Kinder-Care Learning Centers, Inc. *and* United Automobile, Aerospace and Agricultural Implement Workers of America, District 65, AFL-CIO. Case 32-CA-8140

September 27, 1990

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS CRACRAFT AND DEVANEY

On April 29, 1987, Administrative Law Judge Roger B. Holmes issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed exceptions and a supporting brief, and a brief in reply to the General Counsel's exceptions.

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

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

1. The Respondent operates child care centers at various locations throughout the United States, including Antioch and Pittsburg, California. At all material times, the Respondent admittedly has maintained a "parent communication" rule in its employee handbook or as a corporate policy for its employees at its Antioch center and many of its other centers.[1] The judge found that this rule violated Section 8(a)(1) of the Act only to the extent that it bars employees from discussing terms and conditions of employment with their colleagues, who are also parents of children enrolled at the Respondent's centers. In addition, the judge found that the Respondent committed a separate violation of Section 8(a)(1) when, in February 1986, it required employees at the Antioch center to reaffirm, in writing, their adherence to this rule.

The General Counsel and the Respondent each except to the judge's findings concerning the Respondent's "parent communication" rule. The General Counsel does not disagree with the violations found by the judge, but contends that the judge's overall analysis of the nature of the violation is too narrow. Specifically, the General Counsel argues that the rule, which is enforceable through discipline, is violative of Section 8(a)(1) in the following two additional ways. First, the rule interferes with the employees' Section 7 right to communicate with third parties, including parents who are not their coworkers, regarding their terms and conditions of employment. Second, insofar as the rule requires that employees first bring their work-related complaints to the attention of the Respondent's center director or process them according to the problem solving procedure specified in the employee handbook, the rule precludes employees from bringing such complaints to the attention of other persons, organizations, or agencies, e.g., other employees, parents, and a union. We find the additional violations of Section 8(a)(1), urged by the General Counsel, for the following reasons.[2]

Under Section 7 of the Act, employees have the right to engage in activity for their "mutual aid or protection," including communicating regarding their terms and conditions of employment.[3] It is well established that employees do not lose the protection of the Act if their communications are related to an ongoing labor dispute and are not so disloyal, reckless, or maliciously untrue[4] as to constitute, for example, "a disparagement or vilification of the employer's product or reputation."[5] For example, the Board has found employees' communications about their working conditions to be protected when directed to other employees,[6] an employer's customers,[7] its advertisers,[8] its parent company,[9] a news reporter,[10] and the public in general.[11] Specifically, we note that the Respond-

[1] The parties stipulated that the parent communication rule, as contained in the Respondent's handbook, is a national policy that has been in effect since October 30, 1984, at all the Respondent's centers that have adopted the employee handbook. The Respondent's attorney was not aware of any center that had not adopted it This "parent communication" rule states in pertinent part:

> Subjects such as local government regulations, the condition of center facilities, and the terms and conditions of employment are not to be discussed by you with parents and should always remain the responsibility of the Center Director.
>
> . . . .
>
> If you have a work related complaint, concern, or problem of any kind, it is essential that you bring it to the attention of the Center Director immediately or use the company problem solving procedure set forth in this handbook. Failure to abide by this policy statement may constitute grounds for disciplinary action up to and including termination.

[2] We also adopt the judge's finding that the Respondent committed a separate violation of Sec. 8(a)(1) when, in February 1986, it required employees at the Antioch center to reaffirm, in writing, their adherence to the "parent communication" rule.

[3] See *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978).

[4] Cf. *NLRB v. Electrical Workers IBEW Local 1229 (Jefferson Standard)*, 346 U.S. 464 (1953).

[5] See *Sahara Datsun*, 278 NLRB 1044, 1046 (1986), enfd. 811 F.2d 1317 (9th Cir. 1987), quoting *Allied Aviation Service Co. of New Jersey*, 248 NLRB 229, 230 (1980), enfd. 636 F 2d 1210 (3d Cir. 1980).

[6] In addition to *Waco, Inc.*, 273 NLRB 746 (1984), cited by the judge, see also *Heck's, Inc.*, 293 NLRB 1111, 1121 (1989), and *Scientific-Atlanta, Inc*, 278 NLRB 622, 625 (1986).

[7] *Greenwood Trucking, Inc*, 283 NLRB 789 (1987).

[8] *Sacramento Union*, 291 NLRB 540 (1988), enfd. 889 F.2d 210 (9th Cir. 1989)

[9] *Oakes Machine Corp.*, 288 NLRB 456 (1988), enfd. 897 F.2d 84 (2d Cir. 1990); *Mitchell Manuals, Inc.*, 280 NLRB 230, 232 fn. 7 (1986)

[10] *Auto Workers Local 980*, 280 NLRB 1378 (1986), enfd. 819 F.2d 1134 (3d Cir. 1987), *Roure Bertrand Dupont, Inc.*, 271 NLRB 443 (1984).

[11] *Cincinnati Suburban Press*, 289 NLRB 966 (1988).

ent's "parent communication" rule, to the extent that it prohibits employee discussions with all parents, is inconsistent with *Golden Day Schools*, 236 NLRB 1292 (1978), enfd. 644 F.2d 834 (9th Cir. 1981). Thus, in that case, which also involved child care facilities, the Board found protected the employees' flyer, which listed unsatisfactory working conditions and was directed to the parents of children enrolled at the employer's day care centers. We, therefore, conclude that the judge erred in failing to find that the Respondent's rule violates Section 8(a)(1) because it restricts employees' Section 7 rights to communicate not only with the employee-parents, but with *all* parents.[12]

We also find that the judge erred in failing to find that the "parent communication" rule unlawfully interferes with the statutory right of employees to communicate their employment-related complaints to persons and entities other than the Respondent, including a union or the Board. Although the rule does not on its face prohibit employees from approaching someone other than the Respondent concerning work-related complaints, it provides that employees first report such complaints to the Respondent "immediately or use the company problem solving procedure" and that it is "essential" for the employees to do so. Furthermore, the rule provides that the failure of employees to abide by this policy may result in discipline, including discharge. In these circumstances, we find that the Respondent's rule does not merely state a preference that the employees follow its policy, but rather that compliance with the policy is required. We further find that this requirement—which has no basis in either the language or the policy of the Act—reasonably tends to inhibit employees from bringing work-related complaints to, and seeking redress from, entities other than the Respondent, and restrains the employees' Section 7 rights to engage in concerted activities for collective bargaining or other mutual aid or protection.[13]

This attempt by the Respondent to impose a procedural prerequisite to the exercise of employees' Section 7 rights conflicts directly with the statutory policy of facilitating the ability of employees to organize and bargain collectively to restore equality of bargaining power between employers and employees.[14] Some employees may perceive themselves individually as powerless vis-a-vis their employers, and therefore may fear to approach their employers singly with work-related problems.[15] The same employees, however, may take courage from associating with other employees with similar problems, and may be willing to present those problems to employers collectively or through a union. The Respondent's rule that employees must first take any work-related complaint to the Respondent tends to inhibit employees from banding together by requiring that, in every such case, an employee must approach the Respondent before invoking the assistance of a union and perhaps even before discussing the issue with other employees.[16] Faced with such a requirement, some employees may never invoke the right to act in concert with other employees or to seek the assistance of a union, because they are unwilling first to run the risk of confronting the Respondent on an individual basis.

Accordingly, we conclude that this portion of the Respondent's "parent communication" rule also violates Section 8(a)(1).

2. The complaint alleged that the Respondent unlawfully discharged employee Rebekah Munana on June 6, 1986, because of her union or protected concerted activities. The judge dismissed this allegation. For the reasons set forth below, we reverse the judge and find that Munana was discharged in violation of Section 8(a)(3) and (1) of the Act.

Beginning in September 1985, Munana taught the kindergarten class at the Antioch center. She was qualified to teach any of the age groups at the

[12] We find no merit in the Respondent's argument that, even if the rule slightly infringes on the employees' Sec. 7 rights, then those rights should yield to considerations that the Respondent asserts are unique to the child care industry. In this connection, the Respondent contends that the child care industry is heavily regulated, the child care provider can be exposed to substantial liability because children are involved, and the parents' peace of mind that their children are being well cared for in a safe environment is at stake. Contrary to the Respondent's contention, the infringement on Sec. 7 rights here is not slight as is apparent from the cases cited above. Moreover, the concerns raised by the Respondent are not unique because other employers outside the child care industry have a similar desire to abide by regulations, decrease liability exposure, and satisfy customers' needs, and the Board has not given them greater leeway in restricting employees' Sec. 7 rights to publicize their work-related complaints.

[13] See, e.g., *T & W Fashions, Inc.*, 291 NLRB 137 (1988) (employees' cooperation with the Department of Labor found protected); *Delta Gas*, 283 NLRB 391 (1987), enfd. 840 F.2d 309 (5th Cir. 1988) (employees' union activites and cooperation with the Board found protected); *Miami Health Care Center*, 282 NLRB 214 (1986) (employees' union activities and participation in civil lawsuit found protected), *Squier Distributing Co.*, 276 NLRB 1195 (1985), enfd. 801 F 2d 238 (6th Cir. 1986) (employees' cooperation with a local sheriff found protected); and *Mount Desert Island Hospital*, 259 NLRB 589 (1981), remanded on other grounds 695 F.2d 634 (1st Cir. 1982) (circulation of an employee petition found protected).

[14] See Sec. 1 of the Act.

[15] Often with good reason. As we discuss below, when employee Munana suggested changes in the Respondent's sick leave policy, she was upbraided by the Respondent's district manager, who accused her of being a troublemaker Treatment of that sort would underscore in employees' minds the danger of complaining to the Respondent's management.

[16] Of course, an individual employee who complains to his employer without first involving other employees may be found not to have engaged in concerted activity, and thus may lose the protection of the Act. See generally *Meyers Industries*, 281 NLRB 882 (1986), affd. sub nom *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987)

center,[17] and she received a satisfactory job evaluation in December 1985. During her employment, she never received any disciplinary counseling or reprimands of any type, and the Respondent did not have any problems with her work.

In January 1986[18] the Union began a drive to organize the employees at the Antioch and Pittsburg centers. Munana's union activities began January 3, when she attended a union meeting in Antioch, California, at the home of Pittsburg employee Johnnie Bradford.[19] About a dozen of the Respondent's employees attended this meeting, during which a representative of the Union distributed leaflets about union organizing, and the employees discussed and listed their complaints about their working conditions. Munana participated in a similar union meeting held in Concord, California, about 3 weeks later.

In late January, several officials of the Respondent learned of union activity at the Antioch and Pittsburg centers. On February 2, Candace Pardue, the Respondent's director of human resources, arrived in the Antioch-Pittsburg area from the Respondent's corporate headquarters in Alabama, admittedly in response to the Union's organizing activities. During the next several days, Pardue visited the Pittsburgh and Antioch centers and interviewed employees and invited their comments about the Respondent's operations. While at Antioch, Pardue met with Munana and took notes of her complaints about company policies, including the employee sick leave policy. Munana pointed out some of the problems employees encountered with that policy and asked if an attendance incentive plan could be instituted instead. About 2 weeks later, Pardue returned to the Antioch center and, along with Michael Hill, the Respondent's district manager for the Antioch and Pittsburg centers, conducted a series of small group meetings with employees and informed them of the Respondent's strong opposition to the Union.

District Manager Hill returned to the Antioch center the following week, and met with small groups of employees to discuss a list of the employees' grievances expressed to Pardue during her February 2 visit.[20] Hill's meeting with Munana lasted about 3 hours and also involved Terry Coombs, a teacher's aide. After discussing several of the grievances on his list from Pardue, Hill mentioned a complaint about the Company's sick leave policy. Hill stated that he did not know why anyone would want to consider anything like an incentive program for attendance since, in his view, getting paid was incentive enough for showing up for work. Hill said that apparently some teachers were dissatisfied with the benefit of receiving 5 paid sick days. Munana responded that perhaps Hill had misinterpreted the statement concerning an attendance incentive plan, and she attempted to explain why the sick leave policy encouraged absenteeism.

Hill then, in a raised voice, said to Munana: "Who do you think you are to be telling us how to run our corporation and have these benefits, after all there is a board that spends lots of time in exploring the benefits and policies that we have at our center." Munana replied that she was merely suggesting that more consideration be given to the sick leave policy. Hill, still in a raised voice, responded that he could see what kind of a person and teacher Munana was, and that wherever Munana was, there was "bound to be trouble stirred up." Hill added that if Munana were to be absent from work again she would be required to bring in a doctor's note on her return. Munana told Hill that she believed that he was trying to intimidate her. Munana started crying and asked Coombs to get some tissues. When Coombs returned with the tissues, she told Hill that she felt that he was getting the wrong impression of Munana as a teacher. Coombs said, inter alia, that Munana's attendance was regular, that she was helpful, and that she performed her work well. The remainder of their meeting was devoted to other topics and ended on a positive, but not friendly, note.

During a staff meeting in April, Lorie Nichols, the Antioch center director, informed the teachers that those who wanted to leave the center for the summer could do so. Nichols explained that the center would have a drop in enrollment during the summer, and that seniority, if that was agreeable to the Antioch staff, would be honored in determining which teachers would be retained for the summer if more wanted to work than the Respondent could use. Nichols added that those who had been on the staff for the longest time would have the first choice of when they would work and that if there were layoffs those employees who had been there the least time would be the first to leave. All the teachers present at the meeting agreed with using

[17] In addition to Munana, the Antioch center employed a teacher for the 4-year-olds; two teachers for the 3-year-olds; two teachers for the 2-year-olds; one teacher for toddlers; and one teacher for the "club mates," a program involving children who range in age from 5 through 12 years.

[18] All subsequent dates are in 1986, unless stated otherwise.

[19] Johnnie Bradford was employed as a teacher at the Pittsburg center until her unlawful discharge on January 31 for engaging in union activities. See *Kinder-Care Learning Centers*, 284 NLRB 509 (1987), enfd mem. 855 F 2d 861 (9th Cir. 1988).

[20] The record shows that Hill did not know which employees had voiced these grievances because the list of grievances he had received from Pardue did not identify the employees involved

seniority as outlined by Nichols above.[21] After the meeting, Munana advised Nichols that during the summer she would be available to work part time with "whichever age group you need me."

In early May Nichols informed Hill that two teachers had indicated that they would take the summer off, but that there likely would be the need to eliminate another two or three positions for the summer. Although Nichols did not mention any teachers by name or give any more information, Hill told her that she may have to lay off the kindergarten teacher. Hill testified that based on past experience he found that the biggest drop in a center's enrollment came from the kindergarten program. Hill further acknowledged that at the time of this conversation he knew that Munana was the kindergarten teacher.

On May 19, Nichols conducted another staff meeting at Antioch and told the teachers that she had not yet prepared a summer schedule and would not have one for another 2 weeks. Munana responded that delaying the summer schedule until the beginning of June would cause the teachers to be unprepared, since they would not know what age group or hours they would be teaching. Nichols replied that she would speak to Munana about that subject later.

After this meeting Nichols, at Munana's request, met privately with her in the office. Nichols repeated that she did not know which teachers would remain on the staff over the summer. In response to Munana's question, Nichols stated that Munana might be laid off and told her that the Respondent preferred employees who could work full time during the summer. Nichols then assured her that she would be given 1 to 2 weeks' notice before a layoff. The next day Munana advised Nichols that she would be available for full-time work during the summer. Nichols replied that was "okay."[22]

On May 21 or 22 the Union distributed to both parents and teachers at the Antioch center leaflets that advised that the Union had begun an organizing campaign, referred to the pending unfair labor practice case involving the discharge of Johnnie Bradford, and invited them to a union meeting in Antioch to be held on May 22. Among those present at the May 22 meeting were Munana and Glenda Banks, a parent who had a child in Munana's class. During the meeting, the Union's organizing efforts and employee complaints about the Respondent's operations were discussed. Munana spoke up and discussed at some length the dissatisfactions that had led to the teachers' interest in having a union represent them. She also urged the parents to communicate more, with the teachers and the center director, about problems at the center.

On May 23 the Respondent posted at its Antioch center a written statement in opposition to the Union's recent solicitation of the parents. Later that day, Nichols told Munana of a conversation that Nichols had with Banks. Nichols told Munana that Banks was concerned, and that Banks had attended the union meeting the night before. Munana testified that in response to this, "I shook my head and said yes." Nichols then stated that Banks had told Nichols that it was awful that some teachers had been fired or laid off from some other centers, and that Banks was glad that Munana had not been laid off.

On Friday, May 30, Hill telephoned Nichols and instructed her to lay off Munana on Friday, June 6. Hill made the decision to lay off Munana.[23] Hill testified that Munana was laid off because the Antioch center was not going to have a summer kindergarten program and those few kindergarteners enrolled during the summer would be moved into the existing club mates program, which already was assigned to another teacher. Hill, however, admitted that teachers are shifted from one age group to another according to staffing needs of the center.

On June 6, Munana saw a notice to parents posted at the Antioch center stating that there would not be a summer kindergarten program. At noontime, Nichols called Munana into the office and told Munana that since the center did not have a kindergarten program, Nichols did not need her as a teacher "anymore." Munana asked Nichols about her statement at the April staff meeting that seniority would be honored in deciding who would work during the summer. Nichols replied that "we don't go by seniority here after all" and stated that her earlier statement had been a mistake. Nichols then handed Munana her final check, which paid her through June 6. Munana asked Nichols to send her a written notice regarding the reason for her layoff. Although Nichols promised to do so, Munana was never given any written explanation from the Respondent concerning her layoff.

[21] We do not adopt the judge's finding that the Respondent had a policy of not following employee seniority in making layoff selections. The record clearly reveals that the Respondent did not have such a policy. In fact, Hill's testimony shows that the Respondent did not prohibit the use of seniority by the center director for any purpose, including a layoff situation, and that, in the case of assigning employees' vacation times, seniority could be applied.

[22] The record shows that on May 19 and 20 Nichols did not indicate in any way to Munana, or during the staff meeting, that layoff selections would not be according to seniority, as previously stated at the April staff meeting.

[23] The record indicates that since Munana's layoff, Hill has not instructed Nichols to lay off any other teacher.

A week after Munana's layoff, the Respondent reassigned the club mates program to Terry Coombs, a teacher's aide who had never worked in that program. The Respondent admittedly did not consider Munana for that position. The Respondent also retained a number of teachers, including Teresa Rodriguez, who had less seniority than Munana. Rodriguez, who had been hired on May 8, was assigned the 4-year-olds' class for the summer. She, however, had received four separate disciplinary warnings in the 2-week period prior to June 6 and was ultimately discharged on June 27 for, inter alia, "inability to perform the job." On August 15, after the Board charge had been filed in this case, the Respondent offered Munana reemployment as a teacher of 2-year-olds.[24]

The judge concluded that the General Counsel did not satisfy his initial burden under *Wright Line*[25] because he did not show that Munana's layoff of June 6 was discriminatorily motivated. The judge found that prior to June 6 Munana had complained about company policies; that she had engaged in union activities by attending and participating in three union meetings; that the Respondent had knowledge of "general union activity" at its Antioch and Pittsburg centers; and that the Respondent had animus towards the Union's organizing efforts. Nevertheless, he found that Munana's complaining did not involve any concerted activity and that the circumstances of this case did not warrant drawing an inference that the Respondent had knowledge of Munana's union activities. Critical to the judge's 8(a)(3) analysis were his underlying findings that Munana had been laid off as opposed to terminated, that the timing of her layoff coincided with the end of the kindergarten program for that school year, that the Respondent's layoff policy was not to follow employee seniority in making layoff selections, and that Munana was in a unique position because she was the only kindergarten teacher, and that program had concluded for the summer. The judge also found that there was no evidence that the Respondent knew about Munana's attendance or comments at the May 22 union meeting. The judge further considered speculative the notion that Munana's criticisms of the Respondent's policies would likely indicate that she was a union supporter. After careful review of the record, we disagree with the judge and find that the Respondent's knowledge of Munana's union activities properly can be inferred from all the circumstances of this case.

We initially observe that the judge failed to consider Hill's direct involvement in the selection of Munana for layoff. Because Hill has not participated in any layoff selection decision since Munana's layoff, his involvement in Munana's layoff is, at the least, suspicious.[26] Hill also exhibited a strong hostility towards Munana during their prior February discussion involving employee grievances. In fact, during that meeting, Hill directly told Munana that wherever she was, there was "bound to be trouble stirred up." Given the Respondent's animus towards the Union and that Pardue's and Hill's February meetings with employees were in quick response to the ongoing union activity, Hill's remark about "trouble" strongly suggests a linkage with the union activity,[27] indicating a suspicion that Munana was a current, or likely future, union supporter.

Further, we are not persuaded that the evidence supports the judge's finding that Munana was laid off and not terminated. The judge's reliance on the "timing" of Munana's separation from employment occurring at the end of the employer's school year simply begs the question. "In determining whether an Employee has been discharged, events must be viewed from the employee's perspective; the test is whether the actions of an Employer would reasonably lead an employee to believe that he has been discharged."[28] Under this test, Munana was clearly given the impression that she had been discharged.[29] First, Munana was told by Nichols on June 6 that she was not needed "anymore." Second, Munana also was not given any indication on June 6 that the Respondent intended to have her return to teach the next year's kindergarten program.[30] Third, Nichols had stated that a layoff would be according to seniority and had indicated that layoff was a possibility if Munana wanted to work part time, and Munana had changed her summer availability to full time. Finally, Nichols had expressly promised Munana advance notice of layoff.

[24] Several days later, Munana turned down the job offer, explaining that she had obtained other employment.

[25] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); approved in *NLRB v. Transportation Management Corp.*, 462 U S. 393 (1983).

[26] See *Harvard Folding Box Co.*, 273 NLRB 1031 fn. 2 (1984).

[27] "The use of such euphemisms for protected activity is indicative of unlawful motive." *Master Security Services*, 270 NLRB 543, 551 (1984) (and cases cited therein).

[28] *Future Ambulette*, 293 NLRB 884, 893 (1989), enfd. 903 F.2d 140 (2d Cir. 1990).

[29] Our use of the term "layoff" elsewhere in this decision thus should not be misconstrued. However the Respondent may have styled Munana's separation from its employ, we find that she was, in fact, discharged.

[30] Contrary to the judge, we do not consider the Respondent's August reemployment offers to Munana, made in the face of a pending Board charge, sufficient to negate the finality previously expressed by Nichols on June 6.

We also find that the judge failed to recognize the significance of the close timing between Munana's layoff and the May union activity. In the 2-week period preceding Munana's layoff, the following events occurred: the Union handbilled the Antioch center, Munana conspicuously favored unionization at a well-publicized union meeting for employees and parents, Nichols discussed that union meeting with Munana, and the Respondent posted at its Antioch center a written statement in opposition to the Union's recent solicitation of the parents. These events, coupled with our finding below that the Respondent's asserted reasons for selecting Munana for layoff do not withstand scrutiny, are indicative of illegal motivation in the selection of Munana for layoff for reasons related to union activity.[31]

The Respondent contends, inter alia, that Munana was laid off because the Antioch center was not going to have a summer kindergarten program and those few kindergarteners enrolled during the summer would be moved into the existing club mates program, which already was assigned to Rizzuto. According to the Respondent, it would be less disruptive to keep a relatively new teacher, like Rizzuto, than to retain a more senior teacher, like Munana, who had not taught that program before. Hill, however, admitted that teachers are shifted from one age group to another according to staffing needs of the center. In addition, shortly after Munana was laid off, a club mates class was assigned to Coombs, a teacher's aide, who previously had never worked in the club mates program. As it is uncontroverted that Munana was a teacher qualified to teach any age group, Munana clearly was qualified to teach the club mates children, but was not considered for the job.

We further find it significant that Munana was laid off out of seniority even though Nichols previously had informed her and the Antioch staff that seniority would be honored for summer employment. The judge erroneously found the Employer's policy was not to follow seniority regarding layoffs. The record shows, on the contrary, that the Respondent lacks any affirmative seniority policy and that center directors have not been prohibited from using seniority for any purpose. In fact, the Respondent allows center directors to apply seniority regarding certain situations. Moreover, the Respondent has presented no urgent reason why Nichols rescinded her promise to use seniority. Furthermore, we note that Munana had experience and a good record in contrast with Rodriguez, who was retained and not only had less seniority, but had received several disciplinary warnings in a short timeframe and proved to be an unsatisfactory employee.

Under all the above circumstances, we find that the General Counsel has met his burden under *Wright Line* of establishing that Munana was selected for layoff because of her union activities and that the Respondent has failed to show that Munana would have been laid off even in the absence of her union activities.[32] Accordingly, we find that the Respondent violated Section 8(a)(3) and (1) in laying off Munana on June 6.

AMENDED REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order the Respondent to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

We shall order the Respondent to rescind the portion of its parent communication rule in its employee handbook that prohibits employees from discussing terms and conditions of employment with parents of children enrolled at the Respondent's centers and to rescind the portion of the same rule that requires employees to report work-related complaints first to the Respondent and to use the established company problem solving procedure to air such complaints. In addition, because the Respondent has maintained its parent communication rule as a companywide policy, we shall order the Respondent to modify this rule or policy by deleting those portions that we have found to be unlawful, as discussed above, and to post an appropriate Board notice to employees at all its centers where this rule or policy has been or is in effect.[33]

We shall also order the Respondent to make employee Rebekah Munana whole for any loss of earnings and other benefits she may have suffered as a result of her unlawful layoff, from the date of her layoff to August 15, 1986,[34] less any net interim earnings, to be computed in the manner as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). We also

[31] See *Active Transportation*, 296 NLRB 431 (1989).

[32] See *BMD Sportswear Corp*, 283 NLRB 142, 143 (1987).

[33] We find merit in the General Counsel's exception that the judge's recommended Order requiring the Respondent to modify its parent communication rule or policy and simply "give notice [of this modification] to employees in writing on a nationwide basis" is ambiguous and inadequate to remedy the violations involved.

[34] We are not including a reinstatement remedy as part of our Order because there were no exceptions to the judge's findings that the Respondent offered Munana reemployment on August 15, 1986, with her previous pay and without any loss in benefits or seniority, and that she declined the offer.

shall order the Respondent to remove from its records any references to the unlawful layoff of Munana, provide her with written notice of such removal, and inform her that her unlawful layoff will not be used as a basis for future personnel actions concerning her. See *Sterling Sugars*, 261 NLRB 472 (1982).

ORDER

The National Labor Relations Board orders that the Respondent, Kinder-Care Learning Centers, Inc., Antioch, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining a parent communication rule or policy that prohibits employees from discussing terms and conditions of employment with parents of children enrolled at its centers.

(b) Maintaining a parent communication rule or policy that requires employees to report work-related complaints first to the Respondent or to use the established company problem-solving procedure to air such complaints.

(c) Requiring employees at its Antioch, California center to reaffirm their adherence to a parent communication rule or policy that interferes with the rights guaranteed them by Section 7 of the Act.

(d) Discharging or otherwise discriminating against any employee for engaging in activities on behalf of United Automobile, Aerospace and Agricultural Implement Workers of America, District 65, AFL–CIO or any other labor organization.

(e) In any like or related 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) Rescind or modify its parent communication rule or policy at all its centers by deleting those portions of the rule or policy that prohibit employees from discussing terms and conditions of employment with parents of children enrolled at its centers and that require employees to report work-related complaints first to the Respondent, or use the established company problem-solving procedure to air such complaints.

(b) Make Rebekah Munana whole for any loss of earnings and other benefits suffered as a result of the discrimination against her, in the manner set forth in the amended remedy section of this decision.

(c) Remove from its files any reference to the unlawful discharge of Rebekah Munana and notify her in writing that this has been done and that the discharge will not be used against her in any way.

(d) 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.

(e) Post at its Antioch, California center copies of the attached notice marked "Appendix A," and post at each of its other centers where its parent communication rule or policy has been or is in effect copies of the attached notice marked "Appendix B."[35] Copies of the notice, on forms provided by the Regional Director for Region 32, 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 Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

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

APPENDIX A

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 maintain a parent communication rule or policy that prohibits you from discussing terms and conditions of employment with parents of children enrolled at our centers.

WE WILL NOT maintain a parent communication rule or policy that requires you to report work-related complaints first to us, or to use the estab-

lished company problem-solving procedure to air such complaints.

WE WILL NOT require you to reaffirm your adherence to a parent communication rule or policy that interferes with the rights guaranteed you by Section 7 of the Act.

WE WILL NOT discharge or otherwise discriminate against any of you for engaging in activities on behalf of United Automobile, Aerospace and Agricultural Implement Workers of America, District 65, AFL–CIO or any other labor organization.

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

WE WILL rescind or modify our parent communication rule or policy at all our centers by deleting those portions of the rule or policy that prohibit you from discussing terms and conditions of employment with parents of children enrolled at our centers and that require you to report work-related complaints first to us or use the established company problem-solving procedure to air such complaints.

WE WILL make Rebekah Munana whole for any loss of earnings and other benefits resulting from her discharge, less any net interim earnings, plus interest.

WE WILL notify Rebekah Munana that we have removed from our files any reference to her unlawful discharge and that the discharge will not be used against her in any way.

KINDER-CARE LEARNING CENTERS, INC.

APPENDIX B

NOTICE TO EMPLOYEES
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KINDER-CARE LEARNING CENTERS, INC.

Kenneth Ko, for the General Counsel.

William H. Andrews, Esq. (Coffman, Coleman, Andrews & Grogan), of Jacksonville, Florida, and *Dan E. King, Vice President* of Human Resources, of Montgomery Alabama, for the Respondent.

Gail E. Wetzel, Esq., of Oakland California, and *Mary Ann Masenburg, General Organizer*, of San Francisco, California, *President* of Human Resources, of Montgomery, Alabama, for the Charging Party.

Mary Ann Massenburg, General Organizer, of San Francisco, California, for the Charging Party.

DECISION

STATEMENT OF THE CASE

ROGER B. HOLMES, Administrative Law Judge. The Charging Party, United Automobile, Aerospace and Agricultural Implement Workers of America, District 65, AFL–CIO, filed on 19 June 1986, the original unfair labor practice charge in this case. The Charging Party filed on 15 August 1986 the first amended unfair labor practice charge in this case. I usually will refer to the Charging Party in this decision as the Union.

The Regional Director for Region 32 for the National Labor Relations Board, who was acting on behalf of the General Counsel of the Board, issued on 19 August 1986, the complaint and notice of hearing in this proceeding. The General Counsel alleged that the Respondent, Kinder-Care Learning Centers, Inc., had engaged in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act. The Respondent filed an answer to the General Counsel's complaint; denied that the Respondent had engaged in the alleged unfair labor practices; and raised certain affirmative defenses. I usually will refer to the Respondent in this decision as the Employer.

On 15 October 1986 the Regional Director for Region 32 of NLRB issued an amendment to the General Counsel's complaint and added paragraph 6(c), which was alleged to be a separate violation of Section 8(a)(1) of the Act. The Employer filed an answer to that amendment and denied that allegation.

The counsel for the General Counsel further amended the complaint on the second day of the hearing, but during the General Counsel's case-in-chief. The General Counsel added paragraph 6(d), which is another allegation of conduct urged to be violative of Section 8(a)(1) of the Act. The Employer also denied that allegation. (See Tr. 314–325.)

I heard the evidence in this proceeding at the hearing which was held on 26 and 27 October 1986 at Oakland, California. The time for filing posthearing briefs was extended to 22 December 1986. Both counsel for the General Counsel and the attorney for the Respondent timely filed briefs, both of which were argued persuasively from their respective points of view of the issues. At page 2, footnote 2, of his posthearing brief, counsel for the General Counsel moved to correct the transcript of the proceeding in three respects which pertain to statements made by the attorneys. Without objection, the General Counsel's motion is granted.

FINDINGS OF FACT AND CONCLUSIONS

I. JURISDICTION

The Employer is an Alabama corporation and is engaged in the operation of child care centers at various locations, including one at Antioch, California. During the 12 months preceding the issuance of the General Counsel's complaint, the Employer had gross revenues in excess of $250,000, and the Employer purchased and received goods or services valued in excess of $5000, which had originated outside of California.

Based upon the pleadings and the evidence presented in this proceeding, I find that the Employer has been at all times material an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

Based upon the pleadings and the evidence presented in this proceeding, I find that the Union has been at all times material a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The General Counsel's 8(a)(1) Allegations in Complaint Paragraphs 6(a), (b), and (d)*

1. Allegations

The General Counsel alleged the following in complaint paragraphs 6(a), (b), and (d) to be violations of Section 8(a)(1) of the Act:

6.

(a) Since at least February 16, 1986 Respondent has maintained nationwide in its employee handbook the following rule:

Parent Communication

. . . .

Subjects such as . . . the conditions of center facilities and the terms and conditions of employment are not to be discussed by you with parents and should always remain the responsibility of the Center Director.

. . . .

If you have a work related complaint, concern, or problem of any kind, it is essential that you bring it to the attention of the Center Director immediately or use the company problem solving procedure set forth in this handbook. Failure to abide by this policy statement may constitute grounds for disciplinary action up to and including termination.

(b) On or about May 23, 1986, Respondent, at its Antioch, California facility, acting through Nichols, orally warned an employee for violating the rule set forth above in subparagraph 6(a).

(d) During the first two weeks of February 1986 Respondent, acting through Lorie Nichols, at its Antioch, California, facility, required employees to reaffirm in writing their adherence to the parent communication policy of Respondent described above in paragraph 6(a).

2. Facts

General Counsel's Exhibit 2 is a copy of the Employer's "Employee Handbook." On pages 8 and 9 of that handbook there is a section entitled "Parent Communication." That section states:

Parent Communication

As a Kinder-Care staff member, you are in the best position to observe the educational progress of the children you see each day in the classroom. Kinder-Care encourages you to communicate positively with parents regarding the growth, development, and needs of their own child. Such discussions should be restricted to your regular working hours at the center, and must not divert your attention from your primary responsibility . . . caring for the children. Discussions regarding problems or concerns of the child must include the Center Director. Conferences will be scheduled for these discussions. Telephone conversations or meetings which occur outside of your regular working hours or away from the center, without prior approval of the Center Director, are unauthorized and will violate this policy.

Subjects such as local government regulations, the condition of center facilities, and the terms and conditions of employment are not to be discussed by you with parents and should always remain the responsibility of the Center Director.

If parents inquire of you about any such subjects, they should always be referred to the Center Director for a response. The Center Director or some other Kinder-Care official will handle the matter.

If you have a work related complaint, concern, or problem of any kind, it is essential that you bring it to the attention of the Center Director immediately or use the company problem solving procedure set forth in this handbook. Failure to abide by this policy statement may constitute grounds for disciplinary action up to and including termination.

The parties stipulated that the parental communication policy, as contained in the Employer's "Employee Handbook," is a national policy which is in effect at all of the Employer's centers which have adopted the "Employee Handbook," which insofar as the attorney for the Respondent knew, was every center. The parties also stipulated that the rule either in the form of the "Employee Handbook," or in the form of a parent communication policy, or in some other form, was in effect going back for 2 years before 30 October 1986.

General Counsel's Exhibit 3 is a copy of a document entitled "Kinder-Care Learning Centers, Inc.'s Policy Statement on Communications with Parents." The parties stipulated that copies of General Counsel's Exhibit 3 were distributed to the employees at the Antioch, California Center in February 1986 at or about the time that the Employer learned of union activity at the Employer's Pittsburg, California Center. General Counsel's Exhibit 3 states, with the italicized words appearing on the exhibit itself, as follows:

KINDER-CARE LEARNING CENTERS, INC.'S
POLICY STATEMENT
ON COMMUNICATIONS WITH PARENTS

Kinder-Care Learning Centers is committed to the development, growth, education, safety and comfort of the children enrolled in our Centers. We are dedicated as well to the responsibilities we have to the parents of those children. One of our responsibilities as providers of child care is to accurately communicate with parents regarding their children. This policy statement is to advise and guide you regarding those subjects which you properly may discuss with parents and those subjects which you should refrain at all times from discussing with parents.

Kinder-Care staff is responsible for knowing, caring for, and being alert to the needs to the children under their supervision. As a staff member, you are in the best position to observe the educational progress of the children you see each day in the classroom. You should feel free to communicate with parents regarding their own children and the growth, development and needs of the child. Such discussions should be restricted to your regular working hours at the Center. Telephonic conversations or meetings which occur outside of the staff's regular working hours or away from the Center, without prior approval of the Center Director, are unauthorized and will violate this policy.

Subjects such as *local government regulations, the condition of Center facilities,* and the *terms* and *conditions* of *staff employment* are not to be discussed by staff members with parents, and should always remain the responsibility of the Center Director. If parents inquire of you about any such subjects, the parent should always be referred to the Center Director for a response. The Center Director or some other Kinder-Care official will handle the matter.

If you have a work related complaint, concern or problem of any kind, it is essential that you bring it to the attention of the Center Director immediately or use the Company problem solving procedure set forth in the employee handbook. Failure to abide by this policy statement may constitute grounds for discipline up to and including termination. It is absolutely necessary for us to have this and other policies if we are to maintain the professional image we have built together. Kinder-Care appreciates your understanding and compliance with this policy.

DATE SIGNATURE

The findings of fact in the foregoing paragraphs are based on stipulations by the parties and documentary evidence. Later in this section of the decision and in subsequent sections, some additional findings of fact are based either on stipulations or on documentary evidence. However, most of the findings of fact throughout the decision are based on credited portions of the testimony given by the five witnesses who testified at the hearing in this proceeding. In alphabetical order by their last names, the five witnesses were: Terry Coombs, who formerly was an employee of the employer at the Antioch Center; Michael Hill, who is a district manager of the employer and whose district includes the Antioch Center; Rebekah Munana, who formerly was employed at the Antioch Center and who is the alleged discriminatee in this proceeding; Lorie Nichols, who formerly was the center director at the Antioch Center from July 1985 to July 1986; and Candace Pardue, who is the director of human resources for the Employer.

In making credibility resolutions, I have considered primarily the demeanor of the witnesses as they related their versions of the facts on the witness stand. I also have considered the witnesses' perception, the witnesses' memory, and the witnesses' ability to relate past events accurately. I have considered whether the witnesses spoke convincingly in responding to questions. I have considered the consistency or the inconsistency of the witnesses' versions of the events, and the probability of the testimony given by the witnesses.

Finally, in making the findings of fact, I have been guided by the holding that it is common that a trier of fact will believe some of the testimony of witnesses, but not necessarily believe all of the witnesses' testimony. The court held in *NLRB v. Universal Camera Corp.*, 179 F.2d 749, 754 (2d Cir. 1950), "It is no reason for refusing to accept everything that a witness says, because you do not believe all of it; nothing is more common in all kinds of judicial decisions that to believe some and not all."

Candace Pardue is the director of human resources for the Employer. She is headquartered in Montgomery, Alabama. Pardue was not involved in the Employer's decision-making process which resulted in the Employer's initial parental communication policy as set forth in General Counsel's Exhibit 3. However, Pardue was the one who added the "Parent Communication" section to the employer's "Employee Handbook," which is quoted above from General Counsel's Exhibit 2. In Pardue's opinion, it was not the intent of the Employer's parental communication policy to discourage or to prohibit employees from discussing among themselves their wages, hours, or working conditions. However, she did not testify that the foregoing ever was communicated to the Employer's employees.

In Pardue's opinion, the child care business is unlike a lot of other businesses because the child care business is heavily regulated. She explained that there are both Federal standards and state standards regarding the care of children. In some instances there are city guidelines with which a child care business has to comply. Because of such regulations and because of the severe potential liability, Pardue felt that, if there were any problems within the child care centers, the Employer would want to know directly about those problems. However, she did not testify that the foregoing ever was communicated to the Employer's employees.[1]

The parties stipulated that in late January 1986 the center director at the Employer's Pittsburg, California Center, whose name is Kathy Jacobson, received two telephone calls at least. During the course of those telephone calls: (1) Jacobson was told that union organizing activities were going on at the Pittsburg Center; and (2) Jacobson was told that Johnnie Bradford was involved.

The parties also stipulated that Michael Hill, who is the Employer's district manager whose district includes the Pittsburg and Antioch Centers, received a couple of telephone calls from Kathy Jacobson on 27 January 1986. During the course of those telephone calls Hill was told: (1) that there were union organizing activities going on in Pittsburg; and (2) that Johnnie Bradford was involved. After Hill received those telephone calls, Hill telephoned his management superior, Benowitz. Benowitz told Hill to do certain things. Subsequently, Hill received two telephone calls on a Monday, and Hill again telephoned Benowitz. On a Friday, Jacobson was visited by Johnnie Bradford and Mary Ann Massenburg, who is the union representative involved in this case. That visit precipitated another telephone call from Jacobson to Hill. The parties further stipulated that Hill had testified to the foregoing matters in an earlier unfair labor practice hearing. That telephone call also led to still another telephone call from Hill to Benowitz. That event occurred on Friday, 31 January 1986. The very next week Candace Pardue, whose office is located at the Employer's headquarters in Montgomery, Alabama, visited the Pittsburg Center. At about the same time Pardue also visited the Antioch Center. The parties further stipulated that the reason why Pardue went to the Antioch Center was because the Employer had learned of union activity at the Pittsburg Center.

The findings in the foregoing paragraphs are based on stipulations by the parties. In addition, I have taken judicial notice of the decision which was issued on 19 November 1986 by Administrative Law Judge George Christensen in *Kinder-Care Learning Centers* [284 NLRB 509 (1987)]. At the time that I am dictating the decision in this case, the decision of Judge Christensen was on appeal to the Board in Washington, D.C.

The first time that Pardue visited the Antioch Center was in early February 1986. Pardue was there for at least 2 days. During the first day of her visit to the Antioch Center, Pardue examined the personnel files of the employees, and she discovered that those files were incomplete. Pardue told Center Director Nichols that the personnel files did not contain signed copies of General Counsel's Exhibit 3, as well as certain other forms. Pardue instructed Nichols to have all of the Employer's forms and policies signed by the employees and placed in the employees' personnel files so that those files would be complete.

At the time of Pardue's first visit to the Antioch Center, that center did not have copies of the Employer's "Employee Handbook." (G.C. Exh. 2.) Pardue told Nichols that Nichols could expect to receive copies of the "Employee Handbook" within a week or a week and a half of Pardue's visit.

As a result of her conversation with Pardue regarding the Antioch Center's personnel files, Nichols had the employees at the Antioch Center sign copies of General Counsel's Exhibit 3, and Nichols placed those documents in the employees' personnel files. Nichols did the foregoing during the first 2 weeks of February 1986.[2]

Munana identified General Counsel's Exhibit 5 as being a copy of a document which had been handed to Munana by Nichols. Nichols had asked Munana to sign the document. Munana believed that Nichols also handed copies of the document to several other staff members, and that Nichols said that the document was a reminder about communications. Munana stated that Nichols also told them that Nichols needed to have the document signed in order for it to be put in the employees' files. As a result, Munana signed a copy of General Counsel's Exhibit 5 at that time. Munana also placed a date on the document. Munana did not recall that she had been asked to sign any such similar policies prior to 5 February 1986, which is the date on General Counsel's Exhibit 5. Munana stated that the italicized words in the third paragraph of General Counsel's Exhibit 5 were underlined when Nichols gave her the document.[3]

During Pardue's first visit to the Antioch Center, Pardue spoke individually with certain employees there. Pardue's conversation with Munana on that occasion will be set forth in section C of this decision.

Later in February 1986 after Pardue's first visit to the Antioch Center, copies of the Employer's "Employee

[1] The foregoing paragraphs are based on credited portions of the testimony of Pardue.

[2] The findings in the foregoing paragraphs are based on a composite of credited portions of the testimony of Nichols and Pardue.

[3] The findings in this paragraph are based on credited portions of the testimony of Munana.

Handbook" were received at the Antioch Center. Nichols then distributed copies of General Counsel's Exhibit 2 to the employees at the Antioch Center at that time. Nichols had the employees sign and date an acknowledgment of receipt of the "Employee Handbook," and Nichols placed those acknowledgments in the employees' personnel files.[4]

The conversation which is alleged as the basis for the General Counsel's complaint allegation in paragraph 6(b) took place on 23 May 1986 between Munana and Nichols. Doug Brown, an official of the Employer, was present. The conversation took place at the Antioch Center. In the opinion of Munana, Nichols was angry at the time.

Nichols told Munana that Munana must not speak with parents because Nichols did not want to have any more "paranoid parents" calling Nichols. Munana asked who? Nichols replied that Espinoza had called, and that Espinoza had spoken with Brown on the telephone. Nichols also told Munana that Espinoza was very upset about the conversation which Munana had with Espinoza earlier in the week. At the hearing, Munana said that she was shocked because Munana could not recall anything that would have upset Espinoza so. Nichols told Munana that Espinoza was so upset that Espinoza was considering taking her child to a psychologist. Munana asked Nichols if Nichols would like to know exactly what Munana had told Espinoza. Nichols said yes.

Munana then told Nichols that Munana had told Espinoza that they had just finished their first day of working on the Metropolitan tests. Previously, Espinoza had asked Munana to please keep her informed about her son's progress. At the hearing, Munana explained that Espinoza's son had come to the center because he was not doing well in the public school kindergarten. Espinoza was hoping that being in a small group and having more individual attention that her son would do better. Munana told Nichols that Munana had told Espinoza that the tester had indicated to Munana that Anthony Espinoza had not done well in his first test, but oftentimes it takes the first test or the next test in order to become familiar with the method of that particular testing. Munana told Espinoza that each test was in a different area, and Munana would let Espinoza know; that they would then schedule a conference; and that Munana would be sure to let Espinoza know where Anthony was so that Espinoza could make whatever plans were necessary for Anthony for the next year.

Munana also told Nichols that at the time that Munana had spoken with Espinoza some tears came to Espinoza's eyes, and that Espinoza told Munana that she was so concerned about Anthony. Munana told Nichols that Munana had put her arm around Espinoza, and that Munana had told Espinoza that Munana knew that Espinoza was concerned, and that Munana would let Espinoza know how it was going. Then Espinoza had left. Munana told Nichols that was all that Munana had heard about that matter.

Nichols then told Munana that Munana must not speak with any parents unless Nichols was present, and that when they had their conferences, Nichols would be there for each conference.

Munana did not receive a written reprimand regarding the foregoing, nor was she asked to sign anything. However, Munana considered her conversation with Nichols to be a verbal reprimand. Based on Munana's understanding of the Employer's parental communication policy in the "Employee Handbook" and based on prior communications from Nichols, Munana believed that Munana had the responsibility to communicate with parents regarding the positive aspects of a child's growth and to set up conferences with parents.

During the week following the conversation between Nichols and Munana described above, Munana had a number of end-of-the-year conferences with parents. During the course of those conferences, Munana made recommendations to the parents as to whether the children who had been enrolled in Munana's kindergarten class would be graduated to the first grade. At the hearing, Munana explained that the teachers made recommendations based on their observation of the children's behavior; the children's biological readiness; and the children's progress in the academic curriculum.[5]

3. Conclusions

A literal reading of the Employer's "Parent Communication" rule as set forth in the Employer's "Employee Handbook" (G.C. Exh. 2) reveals that the rule prohibits employees of the Employer from discussing their terms and conditions of employment with parents. An employee of the Employer may also be a parent of a child who attends a Kinder-Care Center. One of the Employer's benefits for its employees is that employees are given a 50-percent discount on child care tuition if the employee's child is enrolled at Kinder-Care. The rules applicable to such discounts are set forth in the section entitled "Child Care Tuition Discounts" on page 19 of the Employer's "Employee Handbook." If an employee takes advantage of that benefit, then that person is both an employee of the Employer and simultaneously a parent of a child enrolled at Kinder-Care. Thus, the Employer's rule on "Parent Communication" in the Employer's "Employee Handbook" would prohibit employees from discussing their terms and conditions of employment with another employee if that employee also was a parent of a child at the center. The foregoing illustrates how the Employer's rule literally applies in such circumstances, and how the rule literally interferes with employees' rights. As indicated in the findings of fact, the evidence does not establish that Pardue's views regarding the rule ever were communicated to the Employer's employees. Thus, employees would necessarily have to read the rule literally.

With regard to the existence of a rule which was found to be unlawfully broad on its face, the Board re-

[4] The findings in this paragraph are based on credited portions of the testimony of Nichols.

[5] The findings in the foregoing paragraphs are based on credited portions of the testimony of Munana. Nichols testified next after Munana had testified, but Nichols did not dispute Munana's account. Neither Brown nor Espinoza testified at the hearing.

cently has reaffirmed its earlier holdings in *Schnadig Corp.*, 265 NLRB 147, 157 (1982), and *Staco, Inc.*, 244 NLRB 461 (1979). In its decision in *Brunswick Corp.*, 282 NLRB 794 (1987), the Board held at "[T]he mere existence of an overly broad rule tends to restrain and interfere with employees' rights under the Act even if the rule is not enforced."

In its decision in *Waco, Inc.*, 273 NLRB 746 (1984), the Board held: "There can be little question that the Respondent's rule prohibiting employees from discussing their wages constitutes a clear restraint on employees' Section 7 right to engage in concerted activities for mutual aid and protection concerning an undeniably significant term of employment." The Board distinguished the *Waco* rule from the rule and the circumstances which were present in *International Business Machines Corp.*, 265 NLRB 638 (1982). The Board also pointed out that Waco had not established a business justification for having such a rule. I reach the same conclusion here after considering the Respondent's argument which compares a child care business to a health care facility. After reviewing the Supreme Court's opinions in *NLRB v. Baptist Hospital*, 442 U.S. 773 (1979), and *Beth Israel Hospital v. NLRB*, 437 U.S. 483 (1978), I conclude that the Court was concerned with the adverse effects on patients of the disruption of patient care and the disturbing of patients. Those concerns for persons, who are so seriously ill as to require hospitalization, are not present in the Employer's business. Thus, I conclude that the concerns for the parents of children at the Employer's centers are not similar to the concerns for patients at a health care facility.

In view of the foregoing, I conclude that the Employer's "Parent Communication" rule as set forth in the Employer's "Employee Handbook" (G.C. Exh. 2) interferes with and restrains employees of the Employer in the exercise of their rights under Section 7 of the Act in this respect: The rule prohibits employees of the Employer from discussing their terms and conditions of employment with an employee who is a parent of a child attending one of the Employer's centers. Accordingly, I conclude that the Employer's maintenance of such a rule on a nationwide basis is violative of Section 8(a)(1) of the Act.

The other portion of the "Parent Communication" rule in the Employer's "Employee Handbook" alleged to be unlawful in the General Counsel's complaint paragraph 6(a) pertains to employees reporting work-related complaints, concerns or problems of any kind to the center director, or the use of the problem-solving procedure in the handbook. A literal reading of that portion of the rule does not preclude employees of the Employer from taking additional action. Such additional action not precluded by the literal reading of the rule would be employees' bringing such work-related complaints, concerns, or problems of any kind to the attention of other persons, labor organizations, and Federal, state, or city agencies. Thus, a literal reading of the rule does not require that such matters only be reported exclusively to the center director, or that the employees must exclusively use the problem-solving procedure contained in the handbook. In other words, the rule does not prohibit the employees from taking additional action. In view of the foregoing, I find that that portion of the rule is not violative of Section 8(a)(1) of the Act, and, accordingly, I recommend that that portion of the allegations contained in paragraph 6(a) of the General Counsel's complaint be dismissed.

With regard to the allegations set forth in paragraph 6(d) of the General Counsel's complaint, I conclude that the evidence established that the Employer required its employees at its Antioch Center to reaffirm their adherence to an unlawful rule when the employer required its employees at the Antioch Center in February 1986 to sign copies of General Counsel's Exhibit 3, and later in the same month to sign acknowledgments of General Counsel's Exhibit 2. Because I have found the portion of the Employer's rule, as described above, to be unlawful, I further conclude that it was violative of Section 8(a)(1) of the Act to require the Antioch Center employees in February 1986 to reaffirm their adherence to an unlawful rule.

With regard to the General Counsel's complaint allegations in paragraph 6(b), I conclude that the evidence showed that the subject matter of the conversation in question here between Nichols and Munana pertained to Munana's discussion of the test results of a child with a concerned parent, Espinoza. That subject matter comes within the portion of the "Parent Communication" rule which states: "Discussions regarding problems or concerns of the child must include the Center Director." That portion of the "Parent Communication" rule in the Employer's "Employee Handbook" was not alleged in the General Counsel's complaint to be unlawful. This particular discussion between a teacher and a parent with regard to a child's test results was not a discussion of employees' terms and conditions of employment. Thus, I conclude that the discussion was not within the portion of the "Parent Communication" rule found to be unlawful. In view of the foregoing, I recommend that the allegations in paragraph 6(b) of the General Counsel's complaint be dismissed.

B. *The General Counsel's 8(a)(1) Allegations in Complaint Paragraph 6(c)*

1. Allegations

The General Counsel alleged the following in complaint paragraph 6(c) to be violative of Section 8(a)(1) of the Act:

> 6.
>
> (c) On an unknown date in mid-February 1986, Respondent, at its Antioch, California facility, acting through Candace Pardue, informed employees that joining a union "inevitably" would lead to a strike and the recruitment and hiring of new teachers as permanent replacements.

2. Facts

As indicated in the previous section of this decision, Candace Pardue is the Employer's director of human resources. Pardue began working for the Employer in

August 1981. Originally, Pardue held the position of zone personnel and training manager at Houston, Texas. In that position, Pardue had responsibilities which were similar to those of the director of human resources. In that earlier position, Pardue had responsibilities for a geographical area which included about five States. Next Pardue became the personnel training manager for the Employer. In 1984 Pardue was promoted to the position of corporate manager of employee relations. At that point in time she was relocated to Montgomery, Alabama. Pardue was involved in the development of policies and procedures for the Employer, and the implementation of those procedures as well as continuing to perform some training in the field.

Prior to going to work for the Employer, Pardue was the personnel director of Brookhaven Medical Center in Dallas, Texas. Pardue held that position for 3 years. Prior to working for the Brookhaven Medical Center, Pardue worked for the Terrell State Hospital as a personnel assistant. She worked in that position for 2 years. Prior to that time Pardue had worked for 1-1/2 years as the personnel director at a hospital located in Denton, Texas.

Pardue attended undergraduate school at the Northeast Louisiana University in Monroe, Louisiana. Pardue also attended the University of Texas in Denton, Texas. In addition, she also had about 18 hours of postgraduate work at East Texas State and at North Texas State. Pardue studied both education and business.

Pardue has attended two labor relations training seminars. One was held in Dallas, Texas, while Pardue was working there. That seminar was sponsored by the Texas Hospital Association. Pardue attended another training seminar in Montgomery, Alabama, which was presented by the local chapter of the American Society of Personnel Administration. The subject matter discussed at the seminars was union prevention. The participants in the seminars discussed the legal aspects of union organizing and what a person could and could not do during a union campaign. In addition, Pardue has attended at least 12 other seminars concerning "union education." The term "union education" in that context pertained to what persons could say and what they could not say or do with regard to union activities. Pardue also conducted at least seven workshops or seminars regarding "union education," and she also has conducted seminars on union prevention.[6]

In February 1986 Pardue spoke to the employees at the Employer's Antioch Center in small group meetings. Pardue had a prepared text of a speech which she read to the employees in each one of the group meetings. Respondent's Exhibit 2 is a copy of a document entitled "Kinder-Care Learning Centers, Inc. Northern California 'Don't Sign Anything' Speech.'" Before the meetings with the employees, Pardue gave a copy of the text of that speech to Hill, and Pardue asked Hill to follow the text of the speech while she spoke to the employees. Pardue testified that she read the text of the speech verbatim to the employees, and that she did not mention the words "strikes" or "replacement of strikers" in any form or fashion which were not contained in the written text. Pardue specifically denied telling the employees that joining a union inevitably would lead to a strike and the hiring of permanent replacements. Pardue acknowledged at the hearing in this proceeding that some questions may have been asked during the course of her meetings with the groups of employees. She did not recall any specific questions, or that any questions were asked at the small group meeting which Munana attended.[7]

District Manager Michael Hill confirmed in his testimony that he was present during the meetings which Pardue conducted with the employees at the Antioch Center in February 1986. Hill also stated that Pardue read from a prepared text. Hill had a copy of a text in front of him, and he followed that document as Pardue spoke to the groups of employees. Hill testified that Pardue stated to the employees what was contained in the text with the exception that, when she was asked to do so by an employee, Pardue defined a word or term used in the text.[8]

Former employee Terry Coombs testified that she attended a meeting which Pardue conducted at the Antioch Center. Coombs' recollection was that Pardue basically read from a prepared document. Coombs did not testify regarding what Pardue stated at the meeting which Coombs attended.[9]

Rebekah Munana and two other employees at the Antioch Center attended a meeting in February 1986 with Pardue in the staff room at the Antioch Center. Munana identified the other two employees only by their first names of Barbara and Tasha. Munana confirmed that Hill was present during the meeting, and that Hill said nothing during the meeting. It appeared to Munana that Pardue was reading from a prepared statement during the meeting. However, in Munana's opinion, Pardue did not read every word because Pardue continued to speak to the employees when Pardue looked up from the document in order to maintain eye contact with the employees. Munana acknowledged that she did not take any notes of what was said during the meeting, either during the course of the meeting or afterwards. Munana acknowledged that she was relying only on her own recollection. Munana testified that, while Pardue was reading from the prepared text, Pardue stated that joining a union inevitably would lead to a strike and the hiring of permanent replacements.

Based on the criteria for resolving credibility set forth in section A of this decision, I have not credited the portion of Munana's testimony that Pardue told the employees that joining a union inevitably would lead to a strike and the hiring of permanent replacements. I find that the text of the speech given by Pardue on that occasion, Respondent's Exhibit 2, provides the more reliable and more accurate version of what actually was stated by

[6] The findings in the foregoing paragraphs are based on credited portions of the testimony of Pardue.

[7] The foregoing findings are based on credited portions of the testimony of Pardue.

[8] The foregoing findings are based on credited portions of the testimony of Hill.

[9] The foregoing findings are based on credited portions of the testimony of Coombs.

Pardue. I find that Munana has related her impression of what was said by Pardue on that occasion. However, the Board has pointed out that a respondent is not responsible for the impression that an employee may derive from certain remarks. In its decision in *Fidelity Telephone Co.*, 236 NLRB 166 (1978), the Board held:

> A respondent is responsible only for the remarks it makes to employees and not for the impressions that employees may derive from the remarks. Here, the speech in question clearly falls within the limits of Section 8(c) of the Act and, absent evidence that Delcour departed at any time from the text of this speech, we are unable to predicate a violation of the Act on the mere impression an employee received from listening to prepared remarks. Accordingly, we shall dismiss this allegation of the complaint.

In connection with the foregoing credibility resolution, I have noted that Munana did not testify that Pardue made the remark about the inevitability of a strike and the hiring of permanent replacements during a question and answer portion of the meeting. Instead, Munana attributed the statement to Pardue while Pardue was reading from the text. In addition, I have noted that Coombs did not testify in support of Munana's testimony on this point. Furthermore, neither employees Barbara or Tasha testified in support of Munana's testimony.

Munana also testified that copies of General Counsel's Exhibit 4 were distributed to the employees. General Counsel's Exhibit 4 is a one-page typewritten document entitled "Statement of Position on Unionization." I credit that portion of Munana's testimony that the document was distributed by Pardue on that occasion in February 1986. The General Counsel does not allege in the complaint that General Counsel's Exhibit 4 contains any statement violative of Section 8(a)(1) of the Act. Instead, the General Counsel urges that the document reflects the Employer's animus towards the Charging Party Union.

The text of the "Don't Sign Anything" speech given by Pardue at the Antioch Center in February 1986 to small groups of employees covers 12 typewritten pages. Therefore, I will not reproduce the text of the speech here. Instead, I will summarize some of the points made in the speech so that the statements in the text regarding strikes and the hiring of permanent replacements can be considered in the context in which they were made. The first point made in the text is that it had come to the attention of the Employer that some of the employees of Kinder-Care had been approached and had been urged to join a union. The next point made in the speech was that the Employer was opposed to any union coming into the company; that Kinder-Care was a nonunion company and the Employer intended to keep it that way; that the Employer intended to oppose any union which tried to come in there by every legal and proper means; and that at the conclusion of the speech, the employees would receive a copy of the Employer's statement of position on unionization. The text of the speech then indicated that Pardue was to read portions of the Employer's statement of position on unionization.

The next 3-1/2 pages of the text of the speech pertained to the Employer's views and opinions with respect to the signing of union authorization cards by the employees. General Counsel's allegation in paragraph 6(c) of the complaint does not allege those remarks to be violative of Section 8(a)(1) of the Act.

Beginning on page 5 of the text of the speech, the speech refers to three possibilities which could occur if the Employer refused the union's request for recognition and bargaining based on the Employees' signing union cards. Those three possibilities are listed as: "A. it can call an immediate strike for recognition; B. It can request a labor board election; or C. it can request the labor board to count the cards at a public hearing." The text then discusses what the Employer describes as "counting the cards at a public hearing."

The text of the speech then gives the Employer's view that the Union can promise anything, but that the Union could not guarantee better wages, better training, better benefits, or anything else except for two things. Those two things, in the Employer's view, are that the employees would pay union dues, and "That you *may be called out on strike* if the company says 'no' to union demands."

The text of the speech then discusses what would happen if the Union was voted in by the employees and the Union was certified by NLRB. The text indicates the Employer's opinion that the Union would prepare a proposed collective-bargaining agreement and present that proposal to the Company. The text states that the Employer would hire a professional management negotiator to assist the Company at the bargaining table. The text indicates that the Employer would prepare a complete counterproposal to the union contract. The text of the speech then gives the Employer's views regarding a union dues-checkoff system and a union-shop clause. The text points out that the Employer would not have to agree to any of the Union's demands which were not in the Employer's best interest, and if the two sides could not get together, it would mean that the company negotiator and the union negotiator were deadlocked. The text then indicates the Employer's view that the Union would call a meeting to inform the Employees of the foregoing. The text further states: "You could be told at the union meeting that in order to get everything on your shopping list you are going to have to go on strike." The text of the speech then states:

> I RESPECT YOUR RIGHT TO STRIKE: HOWEVER, YOU SHOULD CLEARLY UNDERSTAND THAT THE SAME LAW THAT ALLOWS YOU TO STRIKE ALLOWS THE COMPANY TO CONTINUE OPERATING DURING A STRIKE BY HIRING PERMANENT REPLACEMENTS. THE COMPANY WOULD NOT HAVE TO SIT BACK AND LOSE ITS BUSINESS WAITING ON STRIKERS TO COME BACK TO WORK. ON THE CONTRARY, I CAN PROMISE YOU THAT SHOULD A STRIKE OCCUR, WE WOULD ADVERTISE FOR, RECRUIT AND HIRE NEW EMPLOYEES TO TAKE THE PLACE OF THOSE WHO HAD TO GO ON STRIKE. WHEN THE STRIKE IS OVER, WE WOULD TELL THE STRIKERS WHO HAD BEEN PERMANENTLY REPLACED THAT WE DID NOT NEED THEM.

The text of the speech then sets forth the Employer's view that a strike would affect the care of the children at Kinder-Care; that employees should have all the facts before making important decisions; that everything at Kinder-Care was not perfect; that the key to success, job security, and prosperity was to work together as a team; that the Employer was asking each employee to do his best to keep a union from coming between the Employer and the employees; and that Pardue was available to answer questions of the employees.[10]

3. Conclusions

Based on the findings of fact set forth above, I conclude that Pardue did not tell employees that joining a union inevitably would lead to a strike and the recruitment and hiring of new teachers as permanent replacements. Cf. *Louis Gallet, Inc.*, 247 NLRB 63 (1980); *Middletown Hospital Assn.*, 282 NLRB 541 (1986). Instead, I conclude that the facts show that the Employer presented to the employees at the Antioch Center in February 1986 the Employer's views and opinions as to what might occur as the result of the employees' signing union authorization cards; what might occur as a result of a union's request for recognition based on the signing of those authorization cards; what might occur if the Employer refused the Union's demands; what might occur if the Employer and the Union became deadlocked during contract negotiations; and the Employer's intention to hire permanent replacements in the event of a strike by the employees. With regard to the last point, the Board held in its decision in *Eagle Comtronics,*, 263 NLRB 515 (1982): "the Board has long held that an employer does not violate the Act by truthfully informing employees that they are subject to permanent replacement in the event of an economic strike. The Board has held that such comments do not constitute impermissible threats under Section 8(a)(1), or objectionable conduct in an election." In this connection, see also the Board's decision in *National Micronetics*, 277 NLRB 993 (1985).

In view of the foregoing, I recommend to the Board that the allegations in paragraph 6(c) of the General Counsel's complaint be dismissed.

C. *The General Counsel's 8(a)(1) and (3) Allegations in Complaint Paragraphs 7 and 8*

1. Allegations

The General Counsel alleged the following in complaint paragraphs 7 and 8 to be violations of Section 8(a)(1) and (3) of the Act:

7.

On or about June 6, 1986, Respondent discharged its employee Rebekah Munana, and since that date has failed and refused, and continues to fail and refuse, to reinstate her to her former position of employment.

8.

Respondent engaged in the conduct described above in Paragraph 7 because Munana joined or assisted the Union or engaged in other protected concerted activities for the purpose of collective bargaining or other mutual aid or protection.

2. Facts

Prior to the time that Rebekah Munana began working for the Employer, Munana had graduated from high school, and she had attended a community college where she received an Associate Degree in Early Childhood Education. About the same time that she received her Associate Degree, Munana became employed by the College Observation Preschool as the assistant director. After Munana had worked there for about a year, she moved to the State of Oregon where she attended the Oregon College of Education. Munana received some higher education in the field of education there. Munana also taught kindergarten at the Petersburg School in Oregon during the school year.

Following the above events, Munana returned to San Jose, California, where she previously had graduated from high school and where previously she had attended the community college. On her return to San Jose, Munana accepted employment in a couple of different preschools. After teaching for a year in one of those preschools, Munana became the director of the preschool. She remained in that position for 2 years. The reason that Munana left that position was because her husband and she moved from San Jose to Antioch, California. That occurred during the summer of 1981.

After moving to Antioch, Munana remained at home for about a year and a half. Then in January 1983 Munana became employed by the Mount Diablo Community Child Care Advocates as the head teacher for an extended day care program for children who were in special circumstances. The children involved were school-age children. Munana worked there for about a year and a half, and then she worked there only as a substitute.

Also in January 1983 Munana applied for a California State Children's Center permit. Thereafter Munana received that permit from the State of California. That permit allows a person to teach or to operate a day care center, and the permit is valid for 5 years.

The Associate Degree held by Munana was in the field of Early Childhood Education. Most of her first 2 years of college also were in that field. For the Associate Degree, Munana had about 20 or 30 units in general education, and she had an additional 30 or more units in Early Childhood Education.

A friend of Munana's informed Munana that she had heard from her next door neighbor that Kinder-Care was going to establish a new day care center at Antioch. Munana asked her friend's neighbor to ask the director of the new center if the director would give an appointment to Munana. As a result of the foregoing, Munana went to the Antioch Center and spoke with Center Director Lorie Nichols. Munana was given an application form which she completed and returned to Nichols.

[10] The foregoing summary is based on an examination of R. Exh. 2.

Munana listed in detail on the application form what her prior educational work experience had been. Then Nichols interviewed Munana. Nichols reviewed Munana's application with her. Munana asked Nichols about the positions at the new center which were available. Nichols informed Munana that there was a position available in the 4-year-old room and the kindergarten room. Nichols also asked Munana which one she would prefer. Munana replied that she would prefer the kindergarten room, but Munana stated that she would be willing to take either position. Nichols then asked Munana if Munana also would be willing to combine the 4-year-olds and the 5-year-olds until the Antioch Center became better established. Munana replied that she would be willing to do so. Nichols and Munana also discussed what her wages would be. Munana had listed a wage rate on her employment application form that Munana would have liked to have earned. Nichols informed Munana that the wage rate she had listed was a higher rate than what the Employer was paying. Nichols also told Munana that Nichols would submit Munana's application to District Manager Michael Hill, and that Nichols would advise Munana as to what her wage rate would be. They also spoke about some of the jobs which would be performed if Munana was hired at the Antioch Center. Nichols informed Munana that the staff was taking inventory at that time and setting up the center. The staff was doing painting and decorating. Nichols also said that Munana would be involved in attending some training sessions. Nichols then showed Munana around the center, and Nichols told Munana that Nichols would telephone her with a reply.

A day or two after her preemployment interview, Nichols telephoned Munana at her home, and Nichols informed Munana that the Employer would like to hire her. Nichols informed Munana that she would be starting to work the following Monday which was 19 August 1985. Nichols said that Munana would be working 8 hours a day in the beginning, but that when the school started that Munana's hours would be changed. Nichols told Munana that she would be earning $5 an hour.

On the following Monday Munana began working for the Employer. Basically, she worked a 40-hour workweek at that time. During the first week of her employment with the Employer, Munana spent her working time in preparation of the center. The center staff worked together as a team in readying one room at a time. The staff decorated the rooms, and the staff had input as to the kind of theme that they wanted to carry out throughout the rooms and hallways at the center.

Munana also attended training sessions on 3 days a week. Cora Anderson was in charge of the training sessions which were conducted at the Employer's Pittsburg Center. The employees were given written materials during the training session, and they were informed of the Employer's rules and what the benefits were. They also spoke about the kind of lessons which would be implemented; what kind of discipline was considered to be appropriate by the Employer; and the Employer's policies. With regard to one of the Employer's policies, Munana recalled that the children of the staff would be able to attend the Employer's center at a 50-percent tuition discount. Another benefit discussed at the training sessions was the Employer's sick time policy. Munana asked for clarification of that policy because she did not understand it at first. After the policy was clarified, Munana made the statement at the training session that it did not seem right to Munana that an employee would have to be absent for 3 days consecutively before getting paid for that third day as the employee's first day of sick time. Munana also asked Anderson at the training session whether, after an employee initially had been absent for 2 days for starting the employee's sick time, did that mean that the next time the employee was sick that it was the employee's second day. Anderson replied no, and that the staff member would have to be absent 2 more days.

The second and third weeks of Munana's employment by the Employer were spent in decorating and painting the Antioch Center; cutting out letters to staple onto the cork board on the wall; and in traveling to a couple of the other centers in order to observe how those centers were decorated.

Beginning in mid-September 1985, the educational program at the center began. Munana began working at the center from 6:30 a.m. until 12 noon. The actual hours of the kindergarten class which she taught were from 8:30 a.m. until 12 noon. Munana estimated that the number of children in her kindergarten class ranged between five and seven children.

When the educational program began at the Antioch Center, Nichols was the Center Director, and there was no assistant center director at that point in time. In addition to Munana, who was the kindergarten teacher, there was a teacher for the 4-year-old group; two teachers for the 3-year-old children; two teachers for the 2-year-old children; one teacher of the toddlers; one teacher of the club mates; and one cook at the facility.

In December 1985 Munana received her first job evaluation. That evaluation was for work which Munana had performed for the Employer in October 1985. The evaluation form provided for ratings ranging from one to five, with the rating of five being considered excellent. Most of the ratings which were received by Munana in December 1985 fell into the range of ratings two and ratings three. Munana said that she was disappointed with the evaluation. Nichols told Munana not to be alarmed, and Nichols explained to Munana that generally she evaluated low at first, and that if Nichols evaluated higher, where was the room for growth? Nichols also informed Munana that many of the teachers were upset by their first evaluation.

Prior to Christmas in December 1985, a staff meeting was held at the Antioch Center. Nichols presented some information to the staff at that time. Then Nichols asked the staff if there was anything that anyone wanted to bring up. Munana spoke up about the evaluation forms, and Munana asked the other staff members to take it upon themselves to speak to Nichols about their evaluation forms. Nichols agreed with Munana that the staff needed to come to Nichols and see their evaluation forms if they desired to do so, and that Nichols would present the evaluation forms to the staff members if there

was any specific concern or problem. After the staff meeting was over, Munana told Nichols about a book that Munana had read and which Munana felt had been helpful to her. Munana recommended that Nichols read the book. The name of the book was the "One Minute Manager."

Munana had met Johnnie Bradford at one of the Employer's training sessions which had been held at the Employer's Pittsburg Center during the first week of Munana's employment with the Employer.

In early January 1986 Bradford telephoned Munana at Munana's house. Bradford told Munana that there was a group of teachers who were concerned about child care teaching as a profession; that they wanted to upgrade and maintain a professional outlook for the child care provider; and that Bradford was having a meeting in her home on 3 January 1986. Bradford asked Munana if she would be interested in attending the meeting, and that there were possibilities of considering union organizing. Munana did attend the January 1986 meeting at Bradford's house. Bradford lived in Antioch. There were some other teachers at the meeting from the Employer's Pittsburg Center and from the Employer's Antioch Center. Union Representative Mary Ann Massenburg also was present. Munana estimated that about a dozen employees of the Employer were at the first meeting Munana attended. Massenburg distributed some leaflets about union organizing at the meeting, and the employees decided that they would write a list of their grievances or concerns. The employees also decided that they would like to consider the matter further, and that they would invite other staff members from the Employer's Concord Center to be present at another meeting.

About 3 weeks later in January 1986 Munana attended a second union organizing meeting. That meeting was held at the Clayton Valley Community Center located in Concord, California. Munana estimated that between 8 to 10 Employees of the employer attended that meeting. There were some employees from the Antioch Center, the Pittsburg Center, and the Concord Center. Union Representative Massenburg also attended that meeting, and she made the same presentation as she had made at the earlier meeting at Bradford's house. The employees decided that they should make contact with employees at other centers of the employer in order to determine if the employees at those centers were having the same problems and having the same feelings that the employees at the meeting had. The employees decided that they wanted to explore the matter further and to see if they could branch out further.

That was the last union organizing meeting which Munana attended until 22 May 1986. At the hearing in this proceeding, Munana explained that she had been aware that there had been two or three other union meetings held in the interim. However, Munana did not attend those meetings because they were held on Saturdays, and Munana attends church on Saturdays.[11]

[11] The findings in the foregoing paragraphs are based on credited portions of the testimony of Munana.

General Counsel's Exhibit 6 is a copy of the evaluation which Munana received on 17 February 1986. That was Munana's 6-month evaluation. Munana received 4 ratings of 5 which the Employer considered to be outstanding; 22 ratings of 4 which the employer considered to be excellent; 50 ratings of 3, which the Employer considered to be satisfactory; and 2 ratings of 2 which the Employer considered to be fair.[12]

The parties stipulated that there were no counselings or reprimands of any type in Munana's personnel file during the entire duration of Munana's employment by the Employer.

Nichols testified that she did not have any problems with Munana's work at any time. In the opinion of Nichols, Munana was qualified to teach any of the age groups which were being taught at the Antioch Center, assuming that Munana emotionally could adjust from teaching 4-year-olds to teaching 2-year-olds.[13]

Also in February 1986 Munana had a meeting with Candace Pardue at the Antioch Center. The meeting took place in the teachers' staff room. Pardue introduced herself to Munana. Munana asked Pardue about the kind of job that Pardue performed for the Employer. Pardue explained to Munana that Pardue was in personnel relations. Munana then asked Pardue how Pardue liked this part of California, and they had a couple of minutes of pleasant conversation. Pardue then told Munana that Pardue would like to have the chance to speak with employees who were at the new centers, such as the Antioch Center, in order that the employees might air some of their feelings and talk about the kind of things that they might come up against.

Munana then told Pardue about some of the things that pleased Munana. Munana said she was pleased that she was able to have her own children attend the Antioch Center where Munana was working. Munana also told Pardue that Munana felt that Center Director Nichols was showing some growth as a director. Munana told Pardue that Nichols had mentioned to Munana after the Christmas vacation that Nichols had purchased a book that Munana had recommended to Nichols. Munana also told Pardue that Nichols had told Munana that Nichols appreciated it. Munana told Pardue that, even though Munana had observed some inexperience on Nichols' part, that Munana had seen some growth in Nichols, and Munana was pleased. Munana also told Pardue that Munana liked the fact that Nichols had changed the teachers' room so that it was more efficient for the teachers to use.

Munana then told Pardue that there also were some things that Munana was displeased with. Munana stated that her room was not overloaded, but that some of the other teachers were out of ratio. Munana also told Pardue that Munana just could not understand how teachers' hours would be cut back sometimes. Munana pointed out that if a child was absent 1 day, the child still paid for that day. Munana further told Pardue that it

[12] The foregoing findings are based on credited portions of the testimony of Munana and documentary evidence.

[13] The foregoing findings are based on credited portions of the testimony of Nichols.

seemed that Nichols was so concerned with the budget that it seemed to Munana that it boiled down to "the almighty dollar." Munana further explained to Pardue that in December 1985 there was one parent who could not come in during the morning hours which were the hours that Munana worked. That parent requested to meet in a conference with Munana in the late afternoon. Munana then asked Nichols for approval. Nichols replied no; that Nichols could not approve that because Nichols had to stay within the budget. Munana told Pardue that even a half hour of time therefore could not be scheduled for that conference with the parent of the child. Munana told Pardue that Munana went ahead and met with the parent, but without Munana's being able to record that time on Munana's timecard. Pardue then assured Munana that Munana should, in fact, be paid for that time. At the hearing, Munana stated that the time was not added to Munana's timecard.

Munana further told Pardue that Munana wondered if there could be some incentive plan for attendance by teachers rather than the Employer's current benefit plan for sick time. Munana told Pardue that it seemed unnatural to Munana for a teacher to have to be absent for 2 days before receiving sick time. Munana said that when a teacher first begins to work with young children, the teacher's health tolerance is low, and it was easy for a teacher to become ill in view of the types of illnesses that children often have. Munana told Pardue that it seemed logical to Munana, based on Munana's experience that when a teacher was absent, the teacher usually was absent for just 1 day. Munana further told Pardue that a teacher might be absent for just 1 day on four or five occasions during the year. Munana said, if that was the case, then it would be highly unlikely that the teacher would have any sick time pay as a benefit. While Munana was telling Pardue the foregoing, Munana noticed that Pardue appeared to be writing those matters down on a notepad.

When Munana made the comment to Pardue in reference to "the almighty dollar," Pardue replied that the money that was brought in by the Employer did not go to just that particular center, and that there was an overall picture which Munana could not see. Pardue explained to Munana that the Employer had obligations to its stockholders, and that there were many other ways the money was used, and that the Employer's money did not go just to pay teachers' wages. Pardue told Munana that oftentimes when a center was started, the center was "floated" by some of the other existing centers, so Munana could not just think about the money that was coming into a particular center. Pardue also told Munana that Pardue was going to sum up some of the things that the teachers had told her, and Pardue was going to present those things to a board back in Alabama.

In addition to the foregoing matters, Munana further told Pardue that some of the staff members at the Antioch Center had their working time cut back without any forewarning. Munana also told Pardue that Nichols was working longer hours, and that Munana believed that Nichols was setting herself up for "a quick burnout."[14]

Later in February 1986 District Manager Hill met with Munana and employee Terry Coombs at the Antioch Center. Hill informed Munana and Coombs that he wanted to tell them about a summary of the grievances or concerns of the employees and Hill's plan to overcome some of those grievances or concerns. Hill explained that there had been certain grievances expressed to Pardue during the interviews she had with employees, and that Hill had a written list of those grievances or concerns with him.

Hill first discussed with Coombs a grievance which Coombs had expressed with regard to her status with the Employer. Coombs had been employed as a part-time employee at one of the Employer's centers, and then Coombs was moved to another center still as a part-time employee. Subsequently, Coombs was changed to full-time employee status, but the paperwork had not been sent in with regard to her change in status. Hill assured Coombs that Hill was working on the problem, and that it would be corrected. Hill stated that those kinds of mistakes usually occurred when a center director was inexperienced and did not send in the paperwork.

Hill then mentioned some of the other concerns of the employees. One such concern was that the teachers wanted to have a compromise regarding the dress code. The teachers felt that there were times when it was necessary to wear jeans to work rather than their dress clothes. Hill stated that Nichols had come up with the idea that the employees could wear jeans every other Friday, and that the day would be easy to remember because it was payday. Munana and Coombs stated that they were glad for that change in the dress code because there were things that they needed to do that necessitated their wearing more relaxed clothing.

Another concern was the repair work in the back yard. Hill stated that that matter already had been taken care of.

Hill then spoke about the sick leave benefit of the Employer. Hill chuckled and stated that he did not know why anyone would want to consider anything like an incentive plan for attendance. Hill said that after all the employees were getting their wages, which should be incentive enough for their being at work. Hill said that apparently some teachers were dissatisfied with the benefit of receiving 5 paid sick days. In the opinion of Munana, Hill's attitude regarding the foregoing was sarcastic, so Munana spoke up and told Hill that perhaps he was misinterpreting that statement. Munana said that, of course, getting paid for their worktime was good, and it was an incentive. However, it seemed to Munana that it was human nature that, if a teacher were absent for 2 days because of illness, and on the third day it was questionable as to whether or not she should go back to work, the teacher would think why did she not take the third day off and make sure that she was well before going back to work. The teacher would think that perhaps her

[14] The findings in the foregoing paragraphs are based on credited portions of the testimony of Munana. Pardue did not contradict Munana's version.

resistance was low, and that she might just get ill once again. In the opinion of Munana, Hill raised his voice to her. Munana said that Hill told her: "Who do you think you are to be telling us how to run our corporation and have these benefits, after all there is a board that spends lots of time in exploring the benefits and policies that we have at our center." Hill repeated who was Munana to think that. Munana replied that she was merely suggesting that more consideration be put into that subject. Munana stated that certainly there was another plan that could work more effectively for the teachers. Hill stated that he could see what kind of person Munana was; what kind of teacher Munana was; and that where Munana was, there was bound to be trouble stirred up; and that if Munana were to be absent again, a doctor's note would be expected to come back with Munana when Munana returned to work. Munana told Hill that Munana believed that Hill was trying to intimidate her. At the hearing Munana said that she could not control her emotions. Munana started crying. Munana then asked Coombs to please go and get some tissues. At that point Coombs left the room, and then Coombs returned with some Kleenex.

When Coombs returned to the room where Hill and Munana were, Coombs told Hill that Coombs felt that Hill was getting the wrong impression of Munana as a teacher. Coombs said that Munana was not that way, and that Munana's attendance was regular. Coombs stated that Munana was helpful and that Munana performed her work well.

Munana and Hill talked about the kindergarten program, and the curriculum that was being used. They also discussed Munana's previous experience in using a certain mathematics program and a certain reading series. They also discussed a kindergarten emphasis week which would be coming up soon. They also talked about communicating to the parents and to the community that the employer had a kindergarten program. Hill suggested to Munana that Nichols and Munana get together and talk to each other about creative ways of informing the community of the kindergarten program. Hill also suggested to Munana that they have a back-to-school night where the center could invite the parents of the 4-year-old class to come and meet the kindergarten teacher, so that the parents might plan on enrolling their children in kindergarten the next school year.

Hill and Munana also talked about teachers' meetings. Munana told Hill that, even though it was Nichols' goal to have monthly meetings, they did not have monthly meetings. Munana told Hill that either someone could not make the meeting, or something came up so that they did not have a regular monthly meeting. Munana told Hill that it seemed like the meetings were spaced every 6 to 8 weeks during the first several months that the school was in operation. Munana also told Hill, that when they did have meetings, the meetings mostly pertained to passing information to the teachers, and that the meetings were not a time for the teachers to experience team support in exchanging resources, ideas and a shared teaching approach. Munana told Hill that Nichols was more self-directed, rather than team work and goal-directed. Hill told Munana than an effective staff meeting could be done just by Nichols stating that they had a common goal, and that the goal was for the center to be the best center that there was, and how they could achieve that goal. Munana agreed with Hill, and said that was an excellent suggestion. Munana added that they needed to encourage unity and team work in the center.

Munana estimated that the meeting with Hill lasted for about 3 hours. She acknowledged that the meeting had ended on a positive note in the sense that Hill and Munana were talking about the future of the kindergarten. Munana stated that she did not feel that the conversation had ended on a friendly basis, or that they had worked out all of her differences, but Munana acknowledged that she did feel like that she had come to an understanding.[15]

In April 1986 Munana attended a staff meeting conducted by Nichols at the Antioch Center. Nichols informed the staff that those employees who chose to leave the center for the summer would have that option. Nichols explained that the center would have a drop in enrollment, and the center would need to lose some staff. Nichols told the employees that seniority would be honored, and Nichols asked if that was agreeable to everyone. The staff who were present said yes. Nichols told them that she could handle it that way, and those who had been on the staff for the longest time would have the first choice of when they would like to have their day off or their week off, and when and what hours they would like to work. Nichols also stated that if she needed to lay off some teachers, those who had been there the least time would be the first to leave. Nichols also asked the staff members to submit in writing their preference for vacation, and, if they needed to change

[15] The findings in the foregoing paragraphs are based on credited portions of the testimony of Munana. Hill acknowledged at the hearing that his recollection of the meeting with Munana was vague because he had held many meetings with employees, and he did not remember what each employee had said. Coombs gave a partial account of the meeting. At one point in her testimony, Coombs stated that Hill had used the term "troublemaker" in reference to Munana. However, subsequently in her testimony, Coombs acknowledged that she was not positive that Hill had used the term "troublemaker," and Coombs acknowledged that she did not specifically recall that Hill stated that Munana was a "troublemaker." Coombs stated that was just her interpretation. As indicated above, I have based the findings of fact on Munana's account as being the credible one. The Employer's sick leave policy is set forth on pp. 16 and 17 of G. C. Exh. 2. In part, the Employer's sick leave policy provides that an employee would be credited with 5 working days of sick leave after 3 months of full-time employment with the Employer. After the completion of 1 year of full-time employment, and on each anniversary date thereafter, the employee was to be credited with 6 working days of sick leave. Such sick leave could be accumulated by the employee up to a maximum of 30 working days. During the employee's first year of full-time employment, the employer's policy provided for a 2-day waiting period on each absence before the employee became eligible for sick pay on the third regularly scheduled working day. There were three exceptions to the 2-day waiting period. Those exceptions pertained to a situation where the employee was involved in a major accident; when the employee was hospitalized overnight or longer or underwent out-patient surgery, and when an employee was unable to work due to an on-the-job injury. After an employee had been employed by the Employer on a full-time basis for 12 months, the 2-day waiting period no longer applied. The Employer's sick leave policy also stated: "When taking sick leave," you may be required to furnish a doctor's statement prior to being paid sick leave.

rooms or change hours, their preferences in that regard. Nichols told the staff that she would consider their request and let them know. Nichols also told the staff how the recreation program would be handled and how the center would have certain themes and activities. Nichols told the staff to be thinking about those themes and activities for the summer program.

Following the staff meeting, Munana turned in a written request to Nichols. General Counsel's Exhibit 7 is a copy of Munana's handwritten request. The document is dated 16 April 1986. The request states:

> Lorie,
>
> This is to request the week of Aug. 25–29 as my 5 days vacation, following my 1 yr. anniversary date of Aug. 19.
>
> During the summer of 1986 I will be available to work between the hours of 1:00 p.m.—5:00 p.m. (or 6:00 p.m.) daily. I would like to suggest that I be used to continue "K" program during rest time, also perhaps help 1st graders who may need the additional "summer school." I am willing to work with *whichever* age group you need me.
>
> Thanks,
> Rebekah
>
> P.S. Starting first part of June—as I finish my present p.m. job last of May.

At the hearing Nichols stated that Munana was the only employee who ever submitted a written request to Nichols with regard to summer employment. All of the other employees who made a request did so verbally. Except for the finding in the preceding sentence, I have based the findings of fact with regard to the events at the April 1986 staff meeting on credited portions of the testimony of Munana. Nichols did not specifically deny in giving her account of the April 1986 staff meeting that Nichols had told the staff members that seniority would be honored.

On 25 April 1986 an evaluator from the Department of Social Services, Community Care Licensing, Health and Welfare Agency of the State of California issued a licensing report with regard to the Employer's Antioch Center. Respondent's Exhibit 1 is a copy of that report. In summary, the report indicates that the evaluator found that the Antioch Center was not in compliance with the staff/child ratio. The report indicated that the center would have to hire an additional qualified teacher in order to meet state licensing regulations. The report further stated that civil penalties in the amount of $50 per day would be levied on the Employer commencing on 24 May 1986 if the Antioch Center had not met the licensing requirements.[16]

In early May 1986 Nichols telephoned Hill with regard to the anticipated summer enrollment at the Antioch Center and with regard to the probable need to lay off some teachers. Nichols did that in accordance with the instructions which Hill had given in April 1986 at a meeting of all of the center directors within Hill's jurisdiction. Hill had instructed the center directors to poll the parents of the children in order to determine what the anticipated summer enrollment at their centers might be. Hill also instructed the center directors to ascertain the desires of the teaching staff with regard to whether the teachers wanted to work during the summer months. As a result, Nichols telephoned Hill in early May 1986 and reported to Hill that there were approximately two teachers at the Antioch Center who would like to take the summer off. Nichols also reported to Hill that Nichols felt based on her conversation with parents of children that the Antioch Center probably would be losing enough children during the summer months that the two teachers who did not want to work would not be an adequate reduction. Hill explained at the hearing that that information indicated that the Employer would have to make further cuts in the teaching staff in addition to those two teachers who did not desire to work that summer. Nichols' best estimate in early May 1986 was that the Antioch Center probably would have to cut still another two teachers or maybe even three teachers. Hill acknowledged at the hearing that the foregoing was speculation at that point in time in early May 1986 because there was still another month before the end of the school year. During that conversation Nichols did not mention anyone by name to Hill.

Hill then told Nichols that based on his experience during the previous summer at other centers that he found that the biggest drop in enrollment came from the kindergarten program. Hill told Nichols that the kindergarten children were at the center just for the educational program, and that the kindergarten children did not participate in the summer program. Hill explained that the children who did participate in the summer program at the Employer's centers moved up to the club mates program. Hill also told Nichols that they might have to lay off the kindergarten teacher. Hill did not mention Munana by name at that time. However, Hill acknowledged at the hearing that he knew who the kindergarten teacher at the Antioch Center was, and he knew that the kindergarten teacher was Munana. Hill explained at that time he did not know whether or not Munana had indicated any interest to Nichols in working at the Antioch Center during the summer months.

Hill explained at the hearing that he spoke with the center directors every Friday, so he probably spoke with Nichols every Friday thereafter during the month of May. Hill said that he had several conversations with Nichols in May regarding the possibility that staff at the Antioch Center would have to be laid off.[17]

On 19 May 1986 Nichols held a staff meeting at the Antioch Center. Munana was among those who were present at that meeting. Nichols introduced Pamela Blackwell as the new assistant director. Nichols also introduced some new staff members to the group. Nichols then told the staff about an upcoming contest with regard to the materials which were used to decorate the

[16] The findings in the foregoing paragraphs are based on documentary evidence.

[17] The foregoing findings are based on a composite of credited portions of the testimony of Hill and Nichols.

rooms at the center. Nichols informed the staff that someone would be looking at the rooms to see if the teachers were using the materials which the Employer had provided as well as using homemade materials.

Nichols then told the staff at the meeting that Nichols had not yet prepared the summer schedule for the staff. Nichols said that she would let the staff know in a couple of weeks as to who was working, when and where. Munana then spoke up at the meeting, and Munana stated that she had looked at a calendar and observed that a couple of weeks from that date would be 2 June 1986. Munana asked Nichols how Nichols could wait until 2 June 1986 in order to let the employees know about the schedule. Munana also asked Nichols how the employees could be prepared to teach a class for the summer if the employees did not know what age group or what hours they would be working. Nichols replied to Munana that Nichols would speak to Munana about that later. Nichols then discussed a couple of other things at the staff meeting, but Munana did not recall what those things were.

As soon as the staff meeting was over, Munana asked Nichols if Munana could speak with her privately in the office. Nichols replied yes, so they went to the office. Munana apologized to Nichols for asking the questions in a way that had made Nichols feel defensive. Munana explained to Nichols that Munana's main concern was not only in preparing lessons for the children at the Antioch Center, but also in making preparations for Munana's own family. Munana said that she had three children of her own, and she wanted to provide care for them for the summer. Munana told Nichols that she needed to plan ahead in order to have those matters taken care of. Nichols replied that Nichols could not honestly tell Munana at that time because Nichols did not know what the enrollment was going to be, or who would remain on the staff.

Munana then asked Nichols if Nichols was suggesting that Munana might be laid off. Nichols replied that Munana might be laid off, and that was a possibility. Nichols also told Munana that Nichols preferred to have staff members who could work full time or 8-hour days. Munana then thanked Nichols for speaking with her, and Munana told Nichols that she would think about what Nichols had said. Munana then asked Nichols, if Munana were to be laid off, how much notice would Munana be given so that Munana might seek other employment. Nichols told Munana that Nichols would give Munana 1 or 2 weeks' notice before a layoff.

Munana went home that evening and spoke with her husband. They decided that it would be advantageous for Munana to remain at one place of employment. At the hearing Munana explained that she had lined up two part-time jobs, but one of the jobs was out-of-town. Munana and her husband thought that it would be better for Munana to remain in Antioch.

The next morning Munana went to work, and Munana told Nichols that Munana had discussed the foregoing with Munana's husband. Munana told Nichols that Munana was available for full-time work, and that Munana would be able to work 8 hours each day. Nichols replied that was okay.[18]

The parties stipulated that the Union handbilled at the Employer's Antioch Center prior to the time that Munana was laid off from work at that center. The parties further stipulated that the union persons stood out in the parking lot and the perimeter of the Antioch Center and handbilled both employees and parents. Nichols acknowledged at the hearing that she had observed that leaflets were being distributed in front of the Antioch Center. Nichols observed that the leaflets were being handed out to parents as they came to pick up their children, and as the parents left the Antioch Center after they had picked up their children. On that same day Nichols received a copy of a leaflet from Assistant Director Blackwell. Nichols said that she received that leaflet around 21 or 22 May 1986. General Counsel's Exhibit 9 is a copy of a handbill on the letterhead of the Charging Party Union. The handbill is dated 19 May 1986. In summary, the handbill made reference to the Union's unfair labor practice charges which had been filed against Kinder-Care regarding the termination of Johnnie Bradford at the Employer's Pittsburg Center. The handbill also announced that an informational meeting would be held at the Antioch Community Center on 22 May 1986.[19]

On 22 May 1986 Munana and her husband attended the union meeting held at the Antioch Community Center. That was the third union meeting which Munana had attended during the course of her employment with the Employer. Munana recalled at the hearing that there was discussion of union organizing at the meeting; discussion of concerns and opinions being expressed by parents who did not want to see Kinder-Care organized into a union; some discussion of teachers' wages; some discussion of specific goals or concerns on points that they might agree upon; discussion of a specific goal that the teachers be permitted to talk with parents regarding the terms and conditions of the teachers' employment; and some discussion about teachers being either laid off or terminated at other centers.

In the opinion of Munana, one person was monopolizing the discussion, and Munana felt that those present should hear the teachers' side of the story as well as the parents' side of the story. As a result, Munana stood up at the meeting and introduced herself to the group as being a teacher from the Antioch Center. Munana told the group that there were things that the parents could not see, just as there were issues that perhaps the teachers could not see. Munana told the parents that oftentimes their children would arrive at the Antioch Center and be moved to another room. Munana said that the child was removed from the familiarity of the child's room. Munana further stated that there were times when Munana felt as though she were being followed around. Munana said that she did not have the freedom to speak with the parents as Munana would like to do. Munana

[18] The foregoing paragraphs are based on credited portions of the testimony of Munana. Nichols did not contradict Munana's version.

[19] The foregoing findings are based on a stipulation; credited portions of the testimony of Nichols; and documentary evidence

urged the parents to speak to their children's teachers. Munana told the group that the teachers were giving their children immediate care, and that the teachers were with their children for the greater part of the day. Munana also stated that the center director had other obligations and duties, and, if the parents needed to find out what was going on with their children, they should speak to the teachers. Munana also stated that, if there were matters of concern, the parents should go to the center director and ask the director what was going on. Munana also urged the parents to find out why the teachers were interested in organizing a union. Munana said that the fact that Munana was present at the meeting showed that Munana had some concerns and some fear for her job. Munana told them that there were a couple of parents at the meeting whose children were in Munana's room. Munana told the group that those parents could attest to the fact that oftentimes when children went through Munana's room, Nichols would be right behind them.

Munana said that the rest of the union meeting concerned the goals and rights of teachers. She said it was decided that they would talk about this further and see what could be done about it. At the hearing, Munana stated that the parents of the children in her class were Glenda Banks and Kathleen Salazar.[20]

On 23 May 1986 Munana went to work. Munana noticed that there was a statement attached to the board above the place where the parents signed a book. The statement said that the parents might have been solicited by a union, and that Kinder-Care was not in favor of that, and the Employer gave its view with regard to that.

During the course of the morning, Doug Brown came into Munana's room while the children were doing something at a table. Brown told Munana that he had had a conversation with Kathleen Salazar. Brown stated that Salazar was very concerned about what her daughter would be doing during the summer months at the center because Salazar's daughter had been born in the month of November. Salazar explained that biologically her child was a bit immature when a person looked at the norms for a kindergarten-age child. Because of that immaturity, Salazar's daughter had not progressed at the rate that she would like to see for a child who was getting ready to enter the first grade. Salazar told Brown that if they continued the educational program during the summer, it would be advantageous to Salazar's daughter as well as to some of the other children. Brown also told Munana that Salazar was dissatisfied with his answer that the Antioch Center had a recreational program during the summer months. Brown also told Munana that there were some options that the Employer could do during the summer in order to continue an educational program, and Brown made some suggestions to Munana. Brown told Munana perhaps there were a few students in the same situation at the Pittsburg Center, and it would be feasible to get the two centers together in order to continue an educational program for two or three times during the week. Brown also told Munana that perhaps there would be enough people in the community that would want to have a summer school for their kindergarten age children. Brown told Munana that he needed to survey or put out some questionaires to see who would be interested, and to see if it was feasible to continue an educational program.[21]

Also on 23 May 1986 Nichols had two conversations with Munana. One of those conversations has already been described in section A of this decision with regard to the General Counsel's complaint allegations in paragraph 6(b). That conversation referred to Espinoza and her concerns regarding her son's test results. The other conversation which Nichols had with Munana on 23 May 1986 pertained to Glenda Banks who was a parent of a child in Munana's kindergarten class at the Antioch Center. Nichols told Munana that Nichols had had a conversation with Banks. Nichols told Munana that Banks was concerned, and that Banks had attended the union meeting the night before. Munana testified: "I shook my head and said yes." Nichols then stated that Banks had told Nichols that it was awful that some teachers had been fired or laid off from some other centers, and Banks told Nichols that Banks was glad that no one, especially Munana, had been laid off from the Antioch Center. Munana then told Nichols that Banks had had many concerns about her son, Andrew, and that Munana knew that Banks felt special towards Munana. Nichols replied yes, and that Banks felt special towards Munana because Munana had taught Andrew to read.[22]

Either on Friday, 30 May 1986, or on Monday, 2 June 1986, Hill instructed Nichols to lay off Munana on Friday, 6 June 1986. There is no uncertainty that Hill was the one who made the decision to lay off Munana. The uncertainty is the date of the telephone conversation between Hill and Nichols regarding the layoff. Hill believed the conversation was on the last Friday before Munana was laid off, but at another point he also said the conversation occurred either the end of May or the first of June 1986. Nichols believed their conversation was on Monday, 2 June 1986, but at another point she said the conversation occurred either in May or June 1986.

As a result of his foregoing thoughts, Hill instructed Nichols to lay off Munana effective Friday, 6 June 1986. With regard to the date of the layoff, Hill said he was aware at that time that the kindergarten children were to graduate on Wednesday, 4 June 1986, and, in addition, he wanted to delay Munana's layoff for as long as possible.

There was no kindergarten program at the Antioch Center during the summer of 1986.[23]

On Monday, 2 June 1986, Munana went to work as usual. Munana continued working on the children's curriculum books. At that time the center was planning for

[20] The findings in the foregoing paragraphs are based on credited portions of the testimony of Munana.

[21] The findings in the foregoing paragraphs are based on credited portions of the testimony of Munana.

[22] The foregoing findings are based on credited portions of the testimony of Munana.

[23] The findings in the foregoing paragraphs are based on a composite of credited portions of the testimony of Hill and Nichols.

a graduation program for the kindergarten children. The graduation was to take place on Wednesday of that week. The center wanted to give the kindergarten children some recognition by graduating them from kindergarten to the first grade. The preparation for the graduation occupied Munana on Monday, Tuesday, and Wednesday.

On Thursday, 5 June 1986, Munana was absent from work that day. Previously, Munana had requested to have that day off because her oldest daughter had been attending boarding school, and she was returning home for the summer.

On Friday, 6 June 1986, Munana went to work as usual at the center. One of the parents came to Munana while Munana was watching the children outside the center. At the hearing Munana explained that it was a nice day, and she had the children outside at 8:30 in the morning. The parent asked Munana where her daughter would go. The parent also asked Munana when would Christina be ready for club mates. Munana replied that the parent would have to check with Nichols to be sure, but it was Munana's impression that Christina would be going into the club mates program when the other children were released from public school on 13 June 1986.

Another teacher came outside, so Munana went inside the center in order to prepare Munana's room for the children. As Munana went through the club mates room, Munana glanced at the parents' board by the club mates door. Munana saw a letter there that Nichols had written. The letter was addressed to the parents of children and the letter pertained to the kindergarten children. Munana read the letter which indicated that this would be the last day of the kindergarten, and that the kindergarten children would go into the club mates program starting on Monday, 9 June 1986. Previously, Munana had not seen that letter.

As a result of the foregoing, Munana took the letter to Nichols' office about 8:30 or 8:45 a.m. Munana asked Nichols in light of the information in the letter what should Munana do to prepare the children for their transition into club mates. Nichols replied that Munana should have the children collect their things; put them in their cubby boxes; and close up kindergarten. Munana then asked Nichols what this meant for Munana. Munana also asked if she would be at work on Monday. Nichols replied that she needed to talk to Munana about that later. Munana told Nichols to please just give Munana a "yes" or "no" as to whether Munana would be at work on Monday. Nichols replied that she needed to talk to Munana about that later. Munana said okay, and she went back to her classroom. Munana called the children in, and she had them collect their belongings. Munana also collected her own belongings. Munana spent the rest of the morning doing some cleaning, and she spent some time with the children. Munana discussed how the children had finished the school year, and that the children would be going over to the club mates, and that some of the children would spend time with a babysitter.

At 11:30 a.m. Munana had one more conference scheduled with a parent. Therefore, Nichols and Munana had that conference at 11:30 a.m. After the parent left the time was about 11:45 a.m. Nichols told Munana at that time to come to see her in the office.

Munana then went to Nichols' office. Nichols asked Assistant Director Pamela Blackwell to come into the office. Nichols told Munana that since the Antioch Center did not have a kindergarten program any more, Nichols did not need Munana as a teacher. Munana asked if Nichols was telling Munana that Nichols was not going to honor seniority after all, as Nichols earlier had said. Nichols replied that they did not go by seniority at the center. Munana asked if Nichols was telling Munana that Nichols had made a mistake at the previous staff meeting when Nichols had said that seniority would be honored. Nichols replied yes, and Nichols said that she had made a mistake. Nichols then asked if she could help Munana pack up her things. Munana replied no, and that Munana had already packed. Munana then asked Nichols when Munana would receive her check. Nichols handed the check to Munana. The check had already been written out, and it paid Munana through that date. Munana asked Nichols if Nichols would please send a written notice to Munana as to the reason why Munana was being laid off. Nichols said yes. Munana asked if she could expect that written notice in the mail within a couple of days. Nichols replied yes. Munana then took her things and left.

Thereafter, Munana did not receive any kind of notification from the Employer concerning why Munana was let go.[24]

In August 1986 Munana telephoned Kinder-Care because an attorney had advised someone at NLRB that Kinder-Care would like to give Munana an opportunity for reemployment. As a result of the foregoing, Munana spoke with Kathy Jacobson on the telephone. They set up a date for Munana to come in for a meeting. The meeting took place on Friday, 15 August 1986.

At the meeting Jacobson told Munana that there was an immediate opening to teach 2-year-olds. Jacobson said that she presumed that Munana was able emotionally to go down to teaching a class of 2-year-olds. Jacobson also told Munana that Munana would be employed at the same rate of pay and without any loss in benefits or seniority. Munana told Jacobson that she would consider that. Jacobson also told Munana that in September or October 1986 the Employer would be starting a kindergarten class again. Jacobson said that the Employer had not yet hired a kindergarten teacher. Jacobson told Munana to please let Jacobson know because there was someone else who was interested in that position. Munana told Jacobson that Munana would consider the offer over the weekend.

Munana telephoned Jacobson the following Monday. Munana told Jacobson "thank you" for her offer of reemployment, but Munana already had other employment.

At the time of the hearing in this proceeding, Munana was working at the Antioch Seventh Day Adventist Church School. Munana had begun working for that em-

[24] The findings in the foregoing paragraphs are based on credited portions of the testimony of Munana. Nichols did not contradict Munana's account.

ployer on 18 August 1986. Munana teaches kindergarten at that school. [25]

Certain employees at the Employer's Antioch Center were retained and continued to work there after Munana had been laid off on 6 June 1986. One of those employees was Terry Coombs. Coombs first began working for Kinder-Care at the Pittsburg Center in August 1985. Subsequently, Coombs went to the Employer's Antioch Center in order to help open that center. Then Coombs returned to the Pittsburg Center. In October 1985 Coombs was transferred again to the Antioch Center as a teacher's aide in the 2-year-old room. Later, Nichols informed Coombs that Coombs would be transferred to work as a teacher's aide in the 3-year-old room because she was needed there.[26]

Lorie Rizzuto had been teaching in the afternoon in the Employer's club mates program at the Antioch Center. Rizzuto left the Employer in mid-June 1986 in order to accept a position with the Parks and Recreation system. Nichols selected Coombs to replace Rizzuto as the teacher in the club mates program during the afternoon.[27]

In August 1986 Coombs asked Nichols for a raise in pay. At the hearing, Coombs explained that her 1-year anniversary date with the Employer was approaching, and Coombs had received only a 15 cents an hour raise during the entire time that Coombs had worked for the Employer. Coombs further explained that she had previously asked Nichols for a raise on a couple of occasions, but that Nichols had denied those requests on the grounds that Coombs did not have any early childhood education units. Coombs further explained at the hearing that she approached Nichols about a raise in August 1986 because Doug Brown had talked to Coombs about taking the position as a club mates teacher, and the club mates teacher position did not require that a person have early childhood education units. Coombs said that she informed Nichols that if Nichols did not give her a raise, Coombs would quit working for the Employer. Nichols refused to give Coombs a raise, so Coombs quit. Around August 1986 Coombs went to work for a preschool day care facility known as Railroad Junction which is located in Pittsburg.[28]

The Employer's club mates program involves children who range in age from 5 years old through 12 years old. Four of the 5-year-old children who were in the club mates program at the Antioch Center during the summer of 1986 previously had been students of Munana. Nichols acknowledged at the hearing that, when Rizzuto left the Employer's employment, Nichols did not consider recalling Munana to work to teach in the club mates program.[29]

In addition to Coombs, another employee who was retained by the Employer after the layoff of Munana was Christie. She was identified only by her first name. Christie taught 3-year-olds.

Leslie Lanoy also was retained. Lanoy had been hired by the Employer in May 1986 at the Antioch Center. Lanoy was hired to replace Sandy Buchanan who had left the Employer's employment. Lanoy taught 3-year-olds.

Leslie Liston was hired by the Employer in mid-May 1986 to teach 2-year-olds at the Antioch Center. Liston left the Employer's employment about the end of July 1986.

Catrice McEachin was hired by the Employer in either April or May 1986. McEachin taught toddlers.

Linda Paoli taught 2-year-olds at the Employer's Antioch Center. She was hired in either April or May 1986. When Mary Armstrong voluntarily chose not to work during the summer months at the Antioch Center, Paoli began working a full day at the center.

Teresa Rodriguez began working at the Antioch Center on 8 May 1986. Rodriguez was a qualified teacher in the sense that she had 12 units in early childhood education plus 6 months of experience. Rodriguez taught 4-year-olds. Rodriguez, like other employees of the Employer, had a 90-day probationary period. During that period of time Rodriguez received four separate counselings within a period of 1-1/2 or 2 weeks. General Counsel's Exhibit 8(a) through (d) are copies of the counselings which were given to Rodriguez. The dates of those counselings were 22, 23, and 28 May and 4 June 1986. At the hearing Nichols identified a copy of the "Employee Separation Form" for Rodriguez. The document indicated that Rodriguez' last day worked at the center was 27 June 1986. The document also indicated two reasons why Rodriguez was laid off or was no longer working there. One reason was: "lack of work (reduction of staff)." The other reason was "inability to perform the job." The latter was under the general caption of "discharged." No one was hired to replace Rodriguez.

Deena Sutton was employed as a cook at the Antioch Center. Sutton had worked for the Employer at that center since August 1985.

Barbara Vinci taught toddlers at the Antioch Center.[30]

3. Conclusions

I conclude that the General Counsel has presented evidence which established that Munana had participated in union activities by attending and participating in three union meetings during her employment with the Employer. I further conclude that the General Counsel has presented evidence which also established that the Employer was opposed to the employees' selecting a union as their collective-bargaining representative, and that the

[25] The findings in the foregoing paragraphs are based on credited portions of the testimony of Munana.

[26] The foregoing findings are based on credited portions of the testimony of Coombs.

[27] The foregoing findings are based on credited portions of the testimony of Nichols. Coombs indicated in her testimony that Rizzuto taught the club mates program during the morning hours. As indicated above, I have accepted Nichols' version as being more reliable and credible.

[28] The foregoing findings are based on credited portions of the testimony of Coombs.

[29] The foregoing findings are based on credited portions of the testimony of Nichols.

[30] The findings in the foregoing paragraphs are based on a composite of credited portions of the testimony of Munana, Nichols and Coombs.

Employer was hostile to the Union's organizing campaign at the Employer's centers.

However, I conclude that the evidence does not establish a necessary element for a finding that the General Counsel has established a prima facie case of a violation of Section 8(a)(3) and (1) of the Act with regard to Munana. That missing element is proof that the Employer had knowledge of any union activities or protected concerted activities on the part of Munana at the time the Employer laid off Munana on 6 June 1986. The Board held in its decision in *Consolidated Freightways Corp.*, 276 NLRB 477 (1985): "A necessary element in the General Counsel's prima facie case is a showing that the employer had knowledge of the employee's union activity."

I recognize that direct evidence is not the only means by which an employer's knowledge of union activity may be established because such knowledge also may be inferred from all of the circumstances. *Marathon Le Tourneau Co.*, 256 NLRB 350 (1981).

The Board held in its decision in *BMD Sportswear Corp.*, 283 NLRB 142 (1987)

> It has long been held that where there is no direct evidence, knowledge may be proven by circumstantial evidence from which a reasonable inference may be drawn. *NLRB v. Wal-Mart Stores*, 448 F.2d 114, 117 (8th Cir. 1973). See generally *NLRB v. Link-Belt Co.*, 311 U.S. 584, 602 (1941). Such circumstances may include proof of knowledge of general union activity, the employer's demonstrated animus, the timing of the discharge, and the pretextual reasons for the discharge asserted by the employer. *General Iron Corp.*, 218 NLRB 770, 778 (1975), enfd. 538 F.2d 312 (2d Cir. 1976). See also *Hunter Douglas, Inc. v. NLRB*, 804 F.2d 808 (3d Cir. 1986), enfg. 277 NLRB 1179 (1985). In addition, the discharge of an employee who is not known to have engaged in union activity but who has a close relationship with a known union adherent may give rise to an inference of discrimination. See *Permanent Label Corp.*, 248 NLRB 118, 136 (1980), enfd. 657 F.2d 512 (3d Cir. 1981). Thus a discharge motivated by an employer's belief or suspicion that an employee engaged in union activity violates the Act. Id.

Applying the *BMD Sportwear* analysis to the facts in this case, I conclude that the evidence established that the Employer had knowledge of general union activity at its Antioch Center, as well as at its Pittsburg Center, and that the Employer had animus toward the Union's organizational efforts. With regard to the factor of "timing," I conclude that the Employer laid off Munana from employment as distinguished from terminating her. The "timing" of the Employer's action was at the end of the Employer's school year. With regard to the factor of a "pretextual reason" for her separation from employment, I conclude that the evidence revealed that Munana had been the only kindergarten teacher at the Employer's Antioch Center at that time, and the Employer had no kindergarten program at the Antioch Center during the summer of 1986. The Employer's policy was not to follow seniority with regard to layoffs. Nichols admitted to Munana that Nichols had made a mistake in her earlier comments about seniority. Therefore, the fact that less senior teachers were retained by the Employer, and Munana was not given preference over the newer teachers, has to be weighed in that light. Munana was in a unique position at the Antioch Center because she was the only kindergarten teacher, and the kindergarten program ended at the end of the school year. Thus, I conclude that the "timing" factor and the "pretextual reason" factor mentioned in the *BMD Sportswear* decision are not factors in the circumstances of this case which would warrant drawing the inference that the employer had knowledge of Munana's union activities. The Employer's subsequent offer of reemployment to Munana in August 1986 is another indication that the Employer had laid off Munana at the end of the school year, rather than terminating her.

I have given consideration to the fact that both of the parents, who had children in Munana's class and who had attended the union meeting on 22 May 1986, spoke to persons in the Employer's management the next day after that union meeting was held. Salazar spoke to Brown, and Banks spoke to Nichols. Neither Salazar nor Banks testified at the hearing. Brown also did not testify. I conclude that there is no evidence that Salazar or Banks informed management of Munana's attendance at the union meeting on 22 May 1986 or of the fact that Munana spoke at that meeting.

I also have given consideration to the conversation between Nichols and Munana on 23 May 1986 in which Nichols told Munana that Banks was concerned, and that Banks had attended the union meeting the night before. With regard to Nichols' statement, Munana testified: "I shook my head and said yes." I conclude that Munana's reaction to Nichols' statement about Banks does not show that Munana informed Nichols that Munana had attended the union meeting.

I also have given consideration to the General Counsel's argument that the Employer may have learned of Munana's union activities from the informant who previously had identified Johnnie Bradford as being an employee proponent of the Union. (See the argument, p. 30 of the General Counsel's posthearing brief.) Similarly, I have also considered the General Counsel's argument that Munana's criticisms of the Employer's policies would likely indicate that Munana was likely to be a supporter of the Union. I conclude that the evidence presented does not prove those theories, and I conclude that I would be engaging in speculation if I based a finding of employer knowledge of Munana's union activities based on those theories.

In raising complaints to Pardue, Hill, and Nichols regarding the Employer's policies, I conclude that the evidence does not show that Munana was acting in concert with other employees of the Employer. For example, insofar as the evidence shows, Munana was acting alone in voicing her complaints regarding the Employer's sick leave policy. While the Employer's sick leave policy may be inferred to be a matter of common concern to

the employees of the Employer, I conclude that the evidence does not show that Munana was acting in concert with any other employee. Thus, her activities were not concerted activities. *Meyers Industries*, 268 NLRB 493 (1984), and 281 NLRB 882 (1986).

Under the analytical procedure described in the Board's *Wright Line* decision,[31] if the General Counsel has not established a prima facie case of discrimination, then I should not further examine the Respondent's evidence in defense of the General Counsel's complaint allegations.

In view of the foregoing, I recommend to the Board that the 8(a)(3) and (1) allegations in paragraphs 7 and 8 of the General Counsel's complaint be dismissed.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

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

3. The Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act by maintaining a nationwide rule in the "Parent Communication" section of the Employer's "Employee Handbook," which prohibits employees of the Employer from discussing their terms and conditions of employment with an employee who is a parent of a child attending one of the Employer's centers and by requiring employees at its Antioch, California Center to reaffirm in February 1986 their adherence to that rule.

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

THE REMEDY

Because I have found that the Respondent has engaged in certain unfair labor practices within the meaning of Section 8(a)(1) of the Act, I shall recommend to the Board that the Respondent be ordered to cease and desist from engaging in such unfair labor practices and to take affirmative action designed to effectuate the policies of the Act.

The General Counsel both alleged in the complaint and requested in the complaint that an order be issued which prohibits the Respondent from maintaining an unlawful rule in its "Employee Handbook" at any of its facilities located within the United States. I conclude that the evidence established that the "Employee Handbook" was distributed to employees of the Employer on a nationwide basis, and, therefore, the scope of the Order should apply accordingly. The General Counsel also requested as a remedy that the enforcement of the unlawful rule be prohibited. However, I conclude that the evidence does not establish that the Employer has enforced the unlawful rule either at the Antioch Center or at any other center in the sense of issuing warnings, reprimands, suspensions from work, terminations, or other adverse disciplinary actions for violations of the unlawful portion of the rule. Therefore, the scope of the Order will be with regard to the maintenance of the unlawful rule.

The General Counsel has requested that a visitatorial clause be included in the Order. I conclude that the evidence presented in this proceeding does not establish the necessity for such a visitatorial clause. Accordingly, I hereby deny the General Counsel's request.

[Recommended Order omitted from publication.]

[31] *Wright Line*, 251 NLRB 1083 (1980), enfd. 622 F.2d 899 (1st Cir. 1981), cert denied 455 U.S. 989 (1982).