1) and (3) by requiring Vivian Newton to sit at a table behind materials that blocked the view of the machines that other employees were operating, and by forbidding Newton permission to help other machine operators as she had done in the past. The first allegation also involved Newton. Newton's job was to stock the machines that insert advertising literature into mailing envelopes. Newton testified that Night Shift Mailing Supervisor William Moore told her that if she had nothing to do, she could bring a book to read, and she did. However, according to Newton, Moore told her in September that she could not do this anymore because some employees were complaining. Newton testified that some machine operators were given the same admonition, but continued to read anyway unless they were caught. On cross-examination, Newton admitted that in September she was reading a book at work for 3 consecutive days, when Moore asked (apparently sarcastically) whether it had any interesting parts. On the fourth day, Moore told her to stop. Newton answered that if he did not like it he should find her some work. Moore said that he would check with another supervisor. Newton testified that thereafter she continued to read a book for a few minutes at a time, and that she did so on the work floor. However, on her earlier direct testimony, Newton testified that the day after Moore told her to stop reading, he told her to sit at a certain table when she was not working. Newton testified at one point that the table faced a wall, and at another point (and in her affidavit) that there were rolls of material in front of the table that blocked her view of the machines. Newton testified that previously she was told that she could sit at the table if she wanted. However, in her investigatory affidavit, Newton stated that about October 16 (when she was still wearing a union T-shirt), she asked Moore if she could sit in the aisle in order to see the machines, and he answered that he did not care where she sat. Newton further testified that in mid-September, Moore told her that she could help machine operators, and that she did so for 2 days, but that on the third day Moore told her to stop. According to Newton, Moore told her about a week later that he stopped her because of complaints that she was helping only certain employees. Newton testified that this was not true, but she admitted that she helped three specific individuals because in her opinion, they needed help.

Supervisor Moore testified that in the fall of 1980, he told Newton that she was talking and visiting too much. According to Moore, he told her that if she had nothing to do, she could use an area in the rear of the department, but he did not require her to sit there. Moore testified that he saw her spending a lot of time talking to operators at their machines. According to Moore, he gave Newton permission to read a book but told her not to make a habit of it. However, that evening he saw her sitting on a skid, reading her book, in an area where other operators were working. He told her that she should not just sit there reading. Moore testified that on another occasion he told Newton that she could help other employees, but that she should help equally. According to Moore, he said this because she was spending too much time at one machine. However, Assistant Vice President Stark told him that she could not do any work other than her own unless she volunteered to do such work,

and if she was just going to visit the operators, he would rather that she not help at all.

The General Counsel contends (Br. 29) that the alleged unlawful conduct was part of a campaign to isolate prominent union supporters. As has been and will be discussed, there is evidence that the Company did unlawfully seek to restrict communication between union activists and their fellow employees, and did engage in discriminatory action against Newton in particular. Nevertheless, even on the basis of Newton's testimony (including the contradictions therein), and the testimony of operator Joanne McMeans, who partially corroborated the testimony of Newton, it is difficult to find discriminatory action based on the present three allegations. Newton enjoyed the privilege of reading a book when she was not busy (i.e., a privilege that was not available to other employees) and she was given this privilege during the union campaign, when her union sympathies were known to management. Nevertheless Moore said nothing to her until it became evident, as it would to a reasonably minded supervisor, that she was possibly abusing the privilege. Newton was a capable employee who performed her job well, and because of this and the nature of her regular work, there were periods of time when she had nothing to do. However, the evidence fails to indicate that the Company had a policy of permitting employees to sit around reading books in the presence of other employees who were working at their machines. Moore did not require Newton to sit in the rear area at all times when she was not working. However, Newton evidently understood that the Company preferred that she do so rather than read books on the work floor or talk to operators who were working at their machines. Such a preference cannot be viewed as discriminatory unless the workplace is viewed as a public library or social center. I do not credit the testimony of Newton that she could not see the machines from the rear table. If so, she would not be able to know when the machines needed stocking. However, Newton never claimed that this was a problem. As for helping other operators, it is evident on the basis of Newton's own testimony that she was exercising selectivity in this regard. Under the circumstances, it is reasonable to expect that an employer would wish to exercise some control over the work performed by its employees. By reason of the nature of her work, Newton had ample opportunity to go from one machine operator to another during the course of her working day. Whether the Company discriminatorily prohibited her from talking to other employees is a matter that will be taken up at a later point in this decision. However, with respect to the present allegations, I find that the evidence is insufficient to show that the Company discriminatorily altered Newton's working conditions, and therefore I am recommending that the pertinent allegations of the complaint be dismissed.

4. Surveillance

Union organizer Daniel Glather testified that from June to September 1980, he distributed union literature to employees on the public sidewalk ajoining the Warren plant, and that while engaged in such activity, he saw Supervisor Pauline Stec come out of the plant with a notebook and pencil, watch him, and write on the pad. Glather's testimony was uncontroverted. I find nothing inherently incredible in his testimony. The Company correctly points out (Br. 28) that Stec had no apparent reason to do this for the purpose of obtaining information. In light of the Company's outspoken opposition to unionization, and its unlawful actions, some of which involved Stec, I find that Stec engaged in this activity in order to intimidate employees and thereby discourage them from receiving union literature. Therefore, the present situation is distinguishable from those cases in which the Board found that an employer did not violate the Act by observing union activity that was conducted in full public view outside the employer's premises, where the employer did nothing out of the ordinary. I credit Glather, and I find that the Company, by Stec, violated Section 8(a)(1) by engaging in surveillance of employee union activity.

The consolidated complaint alleges (par. 8(c)) that from the end of July through October 1980, the Company by its supervisors violated Section 8(a)(1) and (3) of the Act by scrutinizing union adherents more closely as they worked, following them around the plant and engaging in surveillance of the employees' union activities. The complaint also alleges (par. 7(m)) that about November 1980 the Company violated Section 8(a)(1) by increasing supervision on the night shift at Warren in order to engage in surveillance of union activity. The testimony of both the General Counsel and company witnesses indicates that there was increased supervision at Warren, but that the Company began this practice well before November. Therefore, I am considering both allegations under the heading of alleged unfair labor practices prior to the critical period. As previously discussed, employees Wilson, Savugot, and McMeans testified that Supervisors Stec, Littlefield, and Roblesky began a practice of constantly staring at them or following them. As a general rule, an employer may lawfully engage in surveillance of its employees at their work stations. Working time is for work, and the employer has the right to observe their employee's work or to determine whether they are performing that work. However, the employer cannot engage in such surveillance for unlawful reasons (e.g., in reprisal for the employee's union activities or for the purpose of obtaining pretextual grounds for disciplining the employee in reprisal for such union activities). See *Brown & Root-Northrup*, 174 NLRB 1048, 1058 (1969). As indicated, I have credited the testimony of the employees. I find in light of the credited evidence that the supervisors had no legitimate reason for closely scrutinizing the work and actions of the union adherents. Rather, the supervisors' conduct was motivated by the same considerations that led the Company to segregate prounion employees and place them in close proximity to the supervisors' office. I find that the Company, by its Warren supervisors, scrutinized openly prounion employees more closely as part of a campaign to isolate and harass the employees, and thereby violated Section 8(a)(1) and (3) by imposing more onerous and rigorous terms of employment on them.

Union activists Joan Hockenberry and Alan LaCava testified to a similar pattern of employer conduct at IDC, principally involving Assistant Plant Manager Carl Nelson and Vice President Carter. Hockenberry testified that one day in September, she began wearing a shirt with "Be wise—let's organize" on the back. Hockenberry testified that beginning about an hour later, a number of supervisors, including Carter and Nelson, individually passed by her work station and observed her. Hockenberry further testified that when she would use the pay phone or go to the cigarette machine, Nelson would stand nearby. LaCava testified that early in the campaign, when he would distribute union literature in front of the IDC facility, Carter and Nelson would stand in the cafeteria window and watch him. LaCava further testified that during this period Carter would frequently stand and stare at him at work. Nelson, in his testimony, denied that he engaged in surveillance of union activity or that he varied his routine during the organizational campaign. As indicated, substantially uncontroverted testimony indicates that at Warren, supervisors engaged in a campaign of conspicuously observing prounion employees, and of observing union distribution outside the plant. In light of this evidence, it is more likely than not that the Company engaged in the same kind of activity at IDC. I credit the testimony of Hockenberry and LaCava. I find that the Company, by its supervisors, engaged in a campaign of harassment against Hockenberry and LaCava by conspicuously and closely observing them at work. The Company thereby violated Section 8(a)(1) and (3) at IDC.[7] However, I find that Carter and Nelson did not act unlawfully by watching LaCava when he distributed literature in front of the plant, as their actions were not characterized by behavior that was "out of the ordinary." *Metal Industries*, 251 NLRB 1523 (1980).

It is undisputed that beginning some time during the period from July through September 1980, the Company increased the amount of supervision on the night shift at Warren. However, the Company's motivation for doing this is disputed. Assistant Vice President Stark testified that the Company was receiving complaints from the female employees about drinking and use of marijuana among mechanics on the night shift. According to Stark, he suggested to his then supervisor, Richard Kerven (who has since retired), that salaried supervisors, who normally worked days, should on a rotating basis return at night in order to help the night-shift supervisors. Kerven agreed, and the practice was instituted. According to Stark, this practice was still in effect at the time of the present hearing. Stark testified that as a result of the increased supervision, the Company learned that Mechanic Supervisor Martin was permitting mechanics to go home early, and consequently discharged him. Stark denied that supervision was increased for the purpose of spying on union activity. Vivian Newton, Barbara Wilson, and Diane Savugot testified, in sum, that the additional supervisors usually remained until 8 p.m., and did not appear to do anything except stare at the operators and talk to other supervisors.

I do not credit Stark's explanation. According to Stark, the problems developed because there were only two supervisors on the night shift. However, there were, in fact, at least five. Additionally, Stark did not pinpoint any alleged problems except those involving the mechanics. Therefore, it would seem that the problems could be resolved by adding another mechanic supervisor. Instead, the Company used some eight or nine additional supervisors, who covered the entire night-shift operation, and spent much of their time staring at the operators. The timing of this arrangement also coincided with other company actions, including surveillance, which were designed to harass and intimidate employees and thereby discourage them from engaging in union activity. I find that the Company increased supervision on the night shift at Warren for the same reason, and thereby violated Section 8(a)(1) of the Act.

5. Restrictions on employee union solicitation and distribution and employee conversation and movement

a. *Company policy and practice*

The consolidated complaint, as amended, alleges that since about September 1980, the Company discriminatorily instituted, maintained, and enforced a policy prohibiting union solicitation, prohibiting employees from talking about the Union, and prohibiting employees from conducting union business on company time. The Company does not have any written rule or policy that expressly restricts talking, solicitation, or distribution on company time or premises. However, the employee handbook, which has been in effect since 1979 and is distributed to each employee, does refer to "visiting." The handbook instructs the employees as follows:

> DON'T WASTE OTHER PEOPLE'S TIME
>
> In other words, don't visit with your neighbors. Visiting not only stops your production but also the work of others. Visiting is a highly contagious disease. Don't start it. Non-business "visiting" during working hours can affect your advancement and even your job itself.

Assistant Vice President for Personnel Richard Zimmerman testified, in sum, that the term "visiting" covers ex-

[7] This is one of several allegations in the present case involving Hockenberry, who was the leading union activist at IDC. By letter dated January 19, 1982, the Acting Regional Director declined to proceed on certain aspects of the charge in Case 6-CA-14697, including the Union's contention that Hockenberry was constructively suspended from employment by virtue of the Company's harassment and attempt to restrict her union activity. The Acting Regional Director administratively determined that Hockenberry did not report to work for personal reasons and that "Hockenberry denies that the Employer engaged in such harassment or that she was instructed by the Employer to curtail her union activities." On appeal, the General Counsel sustained the Regional Director's action. The charge, which was filed on July 7, 1981, alleged that the Company violated Sec. 8(a)(1) "[o]n or about June 4, 1981 and at other times immediately preceeding and thereafter." However, the present allegations involving Hockenberry occurred well before June 4, 1981. Therefore the partial dismissal of Case 6-CA-14697 does not preclude litigation of the allegations of the consolidated complaint involving Hockenberry, and the Acting Regional Director's letter cannot be viewed as an administrative determination that Hockenberry made statements that were inconsistent with the present allegations.

cessive talking on the job, and possibly also solicitation. According to Zimmerman, the Company does not prohibit talking on the job. However, if others are busy, the employees should "hold down on the talking." Otherwise the talking becomes "excessive visiting," and the employee will be so informed. Zimmerman testified that the Company does not interfere with talking unless it is excessive or interferes with production. With respect to solicitation, Zimmerman testified that the Company's policy depends on the type of solicitation involved. The first type consists of collections on behalf of an employee or his or her family by reason of death, illness, or retirement. The second type consists of commercial or any other form of solicitation by company personnel (e.g., sale of cosmetics or raffle tickets and also includes union solicitation). According to Zimmerman, the first type of solicitation does not take much time and normally consists only of passing an envelope from one employee to another. However, Zimmerman admitted that it might be necessary for the solicitor to explain the purpose of the solicitation, and for employees to get money from their purses (which may be kept on the work floor). Zimmerman testified that the second type is permitted only before and after work and during breaks and lunch periods. According to Zimmerman, the Company's policies are enforced by its supervisors, persistent violations will result first in oral, and then in a series of written warnings, and excessive visitation will be noted on an employee's annual evaluation.

Zimmerman's testimony concerning the Company's alleged practices was contradicted by employee witnesses for the General Counsel. Employees Freeda Carr, Nancy Race, Cindy Dorotics Rossman, Donna Fehlman, Vivian Newton, and Barbara Wilson testified in sum that commercial solicitation was conducted on working time. Race testified that Supervisor Wilbur Mineweiser solicited orders for Christmas decorations from employees who were engaged at work, and Carr testified that Supervisor Randy Chase sold raffle tickets to employees at work. Mineweiser was not presented as a witness, and Chase, although presented as a company witness, did not deny Carr's testimony. I credit the testimony of the employees. I find in light of Zimmerman's testimony concerning the Company's alleged policy, and the testimony of the employees concerning its actual practices, that the Company instituted and maintained a policy that discriminatorily restricted union solicitation while permitting various forms of commercial, charitable, and other solicitation. The Company thereby violated Section 8(a)(1) of the Act. *St. Vincent's Hospital*, 265 NLRB 38, 40 (1982). The policy as defined by Zimmerman was further discriminatory in that the policy could be interpreted as permitting on-the-job conversations between employees, while prohibiting such conversations concerning the Union, on the grounds that they constituted "solicitation" on behalf of the Union. As will be discussed, the evidence further indicates that the Company in fact enforced its policies in a discriminatory manner, by prohibiting various forms of employee expression on behalf of the Union, while permitting other comparable forms of expression, including opposition to the Union.

b. *Restrictions on employee conversation and movement*

The consolidated complaint alleges (par. 8(a)) that around July 1980, Supervisors Pauline Stec and Rick Arthur unlawfully prohibited employee Vivian Newton from talking to machine operators and other employees. Newton testified that in September, Stec told her in the presence of two other employees who were helping her to stock the machines, that she should not "talk to the operators" or "bother the operators." According to Newton, one of her helpers (Candy Remey) was also talking to an operator, but Stec said nothing to Remey. However, in her investigatory affidavit Newton said that Stec told her not to talk to the operators because it was slowing up production. Newton was the only witness to testify concerning this alleged incident. I am not persuaded that the General Counsel has made out a case of union-related discrimination on the basis of this incident. Newton's testimony did not indicate that she was talking about the Union, or that Stec had reason to believe that she was discussing the Union. Newton did not indicate whether the operator or operators were actually engaged in production. Therefore it is possible that Stec was in fact concerned that Newton's conversation was affecting production work. However, Newton's uncontroverted testimony concerning another incident involving Stec presents a different situation. Newton testified that one day in July, she was in the breakroom with two other employees during the 5-minute cleanup period at the end of the work shift. Supervisor Stec came into the breakroom and asked one of the employees for his union card, which he was holding and apparently had just signed. Newton said that he was allowed to sign the card. Stec replied that they were not allowed to sign anything between 5:30 and 10:30 p.m., but she would check with her superior. Stec did not confiscate the card, but she never withdrew her statement. The cleanup period was a time when the employees were not expected to be at work, and indeed, was a form of breaktime. I find that the Company, by Stec, violated Section 8(a)(1) of the Act by telling the employees that they were not permitted to engage in union activity at times when they were properly not engaged in their work tasks.

Employee Frances Work testified without contradiction or corroboration that after she began wearing a union T-shirt, Supervisor Rulander told her that the operators were not allowed to leave their machines when in working order, in order to talk to employees across the aisle or at the next machine. Work testified that until then she occasionally left her work area to talk, but nothing was said. According to Work, she saw another employee, Joan Russ, who was not wearing union insignia, leave her work area. Work inquired of Rulander, who said that Russ had questions pertaining to her work. I credit the testimony of Work, but I am not persuaded that the General Counsel has made out a case of discriminatory conduct on the basis of this incident. Work did not claim that Rulander told her she could never leave her machine to talk to other employees. Rather, she simply testified that he told her not to leave when her machine was in working order. If the machine was in

working order, then Rulander could reasonably expect and direct that Work be available for production. Work did not claim that Rulander previously permitted her to leave her machine when there was work to be done. Work also did not claim that Joan Russ had no work to do, or that she left her area to engage in personal conversation. Therefore, I am recommending that the pertinent allegation of the complaint (par. 8(d)) be dismissed.

c. *Prohibiting display of signs*

Forklift operator Donna Fehlman Wilcox,[8] who worked at IDC, testified that in the second week of October, she saw David Shaffer, another forklift operator, with an antiunion sign on his heister which said that "only idiots and crazy bastards would want a union." She testified that she saw Shaffer operating the vehicle in this manner both in the morning and afternoon. Fehlman and another employee then decided to put a prounion sign on Fehlman's heister, and they did so the next morning. However, within a few minutes Finishing Area Supervisor Kerry Gern told Fehlman that there would be no more signs because the practice was hazardous and the heisters were company property. Thereafter, Fehlman did not see any signs. Fehlman testified that the sign, which was taped to the front of the heister, did not interfere with its operation. The Company did not, either at that time or in the present hearing, offer any explanation regarding why such signs would constitute a safety problem. Stock Replenishment Supervisor Randall Chase testified that one morning, about 1-1/2 hours after starting time, Supervisor Charles Walters, who reported to him, said that Shaffer had an antiunion sign on his heister. According to Chase, he informed Vice President Carter, who instructed him that there could be no signs, either pro- or antiunion. Carter also testified that he instructed Chase that the sign should be removed. Carter admitted that he was informed when Shaffer first brought the sign into the plant, although he testified that he did not know what Shaffer intended to do with it. Carter and Gern each testified that Gern reported to Carter about the Fehlman sign, and Carter instructed him that it should be removed. However, in his investigatory affidavit, Gern indicated (as did Fehlman in her testimony), that Gern ordered Fehlman to remove the sign immediately on observing it. Neither Supervisor Walters nor employee Shaffer was presented as a witnesses. In light of the Company's failure to produce Walters, the supervisor who allegedly actually saw the Shaffer sign, I credit Fehlman. I find that the Company tolerated the display of antiunion signs on its equipment, and objected to such conduct only after prounion employees sought to display their own signs. I find that the signs presented no safety hazard, and that the Company's assertion in this regard was a pretext. The Company could not prohibit the signs simply because they were taped onto company property. The display of such signs does not constitute solicitation or distribution, but is a form of expression that is protected by the Act. Therefore, the Company violated the Act by prohibiting the display of both pro- and antiunion signs. *Montgomery Ward & Co.*, 220 NLRB 373, 389 (1975), enfd. 554 F.2d 996 (10th Cir. 1977). Moreover, as indicated, the Company enforced its alleged policy in a discriminatory manner, by tolerating the display of an antiunion sign until prounion employees attempted to display their own sign.

[8] I shall refer to her as Fehlman, which was her name at the time of the events in question, in order to avoid confusion with Maintenance Supervisor Frank Wilcox, who also worked at IDC.

d. *Breakrooms*

The Company maintains breakrooms at Warren and a cafeteria at IDC, which are used by both employees and supervisory personnel. These are nonwork areas. At IDC there are lunch periods from noon to 12:30 p.m. and from 12:30 to 1 p.m. There was also a lunchbreak for the second shift. There is no general prohibition on personal literature in these locations, and in fact, such items as sales catalogues, notices of items for sale, and raffle tickets have been placed in the breakrooms and cafeteria. Barbara Wilson and Diane Savugot testified, in sum, that in September, shortly before the beginning of the evening shift, they placed copies of union literature on breakroom tables. Employees took some copies. A few minutes after the work bell rang, Supervisor Stec picked up the remaining copies and placed them in her pocket. The employees testified that they had not previously seen supervisors remove literature from the breakroom. Alan LaCava testified that at IDC, he saw supervisors pick up union literature that was left on tables after the first lunchbreak, although normally the tables were not cleaned until both midday lunchbreaks were completed. Vice President Carter, whose knowledge was limited to IDC, was the only company witness to testify concerning this matter. Carter testified that leaflets were left "helter-skelter" on tables, that the employee cleanup person would remove the leaflets, that this was not a supervisor's job, and that no special effort was made to remove union literature. If supervisors did not normally clean the tables, then it is evident from the uncontradicted testimony of the employees that the supervisors were performing a special and unusual function when they removed union literature from the breakroom and cafeteria, and that this function was unrelated to normal cleanup work. I credit the employees' testimony, and I find that the supervisors engaged in this unusual conduct as part of a company effort to minimize, wherever possible, communication between the Union and the employees. The Company thereby violated Section 8(a)(1) of the Act by confiscating union literature. *Photo-Sonics, Inc.*, 254 NLRB 567 (1981), enfd. 678 F.2d 121 (9th Cir. 1982).

e. *Denial of use of bulletin boards*

The complaint alleges (par. 7(j)) that about October 1980, the Company, by Supervisors Moore and Guthrie, at the Warren plant, denied the Union permission to post literature on the company bulletin board and removed literature from the company bulletin board while permitting other nonwork literature to be posted. In order to properly evaluate this allegation, it is necessary initially to consider the Company's asserted policy regarding em-

ployee use of bulletin boards. The Company has no written policy in this regard. Assistant Vice President Zimmerman testified that employees may use the plant bulletin boards to post personal notices, such as thank you cards and items for sale, but may not use the boards to post controversial notices, including pro- or antiunion literature or items derogatory or critical of the Company. Zimmerman testified that the procedure for posting notices differs at Warren from that at IDC. According to Zimmerman, at Warren the receptionist must first initial or date the proposed notice. If the receptionist has any problem, she will check with Zimmerman. The receptionist will take down any unapproved notices. Approved notices normally may remain up for a week. At IDC, prior approval is not required. However, according to Zimmerman, Vice President Carter and Assistant Plant Manager Nelson regularly police the boards. The employees were never generally informed of these alleged policies, although Zimmerman testified that an employee would be informed concerning the reason his or her notice was removed. Zimmerman testified that the Company uses the boards for legally required notices, notices relating to the company savings plan, and notification of merchandise available at the company store, but did not post any campaign literature on the boards.

Employees Barbara Wilson and Diane Savugot testified, in sum, that in September or October they posted two notices on a bulletin board at Warren. One purported to be the pay scale for company executives, and the other purported to be a company list of do's and don'ts for its supervisors with respect to the organizational campaign. They did so without obtaining prior permission. Within a few minutes Supervisors Moore and Guthrie removed the notices. Moore testified that on one occasion he removed posted union literature because it was not dated or initialed, and that no one ever asked him for permission to post union literature on the bulletin boards. However, Wilson testified that in October she asked Supervisor Stec to initial a union notice concerning alleged lack of employee seniority rights. According to Wilson, Stec answered: "You know we can't put stuff like this on the board"; adding that she never initialed anything, but would leave the notice for the receptionist or someone else. Wilson heard nothing more about the matter. Wilson testified that prior to the organizational campaign she often saw uninitialed notices on the bulletin boards, and Supervisor Moore admitted in his testimony that employees sometimes posted notices without permission. The Warren receptionist was not presented as a witness, although the Company presented testimony by the receptionist at IDC. No evidence was presented that would indicate that Company ever permitted or tolerated union notices on bulletin boards at Warren. With respect to IDC, Vice President Carter testified that he saw both pro- and antiunion literature on bulletin boards, that he saw union literature three times, that he removed the literature the first time, but that he never removed antiunion literature. Carter gave no explanation for this apparent change in practice.

I find that the Company violated Section 8(a)(1) by denying employee access to the bulletin boards at Warren for the purpose of posting union literature. Having made its bulletin boards available for personal use by its employees, the Company could not lawfully exclude the posting of notices that fell within the ambit of union or concerted activity, on the grounds that it considered such notices to be "controversial" or otherwise distasteful. *G. H. Base & Co.*, 258 NLRB 140, 142 (1981); *Container Corp. of America*, 244 NLRB 318 (1979). The notices that the union adherents sought to post at Warren, including the executive pay scales, fell within the ambit of protected activity. See *Virginia Apparel Corp.*, 264 NLRB 207, 210 (1982), enfd. in pertinent part mem. 720 F.2d 673 (4th Cir. 1983). In light of Zimmerman's testimony concerning the Company's policy, and in light of what Supervisor Stec told Wilson, it is evident that the Company would not in any event have granted permission for the posting of union literature. Moreover, until the organizational campaign, the Company tolerated the posting of notices at both Warren and IDC without prior permission. Therefore, I find that the Company removed union notices at Warren and IDC, and denied permission for posting at Warren, because of the nature of the notices, and not because the employees failed to seek requisite permission. The Company's conduct was unlawful for the additional reason that notwithstanding its ostensible policy concerning "controversial" material, the Company precluded the posting of union notices at Warren, and at least for a time, at IDC, while permitting antiunion notices at IDC.

f. *Written warning to Vivian Newton*

In late September, the Company sent letters to some 25 employees, asserting that the Company was in possession of union authorization cards ostensibly signed by the employees. On October 1, when Vivian Newton reported to work, employee Barbara Ransom told her that prounion employees were in trouble because they allegedly forged union cards, and that some of the employees whose cards were allegedly forged were going to see Personnel Director Richard Zimmerman. Ransom mentioned the name of employee Chris Nuhfer. Newton then went over to Nuhfer and asked her about the matter. Newton testified that both of these conversations took place just before starting time (5:30 p.m.), and that she spoke to Nuhfer in the breakroom. About 5:50 p.m., Newton telephoned union organizer Joe Picarreto from a pay phone, which was located near Assistant Vice President Stark's office. Stark saw Newton on the telephone, but did nothing at this time. Newton then went over to Nuhfer, who was at her machine, and asked if she could see Nuhfer's card. Nuhfer said that she wanted to talk to Zimmerman first. Newton testified that during this period she was caught up in her work and had nothing to do. About 6:30 p.m. Newton was summoned to Zimmerman's office. Zimmerman, Stark, and Mailing Supervisor Moore were present. Stark told Newton that they received complaints from several employees that Newton was conducting union business on company worktime. (In fact, only Nuhfer complained to the Company.) Newton denied the accusation, saying that she was only talking to employees, but Zimmerman responded that they had witnesses. The supervisors gave Newton a writ-

ten "employee warning record," prepared by Stark, which was placed in Newton's personnel file. The warning for "misconduct" stated that: "It has been reported that Vivian Newton has been conducting union organizing business while on Company time rather than doing her work. Continuance of union organizing business on company time may result in dismissal." However, shortly after the interview Stark struck out the phrase "rather than doing her work," because, according to Stark, Newton was doing her work and normally did perform her job functions.

Nuhfer was not presented as a witness in this proceeding. Stark testified that Nuhfer complained to him that while she was at work, Newton approached her and was "badgering" her to give her a letter and authorization card, and that Newton said the union organizer told her to ask for them. Stark testified that he reported the matter to Zimmerman, and that Company Secretary Robert Blair instructed them to give Newton a written warning because she "was engaged in union business during Company work time and badgering an employee at their work station, when the employee was supposed to be working."

The General Counsel correctly points out (Br. 30) that as a general rule, in the absence of a formal and valid no-solicitation rule, an employer may discipline an employee for solicitation only if the solicitation resulted in actual work interference. *Midwest Stock Exchange,* 244 NLRB 1108, 1116 (1979), enfd. in pertinent part 635 F.2d 1255, 1270 (7th Cir. 1980). In the present case, the Company could reasonably believe, on the basis of Nuhfer's complaint, that Newton was interfering with her work. Nevertheless, I find that the Company violated Section 8(a)(1) and (3) of the Act by issuing the written warning to Newton. First, the Company did not give Newton a warning for interfering with Nuhfer's work. Indeed, Assistant Vice President Stark admitted in his testimony that he attempted to conceal Nuhfer's identity by telling Newton that he received complaints from several employees. Rather, as the warning plainly indicated on its face, Newton was given a warning and threatened with discharge for "conducting union organizing business while on Company time." The Company did not make clear to Newton, either through the language of the warning or the accompanying statements by the company officials, that Newton had the right to discuss union matters with her fellow employees during periods of the workday when they were properly not engaged in their work tasks (not limited to formal break periods). The term "company time," like the term "company working hours," is so broad as to encompass periods from the beginning to the end of work shifts, including lunch and break periods and other times when employees are properly not engaged in their work tasks. See *Campbell Soup Co.*, 159 NLRB 74, 82 (1966), enfd. as modified 380 F.2d 372, 373 (5th Cir. 1967), cited with approval in *Our Way, Inc.*, 268 NLRB 394 fn. 3 (1983). Therefore the warning was overly broad and unlawful. Second, the warning was discriminatory and therefore unlawful because it was given pursuant to a policy that tolerated "badgering" by antiunion employees while severely disciplining lesser conduct by union adherents. In December, union adherent Joan Hockenberry complained to Finishing Area Supervisor Kerry Gern that employee Paul Williams intentionally stacked pallets in such a manner as to block a sign posted by Hockenberry that read "Merry Christmas from Local 1." Gern reported the matter to Vice President Carter. However, although Williams was engaging in antiunion activity in the guise of performing a work function, he was not disciplined. Instead, Gern advised Williams "not to be so obvious." Gern characterized Hockenberry as a troublemaker and suggested to Carter that Hockenberry "might lose control and help us" because (as testified by Carter), Hockenberry was "thin-skinned." The same could be said of Nuhfer. As indicated, this was not the only instance in which the Company tolerated antiunion activity while suppressing comparable forms of union activity. Additionally, as previously discussed the Company tolerated commercial and other forms of solicitation even when such conduct interrupted employees engaged at work. I find that the Company gave Newton a written warning because she was engaged in union, as distinguished from some other form of activity. Therefore the Company violated Section 8(a)(1) and (3) by disciplining Newton.

g. *Transfer of Joan Hockenberry*

Joan Hockenberry was the leading union adherent at IDC. She was closely identified with the Union. As indicated, the Company even regarded her personality as a potential campaign issue. Hockenberry had a practice of wearing union slogans and notices of union meetings on the back of her shirt. However, beginning on Tuesday, October 2, Hockenberry wore a sign which declared that the Company was "unfair" and "discriminates." The sign referred to the situation of Freeda Carr and Nancy Race, who had just quit their jobs after being transferred to the returns department, and were now seeking reinstatement. As will be discussed, the matter of Carr and Race soon became a major issue in the organizational and election campaigns. At this time Hockenberry worked on the multiple packing line in the finishing area. She was on the day shift, and Kerry Gern was her immediate supervisor. There were 32 to 34 employees on the multiple packing line. They were seated on both sides of a conveyor belt, in an open area, and generally in view of each other. Hockenberry began wearing the "unfair . . . discriminates" sign after the lunchbreak. Hockenberry testified that about one-half hour later, Gern told her to go to the sportcoat line, which was some 50 to 60 feet away. There were about 12 employees on the sportcoat line. Hockenberry testified that the employees could not see her back. The same would also normally be true of the multiple packing line, as the employees were seated in rows facing each other. However there was less opportunity for employees to move about the sportcoat line. That line was located in a closed area, and it was necessary for Hockenberry to crawl under the conveyor in order to leave her seat. Hockenberry testified that in the same week she was also assigned to the nylon line, where the employees could not see each other without turning around. There were six employees on the nylon line. Like the sportcoat line, this line was located in a

closed area, and it was difficult for Hockenberry to leave her seat. The next week Hockenberry stopped wearing the "unfair . . . discriminates" sign, and she returned to the multiple packing line. However, Hockenberry admitted that as of Friday, October 10, she was posted to work on the multiple packing line the following week, although on October 10 she was still wearing the sign.

Supervisor Gern testified that he normally rotated employees in the finishing area, usually every third week, and that each Friday he prepared a schedule for the following week. Gern denied that he transferred Hockenberry because of her sign. However, Gern failed to explain why Hockenberry was suddenly switched to the sportcoat line in midweek, and why she was transferred to yet another line during the same week. I find that the Company, by Gern, transferred Hockenberry from the multiple packing line in order to minimize employee communication concerning the Race-Carr matter, and to prevent possible galvanizing of employee sentiment for Carr and Race during the crucial period immediately following their departure. As will be discussed, on the same day that Hockenberry began wearing her sign, the Company caused the arrest of union organizers who sought to distribute union literature concerning the Carr-Race matter to employees at IDC. I find that the Company violated Section 8(a)(1) and (3) of the Act by discriminatorily transferring Hockenberry from the multiple packing line to the sportcoat and nylon lines.

6. Company threats of reprisal and solicitation to inform on union activities

In October, the Company sent a two-page letter to its employees, signed by President Jack Blair, concerning the union organizational campaign. The second page, captioned "Our Labor Relations Policy," began with the statement: "We firmly believe that our employees, our customers and the company have nothing to gain through union representation, and, in fact, have much to lose." The General Counsel contends that by such statement, the Company threatened its employees with unspecified reprisals if they joined or selected the Union as their bargaining representative. The standards governing the legality of such statements are set forth in *Greensboro Hosiery Mills*, 162 NLRB 1275, 1276 (1967), enf. denied in pertinent part 398 F.2d 414, 417 (4th Cir. 1968). (The court of appeals accepted those standards, but disagreed with the Board on their application to the facts in *Greensboro*.) Applying the *Greensboro* standards to the facts of the present case, I find that the statement, when viewed in the context of the letter and the Company's contemporaneous conduct, constituted a threat of reprisal if the employees designated or selected the Union as their bargaining representative. The first page of the letter centered on a list of alleged costs and obligations incurred through union membership. If the letter said nothing more, then the statement at issue might reasonably be construed as a reference to these obligations. However, on the second page, immediately following the statement, the Company set forth its purported personnel policies as a "non-union organization." An employee could reasonably infer from "our labor relations policy" that if the employees chose union representation, the Company would no longer be so magnanimous in dealing with its employees (e.g., it would no longer treat the employees as individuals, it would not recognize and reward individual effort and contribution, it would not permit employees to deal directly with management, and it would not assure its employees of equal opportunity). Second, as has been and will be discussed, the letter was sent to the employees in the context of numerous unfair labor practices, including acts of discrimination against union adherents. These acts included, as found, infra, the Company's discriminatory refusal to reinstate Freeda Carr and Nancy Race. The Company's discriminatory pattern of conduct was apparent to the employees by the time they received this letter. In sum, the letter plainly inferred that if the employees chose union representation, the Company's discriminatory policy toward union adherents would become its standard policy in dealing with all its employees. Therefore, I find that the Company violated Section 8(a)(1) of the Act by threatening its employees that they had "much to lose" if they chose union representation.

Personnel Director Zimmerman testified that the Company distributed to some of its supervisors, a memorandum captioned "DO'S and DONT'S for NPC Supervisors." The memorandum stated in pertinent part that supervisors "CAN . . . tell employees no one has the right to threaten or pressure them. The Company should be informed of any such threats or pressure and will take all necessary steps to prevent it." The General Counsel contends that the Company, by its supervisors, unlawfully solicited employees to report on the union activities of fellow employees. The General Counsel would be correct if in fact any supervisor actually told an employee to report instances of union "pressure." See *Union Carbide Corp.*, 259 NLRB 974, 978 (1982); *J. H. Block & Co.*, 247 NLRB 262 (1980). The difficulty with the General Counsel's contention is that the present record fails to indicate that any supervisor actually did so. Under questioning by the General Counsel, Zimmerman testified that pursuant to the "Do's and Don'ts," supervisors "would have" so informed the employees. However, it does not follow from the admission that any supervisors actually did so. Therefore, I am recommending that the pertinent allegation of the complaint (par. 7(x)) be dismissed.

7. Refusal to reinstate Freeda Carr and Nancy Race

The consolidated complaint, as amended, alleges that since about October 6, 1980, the Company has violated Section 8(a)(1), (3), and (4) of the Act by refusing to reinstate Freeda Carr and Nancy Race because of their union and concerted activities and because of the charge filed on their behalf in Case 6–CA–13933.

At the beginning of October 1980, Carr and Race were working in the housewares department at IDC. Rick Arthur was their immediate supervisor. Carr had been continuously employed by the Company since 1972. She worked at several jobs, and at one time was a supervisor. Since September 1979 she had been working as order giveout girl in housewares, where her duties included training of new employees. Her personnel file in-

dicates that she progressed in her work performance over the years, and was rated as an above-average employee in all respects except attendance, for which she was rated average. Nancy Race Nee Poole began working for the Company in June 1978. She worked as an order filler in housewares. By July 1979 Race had received three warning notices for unsatisfactory attendance. However, much of her attendance problem was related to her pregnancy. In May 1980 Race returned from maternity leave. Thereafter, her attendance improved substantially, and she received no further warnings. Race was rated as an average or above-average employee in all respects except attendance.

Carr and Race were not leading union adherents prior to their separation from employment, but they did actively support the Union. They each signed a union card and wore union T-shirts and pins to work. Carr solicited other employees to sign cards. Both Carr and Race made their prounion views known to Supervisor Arthur. By October 1, top management at IDC (specifically, Vice President John Carter and Assistant Plant Manager Carl Nelson) were aware of what they regarded as friction among the housewares department employees, and they specifically viewed Carr, Race, and Donna Fehlman as part of a prounion clique within the department, with Carr as the leader of the clique. Management was also aware that Supervisor Arthur was himself a principal source of controversy within the department, primarily because of his lack of tact in dealing with the female employees under his supervision (Arthur subsequently went on sick leave, and returned to the Company in a nonsupervisory capacity). On October 1 and 2 Carter and Nelson met individually with the department employees. Immediately following this series of meetings, Carter informed Carr that he would give Arthur "another chance" but would transfer Carr to the returns department, where she had worked when she began at IDC. Carter then assembled a meeting of all department employees except Carr, and informed them that Elaine Fox (an outspoken antiunion employee) was replacing Carr as giveout girl. Carter then loudly and repeatedly asked Nancy Race what was her problem. Race had said nothing up to this point. She initially remained silent, but then asserted that she did not have to answer. Carter disagreed, whereupon Race told him that he could shove the job up his "ass." Carter invited Race to leave the meeting, and she did. After the meeting, Carter asked Race if she quit. Race indicated that she did not, but that Carter could fire her if he wanted. Carter said that he would if she did not get along with the other employees. The next morning (Friday, October 3), Race was summoned to the conference room, where Carter and Nelson gave her a written warning notice for "misconduct" based on her outburst at the October 2 meeting, and informed her that she would be working in returns. Carr and Race viewed returns as unpleasant work, because it involved handling of used, and sometimes unclean clothing. Race reported to returns, but that same morning, after consulting with her husband, she informed Carter that she was quitting. In the meantime Carr, who had taken the day off, came to IDC and met with Carter and Nelson to ask if they would reconsider their decision. They refused. Carr said she was quitting, and would use her accumulated leave time as 2 weeks' notice. Carter urged her to reconsider, but she insisted that she was leaving because she felt she had been treated unfairly. At no time did Carter or any other company official tell her that she failed to give adequate notice, or that she could not use her accumulated leave time for notice purposes.

Vice President Carter testified that he decided to transfer Carr and Race because in his opinion Carr and to a lesser extent Race were causing a split between Supervisor Arthur and the employees. The evidence fails to indicate whether Carr and Race consulted with each other before they decided to quit. However, shortly thereafter they decided to enlist the Union's help in order to regain their jobs. On Monday morning, October 6, they met with union organizer Dan Glather at the Holiday Inn in Warren. Glather advised them to request reinstatement. He telephoned Carter and informed him that Carr and Race wanted to return to work in the returns department. Carter told Glather that he would have to speak to the Company's attorney. Glather attempted to speak to Assistant Vice President Zimmerman, but Zimmerman refused to accept the call. That same day, the Union's attorney sent a telegram to Zimmerman, which was received on October 8. The telegram stated that Carr and Race were ready, willing, and able to return to work "at their most recent assignments," and requested that the Company contact them to arrange for a time to resume work. The Company did not respond to the telegram. On the afternoon of October 6, and again on October 7, several union organizers, accompanied by Carr, Race, and a former employee, attempted to distribute union literature and cards at the IDC premises. The literature included a handbill signed by Carr and Race, which protested their transfer "without regard to seniority." (The Company's responses to these efforts are alleged as unfair labor practices, and will be discussed under the next heading of this decision.) As found, Joan Hockenberry also attempted to publicize the Carr-Race matter inside the plant.

On October 13 Carr and Cindy Durotics Rosman, who quit her job in housewares on October 10, met with Assistant Vice President Zimmerman and Personnel Assistant Rodney Henry. Much of the meeting was taken up with a discussion of Supervisor Arthur. However, one aspect of the meeting is sharply disputed. Carr and Durotics testified in sum that Carr asked about getting her job back, whereupon Zimmerman answered that she would have to fill out a new application in order to be considered. Zimmerman and Henry testified, in sum, that Carr asked if there was work available at Warren, whereupon Zimmerman answered no, but that she could go across the hall (i.e., to the personnel office) and update her application. Carr did not go to the personnel office until February 27. Carr testified that she did not go because she did not think she should have to return as a new employee. On October 15 the Union filed its charge in Case 6–CA–13933, alleging among other things that the Company violated Section 8(a)(1) and (3) by discriminatorily transferring Carr and Race, thereby constructively discharging them, and by refusing to reem-

ploy them, even in returns. Within the next 3 days, two letters crossed in the mail. On October 16 or 17, Carr sent a letter to Zimmerman, which he received on October 18.[9] Carr reasserted her request, as set forth in the Union's telegram, to continue working "at the assignment last given to me in returns." However, she restated her position that her transfer was unfair, and reserved her right to take other legal means to get back her job. However, by letter dated October 16, Zimmerman informed Carr as follows:

> Re: Our meeting of October 13, 1980
>
> Please be advised that as of this date we received a charge through the National Labor Relations Board which appears to encompass the circumstances of your resignation. I have determined that your case is better left in the hands of the National Labor Relations Board for investigation and resolution.

There was no further communication between Carr and Zimmerman.

I credit the testimony of Zimmerman and Henry concerning the October 13 meeting. It is unlikely that Zimmerman would have advised Carr to fill out a new application, because even applicants who had never worked for the Company were not required to follow this procedure. Rather Zimmerman, Henry, or another personnel assistant filled out the application. Zimmerman's version of the meeting reflected the Company's usual procedure for former company employees who were reapplying for work. Under this procedure, the former employees would in an informal manner, usually by telephone or in person, indicate their availability for reemployment and indicate any changes in name, address, telephone number, employment history, and physical capabilities. The information would be entered in their personnel file, which would then be placed in an active file together with the applications of new job applicants and the files of other former employees seeking reemployment. However, for reasons that will be discussed, I find that Zimmerman injected an unnecessary obstacle by telling Carr to follow this procedure, and that absent a discriminatory motive, Zimmerman would have promptly accepted Carr's offer to work in returns. I further find that after Zimmerman sent his October 16 letter to Carr, such procedure would have amounted to an exercise in futility, because Zimmerman made clear that by reason of the pending unfair labor practice charge, the Company would not reemploy Carr unless it was ordered to do so by the Board.

Thereafter the Union pursued various legal avenues on behalf of Carr, in addition to the unfair labor practice charge on behalf of Carr and Race, and suffered repeated rebuffs in the process. With the Union's assistance, Carr filed a claim for unemployment compensation, and also filed a complaint with the Pennsylvania Human Relations Commission, alleging sexual harassment. On February 24, following a hearing, a referee of the Pennsylvania Unemployment Compensation Board of Review held that Carr was ineligible for compensation because there was no necessary or compelling reason for her to quit.[10] Immediately on receiving the referee's decision, Carr went to the Company's personnel office and informed Personnel Assistant Henry that she was reapplying for work. Henry then pulled her personnel folder and placed it in the active file with those of other applicants. There were no changes with regard to pertinent information. Carr indicated a preference for clerical work, but did not rule out any job or either plant. Thereafter Carr called in about her application. On July 15, 1981, the sexual harassment charge was administratively dismissed for lack of probable cause. In the meantime, on January 30, the Regional Director declined to proceed on the Carr-Race matter; however, on January 29, 1982, the General Counsel granted the Union's appeal with respect to the Company's refusal to reinstate the employees. Meanwhile, during the election campaign the Carr-Race matter became a company issue as well as a union issue. In a series of captive audience speeches that he delivered to assembled employees shortly before the election, Company Vice President Robert Blair repeatedly hammered home the theme that the Union demonstrated its ineptitude by failing to get Carr and Race reinstated to their jobs. In the following or similar language, Blair told the employees:

> Now they have also, these union organizers, have also been going around telling certain people, people that used to work at the company and no longer work here, they will, we'll show them, we're going to get you your job back here. Just watch us. We're going to get you your job back here. And they've said to certain individuals, you worried about your unemployment comp? Well, don't worry about it. We'll see that you get unemployment comp. They've said, we're going to file a flock of charges against the company in front of various state agencies like the Pennsylvania Human Relations Commission. And they did, they filed charges against us in front of the Pennsylvania Human Relations Commission. Well, the fact of the matter is not one single person that they said they'd get their job back is back here working. Not one single person that they said—don't worry we'll get you unemployment comp—got unemployment comp.

Although Blair did not mention names, Assistant Vice President Zimmerman testified that he was referring to Carr and Race.[11]

[9] The letter is dated October 10, and Carr testified that she mailed it the next day. However, the letter was postmarked October 17.

[10] The referee found that Carr was instructed to complete an application for employment in order to be considered for reemployment. For the reasons previously discussed, I do not agree with this finding. The referee noted Carr's assertion that the Company disapproved of her union activities. However, the referee did not consider the question presented in this case, namely, whether the Company refused to reinstate Carr because of her union and concerted activities or because of the pending unfair labor practice charge.

[11] The foregoing quotation is taken from a transcript of a company tape recording. Both the Company and the Union tape recorded captive audience meetings during the week of June 1, 1981. Generally the company transcripts are more accurate with respect to the statements of com-

Continued

The Company never offered reemployment to either Carr or Race. Assistant Vice President Zimmerman testified that the Company did not offer reemployment to Carr because (1) she did not give notice to the Company that she was leaving, and (2) her reason for leaving (i.e., her transfer to another job) was not a good reason. Zimmerman testified that the Company did not offer reemployment to Race because (1) she never reapplied, (2) she had a poor attendance record, and (3) she told Carter to shove the job up his "ass." In fact, as indicated, Zimmerman informed Carr by his letter of October 16 that the Company would not consider her request for reemployment because of the pending unfair labor practice charge. Neither Carr nor Race was ever given any other reason. The October 16 letter constituted an admission that the Company was refusing to consider Carr for reemployment because the Union had filed a charge on her behalf. Therefore the letter evidenced that the Company was violating Section 8(a)(4) of the Act. See *NLRB v. Syracuse Stamping Co.*, 208 F.2d 77, 79–80 (2d Cir. 1953). The letter further evidences that the reasons advanced by Zimmerman for refusing to reemploy Carr simply constituted a rationalization for a decision that the Company made when it received the charge. As the language of the letter was sufficiently broad to also encompass the situation of Nancy Race, the inference is warranted, and I so find, that the charge was also at least a factor in the Company's refusal to consider Race for reemployment.

The evidence further indicates that the reasons advanced by Zimmerman, both as to Carr and Race, lacked any credible factual basis, or did not normally constitute grounds for refusing to consider an applicant for reemployment, or both. The Company contends that Carr did not apply for reemployment until February 27, and that Race never reapplied. In fact, as Zimmerman was well aware, both Carr and Race applied for work by telephone and by telegram on October 6, and Carr further applied in person on October 13 and by letter on October 16 or 17. Neither Carter nor Zimmerman, in his testimony, gave any explanation for their refusal to accept organizer Glather's call as a good-faith request for reemployment. If the company officials believed that such request should have come personally from Carr and Race, then it would have been a simple matter for either official to request that the employees be placed on the telephone. But for the fact that the initial caller was a union organizer, Carter or Zimmerman probably would have done this. Zimmerman testified that he did not regard the October 6 telegram as a valid reapplication because he never received such a request by telegram, and because the telegram did not come from Carr and Race, and that he did not consider Carr's letter as a valid request. Zimmerman gave no explanation for the latter assertion. In fact, the Company had no established manner for submission of requests for reemployment. Rather, such requests could be and were often received in an informal manner (e.g., by telephone call). Moreover, on October 13 Carr came in person to request reemployment. Although Carr inquired about the Warren plant, Zimmerman was aware, by reason of Glather's call, the Union's telegram, and Carr's subsequent letter, that Carr was willing to work in returns. As indicated, Zimmerman told Carr to go to the personnel office to update her application. Had she done so, she would have ended up talking to either of the same officials who were present in the conference room (i.e., Zimmerman or Henry). In view of the short time that had elapsed since Carr quit her job, it was obvious that there was no need for Carr to update her application. Indeed, the Company's own records indicate that absent a discriminatory motive, the Company would have immediately returned Carr and Race to their jobs on their request to return, without telling them to update their application or otherwise go on a waiting list.[12] The situation of Mary Lou Rigby, which is documented in a series of memos in her personnel file (G.C. Exh. 178) is illustrative. Rigby began working for the Company in order handling in September 1972. In February 1974 Rigby was assigned to work as giveout in returns. Rigby complained loud and long about the transfer, and then informed the Company that she was quitting. Her resignation was accepted. The file memo indicates management's view that Rigby's attitude was "completely negative," that she had "a history of job changing," and that "It's best she leaves NPC." However, prior to the effective date of her resignation, Rigby changed her mind. Rigby thereafter retained her job, without being asked to reapply or update her application. Thereafter Rigby worked for the Company until September 1979, when she quit her job in order to obtain a better job with National Forge Company. During much of the intervening period Rigby's attendance was rated as unsatisfactory. She was frequently absent or tardy. By 1979 Zimmerman was personnel director and Rodney Henry was personnel assistant. Nevertheless, having had the benefit of the foregoing information in Rigby's personnel file, they recommended her without qualification for future reemployment (Rigby was given a "Yes" rating, which will be explained, infra).

In sum, the Rigby file demonstrates that absent a discriminatory motive, the Company will excuse an employee who quits (for whatever reason), but shortly thereafter changes his or her mind, and will not require the employee to reapply and wait for reemployment. Therefore, Freeda Carr was correct in concluding that by directing her to the personnel office to update her application, Zimmerman was, for discriminatory reasons, avoiding an offer of reemployment by placing her on a waiting list with other applicants. The Rigby file further demonstrates that the Company does not view employee dissatisfaction with job assignments as a bar to reemployment, even when such dissatisfaction becomes a habit, or when the employee quits as a result of a transfer. As will

pany officials, whereas the union transcripts tend to more accurately reflect questions or statements by employees. The difference probably reflects the location of the recording devices.

[12] Some of the evidence discussed here was adduced at the reopened hearing on April 27, 1983. To the extent relevant, such evidence may be considered with respect to the matter of Carr and Race, just as evidence adduced in the original hearing may be considered with respect to the additional alleged discriminatees. See *Air Express International Corp.*, 245 NLRB 478, 483 fn. 10 (1979), enfd. as modified 659 F.2d 610 (5th Cir. 1981).

be discussed, the Rigby file is also evidentiary with respect to other alleged discriminatees in the present case.

Zimmerman testified that Carr failed to give adequate notice of quitting because the Company "appreciate[s]," but does not require, 2 weeks' notice, and that accumulated vacation time cannot be used for notice purposes. According to Zimmerman, the reason for this policy is to give the Company sufficient time to obtain a replacement. Interestingly, the Company does not contend that it refused to rehire Race because she failed to give adequate notice. The Company's employee handbook is silent with respect to notice of quitting. However, alleged discriminatee Barbara Morgan testified without contradiction that Supervisor Pauline Stec told her that she could use accumulated leave time for notice purposes. As indicated, Vice President Carter did not object when Carr made the same request. I credit the testimony of Morgan, and I find that the Company has no consistent policy with respect to notice. Rather, the Company will accept accumulated leave time as notice unless the Company informs the employee otherwise. In Carr's situation, the matter of notice was plainly a sham, because Carr did not lose even 1 day from work before she requested reemployment. Carr quit on Friday, October 3, which was her day off, and immediately notified the Company, thru organizer Glather, on Monday morning, October 6, that she was willing to accept her assignment in returns. Moreover, the Company's records indicate that failure to give notice, even in an extreme situation, does not constitute a bar to reemployment of an otherwise qualified employee. Chris Nuhfer, who complained to management about Vivian Newton's union activity, failed to return from pregnancy leave in early 1979, and her name was removed from the personnel roster. She was rehired in December 1979. She stopped coming to work after April 29, 1981, and on June 10, 1981, her name was removed from the personnel roster. On June 3, 1980, she was given a written warning for unsatisfactory attendance. Nevertheless, Nuhfer was rated as recommended for reemployment, and she was rehired in the mailing department on August 24, 1981. The personnel files of Kathy Reist and Debra Frank indicate that they gave no notice before they quit, but instead, gave notice after they stopped working. Nevertheless, both employees were recommended for reemployment, and Proctor was subsequently twice rehired (the second time, after having refused work at IDC in lieu of a layoff). Similarly Nancy Naser, who had a poor attendance record throughout her career at the Company, was rehired after having quit her job without notice.

Approximately 30 percent of the Company's work force consists of reemployed employees who formerly worked for the Company. It is not unusual for employees to work two, three, or even four separate times for the Company. The Company's records indicate that employees leave for a variety of reasons (e.g., family responsibilities, relocation, and better employment). When an employee leaves, the personnel office evaluates the employee's eligibility for future reemployment, and the rating is entered on the employee's personnel file. However, the employee is normally not notified of such rating. Personnel Assistant Henry normally makes the evaluation, subject to review and revision by Assistant Vice President Zimmerman. The ratings are as follows. "Yes" means that the employee is eligible for rehire. "Yes?" means that there is a small problem, but the employee could be eligible for reemployment. "No?" means that there is a more serious problem, but the employee could still be eligible. "No" means that it is unlikely that the employee would be rehired. The ratings are sometimes accompanied by an explanation, qualification, or other notation. The overwhelming majority of rehired employees received a "Yes" rating when they left. It is unusual for the Company to rehire an employee with a "No" or "No?" rating. Zimmerman testified that over a 3-year period, only two employees were rehired with a "No" rating, and that one of them was rehired as a result of a personal appeal by her husband, who was then working for the Company, and who pleaded financial hardship. In sum, a "Yes?" rating places the applicant at a disadvantage when competing with other applicants, a "No?" rating makes reemployment unlikely, and a "No" precludes consideration for reemployment. The Company's records indicate that poor attendance is usually the indicated reason for a qualified or unfavorable recommendation.

Freeda Carr's personnel file indicates that she was rated as follows: "Yes? See REZ, JMC CHN" (i.e., see official Zimmerman, Carter, or Nelson). No other explanation was given. It is evident that Personnel Assistant Henry was hard put to explain any qualified rating for this longtime and valued employee. Notwithstanding the "Yes?" rating, Zimmerman, as indicated, testified that the Company did not offer her reemployment because of the alleged lack of notice and inadequate reason for leaving. Nancy Race's personnel file indicates a rating of "No. Attendance." However, Race's attendance record was better than that of other employees who were given a "Yes" or "Yes?" rating on their departure. For example, Edith Falconer Fehlman was given a "Yes" rating, although she had seven absences, totaling 103 days during a 1-year period. Race's absences were caused substantially by pregnancy, which, as testified by Zimmerman, constituted a mitigating factor. Moreover, Race's attendance record improved to an acceptable level following her return from maternity leave. As for Race's emotional outburst on October 2, the evidence indicates that Vice President Zimmerman testified that in considering former employees for reemployment, the Company looks at those factors that reflect stability of employment (e.g., attendance and continuity of employment). If so, then it is difficult to see why Zimmerman would attach much significance to one emotional outburst. The Company's records indicate that normally it does not. Employee Laura Zaffino's file indicated that she assaulted a fellow employee, splitting her lip. Zaffino also demonstrated a repeated reluctance to follow the instructions of her supervisors. On leaving the Company, Zaffino was given a "Yes?" rating.

I find that the reasons advanced by the Company for refusing to rehire Carr and Race, except for that advanced by Zimmerman in his letter to Carr, were pretextual. The Company refused, and continued to refuse, to

rehire Carr and Race because they actively sought the Union's assistance in regaining their jobs, which assistance included the filing of an unfair labor practice charge in Case 6–CA–13933. Indeed, Company Vice President Blair came close to conceding as much in his speeches to the employees in June 1981. Blair made clear that he regarded the Union's inability to obtain reinstatement for the employees as an issue in the campaign. By so doing, the Company boxed itself into a position whereby even if it were inclined to reinstate Carr and Race, it could not do so without appearing to give the Union a victory. Compare, in the context of an 8(a)(5) violation, *General Electric Co.*, 150 NLRB 192, 196 (1964), enfd. 418 F.2d 736, 755 (2d Cir. 1969), cert. denied 397 U.S. 965 (1970).

It is undisputed that on and after October 6 there was work available for Carr and Race in the returns departments. Pursuant to a department request on October 6, the Company, during the period from October 13 to 20, hired nine new employees for work in returns. Most worked as returns inspectors. Personnel Assistant Henry testified that the Company continued to hire employees after February 27, 1981 (when the Company formally acknowledged Carr's reapplication) and that Carr would have been qualified for some of the positions. I find that but for the actions of Carr and Race in seeking union assistance, the Company would have reinstated them when, acting through organizer Glather, they requested reinstatement on October 6. Therefore, the Company violated Section 8(a)(1), (3), and (4) of the Act, and Carr and Race are entitled to reinstatement and backpay from that date. I further find that the Company's discriminatory actions with request to Carr and Race may properly be considered as evidence with respect to the other alleged discriminatees.

8. Denial of access by nonemployee organizers to IDC premises

On the afternoon of October 6, union organizers Dan Glather and Frank LaCotta, accompanied by Freeda Carr, Nancy Race, and former employee Chris Branstrom, entered on the premises of IDC for the purpose of distributing union literature and talking to employees as they left the plant. Vice President Carter told Glather that this was private property, and he requested that they leave. Glather asserted that they were exercising their rights under the Act to communicate with the employees. Carter responded that if they returned the next day the Company would contact "the authorities" and have them removed. The next day (October 7) union organizers Glather, Joe Picarretto, and James Gilmartin, accompanied by Carr, Race, and Branstrom, again went to the IDC premises. They were confronted by a state trooper who was present at the Company's request. The trooper told them that if they did not leave they would be arrested. The group temporarily left. However, the three professional organizers returned to the premises (while the others waited on a public road), and they proceeded to distribute union literature to employees leaving the plant. The trooper again threatened them with arrest, but they persisted. The trooper asked Company Maintenance Supervisor Frank Wilcox if he wanted them arrested. Wilcox said that he did. However, the trooper's supervisor advised him to "continue the arrest by summons." The organizers left after they finished distributing their literature. Within a few days the organizers were served by mail with a summons, prepared by the trooper, charging them with criminal trespass by entering the Company's property and refusing to leave on request. The matter did not go to trial, because the district attorney and the Union's attorney worked out an agreement whereby the charges were dropped against Glather and Picaretto, Gilmartin pleaded guilty to disorderly conduct and paid a fine, and the Union agreed that it would not return to the Company's property unless it could prove through Board processes that it had a right to be there. The district attorney took the position that the Union's alleged statutory right was a matter for the Board, and not the state courts. The Company did not object to all charges being dropped, but the district attorney insisted on the guilty plea by Gilmartin, because of his alleged disrespectful behavior toward the state trooper. By letter dated February 26, 1981 (during the pendency of the election petition in Case 6–RC–8922), the Union requested permission from Carter "to hand bill the Irvine employees to give our side of Freeda's case or in liu [sic] of your permission we would formally request a current list of the names and addresses of the Irvine employees." The Company did not respond to the letter.

The consolidated complaint alleges (pars. 7(k), (l), and (o) that the Company violated Section 8(a)(1) on October 6 by threatening union organizers with arrest because they distributed union literature on company property, on October 7 by causing their arrest for the same reason, and on February 26 by refusing to permit the Union to handbill at IDC. The first two allegations are factually inaccurate. The Company threatened to call the police and have the organizers removed, but did not threaten to have them arrested. The Company caused the organizers to be evicted, and caused criminal proceedings against them, but they were not arrested (i.e., placed in police custody). However, what is significant is that the Company refused to permit the Union to distribute literature and communicate with employees on the IDC premises, and threatened to and did initiate police action to expel and keep nonemployee union organizers from its premises. (The Company's actions with respect to Carr and Race will be discussed at a later point in this decision.) In sum, the issue presented by all three allegations is whether the organizers had a statutorily protected right to distribute literature and communicate with employees on the IDC premises, and consequently whether the Company violated the Act by interfering with the Union's exercise of that right. Therefore, although paragraph 7(o) alleges a violation during the pendency of the election petition, I shall consider all three allegations together at this point.

The General Counsel and the Company agree, and correctly so, that the governing standards are set forth in *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 112–113 (1956). In *Babcock & Wilcox*, the Supreme Court held as follows:

> . . . an employer may validly post his property against nonemployee distribution of union literature if reasonable efforts by the union through other available channels of communication will enable it to reach the employees with its message and if the employer's notice or order does not discriminate against the union by allowing other distribution. In these circumstances the employer may not be compelled to allow distribution even under such reasonable regulations as the orders in these cases permit.
>
> This is not a problem of always open or always closed doors for union organization on company property. Organization rights are granted to workers by the same authority, the National Government, that preserves property rights. Accommodation between the two must be obtained with as little destruction of one as is consistent with the maintenance of the other. The employer may not affirmatively interfere with organization; the union may not always insist that the employer aid organization. But when the inaccessibility of employees makes ineffective the reasonable attempts by nonemployees to communicate with them through the usual channels, the right to exclude from property has been required to yield to the extent needed to permit communication of information on the right to organize.
>
> . . . .
>
> The right of self-organization depends in some measure on the ability of employees to learn the advantages of self-organization from others. Consequently, if the location of a plant and the living quarters of the employees place the employees beyond the reach of reasonable union efforts to communicate with them, the employer must allow the union to approach his employees on his property.

I have studied numerous case decisions involving application of the *Babcock & Wilcox* standards, including *Babcock & Wilcox* itself. These decisions tend to reflect certain distinct currents in the developing body of law. First, as the Supreme Court itself has recognized, the courts, including the Supreme Court, have demonstrated great reluctance to compromise employer property rights by finding that an employer violated the Act by excluding nonemployee organizers from its premises. See *Sears, Roebuck & Co. v. Carpenters*, 436 U.S. 180, 205 (1978). I am unaware of any court decision affirming such a finding by the Board under *Babcock & Wilcox* standards, except in situations where the employees lived on the employer's premises. Even in such situations, the courts have sometimes declined to find a violation. See *NLRB v. Tamiment, Inc.*, 451 F.2d 794 (3d Cir. 1971); *NLRB v. Kutsher's Hotel & Country Club*, 427 F.2d 200 (2d Cir. 1970). However, the courts have indicated a greater willingness to grant temporary union access as a remedy for serious unfair labor practices. See *Conair Corp. v. NLRB*, 721 F.2d 1355 (D.C. Cir. 1983); *Decaturville Sportswear Co. v. NLRB*, 406 F.2d 886, 889 (6th Cir. 1969). Both the Board and courts have tended to attach significance to a union's efforts, or lack of effort, to communicate with the employees by other means. See *Tamiment, Inc.*, supra at 798–799; *Lee Wards*, 199 NLRB 543, 545–546 (1972). Generally, Board decisions in this area do not tend to attach the same weight to employer property rights, vis-a-vis Section 7 rights, as the court decisions. However, it is evident from the history of Board litigation that the whole question of union access to employer property has been a highly controversial one, with the result sometimes depending as much on the makeup of the Board as the facts involved in particular cases. See and compare *Monogram Models*, 192 NLRB 705 (1971) (majority and dissenting opinions); *Hutzler Bros. Co.*, 241 NLRB 914 (1979), enf. denied 630 F.2d 1012 (4th Cir. 1980); *Ameron Automotive Centers*, 265 NLRB 511 (1982) (majority and dissenting opinions).

In the present case, unlike many others, the evidence indicates that the Union made extensive efforts to communicate with IDC employees by alternative means. For this if no other reason, careful consideration must be given to the feasibility of such means, including the Union's efforts and relative success or lack of success in reaching the employees. As will be discussed, the present case involves other factors that make it somewhat sui generis; specifically, (1) the large number of employees involved, coupled with continuing turnover among the employees; (2) the Company's extensive and unlawful interference with employee organizational activity; and (3) denial of access to alternative means away from the Company's premises (i.e., radio, newspapers, and meeting locations).

The first question to be considered is whether the Union could have communicated with the IDC employees at IDC entrances or exits without entering onto company property. A comparison of the Warren and IDC locations is in order. The Warren plant is located in downtown Warren; its entrances, exits, and parking lots are immediately adjacent to the public sidewalks. There is no contention that the location of the Warren plant poses any obstacle to union communication with employees in the plant area, although as found, supra, the Company engaged in unlawful surveillance of union distribution at Warren. However, IDC is located on a large, company-owned tract of land in a semirural area, adjacent to a highway (U.S. Route 62). No employees walk to work at IDC. The plant building, a roadway in front of the plant (known as the "Main Road"), dirt roads on either side of the plant, a walkway from the front entrance to the employee parking lot, the lot itself, the grounds around the plant, and the access roads to and from Route 62 are all located on company property. The access roads form a cloverleaf-type intersection with Route 62. The speed limit on Route 62 is 55 miles per hour. Much testimony and documentary evidence, including photographs, diagrams, and maps, were introduced concerning the physical situation at IDC. In addition, with the concurrence of the parties I personally visited the IDC premises, and I did so between 3:55 and 4:30 p.m. on October 20, 1982, a rainy afternoon when employees were leaving at the end of their workday (4 p.m.). On consideration of the evidence, including but not limited to my own observations, I find that there was no feasible way in which union organizers could communicate with employees at

or near the IDC premises, without actually entering onto company property. The only suggestion offered by the Company is that the union organizers could have stood on the grassy right-of-way adjacent to Route 62 at points where the access roads intersect with Route 62. The evidence is inconclusive regarding the width of the right-of-way. I agree with the testimony of organizers Glather and Gilmartin, in sum, that any attempt to distribute union literature and talk to employees at these locations would have been dangerous and impractical. Vehicles leaving the plant approach Route 62 at a high rate of speed; indeed, they move at a steadily increasing rate of speed from the time they leave the employee parking lot. If they did not, there would be a backup. An organizer who attempted to distribute literature at the intersections with Route 62 would not only risk injury to himself (particularly at times of bad weather or poor visibility) but might cause a backup or collision between vehicles if a driver stopped to receive literature or ask questions. Many of the drivers were not employees, but individuals who came to the plant to drop off or pick up employees (e.g., spouses) and therefore might not be personally interested in stopping to talk to union organizers. Additionally, since October 1981 some employees have traveled to and from work by bus. As of the present hearing, approximately 25 percent of the IDC employees commuted in this manner. The buses dropped off and picked up their passengers at the front entrance to the plant. Therefore, there is no way that the organizers could distribute literature or talk to these employees in the vicinity of IDC without entering onto plant premises.[13] In these circumstances, the Union cannot be faulted for failing to attempt distribution on the right-of-way. There is no question that the Company would not in any circumstances permit union organizers to enter onto its premises to distribute literature or otherwise communicate with employees. As found, the Union formally requested such permission, but the Company failed to respond. Assistant Vice President Zimmerman testified in sum, that the Company does not permit outsiders to make solicitations on its property, and that such property includes the access roads and land adjacent thereto, as well as land on both sides of Route 62.

The next question presented concerns the feasibility of alternative means of communication away from the IDC premises. I shall first consider the use of the media (radio, television, and newspapers) and meeting locations. There are no television stations in the Warren area. The nearest stations are in Erie, Pennsylvania, and Buffalo, New York. Organizers Glather and Gilmartin testified in sum that the media was unsatisfactory for their purposes because they lacked personal contact with the employees, the Union could not determine which employees it was reaching, and the media could not be used expeditiously (i.e., radio time and newspaper space must be reserved). Additionally, radio and television were too expensive. Nevertheless, the Union attempted to use the local media, but was rebuffed in the process.[14] There is one radio station and one newspaper in Warren. There is also an advertising periodical. The newspaper and the advertising periodical refused to accept the Union's ads, ostensibly because they regarded the matter as one between the Company and its employees and not for public display. The radio station discontinued the Union's ads in January, ostensibly because of complaints from within the community. The Union used a country and western radio station in Jamestown, New York, although it was more expensive than the Warren station, and few company employees lived in the Jamestown area.

The Union held regular weekly meetings in a motel meeting room in Warren.[15] The Union also held meetings in employees' homes. There is no allegation that the Company interfered with these meetings by surveillance or in any other manner. However, the Union encountered difficulty when it attempted to rent an auditorium for a mass rally shortly before the election. There were few locations in the Warren area that were adequate for such purpose. The Union initially attempted to rent a semipublicly owned theatre, but learned that the requisite procedure was time consuming, and that if permission was eventually denied, the Union might be left with nothing. Eventually through the area Combined Labor Council, the Union was able to obtain a school auditorium the movie "Norma Rae," and an appearance by Crystal Sutton, the real Norma Rae. However, under conditions added to the rental agreement, the council was not permitted to use the auditorium as a "place of rally" or for the distribution of union literature. The Warren newspaper refused to accept union notices of the presentation. The day before the presentation, a news article referred to the presentation, but gave the wrong time.

This brings me to the alternative means of communication on which the Supreme Court in *Babcock & Wilcox* placed the greatest emphasis; namely, the use of home visits, mailings, and telephone calls.[16] Unlike the methods discussed above, these methods presuppose that the Union knows the names and addresses or telephone numbers of the employees. In the present case, compilation

[13] The violations alleged in this case are continuing in nature (i.e., the Company refused and continues to refuse to permit union access to its premises). Therefore, developments since February 1981 may properly be considered in determining the feasibility of alternative means of contact.

[14] With respect to the charge in Case 6-CA-14403, the Regional Director administratively determined that there was insufficient evidence to proceed on allegations that the Company unlawfully prevented union access to the media by causing the local newspaper and radio station to cease or refrain from carrying the Union's advertisements. The General Counsel denied the Union's appeal, and thereby precluded litigation of such allegations in the present case. However, the refusal of the media to carry union ads, regardless of causation, may properly be considered in this case, because the *Babcock & Wilcox* standards are not limited to consideration of factors within the employer's control.

[15] I do not credit the testimony of organizer Gilmartin that these were simply organizing committee meetings. The Union informed employees through its mailings and by word-of-mouth that these were regular meetings that were open to all employees. In any event, the Union could have used the motel for general meetings if it wished, subject to limitations of space.

[16] In *Babcock & Wilcox*, the Court also referred the Union's ability to meet with employees on the public streets. In the case of IDC, that would not be a viable alternative. There are no public sidewalks near IDC, the employees eat and take their breaks on the Company's premises, and come from and return by vehicle to their homes, which are scattered over a large, semirural area.

of such information was no easy task. By the fall of 1980, the Union with the assistance of its employee organizing committee, compiled a list of the names of approximately 1200 employees, and the addresses of approximately 800 of those employees. The Union utilized its lists for house calls and mailing literature. However, the Union did not obtain a complete and accurate list of names and addresses until it received the Company's *Excelsior* list following the direction of election. In the meantime, the Union was constantly confronted with the need to maintain and update its lists. This was no modest task, in light of the large number of employees involved, and constant employee turnover.[17] Organizer Glather testified in sum that about 25 percent of the Union's mailings went to a wrong address or were sent to individuals who no longer worked for the Company. As found below, when members of the employee organizing committee attempted to assist the Union by copying names from timecards, the Company unlawfully disciplined them. In compiling lists of employees, the Union was heavily dependent on its employee committee. The predominantly female work force included many women whose telephone numbers and automobiles were listed and registered in their husbands' names. Therefore, telephone directories and auto registration records did not provide an adequate basis for obtaining employee names, addresses, or telephone numbers. The Union did not have any paid organizers within the plant. In these circumstances, it is significant, in considering the feasibility of alternative means of communication, that the Company countered the Union's organizational campaign with unlawful acts and conduct, which were directed at restricting communication by union adherents, and isolating and intimidating those employees. The Company thereby engaged in conduct that tended to increase the Union's need for communication by nonemployee organizers, while restricting the ability of prounion employees to assist the organizers (e.g., by furnishing them with the names and addresses of employees).[18] The Union's inability to maintain a complete and accurate list of names and addresses or telephone numbers of employees limited the effectiveness of home visits, mailings, and telephone calls.[19] The Union encountered additional frustrations when it went out into the field to make house calls.[20] During the lengthy campaign the Union made some 1000 house calls. However, the house calls were inadequate for establishing and maintaining contact with many of the employees. The employees' homes were scattered over a 40-mile radius from Warren, in a predominantly rural and hilly area of northwestern Pennsylvania and adjacent New York State. Most of the employees lived in Warren County. However, only about one-half lived in Warren, and many of these had rural addresses. The Company's *Excelsior* list indicates that nearly one-third of the employees gave rural delivery or box number addresses. Many employees were not at home when an organizer called. Some of the female employees were unwilling to accept visits from the male organizers while their husbands were at work or otherwise away from home. Moreover, even when home visits were effective to establish initial contact, the large number of employees, and the large area involved, precluded the use of house visits as a means of conveying the Union's position throughout the campaign. In contrast, it would have been relatively easy and inexpensive for the Union to convey its position (e.g., as it unsuccessfully sought to do with regard to the separation from employment of Carr and Race), by distributing literature and talking to employees as they left work at IDC. Indeed, the situs of employment would seem to be the logical place for such communication.

The General Counsel contends (Br. 76–78) that in part the Union is entitled to access to the IDC premises because, to a limited extent, the Company has permitted or tolerated the presence of nonemployees on IDC premises for nonbusiness-related reasons (e.g., former employees sometimes came to visit their friends). The General Counsel witnesses testified that food vendors sometimes came onto the premises, although Vice President Carter testified that such vending was not permitted. However, the General Counsel's argument misconstrues the *Bab-*

[17] At the representation case hearing in February, Assistant Vice President Zimmerman testified that the Company had an annual employee turnover rate of 50 percent. However, Zimmerman's testimony indicates that he included in this figure transfers between departments and plants. Figures introduced in evidence in the present hearing indicate that from February 1, 1980, through April 30, 1981, the Company hired about 190 employees within the election unit (i.e., excluding temporary help and retail outlet employees), including 102 at IDC; from May 1, 1981, through October 12, 1982, hired about 484 unit employees including about 155 at IDC. This would indicate an average annual turnover rate, excluding transfers, of between 15 and 20 percent. Zimmerman testified that over a 2-year period, approximately 250 employees transferred between departments, but not more than 25 transferred between Warren and IDC.

[18] Organizer Glather testified in sum that as the Company increasingly engaged in unlawful conduct, the Union lost the active support of its committee members, particularly at IDC, until it reached a point where Joan Hockenberry, who was herself a controversial personality, was the only employee who was actively and openly engaging in union activity at IDC. It is not necessary or proper for me to probe the employees' mental processes by determining whether, and if so why, the Union lost support among its committee members. Rather, for purposes of determining the feasibility of alternative means of communication, the question presented is whether the Company engaged in unlawful conduct that tends to coerce and restrain employees in the exercise of their Sec. 7 rights, and thereby reduce the opportunities for communication between the Union and the employees. See and compare *Emerson Electric Co.*, 247 NLRB 1365–1370 (1980), enfd. 649 F.2d 589 (8th Cir. 1981); *Michigan Products*, 236 NLRB 1143, 1147–1148 (1978). As has been and will be discussed, I find that the Company did engage in such conduct.

[19] In *Babcock & Wilcox*, supra, 351 U.S. at 107 fn. 1, the Court noted that the union there had been able to contact a substantial minority of the employer's employees. However, *Babcock & Wilcox*, unlike the present case, involved an organizational campaign in its incipient stages. In the present case, the campaign was long underway, and the Union was attempting to establish and maintain itself as the representative of the employees in a unit that was much larger than that originally contemplated. Therefore, it was not enough for the Union to be able to reach a substantial number of employees. Rather, the Union would be seriously inhibited if as here, it was unable to communicate with or even locate or identify substantially less than all the employees.

[20] The municipality of Warren has a so-called Green River Ordinance, which prohibits door-to-door solicitation. No evidence was introduced that would indicate that the ordinance has been interpreted or enforced in such a manner as to prohibit union solicitation. With respect to the charge in Case 6–CA–14403, the Regional Director declined to proceed on an allegation that the Company unlawfully told employees to notify local law enforcement agencies if they did not want union home visits. The General Counsel denied the Union's appeal from this decision, thereby precluding litigation of this matter in the present case. I adhere to my ruling at the hearing in this regard.

cock & Wilcox standards. As indicated, the Supreme Court held that an employer may exclude nonemployee organizers if other channels of communication are available and adequate and the employer "does not discriminate against the Union by allowing other *distribution*" (emphasis added). The Court said nothing about the extent to which the employer opened his premises to the public for reasons other than such distribution. In *Ameron Automotive Centers*, 265 NLRB 511, 512 fn. 10 (1982), the Board held in essence, that an employer did not engage in discriminatory conduct under *Babcock & Wilcox*, by excluding organizers while permitting commercial vending on its premises. In the present case, the evidence fails to indicate that the Company permitted any other kind of solicitation or distribution. Moreover, Supreme Court decisions since *Babcock & Wilcox* involving retail establishments that are generally open to the public in a very real sense make clear that a union has no more right of access to the premises of such establishments than it does to those of nonretail firms that are not generally open to the public. See *Central Hardware Co. v. NLRB*, 407 U.S. 539, 547–548 (1972); *Hudgens v. NLRB*, 424 U.S. 507, 521–523 (1976). However, I agree with the General Counsel's argument that the Union's ability to conduct regular meetings at the motel was not an adequate alternative to access to the IDC premises. Attendance at union meetings presupposes an interest in unionization on the part of the attending employees, and the Union, under *Babcock & Wilcox* standards was entitled to a reasonable opportunity to generate such interest. *Hutzler Bros.*, supra, 241 NLRB 914 fn. 2. Moreover, many of the IDC employees were dependent on other persons for their transportation to and from work. Therefore they may not have been able to attend union meetings in Warren.

On consideration of the evidence in this case, I find under *Babcock & Wilcox* standards, that notwithstanding conscientious efforts, the Union did not have a viable alternative to communication with IDC employees by entering IDC premises to distribute literature and talk to the employees. Therefore, the Company violated Section 8(a)(1) by excluding the organizers from its premises. As indicated, I am mindful of judicial reluctance to require such access. However, I am also mindful of the Supreme Court's admonition that this is not a problem of "always open and always closed doors," and that there should be an accommodation between organizational and property rights. As discussed, the courts have indicated greater willingness to require temporary access as a remedy for serious unfair labor practices. In the present case, the name of the game was communication. Propaganda on both sides was intensive. In finding that the Company unlawfully excluded union organizers from the IDC premises, I have attached great significance to the fact that the Company frustrated alternative means of communication by its own unfair labor practices directed against the employees. In these circumstances, I find that temporary union access to the IDC premises, coupled with company compliance with the recommended Order in this case, should provide an adequate remedy without unduly compromising the Company's property rights. Therefore, I am recommending that the Company be ordered to grant such access for a period of 6 months. I find that union access during this period, coupled with company compliance with the remedial order including provisions discussed above, would enable the Union to develop adequate alternative means of communication, and would allow sufficient time for establishment of conditions under which the employees can make an informed choice in a second election.

B. *Alleged Violations of Section 8(a)(1), (3), and (4) and Objections to Employer Conduct During the Critical Period from October 27, 1980, to June 9, 1981*

1. Restrictions on employee talk

The complaint alleges (par. 8(b)) that about January 12, the Company by Finishing Area Supervisor Gern discriminatorily prohibited Joan Hockenberry from talking to employees during worktime. Hockenberry testified that on that date, she was working on the multiple packing line when the box boy came to her and asked questions about the Union. Hockenberry answered his questions while continuing to work. After the box boy left, Supervisor Gerns came to her and said that he did not want "anymore of that union arguing going on during working time." Hockenberry explained that she was not arguing, but was answering questions. Gerns responded that this was a warning, and the next time she would get a written warning. Gern initially testified that he did not recall the incident. Gern subsequently admitted that he might have told Hockenberry to stop talking about the Union on working time. Thereafter, Gern attempted to back away from this admission, asserting that he simply told Hockenberry to stop talking.

I credit the testimony of Hockenberry, and I find that Gern discriminatorily and in disregard of the Company's usual policy gave Hockenberry a verbal warning because she was talking about the Union. First, Hockenberry's testimony indicates that the box boy initiated the conversation, and that Hockenberry did not stop work while talking. If the box boy was neglecting his own duties, or was interfering with Hockenberry's work, then absent a discriminatory motive Gern probably would have reprimanded the box boy. Instead, Gern reprimanded Hockenberry, who had done nothing wrong. Moreover, absent a discriminatory motive, the subject matter of the conversation would be irrelevant. Nevertheless Gern pointedly, falsely, and in a disparaging manner accused Hockenberry of "union arguing" during working time. Therefore, the Company violated Section 8(a)(1) and (3) by discriminatorily prohibiting Hockenberry from talking about the Union under circumstances in which company policy permitted other forms of conversation. *Fluid Packaging Co.*, 247 NLRB 1469 (1980), enfd. 649 F.2d 860 (3d Cir. 1981). The incident further tends to indicate that as suggested by the testimony of Assistant Vice President Zimmerman, the Company was treating prounion conversation as union "solicitation," which, unlike other forms of conversation and solicitation, was strictly

limited to lunch and formal break periods, and times before and after the employees' work shift.[21]

2. Denial of access to timecard racks and warnings to Joan Hockenberry, Sheila Mack, and Dawn Dickson

The complaint alleges (pars. 10(e), (f), and (g)) that in January and February the Company discriminatorily issued warnings to employees Joan Hockenberry, Sheila Mack, and Dawn Dickson. The incidents involved actual or apparent copying of names from timecards. Mack and Dickson worked at Warren and Hockenberry at IDC. Organizer Glather testified that he asked the three employees to get the names of employees from timecards, as part of a union effort to compile an accurate and complete list of employees for contact purposes. Mack and Dickson testified in sum that in late January, pursuant to Glather's request, they stood at the timecard rack during their lunch break. Mack read off names and Dickson wrote them down. They did not touch any cards other than their own. After they returned to work, Supervisor Mary Bloom approached each of them. Bloom accused each employee of tampering with the timecards, asserting that they could not do this. Mack and Dickson each protested that they did not touch the cards. Bloom did not indicate that this would excuse their conduct. However, no further disciplinary action was taken against them. Bloom, who was retired at the time of the present hearing, was not called as a witness, and the testimony of Mack and Dickson stands uncontradicted. However, Supervisor Gern testified concerning another incident involving Joan Hockenberry, which occurred at IDC about the same time that Mack and Dickson were warned at Warren. According to Gern, Supervisor Randall Chase reported to him that he saw Hockenberry standing in front of the timecard rack, lifting her head up and down, and writing. Gern reported the matter to Vice President Carter, who instructed him to give Hockenberry an oral warning, which he did. According to Gern, they did not discuss the reason for Hockenberry's conduct, but he suspected that she was doing it for the Union. Gern asked Hockenberry if she was writing down names. Hockenberry said she was not. Gern accepted the denial, but warned her that the cards were company property, and the information on the cards was not for anyone else's use.

On February 19 Gern received another report about Hockenberry. Supervisor Mark Wilson told Gern that he saw Hockenberry standing at the timecard rack with paper in hand, looking at the board, and writing down names. Gern summoned Hockenberry to the breakroom where, in the presence of Wilson, he gave her a written warning notice for "misconduct," which was placed in her personnel file. The warning implied, on the basis of Wilson's report, but did not directly state, that Hockenberry was copying names from the timecards. Hockenberry denied that she copied names, but Gern insisted, on the basis of Wilson's report, that she was observed engaging in such conduct. The next day, at Hockenberry's request, she met with Vice President Carter. Hockenberry again denied that she was copying names, and asserted that she was giving directions. Carter indicated that he did not believe her, and stated that the warning would stand.

Neither Hockenberry nor Supervisor Chase testified concerning the January incident. Hockenberry testified that she did not receive any warnings about the timecards prior to February 19. Supervisor Wilson was not presented as a witness. Hockenberry testified that prior to February 19 she copied names from the timecards for the Union, but that she was not doing this on February 19. According to Hockenberry, she was standing near the rack, holding her timecard and writing directions to an employee's house for the benefit of another employee who was making house calls on behalf of the Union. It is undisputed that whatever Hockenberry was doing, occurred prior to the start of the work shift (i.e., on nonworking time). Vice President Carter testified that the Company has a policy of not releasing names and addresses of employees, and that Hockenberry received a written warning because Supervisor Wilson saw her copying names. Assistant Vice President Zimmerman testified that the Company does not give out names, addresses, and phone numbers of employees for privacy reasons and because such information is sometimes sought to compile lists (e.g., for fundraising). Zimmerman also testified that new employees are instructed that they cannot tamper with other employees' timecards (e.g., by signing another employee's card). However, the evidence fails to indicate that employees are normally informed that they cannot look at other employees' timecards, or copy information from the cards.

I find, as admitted by Mack and Dickson, that they were engaged in copying names of employees from timecards for union organizational purposes. I further find that they were warned against engaging in such activity. Although Supervisor Bloom referred to tampering with cards, it is evident from the testimony of Zimmerman, Carter, and Gern that the Company regarded copying of names as tampering. It is also evident from the testimony of Gern, that by late January the Company had reason to believe that union adherents were engaging in such activity for organizational purposes. Regarding the January incident involving Joan Hockenberry, in the absence of direct testimony the evidence is inconclusive as to just what she was doing on that occasion. As Gern accepted her denial, I am proceeding on the premise that she was not then copying names, but was warned that she could be disciplined for engaging in such activity even if it involved union activity. Regarding the February 19 incident, Hockenberry was the only eyewitness to testify as to what she was actually doing. Gern's testimony is hearsay regarding the incident. Therefore, I credit Hockenberry, and I find that she was writing directions for the purpose of facilitating union visits.

I find that Mack and Dickson were engaged in protected concerted activity under Section 7 of the Act, and

[21] The consolidated complaint alleges (par. 7(v)) that in early June 1981, the Company permitted employees to sell antiunion buttons while preventing communication about the Union. No evidence was presented in support of this allegation. Therefore, I am recommending that the allegation be dismissed.

specifically, that they did not attempt to copy information from private or confidential records. The timecards were located in open areas where they could be and were regularly viewed by employees arriving at work or leaving work. The only pertinent information on the cards consisted of employee names. They did not even indicate addresses. The timecards were used to record employee attendance at work, and to that extent were used to compute pay. Therefore, new employees were informed, as part of their orientation, that they could not sign other employees' cards. However, until the incidents described above, the Company did not inform its employees that they could not look at the cards or copy the names of employees. The employees had a legitimate reason to copy names (i.e., to facilitate lawful organizational activity), and the evidence fails to indicate that they sought the names for any improper purpose. Therefore, the activity was protected under Section 7. See *Ridgely Mfg. Co.*, 207 NLRB 83 (1973), enfd. 510 F.2d 185 (D.C. Cir. 1975); *Gray Flooring*, 212 NLRB 668 (1974). I do not agree with the Company's argument (Br. 79) that the Board policy set forth in *Excelsior Underwear*, 156 NLRB 1236 (1966), precludes such finding. *Ridgely* and *Gray Flooring*, supra, were both decided after *Excelsior*. In *Excelsior*, the Board held: "A list of employee names and addresses is not like a customer list, and an employer would appear to have no significant interest in keeping the names and addresses of his employees secret (other than a desire to prevent the union from communicating with his employees—an interest we see no reason to protect)." (Id. at 1243.) That rationale is applicable to the present case. Moreover, the Board emphasized that the policy enunciated in *Excelsior* constituted an exercise of its authority to establish rules governing the conduct of Board elections, and did not preclude any finding, in an appropriate proceeding, that an employer commits an unfair labor practice by failing or refusing to make available the names and addresses of its employees (156 NLRB at 1245–1246).

I further find that the Company unlawfully interfered with Section 7 rights, and thereby violated Section 8(a)(1) and (3) of the Act, by giving oral warnings to Hockenberry, Mack, and Dickson and a written warning to Hockenberry. As discussed, the Company had reason to believe that the employees were engaged in union activity. Nevertheless the Company took the position that they had no right to copy names, regardless of the purpose. Therefore, it would have been futile for the employees to tell the Company that they were engaged in union activity. It is evident that this would not have changed the Company's course of action. The oral warning to Hockenberry was unlawful because regardless of what she was then doing, Gern in essence warned her that she could not engage in protected concerted activity, i.e., copying names for the Union. As for the written warning, Hockenberry's testimony indicates that she was engaged in undisputedly protected activity, i.e., giving directions for a union house call. Therefore, the warning was unlawful, either as interference with such activity, or as discipline imposed by the Company under the mistaken belief that she was engaged in other, albeit also protected activity. See *NLRB v. Burnup & Sims*, 379 U.S. 21, 23 (1964).

3. Surveillance

The complaint alleges (par. 7(p)) that about March 16 the Company by its supervisors engaged in surveillance of the union activities of its employees at IDC. The evidence indicates that on March 18 several supervisors watched from the window of the IDC reception area while employees Joan Hockenberry, Freeda Carr, Donna Fehlman, and Kay Davis distributed union literature in front of the plant. As the evidence indicates that the supervisors simply watched the distribution without engaging in any unusual conduct that might be viewed as coercive, I am recommending that this allegation be dismissed. See *Metal Industries*, 251 NLRB 1523 (1980).

4. No-trespassing policy against employees

On March 19, the day after the handbilling described above, Assistant Vice President Zimmerman sent a letter to Freeda Carr, advising her that "as a individual who no longer enjoys employee status" with the Company, "you are not permitted to enter upon New Process Company property without permission." Zimmerman asserted that should she do so, "we will be obliged to resort to legal recourse." The General Counsel contends that the Company thereby violated Section 8(a)(1) of the Act.

As found, the Company discriminatorily refused to reinstate Carr on and after October 6. Therefore Carr enjoyed the status of an employee under the Act, including the rights of an off-duty employee. Specifically, Carr was entitled, under Section 7 of the Act, to engage in union solicitation and distribution at parking lots, gates, and other outside nonworking areas of the Company's premises. *Tri-County Medical Center*, 222 NLRB 1089 (1976). Therefore, the Company violated Section 8(a)(1) by refusing to permit Carr to engage in such activity on its premises, and by threatening her with legal recourse if she engaged in such activity. The Company could not properly rely on the Regional Director's administrative refusal (on January 30) to proceed on her case. Rather, her status as an employee, and her rights as an employee (e.g., her right to vote in the election and her entitlement to reinstatement and backpay) are dependent, retroactively, on the ultimate merits of her case. Moreover, even after the General Counsel administratively determined that a complaint should issue based on the Company's refusal to reinstate Carr and Race, Zimmerman did not withdraw his letter or otherwise inform Carr that she could engage in union activity on outside nonworking areas. Assuming arguendo, that Carr's case did not have merit, then she would be entitled to the rights of a nonemployee organizer as discussed above.

5. Company speeches and other statements to employees

a. *Statements alleged as unfair labor practices*

In mid-November, Finishing Area Supervisor Gern assembled and spoke to small groups of employees about the Union. Joan Hockenberry asked to and did attend

one of these meetings. According to Hockenberry, Gern said that if the Union came in, the Company would bargain for a contract, but did not have to start at the current rate, and "could start at the bottom." Gern testified that he did not say that the Company would bargain from scratch, and that he did not think he said that the Company would bargain from the bottom. According to Gern, he answered employee questions by referring to a booklet entitled "What every union free supervisor should know about unions." In pertinent part, the booklet stated in question-and-answer form as follows:

> Q. Is it possible that an agreement between a union and an employer could call for less in wages and benefits than employees had before?
>
> A. Yes. An employer is under no obligation to agree to a union's proposals or to grant concessions to the union. The employer is only required to bargain in good faith. And bargaining can be a "two way street." Employees' wages and benefits can go up, but they can just as easily go down.

I credit the testimony of Gern that he read the above-quoted excerpt from his booklet. Hockenberry testified that he had a booklet in front of him when he was speaking. However, I credit the testimony of Hockenberry that Gern said that bargaining could start from the bottom. As indicated, Gern was somewhat equivocal about whether he made such a statement. In his investigatory affidavit to the Board, Gern stated that he did not remember saying that the Company would start bargaining at the bottom. Gern's testimony indicates that although he referred to the booklet, he did not limit his statements to the booklet text, e.g., when referring to the selection of union stewards.

Under Board law, employer statements to the effect that bargaining can start at the bottom, may or may not be unlawful, depending on the surrounding circumstances. "Such statements are objectionable when, in context, they effectively threaten employees with the loss of existing benefits and leave them with the impression that what they may ultimately receive depends in large measure upon what the Union can induce the employer to restore. On the other hand, such statements are not objectionable when additional communication to the employees dispels any implication that wages and/or benefits will be reduced during the course of bargaining and establishes that any reduction in wages or benefits will occur only as a result of the normal give and take of collective bargaining. *White Stag Mfg. Co.*, 219 NLRB 1246, 1246-1251 (1975) (Member Fanning, dissenting); *Computer Peripherals*, 215 NLRB 293, 293-294 (1974) (Member Fanning, dissenting); *C & K Coal Co.*, 195 NLRB 1038, 1038-1039 (1972). The totality of all the circumstances must be viewed to determine the effect of the statements on the employees." *Plastronics, Inc.*, 233 NLRB 155, 156 (1977).

Applying the foregoing standard to the instant matter, I find that Gern did not unlawfully threaten the employees with loss of benefits. Gern told the employees that the Company could start at the bottom. However, by reading the quoted language in his booklet, Gern lawfully indicated that any losses would occur as a result of the normal give and take of collective bargaining (i.e., in the words of the booklet, that bargaining can be a "two-way street"). Therefore, I am recommending that the pertinent allegation of the consolidated complaint (par. 7(n)) be dismissed.

In mid-April, Assistant Vice President for Mailing George Stark assembled and addressed the department employees in small groups. Stark, who took charge of the department in January, testified that he conducted the meetings to answer the many employee questions about the Company's review system, raises, benefits, and other matters, which he found difficult to answer individually. Laurie Conklin Hockenberry, Joan's daughter-in-law, attended one of the meetings. Hockenberry testified that in response to employee complaints that typists were paid at a higher level, Stark said that the Company would like to raise the level of the machine operators, but could not at that time because it would be an unfair labor practice. (In her affidavit, she said that Stark said the Union might call this an unfair labor practice.) Stark testified that in response to the employee complaints, he said that he favored an in-depth review of the situation, but that such review and its results might be construed as an unfair labor practice. Stark testified that he did not believe he said that he would like to raise the level of machine operators. Stark explained that under company policy there could not by any general upgrading without an in-depth review. In fact, no such review was conducted even after the election.

I credit the testimony of Stark concerning his statement to the employees. Stark may have also expressed his personal opinion that the operators should get a raise. However, it is unlikely that Stark would have suggested that the Company favored such a move, because he was in no position to make such a statement in the absence of a complete study. The mailing department employees were not scheduled to receive either a general raise in grade level or a review of their situation prior to the election. Stark did not state or infer that the Union was preventing the employees from receiving a general increase in pay. He did not even promise that the employees would receive either a raise or a review of their situation after the election. I find that Stark correctly stated the applicable law, and that he did not, as alleged in the complaint, threaten the employees "with a loss of benefits because they selected, supported or joined the Union." *Uarco, Inc.*, 169 NLRB 1153, 1154 (1968); *Xidex Corp.*, 238 NLRB 1208, 1215-1216 (1978). Therefore, I am recommending that the pertinent allegation of the consolidated complaint (par. 7(r)) be dismissed.

During the week of June 1, company officials addressed captive audience meetings of employees who were assembled in groups of 20 to 25 at each meeting. The General Counsel contends that during the course of these meetings, Company Officials Robert and Steve Blair violated Section 8(a)(1) by telling employees that if they selected a union to represent them (1) they would always have to go through a shop steward to speak to a supervisor, and (2) that the Union would seek a closed shop and all employees in the bargaining unit would be

required to join the Union. In support of these contentions, the General Counsel relies (Br. 26) on the Company's transcripts of its tapes of these meetings (previously discussed regarding the matter of Carr and Race).

I have examined and considered both the alleged unlawful statements and the context in which these statements were made. With reference to the first alleged statement, the Company correctly points out (Br. 43), that in each instance the speaker (Company Vice President Robert Blair) expressed his opinion of what the Union allegedly wanted; in sum, to come between the employees and management through the functions of a shop steward. However, the difficulty with the Company's premise is that Blair did not confine himself to this line of argument. Rather, Blair went on to suggest that if the Union came in, the employees would *in fact* be precluded from communicating with management except through a steward or business agent. The following transcript excerpt is illustrative (G.C. Exh. 31A at 8):

> The unions hate meetings like this, they just hate them. They want to turn management against the employees and they want to turn the employees against management. They'd like to have someone in here right now standing between us so we can't talk to you and you can't talk to us. They want to put somebody like a shop steward right in between us, or a business agent. *If we wanted to talk to you, we'd have to talk to the steward and the steward would talk to you. And if you wanted to talk to us, and your supervisor and your department head or copersonnel, you'd have to go to the shop steward, the shop steward would come to us.* They want to have somebody doing your thinking and your talking for you. We hope you won't let them do that; we hope you won't let them get control of your lives. We hope you don't need anybody to do your thinking and your talking for you. [Emphasis added.]

The plain implication of the above language, which was similarly stated by Blair in his other speeches, was that if the employees voted for union representation, the Union's alleged wish would become fact, and the employees would be deprived of direct access to management, contrary to Section 9(a) of the Act and the Company's existing open door policy. The Company thereby violated Section 8(a)(1) by threatening to deprive the employees of an existing open door policy. *Cardio Data Systems Corp.*, 264 NLRB 37, 38 (1982); *Tipton Electric Co.*, 242 NLRB 202, 205–206 (1979), enfd. 621 F.2d 890 (8th Cir. 1980).[22]

Regarding the closed shop allegation, the transcripts indicate that Vice President Blair repeatedly used the terms "closed shop" and "union shop" interchangeably. Thus, Blair asserted in the following or similar language:

> . . . there's some things that they [the Union] want first that right away they want a union shop and that simply means that's a closed shop, a union shop. That means that all employees in the bargaining unit, in the voting unit, would have to, would have to join the union whether they wanted to or now [sic]. That's what a closed shop is and unions want that.

The Company contends (Br. 47 at fn. 35), that such references were innocuous, and that in fact Blair defined both a "closed shop" and "union shop" in terms of a union shop as permitted under Section 8(a)(3) of the Act. However, the transcripts indicate otherwise. The transcripts indicate that Blair categorically equated lack of union membership for *any* reason with loss of employment, and that the employees would be subject to such conditions if they selected the Union as their representative. Thus Blair stated in the following or similar language (G.C. Exh. 30A at 12–13):

> We have here the UFCW International constitution and I'd like to quote from it. I have a copy in case you'd like to take a look at it later. I've taken some of the more important aspects out of it. Here we go: "Members may be disciplined for violating provisions of either the local or international bylaws, failure to pay dues, fines, assessments, fees, advocating withdrawal, disrupting meetings, mishandling funds, interfering with an officer in the performance of his duties, crossing a UFCW picket line, crossing other union picket lines sanctioned by UFCW. Any member found quilty may be censured, fined, suspended, expelled. *Now if you're suspended, expelled—particularly if you're expelled—that means also that you lose your job,* if, *in the contract, a union shop clause is negotiated. And we don't know of a contract that we've seen that does not have a union shop clause in it. And the Company can have nothing to do with getting your job back.* [Emphasis added.]

The above language goes substantially beyond the kind of misstatement of law that the Board has held to constitute objectional conduct for election purposes, but not an unfair labor practice. See *Daniel Construction Co.*, 257 NLRB 1276 (1981). Rather, the evidence indicates that Blair threatened the employees that if the Union came in, the Company would negotiate a contract that would cause them to lose their jobs if they lost their union

[22] The company officials spoke at both Warren and IDC. The complaint, in its present form, alleges that the unlawful statements concerning union representation and closed shop were made at Warren. During the hearing, I denied the General Counsel's belated motion to amend pars. 7(t) and (u) of the complaint for a second time, this time to allege that the unlawful statements were also made at IDC. I anticipated that the General Counsel would present its evidence in the form of disputed testimony, and that it would be unfair to confront the Company with a new allegation at this point in the hearing. However, I ruled that the speeches at IDC could be used as evidence in support of the Union's objections to the election. In retrospect, it is apparent that the General Counsel was relying on the Company's transcripts, that the evidence was undisputed, and therefore that the Company would not have been prejudiced by the proposed amendment. Blair made substantially the same speech at IDC as he did at Warren, asserting that: "We have to talk to them through the stewards or the business agent and they'll talk to you. They want to get between us. We hope you won't let us, we hope you won't let them do that to you. We hope you'll vote no." I find that the Company thereby threatened its employees with loss of access to management if they selected the Union as their representative, and thereby, as alleged in Union Objection 2, interfered with the conduct of the election. See *Hahn Property Management Corp.*, 263 NLRB 586 (1982).

membership for any reason whatsoever, and not simply because of failure to pay dues and initiation fees under a valid union-security agreement. In *K-F Products*, 170 NLRB 366, 367 (1968), the Board held that such statements constitute objectionable misrepresentations. *K-F Products* was a representation case, and the Board was not called on to decide whether such statements are also violative of Section 8(a)(1). However, in other cases the Board has held statements of comparable or even lesser gravity to constitute unfair labor practices. Thus, in *H. A. Kuhle Co.*, 205 NLRB 88, 104–105 (1973), the Board held that an employer violated the Act by telling his employees that a checkoff clause "includes assessments the union may authorize." And in *M. O'Neill Co.*, 211 NLRB 150, 151 (1974), enfd. sub nom. *Retail Clerks Local 698 v. NLRB*, 514 F.2d 894 (D.C. Cir. 1975), the Board held that an employer violated Section 8(a)(1) by telling an employee that a union contract would require a health examination that he could not pass. I find that the Company, by Blair, violated Section 8(a)(1) by threatening its employees with loss of job security under unlawful conditions if they selected the Union as their representative and that such threats also constitute objectionable conduct.

b. *Statements not covered by the complaint, but alleged by the Union as objectionable conduct*

As previously discussed, the Union's objections to the election are so broadly worded to encompass virtually every form of potentially objectionable conduct. During the hearing, I directed union counsel to specifically define conduct alleged to be objectionable, to the extent that such alleged conduct was not already identified in the consolidated complaint or otherwise identified with specificity in the record of this proceeding. Union counsel did so in statements at the close of the General Counsel-Union case and at the close of the original hearing. These allegations consisted of numerous alleged unlawful or otherwise improper statements in company speeches and letters. I informed the parties that this statement was intended for informational purposes (i.e., to inform Respondent and the administrative law judge of the specific allegations), and that I did not regard the statement as a substitute for full legal argument, including citation of case authorities. Nevertheless, although the allegations are numerous, and in many instances novel (and, I might add, ingenious), the Union presented no further argument on the merits of its objections, either by way of oral argument or in its posthearing brief.[23]

Before proceeding to the specific allegations, two pertinent Board policies should be restated. The first, previously discussed, is that the Board dismisses as a matter of form, objections to an election that are mere reiterations of unfair labor practice charges that have been dismissed. The second concerns current Board policy on misrepresentations during an election campaign. In *Midland National Life Insurance Co.*, 263 NLRB 127, 133 (1982), the Board held as follows:

> In sum, we rule today that we will no longer probe into the truth or falsity of the parties' campaign statements, and that we will not set elections aside on the basis of misleading campaign statements. We will, however, intervene in cases where a party has used forged documents which render the voters unable to recognize propaganda for what it is. Thus, we will set an election aside not because of the substance of the representation, but because of the deceptive manner in which it was made, a manner which renders employees unable to evaluate the forgery for what it is. As was the case in *Shopping Kart*, we will continue to protect against other campaign conduct, such as threats, promises, or the like, which interferes with employee free choice.

The Board further held that: "In accordance with our usual practice, we shall apply our new policy not only 'to the case in which the issue arises,' but also 'to all pending cases in whatever stage.'" *Midland* overruled *General Knit of California*, 239 NLRB 619 (1978), which overruled *Shopping Kart Food Market*, 228 NLRB 1311 (1977), which overruled *Hollywood Ceramics Co.*, 140 NLRB 221 (1962). It is possible that by the time the present litigation has completed its course, *Hollywood Ceramics* will once again be revived as Board policy. In the meantime, I do not have discretion to choose between the "sound rule announced in *Shopping Kart*" (majority opinion in *Midland*) and the "flexible and balanced *Hollywood Ceramics* standard" (dissenting opinion). Rather, it is my obligation to apply the latest pronouncement of Board policy as set forth in *Midland*. That policy, in sum, precludes noncoercive misrepresentation as a ground for objecting to the conduct of an election, except under limited circumstances that are not present in the instant case.[24]

Most of the stated objections concern statements made by company officials at the captive audience meetings in early June. The Union contends that the expression "God forbid if the Union wins the elections" belied the Company's assertion that it would bargain in good faith with the Union and contained an implicit threat of reprisal. I do not agree. The above expression was immediately followed by an assertion that if the Union won the

[23] This fact tends to demonstrate the wisdom of the Board's policy set forth in *Times Square Stores*, supra. Sound administrative practice is not effectuated when novel propositions of law are presented in litigation without benefit of consideration or briefing by the General Counsel. It could well be argued that none of the statements made in the captive audience speeches in June 1981 should be considered under this heading, because the speeches themselves were the subject of the charge in Case 6–CA–14697. However, I have given the Union the benefit of the doubt, and have considered those allegations not expressly covered by the Region's dismissal letters.

[24] Under Board policy as set forth in *General Knit* and *Hollywood Ceramics*, "[A]n election should be set aside only where there has been a misrepresentation or other similar campaign trickery, which involves a substantial departure from the truth, at a time which prevents the other party or parties from making an effective reply, so that the misrepresentation, whether deliberate or not, may reasonably be expected to have a significant impact on the election." 140 NLRB at 224. In the present case, the Union might well have argued that under that standard, a substantial misrepresentation would be objectionable regardless of its timing, because at least in part by reason of the Company's unlawful conduct, the Union lacked the means to make an effect reply. However, the present case is controlled by *Midland*.

election the Company would bargain in good faith. I find that the speaker used a figure of speech that expressed the Company's strong opposition to unionization without conveying a threat of reprisal or promise of benefit and therefore did not engage in objectionable conduct. Compare *Valiant Moving & Storage*, 204 NLRB 1058, 1066 (1973), in which the Board held that an employer did not act unlawfully by asserting: "I'll be damned if a union gets in there. . . . You can't have a union in this shop."

The Union further contends that the Company unlawfully conveyed the impression that "if the Company had to bargain with the Union, the employees would be, in effect, stuck with certain provisions of these local supermarket contracts [Quality and Super-Duper] that would detract from benefits that the employees already had at NPC." With respect to the charge in Case 6–CA–14697, the Acting Regional Director administratively determined that "a review of the plain language used by Employer spokesmen fails to establish that the employees were, in fact, promised increased wages and/or benefits or that the employees were threatened with lower wages or a loss of jobs if they selected the Union to act as their representative." The General Counsel denied the Union's appeal from this determination, and thereby precluded litigation of the present allegation as a basis for objecting to the conduct of the election. However, for reasons that will be discussed, I find that the statements regarding area supermarkets are evidentiary with respect to the matter of the additional alleged discriminatees in Case 6–CA–15995. The General Counsel's disposition of the charge in Case 6–CA–14697 also precludes litigation of the Union's assertions that the Company (1) unlawfully stated that "every single decision that the [Board] has issued on these charges has been in favor of the Company and against the Union," and (2) unlawfully accused union representatives of forging authorization cards. If the Union is contending that the Company thereby engaged in something less than unfair labor practice conduct (i.e., misrepresentation), then such contention would be precluded under current Board policy. Moreover, the statements in question would not even constitute misrepresentation under *Hollywood Ceramics*. As of June 1981 the statement regarding disposition of charges was at least arguably true, depending on one's own concept of "decision." Concerning the matter of forged cards, there has never been any adjudication of this matter, and the Union failed in this proceeding to prove that the accusation was false. The Union cannot rely on the Acting Regional Director's administrative dismissal (sustained by the General Counsel) of the Company's charge in Case 6–CB–6241, as proof of falsity, because the facts are in dispute, and therefore there must be an evidentiary hearing on the matter before the Company can be found guilty of improper or unlawful conduct. See *NLRB v. Lawrence Typographical Union Local 570 (Kansas Color Press)*, 376 F.2d 643, 648–649 (10th Cir. 1967). The General Counsel's administrative disposition of a charge may be used as a shield, but not as a sword.

The Union contends that the Company engaged in misrepresentation and an implied threat by asserting that "if the Union gets in here, it's going to cost you money." For the reasons discussed above, I find that the General Counsel's disposition of the charge in Case 6–CA–14697 precludes litigation of this statement as a threat, and *Midland* precludes a finding of misrepresentation. The Union further contends that the Company unlawfully solicited employee grievances when the speaker, at the conclusion of his opening remarks, asked the employees if they had any questions. The Union similarly contends that the Company unlawfully solicited grievances when the speaker, in response to an employee's complaints, told the employee that if she had such problems, she should call him on the phone and they would look into it. These contentions misconstrue applicable Board law. Solicitation of grievances is not per se unlawful; rather, such solicitation is unlawful to the extent that it carries an express or implied promise to correct the grievances to discourage support for the Union. *Uarco, Inc.*, 216 NLRB 1 (1974). An employer does not violate the Act by reminding its employees of benefits that they already enjoy. Rather, this is legitimate campaign propaganda. In the context of the disputed statements, it is evident that the speaker was engaging in just such propaganda. The speaker simply answered questions about existing working conditions. With regard to his response to the employee's complaints, the speaker made clear that this was the Company's usual way of dealing with such problems, asserting "that's what we're going to continue to do." The speaker also indicated that he was not making any promises, asserting that "It may not be resolved in the manner that you want it to be resolved, but we're going to look into it." Therefore, I find no merit in these objections.

The Union further contends that the Company interfered with the election by its assertions, previously discussed in connection with the matter of Freeda Carr and Nancy Race, that the Union had been unable to obtain reinstatement of these employees. This contention is also precluded from litigation by the General Counsel's refusal to proceed by way of complaint on the basis of company statements to the effect that the Board had ruled in favor of the Company on the Union's charges. However, for the reasons previously discussed, the Company's statements are evidentiary with respect to the merits of the Company's refusal to reinstate Carr and Race. The Union also contends that the Company improperly misrepresented the Union's dues structure and history regarding fines. This contention is precluded from litigation by the Regional Director's refusal to proceed on the Union's charge in Case 6–CA–14615, containing those allegations, which refusal was sustained by the General Counsel; and is further precluded by current Board policy under *Midland*, supra.

The Union's next two contentions are interrelated. The Union contends that the Company interfered with the election when its offficial read aloud a letter from a named antiunion employee, and then praised the employee as "very sweet" and courageous. The Union contends that the Company also interfered with the election by a letter to its employees, dated May 11, in which it referred to prospective union stewards as "easily deceived and usually ill-informed . . . . [U]nlike the majority of NPC employees." The Union contends that the Compa-

ny thereby demonstrated a tendency to vilify and demean prounion employees while lauding or rewarding antiunion employees. The Union argues that "the Employer is prohibited from favoring one group against another group whether it's pro- or anti-union." The argument is only partially correct. The Act prohibits an employer from favoring one group over another with regards to hire or tenure or terms and conditions of employment, or to discriminatorily restrict activity by either group. As found in this decision, the Company did in fact unlawfully discriminate against union adherents. However, the Act does not prohibit an employer from expressing its opinion concerning the pro- or antiunion activities of its employees, provided that it does so in a restrained manner, without harrassment or abusive language or actions that could properly be characterized as coercive, and without express or implied threats of reprisal or promises of benefit. Indeed, in some cases the Board has declined to find that an employer acted unlawfully by referring to union adherents in arguably abusive terms (e.g., by referring to them as "clowns," "trash," or "dumb-dumb"). See respectively *Hospital Products*, 245 NLRB 703, 707 (1979); *Serv-U-Stores*, 225 NLRB 37 fn. 7 (1976); *Montgomery Ward & Co.*, 187 NLRB 956, 964 (1971). In contrast, the Company's language was moderate and restrained. I find that the Company did not exceed the limits of permissible propaganda, and that the objection is without merit.

The Union further contends that the Company interfered with the election (1) when the speaker allegedly adopted by reference, a statement in the employee's letter that, "if I belonged to the Union now, I could be heavily fined for just writing this," and (2) when the speaker asserted that an employee could be fined or expelled from the Union for filing a decertification petition. I agree that the statements were objectionable, because in the context in which they were made, they constituted unlawful threats of loss of job security. The statements were partially incorrect as a matter of law. A union may expel, but cannot fine a member for filing a decertification petition. *Molders Local 125 (Blackhawk Tanning)*, 178 NLRB 208 (1969), enfd. 442 F.2d 92 (7th Cir. 1971). A union also cannot impose "heavy" (i.e., unreasonable) fines on its members for engaging in antiunion activity, such as the employee's letter (assuming that it can impose any fine at all, which is questionable). See *Scofield v. NLRB*, 394 U.S. 423, 430 (1969); *Operating Engineers Local 965 (Elcon Pipelines)*, 247 NLRB 203, 210 (1980). The company official did not disavow any or all of the employee's letter. Rather, he read the letter with expressed approval, thereby indicating to the assembled employees that the Company endorsed the statements contained therein. As previously discussed, the Company made these statements in the context of the same series of speeches in which the Company conveyed the message that any collective-bargaining contract would provide for closed shop conditions under which loss of union membership for any reason would result in loss of employment. In context, I find that the Company unlawfully threatened its employees with fines and loss of job security if they voted for the Union, and thereby interfered with the conduct of the election.

The Union further contends that the Company unlawfully suggested that the employees form an independent union. I do not agree. In one instance, the suggestion was made by union adherent Joan Hockenberry, who asked the company official what the Company's policy would be if employees tried to form an independent union. The official's response, in sum, was that the Company was willing to "sit down and discuss anything that affects the employees of the company with the employees," but did not feel "obligated to sit down and discuss unionization with some outsiders from Utica, New York." This was a lawful statement of the Company's position. It is not unlawful for an employer to state that it opposes one union or one kind of union, rather than all unions. The second and third allegedly unlawful statements had nothing to do with independent unions, but simply purported to be descriptions of the Company's existing policy for dealing with employee grievances. The Union contends that the Company unlawfully threatened that wages would be frozen according to classifications if the Union were successful and were to negotiate a contract. This contention is precluded by the General Counsel's refusal to proceed in Case 6–CA–14697 on allegations that the Company threatened lower wages. The General Counsel's disposition of Case 6–CA–14697, in which the General Counsel declined to proceed on allegations that the Company threatened plant closure and loss of jobs, precludes litigation of the Union's contention that the Company threatened plant closure in the captive audience speeches. The disposition of Case 6–CA–14697 also precludes allegations that the Company promised increased wages or benefits. The remaining objections as set forth in union counsel's statements on the record, comprise allegations that are substantially similar to those discussed above in this section. Except to the extent indicated, I am recommending that the Union's objections be overruled as being without merit, or precluded from litigation under Board policy. As indicated, I have recommended that most of the Union's allegations regarding the captive audience meetings and company letters be overruled. However, the speeches and letters are significant among other reasons, because they demonstrate that the Company was engaging in a barrage of propaganda covering the entire spectrum of issues important to the employees, at a time when the Union, by reason of the Company's unlawful conduct, was deprived of effective means of presenting its own arguments to all the employees.

6. Denial of union access to company premises

As discussed, the consolidated complaint alleges that the Company violated Section 8(a)(1) by refusing to grant the Union's request of February 26 to handbill at IDC. For the reasons previously discussed, I find that the Company violated the Act, and I further find that the Company thereby interfered with the conduct of the election.

By letter dated May 7 to the Company, the Union requested an opportunity to respond to alleged "captive audience" addresses by Assistant Vice President Stark at Warren in April and by Supervisor Gern at IDC in No-

vember. The Union indicated that its request also applied to any future such meetings. The Company did not respond to the letter. As discussed supra, Gern and Stark did address groups of employees in November and April, respectively, at which they stated the Company's position with regard to matters relevant to the election campaign.

The General Counsel contends that the Company violated Section 8(a)(1) by refusing to accede to the Union's request. I agree. In *Montgomery Ward & Co.*, 145 NLRB 846 (1964), enfd. as modified 339 F.2d 889 (6th Cir. 1965), the Board held in sum that an employer violates Section 8(a)(1) during a union organizational campaign and while maintaining or enforcing an unlawful no-solicitation rule, by making antiunion speeches to employees during working hours on employer premises without according, on reasonable request, the union against whom the speeches are directed, a similar opportunity to address the employees.[25] For the reasons previously discussed, I have found that the Company maintained and enforced a policy that discriminatorily and unlawfully restricted employee solicitation on behalf of the Union. I do not agree with the Company's argument (Br. 40) that this allegation should be dismissed at least in part because the meetings conducted by Stark and Gern were not true "captive audience meetings" as alleged in the complaint. The Company correctly points out that employees were not required to attend the November meetings, and that although employees were summoned to the April meetings, Stark discussed a variety of matters. However, the *Montgomery Ward* rule applies to any antiunion speeches during working time on employer premises. The November meetings were conducted for antiunion speeches by Gern (albeit informal and to small groups of employees), and the April meetings featured antiunion statements on matters of substantial interest to the employees. I find that the *Montgomery Ward* rationale applies to those meetings. Moreover, the Union made clear that its request also applied to any future meetings. There is no question that the meetings conducted by company officials in early June were "captive audience meetings" in the strictest sense of that term. I find that the Company violated Section 8(a)(1) by failing to grant the Union's request under the unlawful conditions that prevailed during the election campaign. Therefore, the Company also unlawfully interfered with the conduct of the election.

C. *The Complaint in Case 6–CA–15995: Refusal to Recommend for Rehire, and to Rehire, Pamela Damon, Debra Nuhfer, Rhonda Gross, Barbara Morgan, Floyd Monticue, and Rebecca Stuart Walton*

The General Counsel contends and the complaint in Case 6–CA–15995 alleges in sum, that the Company violated Section 8(a)(1) and (3) by refusing to recommend for reemployment, i.e., giving less than a "Yes" recommendation, to Pamela Damon, Rhonda Gross, Barbara Morgan, Debra Nuhfer, Floyd Monticue, and Rebecca (Bower) Stuart Walton on their voluntary separation from employment, and by refusing to rehire them when they subsequently applied for reemployment. The complaint further alleges that the Company violated Section 8(a)(4) insofar as the Company's actions were also allegedly based on the fact that Damon and Gross were subpoenaed to testify as witnesses for the Union in the representation hearing in February 1981. Morgan was allegedly denied employment in January 1981. The remaining alleged discriminatees all applied for reemployment after the election in June 1981. I find that Morgan's case may properly be considered as grounds for setting aside the election under Union Objection 4 (discrimination against union supporters). However, as the General Counsel is alleging, in sum, a pattern of unlawful conduct, it is necessary to consider all six cases together.

During the hearing on the consolidated complaint, the Company presented in evidence a list of names in its active file of former employees who reapplied for work during the period from October 1, 1981, through September 30, 1982. The General Counsel contends that this list includes the names of eight former employees who were identified as union committee members during their employment (Freeda Carr, the six alleged discriminatees in Case 6–CA–15995, and Donald Saporito), that all but Saporito were given less than a "Yes" rating, that the Company knew that Saporito was not an active committee member, that in contrast, nearly 40 percent of the employees on the entire list received "Yes" ratings, and that therefore the list reflects a pattern of discrimination against applicants who were active union adherents during their former employment. However, the General Counsel's reliance on this list begs the question. The Company would not know at the time each employee quit, whether that employee would eventually apply for reemployment. Therefore, any analysis must take into consideration the ratings given to all former employees who were identified as committee members, regardless of whether they subsequently applied for reemployment. The Company's records indicate that several committee members were given "Yes" ratings, including Martha Asp, Sheila Mack, and Fran Peterson, who were identified by organizer Dan Glather in his testimony, as being active union adherents. In contrast, several committee members who were allegedly *not* active union adherents were given less than favorable ratings. The General Counsel's contention is also based on a presumption that the Company knew precisely which committee members were not active union adherents. Although there is evidence of knowledge in specific cases, the evidence is insufficient to establish a general presumption. Moreover, the evidence is not always consistent with the General Counsel's theory even where knowledge is shown. Thus, Alan LaCava was given a less than favorable rating, although the Company knew that he had abandoned his early support for the Union. Therefore, it is necessary to examine the evidence with respect to the individual cases in order to determine whether, as alleged by the General Counsel, there was a pattern of discrimination.

[25] The Board's decision also applied to denial of access under a "broad privileged no-solicitation rule." However, that aspect of the Board's decision applies only to retail stores, as there is no broad, privileged rule applicable to nonretail businesses.

Barbara Morgan began her employment with the Company in October 1978. She worked in the mailing department at Warren, on the second shift. Morgan was generally rated as an average employee. Her attendance record declined somewhat after her first year, but was nevertheless rated as average. Morgan joined the Union in the summer of 1980, and was active on its behalf. She wore union insignia to work and once distributed union literature outside the plant. As found, Morgan was one of the union adherents who were subjected to harassment by Supervisor McWilliams when they wore union T-shirts to work. She was also one of the prounion mailing department operators who were segregated at their workplace. By letter to the Company dated August 21, the Union identified Morgan, Debra Nuhfer, Rhonda Gross, and another employee as members of its committee.

Morgan quit her job on September 25, 1980, in order to take other full-time employment. Morgan testified without contradiction that Supervisor Pauline Stec told her that she could use her accumulated 2 weeks' vacation time as notice. Morgan was rated for reemployment as: "Yes? No Notice Given." As discussed, Personnel Assistant Rodney Henry normally made these evaluations. However, Henry was not called as a witness at the reopened hearing. Assistant Vice President Zimmerman was the Company's only witness. Nevertheless, with respect to all six alleged discriminatees, Zimmerman failed to explain who made the evaluation, or the reason or reasons for the evaluation, or why the employee was not rehired. Instead, Zimmerman substantially confined his testimony to a recitation of what he regarded as "negative reemployment considerations" in each individual's personnel record. With respect to Morgan, Zimmerman was able to point out only one negative consideration, namely, her alleged failure to give notice before quitting her job. For the reasons discussed in connection with Freeda Carr, I find that this alleged consideration was false, and that in fact Morgan gave acceptable notice. Morgan's personnel record reflected the type of reliable worker that, according to Zimmerman, the Company normally sought. Morgan worked continuously for the Company for nearly 2 years, and she had an acceptable attendance record. At the least, she made an effort to give notice before she quit, in contrast to other employees, e.g., Chris Nuhfer, who simply stopped coming to work without giving any notice whatsoever, but were nevertheless recommended without qualification for reemployment. I find that absent a discriminatory motive, Morgan would have been given a "Yes" rating.

Morgan testified without contradiction that in December 1980 she telephoned Zimmerman and asked if she could get her job back, indicating that she would take "either shift or any job he had open." Zimmerman told her that she would have to come in and update her application, although the Company normally permitted former employees to update their applications by telephone. Zimmerman also told Morgan that the Company was not hiring, although in fact the Company was hiring temporary help in December. Morgan went to the personnel office to update her application and she subsequently called several times to indicate her continuing interest, but she was always told that they were not hiring. The Company's records indicate that she initially applied on December 19. Notwithstanding her asserted willingness to accept any job on any shift, the Company's records indicate only that she was interested in the second shift in the mailing department at Warren. Morgan was never told of any problem with her record. I credit the testimony of Morgan, and I find that the manner in which the Company, and particularly Zimmerman, dealt with her reapplication tends to indicate an unwillingness to accept her for reemployment. The Company's records indicate that the Company hired some 51 permanent employees during the period from January 5 through February 16, 1981, including 8 in the mailing department (day shift).

Debra Nuhfer began working for the Company in June 1976, and she continued in the Company's employ until she quit in January 1981. She worked in the mailing department. Nuhfer was generally rated as an average or slightly above-average employee. In 1978 her attendance was rated as below average, and in May 1979 and February 1980 she was given warnings for excessive absenteeism. However, in 1979 and 1980 her attendance was rated as average, and attendance was not listed as a weak point in her annual evaluations. In the summer of 1980 Nuhfer joined and became active in the Union. Nuhfer joined the organizing committee, attended union meetings, and wore union insignia at work. Her last day of work was January 16, 1981. She had been working part time for Quality Markets. Nuhfer testified that 2 weeks before she quit work, she told Supervisors Stec and Littlefield that she was quitting her job to work full time for Quality, because she was unhappy with her pay scale and would probably make more money at Quality. Thereafter, Nuhfer was summoned to a meeting with Stec and Assistant Vice President for Mailing George Stark, who asked her what they could do to help her remain with the Company. Nuhfer adhered to her decision. She complained that she was making less money than employees in other departments, and that her brother-in-law was making more money as a stock boy, although she had more seniority. Nuhfer was given a reemployment rating of "No. see REZ." Therefore, pursuant to company policy, Nuhfer was effectively precluded from reemployment with the Company. The notation "see REZ" indicates that Zimmerman personally made the decision to give her a negative rating. Nevertheless Zimmerman in his testimony simply referred to the "negative reemployment considerations" in her personnel file. Zimmerman testified that these considerations were (1) that her reason for leaving (i.e., "unhappy with rate of pay") was "not acceptable," and (2) that she failed to give notice. Zimmerman also noted the two attendance warnings in her file. Zimmerman's assertion regarding lack of notice was patently false. The personnel file does not contain any statement that Nuhfer left without giving notice. Zimmerman based his assertion on the fact that the file contains a memo from Stark, dated January 14, indicating that Nuhfer would be quitting on January 16. However, Nuhfer testified credibly and without contradiction that she gave 2 weeks' notice to Stec and Litt-

lefield. Zimmerman admitted that the dates of such memoranda do not necessarily indicate the date of notice, because they may be written several days after notice is given. Moreover, entries in Nuhfer's personnel file tend to corroborate Nuhfer's testimony. The file contains a memo, dated January 2, which lists her grievances and states, that "She feels if nothing can be done she will give her notice and look elsewhere. Last night would be the 16th." The file also contains a memo from Stark to Stec dated January 6, consisting of a point-by-point rejection of Nuhfer's complaints.

Assuming that the Company were evaluating Nuhfer in a nondiscriminatory manner, it is difficult to see why her professed reasons for leaving the Company, either standing alone or in conjunction with other factors, would warrant a recommendation against reemployment. The Company's personnel records indicate that other employees who expressed dissatisfaction with their working conditions and/or left to obtain better employment elsewhere were given either "Yes" or "Yes?" ratings for reemployment purposes. Thus, Thomas Nansen, who "never seemed happy at NPC," and Judith Donnell, who was "not very happy with our line of work," and left to work in a restaurant, were each given "Yes?" ratings. Sandra Katzbauer, who quit to become a Tupperware manager, and William Brunecz and Dan Johnson, who each left for a "better job," were all given unqualified "Yes" ratings. (Johnson's file contains a memo indicating that he was quitting and his "last night is tonight.") See also my discussion of Mary Lou Rigby in connection with the matter of Freeda Carr, above. However, in the context of the organizational and election campaigns, including the Company's vehement and often unlawful opposition to unionization, the Company's motivation for its treatment of Nuhfer becomes apparent. Nuhfer was in effect, voicing the Union's position on issues that the Company regarded as crucial. The employees at Quality Markets were covered by a collective-bargaining contract with the Union. During the campaign the Company repeatedly argued that the terms and conditions of employment at Quality were unfavorable in comparison to those at the Company. Plainly the Company did not wish to hear or let it be known that an employee left the Company to make more money at Quality. Nuhfer's complaints about pay inequity also echoed the Union's position. Therefore, Assistant Vice President Stark attempted to mollify Nuhfer and persuade her to remain. However, once she left the damage was done. I find that the Company effectively precluded Nuhfer from reemployment by giving her a "No" rating in reprisal for what it regarded as her outspoken support for the Union. I further find, in light of her lengthy and generally satisfactory work record, that absent a discriminatory motivation the Company would have recommended her without qualification for reemployment.

On September 10, 1982, Nuhfer telephoned the personnel office to request reemployment. She spoke to Personnel Assistant Donna Farone. Nuhfer did not request any specific department or shift. She said that she would "even" work nights, not that she would only work nights. Nevertheless, the Company's records indicate that Nuhfer was "Int. in Nights—clerical or mailing." Farone discussed the reason Nuhfer left, but failed to disclose that this was a bar to her reemployment. Farone said that they were not hiring then. This was false. During September 1982 the Company hired a substantial number of employees to work nights in the mailing department. Specifically, the Company hired six employees on September 7, six on September 13, five on September 20, and four on September 27.

Rhonda Trawick Gross began working for the Company in July 1973. In September 1973 she left to return to high school. In January 1975 she returned to the Company and worked in the order handling department at Warren. In April 1977 she went on pregnancy leave, and she returned to work in January 1978, when she commenced working in the mailing department. Thereafter, Gross remained continuously in the Company's employ until February 12, 1982. Gross was initially regarded as a slow worker, but she progressed to the point where she was rated as average or above average in all categories, including average in quantity of work. Her annual evaluation for the year 1981, prepared in October of that year, described her as a fast and good worker, but indicated that her attendance needed improving. In fact, Gross' attendance record had gradually improved over the years, although it declined during 1981, when she had 14 absences totaling 16-1/2 days, including 4 days at the representation hearing. Her file does not contain any attendance warnings.

Gross joined the Union and its organizing committee, and by October 1980 she was actively engaged in the Union's campaign. She wore union insignia to work, attended union meetings, talked in favor of the Union to other employees, and distributed union literature at the Warren plant on three or four occasions during the period from October to January. Gross was present at the representation proceeding in February pursuant to union subpoena, but she was not called to testify. In February 1982 Gross was pregnant. However, instead of taking pregnancy leave, Gross informed the Company that she was quitting because of the pregnancy and because her husband had a good job. She was rated for rehire as follows: "No. See REZ. Not Happy Here." Gross' personnel file fails to disclose any basis for concluding that she was not happy in her job. On the contrary, her last annual evaluation indicated that she was above average in personality. In view of the notation on her file, it is evident that Zimmerman personally made the decision to recommend against reemployment, that he would know why the Company regarded her as "not happy here," and that this was at least the principal reason for his recommendation. Nevertheless, Zimmerman failed to explain the notation. Instead, Zimmerman testified, in sum, that the "negative employment considerations" were "the stability factor; the fact that she has already worked for us before at prior times, and the attendance factor." Both asserted grounds were patently false. Gross' record reflected the kind of stability and steady progress that the Company normally desired in its employees. Gross quit her employment on two occasions. The first time was in September 1973, when she returned to school. Perhaps I am being naive, but I con-

sider it unlikely that the Company would regard as unstable or unreliable, a 17-year old person who left work at the end of summer in order to complete her high school education. Although Gross left work in 1979, she did so by taking pregnancy leave; and the Company's records indicate that the Company does not regard such leave as a quit. Thereafter, Gross worked continuously for over 4 years. As Zimmerman conceded in his testimony, it is quite common for employees to work more than once for the Company, and also common for employees among the predominantly female work force to leave for personal reasons (e.g., marriage, family responsibility, or relocation). Zimmerman further conceded that the Company does not regard such departures as indicating that the employee is "not happy here." The Company's records are replete with the names of employees who were recommended for reemployment, notwithstanding that they worked as many as three or four times for the Company, or who were given a "Yes" or "Yes?" recommendation, notwithstanding that such multiple employment was accompanied by other ostensibly negative factors such as a poor attendance record. For example, Carol Leach was given a "Yes" rating, notwithstanding that her personnel file indicated that she quit three times (possibly without timely notice on each occasion) in addition to two pregnancy leaves, and that she was described as a "good worker but attendance could have been better." Janice Muscaro, who quit her employment six times over a period of slightly more than 6 years, was also given a "Yes" rating. Mary Sherwood also received a "Yes" rating, notwithstanding that she quit three times and had an attendance record comparable to that of Gross. As for Gross' allegedly poor attendance record, the Company's records indicate that where attendance is regarded as a problem, the personnel office will normally make an appropriate notation with the recommendation on reemployment, regardless of the recommendation itself. However, in the case of Gross the only notation concerns her alleged unhappiness. Moreover, Gross' attendance record, even when considered with her employment history, was equal to or better than that of numerous other employees who received "yes" or "Yes?" ratings. I find in light of (1) the Company's vehement opposition to unionization, (2) its pattern of discriminatory conduct, including its refusal to rehire or recommend for rehire, Freeda Carr, Nancy Race, Barbara Morgan, and Debra Nuhfer, (3) Zimmerman's failure to explain the notation that Gross was "not happy here," and (4) the demonstrably false explanation given by Zimmerman for her negative rating; that Zimmerman gave her the negative rating because of her active support for the Union, which Zimmerman translated as reflecting a lack of happiness with the Company. I further find, in light of Gross' employment history and the comparable records of other employees, that absent a discriminatory motive, Zimmerman would have recommended her without qualification for reemployment.

Gross testified that in August 1982 she came to the personnel office and asked Personnel Assistant Farone about a job. Farone answered that there was no opening, whereon Gross responded that she would take anything they had. The Company's records indicate that on October 15, 1982 (by telephone), Gross said she was interested in part-time employment, and that she again expressed interest on November 8 and December 30, 1982. Farone did not testify in this proceeding. I credit Gross. As discussed, supra, the Company hired a substantial number of employees in the mailing department in September 1982. Zimmerman testified (apparently in reliance on the October 15 date), that since October 15 date), that since October 15, 1982, the Company has not hired anyone in the mailing department, except for one electronics technician. However, Zimmerman admitted that the Company has hired employees in merchandise handling (i.e., at IDC), and that these positions did not require any more training than that required for order handling or mailing.

Rebecca (Bower) Stewart Walton began working at IDC in February 1975 as an order filler in merchandise handling. In August 1975 she was denied leave for the purpose of taking an extended vacation. Instead she quit her job. She was recommended for rehire, and was rehired and returned to work in October 1975. Walton went on pregnancy leave in September 1976 and returned to work in February 1979. Thereafter, she remained continuously in the Company's employ until June 19, 1981. During her employment she worked both at IDC and Warren. She was generally rated as an above-average employee. Her file fails to disclose any criticism of her attendance. Walton testified that she joined the Union and its organizing committee in February 1980, and that she frequently wore union insignia to work. The record fails to indicate that the Union ever notified the Company that Walton was a member of its committee. However, Walton served as a union observer at the June 9 election. Shortly after the election the Company requested volunteers for temporary layoff. Walton volunteered, and was laid off on June 19. About October she was recalled to work. However, in the interim Walton had remarried and her husband was transferred to Erie, Pennsylvania. Walton so informed the Company, and said she could not return to work. Walton's rating for reemployment was: "No? Doubt if she would be happy here." As with Rhonda Gross, her personnel file fails to disclose any basis for this conclusion, and Zimmerman failed to explain the notation in his testimony. Rather, her personnel file indicates that she was regarded as an employee who "can be depended upon to get the job done quickly, neatly and accurately," and a "fast learner who is willing to help out where needed" and who "works well with others." Zimmerman was able to come up with only one "negative reemployment consideration," namely, her "stability . . . because of the three prior quits." In fact, Walton quit only twice, as the third absence was an extended pregnancy leave. Walton's personnel file indicates that she was a longtime employee with a good work and attendance record, who was scrupulous in keeping the Company informed of planned departures from work. Her record for "stability" compared favorably with that of numerous other employees who received "yes" ratings. For example, Michelle Booth, Barbara Boutelle, Pamela Grettenberger, Georgia Leonard, and Sheryl Dipierro were all given "yes" ratings, notwithstanding a demonstrated proclivity to repeatedly

quit their employment for a variety of reasons. Walton's negative rating, when considered with that of other active union adherents, tends to indicate a pattern of evaluation for such employees. Thus, during the election campaign Debra Nuhfer was ostensibly disqualified because she was unhappy with her rate of pay. Shortly after the election, the Company disqualified Walton because it doubted that "she would be happy here." Eight months after the election, the Company disqualified Rhonda Gross because she was "not happy here." It is evident that the Company equated active support for the Union with lack of happiness with nonunion conditions at the Company, and used this equation as an excuse for disqualifying the employees from future employment. I find that the Company gave Walton an adverse rating in reprisal for her active union support, as manifested most recently by her service as a union observer, and thereby rendered reemployment unlikely. I further find in light of her own record and comparable records of other employees that absent a discriminatory motive the Company would have recommended her without qualification for reemployment.

Walton testified that in June 1982 on returning to her home area of Youngsville, Pennsylvania, she telephoned the personnel office about reemployment. According to Walton, a woman (probably Farone) told her that she did not have to come to the plant to update her application, that her card would be placed in the active file, but that the Company was not then hiring. Walton said that she would work either shift or plant, but preferred IDC. Walton testified that she called several times thereafter, but was always told that they were not hiring, except on one occasion in early 1983, when Personnel Assistant Henry told her that the Company was obligated to first hire temporary employees who worked during the holiday season. No other evidence was adduced in this proceeding that would indicate that the Company had such a policy. The Company's records indicate that Walton inquired about reemployment on August 31, September 22, and December 6, 1982, and on March 7, 1983, and that she indicated willingness to work at either plant, including part time, but preferred IDC. I credit the testimony of Walton. However, as the complaint alleges that she was denied reemployment about August 31, 1982, I shall use that date as the date of her initial request. As discussed, supra, the Company has hired employees at both Warren and IDC since that date.

By letter dated October 1, 1980, the Union notified the Company that Pamela Damon and Floyd Monticue were members of its organizing committee. Damon began working in the mailing department in January 1977. In May 1977 she quit because she was moving to Corry, Pennsylvania. In March 1979 she was rehired and returned to work as an order filler at IDC. In September 1979 she received a warning memorandum for unsatisfactory attendance. In November 1979 she quit in order to take another job in Corry. At that time Damon was given a recommendation for rehire, subject to review of her attendance. In February 1980 Damon was rehired with her promise that she would make a good attendance record. However, her subsequent attendance record was still rated as deficient. In her annual evaluation for 1980, prepared in January 1981, Damon was rated as below average in attendance, and the evaluation indicated that her "attendance could improve." During the evaluation year she had 11 absences totaling 14 days. Otherwise she was generally rated as an above-average employee. Damon testified that she joined the Union and the organizing committee in September 1980. In December she was subpoenaed by the Union for a representation hearing on December 11 (on the first union petition). She was present at the hearing but was not called to testify. She was again subpoenaed by the Union for the representation hearing in February 1981. She was present throughout the hearing and testified as a union witness. In September 1981 Damon again wished to leave her employment. Damon's husband had obtained a temporary second job that promised training for a new skill, and she wished to remain home rather than hire a babysitter. Damon testified that she gave 2 weeks' notice to her supervisor, Ernie Dollinger. However, Dollinger suggested that she apply for a leave of absence. By memo dated September 1, 1981, Damon formally requested a leave of absence from September 7 to November 1, 1981. Vice President Carter and Assistant Vice President Zimmerman rejected the request, indicating that Damon would have to quit and then reapply when she was available. Damon followed this course. She left work on September 4. She was given a "No" rating, with the comment: "Has worked 3 times in 4 years—unstable. Also attendance should have been better."

Damon testified that beginning in November 1981 she contacted the personnel office, spoke to Donna Farone, and requested reemployment. She asked for temporary work during the Christmas season, but was told that the Company already hired its temporary help. Damon expressed a preference for IDC on any shift. Damon testified that in August Zimmerman told her that the Company had a lot of applicants and was not then hiring. The Company's records indicate that Damon inquired about reemployment on November 23, 1981, and August 20, 1982.

Zimmerman testified that the negative reemployment considerations in Damon's file were (1) stability, in that she worked three times for the Company, (2) poor attendance record, and (3) failure to give notice when she quit in September 1981. Zimmerman based this last assertion on a file memo, dated September 3, indicating that Damon's last day of work would be September 4. As discussed above, Zimmerman admitted that such memos are not a reliable indication of lack of notice. Moreover, Damon testified that she gave 2 weeks' notice and Zimmerman knew by reason of her request for leave that she had to leave work. I credit Damon, and I find that Zimmerman knew that she gave advance notice of her departure.

Damon's situation presents a closer case than those discussed above. Unlike those cases, Damon's does not involve evidence in the form of overt discriminatory words or actions against the employee, unexplained evaluations that tend to indicate discriminatory motive, or alleged negative considerations that totally or substantially lack any factual basis. However, Damon's evaluation,

when viewed in the context of those of employees with comparable records, tends to indicate that the Company was applying a double or even triple standard, by holding active union adherents to a higher standard, and antiunion employees to a lower standard, than that normally followed in evaluating departing employees. The case of Chris Nuhfer has already been discussed in connection with Freeda Carr. During the evaluation period from July 1980 to July 1981, Nuhfer had 14 absences totaling 29 days (i.e., a worse record than that of Damon), and she was also rated as below average in attendance. Nevertheless, Nuhfer was recommended for rehire when her name was removed from the personnel roster. Typically, employees with records comparable to that of Damon are given "Yes?" (i.e., qualified recommendations for reemployment), although some (heretofore discussed) were recommended without qualification. The records of Ruth Ann Walter, Donna Hice, Linda Wilhelm, Sandra Morse, Normajean Driscoll, and Katherine Correlli (all given "Yes?" ratings) are illustrative. I find that but for her activities on behalf of the Union, including her testimony at the representation hearing, Damon probably would have received a "Yes?" rating. Since November 23, 1981, the Company has hired very few former employees who have less than a "Yes" rating. With respect to positions at IDC for which Damon would be qualified, the Company's records indicate that on August 3, 1982, the Company hired Elyane Blaire, a former employee with a "No?" rating, for the day shift in merchandise handling. At Warren, the Company on August 20, 1982, hired Laurie Crossley, a former employee with a "Yes?" rating, for the day shift in merchandise handling, and on August 25, 1982, hired Amy Paden, a former employee with a "No" rating, for the night shift in mailing.

Floyd Monticue began his employment with the Company in May 1977, and he continued to work for the Company until he quit on May 15, 1981. He worked as a mechanic in the mailing department. Monticue testified that he joined the organizing committee and wore union paraphernalia. Monticue also testified that Supervisor Pauline Stec accused him of wasting time in the parking lot by talking to Rhonda Gross about the Union, and questioned him about why he supported the Union. However, in his investigatory affidavits Monticue stated that no one from the Company ever spoke to him about his support for the Union, that Stec never told him that he was not supposed to speak to Gross because she was a union supporter, and that he joined the Union after the incident involving Gross. Therefore, I do not credit Monticue's testimony concerning his alleged conversation with Stec, and I find that although the Company was on notice that Monticue was a member of the organizing committee, no one from the Company ever spoke to him about his union activity.

Monticue testified that he quit his job on May 15, 1981, because the "pressure was too great." Monticue went to work for National Forge Company in Irvine, Pennsylvania. His new job paid substantially more than he was earning at the Company. The Company's records indicate that Monticue quit in order to work at National Forge. Monticue was given a "No" rating, unaccompanied by any explanatory notations. Monticue testified that he was laid off at National Forge in January 1982, recalled in May 1982, and laid off again in July 1982. Monticue further testified that probably in the winter of 1982–1983 he initially contacted the Company about reemployment. According to Monticue, he told Zimmerman that he was laid off and looking for work, and would take anything, but that Zimmerman said there was nothing, and the personnel office subsequently told him they were not hiring. The Company's records indicate that Monticue inquired about reemployment on September 15, November 10, and December 7, 1982, and on February 1, 1983, and that he expressed willingness to work in either building on any shift, but preferred maintenance or janitorial work.

Assistant Vice President Zimmerman testified that the negative reemployment considerations reflected in Monticue's file were (1) an incident of reported violence between Monticue and then mechanic Charles Martin in October 1978, (2) a workmen's compensation claim by Monticue in September 1977, which was subsequently denied, and which, on the basis of the Company's investigation, did not involve any injury at work, (3) a probability that Monticue would return to National Forge if he were recalled from layoff, and (4) a poor attendance record. The fourth alleged consideration is contradicted by Monticue's personnel file. Monticue's attendance was evaluated as average for the period from May 11, 1980, to May 11, 1981, when he had seven absences totaling 14 days (including 5 days hospitalization and 4 days when his home burned), and as above average for the period from May 11, 1979, to May 11, 1980, when he had four absences totaling 28 days (including 25 days for surgery). Monticue's file fails to indicate any attendance warnings. On the contrary, until 1981 his attendance was always rated as above average, superior, or outstanding. Zimmerman testified that the Company expects that an average employee will have 5 or 6 absences per year, and that 10 to 12 incidents of "call-in absences" would be regarded as excessive, but that a prolonged absence (e.g., for pregnancy) would not be held against the individual. Therefore, even by this professed standard, Monticue's attendance record would be regarded as acceptable. The third alleged consideration, based on Monticue's layoff in July 1982, plainly had nothing to do with his evaluation in May 1981.[26] Moreover, as previously discussed in connection with Debra Nuhfer, the Company does not reject applicants for reemployment because they left the Company to obtain better jobs elsewhere. For example, Ernest Carlson, who quit the Company in September 1981 to work for National Forge, was given a "Yes" rating for reemployment. The first and second alleged considerations are demonstrably pretextual, when viewed in light of Monticue's overall record and evaluations of employees who engaged in similar alleged misconduct. Both matters occurred early in Monticue's employment. He filed the compensation claim while still a probationary employee. Therefore, it is probable that the Company would have terminated Monticue if it believed that he

[26] The Company's assertion (Addendum Br. 10) that Monticue "twice" quit the Company in order to obtain a higher paying job is unsupported by the record. Monticue quit his job only once.

committed a serious offense. Instead the Company gave him a raise and made him a permanent employee. The second incident, which did not involve injury to either employee, occurred in October 1978. Notwithstanding both incidents, which were documented in his file, the Company in January 1980 placed Monticue in charge of a group of mechanics on the night shift, in effect as an assistant foreman to Supervisor Randy McWilliams. Monticue subsequently asked to be taken off this job. If the Company refused to recommend Monticue for reemployment because it viewed him as an individual who could not control his temper or who would knowingly cheat the Company, then it is unlikely that given the same information, it would have promoted him to a position of responsibility over other employees.[27] Moreover, the Company's negative recommendation on Monticue contrasts with its treatment of personnel who were involved in comparable or more serious incidents. See the discussion of Laura Zaffino in connection with the case of Nancy Race, above. See also the discussion of the Company's failure to discipline Supervisor Randy McWilliams for his assaults on prounion employees. Additionally, in June 1980 the Company gave former employee Shawn Jukes a "Yes?" rating for reemployment, notwithstanding that her personnel file indicated that she (1) apparently forged a dental appointment slip in order to get time off from work, (2) had an attendance record that was rated as unsatisfactory, and (3) suffered from poor health that limited her ability to perform her job.

As discussed, I find that two of the four asserted negative considerations lacked any credible factual basis, and that all of them were pretextual.[28] It is evident that the Company regarded Monticue as a competent and reliable employee. I find, in light of Monticue's overall employment record, the false and pretextual reasons advanced by Zimmerman for his negative rating, the comparable records of other employees, and the discriminatory pattern of conduct that is evidenced by the Company's treatment of the other alleged discriminatees, that but for his union activity, Monticue would have been rated as eligible for reemployment. As discussed, the Company has hired employees since September 15, 1982, in positions for which Monticue would be qualified.

In sum, the evidence indicates that for discriminatory reasons, the Company effectively precluded Damon, Gross, Nuhfer, Walton, and Monticue from consideration for reemployment by recommending against their employment. The Company's course of conduct with respect to Barbara Morgan, including an unwarranted qualified rating, further indicates that the Company was, for discriminatory reasons, also refusing to consider her application for reemployment. I am not persuaded that there is no basis for finding discrimination because some union adherents were recommended for reemployment or because the Company did not discriminate against union adherents in every conceivable manner (e.g., by denying them pay raises, transfers, or promotions). The evidence indicates that most of the active committee members who quit their jobs were given qualified or unfavorable ratings for reemployment. With respect to the six alleged discriminatees in Case 6–CA–15995, the evidence indicates that the Company knew that they were active on behalf of the Union and that the professed "negative reemployment considerations" in their files were for the most part demonstrably false or otherwise pretextual. Two of the personnel files (Gross and Walton) contain unexplained entries that indicate that their negative ratings were based on their active support for the Union. As discussed, the Company is a large employer in a predominantly rural area, with a work force that includes many employees who have worked more than once for the Company. It is evident that the prospect of reemployment is an important consideration for the employees, and that the discriminatory denial of reemployment, or consideration for reemployment, is conduct that would tend to intimidate not only active union adherents, but also any employees who might otherwise be inclined to become active on behalf of the Union.

I agree with the Company that on the basis of the evidence in this proceeding, it is not possible to determine whether in fact, and if so when, the Company would have rehired the six discriminatees. As found, the Company discriminatorily refused to consider them for reemployment, thereby depriving them of an opportunity to compete with other applicants. Where, as here, a respondent employer or union has engaged in misconduct that might have prevented an employee from obtaining or regaining a job, but the evidence is inconclusive on this point, the Board will normally resolve the doubt against the wrongdoer rather than against the wronged employee. Therefore the Board will find that the employee was discriminatorily denied employment, and will direct that the employee be offered employment with backpay from the time that a job became available for which the employee was qualified. *Yong Hinkle Corp.*, 244 NLRB 264, 268 (1979); *Alexander's Restaurant & Lounge*, 228 NLRB 165, 179 (1977), enfd. 586 F.2d 1300 (9th Cir. 1978); *Madison South Convalescent Center*, 260 NLRB 816, 832 (1982); *Associated Truck Lines*, 239 NLRB 917, 921 (1978), enfd. as modified 653 F.2d 241 (6th Cir. 1981).

I find that the Company discriminatorily refused to recommend for rehire, and to rehire, Morgan, Gross, Nuhfer, Walton, Damon (as qualified herein), and Monticue, because of their known and active support for the Union. The Company thereby violated Section 8(a)(1) and (3) of the Act. As that support included the presence of Damon and Gross as prospective union witnesses in the representation proceedings, and Damon's testimony on behalf of the Union, I find that the Company also violated Section 8(a)(4). *NLRB v. AA Electric Co.*, 405 U.S. 117, 124–125 (1972); *Royal Mfg. Co.*, 177 NLRB 264, 266 (1969). The General Counsel submits (Br. 95) that the dates of rehire should be left for determination at the

[27] In his May 1981 evaluation, the Company criticized Monticue as being antagonistic toward other employees. Nevertheless, Monticue was rated as above average in personality.

[28] In view of the foregoing findings, I find it unnecessary to decide whether by reason of Federal of state law, the Company was precluded from taking any adverse action against Monticue by reason of the fact that he filed a workmen's compensation claim that the Company considered to be false. See *Firestone Textile Co. v. Meadows*, 114 LRRM 3559, 3561 (D.C. Ky. 1983).

compliance stage of this proceeding. However, the evidence adduced in this proceeding affords an adequate basis for determining when, after their respective reapplications, positions became available for which the discriminatees were qualified. I find that the discriminatees were entitled to reemployment and are entitled to backpay as follows: Barbara Morgan, who initially reapplied on December 19, 1980, was entitled to employment as of December 29, 1980, when the Company hired employees for merchandise handling. (Although most were hired as temporary help, the Company hired a substantial number of permanent employees in January 1981.) Debra Nuhfer, who initially reapplied on September 10, 1982, was entitled to reemployment as of September 13, 1982, when the Company hired six employees in the mailing department. Rhonda Gross, who initially reapplied some time in August 1982, was entitled to employment as of September 7, 1982, when the Company hired six employees in the mailing department. Rebecca Walton, who for reasons discussed is regarded as having initially reapplied on August 31, 1982, was also entitled to employment on September 7, 1982. (Walton expressed a preference for IDC, but did not exclude work in the mailing department.) Pamela Damon, who initially applied for reemployment on November 23, 1981, but whose record fell short of the Company's normal standard for a "Yes" rating, was entitled to employment as of August 3, 1982, when the Company hired a former employee with a "No" rating for merchandise handling. Floyd Monticue, who initially reapplied on September 15, 1982, was entitled to employment as of September 20, 1982, when the Company hired five employees in the mailing department. (Monticue expressed a preference for maintenance or janitorial work, but did not exclude any other kind of work.)

V. CONCLUDING FINDINGS AND RECOMMENDATIONS WITH RESPECT TO THE OBJECTIONS TO THE ELECTION; AND THE UNION'S REQUEST FOR A REMEDIAL BARGAINING ORDER

The Union objected to the election on the grounds that the Company engaged in the following enumerated alleged misconduct.

1. Conducted or aided in illegal pool of the employees concerning their sympathies in the election.
2. Threatened reprisals and intimidated and coerced employees concerning union activities.
3. Granted, promised, and/or withheld raises, bonuses, and other rewards.
4. Discriminated against supporters of the Union.
5. Discriminated against employees who have testified on behalf of the Union.
6. Engaged in surveillance of union supporters and other employees.
7. Misrepresented material facts concerning the nature, organization, and operations of the Petitioner and other matters.
8. Generally vilified the Union, its officers, and agents.
9. Solicited the grievances of employees and promised to remedy them.
10. Solicited antiunion support from individual employees.
11. (withdrawn)
12. Discharged or refused to rehire Freeda Carr and Nancy Race on account of their union activities.
13. Prevented union access to its property in order to communicate with employees, and denied employees the use of company bulletin boards for union materials, and interfered with the Union's use of the media.
14. Mischaracterized the Labor Board and its processes.
15. Instilled in employees the fear of plant closure if the Union won.
16. Conducted captive audience meetings while maintaining rules against distribution and solicitation, and denied union representatives an opportunity to respond.
17. And in other ways has interfered with the free choice of employees in selecting a collective-bargaining agent.

Objection 1 is overruled for failure of proof of such conduct during the critical period. Objection 2, which is broad enough to cover any violation of Section 8(a)(1) of the Act, is sustained by reason of the Company's threats to deprive its employees of access to management, and of loss of job security under closed shop conditions, and is further sustained to the extent specifically found under other objections. Objection 3 is overruled for the reasons set forth in section IV,B,5,b of this decision. Objection 4 is sustained by reason of the following unlawful conduct during the critical period: discriminatory prohibition (directed to Hockenberry) against talking about the Union; denial of access to the timecards, the oral warnings to Hockenberry, Mack, and Dixon, and the written warning to Hockenberry; denial of access by Freeda Carr to IDC premises; and refusal to rehire Barbara Morgan.[29] Objection 5 is overruled for failure of proof of such conduct during the critical period. Objection 6 is overruled for failure of proof of such conduct during the critical period, as discussed in section IV,B,3 above. Objection 7 is overruled for the reasons discussed above. Objection 8 is overruled for failure of proof of any such conduct that would constitute grounds for setting aside an election under appropriate Board law. Insofar as such vilification would rise to the level of threats, they are covered under Objection 2. Objection 9 is overruled for failure of proof, as discussed in section IV,B,5,b, above. Objection 10 is overruled in accordance with my ruling at the hearing. (See Tr. 698, 702, 704.) Objection 12 is overruled, as the objection is predicated on events that occurred prior to the critical period. Objection 13 contains three allegations. The first is sustained by reason of the Company's unlawful refusal to grant the Union's request for access in February 1981. The second is overruled as based on events that occurred prior to the critical period. The third allegation is precluded by the General Counsel's refusal to proceed on such allegations by way of complaint. Objections 14 and 15 are overruled for the reasons discussed in section IV,B,5,b. Objection 16 is sustained for the reasons discussed in section IV,B,6, supra. Objec-

[29] During the critical period the Company discriminatorily refused to recommend Debra Nuhfer and Floyd Monticue for reemployment. However, these actions were not communicated to the discriminatees or to any other employees.

tion 17 is overruled for failure of proof of any other unlawful or improper conduct that would constitute grounds for setting aside the election.

In sum, I am recommending that Union Objections 2, 4, and the first part of 13 and 16 be sustained, and that the remaining objections be overruled. The objectionable conduct included unfair labor practices that tend to seriously impede the right of employees to communicate with, and to receive communication from, the Union. The conduct also included discriminatory personnel actions, including denial of employment, against active union adherents. The objectionable conduct also included threats of loss of job security and denial of access to management, which threats were communicated by top company officials in a series of captive audience meetings at both the Warren and IDC plants. These unfair labor practices occurred against a background of other unlawful conduct that occurred or commenced prior to the filing of the first election petition and that involved violations of comparable gravity, the effect of which continued throughout the critical period. These earlier violations lend "meaning and dimension" to the unlawful conduct during the critical period. *Dresser Industries*, 242 NLRB 74 (1979). Conduct violative of Section 8(a)(1) is, all the more, conduct that interferes with the exercise of a free and untrammeled choice in the election. Therefore, the Board will normally direct a new election whenever an unfair labor practice occurs during the critical period, unless the violations are such that it is virtually impossible to conclude that they have affected the results of the election. *Enola Super Thrift*, 233 NLRB 409 (1977). The Company's unfair labor practices constitute the kind of conduct that warrants setting aside an election. Therefore, I am recommending that the election be set aside on the basis of Union Objections 2, 4, 13, and 16.

The Union requests (Br. 6–11) a remedial bargaining order instead of a new election. The Union initially made this request at the close of the original hearing.[30] In *United Dairy Farmers Assn.*, 257 NLRB 772 (1981), following a remand from the United States Court of Appeals for the Third Circuit, the Board reversed prior policy by (1) granting a remedial bargaining order in a case involving "outrageous" and "pervasive" unfair labor practices, notwithstanding that the union involved never obtained a card majority, and (2) granting the order at the request of the charging party, without any allegation in the complaint that the employer violated Section 8(a)(5) of the Act. The two circuit courts with potential venue over the present case are in disagreement as to the applicable law. In *United Dairy Farmers Assn. v. NLRB*, 633 F.2d 1054, 1069 (3d Cir. 1980), the court held that the Board had authority to issue remedial bargaining orders in such cases. However, in *Conair Corp. v. NLRB*, 721 F.2d 1355 (D.C. Cir. 1983), the only other case in which the Board issued a nonmajority remedial bargaining order, the Court of Appeals for the District of Columbia Circuit held that the Board lacked such authority. I am proceeding on the premises that the Board's decision on remand in *United Dairy Farmers* constitutes Board policy that is binding on me. In evaluating the propriety of a bargaining order in the present case, I have taken into consideration the Company's entire course of conduct, and not simply those unfair labor practices that were committed during the critical period prior to the election. Nevertheless, and regardless of whether the present case be regarded as a class I *Gissel*[31] case (i.e., an "exceptional" case marked by "outrageous" and "pervasive" unfair labor practices), or a class II case (i.e., a "less extraordinary" case "marked by less pervasive practices which nonetheless still have the tendency to undermine majority strength and impede the election processes"), I find that a bargaining order is not warranted. It is evident that from the beginning of its campaign, the Union was pessimistic about its ability to obtain majority status in the unit ultimately found appropriate by the Regional Director. Even before the Company began its campaign of unlawful activity, the Union sought to organize a relatively small unit, and it eventually agreed only with reluctance, to an election in a large unit that included most of the personnel at both plants. The Union lost the election by an overwhelming vote (231 to 1049). There is an administrative presumption that the Union obtained authorization cards or other showing of support from at least 30 percent of the employees in the appropriate unit. However, the Union's private demonstration does not constitute evidence in an unfair labor practice proceeding. The only evidence in this proceeding of the extent of the Union's support at any time consists of the 231 votes that it received in the election. In *United Dairy Farmers*, supra at fn. 22, the Board held that a close election was not a condition of a bargaining order, but the Board did not exclude the result of the election as a factor for consideration. Moreover, many of the violations in the present case involved interference with communication between the Union and the employees. It is anticipated that removal of these barriers by an appropriate remedial order, would enable the employees to make an informed choice in a rerun election campaign. However, a bargaining order would in the present circumstances defeat the purposes of the Act by imposing on the employees a representative that never demonstrated either majority or near majority support, or even the probability of such support. Therefore, I am recommending that a new election be directed at such time as the Regional Director deems appropriate.

CONCLUSIONS OF LAW

1. The Company 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.

[30] This fact is another illustration of the questionable wisdom of practices that would permit a charging party to inject a major issue into litigation without the benefit of briefing or even a statement of position by the General Counsel. By waiting until the close of the hearing to make its request, the Union effectively precluded the other parties and the administrative law judge from adducing evidence that might be relevant to the propriety of a bargaining order, albeit not relevant to the specific allegations of the complaint and the objections to the election.

[31] *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 613–615 (1969).

3. By interfering with, restraining, and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act, the Company has engaged and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

4. By refusing to reinstate Freeda Carr and Nancy Race, by refusing to recommend for reemployment and to rehire Pamela Damon, Rhonda Gross, Barbara Morgan, Debra Nuhfer, Floyd Monticue, and Rebecca Stuart Walton, by discriminatorily transferring Joan Hockenberry, by issuing written warnings to Vivian Newton and Joan Hockenberry and oral warnings to Hockenberry, Sheila Mack, and Dawn Dickson because of their union activity, and by imposing more rigorous and onerous terms and conditions of employment on union adherents among its employees, by segregating them at work, conspicuously and closely observing and scrutinizing them at work, and discriminatorily prohibiting them from talking at work, thereby discouraging membership in the Union, the Company has engaged, and is engaging, in unfair labor practices within the meaning of Section 8(a)(3) of the Act.

5. By refusing to reinstate Carr and Race because they filed charges under the Act, and by refusing to recommend for reemployment and to rehire Pamela Damon and Rhonda Gross because they gave testimony under the Act, the Company has violated and is violating Section 8(a)(4) of the Act.

6. Union Objections 2, 4, and the first part of 13 and 16 in Case 6–RC–8922 have been sustained by the evidence, and the Company thereby interfered with the Board election on June 9, 1981. Objections 1, 3, 5–10, 12, and the second and third parts of 13–15 and 17 are without merit or precluded by law or Board policy from consideration as objectionable conduct.

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

THE REMEDY

Having found that the Company has committed numerous violations of Section 8(a)(1), (3), and (4) of the Act, I shall recommend that it be required to cease and desist therefrom, to post appropriate notices, and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Company discriminatorily refused to reinstate Freeda Carr and Nancy Race on their offer to return to work in the returns departments, I shall recommend that the Company be ordered to offer each of them immediate and full reinstatement to their former jobs, or if such jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed, and make them whole for any loss of earnings and benefits they may have suffered from October 6, 1980, when they initially requested to return to work, until the date of the Company's offer of reinstatement. Having found that the Company discriminatorily refused to rehire Pamela Damon, Rhonda Gross, Barbara Morgan, Debra Nuffer, Floyd Monticue, and Rebecca Stuart Walton, I shall recommend that the Company be ordered to offer each of them immediate and full employment, in a nondiscriminatory manner, to positions for which they are qualified, without prejudice to their seniority or other rights and privileges to which they would be entitled, absent the discrimination against them. I shall further recommend that the Company be ordered to make each of them whole for any loss of earnings and benefits from the date of the Company's discriminatory refusal to rehire them, as determined in this decision, until the date of the Company's offer of reemployment. Backpay shall be computed in accordance with the formula approved in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest computed in the manner and amount prescribed in *Florida Steel Corp.*, 231 NLRB 651 (1977).[32] It will also be recommended that the Company be required to preserve and make available to the Board, or its agents, on request, payroll and other records to facilitate the computation of backpay due. I shall further recommend that the Company be ordered to remove from its files the negative or qualified reemployment recommendations for each of the above-named employees, to revoke, and remove from its files the written warnings that were given to Vivian Newton in October 1980 and to Joan Hockenberry in February 1981, and any reference to the oral warnings that were given in January 1981, to Hockenberry, Sheila Mack, and Dawn Dickson, and to give written notice of such expunction to each of them, and to inform each of them that its unlawful conduct will not be used as a basis for future personnel actions against them. See *Sterling Sugars*, 261 NLRB 472 (1982).

With regard to remedies involving union access to employees, I am, for the reasons discussed above, recommending that the Company be ordered to permit access by union organizers to outside nonworking areas of the IDC premises for a period of 6 months from the effective date of the order in this case. I am also recommending that the Company be ordered to make available to the Union a list of the names, addresses, and telephone numbers of all employees currently employed, and to keep such list current for a period of 6 months. This provision is without prejudice to the Union's rights under *Excelsior Underwear*, supra, in the event of a rerun election. These provisions, coupled with company compliance with the prohibitive and other provisions of the order in this proceeding, should enable the Union to develop adequate means of communication with the employees in an atmosphere free of coercive employer conduct. I am not persuaded that the policies of the Act would be effectuated by granting these remedies for a longer period of time or by granting other extraordinary remedies involving access by nonemployee union representatives. The Company does not have a prior history of unfair labor practice conduct, and the unlawful conduct in the present case does not equate in severity or intensity with that involved in cases in which the Board granted such extraordinary relief. Additionally, I am not persuaded that it would effectuate the purposes of the Act by in effect placing the Board's imprimatur on another long, drawn-out organizational campaign. The unit

[32] See generally *Isis Plumbing Co.*, 138 NLRB 716, 717–721 (1962).

is defined. The Union correctly asserts (Br. 12) that the present case involves a relatively large unit. However, the Board has conducted elections in far larger units. Compare, e.g., *Newport News Shipbuilding*, 239 NLRB 82 (1978).

The Union also requests reimbursement for its organizational expenses (Br. 14–18). Here again, the present case fails to meet the conditions that are required for such an extraordinary remedy. In determining the propriety of reimbursement, the Board will consider (1) whether the employer's defenses to the complaint were "patently frivolous," and (2) whether there is a "demonstrable 'nexus' between extraordinary expenses for such purposes and the unlawful conduct." *Conair Corp.*, 261 NLRB 1189, 1287–1288 (1982), enfd. in pertinent part 721 F.2d 1355 (D.C. Cir. 1983); *J. P. Stevens & Co.*, 244 NLRB 407, 457, 458 (1979). The present case involves difficult questions of fact, law, and policy, and the Company's defenses cannot accurately be characterized as frivolous. The Union has also failed to prove a substantial nexus between extraordinary organizational expenses and the Company's unlawful conduct, to the extent that it should be reimbursed for its expenses. Indeed, the Union's arguments in its brief are based in large part on assertions of fact that are not evidenced in the present record, and therefore must be disregarded. Moreover, the Union's position is characterized by contradictions that cast serious doubt on whether such a nexus can be proven. Thus, the Union argues (Br. 2) that as a result of the Company's unfair labor practices, which began as early as June or July 1980 "[T]he signing of authorization cards was reduced to a trickle"; but then asserts (Br. 4) that when the Regional Director directed an election in a "virtually 'wall-to-wall unit,'" the Union was able to produce signed authorization cards from 30 percent of the total number of eligible employees. In sum, the Union is conceding that renewed organizational activity was dictated by the Regional Director's ruling, rather than by the Company's unlawful conduct. The Union also places great emphasis on employer conduct that was directed at inhibiting organizational activity by prounion employees. However, with respect to the issue of access to the IDC premises, the Union, through the testimony of its organizers Glather and Gilmartin, also emphasized the need for personal contact between the employees and the organizers. In sum, even if the members of the employee committee were not subjected to employer interference, the Union would nevertheless find it necessary to make extensive use of its organizing staff. Glather also testified, in sum, that certain employer conduct affected the Union's efforts and consequent expenses. However, his assertion was based to a substantial extent on matters that were not alleged or not proven as unfair labor practices in this proceeding. Thus, Glather testified that the conduct included the "discharge" of Carr and Race, and the Company's assertions regarding the Union's history and policy on fines and dues. Glather also testified that at IDC, the Union's committee dissolved because (1) an employee's T-shirt was torn off her back, (2) two employees were discharged for wearing union T-shirts, and (3) Joan Hockenberry was ostracized and moved around. Except for Hockenberry's temporary transfer in October 1980, none of these assertions are based on any alleged unfair labor practices in this proceeding. An organizational campaign among a large complement of employees may require substantial expense and utilization of professional organizers, but the Union must be willing to undertake that effort if it is seriously interested in organizing the employees. An employer cannot be expected to subsidize the Union's campaign. Therefore I am recommending that the Union's request for reimbursement be denied.

However, on consideration of the facts in this case, I find that the unfair labor practices proven here are sufficiently broad in scope and intensive in nature as to demonstrate that the Company has a general disregard or hostility to the Act. These unfair labor practices, extended over a long period of time, were committed, approved, or condoned by high management officials and involved not only discrimination and harassment of employees who sought to exercise their Section 7 rights, but also discrimination against employees who sought redress through Board proceedings. In particular, the Company's discriminatory treatment of prounion employees, even after the election, tends to indicate a vindictive course of conduct. Therefore, I shall recommend that the Company be ordered to cease and desist from infringing in any manner on the rights guaranteed in Section 7 of the Act. See *Delta Faucet Co.*, 251 NLRB 394, 407 (1980).

[Recommended Order omitted from publication.]