Murcel Manufacturing Corp. *and* International Ladies' Garment Workers' Union, AFL–CIO. Cases 10–CA–10122, 10–CA–10152, and 10–RC–9502

August 25, 1977

DECISION AND ORDER

On April 18, 1974, Administrative Law Judge Ramey Donovan issued the attached Decision in this proceeding. Thereafter, counsel for General Counsel, the Charging Party, and Respondent filed exceptions and supporting briefs.[1] Counsel for Respondent also filed an answering brief to the exceptions of the General Counsel and the Charging Party.

On February 2, 1976, the National Labor Relations Board, having determined that the instant case raised issues of substantial importance in the administration of the National Labor Relations Act, as amended, held oral argument in this case.[2] In conjunction with the oral argument, counsel for General Counsel filed a statement of position and the Chamber of Commerce of the United States of America filed an *amicus curiae* brief, as did the American Federation of Labor and Congress of Industrial Organizations.[3] Thereafter, counsel for General Counsel filed a supplementary statement of position; the AFL–CIO filed a reply thereto; and counsel for General Counsel also filed a Notice of Court Decision.

The Board has considered the record and the attached Decision in light of the exceptions and briefs, the oral argument, and briefs and statements of position in conjunction therewith, and those filed thereafter, and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order, as modified herein.

We agree with the Administrative Law Judge that, on February 12, 1973, when Respondent refused to bargain with the Union, the Union did, in fact, represent a majority of the employees in the unit the Administrative Law Judge found appropriate.[4] We also agree with the Administrative Law Judge for the reasons he has set out that Respondent violated the Act in the particulars he noted.[5] And we conclude,

[1] Charging Party's brief was also a brief in support of certain parts of the Administrative Law Judge's Decision.

[2] Of the parties to this case, only Charging Party, International Ladies' Garment Workers' Union, AFL–CIO, appeared and argued at the oral argument, although all parties were afforded an opportunity to do so.

[3] The Chamber of Commerce and the AFL–CIO also appeared and argued at the oral argument as *amici curiae*.

[4] The Administrative Law Judge listed 102 authorization cards as having been submitted in the appropriate unit of 148 employees. There were, in fact, 103 cards submitted, counting the card of Hazel Terrell, who signed on April 12, 1973. The Administrative Law Judge then concluded that he had found 82 cards valid. However, from his computations it is clear that the Administrative Law Judge also meant to include as valid the card of Ila Mae Causey. We therefore find that the Administrative Law Judge, in fact, found 83 cards valid, and we agree with that determination.

We also find that the Administrative Law Judge, in arriving at the majority figure, did exclude (while not expressly so stating) the cards of Mary Lee Brown and Hilda Ogden (both of whom signed after the demand date) and that these cards were excluded for the same reason that the 10 other cards signed after the demand date were specifically excluded by the Administrative Law Judge.

In agreeing with the Administrative Law Judge that the Union represented a majority on February 12, 1973, we agree with his conclusion that those cards dated February 5 and 6, 1973, which he included, are valid. These include the cards of Howard, Durrence, Flowers, and Martin which were dated February 5 and the cards of Middleton, M. Weathers, J. Stubbs, Branch, Mincey, Kunney, Brunson, and Wiley, dated February 6. Since Sikes, the key employee union organizer, testified that she did not receive the authorization cards from the Union's organizer until the evening of February 6, Respondent argues that the validity of the cards dated February 5 and 6 has been undermined due to the irregularity of an incorrect date on them and an uncertainty as to when they were signed. The Administrative Law Judge concluded that the cards dated February 5 were in fact signed sometime during the period February 6–12, and that the February 5 date was simply a mistake. We agree with his reasoning on these cards. While the Administrative Law Judge did not specifically set out a rationale for including those cards dated February 6, we also agree with his inclusion of these cards. We note that all the cards dated February 5 and 6, which Respondent is contesting, were time-stamped as received by the Board on the morning of February 14 and they were fully signed at that time. The cards were included with all those other cards specifically dated between February 7 and 10 to support the Union's showing of interest. Further, we note that two of the four signers of the cards dated February 5 (Flowers and Martin) and all the pertinent signers of the cards dated February 6, with the exception of Brunson and Wiley, were listed as members of Charging Party's organizing committee on the telegram which accompanied the Union's February 13 telegraphic request for recognition.

We therefore believe it a valid inference that the cards which the Administrative Law Judge counted, which were incorrectly dated February 5 and 6, were, in fact, signed by the date of February 12, the first demand date for recognition, and that these cards are therefore valid.

However, we find it unnecessary to pass on the validity of the card of Betty Blocker which the Administrative Law Judge excluded and to which exclusion the Charging Party excepts.

The card majority includes the card, dated February 6, 1973, of Celia B. Wiley, incorrectly spelled "Wylie" by the Administrative Law Judge. Sikes verified that she saw Wiley sign the card and that, at the time Wiley signed, there were no pencil marks through her name on the card, though, there were when the card was submitted at the hearing. In light of Sikes' testimony and the fact that there was a "Celia B. Wiley" listed on the stipulated eligibility list, we include the card as valid notwithstanding the fact that the name Wiley on the card has been lined out and the name "Burley" written in and that the signature line reads "Celia Burley," rather than Celia B. Wiley" as is set out at the top of the card.

[5] *Inter alia*, Respondent excepts to the Administrative Law Judge's findings that on May 3, 1973, Respondent violated Sec. 8(a)(1) of the Act by announcing to the employees a new, more monetarily favorable, transfer policy and an increase in the base rate minimum to be effective on January 1, 1974. Respondent claims these matters were not alleged in any charge or in the consolidated complaint, nor were these matters litigated at the hearing and thus the Administrative Law Judge was in error in finding them to be violations. We find otherwise. We note that "when an issue relating to the subject matter of a complaint is fully litigated at a hearing, the [Administrative Law Judge] and the Board are expected to pass upon it even though it is not specifically alleged in the complaint." *Monroe Feed Store*, 112 NLRB 1336 (1955); see also *Granada Mills, Inc.*, 143 NLRB 957 958, fn. 1 (1963); and *Jones Plastic and Engineering Corp.*, 186 NLRB 947, fn. 3 (1970). Here, the findings that the Administrative Law Judge made on the institution of a more favorable transfer policy and the promise of a base rate increase concern types of beneficial economic changes akin to other economic benefits instituted by Respondent that were alleged as violations in the consolidated complaint (e.g., the further May 3 announcement of a change in the minimum hourly rate, and the February 1973 restoration of the piece rate cut in early January 1973). Thus, the additional findings made by the Administrative Law Judge do relate to matters which were the subject of the consolidated complaint and were properly considered by him. We note additionally that the piece rate increase announced on May 3, 1973, may well be considered to have been alleged as a violation in the rider (part D) to

(Continued)

for those reasons set out at length by the Administrative Law Judge, that the possibility of erasing the effects of those unfair labor practices and ensuring a fair rerun election is slight and that, therefore, the employees' sentiments, having been expressed by authorization cards would, on balance, be best protected by a bargaining order rather than a second election.

Respondent, however, contends that, under the teaching of *N.L.R.B.* v. *Mansion House Center Management Corp.*, 473 F.2d 471 (C.A. 8, 1973), and because of the Union's alleged discrimination on the basis of race and sex and because of its conflicts of interest, the Union is not a labor organization qualified to be the employees' exclusive bargaining representative or a charging party, and is therefore not entitled to the benefits of a bargaining order. We reject these various defenses of Respondent, as explained below.

Respondent first raised these defenses in its answers to the complaints herein. Thereafter, and before the hearing, counsel for General Counsel filed a motion for a bill of particulars concerning these defenses and Respondent was subsequently ordered to serve on the General Counsel and the Union a bill of particulars containing:

> A clear and concise description of the acts and conduct which are claimed to constitute the bases of the affirmative defense[s] of [racial and sex discrimination and a conflict of interest], including, where known, the approximate dates and places of such acts and conduct, and the names of the Union's agents or other representatives by whom committed.

Thereafter, Respondent filed a bill of particulars. Following a statement that Respondent "is unable to describe with particularity the dates, places, and names of the union's agents, as these matters are particularly within the knowledge of the charging party," the particulars were stated to be:

> 1. The charging party, whose membership is predominately female with substantial numbers of Negroes, has at all times discriminatorily denied to females and Negroes positions of leadership, such as officers, directors and managers.
>
> 2. The charging party and/or its affiliates have maintained financial interests in businesses owned and operated by competitors of respondent.
>
> 3. The charging party has been a party to collective-bargaining agreements that discriminate against female and minority members.
>
> 4. The charging party has discriminatorily disqualified Negroes from employment, membership, training, and referral by the use of discriminatory requirements.
>
> 5. By these and other acts, the charging party has discriminated against females, Negroes, and other minorities.

Respondent also served on the Union's vice president a *subpoena duces tecum* returnable at the hearing which sought voluminous records of the Union concerning Respondent's various defenses.[6]

At the hearing, General Counsel moved to strike Respondent's affirmative defenses on the grounds that Respondent's answer was lacking in the specificity required by the order and that the bill admitted by Respondent's inability to plead more specifically. General Counsel and the Union therefore claimed Respondent was on a fishing expedition.

Respondent in turn contended it had filed a general bill of particulars because the nature of its affirmative defense was class discrimination based on race and sex. It contended further it had evidence not within the order on the bill of particulars, but on the issues, which it had chosen not to plead; and indicated that its affirmative defenses were based on showing a statistical survey or picture of the Union.

At the hearing, the Administrative Law Judge granted both the motion to strike Respondent's affirmative defenses and Charging Party's petition to revoke its *subpoena duces tecum* for the same two reasons. As set out at the hearing and in his Decision, the Administrative Law Judge found first that

the first amended charge in Case 10–CA–10122.

We note Respondent's argument that when counsel for the Charging Party inquired specifically into the matters of the May 3 transfer policy and base rate increase announcements that counsel for Respondent objected to the testimony going to postelection matters which were not alleged as violations in the charges and the complaints, and counsel for General Counsel stated these matters were relevant to other allegations in the complaint, and that the Administrative Law Judge admitted the evidence for that limited purpose only. The record indicates, however, the Respondent objected only when the Charging Party inquired of employee Brown whether an engineering program, promised to continue by Respondent on the day of the election, had continued, and whether Brown had, in fact, received any additional piece rate increases since the election. Respondent had not earlier objected when employee Brown was asked specifically about the May 3 announcements and when employees Lindsey and Sikes were also specifically asked about the May 3 announcements. Respondent did not later object when Manager Gibson was asked about his May 3 announcement on the piece rate change. Thus, it is found that Respondent objected only to questions concerning the possible fruition, after the election, of benefits allegedly promised before the election and did not properly object to questions concerning the May 3 *announcements*.

In such circumstances, the Administrative Law Judge correctly addresed himself to the question of whether Respondent's May 3 announcement of the new transfer policy and the promise of the base rate increase were violations of the Act.

[6] In his Decision, the Administrative Law Judge has set out the substance of what was sought in the subpena and reference should be made to his Decision for further information on what documents and records Respondent sought.

Respondent's bill of particulars did not, in fact, contain the specificity required by the order. Secondly, the Administrative Law Judge found that Respondent was, in any event, seeking to embark on an investigation of the Union regarding the latter's alleged discriminatory internal structure and practices in the areas of race, sex, and conflicts of interest. He found that the conducting of such an investigation was not the function of an Administrative Law Judge assigned to hear a specific unfair labor practice case under the Act and that the issues raised by Respondent's affirmative defenses were therefore not properly before him.

Because of the importance of this issue, we held oral argument in this and other cases,[7] and, after fully considering the various arguments on either side, we now reject Respondent's defenses based on the Union's alleged race and sex discrimination. We note that in *Handy Andy, Inc.*, we recently overruled our decision in *Bekins Moving & Storage Co. of Florida, Inc.*, 211 NLRB 138 (1974), as we determined in *Handy Andy* that relevant constitutional and statutory considerations do not require or warrant withholding certification from a union which allegedly practices invidious discrimination but which has also been duly selected as the exclusive representative of an employer's employees. In *Bell & Howell Company*, we determined that those considerations do not warrant the withholding of a bargaining order against an employer who refuses to bargain with a duly certified union. Although in the instant proceeding the Union has not been certified, it has obtained valid authorization cards from a majority of the employees in the appropriate unit which thereby designated it as exclusive representative for the purposes of collective bargaining.[8] Respondent has also committed unfair labor practices which warrant the imposition of a bargaining order rather than the holding of a second election. Accordingly, a bargaining order would be an appropriate remedy here unless Respondent's contentions based on the Union's alleged race and sex discrimination dictate otherwise. However, for all those relevant reasons set forth in our decisions in *Handy Andy, supra,* and *Bell & Howell, supra,* we herewith reject these various contentions of Respondent and we conclude that a bargaining order is an appropriate remedy here for those violations we have found Respondent committed.[9] Accordingly, we affirm the Administrative Law Judge's ruling striking Respondent's affirmative defenses based on the Union's alleged discriminatory practices and policies as not appropriately before him in this proceeding.[10]

In light of the findings made herein, the election held in Case 10–RC–9502 is set aside and the petition dismissed.

We note that the Administrative Law Judge omitted Conclusions of Law from his Decision and we hereby correct this oversight.

Conclusions of Law

1. Murcel Manufacturing Corp., Respondent herein, is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. International Ladies' Garment Workers' Union, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

[7] *Handy Andy, Inc.*, 228 NLRB 447 (1977); *Bell & Howell Company*, 230 NLRB 420 (1977); *Trumbull Asphalt Company, Inc.*, 230 NLRB 646 (1977).

The contention that the Union's representation of the employees would create a conflict of interest was not considered at the oral argument. We conclude Respondent can raise such an issue at the present time. *H. P. Hood & Sons, Inc.*, 205 NLRB 833 (1973).

[8] The fact that the Union has achieved its exclusive representative status by this means rather than as a result of the Board election does not alter application of the principles set forth in *Bell & Howell.*

[9] Consistent with *The Kroger Co.*, 228 NLRB 149 (1977), a majority of the Board, i.e., Members Penello, Murphy, and Walther, would find the bargaining obligation began on February 28, 1973, the proximate date of Respondent's first unfair practice. Chairman Fanning would find the bargaining obligation as of February 12, 1973, the date of Respondent's refusal to bargain with the Union.

[10] While our conclusion that Respondent may not presently raise a claim that the Union is engaged in discriminatory conduct necessarily includes a finding that the specificity of any allegations raised on that issue are irrelevant, we do pass on the specificity issue in this case since it was discussed at oral argument. Thus, were we called upon to decide this issue, we would find that Respondent's defenses based on the Union's alleged discriminatory practices lacked sufficient specificity. In the order on the bill of particulars, Respondent was instructed to supply to General Counsel and the Union a "clear and concise description of the acts and conduct" which were claimed to constitute the bases of its various affirmative defenses. Respondent pleaded in its response that it could not do so since this information was allegedly in the Union's knowledge. Instead, Respondent made five sweeping assertions of union misconduct.

We note that with respect to its alleged race and sex discrimination defense, Respondent is, in effect, contending that this Agency is under a fundamental disability in the processing of this case and we therefore believe it was incumbent upon Respondent to disclose the particular facts on which the alleged disability is based so that an intelligent evaluation of the contention could be made. Respondent did not meet that burden here.

Rather, we find that the Administrative Law Judge was confronted with a situation where Respondent was not able to comply with a lawful order to furnish certain information, and, as noted above, claimed it had other information allegedly not covered by the order which it unilaterally had decided not to reveal, seeking, instead, further information in the form of a subpena whose provisions clearly indicated Respondent was embarking on an investigatory proceeding akin to discovery procedures for which the National Labor Relations Act makes no provision. *Plumbers and Steamfitters Union Local 100, affiliated with the United Association of Journeymen & Apprentices of the Plumbing and Pipefitting Industry of the U.S. and Canada, AFL–CIO (Beard Plumbing Company)*, 128 NLRB 398, 400 (1960), and cases cited at fn. 8. In such circumstances, the Administrative Law Judge correctly exercised his discretion in striking Respondent's affirmative defenses related to alleged race and sex discrimination by the Union. See *N.L.R.B.* v. *Bancroft Manufacturing Company, Inc.*, 516 F.2d 436, 445–447 (C.A. 5, 1975); *The Firestone Tire & Rubber Company*, 187 NLRB 54, 61, fn. 25 (1970).

With respect to Respondent's conflict-of-interest defense, we note that Respondent also has the burden to come forward with a showing that the danger of a conflict of interest interfering with the collective-bargaining process is clear and present. *N.L.R.B.* v. *David Buttrick Company*, 399 F.2d 505, 507 (C.A. 1, 1968), enfg. 167 NLRB 438 (1967). It did not do so here and this defense was also properly stricken.

3. By promising and/or granting benefits to its employees unilaterally in the form of increased piece rates, wage rates, benefits, and improved conditions of employment, for the purpose of defeating and undermining the Union, Respondent violated Section 8(a)(1) of the Act.

4. By asking employees who display prounion insignia what their names are, and by writing in a pad or notebook immediately thereafter and in the presence of the questioned employee, Respondent violated Section 8(a)(1) of the Act.

5. By threatening employees with a detrimental change in working conditions if the Union was successful in coming into the plant, Respondent violated Section 8(a)(1) of the Act.

6. By threatening employees with the possibility of discharge because of union activity, Respondent violated Section 8(a)(1) of the Act.

7. By granting the employees a free lunch the day after the election, when objections to the election could still be filed, Respondent violated Section 8(a)(1) of the Act.

8. An appropriate unit for the purposes of collective bargaining within the meaning of Section 9(b) of the Act is:

> All employees and maintenance employees employed at Murcel Manufacturing Corporation's Glennville, Georgia, plant, including the night cleanup man, plant clerical employees, but excluding office clerical employees, professional employees, salesmen, Lethera Waters, floor girls, and all other supervisors as defined in the Act.

9. On February 12, 1973, the Union represented a majority of the employees in the above unit and was, and is now, the exclusive representative of all employees in the unit described above for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

10. By refusing to recognize and bargain with International Ladies' Garment Workers' Union, AFL–CIO, on February 28, 1973, as the exclusive representative of its employees in the appropriate unit, Respondent violated Section 8(a)(5) and (1) of the Act.

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

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as herein modified, and hereby orders that the Respondent, Murcel Manufacturing Corp., Glennville, Georgia, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as modified below:

1. Insert the following as paragraph 1(f) and reletter the following paragraphs accordingly:

"(f) Granting the employees a free lunch the day after an NLRB election when objections to the election could be filed."

2. Substitute the attached notice for that of the Administrative Law Judge.

IT IS FURTHER ORDERED that the election conducted on April 12, 1973, in Case 10–RC–9502 be set aside, that the petition be dismissed, and that the proceedings in Case 10–RC–9502 be vacated.

MEMBER JENKINS, concurring:

I concur in the result, but in dismissing the allegations of race and sex discrimination I do not rely on *Handy Andy* and *Bell & Howell,* but on the fact that Respondent's allegations were merely conclusory, without being supported by any allegations of facts supporting the conclusions.

MEMBER WALTHER, concurring:

I agree with my colleagues that the Board is not constitutionally obligated to entertain claims of union discrimination as an affirmative defense to the issuance of a remedial 8(a)(5) bargaining order. Accordingly, I join in their adoption of the Administrative Law Judge's ruling striking Respondent's affirmative defenses. In addition to the reasons which my colleagues offer, I think there are additional considerations which militate in favor of utilizing the prohibitions of Section 8(b) as the most desirable avenue for analyzing claims of unlawful union discrimination.

At the outset, I think it is important to understand precisely what Respondent is requesting us to do. It is Respondent's position that a remedial bargaining order which would otherwise be appropriate to remedy its serious unfair labor practices committed in this bargaining unit should be withheld on the basis of alleged discriminatory practices engaged in by the Charging Party at other locations. However, as I indicated in my concurring opinion in *Handy Andy, Inc.,* 228 NLRB 447 (1977), I would limit the Board's investigation of discrimination claims to conduct alleged in the particular unit in question. By confining consideration of all fair representation claims to 8(b) unfair labor practice proceedings, the Board would be taking a large step towards insuring that the alleged conduct occurred in the particular unit involved.

There is, however, an even more compelling reason for favoring an 8(b) proceeding over 8(a)(5) affirma-

tive defenses; namely, the due process protections which it affords charged labor organizations. First, the charging party is obligated to come forward with sufficient evidence of discrimination in the unit to persuade the General Counsel to issue a complaint. Second, the 6-month limitation period in Section 10(b) applies so that stale claims are avoided and unions which have recently eliminated prior discriminatory practices are protected as Congress provided. Third, the union is provided with an adversarial proceeding culminating in a judicially enforceable order pinpointed directly at the alleged discriminatory conduct.

Finally, an 8(b)(1)(A) proceeding allows for the tailoring of a remedy to fit the nature of the discrimination found. The withholding of an otherwise appropriate 8(a)(5) remedial bargaining order is a relatively drastic remedy which completely precludes the establishment of a bargaining relationship. It is also a rather blunt instrument with which to treat what in many cases may be a rather minor ailment. Our 8(a)(3) cases long ago taught us that "discrimination" is a multifaceted concept. It appears in a wide variety of forms carrying with it varying degrees of culpability. It seems somewhat unjust to me to remedy each and every instance of discrimination with a lumberjack's axe when what may really be needed is the precision of a surgeon's scalpel.

Proceedings under Section 8(b), on the other hand, offer an opportunity to inject some remedial sensitivity into this area. In many situations a cease-and-desist order coupled with an affirmative make-whole obligation will provide a completely adequate remedy. In cases where the discrimination is more pervasive, a revocation of the union's certification may well be the only appropriate remedy. The point is, however, that this flexibility can only be attained through an 8(b) proceeding.

As noted in my concurring opinion in *Handy Andy, Inc., supra,* I would afford different treatment to allegations of discrimination in membership than I would to allegations relating to a union's duty of fair representation. As I indicated in that opinion, since the proviso to Section 8(b)(1)(A) precludes the Board's examination of a union's membership policies in an unfair labor practice proceeding, special procedures must be utilized in situations where the union's constitution, bylaws, or other written statement of policy indicates that the union restricts access to membership on the basis of race, alienage, national origin, or sex. Just as I think it would be inappropriate to permit a union which engages in such blatant discrimination to utilize our election procedures, so too I think it would be inappropriate to direct a remedial 8(a)(5) bargaining order in favor of such a union. Accordingly, in this very limited situation, I would permit a respondent to raise such discrimination as a defense to an 8(a)(5) remedial bargaining order. However, since Respondent herein has not alleged the existence of such documentary evidence, I agree that its affirmative defenses were properly overruled.

I agree with my colleagues that an 8(a)(5) bargaining order in this case is appropriate, but I join Members Penello and Murphy in dating both the 8(a)(5) violation and the bargaining order from February 28, 1973. See my separate opinion in *Drug Package Company, Inc.* 228 NLRB 108 (1977).

APPENDIX

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

WE WILL NOT promise and/or grant benefits to our employees unilaterally in the form of increased piece rates, wage rates, benefits, and improved conditions of employment, for the purpose of defeating and undermining the Union.

WE WILL NOT ask employees who display prounion insignia what their names are, and write in a pad or notebook immediately thereafter and in the presence of the questioned employee.

WE WILL NOT threaten employees with a detrimental change in working conditions if the Union is successful in coming into the plant.

WE WILL NOT threaten employees with the possibility of discharge because of union activity.

WE WILL NOT grant employees a free lunch the day after a Board election when objections to the election can be filed.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of their rights guaranteed in Section 7 of the Act.

WE WILL NOT refuse to recognize and bargain with International Ladies' Garment Workers' Union, AFL–CIO, the Union herein, as the exclusive representative of the employees in the appropriate unit. The appropriate unit for the purposes of collective bargaining within the meaning of Section 9(b) of the Act is:

> All employees and maintenance employees employed at Murcel Manufacturing Corporation's Glennville, Georgia, plant, including the night cleanup man, plant clerical employees, but excluding office clerical employees, professional employees, salesmen, Lethera Waters, floor girls, and all other supervisors as defined in the Act.

WE WILL, upon request, recognize and bargain with the Union as the exclusive representative of our employees in the appropriate unit.

MURCEL
MANUFACTURING CORP.

DECISION

RAMEY DONOVAN, Administrative Law Judge: In this consolidated proceeding, objections to an election were combined with complaint allegations of unfair labor practices since the particular objections to the election dealt with conduct that allegedly constituted unfair labor practices.

A petition for certification in a representation election was filed by International Ladies' Garment Workers' Union, AFL–CIO, herein the Union, on February 14, 1973. The Board conducted an election on April 12, 1973, in an appropriate unit of Murcel Manufacturing Corporation's production and maintenance employees at the Glennville, Georgia, plant, or Murcel.[1] Of approximately 144 eligible employees at Murcel, 50 voted for the Union; 80 voted against the Union; 1 ballot was void; and 2 ballots were challenged. On April 19, 1973, the Union filed timely objections to the election, with service on the Company.

The Union filed a charge in Case 10–CA–10122 on April 26, 1973, and an amended charge on May 17, 1973; and on May 10, 1973, the Union filed a charge in Case 10–CA–10152. A complaint and notice of hearing in Case 10–CA–10152 was issued on June 14, 1973, alleging violations of Section 8(a)(1) of the Act. In its answer, Respondent denied the commission of the alleged unfair labor practices. A complaint and order consolidating Cases 10–CA–10122 and 10–CA–10152, alleging violations of Section 8(a)(1) of the Act, was issued on October 24, 1973. Respondent was put on notice that the General Counsel would seek a bargaining order as a remedy for the alleged unfair labor practices. On October 26, 1973, the Regional Director of the Board issued a supplemental decision, order directing hearing and consolidating cases, and notice of hearing, which in substance overruled the objections to the election, except Objections 1, 2, and 8. These three objections, which coincided with the previously mentioned complaint allegations, were consolidated therewith for the purpose of hearing.

In its answer to the consolidated complaint in Cases 10–CA–10122 and 10–CA–10152, Respondent denied the commission of the alleged unfair labor practices and averred as an affirmative defense that the Union was not "a qualified labor organization" to be the collective-bargaining representative of the unit employees because of "discrimination on account of race and sex" and "on account of conflicts of interest."

On November 9, 1973, counsel for the General Counsel filed a motion for bill of particulars respecting the above affirmative defenses in Respondent's answer.

Administrative Law Judge Arthur Leff on December 21, 1973, issued an order granting the motion for a bill of particulars respecting Respondent's affirmative defenses and directing that the following particulars be served on the General Counsel and on counsel for the Charging Party:

1. A clear and concise description of the acts and conduct which are claimed to constitute the basis of the affirmative defense of racial discrimination, including where known, the approximate dates and places of such acts and conduct, and the names of the Union's agents or other representatives by whom committed.
2. A clear and concise description of the acts and conduct which are claimed to constitute the basis of the affirmative defense of sex discrimination, including, where known, the approximate dates and places of such acts and conduct, and the names of the Union's agents or other representatives by whom committed.
3. A clear and concise description of the acts and conduct or circumstances which are claimed to constitute the basis of the affirmative defense of a conflict of interest, including, where known, the approximate dates, places, and names of the Union's agents or other representatives by whom such acts or conduct were committed.

Thereafter, Respondent furnished a bill of particulars pursuant to the aforementioned order of Administrative Law Judge Leff. Following a statement in the bill of particulars that Respondent "is unable to describe with particularity the dates, places, and names of the Union's agents, as these matters are particularly within the knowledge of the charging party," the particulars were stated to be:

1. The Charging Party, whose membership is predominantly female with substantial numbers of Negroes, has at all times discriminatorily denied to females and Negroes positions of leadership, such as officers, directors, and managers.
2. The Charging Party and/or its affiliates have maintained financial interests in business owned and operated by competitors of Respondent.
3. The Charging Party has been a party to collective-bargaining agreements that discriminate against female and minority members.
4. The Charging Party has discriminatorily disqualified Negroes from employment, membership, training and referral by the use of discriminatory requirements.

Respondent served on Nicholas Bonanno, vice president of the Union, Atlanta, Georgia, a *subpoena duces tecum*

[1] The Kotkes family has been in the garment industry for 59 years. The deceased founder of the enterprises was the father of Jonas Murray (J. Murray) Kotkes. J. Murray Kotkes is the president and, together with his wife, is the principal stockholder of the Kotkes enterprises. William Kotkes, son of Murray, is vice president of W. Kotkes & Son, the parent organization, and his younger brother, Fred, also participates in the business. The parent organization has three plants: Murcel at Glennville, Georgia; Summerton Uniform Company at Summerton, South Carolina; and another garment plant in Lynchburg, Virginia.

returnable at the hearing. Fourteen paragraphs of the last-mentioned subpena specify the documents sought.

Without setting forth all 14 paragraphs of the *subpoena duces tecum,* I shall quote paragraph 1 as an example of the basic phraseology and time periods found in succeeding paragraphs and I shall paraphrase the substance of the succeeding paragraphs.

> Paragraph 1. All forms, records, or other documents showing the company and the amounts of all loans, securities, mortgages, or other investments by the international union in any company for the period of January 1, 1971, through October 1973.

The same type of documents are sought as to the Union's unemployment service benefit fund; the Union's retirement fund; the Union's health service plan; and the same information as in paragraph 1 as to constituent local unions in Georgia. The following is then sought: All documents showing the name, race, and sex of all officers of the International union and of constituent local unions in Georgia; documents showing the race and sex of the membership and the referrals in the International union and in constituent local unions in Georgia; all documents containing charges of employment discrimination based on race or sex filed against the International union and constituent local unions with the Equal Employment Opportunity Commission and any similar state agency; documents showing name, sex, and race of all persons excluded or expelled from membership in the International union and constituent local unions; all collective-bargaining agreements negotiated by the International union and constituent local unions; all documents showing requirements for participation in International or local union apprenticeship, training, or referral programs.

At the instant hearing, Respondent, *inter alia,* in a brief opening statement of its position, reiterated its affirmative defense that the Union by reason of racial and sexual discrimination was not a qualified labor organization in the unit at Respondent's plant and, further, that, for the same reason, the Union was not qualified to be a charging party.

During the initial period of the hearing, the General Counsel moved to strike the affirmative defenses in Respondent's answer on the ground that Respondent's bill of particulars was lacking in the specificity and particulars required by Administrative Law Judge Leff's order and that the bill admitted Respondent's inability to plead more specifically and that it was the General Counsel's contention that Respondent was engaged in a "fishing expedition." Counsel for the Union took the same position. Respondent's counsel stated, *inter alia,* that "we have filed a rather general bill of particulars because the nature of our affirmative defense is class discrimination on a basis of race and sex." Counsel stated that we have "substantial evidence in our possession. . . . We have not chosen to plead with greater particularity because we would be pleading evidence rather than conclusions and affirmative defenses."

In further amplication of Respondent's position, counsel indicated that its affirmative defense was based on showing a statistical survey or picture of the Union, e.g., that the union officers were overwhelmingly male, and as "in cases involving schools and cases involving municipal police forces . . . you see just on a daily basis that cases are coming out of that kind."

In addition to ruling on the motion to strike the affirmative defenses of Respondent, I also ruled, at another point in the hearing, on the Union's petition to revoke Respondent's *subpoena duces tecum,* earlier described in the instant Decision. The *subpoena duces tecum* was pursuant to, or auxiliary to, Respondent's affirmative defenses. My rulings on both these matters were based on substantially the same reasons, which are as follows:

The motion to strike the affirmative defenses of Respondent was granted and the petition to revoke the *subpoena duces tecum* was granted.

In my opinion, the order directing Respondent to furnish a bill of particulars respecting its affirmative defense was not complied with for the reason that Respondent's bill of particulars did not set forth or contain the specificity required by the order of Administrative Law Judge Leff. Although not expressed in so many words, it was and is also my opinion that Respondent, in effect, was seeking to embark on an investigatory proceeding of the Union regarding the latter's alleged discriminatory internal structure and practices in the areas of race, sex, and conflicts of interest. In the circumstances presented, it was and is my opinion that the conducting of such an investigation was not my function as the Administrative Law Judge assigned to a specific unfair labor practice case under the National Labor Relations Act.

Although the 1947 amendments to the Act did impose requirements for filing charges and for filing petitions for certification upon unions, and although a noncomplying union could not be the recipient of a Board order directing an employer to bargain, these requirements, Section 9(f),(g), and (h) of the Act, were repealed in subsequent years. Congress has not legislated into the Act any requirement that a union, an employer, or a person, be free of racial, sexual, or any other bias before they may file a charge or be the recipient of a bargaining order, whether the bargaining order is obtained by an employer against a union or a union against an employer. As far as I am aware the aforedescribed parties are not disqualified from the processes of the Board in its administration of the National Labor Relations Act because they may be in violation of the tax laws, or the Fair Labor Standards Act, or the Occupational Safety and Health Act, or the antitrust laws, or the SEC, FCC, EEOC, CAB laws and regulations, or the Environmental Protection Act, or laws against illegal political campaign contributions, or the Hobbs Act or numerous other laws. An employer, for instance, can file a refusal-to-bargain charge against a union, and may be the beneficiary of the Board's processes despite violations or alleged violations of any of the aforementioned laws and a union may be a charging party and be a similar beneficiary despite violations or alleged violations of various laws.

While there is no question that Congress could have required that a party seeking to file a charge under the National Labor Relations Act and seeking to become a beneficiary of the Act's processes and provisions should be in compliance with all or some laws of the land, it has not done so. In the event that the National Labor Relations

Act or other acts did require, as a condition precedent to access to the processes of the various laws and the governmental bodies administering such laws, such as the National Labor Relations Board, the FCC, the ICC and so forth, that a union or employer or other party must have affirmed or have pledged or have demonstrated absence of racial, sexual, or religious discrimination in membership, employment, and so forth, it is doubtful that each agency would or should be the appropriate body to conduct investigations of alleged noncompliance by a party or parties with the aforementioned requirements. Investigations and hearings with respect to alleged discrimination as to race, sex, age, or religion can be major undertakings and in the case of the National Labor Relations Board, for instance, the time spent on racial, sex, age, and religious policies of employer and union parties involved in National Labor Relations Act elections and unfair labor practices could assume major proportions.

In the case of the noncommunist and other requirements of the Taft-Hartley amendments to the National Labor Relations Act, the Board processed all cases where the parties, in that case union officers and unions, had filed the necessary noncommunist affidavits and other material. Allegations of falsification and so forth by the purported complying parties were investigated and processed by the Department of Justice. It would appear therefore that if there was a requirement, which there is not, that charging parties and potential beneficiaries of the processes of the Act should be disqualified if they had discriminatory policies regarding race, sex, age, and religion, that the investigation and determination of such matters should be vested in the EEOC and the OFCC as the specialized bodies established by Congress in this area.

I perceive no basis in existing law for disqualification of the instant union as a charging party in the case before me. The possibility that the Union might be the beneficiary of a bargaining order if the General Counsel was wholly successful in his complaint and request for remedial action is an anticipatory or contingent matter.

Respondent's affirmative defense is also premised on the express of implied contention that (a) an investigatory hearing and litigation should proceed on the matter of the Union's race and sex policies in the same hearing as the alleged unfair labor practices are litigated, and (b), impliedly at least, the litigation and resolution of the Union's sex and race policies, if Respondent's affirmative defense prevails, would obviate the unfair labor practice litigation since the Union would be disqualified to be either the charging party or the collective-bargaining agent or to be the recipient of a bargaining order. The further implication is that the Union's petition for certification and the subsequent charge by the Union were voidable *ab initio* and subsequently voided by reason of the race and sex policies of that organization.

Under proper circumstances, the Board's concern with fair representation by a certified union or a union that is the recipient of a bargaining order can be most appropriately discharged by the moving party petitioning the Board to conduct a hearing on the matter, separate and apart from either representation or unfair labor practice hearings. The Board presumably will establish the prerequisites for the holding of such a hearing.[2]

Although it is possible to draw a distinction between affirmative defenses raising the issue of race and sex discrimination and the issue of conflict of interest,[3] it would be my opinion that all such matters should be channeled within the procedure referred to in the preceding paragraph. In any event, in the instant case, all the affirmative defenses were stricken because, in my opinion, Respondent failed to furnish the particulars and specifications required by the order of Administrative Law Judge Leff.

The case was heard in Reidsville, Georgia, on January 8–11, 1974, inclusive.

I. JURISDICTION

Murcel Manufacturing Corp. is a New York corporation with a factory in Glennville, Georgia, where it manufactures uniforms.

In a representative year, Murcel sold and shipped finished products valued in excess of $50,000 to customers outside Georgia.

At all times material, Murcel is an employer within the meaning of the Act and the Union is a labor organization within the meaning of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

Union Organization and Majority Representation

Employee Sikes (Sykes) and B. Burkhalther, employees of Respondent, contacted the union office in Atlanta around the end of January 1973. In response to these requests, union organizer Jordan came to Glennville, Georgia, the situs of the Murcel plant, on February 6, 1973. Jordan knew many or most of the employees as the result of a prior union campaign. Jordan met with Sikes on February 6 at Sikes' home and left a supply of authorization cards with Sikes. Between that date and February 12 and thereafter Jordan was in Glennville intermittently. The solicitation of employees to sign union authorization cards was carried on principally by fellow employees although Jordan did solicit and witness the signing of a number of cards.

There is no dispute that there were 148 employees in the appropriate unit as of February 12, 1973, and that the aforesaid unit is:

> All production and maintenance employees employed at the Respondent's Glennville, Georgia plant, including the night cleanup man, plant clerical employees, and cafeteria employees, but excluding all office clerical employees, professional employees, salesmen, Lethera Waters, floor-girls, and all other supervisors as defined in the Act.

[2] It may be that absent an inherent discriminatory structure in a union, such as discriminatory provisions in its constitution and bylaws or local unions restricted or limited as to race or sex, such as separate white and black locals and separate seniority lists, the Board should leave the matter of investigating alleged discriminatory practices because of race or religion to the EEOC as the agency vested with this responsibility by the Congress.

[3] *Bausch & Lomb Optical Company*, 108 NLRB 1555 (1954).

The authorization cards signed by employees set forth the full name and affiliation of the Union and the following legend:

Authorization Card

I, of my own free will hereby authorize the International Ladies Garment Workers Union, its affiliates and representatives, to act exclusively as my agent and representatives for the purpose of collective bargaining. [Name, address, date, etc.]

The cards introduced in evidence and their dates, authenticity and validity or the contrary are as follows:

1. Sikes, February 7, authenticated by Sikes.
2. R. Middleton, February 6, authenticated by Sikes who saw her sign the card on that date.
3. L. Howard, February 5, same as 2.
4. T. Roberson (Robinson) February 8, same as 2.
5. E. Burkhalter, February 7, same as 2.
6. C. Wylie February 6, same as 2.
7. M. Durrence, February 5, same as 2.
8. B. Flowers, February 5, same as 2.
9. A. Ford, February 8, same as 2.
10. M. Johnson, February 8, same as 2.
11. S. Lynn, February 8, same as 2 except that the name, address and so forth are printed. Sikes testified that she saw Lynn print the information on the card.
12. J. Sapp, February 8, same as 2.
13. S. Thrift, February 7, same as 2.
14. D. Norton, February 8, same as 2.
15. R. Anderson, February 7, same as 2.
16. P. Walker, February 8, same as 2.
17. M. Weathers, February 6, same as 2. Also authenticated by Weathers.
18. L. De Loach, February 6, same as 2. Name not on list of eligible employees; not valid.
19. B. Moody, November 7, 1973. Sikes testified that she saw Moody sign the card in March 1973 and that Sikes solicited no cards after March. The date on the card, including the signature, appear to have been written by the same person, presumably Moody, who did not testify. The date, in my opinion, is clearly "November" and in no way approximates "March." The span between March and November is so substantial that it seems unlikely that any person who signed a card in March would mistakenly write the date as "Nov. 7, 1973." Although this card and others authenticated by Sikes were admitted in evidence without objection, this card, in my opinion, should be excluded as not coming within the appropriate time period.
20. G. Cox, February 8, same as 2.
21. S. Brewton, February 9, same as 2.
22. J. O'Berry, February 8, same as 2.
23. V. Dunham, February 11, same as 2.
24. J. Rogers, February 8, same as 2.
25. E. Hallock, February 14. Sikes testified that she gave Hallock a blank card. Later that day or the next day Hallock returned the signed card to Sikes, asking the latter not to tell anyone that Hallock had signed the card.
26. L. Ogden, February 13, same as 25.
27. J. Sands, February 16, same as 25.
28. L. Kicklighter, February 14, same as 25.
29. H. Ogden, February 14, same as 25.
30. M. Frankfourth, February 8, same as 2.
31. T. Love, February 7, same as 2.
32. Betty Blocker, February 9, authenticated by Blocker. Blocker also testified that during the organizing campaign, a fellow employee, who had given her the authorization card, but whose name Blocker could not recall, told Blocker that, if she signed a card "then," she would not have to pay an initiation fee later. Blocker testified that the foregoing was an "inducement" to her signing the card. When asked her definition of induce or inducement, Blocker opined that inducement "means force." Whether the statement made to Blocker by the card solicitor about initiation fees motivated her to sign, i.e., induced her, or whether she felt forced to sign, it is apparent that her testimony that the initiation fee statement induced her to sign means that the statement was a or the major factor in her signing. Jordan testified that the union constitution provides that initiation fees will be waived during organizing campaigns. Presumably this means that initiation fees are not waived for those who join after the organizing campaign. Since the Union did use employee card solicitors during the organizing campaign and is relying on Blocker's card, secured by an employee solicitor, as part of its proof of majority, it cannot very well disassociate itself from responsibility for the statement made to Blocker by the solicitor. Under the decision of *N.L.R.B.* v. *Savair Mfg., Co.*, 414 U.S. 270 (1973), I consider Blocker's card invalid for the purpose offered.
33. L. Lindsey, February 8, authenticated by Lindsey.
34. P. Wells, February 7, authenticated by P. Wells.
35. D. Wells, February 7, authenticated by D. Wells.
36. N. Wells, February 7, authenticated by N. Wells and D. Wells.
37. J. Stubbs, February 6, authenticated by Stubbs.
38. N. Jernigan, February 7, authenticated by Jernigan and Stubbs.
39. I. Simmons, February 7, authenticated by her sister, Stubbs, who testified that she knew her sister's signature.
40. L. Blocker, February 8, authenticated by Stubbs.
41. F. Deal, February 9, authenticated by Stubbs.
42. M. Ray, February 8, authenticated by Ray.
43. S. Driggers, February 7, authenticated by Driggers.
44. M. Branch, February 6, authenticated by Branch.
45. M. Mobley, February 6, authenticated by Mobley. She testified that she read the card before she signed it. She also said that the person who gave her the card, whose name she could not remember, told her, when she gave Mobley the card, that the "only purpose" of the card was for an election. In view of the foregoing statement, the card is invalid under *N.L.R.B.* v. *Gissel Packing Co., Inc.*, 395 U.S. 575, 607–608 (1969).

46. Jeanette Yeomans Graham, February 9, authenticated by Yeomans Graham. She testified that she had worked for the Company about a month and a half "during this past summer." There is no Yeomans (married name) nor Graham (maiden name) on the stipulated payroll list of eligible employees. The card is invalid.
47. J. Cammack, February 7, authenticated by Cammack.
48. B. Burkhalter, February 7, authenticated by Burkhalter.
49. F. Carter, February 9, authenticated by Carter. Carter testified that she was aware that the Union was attempting to organize the plant and that employee Norton gave her a card on February 9 and asked Carter "if she wanted to sign it . . . she first said I want the Union in and they needed more cards. They got over a hundred and they need a couple more, so I signed the card and that was all." Carter testified that she did not read the card. The witness also testified that at the time she was asked to sign the card she was told that the cards would be used for an election and "she [Norton] told me that was for them to get the election. And that's why I signed the card." On cross-examination, Carter had been asked if, at the time she was asked to sign the card, was she told that the cards "would just be used for the election? And that was all? A. I did not ask for nothing. Q. But was that explanation given to you or offered to you? A. Yes." Overall, I considered Carter, a current 7-year employee, to be a neutral witness on the matter of her card. She was neither friendly nor hostile to any of the parties and she was unaware of some of the finer points in the matter about which she was questioned. Some of her answers were in response to leading questions and some were not. I have evaluated her testimony in total context. In my opinion, Carter was initially aware that the Union was seeking to get into the plant. Later, Norton made it clear that she was working to bring the Union into the plant and that since there were already over a 100 signed cards, Norton and the union and the prounion employees needed a few more cards so that an election could be held to bring the Union into the plant. I do not believe that Carter was told that the cards were only for an election or just for an election. In my opinion, the signing of the card by Carter, in view of what Carter knew and in view of what Norton told her, was a prounion act to aid and to assist the advent of the Union into the plant through an election. Although Norton's statement on February 9 that the prounion people already had over a 100 cards was not true, Carter was not tricked into signing a card because it had been represented to her that the Union was already in or had achieved its goal of entry was already assured of an election as a means of getting in. Carter was in effect informed that her card and a few others were necessary and essential to bring in the union via an election. Carter signed her card in this context and it was a prounion act to assist the advent of the Union into the plant. I consider the card to be valid.
50. M. King, February 8, authenticated by King.
51. G. Austin, February 8, authenticated by Austin.
52. O. Martin, February 5, authenticated by Martin.
53. B. Wolaver, February 8, authenticated by Weathers who saw Wolaver sign her card.
54. L. Wilcox, February 8, authenticated by Wilcox.
55. G. Mincey, February 8, authenticated by Wilcox who saw Mincey sign her card.
56. C. Todd, February 7, authenticated by Todd.
57. J. Grimes, February 8, authenticated by Grimes.
58. O. Iddins, February 9, authenticated by Grimes who saw her mother, Iddins, sign.
59. M. Kicklighter, February 6, authenticated by Kicklighter. This elderly lady testified that she signed the card on February 6 while sitting in her sister-in-law's car in front of the plant. It was early in the morning and dark and she states that she could not and did not read the card. Kicklighter states that her sister-in-law, employee Durrence, had been pestering her to sign a card and Kicklighter asserts that she signed in order to get Durrence off her back. Kicklighter testified that prior to signing the card she had heard talk from employees "telling you different things" but the record contains no explication on description of what she had heard. It is also a fact that Myrtle Kicklighter's name is not on the stipulated eligibility list of unit employees. While it is true that Kicklighter testified that she had worked for the Company for 12 years and had not worked since May 1973, there was no attempt to reconcile this testimony with the stipulated eligibility list or to modify or amend the latter or to introduce additional testimony or other evidence that this employee was an employee as of the eligibility date. Since I credit Kicklighter's testimony that she had not read the card before signing and since there is no evidence that the wording or the import or purpose of the card was ever explained to her either when she signed or before, I consider the card invalid. An additional reason is the absence of her name from the stipulated eligibility list which was neither amended nor attacked regarding the absence of Kicklighter's name.
60. I. Thompson, February 9, authenticated by Thompson.
61. N. Purvis, February 8, authenticated by Purvis. She was a member of the employee union organizing committee. Both Jordan and Sikes gave her a number of blank cards for organizing purposes. They each told her that the cards were for the union, for better working conditions, and more money. Purvis secured signatures on cards from a number of employees, described below, and witnessed their signatures. She told those whom she solicited that the cards were for us to get a union, better working conditions and more money. As to her own card, Purvis, states that she read it and understood it before she signed. In addition to what Jordan and Sikes had told her, i.e., that the cards were for a union, better working conditions and more money, Purvis, when asked, on cross-examination, whether she was told that the cards would be used for an election, answered, "yes. They were meant for an election." She was then asked if she had been told that that was the only purpose and she said, "yes." When considered in

full, Purvis' testimony convinces me that she understood the wording on the card and that she signed it and engaged in organizing work because she wanted the union to come into the plant and thereby secure better working conditions and more pay. As was the probability and the normal course of events in organizing a plant, an election would be held to obtain these goals and the cards would be used in that procedure. Future possibilities, speculation as to what might be the role of the cards in the event that the conditions set forth in *N.L.R.B.* v. *Gissel Packing Co., supra,* might thereafter occur, were not stated to Purvis and she did not receive a dissertation on labor law. However, in my opinion, Purvis was not misled by anything said or not said to her and she signed a card because she wanted a union in the plant and the betterment of conditions that she believed a union would accomplish. I consider her card to be valid.

62. B. Baxter, February 8, authenticated by Purvis.
63. W. Foley, February 8, authenticated by Purvis.
64. C. Armstrong, February 8, authenticated by Purvis.
65. N. Moore, February 8, authenticated by Purvis.
66. M. Long, February 9, authenticated by Purvis.
67. M. Dubberly, February 9, authenticated by Purvis.
68. R. Burkhalter, February 9, authenticated by Purvis. Regina Burkhalter is not on the stipulated eligibility list and the card is therefore invalid.
69. B. Waters, February 8, authenticated by Purvis.
70. K. Waters, February 8, authenticated by Purvis.
71. B. Todd, February 8, authenticated by Purvis. Respondent, in its brief, mistakenly asserts that Todd is not on the eligibility list.
72. A. Hagan, February 8, authenticated by Purvis.
73. M. Blanton, February 9, authenticated by Purvis.
74. L. Futch, February 12, authenticated by Purvis.
75. M. Kunney, February 6, authenticated by Kunney.
76. I. Colson, February 8, authenticated by Colson.
77. P. Rogers, February 8, authenticated by Colson.
78. N. Kennedy, February 7, authenticated by Colson.
79. M. Salter, February 7, authenticated by Colson.
80. D. Dinkins, February 8, authenticated by Colson.
81. G. Dinkins, February 8, authenticated by Colson. Gail Dinkins is not on the stipulated eligibility list and the card is therefore invalid.
82. A. Griffin, February 8, authenticated by Colson.
83. M. Brown, March 8, authenticated by Brown.
84. S. Grooms, February 8, authenticated by Grooms.
85. E. Dees (Deas), February 9, authenticated by Dees. Dees testified that she read the card before she signed and that she signed voluntarily. The person who gave her the card, whose name Dees did not recall, said "to sign the card to vote for the Union." This was all that was said to Dees. On cross-examination, Dees stated that, "at one time," and she could not remember whether it was before or after she had signed her card, she heard one of the girls, unidentified, who was not addressing Dees, make the remark that "if you signed before the election, you would not have to pay the fee." In my opinion, Dees' card is valid since no union representative or person that could be considered a union agent made any representation to her regarding fees; moreover, the evidence does not establish that a remark by some girl, overheard by Dees, occurred prior to the signing of the card. There is no showing that Dees was aware of the Union's constitutional provision regarding initiation fees.
86. L. Kicklighter, February 8, authenticated by Jordan who testified that Kicklighter signed the card in her presence.
87. J. Kicklighter, February 8, same as 86, above.
88. B. Sands, February 9, authenticated by Jordan who testified that she saw Sands sign the card on February 9 at Sands' home. In its brief Respondent states that "the facts indicate that Jordan was not in the Glennville area when she supposedly witnessed the signing of the card" and the card should not be counted. On direct examination Jordan testified that she came to Glennville to Sikes' home on February 6 (Tuesday). She told Sikes that she would return "to your home on the 9th." After the next question, Jordan, *sua sponte,* corrected the foregoing and said that she told Sikes that "I would return on the 8th." Jordan states that subsequently she did return to Glennville on the 8th and attended a union meeting at Sikes' home on that date. She also stated that "when I left on February the 8th, 1972, I told Lanelle Sikes I will contact you over the weekend." Jordan testified that she telephoned Sikes on Sunday, February 11, from Douglas, Georgia. Sikes told her she now had 98 signed cards. Jordan said nothing about having obtained a card from Sands on February 9, although the matter of the total of cards secured was a central theme in the Jordan-Sikes conversation. On cross-examination, Jordan said she was in Glennville between February 8 and 12 but not the whole time. When asked if she was there on February 9, she said, yes, and remembered being there on the 9th and soliciting cards at employees' homes. On direct examination, Sikes testified that she first met Jordan on February 6 and next met with her on February 8. Jordan, on the 8th, said she would contact Sikes shortly. Jordan called her on Sunday, February 11. On cross-examination, Sikes said that, as far as she knew, Jordan was not in Glennville between February 8 and 11 and after February 8 she did not hear from Jordan until the 11th. Since Jordan admittedly left Glennville on February 8, sometime after 9 p.m., it appears unlikely that she returned again on the 9th or, if she did, that she would not have contacted Sikes or have mentioned to Sikes her success or lack of success in soliciting cards on February 9. Although the evidence is not conclusive, I entertain a very serious doubt that Jordan saw Sands sign her Union card on February 9. I therefore regard the Sands card, dated February 9, as not properly authenticated (Sands did not testify).
89. L. Manor, February 8, authenticated by Jordan.
90. I. Causey, February 12, authenticated by Jordan.
91. J. Futch, February 19, authenticated by Jordan.

92. Beatrice Blocker, February 16, authenticated by Jordan. (Betty Blocker is #32, above).
93. M. Strickland, February 20, authenticated by Jordan.
94. M. Bowen, February 7, authenticated by Jordan. In the transcript of testimony the name Majory Bowen appears as Boring and the date as February 12. This is an error. The card handed to Jordan at the hearing and identified was G. C. Exh. 13 which shows the name Margie Bowen, February 7.
95. G. Weathers, February 8, authenticated by Jordan.
96. N. Waters, February 8, authenticated by Jordan.
97. E. Kicklighter, February 8, authenticated by Jordan.
98. O. Stubbs, February 8, authenticated by Jordan.
99. H. Kicklighter, February 8, authenticated by Jordan.
100. M. Lavant, February 19, authenticated by Jordan.
101. M. Bronson, February 6, authenticated by Jordan.
102. B. Phillips, February 7, authenticated by Jordan.

Four of the cards, that are among those described above, are dated February 5, 1973. Three of these cards, those of Howard, Flowers, and Durrence, were identified by Sikes. Since Sikes and Jordan both testified that Jordan did not arrive in Glennville with the blank cards until February 6, it is evident that the date of February 5 on these cards is incorrect.

A mistake in a date by a day or more by a person signing a card is, in my opinion, a reasonable and credible explanation for the February 5 date. Martin, an employee whose card is also dated February 5, identified her card and stated that she had placed the February 5 date thereon and had signed it. Martin admitted the possibility of having made a mistake in the date but she did recall clearly that Sikes had brought the card to her home. Since Martin was a member of the union organizing committee, it is my opinion that she signed between February 6 and 12, the latter being the date when the Union claimed a majority and requested recognition from Respondent. Of the three cards, dated February 5, identified by Sikes, one was by Durrence, the sister-in-law of Myrtle Kicklighter. The latter signed her card on February 6, at the insistence of Durrence. I regard it as reasonable to conclude that if Durrence was vigorously and successfully soliciting Kicklighter, a relative, to sign a card on February 6 that Durrence had signed her own card on or about that same time. I also believe that the two other February 5 cards were signed during the February 6–12 period when Sikes and others were engaged in an intensive organizing effort.[4]

There are 10 other cards, described earlier, that are dated after February 12. They are Ogden, February 13; Hallock, February 14; L. Kicklighter, February 14; J. Sands, February 16; Beatrice Blocker, February 16; J. Futch, February 19; Lavant, February 19; Strickland, February 20; Terrell, April 2; Moody, November 7.

The Union made its claim of majority and demand for recognition on February 12, 1973. The petition for certification was filed February 14. There was, in my opinion, a continuing demand for recognition and a continuing claim of majority. The complaint alleges that on and since February 12, 1973, the Union has represented a majority in the appropriate unit. I regard the period during which the Union could properly establish is majority by cards as extending from February 6, 1973, when cards first became available to April 12, 1973, the date of the Board election. This, however, does not solve the problem of the 10 cards above described that are dated after February 12. By stipulation, the parties had agreed on "a list of the employees in the unit as of February 12, 1973." This list had been subpenaed by the General Counsel. As stated by the latter in his brief, "The stipulated list containing 148 names was the names of the employees as of February 12." Although the names on the 10 cards aforementioned are those of employees on the February 12 list and the signers of the cards are employees in the unit as of that date, it cannot be said that they were unit employees on dates subsequent to February 12 and on the dates when they signed cards.[5] There is, moreover, no testimony that they were employees on the dates when their cards were signed. Their cards, therefore, cannot be counted.[6]

I find the following cards to be valid and to be counted in determining the question of the Union's majority status on and since February 12, 1973: Sikes; Middleton; Howard; Roberson; E. Burkhalter; Wylie; Durrence; Flowers; Ford; Johnson; Lynn; Sapp; Thrift; Norton; Anderson; Walker; M. Weathers; Cox; Brewton; O'Berry; Dunham; Rogers; Frankfourth; Love; Lindsey; P. Wells; D. Wells; N. Wells; Stubbs; Jernigan; Simmons; L. Blocker; Deal; Ray; Driggers; Branch; Cammack; B. Burkhalter; Carter; King; Austin; Martin; Wolaver; Wilcox; Mincey; C. Todd; Grimes; Iddins; Thompson; Purvis; Baxter; Foley; Armstrong; Moore; Long; Dubberly; B. Waters; K. Waters; B. Todd; Blanton; Kunney; Colson; P. Rogers; Kennedy; Salter; D. Dinkins; Griffin; Brown; Grooms; Deas; L. Kicklighter; J. Kicklighter; Manor; Bowen; G. Weathers; Hagan; Waters; E. Kicklighter; O. Stubbs; H. Kicklighter; Bronson; Phillips. Total 82. This is a majority of employees in the unit as of, and since, February 12, 1973.

Refusal To Bargain

On the morning of Monday, February 12, 1973, Jordan met Sikes at the plant pursuant to prearrangement. Sikes gave Jordan the additional signed cards that had been secured since Jordan's last visit on February 8. Jordan

[4] It is very doubtful that, if the cards were fabricated and not authentic, the fabricator would have chosen to write the date on the cards as February 5. Sikes and presumably anyone else who was enough of a union activist and insider to be engaged in card fabrication would be aware that the cards did not come to Glennville and into Sikes' possession until February 6. By analogy, it would be unlikely that a person undertaking to forge a $5 bill would write the number "4" or "6" thereon. In my opinion the February 5 date was the result of innocent error as to date by the card signer. A person making such an error would generally be "off" or wrong as to date by a day or so and in this case I believe the proper date was probably February 6 and certainly not February 4 or 5.

[5] The record indicated that there was a reasonable amount of turnover among Respondent's employees.

[6] *Tilton Tanning, Corp.*, 164 NLRB 1168, 1171 (1967).

entered the plant and asked for the manager. Faircloth came forward and Jordan introduced herself to Manager Faircloth as a representative of the Union. Jordan said that the Union represented a majority of the employees and demanded recognition. Faircloth asked Jordan if she was prepared to submit the cards. She said, yes, and offered them. Faircloth said that he did not have the authority to grant recognition. Faircloth said he only worked for Mr. Kotkes and did not have the authority to grant recognition. On February 13 the Union sent a telegram to the Company repeating its claim of a majority and demand for recognition. A petition for certification was filed with the Board by the Union on February 14.

On February 13, Gibson, manager of the Company's Summerton, North Carolina, plant, arrived in Glennville and assumed the position of manager of the Murcel plant in place of Faircloth who was terminated. Gibson continued in a dual role as manager of Murcel and Summerton for several months. With the inception of the Gibson regime, various time and engineering studies were undertaken at Murcel and there were some changes in rates, job content, and other conditions of employment. Respondent attributes all these matters including the advent of Gibson and Levine and what they did at the plant, as well as a new insurance program, to normal business operation with antecedents predating the coming of the Union. The General Counsel and the Union perceive a series of actions in 1973 calculated to defeat the Union in the election. To evaluate what occurred at the Murcel plant in 1973, we will start with 1972 events.

Levine is a sewing products manager consultant and a production engineer. His contact with the Kotkes family and its enterprises began in May 1972. Levine was told in a meeting in New York City with William, Fred, and J. Murray Kotkes that "they were having some troubles down at their Summerton facility concerning the acceptance of piece rates in the plant." Levine agreed to go to Summerton to make a study of the rates and the general situation. Thereafter, Levine made timestudies and a survey of the plant. As the result of his report to the Kotkes, the Summerton manager was terminated in June 1972, and, with the authorization of the Kotkes, Levine procured Gibson to be the new Summerton manager.

In the middle of July 1972, Fred Kotkes took Levine to visit the Murcel plant. At the end of July, Levine spent several days at Murcel studying that operation. Levine states that in July at Murcel he made "a rather detailed survey similar to the one in Summerton. . . ." In August, Levine made a survey of the Lynchburg plant. Thereafter, in early August, Levine reported to the Kotkeses in New York City on his studies of Murcel and Lynchburg. Both plants manufactured uniforms and Levine pointed out that Lynchburg was the more efficient plant.

The report made by Levine to the Kotkeses, dated August 3, 1972, and discussed with the Kotkeses on August 7, recommended, *inter alia*, the replacement of Murcel manager, Weis, the reduction of indirect and overhead wages "by working people smarter and harder," and pointing out potential payroll savings in direct labor of $130,000 and in indirect labor of $15,000, or a total of $145,000 at Murcel. Levine testified that "direct labor" is the sum total of the piece rates.

Quite evidently because they were impressed with Levine's ability, the Kotkeses entered into a retainer agreement with Levine on August 8, 1972.

The reports, oral and written, that Levine made to the Kotkeses and the information and data that Levine had acquired by studies and surveys at Murcel in 1972 were not superficial. As we have seen, Levine's initial employment by the Kotkeses involved extensive studies of the Summerton plant operation. In July 1972, Levine testified that at Murcel he made "a rather detailed survey similar to the one in Summerton . . ." and when he came to Murcel he "took [made] the time studies right away"; Levine testified that he "provided the information to the management" but, to his knowledge, no changes were made in the piece rates. He stated that in July and August 1972 his average day at the Murcel plant was 14–16 hours and that he "spent a great deal of time in the plant in July and August," including "doing time studies." Levine also stated that he spent time in the Murcel plant in September 1972, and performed timestudies. Levine finally left the Murcel plant in 1972 during the week ending September 29. As far as appears, his work, with its ample timestudies and surveys, had been completed.

Based on Levine's reports, the Kotkeses retired and terminated the Murcel plant manager, Weis, on September 28, 1972. In his place, the Kotkeses hired Evans who had been secured and recommended by Levine. Levine testified that Evans possessed all the abilities and expertise necessary for the job. Evans assumed his position October 1, 1972. At the Kotkeses' request, Levine went to the Murcel plant in the first few days of October to introduce Evans to the situation at the plant. Levine went over with Evans "the data file" that had resulted from Levine's extensive timestudies and surveys of the plant. As described by Levine, "I went over it [the data file of timestudies and so forth] in a very detailed basis with Mr. Evans because I knew the people in the plant in Murcel."

Without, as far as appears, discussing the matter with Levine, William Kotkes terminated Evans about the middle of November 1972 because Kotkes was not satisfied with Evans. In securing a new manager for Murcel, William Kotkes did not consult Levine but decided to procure and to decide on a new manager himself "together [with the advice of] Mr. Gibson [Summerton plant manager] and Mr. Woods [Lynchburg plant manager]." Kotkes then hired Faircloth as the Murcel manager in the first part of December 1972. The reasons why he selected Faircloth, according to Kotkes, were that Faircloth had an engineering background in the work; he had experience working in the area; he was a "southerner" and Kotkes felt that, as such, Faircloth "would be able to communicate with the workers of Georgia."

Having selected Faircloth because of qualities that impressed Kotkes, the latter impressed upon Faircloth the Kotkes family principles of success, to wit, "know-how" in the industry; ability to get along with people and listening to employee complaints; and the importance of the engineering program at Murcel because "we are not satisfied with the profit picture at Murcel; we are not

happy . . . the costs were running high and the plant was not showing an acceptable profit."

Apparently impressed by what had been told him by William Kotkes about the very unsatisfactory cost and profit picture at the Murcel plant, Faircloth, with his engineering background, which was viewed as an asset in appraising his qualifications, conducted some timestudies at the plant and, as a result, some of the piece rates were reduced. This was in early January 1974.

Faircloth's action, from the company standpoint, does not appear to be at this point some aberration disassociated from company goals or policies. In addition to William Kotkes' stress on costs and profits at Murcel to Faircloth, Levine, as early as August 7, had stressed substantial dollar savings in direct labor costs, the sum total of the piece rates, at Murcel, and evidently his extensive timestudies and surveys at Murcel from July to September 1972 bore this out. Gibson, who participated with Kotkes, in some interviews of Faircloth, testified that Kotkes told him to explain to Faircloth "from a technical standpoint exactly what his duties and responsibilities were supposed to be and what the Kotkes family was to expect from him." Gibson then told Faircloth that "his main concern should be the unit cost as it was high. . . ."

In early January 1974, Fred Kotkes asked Gibson if he would like to visit the Murcel plant with him. Gibson accepted and went to Murcel. He had no instructions as to what he was to do at Murcel. However, during the visit, Gibson met with Faircloth and "reviewed what he was doing." Faircloth showed a report he had prepared and told Gibson and Kotkes "of various programs that he had going in the plant." According to Gibson, "it looked like to me he knew what he was doing. He knew what to look for."[7]

William Kotkes testified that he and Fred Kotkes visited Murcel "in the beginning of January [1974]." While there, a substantial number of employees, in groups, came to the Kotkeses and complained that Faircloth had reduced their rates and they said the rates were too tight. William Kotkes told the employees that "the rate may be too high, the rates may be too low" but, not being an engineer, he did not know. Kotkes offered to bring in an independent consultant to time any job on which an employee felt the rate was wrong. Apparently neither the foregoing observation about the rates nor the proposal of an outside consultant met with great acclaim. After the meeting, Kotkes testified that he was disturbed "because I felt that the complaints on the part of the girls were more than usual. . . . What threw me off was that none of the girls agreed to an independent engineer coming in for a timing."

The situation that existed after the above meeting between the Kotkeses and the employees at the beginning of January was that William Kotkes had made it clear that the Kotkeses were not going to change the rates that the employees were complaining about simply became the employees were claiming that the rates were too "tight." Kotkes told the employees that the rates might be too high or too low but he did not know which. Kotkes did not say that he would speak to manager Faircloth about the rates to see if some modification was possible or to ask Faircloth to recheck the rates. Kotkes' sole proposal was to bring in an outside consultant to time any employee who felt that her rates were not correct. According to Kotkes, none of the girls agreed to this proposal. Kotkes made no other proposal or suggestion.

The next series of events involved action by the employees and actions by Kotkes. Some employees contacted the Union in the latter part of January 1974 and, as we have seen, an intensive union organizing effort took place in Glennville and at the plant and its surroundings from February 6–12, 1974.

According to the Summerton plant manager, Gibson, either William or Fred Kotkes telephoned him "in late January or the first week in February" and told him that on a visit to Murcel "a lot of the girls had complained to them about various things." Kotkes asked Gibson to go to Murcel to see if he "could determine what the problems were." Kotkes added that Faircloth has been manager for 7 or 8 weeks and the unit costs had "risen instead of dropped" and "the girls instead of getting happier [presumably if unit costs were up, this reflected higher pay or payroll cost per unit and the girls should have been happier since the Company was paying more for less production] seemed to be in a state of unrest." Gibson agreed to come to "spend a few days at Murcel" as requested or directed by Kotkes.

Since Gibson did not testify as to when he arrived at Murcel and he states that the Kotkeses call to him was in late January or the first week in February, it is difficult to determine the precise period of his visit to Murcel. In any event, after arrival, Gibson had a talk with Faircloth, looked at records and reports, made production checks and studies, and talked with some of the employees. Thereafter, on a date not shown, but apparently in the first part of February, Gibson reported by telephone to the Kotkeses and recommended that Faircloth "be relieved immediately." As far as appears, the Kotkeses made no decision at the time or at least did not tell Gibson of their reaction to his recommendation.

Fred Kotkes did not testify. William Kotkes testified that after he and Fred had the meeting with the Murcel employees at "the beginning of January," he, *thereafter,* sent Gibson on two separate trips to Murcel to check Faircloth and upon Gibson's recommendation Faircloth was terminated on February 8. Gibson testified that in the January-February period he did make two trips to Murcel. The first trip he fixes as being in the early part of January in the company of Fred Kotkes. Gibson stated that he had no instructions as to what he was to do at Murcel. However, Gibson and Fred Kotkes did meet with Faircloth and saw a report and programs of what Faircloth was doing in the plant. Gibson testified that it was his opinion that Faircloth knew what to look for in the plant operation and that Faircloth knew what he was doing. Although Gibson had not made a complete study of the plant on this particular trip, his judgment as to what Faircloth was doing cannot be regarded as that of a first-time casual visitor to Murcel. Both Murcel and the Summerton plant of which

[7] Gibson was a witness called by Respondent. At the time of the hearing, Gibson no longer worked for Respondent. He was an owner and partner in an Alabama garment plant.

Gibson was manager manufactured garments such as uniforms as part of the Kotkes enterprises. Presumably, there were common basic policies and standards of operation at the two plants. Gibson had made timestudies at the Murcel plant in October 1972 and had submitted his findings to the manager of Murcel, Evans. Later, based on his studies and observations, Gibson recommended Evans' discharge. After Evans was terminated, Gibson was interim manager of Murcel, together with Woods. When Faircloth was hired, Gibson was delegated the task of informing Faircloth of the technical aspects of the Murcel operation. This, therefore, is the man who in early January 1973 checked with Faircloth on the latter's reports and current programs at Murcel and testified that it was his opinion that Faircloth knew what to look for and knew what he was doing in managing the plant.

The second trip of Gibson to Murcel, in 1973, as we have seen, was pursuant to a Kotkes call at the end of January or the first week in February, according to Gibson. Since Kotkes states that the two trips of Gibson to Murcel in 1973 were at Kotkes' direction to check on Faircloth and were after Kotkes' meeting with the Murcel employees and that Gibson reported to Kotkes after each trip, it would appear that Kotkes would have received a good report on Faircloth initially, probably early in January. Then, at the end of January or the first week in February, Kotkes again sent Gibson to Murcel. Weeks or a month elapsed between the two trips. After his second trip, Gibson then recommended the immediate termination of Faircloth.

William Kotkes testified that Fred Kotkes was at Murcel on Thursday, February 8, 1973, and that Fred terminated Faircloth on that day. William Kotkes was then asked by Respondent's counsel whether "to your knowledge," Faircloth remained "in Glennville for any period of time after February the 8th." Kotkes said, yes, that Faircloth remained until the end of the week. Gibson testified that on February 8 or 9 Fred Kotkes telephoned him from Murcel. Fred said that "he had relieved Hugh Faircloth of his duties" and offered the job of manager at Murcel to Gibson. The latter accepted, but it was mutually understood that Gibson would remain as manager of the Summerton plant in South Carolina while also being manager of Murcel. It was further agreed that Gibson would have the assistance of an engineer at Murcel and that Kotkes would send Levine to Murcel in that capacity. Gibson arrived as manager at Murcel on Tuesday, February 13, the day after the union demand for recognition. Gibson states that he did not arrive until February 13 because he was delayed by a snowstorm in the area.

It would be reasonable to assume that if Faircloth was terminated and relieved of his duties on Thursday, February 8, he would not be plant manager and functioning as such on Monday, February 12. There is no evidence or claim that on February 8 only a decision was made to terminate Faircloth. The testimony is that Faircloth was terminated and relieved of his duties on that date but remained to the end of the week. Termination involves communication from the discharger to the dischargee and presumably Faircloth knew, on February 8, that he had been discharged.

On February 12, however, when Jordan, with a large group of employees, was at the plant, she asked for the plant manager and Faircloth responded. In reply to Jordan's demand for recognition, Faircloth said, "I only work for Mr. Kotkes" and did not have the authority to grant or to discuss a recognition demand from a union. Faircloth did not say that he was leaving the Company and that the Union should make its request to the new manager who was arriving the next day. For a man allegedly summarily discharged on February 8, the foregoing would have been the most obvious and the most truthful and accurate statement and the easiest "out" for Faircloth, while at the same time staving off the union demand without prejudice or harm to the Company. Nor did he simply refer Jordan to Kotkes without referring to his own current status or function. He said that "I only work for Mr. Kotkes" and did not have the authority to grant recognition, which is probably the type of answer that any competent and current undischarged manager might give under the circumstances.

Since Faircloth and Fred Kotkes did not testify, William Kotkes was asked, on cross-examination, why Faircloth would still be functioning as Murcel manager on Monday, February 12, if he had been terminated on February 8 of the prior week. Kotkes replied that he was not sure of the date of Faircloth's termination and "It was possible he may have been terminated at the beginning of the following week." In view of this testimony and the fact that Faircloth was the functioning and performing plant manager on the morning of Monday, February 12, when the Union made its demand, it may be that Faircloth was terminated later on February 12, after the union demand was made, since this would certainly qualify as a termination at the beginning of the following week. This posture of events raises a question whether Gibson had been designated and assigned to Murcel prior to February 12 or whether at the time of, or immediately after, Faircloth's termination at the beginning of the week of February 12, Gibson was enlisted as Faircloth's replacement. This for the reason that the crux of Gibson's testimony is that on February 8 or 9 Kotkes, who was at Murcel, informed Gibson that he had terminated Faircloth as manager and gave Gibson the job in Faircloth's stead. In any event, we at least know with certainty that a new plant manager, Gibson, was in Murcel on February 13.

Gibson testified that when he arrived at the Murcel plant on February 13, 1973, Fred Kotkes was there. The first thing that Kotkes did when he met Gibson was to show him the union telegram demanding recognition and to state that "we've got to do something about this." Gibson testified that he was "well aware" that a union campaign was going on in February and discussed the matter with "Mr. Kotkes."

The Kotkeses had arranged with Levine for him to go to Murcel to assist Gibson. "Among other things," according to Levine, the Kotkeses told him that they had received a union petition for an election and that Gibson was being moved to Murcel as plant manager. Levine arrived at the Murcel plant a week after Gibson, on February 20. Levine testified that he spent "the first several hours in the plant the first day" discussing with Fred Kotkes and Gibson

"about the situation that was happening" and "the conversations included the situations concerning the fear of the girls [employees], the temperature of the girls, what precipitated this whole union activity." Levine and Gibson also sat down and went over "what had to be accomplished" and program objectives, and they "went over the problems that related to the Union."

Thereafter, Gibson delved into records of earnings, production, records, and so forth, and started engineering programs. Levine made timestudies of the various operations and of the piece rates. He testified that he spent about the same amount of time performing timestudies at Murcel in February as he had spent making timestudies in the same plant in July, August, and September 1972. Levine submitted his 1973 studies to Gibson in February 1973 while he was at Murcel. Gibson, himself, on two occasions in October 1972, or on one occasion in October and the other in November 1972, had come to the Murcel plant and had made timestudies and checks. In 1972, however, in spite of Levine's extensive studies at Murcel, he testified that as far as he knew no changes were made in the piece rates. As an engineer and consultant on a retainer to the Kotkeses and, as such, working extensively at the Murcel plant, it is reasonable to conclude that Levine would have known if the results of his studies in 1972 had been implemented, at least whether some changes had been made. Much the same situation appears to have been the case with respect to Gibson's 1972 studies at Murcel. Gibson testified that he did not know whether there were increases or decreases in the Murcel piece rates in 1972 as the result of his studies. Since, shortly after he had made the studies, Gibson was interim plant manager of Murcel in 1972, it would appear that he would know whether or not his studies had been or were reflected in the piece rates in 1972. While I believe there undoubtedly were some changes in rates in 1972, there is no indication that they were made pursuant to a general program of reviewing and studying almost all rates, as was the case in February and succeeding months in 1973 after the Union's demand for recognition.

Gibson testified that after his arrival at Murcel on February 13, 1973, some piece rates were raised, and some were unchanged, some lowered. Gibson was unable to estimate the percentage in each category. He states that the changes were based on timestudies and engineering principles and that his objective was to increase the profitability of the plant.

While I am prepared to accept the contention that timestudies, engineering practice, and profitability were factors in management's actions regarding rates in February 1973 and thereafter, I am not persuaded that the appearance of the Union; its claim of a majority; its demand for recognition; and the petition for an election, which foretold an eventual election among the employees, were not also important factors accompanying the advent of Gibson and Levine to Murcel and important factors in their subsequent activities and actions. As we have seen, the union situation at Murcel was immediately brought to the attention of both Gibson and Levine and they were fully conscious of it in their subsequent actions. Fred Kotkes told Gibson on February 13 when he arrived at Murcel, "we've got to do something about this [union demand for recognition]."

We have seen that the cutting of certain piece rates in early January 1973 evoked strong complaints from a substantial number of the Murcel employees. In the beginning of January, the employees concertedly, in groups, complained to William and Fred Kotkes about the piece rate cuts. Although greatly disturbed by the unrest of the employees, the Kotkeses neither directed that the cuts in rates be restored nor be restored pending further study, nor were the rates changed, although since June 1972 through November 1972 the Company had made a plethora of timestudies and surveys of the rates at Murcel and certainly had the data available to make a judgment on the justification or otherwise regarding the rates. William Kotkes testified that, after the above meeting with the employees, he sent Gibson to Murcel on two occasions to check on the situation. On the first trip, which must have been very soon after the Kotkes meeting with the employees, inasmuch as Gibson places the time as early in January, Gibson testified that it was his opinion that Faircloth, the Murcel plant manager, knew what he was doing. Faircloth was the person who had cut the rates and these cuts were what the employees had complained about. The cuts rates remained in effect. After approximately a month of the lower rates being in effect, several employees contacted the Union in the latter part of January. The union organizer came to Glennville, a small community, on February 6, and from that date to February 12 and beyond union cards were passed and signed at homes of employees, at the plant, in union meetings, and elsewhere. At the end of January or the first week in February, Kotkes directed Gibson to return to Murcel and to check on Faircloth. Gibson then came from his plant in South Carolina to Murcel. After studying the situation, Gibson now recommended Faircloth's immediate termination. No action was taken at that particular point. Later, in an unclear evidentiary picture presented by Respondent's witnesses, Faircloth was discharged and Gibson was designated Murcel manager, all on either February 8, 9, or 12, 1973. Throughout this entire period, from the first part of January to February 13, the rates that were cut remained in effect.

With the advent of Gibson and Levine at Murcel, after February 12, 13, and 14, when the Union had claimed a majority, demanded recognition, and filed a petition for an election, the Company now took action regarding the piece rates at the plant. Gibson testified, "I reinstated the rates that Hugh Faircloth had cut." Moreover, these particular rates, unlike other rates that Gibson and Levine studied in 1973, beginning in February, were raised "without time studies," according to Gibson. In short, Gibson, although he made changes in piece rates at Murcel after he arrived as manager, made no changes except after timestudies had been made on the particular rates. There was one exception to the foregoing procedure. All the rates that had been reduced by Faircloth were raised and restored by Gibson

by about the end of February 1973, and these rates and restorations were made without timestudies.[8]

It is apparent to me, and I believe that it was apparent to the Company, that the seed of the subsequent union incursion into the plant was the cutting of a substantial number of piece rates in early January 1973. Although the employees complained to the Kotkeses about the rate reductions at that time, the rates remained unaltered. The employees then went to the Union and the Union organized, demanded recognition, and filed an election petition. Fred Kotkes told Gibson on February 13 that they had to do something about the union situation. Since there is no question that Respondent was opposed to having a union in its plant,[9] Respondent's reaction to the appearance of the Union was to first remove and remedy the reduced or cut piece rates that quite evidently had been the catalysts for the prounion move. The piece rates that had been cut in early January were restored and raised to their former levels in the period after the Union's demand and the filing of an election petition. The raising and restoration of piece rates by Respondent on jobs on which rate cuts had been made was the conferring of a benefit on the employees in order to influence their attitude toward the Union and was calculated to dissuade them from supporting the Union in any putative election. I find such conduct to be in violation of Section 8(a)(1) of the Act.[10]

A few employees testified to their personal pay experiences at the Company during the 1973 period when Gibson had taken over as manager. For instance, employee Todd first worked for the Company in 1960. Her last continuous period of employment at the plant was 3 years. Todd does not mention any prior decreases or increases in her piece rates. She did testify, however, that in the latter part of February 1973 she received an increase in the piece rate on collars from 24 to 30 cents and she states that she had never received "an increase like that before." Employee King testified that she had piece rates of 16 cents and 18 cents on some of the styles on which she worked. These rates remained in effect from October 1972 until sometime in February 1973. She saw Levine in the plant during the latter period. According to King, sometime between February and March 1973, the rates on the aforementioned styles on which she worked were increased. The 16-cent rate went to 18 cents and the 18-cent rate went to 20 cents.

Employee Lindsey testified that she worked on 15 or 20 styles. She states that, in March 1973, the piece rate on one style was increased from 76 cents to $1.25. Levine testified that the entire job content of this particular style was restructured and that accounted for the new rate. Lindsey testified that her net earnings increased. Perhaps she earned more on the particular style at the new rate and did not work as hard on the 15 or so other styles on which she worked, but her net earnings changed little. If we take her net earnings on three biweekly payrolls ending on March 15, on March 29, and on April 10, 1973, her approximate average net pay per payroll period was, in round numbers, $97. For the three prior payroll periods, February 1, February 15, and March 1, 1973, her average approximate net pay was $91. However, for the $91 net pay average, the approximate average hours were 70; and for the average $97 net pay the average hours were 72. Computed on an hourly basis there was little difference in Lindsey's net pay and she may have been overly impressed by the rate increase on one style since the job context of that operation had also been increased.[11]

Employee Brown in her 2 years with the Company had had no decreases in her piece rates. However, the piece rate on one of the styles on which she worked was increased from 60 to 74 cents at the end of February 1973. As a result, Brown "began to do better" on this particular style and she made more money on this style. Levine testified that he had reengineered the "methodology" on this particular job. However, Brown's net earnings on her total work on all styles was less in the period subsequent to the end of February than they were previously. Since she had received no decreases in any of her piece rates, an adequate explanation is not possible from the limited data in the record. Perhaps she had more difficulty, for some reason, on the other styles. In any event, on the morning of the Board election, April 12, 1973, and before the commencement of the election, William Kotkes came to Brown's work station and asked her if she was the girl who testified at the Board hearing in Savannah.[12] Brown answered affirmatively. Kotkes then asked her, on this April 12 occasion, if she "was making any money." She said, "no." Kotkes said that the Company's engineering program would continue and that the girls "would be making more money." At the instant hearing, January 8, 1974, Brown was asked, "And are you making more money now?" She said that she was. Respondent introduced evidence concerning Brown's earnings up to the pay period ending April 10, 1973. Her overall earnings up to that point had not increased although one of many piece rates that she received had been increased. The increase in net earnings, i.e., "making more money," was, in effect, promised by Kotkes on April 12, 1973, just before the election, and eventually did occur, according to Brown. This is a promise

[8] Gibson states that he concluded that the cuts made by Faircloth "were all arbitrary."

[9] See, for instance, G.C. Exh. 2(a), and attachments thereto, including a letter from the company president indicating his view in a letter to employees that a union would not be good for them or the Company and stating that he had faith that the employees would not do anything foolish. Gibson in a letter to all employees, stated, *inter alia*, "I would like to repeat the reasons for being so strongly against the union."

[10] *N.L.R.B. v. Exchange Parts Company*, 375 U.S. 405 (1970). The Court rejected the contention that there was no illegality because the benefits were put into effect unconditionally and with no implication that they would be withdrawn if the employees voted for the union.

[11] Respondent introduced data that showed that Gibson reduced the net cost per dozen garments. The figures submitted show that under Faircloth the net cost per dozen was reduced 45 cents from December to January. In February, a month when Faircloth was manager until February 12 and Gibson was manager thereafter, the net cost was reduced a further 49 cents. In March, there was a reduction of 3 cents from the prior month. In April, the reduction was $1.41, with increased average production above that of March.

Under a skillfully engineered incentive piece rate system an individual employee can be favorably impressed by an increase in her piece rate and her net earnings may increase while at the same time the employer may secure proportionately greater production from the employee and thus reduce his net cost. The employee may also react favorably to an increase in a piece rate and to a reengineered flow of work which facilitates her work although her net earnings may change very little.

[12] Subsequent to the filing of a petition by the Union on February 14, 1973, a hearing was held at Savannah. As a result, a decision and order issued directing the holding of the April 12 election.

of increased earnings as alleged in the complaint and is a violation of Section 8(a)(1) of the Act.

Employee Colson, a member of the union committee, wore a "Vote yes" button or card on the morning of the election.[13] On that morning, April 12, before the election, William Kotkes came by Colson's work station and said, "Good Morning." He stood by Colson's work station, looked at her, took a pad from his pocket, asked Colson her name, wrote something in the pad, and left. Since Kotkes neither told the employee why he had asked her name or what he wrote in his pad, the incident would have the normal and foreseeable effect of creating a sense of disquiet or unease in an employee. Whether true or not, the normal inference for Colson from the incident would be that Kotkes was making a note of the fact that employee Colson was wearing a "Vote yes" button on the morning of the election. In view of the fact that the Company had previously made known its opposition to having a union in the plant, it would be the normal inference that, in noting something on a pad after asking Colson her name, Kotkes was writing the name of Colson as a prounion employee. The mystery or unexplained nature of the incident and its purpose would add to its disquieting effect and carried with it an implied possibility of reprisal. I find that the action of Respondent in this incident was in violation of Section 8(a)(1) of the Act since the action interfered with employee rights guaranteed by Section 7 of the Act.

Employee Sikes testified that on April 11, 1973, the day before the election, William Kotkes was going through the plant, "to everybody's machine and talking to them [the employees]." In the course of the foregoing, Sikes and another girl called Kotkes over to their machine and asked why girls brought from the front to the back of the department were guaranteed more an hour than Sikes and others were receiving in the back. Kotkes then summoned Crews, an engineer, to explain why the girls in the front received more than those in the back.[14] Sikes was asked at the hearing if Crews came over and explained the matter. She states that Crews "just came up there and said that we was all like his sisters and he treated us all alike. He really didn't make any sense."

After this rather brief interlude, Kotkes told Sikes that he knew she was one of the union leaders and that she had a great deal of influence with the girls and could get the girls to change their votes.[15] Sikes replied that she did not have that much influence. Kotkes said that employee Todd also had lots of influence with the girls. Sikes told him that he would have to take up that aspect with Todd. Kotkes told Sikes that he knew that she would be the union observer at the election[16] but that she could still vote no since no one would know how she voted. He said that he would not hold it against the employees whichever way they voted. Shifting gears somewhat, Kotkes informed Sikes that he could discharge her, but not for working for the Union, but for putting on buttons and buttonholes crooked. He said, however, that a device had been installed that would facilitate the sewing of the buttons and buttonholes and he thought "we could do better."[17]

Since Sikes' union activities were open and well known, I do not consider Kotkes' statements to her that he was aware of her leadership in the Union and of her being the union observer in the election as creating an impression of surveillance.

However, it is clear that Kotkes endeavored to influence Sikes to vote against the Union and to use her influence for the same objective with the other employees. Inasmuch as Kotkes was trying to influence Sikes along the foregoing lines, it is apparent that this was the principal reason why, when Sikes showed no disposition to assist Kotkes in affecting the votes of the girls, Kotkes then mentioned that he could discharge Sikes. In the same breath, he quickly said that the discharge could be or would be for poor work on the buttonholes but could not be for her union activity. He then mentioned the installation of a device that would enable Sikes and others to do better work. Sikes probably knew without Kotkes telling her that the law forbids the discharge of an employee for union activity. She also knew, without being told by Kotkes, that he or the Company could discharge her or any other employee for bad work. It is apparent, therefore, that Kotkes in an effort to influence Sikes to turn the girls against the Union in the election considered it helpful to impress upon Sikes his power to discharge her for the ostensibly legitimate cause of having made crooked buttonholes more than a week earlier notwithstanding that a device had now been installed to facilitate the sewing of straight buttonholes. Why else did Kotkes bring up this discharge power in the conversation with Sikes about influencing the employees. Sikes had not responded favorably to Kotkes' appeal and she said she did not have much influence. Kotkes then drew off his velvet glove a bit and reminded Sikes how he could discharge her. Indeed, after this rather lengthy conversation in which Kotkes spoke in various directions, Kotkes' parting comment to Sikes was "to think it over." On the whole, I believe the conversation contained an implied and subtle threat of the possible use of discharge or other action in order to affect Sikes' vote and to influence her to affect the votes of other employees. A remark by Kotkes, in the course of the long conversation, that he would not hold it against the employees how they voted[18] does not effectively neutralize the remarks Kotkes made to Sikes about Sikes personally as an employee and about what Kotkes could do in her regard. I find a violation of Section 8(a)(1) of the Act.

The complaint alleges that on or about February 15, 1973, and thereafter, Respondent announced and implemented a new health and life insurance program in order to cause its employees to reject the Union.

Grady is senior vice president of marketing with Blue Cross-Blue Shield. As such, he and his associates, and his

[13] A "Vote yes" sign was an appeal to vote for the Union.

[14] Crews had come to the plant sometime after Levine's arrival on February 20, 1973.

[15] Sikes wore a union button and a "Vote yes" button and was on the union organizing committee that had been publicized to the Company by a union telegram.

[16] Sikes was the union observer at the election.

[17] Previously, Sikes had been off from work about a week because her children were ill. When she came back, she was told that there had been a complaint about some crooked buttonholes or buttons that she had worked on. Her supervisor told her that a guide had been installed on the machine to deal with the matter of crooked buttonholes.

[18] The votes would be secret in any event.

organization, are highly interested in persuading companies and other organizations to take Blue Cross-Blue Shield contract coverage. In 1972 and early 1973 Respondent had a health insurance program at Murcel under Travelers Insurance Company. This program did not provide life insurance. Sometime in March 1972, Grady and Smith, New York City representatives of Blue Cross-Blue Shield, took the initiative in contacting William Kotkes. Grady and Smith had in mind getting Kotkes interested in their insurance for all the Kotkes plants. The first meeting in March was brief, but Kotkes did express interest in the general subject. Smith contacted Kotkes again in August 1972 and reported to Grady that he believed that Kotkes would be receptive to receiving a concrete proposal from Blue Cross-Blue Shield. Thereafter, through its local representatives, Blue Cross-Blue Shield gathered information regarding Respondent's plants. After an October 1972 contact with Kotkes in New York, Smith advised Grady that Kotkes would consider a proposal from Blue Cross-Blue Shield. Owen, director of market support for Blue Cross-Blue Shield, had started working on the Kotkes matter in October 1972. Under Grady, Blue Cross put together a package proposal that was based on rough estimates respecting employee details at Respondent's plants.[19] Grady met with Fred Kotkes in New York on November 15, 1972, and testified that Kotkes liked the proposals although commenting that the rate was a little high. Grady expressed the opinion that with more detailed information about the employees at Respondent's plants he could probably offer a better rate.

Owen met with Fred Kotkes on December 5 to ask for detailed employee data at Respondent's plants; e.g., sex, ages, marital status, and so forth of employees. Owen received this data on December 11 and then sent it on an appropriate form to the Blue Cross underwriting department in order that a specific rate proposal could be prepared. Having received the necessary figures from the underwriting department, Owen, on January 10, 1973, mailed to Fred Kotkes a proposal setting forth coverage rates for Respondent's three plants. On January 25, Fred Kotkes told Owen that the program submitted was what he wanted for the employees and he approved it. Kotkes, however, said, in substance, that the program would first have to be explained and submitted to J. Murray Kotkes who was in Miami Beach.[20] On February 14, Owen wrote to J. Murray Kotkes in Miami Beach, outlining the program and stating what it would do and referring to Owen's talks with Fred Kotkes on the subject. At Grady's direction, Owen flew to Miami and explained the program to J. Murray Kotkes on February 19. The latter told Owen to contact William Kotkes and arrange immediate enrollment of the employees. Owen then flew from Miami to Columbia, South Carolina, on February 19. On February 20 he made the 4-hour drive by car from Columbia to Glennville.[21] The availability of the new Blue Cross-Blue Shield health and life insurance program was announced to the Murcel employees on February 20 although the actual contract between the Company and Blue Cross-Blue Shield was not signed until about February 28.

William Kotkes testified that his father, J. Murray Kotkes, was elderly and semiretired and was in poor health. He states that the decision to install the new health insurance program was made in January by himself and Fred Kotkes and that as a matter of courtesy the sons told Blue Cross to submit the program to their father in Miami Beach. While I believe that J. Murray Kotkes, as the principal or sole stockholder of the Kotkes enterprises and as president, was not a mere figurehead and he could, in my opinion, have decided not to install Blue Cross in his plants, I do not regard this as determinative. The evidence shows the inception of the idea to have Blue Cross in Respondent's plants well before the advent of the Union, albeit with no sense of urgency or speedy accomplishment on Respondent's part. As I view the evidence, the program had developed and fructified in all substantial respects prior to the appearance of the Union. There is no indication that but for the appearance of the Union the program would not have received the ratification of J. Murray Kotkes, or that, if a Blue Cross representative had gone to Miami Beach at the end of January, after approval of the program by Fred and William Kotkes, their father would not have added his approval at that time.[22] It is no doubt true that the Kotkes were glad to have the opportunity to place the new program in effect after the appearance of the Union and they wasted no time in doing so. This alacrity on the Company's part after the Union appeared was in contrast with the relaxed approach from March 1972. It is reasonably clear that, when on February 19 J. Murray Kotkes directed Owens to promptly contact William Kotkes and arrange immediate enrollment of the Murcel employees in the program, the action was prompted by the union situation at Murcel. The program applied to all three Kotkes plants but Owen, as directed by Murray Kotkes, made the long trip to Murcel first and bypassed the more proximate plant at Summerton where there was no union knocking at the gate. However, in my opinion, although the matter is not free from doubt, this is not enough to sustain the complaint allegation in view of the origin of the new health program in a period prior to the Union's appearance.

About 2 weeks before the April 12 election, according to employee Lindsey, her supervisor, Joiner, and other supervisors came into the plant wearing "Vote no" buttons. Lindsey, a member of the union committee, then put on a button that read, "Fool me once, shame on you; fool me twice, shame on me." Joiner came over and asked Lindsey what the button meant. Lindsey said that it referred to a previous occasion when the Union tried to come in and the Company had made a lot of promises to the employees at the time but later did not fulfill the promises. Joiner then asked Lindsey if she liked Manager Gibson. Lindsey replied, in substance, that she did, saying that Gibson "is a

[19] In a November 14 letter to Owen, Whitton, national account manager for Blue Cross, mentioned, *inter alia*, that Owen's program for the Kotkes plants was very close to the ILGWU benefits.

[20] William Kotkes testified that his brother handled the Blue Cross-Blue Shield matter and that in January he had discussed with his brother the decision to go ahead on the Blue Cross-Blue Shield program.

[21] The drive from Columbia to Respondent's Summerton plant which was also covered by the new program was a distance of only about 50 miles.

[22] In the first part of November 1972, Fred Kotkes, when asked by Murcel employees about progress on an insurance program, said that they were still negotiating in order to secure a program that would give the most benefits to the girls at the lowest price.

good boss man. He is fair and considerate to the workers" and is interested in the jobs of the employees. Joiner said, in effect, that, if Lindsey liked Gibson as she had indicated, Lindsey should bear in mind that Gibson "would not be there [at the plant] if the Union came in because he had told them [the Company?] that he would leave if the Union came in."[23]

In context, it is apparent that Lindsey regarded having Gibson as plant manager as an asset or a benefit since she described him as a good boss, fair and considerate, and interested in the jobs of the employees. Joiner, fully apprised of how Lindsey felt about Gibson as plant manager, told Lindsey that Gibson would not be there if the Union came in because Gibson had said that he would leave in the event of a union victory. I regard the foregoing as a threat of a loss of a benefit or the incurring of an employment detriment by an employee if she supported or continued to support the Union and helped to bring the Union into the plant. A "good" plant manager in the eyes of an employee is definitely an asset or benefit. Such conduct by Respondent is found to be in violation of Section 8(a)(1) of the Act.

On the day of the election, April 12, Sikes testified that her supervisor, Suggs, came over to Sikes' machine and asked her why she was wearing a "Vote yes" button. Sikes said that she wore it because she wanted to. Suggs told Sikes that the latter could still vote "no" even if she wore the "vote yes" button. Sikes said she knew that. Suggs then asked Sikes if she knew that, if the Union came in, the factory would be closed. Sikes said this could not happen. Suggs insisted that it could or would happen and that her mother-in-law worked in a factory where "they got the Union in and they closed the factory."

The foregoing threat about the plant closing in the event the Union came in is neutralized, in my opinion, by additional testimony of Sikes. The latter testified that prior to the election she asked Plant Manager Gibson whether the plant could be closed if the Union came in, and Gibson said no. Gibson, of course, was a higher authority than was Supervisor Suggs. Lindsey also testified that a taped message from J. Murray Kotkes was played to the employees in the plant prior to the election. Kotkes informed the employees that he did not want a union in the plant but that he had instructed his sons to carry on the business just as it had been regardless of the results of the election.

Glennville Lingerie is a garment plant not far from Respondent's Murcel plant in Glennville. The Murcel plant makes uniforms and the lingerie plant makes lingerie. Murcel has been in operation for about 14 years, whereas the lingerie plant opened in July 1971.[24] According to the Glennville plant manager, Floyd, his plant paid the minimum hourly rate of $1.60 in 1971 and 1972. Floyd testified that during the union campaign at Murcel in 1973 he had several telephone conversations with Gibson. Floyd explained these contacts by saying, "Well, both of us being in the same town [as plant managers] we worked together." During the aforementioned period, Floyd states that he told Gibson that the lingerie company's managers and directors of manufacturing had proposed to the board of directors that the minimum rate be raised to $1.75. The directors placed the new rate of $1.75 in effect the first week in June 1973 after having notified the Glennville plant the first part of May that the increase had been approved.

Gibson testified that around the end of February or early in March 1973 some of his employees and supervisors asked him if he had heard that the neighboring plant was now paying $1.75. Gibson called Floyd. The latter told him that the lingerie directors had received a proposal to raise the rate of $1.75 in a few months and he had told the employees of this prospect. Gibson then spoke to William Kotkes and told him the neighboring plant was going to $1.75 and that Murcel should raise its minimum rate in order to compete for labor. Kotkes agreed but, Gibson states, Respondent's counsel advised that nothing be done at that time.

After the election, Respondent's employees were informed, on May 3, 1973, that effective May 4 their minimum hourly rate was raised from $1.60 to $1.70. Respondent's base rate at the time was $1.89.[25]

Gibson testified that the minimum rate was raised in order that the plant be able to compete with the lingerie plant for labor in the surrounding geographical area. Gibson stated that the labor supply is tight in the Glennville area.[26]

Based on Floyd's testimony that there was no great influx of employees to his plant from Murcel, the General Counsel and the Union argue that Respondent's asserted concern about competing for labor is not borne out. Floyd testified that there were always some people who came from Murcel to his plant but there had been no great influx in February–April 1973 or in prior years. Floyd indicated that the movement of employees from one plant to another insofar as Murcel and the lingerie plant were concerned was no great problem and that the two companies were not in cutthroat competition for labor. He testified there was "not a great influx, no. We always have some but we [the two companies] have a working agreement." It is also a fact that the lingerie plant did not receive approval or authorization from its own directors to increase its minimum hourly rate until May 1973, and did not place the new rate in effect until the first of June. Even if we prescind from the "working agreement" between the plants as testified to by Floyd, Respondent does not appear to have been under compulsion to place a 10-cent increase in effect

[23] Joiner did not testify.

[24] The lingerie company had three other plants elsewhere.

[25] The base rate is what an average worker, performing at average speed, should make per hour while performing a particular function over a period of time. Such earnings are known as making production; i.e., the employee is performing at the standard or norm of the plant. An employee who does not make production is paid the minimum hourly rate. Since its inception, Respondent's plant has paid, as its minimum hourly rate, the rate established by the Federal Government. In 1972 and 1973 that rate was $1.60 and that is what Respondent paid until it placed a 10-cent raise in effect in May 1973.

[26] Floyd had testified that his Company had decided to raise the minimum rate because it felt that "we were going to have to do something about the minimum wage in order to keep people working"; i.e., to attract or keep people in the labor market. It is, of course, apparent that a minimum of $1.60 per hour would yield an employee $64 for 40 hours before tax and other deductions; $1.70 yields $68 for 40 hours.

almost a month before the lingerie plant increased its rate. Moreover, when the new rates at both plants were in operation, Respondent's rate was 5 cents below its alleged rival's rate and Respondent had known that the lingerie rate was approved to be $1.75 at the time Respondent's rate was raised to $1.70. Respondent's assertion that its raise in its rate was solely based on considerations of competition is therefore not too convincing. Before the rates of the two plants were increased, the rates of both plants were the same. After Respondent raised its rate (assertedly to be competitive) and the lingerie plant raised its rate, Respondent was presumably at a competitive disadvantage notwithstanding that it justifies its raise solely on the basis that it wished to be competitive in securing labor. The evidence persuades me that Respondent increased its hourly minimum rate above the required Federal minimum wage for the first time in 14 years, and while a question of representation was still pending by reason of the Union's objections to the election, in order to insure that its employees would not support the Union and would not support the Union in any possible rerun or future election. Such conduct is in violation of Section 8(a)(1) of the Act.

The record does also reflect that the increase in the minimum hourly rate on May 3, 1973, was not the only type of pay increase or promised increase that was announced on May 3.

When Gibson announced the 10-cent increase in the hourly minimum on May 3, he also announced that when an employee was transferred from one job to another at the Company's convenience, the employee would receive her average hourly pay that she was receiving prior to the transfer. Previously, if an employee was moved from her regular job to a new job to which she was unaccustomed, she would receive what she earned at the new job and this would generally be lower than her former earnings.

Also, on May 3, 1973, according to Gibson, when he told the employees of the 10-cent increase in the hourly minimum, he further informed them that at that time he could not raise the base rate since it had not been "costed" into the garments on hand. However, Gibson did assure the employees on this same occasion that "no later than January 1, 1974, the base rate would go to a minimum of $2.00."

From the record it is clear that an upward change in the base rate or a promise of an upward change in the base rate are very important events in a garment plant such as Respondent's. I also consider the announcement on the same day, May 3, that employees would be paid their former average rate when moved to a different job at the Company's convenience as an important economic benefit. These beneficial changes were announced after the election but also after the Union had filed and served timely objections to the election. While the objections were pending there was still a pending question of representation and a possibility of the objections being sustained in whole or in part and a new election being held. Respondent's announcement on May 3 of the aforementioned beneficial economic changes was, I believe, calculated to further insure the undermining of any union strength among the employees and the success of the Company in any possible future election with the Union. Such conduct is in violation of Section 8(a)(1) of the Act.

After the election on April 12, 1973, in which the Union was defeated, Gibson discussed with William and Fred Kotkes the idea of providing a free lunch for the employees. All agreed that it was a good idea. Gibson testified that the objective of the free lunch was to promote harmony among the employees who had been divided over the issue in the election; i.e., whether to have a union in the plant or not to have a union.

Accordingly, without explication to the employees of the purpose of the free lunch, a free lunch was provided for all employees in the plant cafeteria on April 13. The only prior occasions on which the Company had thus provided a free lunch was around Christmas and apparently around Thanksgiving 1972, when President J. Murray Kotkes, on his way to Miami Beach, had stopped at the plant. Such prior occasions can be characterized as occasions of joy, celebration, and/or honorific in the case of the senior Kotkes. In context, even the last-mentioned occasion can be characterized as a happy occasion or celebration.

The complaint alleges that the free lunch on the day after the election was given by Respondent as an award to the employees for voting against the Union.

The free lunch was not preplanned by Respondent prior to the election or prior to the time when the election was completed. It therefore cannot be said that a free lunch was planned and would have been given irrespective of the election result. Indeed, in view of the fact that the evidence clearly shows that Respondent was opposed to having the Union in its plant and made its opposition to the Union known to its employees in the weeks prior to the election, it is highly unlikely that Respondent would have given a free lunch to its employees if the Union had won the election. In the light of such factors, we are persuaded that the free lunch was a reward to the employees and a gesture of gratitude and of thanks by Respondent to its employees for having voted against the Union. We also believe that in the context of Respondent's publicized opposition to the Union and the defeat of the Union in the election, the employees would interpret the free lunch as it was intended; namely, as an award and a token of Respondent's thanks for the defeat of the Union and an indication of future employer benevolence to the employees under similar circumstances of rejecting a union and remaining nonunion. Occurring on the day after the election, the free lunch was within the permissible period for the filing of objections to the election,[27] a fact of which Respondent would be aware, including the possibility of a second election as the result of potentially valid objections. I find that in the circumstances described the giving of the free lunch was a violation of Section 8(a)(1) of the Act.[28]

[27] Objections were in fact filed in timely fashion about 5 or 6 days later.

[28] *Hills Brothers Company*, 67 NLRB 1249, 1255 (1946), enfd. 161 F.2d 179 (C.A. 5); *Cedartown Yarn Mills, Inc.*, 84 NLRB 1, fn. 3; *Edro Corp.*, 147 NLRB 1167 (1964), enfd. *sub nom. Amalgamated Clothing Workers of America, AFL-CIO* v. *N.L.R.B.*, 345 F.2d 264, 266 (C.A. 2, 1965); *Topeka Discount, Inc.*, 181 NLRB 17, 18 (1970).

THE REMEDY

Having found that Respondent has violated the Act in certain respects, it will be recommended that Respondent be ordered to cease and desist from such conduct and to take affirmative action appropriate to effectuate the policies of the Act.

In selecting an appropriate remedy in the instant case, it is necessary, in my opinion, to consider particular violations of the Act not only as violations in themselves but as part of a total pattern of conduct directed against the Union by Respondent.

After the Union claimed to represent and did represent a majority of the employees in the unit and demanded recognition from Respondent on February 12, 1973, Respondent had two basic and companion reactions. Reaction 1 was that Respondent was strongly opposed to having the Union in its plant as collective-bargaining agent of the employees; and Respondent was determined to defeat the Union and to prevent its ingress into the plant as the bargaining agent. Reaction 2 was to determine why the Union had been able to secure the support of a substantial number of Respondent's employees and to attain and to claim majority representation. Respondent had no reason to underestimate the Union's support since the Union offered to submit its authorization cards to validate its claim of majority; the Union then filed a petition for an election; and Respondent's extensive campaign against the Union attested to the fact that it viewed the threatened union incursion into its plant very seriously. The first order of business, therefore, from Respondent's standpoint, was the determination of why the Union had been able to secure the support of a substantial number, indeed a majority, of Respondent's employees.

The answer to the foregoing question was not difficult when Respondent reviewed events in retrospect. In the first part of January 1973, a large number of employees had personally complained to the Kotkes brothers about recent cuts in their piece rates and about their belief that the rates were too "tight." The employees, according to William Kotkes, were not assuaged by anything said to them by the Kotkeses on this occasion. The aforementioned piece rates remained unchanged from the time of the early January occasion until almost 2 months later. In the meantime, about a month after the complaint by the employees about the rates, the Union had been called in by the employees and, with active employee participation, a majority of the employees were organized into the Union and the Union made its demand on the Company on February 12, 1973. In retrospect, since the Kotkeses, at the time of the early January employee complaint and thereafter, were also conscious of general unrest in the plant, it was not difficult for the Kotkeses to deduce that there were other conditions of employment that had contributed to employee discontent.[29]

Quite evidently on the sound theory that you cannot beat something with nothing, the Company, beginning on February 13 (if not on February 12, when, after the union demand, Plant Manager Faircloth, about whose rate cuts the employees had complained about approximately 6 weeks previously, ceased to be manager) launched a campaign to convince the employees that the Company could and would correct the causes of employee dissatisfaction, improve conditions of employment, and thereby demonstrate to the employees that the Union was no longer needed.[30]

As soon as the new plant manager, Gibson, arrived at the plant on February 13, Fred Kotkes showed him the telegram from the Union claiming a majority and demanding recognition and said to Gibson, "we've got to do something about this." Similarly, the consultant and engineer, Levine, who had been marshaled to the Murcel plant, was shown a copy of the union petition for election and certification by Kotkes as soon as Levine arrived at Murcel on February 20. Levine then spent "the first several hours in the plant the first day" discussing with the Kotkes and Gibson the situation including "the temperature of the girls [the unrest]" and "what precipitated this whole union activity." Levine and Gibson discussed programs and objectives and "went over the problems that related to the Union."

The Company then began its program and campaign to demonstrate to the employees that the Company could and would remove their dissatisfactions and thereby demonstrate that the employees did not need the Union.

The cuts in the piece rates that had been made and that had remained in effect since the first of January were restored by about the latter part of February. This was done without further timestudies on the rates in question. Thus, the cause of the original cancer of dissatisfaction was excised. Other piece rates were also raised. Although Gibson testified that some rates were raised, and others remained the same, and others were lowered, he was unable to give any percentages in the alleged three categories.

On April 12, shortly before the election on that day, William Kotkes informed an employee that the Company's engineering program on production and rates would continue and the employees "would be making more money." The promise was evidently fulfilled. The employee to whom this was said testified without contravention that "now," at the time of the hearing, she was making more money.

Also, on April 12, before the election, William Kotkes came by the machine of an employee in the plant. The employee was a member of the union organizing committee and was wearing a prominent "Vote yes" (for the Union) button. Kotkes said "Good morning," stood there, and looked at the employee. Kotkes asked the employee her name; then he wrote something on a pad he had taken from his pocket and left.

On April 11, the day before the election, William Kotkes, in a conversation with the leading union activist among the employees and whose prounion role was known to Kotkes, said, *inter alia*, that he could discharge her, but not for working for the Union but for sewing crooked buttons and

[29] On February 8 or 9, Fred Kotkes said that "the plant seemed to be in general unrest . . . ."

[30] Former Chairman Miller of the Board has referred to instances where respondent employers "have reacted to a union organizing campaign by promptly identifying and remedying a source of employee dissatisfaction." *General Stencils, Inc.*, 195 NLRB 1109, 1112 (1972).

buttonholes, a reference to an incident that had occurred a week or more before April 11.

Two weeks before the election an employee's supervisor, after ascertaining the employee's high regard for Plant Manager Gibson as being a "good boss," considerate, and interested in the employees, told the employee that Gibson would leave the plant if the Union came in.

The day after the April 12 election, in which the vote was against the Union, the Company rewarded the employees with a free lunch in the plant cafeteria and thus conveyed to employees that company benevolence was evoked by, and connected with, the employees' rejection of the Union.

On May 3, 1973, after the election, but while objections to the election were pending and the question of representation remained unresolved, the Company continued its program of bestowing benefits and ameliorating conditions at the Company's hand, and without a union, by raising the hourly minimum wage rate for its employees. This was the first time in the 14 years since the plant's inception that the Company had paid more than the hourly minimum rate prescribed by the Federal Government.

Also, in the same context and with the same motivation, the Company, on May 3, announced that no later than January 1, 1974, the base rate of $1.89 "would go to a minimum of $2.00."

A further benefit announced on May 3 was that an employee who was moved from her regular job or style to another job or style at the Company's convenience would still receive the average hourly rate that she had been receiving on her regular job. Previously, an employee who had moved from her regular job would receive only what she was able to earn on the new style or on the new job.

As I view the totality of Respondent's unfair labor practices, I am convinced that the most important aspect thereof was a calculated and effective campaign to eliminate all causes or reasons that had led the employees to organize; to demonstrate to the employees that without the Union they could enjoy all the benefits that a union might obtain.

While the Supreme Court had approved the imposition of a bargaining order in "exceptional" cases where the unfair labor practices were so "outrageous" and "pervasive" that "their coercive effects cannot be eliminated by the application of traditional remedies," the Court has also held that a bargaining order is appropriate "in less extraordinary cases marked by less pervasive practices which nonetheless still have the tendency to undermine majority strength and impede the election process."[31]

> The Board's authority to issue such an order on a lesser showing of employer misconduct is appropriate, we should reemphasize, where there is also a showing that at one point the Union had a majority; in such a case, of course, effectuating ascertainable employee free choice becomes as important a goal as deterring employer misbehavior. . . . If the Board finds that the possibility of erasing the effects of past practices and of ensuring a fair election (or fair rerun) by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order, then such an order should issue . . . .[32]

Viewed in the light of the above standards, the evidence has revealed that Respondent's predominant unfair labor practices and their purpose and effect, which I have described above, began after the union attainment of majority and after the Union's demand on Respondent and continued both before and after the election, and, by their nature, these unfair labor practices have a lingering and continuing effect that make it unlikely that the use of traditional remedies will insure a fair rerun election.

The Board's traditional remedies are orders to restore the status quo insofar as possible. For instance, if an employee has been illegally discharged, the employer is ordered to offer the employee reinstatement to his job and to pay him the wages lost by reason of the discharge. If an employer or a union have illegally refused to meet and bargain, the Board orders the guilty party to meet and bargain. But, in the instant case, because of the nature and type of Respondent's campaign of unfair labor practices, I do not believe that traditional remedies are feasible or appropriate. A restoration of the status quo that existed prior to, and on, February 12, 1973, when the Union had a majority and demanded recognition, would, for instance, involve reducing the piece rates to where they had been cut in early January 1973 and where they had remained until the end of February when they were raised as part of the campaign to defeat the Union. The clock would also have to be turned back regarding other benefits conferred in the area of wages, rates, and working conditions. The Board's traditional remedies, in instances where it has found that wage increases or other benefits have been granted to thwart a union, have not included the rescission of the increased rates or other benefits. As a consequence, the traditional remedy would not eradicate the impact that the employer's actions had and continue to have on the employees.

Accordingly, I find that on and since February 12, 1973, Respondent has refused to bargain with the Union and that the Union, on and since February 12, 1973, has represented a majority of the employees in the appropriate unit, earlier described in this Decision. I also find and conclude that as a result of Respondent's unfair labor practices the possibility of erasing their effects and ensuring a fair election is negligible and slight, and the employees' sentiments, having been expressed on cards, would, on balance, be best protected by a bargaining order.[33]

I shall recommend that Case 10–RC–9502 be severed and remanded to the Regional Director for Region 10, with instructions that the election held on April 12, 1973, be vacated and set aside and the petition in the case be dismissed.[34]

[31] *N.L.R.B.* v. *Gissel Packing Co.*, 395 U.S. 575, 614–615 (1969).

[32] *Gissel, supra.*

[33] *Gissel, supra; N.L.R.B.* v. *Tower Enterprises, d/b/a Tower Records*, 79 LRRM 2736, 67 LC ¶ 12,453 (C.A. 9, 1972), enfg. 182 NLRB 382 (1970); *Texaco, Inc.* v. *N.L.R.B.*, 436 F.2d 520, 524, 525 (C.A. 7, 1971), enfg. 178 NLRB 434 (1969); *N.L.R.B.* v. *Easton Packing Company*, 437 F.2d 811, 814 (C.A. 3, 1971).

[34] Further consideration of the objections to the election is unnecessary. Moreover, since the objections consolidated with the unfair labor practices

(Continued)

ORDER[35]

The Respondent Murcel Manufacturing Corp., Glennville, Georgia, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to recognize and bargain with the International Ladies' Garment Workers' Union, AFL–CIO, as the exclusive representative of its employees in the appropriate unit.

(b) Promising and/or granting benefits to its employees unilaterally in the form of increased piece rates, wage rates, benefits, and improved conditions of employment, for the purpose of defeating and undermining the Union.

(c) Interfering with the exercise by employees of their rights under Section 7 of the Act by asking employees, who display prounion insignia, what their names are, and by writing in a pad or notebook immediately thereafter and in the presence of the questioned employees.

(d) Threatening employees with a detrimental change in working conditions if the Union was successful in coming into the plant.

(e) Threatening employees with the possibility of discharge because of union activity.

(f) In any other manner interfering with, restraining, or coercing its employees in the exercise of their rights under Section 7 of the Act.

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

(a) Upon request, bargain collectively with International Ladies' Garment Workers' Union, AFL–CIO, as the exclusive representative of all employees in the unit described above, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its Glennville, Georgia, plant copies of the attached notice marked "Appendix."[36] Copies of said notice on forms provided by the Regional Director for Region 10, after being signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by other material.

(c) Notify the Regional Director, for Region 10, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

IT IS FURTHER RECOMMENDED that allegations of the complaints not found to have been sustained by a preponderance of the evidence be dismissed.

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were coextensive with corresponding complaint allegations, my findings regarding the complaint allegations would be equally applicable to corresponding objections.

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

[36] In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."