306 NLRB No. 17 (N.L.R.B.), 306 NLRB 100, 140 L.R.R.M. (BNA) 1073, 1991-92 NLRB Dec. P 17074, 1992 WL 14561

NATIONAL LABOR RELATIONS BOARD (N.L.R.B.)

Hoffman Plastic Compounds, Inc.
And
Casimiro Arauz

Case 21-CA-26630
January 22, 1992

DECISION AND ORDER

**1 BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND OVIATT

On February 28, 1991, Administrative Law Judge Gordon J. Myatt issued the attached decision. The Respondent and the General Counsel filed exceptions and supporting briefs, and the Respondent filed an answering brief. On June 6, 1991, the Board remanded the proceeding to the judge for the purpose of preparing and issuing a supplemental decision setting forth his resolution on a specified credibility issue and containing findings of fact and conclusions of law. On September 10, 1991, the judge issued the attached supplemental decision. The Respondent filed exceptions and a supporting brief.

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

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

We agree with the judge that the Respondent has shown that the layoff of nine employees on January 31, 1989, was for economic reasons and would have occurred regardless of the union organizing activity. We also agree with the judge that the Respondent, in order to rid itself of known union supporters, discriminatorily selected union adherents for layoff. Contrary to the judge, however, we find that Manuel V. Osuna would have been laid off regardless of his union activity. The Respondent's layoff notice to employees stated that selection was based on seniority and job classification. Osuna was hired August 11, 1988, and had the ninth least seniority in the plant and the eighth least among the classifications chosen for layoff. Having found that the layoff of nine employees was for legitimate economic reasons, we conclude that Osuna would have been laid off even in the absence of his union activities because of his lack of seniority. The other four union supporters had sufficient seniority that they would have been retained absent their discriminatory selection for layoff. Accordingly, we reverse the judge's finding that Osuna was unlawfully laid off, but we agree with the judge that the layoffs of Casimiro Arauz, Jose Castro, Moises Gonzalez, and Mauricio Mejia violated Section 8(a)(3) and (1) of the Act.[2]

AMENDED CONCLUSIONS OF LAW

Substitute the following for Conclusions of Law 3 and 4 of the judge's decision.

"3. By unlawfully interrogating employees Casimiro Arauz and Mauricio Mejia concerning their union activities and sympathies, Respondent has violated Section 8(a)(1) of the Act.

"4. By laying off Casimiro Arauz, Jose Castro, Moises Gonzalez, and Mauricio Mejia on January 31, 1989, because the employees were engaged in activities on behalf of the Union, Respondent has violated Section 8(a)(3) and (1) of the Act."

ORDER

**2 The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Hoffman Plastic Compounds, Inc., Paramount, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(a).

"(a) Offer Casimiro Arauz, Jose Castro, and Moises Gonzalez immediate and full reinstatement to their former jobs, or if those positions no longer exist, to substantially equivalent jobs without loss of their seniority or other rights and privileges previously enjoyed."

2. Substitute the attached notice for that of the administrative law judge.

***101 APPENDIX**

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

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

Section 7 of the Act gives employees these rights.
To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

****3** To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT unlawfully interrogate any of our employees concerning their activities on behalf of a union.

WE WILL NOT lay off employees because they engage in activities in support of a union.

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

WE WILL offer Casimiro Arauz, Moises Gonzalez, and Jose Castro immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make whole the above employees and Mauricio Mejia for any loss of earnings and other benefits they may have suffered from our discrimination against them in the manner set forth in the remedy section of the decision.

WE WILL remove from our files, all reference to the unlawful layoff of all of the above employees, on January 31, 1989, and WE WILL notify them in writing that this has been done and that the layoffs will not be used against them in any way.
HOFFMAN PLASTIC COMPOUNDS, INC.

Paul J. Fisch, Esq., for the General Counsel.
David A. Maddux, Esq. and *Ryan McCortney, Esq. (Sheppard, Mullin, Richter & Hampton)*, of Los Angeles, California, for the Respondent.

DECISION

STATEMENT OF THE CASE

GORDON J. MYATT, Administrative Law Judge.

On a charge filed by Casimiro Arauz, an individual, against Hoffman Plastics Compounds, Inc. (Respondent), the Regional Director for Region 21 issued a complaint and notice of hearing on August 22, 1989.[1] Specifically, the complaint alleges that Respondent unlawfully laid off Arauz and eight other named employees[2] on January 31, and refuses to reinstate them, because the employees engaged in activities in support of a union and to discourage such activities. Further, the complaint alleges that Respondent, acting through alleged supervisors, unlawfully interrogated employees concerning their union activities. The complaint alleges the above conduct violates Section 8(a)(1) and (3) of the National Labor Relations Act (the Act), 29 U.S.C. § 151 et seq. Respondent filed an answer in which it admitted certain allegations of the complaint, denied others, and specifically denied committing any unfair labor practices.

A hearing was held on this matter on April 24 and 25, 1990, in Los Angeles, California. All parties were represented by counsel and afforded full opportunity to examine and cross-examine witnesses and to present material and relevant evidence on the issues. Briefs were submitted by counsel for the General Counsel and the Respondent.

On the entire record in this matter, including my observation of the demeanor of the witnesses, and on consideration of the briefs, I make the following

FINDINGS OF FACT

I. JURISDICTION

****4** The Respondent is a California corporation engaged in the business of formulating and manufacturing polyvinylchloride (PVC) pellets for use by customers in producing materials for pharmaceutical, construction, and household purposes. Respondent maintains its office and place of business in Paramount, California. The pleadings admit that Respondent, in the course of its business operations, annually purchases goods and products valued in excess of $50,000 directly from suppliers located outside the State of California. On the basis of the above, I find Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

United Rubber, Cork, Linoleum and Plastic Workers of America, AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background Facts*

Respondent formulates its compounds and manufactures its products according to the specific requirements of orders received from customers rather than producing generally for the marketplace. The particular formula for each order is developed by Respondent's laboratory employees and then sent to the production department to be manufactured and shipped. Respondent's production and shipping operation consists of employees classified as compounders, who operate ***102** blenders which mix and "cook" the particular formulas; extruder operators, who operate machines from which the mixture is extruded into long strands and then chopped into pellets for bagging and shipment; and the shipping and warehouse employees, who store product and ship it to the customer. Respondent's workweek runs from Monday to Sunday and the employees are paid each Friday for the work performed the prior week.

B. *The Union's Organizing Effort*

The Union began its attempt to organize Respondent's employees shortly before Christmas in 1988. Dionisio Gonzalez (D. Gonzalez), an International representative for the Union, testified he came to facility almost every other day and spoke to employees. D. Gonzalez stated he wore a blue jacket which had the Union's name emblazoned on it. The unrefuted testimony indicates that D. Gonzalez was assisted by several of Respondent's employees in the effort to get employee signatures on union authorization cards. He gave authorizations cards for this purpose to Casimiro Arauz (Arauz), Moises Gonzalez (M. Gonzalez), Mauricio Mejia (Mejia), and Manuel Osuna (Osuna). D. Gonzalez further testified he noticed several days before the Union filed its petition to represent the employees that respondent had a "Help Wanted" notice placed in the window of its front office, which faced the street where he customarily stood when at the facility.[3]

Arauz testified that when he first received the authorization cards from the union representative, he spoke to Javier Gonzalez (J. Gonzalez) to determine whether it was alright to pass out the cards in the plant. Arauz stated the J. Gonzalez was his friend and the supervisor of the maintenance department. According to Arauz, he spoke to J. Gonzalez in the latter's office while they were both on a break. He testified that he told J. Gonzalez what he intended to do and asked if it were all right. Gonzalez replied that Arauz could get into trouble if management found out about his passing out union cards. Arauz then replied that Gonzalez' brother (Moises) was also passing out cards. J. Gonzalez said he would speak to his brother because he also could get fired.[4]

****5** Arauz further testified that a week or two before he was laid off on January 31, 1989, Antonio Avila, who Arauz said was his supervisor in the warehouse and shipping department, called him into the chief engineer's office and asked if it were true that Arauz was involved in union activity. When Arauz relied that it was, Avila asked, "Well, why you didn't tell me about this? You don't trust me?" Arauz responded by saying that he was not supposed to tell any supervisors about his union activities.[5]

Moises Gonzalez testified that while he passed out cards to other employees, he was careful not to let anyone from management observe him. He stated, however, that he informed his brother, Javier, that the employees were trying to get a union in the plant. Moises told Javier the names of the employees helping the Union, including himself. Javier told Moises that he should not be involved in such activity because it could be damaging to him.

Mauricio Mejia testified that he also gave an authorization card to an employee to sign for the Union. Mejia stated that approximately a week before the January layoff, his supervisor, Ramon Rosas, came over to him and asked if Mejia knew anything about the Union. Mejia replied that he did not and Rosas did not question him any further about the matter.

C. *The Layoffs on January 31, 1989*

On January 30, Ronald Hoffman, president and owner of Respondent, issued a notice which listed nine employees who would be laid off, effective 4 p.m. the following day. The notice indicated the layoff was caused by a loss of business over the past several months and that the condition had not improved in January. It also indicated that the selection of the employees to be laid off was based on their job and seniority. All the employees who passed out cards for the Union were included on the list. (G.C. Exh. 3.)

Arauz testified that at the time of the layoff he had more seniority in the shipping department than his coworker, Orsenio Gonzalez. While he acknowledged that O. Gonzalez had been employed by Respondent longer than he, Arauz stated he had been working in the shipping department longer than Gonzalez. Arauz also stated he had experience as a compounder and that he had operated the extruder machines.[6] According to Arauz, when Respondent had a similar layoff due to a decline in business in 1986, he was not laid off. Arauz also testified that approximately a week before the layoff, he saw a "Help Wanted" sign displayed in Respondent's front office window and observed some individuals appearing to be filling out employment applications in the office and in the shipping department. Arauz stated the sign remained in the office window until a few days prior to the layoff.

M. Gonzalez was hired by Respondent as a sweeper in 1983 and became an extruder machine operator approximately a year later. He was not among the employees laid off in 1986 when business declined that year. According to M. Gonzalez, at the time he was laid off there were machine operators with less seniority than he who were retained. He stated he also saw the "Help Wanted" sign in the office window a week before the layoff. Although he could not read English, Gonzalez testified he was aware that the sign was placed in the office window whenever Respondent was seeking to hire additional employees.

****6 *103** Mejia began his employment with Respondent in July 1987 as an extruder machine operator. Mejia testified that after receiving the layoff notice, he spoke to his supervisor, Rosas, and asked why he was being laid off. According to Mejia's unrefuted testimony, Rosas replied that he told Mejia "the Union was cabron." Mejia explained that "cabron" was an expression in Spanish which meant "bad" or "something not good." Mejia then protested that he had more seniority than a coworker (Carlos Osorio) being retained and Rosas repeated that the Union was "cabron."

Respondent's owner and president, Ronald Hoffman, testified that the layoff in January was due solely to a decrease in orders received from customers in November and December of the prior year and in the month of January of the current year. While Hoffman acknowledged that Respondent kept a "Help Wanted" sign in the front office to be placed in the window when Respondent sought additional employees, he denied that he instructed any of his staff to display the sign in the month of January.[7] Hoffman stated Respondent did not hire any new production employees until March 1989. Hoffman also stated that he was not aware of any union activity at the plant, either by the union organizer or by the employees, until he received the

notice (dated February 2, 1989) of the filing of the representation petition from the Board's Regional Office. (R. Exh. 8.)

In support of his contention that the layoff was due to a decline in business, Hoffman stated his accountant provided him with financial statements showing that Respondent was operating at a loss during the months of November and December 1988.[8] (See R. Exh. 1.) According to Hoffman, when he received the November financial reports in mid-December, he decided that he would not take any action regarding the employees until after the holidays. He also decided that if business did not improve in January, however, there would have to be a layoff.

Hoffman further testified that the number of pounds of product shipped the first week in January declined dramatically and the orders received the second week (to be reflected in the third week's production) showed a decline. It was then, according to Hoffman, that he made the decision to lay off production employees but he did not determine when the layoff would actually occur.[9]

Hoffman stated that during the third week in January, he decided he would have to shut down two of the extruder lines and select the employees to be laid off. The machines to be shut down were older and only capable of producing 400 pounds of product per hour as opposed to 1500-2000 pounds per hour produced on the newer equipment. In addition, the older machines consumed as much electrical energy as the newer ones while producing far less.

Hoffman met with his assistant plant manager, Robert Wilkerson, during the week before the layoff to determine which of the employees would be selected.[10] According to the testimony of both, the factors they considered were seniority, number of warning notices, and the job category and skills.[11] They denied knowledge of any union activity taking place at the plant or of any employee involvement in such activity. Wilkerson testified that it was not until after the laid-off employees received the layoff notice that the Union was first mentioned to him. According to Wilkerson, the employees all came to his office to protest the layoff and Arauz acted as their spokesman. During the conversation Arauz stated the employees were let go because of the Union. When Wilkerson asked, "What Union?", he stated Arauz threw up his hands and walked out.

****7** According to the testimony of Hoffman, prior to the layoff, Respondent operated nine production lines using seven extruder operators and three compounders on each shift. Each compounder operated two blenders to mix the formulae. The plant ran 5 days a week and work performed on Saturdays and Sundays was overtime. Therefore, when he decided to shut the two slower extruder lines, it meant that Respondent had to lay off two extruder operators and one compounder for each shift. He also determined that one warehouse and shipping employee had to be laid off; making a total of 10 employees. The testimony indicates that one compounder quit before the layoff was announced, thus reducing the number of employees to be selected to nine.

Concerning the application of the layoff criterion to the employees selected, Hoffman and Wilkerson gave the following reasons:

Casimiro Arauz: According to Hoffman, Arauz was selected because the employee had less seniority with Respondent than the other employee (Sergio Gonzalez) working in the shipping department. Hoffman acknowledged, however, that Arauz had been working in the shipping department longer than Gonzalez. He stated that Arauz also had more warning notices during his employment with Respondent than Gonzalez.[12] Wilkerson testified that he and Hoffman did not give any consideration to the fact that Arauz had experience as a compounder or had operated extruders.

Mauricio Mejia: The record indicates that Mejia began his employment with Respondent in July 1987. (G.C. Exh. 4.) Since that time, Mejia had accumulated six warnings. (R. Exh. 6.) Hoffman testified Mejia was selected because he was an employee with midrange seniority and had "many warning notices."[13]

Moises Gonzalez: M. Gonzalez was hired by Respondent in September 1983. His overall accumulation of warnings at the time of the layoff totaled seven. Of this number, six were warnings for failure to punch out on his timecard. (R. Exh. 7.) Hoffman testified that sometime before Thanksgiving ***104** 1988, he was informed that on a number of occasions M. Gonzalez would clock in and then leave the premises to go and perform personal work for Respondent's then plant manager; especially on the weekends.[14] Hoffman stated he then checked M. Gonzalez' warning notices and determined that the information about his activity was accurate because there were so many for failure to punch out on the timeclock.[15] According to Hoffman, when the layoff selection was made, he decided Gonzalez was an undesirable employee and included him on the list.

Manuel Osuna: Hoffman testified that Osuna, hired in August 1988, was selected because he did not have that much seniority as a compounder and was merely a trainee on the extruders.[16] He also stated that Osuna made it clear to his foreman, Rosas,

and to Wilkerson that he umpired little league baseball games on the weekends and was not available for weekend work. According to Hoffman, with the elimination of the two slower extruders lines, he intended to operate the faster machines around the clock 7 days a week. This would require overtime work on the weekends.[17] Since Osuna's weekend activities meant the employee would not be available to work, Hoffman said he considered this factor also in selecting the employee for layoff.

**8 *Jose Castro*: Hoffman stated Castro, hired May 1988, had little seniority and no versatility on the extruder machines. While Respondent's records list Castro as a compounder and extruder operator, Hoffman asserted that the employee was only a trainee on the extruders.

Jose Avila: Avila was hired by Respondent as an extruder operator in September 1988. Hoffman testified the employee was selected to be laid off solely on the basis of his low seniority.

Cecilio Camacho-Farrera: Respondent's records show this employee was hired as compounder on January 7, 1989. Hoffman stated he was selected for layoff because he had the least seniority.

Juan Rodriguez Hernandez: The record shows that Hernandez was hired as an extruder operator on January 16, 1989. As in the case of Camacho-Farrera, this employee was laid off because he had no seniority.

Felipe Venegas: Venegas was hired as an extruder operator by Respondent on December 30, 1988. He too was selected for layoff on January 31, 1989, because he lacked seniority.

D. *The Recall of the Laid-Off Employees*

Hoffman testified that beginning the first week in February, business picked up considerably compared to the prior 3 months. According to Hoffman, he decided to recall all the laid-off employees with the exception of Osuna. Rosas, Osuna's foreman, did not want the employee back and Hoffman stated he followed his foreman's recommendation. In addition, Respondent was now operating 7 days a week with the faster machines,[18] and Osuna's activities as a little league umpire would make him unavailable for weekend work.

Hoffman had letters sent to the laid-off employees on March 10, instructing them to contact Wilkerson about returning to work.[19] Wilkerson was directed to make telephonic contact with those employees who did not respond to the letter. Hoffman further testified he sent the recall letters even though he knew, from the Board hearing on the Union's petition, that some of the laid-off employees were supporters of the Union and would be eligible to vote in an election on the representation matter.

Wilkerson testified that the return receipt for the recall letter sent to Arauz was returned unsigned to Respondent. He stated, however, that Arauz telephoned him on March 13 and asked what the letter was about. Wilkerson said he told Arauz the only position he had to offer the employee was that of a compounder and Arauz refused it. Wilkerson further testified that Arauz called again, several days later. He stated he told Arauz the Respondent only had a compounder's position available on the graveyard shift and Arauz refused it. According to Wilkerson, Arauz said he would not accept the position "because the other employees might laugh at him."

Contrary to the testimony of Wilkerson, Arauz stated he never received a copy of the recall letter in March, nor did he call Wilkerson in that month about returning to work. Arauz testified the only call he made to Wilkerson about coming back to work was during the second week in June. Arauz said he asked if Respondent had "[his] job" (in the shipping department) and Wilkerson offered him a job as a compounder. Arauz stated he then told Wilkerson, "well I don't need compounder [sic] I need my job." Arauz further testified he did not think he made the statement to Wilkerson that he was refusing the compounder's job because the other employees would laugh at him.

**9 Moises Gonzalez came to Wilkerson's office apparently in response to the recall letter. Wilkerson stated that because of the language difficulty, he had Rosas there as an interpreter. Wilkerson offered Gonzalez a job on the graveyard shift and said the employee agreed to work that weekend beginning Saturday. However, Gonzalez never showed up for work nor did he call in. According to Wilkerson, there has been no contact with Gonzalez since that time.

*105 M. Gonzalez admitted he spoke with Wilkerson, through Rosas, and that he agreed to begin work that weekend. He stated, however, that his son became ill with asthma and he could not come to work as scheduled. Gonzalez testified he called the office the following Monday to see if he could come to work. He stated that Wilkerson told him to report that evening but later called and told him not to show up.[20]

The Supervisory Status of the Foremen

At the hearing on the petition in the representation case and in the instant hearing, Respondent asserted that the individuals occupying the positions classified as "foreman" were not statutory supervisors within the meaning of that term under the Act. Portions of the record in the representation case, where the parties developed testimony and introduced evidence concerning the duties of the individuals classified as foreman, were also introduced into evidence in this case as Joint Exhibit 1(a)-(d). In the Decision and Direction of Election issued in the representation case, the Regional Director held that the shift, maintenance, and the warehouse and shipping foremen were statutory supervisors within the meaning of Section 2(11) of the Act. (G.C. Exh. 2.)[21] Respondent contends the Regional Director was in error and the foremen are no more than leadmen who do not possess the necessary indicia of supervisory authority required by the Act.

Concluding Findings

The threshold issue to be resolved here is whether the foremen are statutory supervisors within the meaning of that term under the Act. Resolution of this issue is critical to a determination of the more fundamental question of whether knowledge of the employees' union activities can be imputed to Respondent. The unrefuted testimony of Arauz, M. Gonzalez, and Mejia clearly establishes that through their individual conversations with Avila, J. Gonzalez, and Rosas, these foremen either learned of or had their prior knowledge confirmed regarding the union activity of the employees.[22]

The joint exhibit setting forth the evidence and testimony relating to the duties and responsibilities of these individuals clearly supports the Regional Director's finding that they were in fact statutory supervisors. As the Regional Director noted, among other things, the shift foremen oversee the production on their shifts and are in charge of a crew of six or seven compounders and extruder operators. While they are hourly paid, punch a timeclock, and receive the same benefits as the production employees, their wage rates are higher. Because they rotate shifts with their crews every 2 months, during the evening and night shifts they are the only supervisory employees present to oversee the production. In addition, the shift foremen exercise their own independent discretion in counseling production employees concerning their conduct or job performance. Although it is Respondent's policy that the shift foremen get Wilkerson's prior approval and signature on written warnings issued to employees, the record discloses that shift foreman have issued such warnings without prior authorization or a signature from higher level management. Finally, it is clear from the record in the representation case and the testimony in the instant case that the shift foremen effectively recommended employees to be hired and, in the case of Osuna, which laid-off employees should be recalled. This is demonstrated by Hoffman's own testimony that he would not go against the wishes of his shift foreman (Rosas) when the latter made known that he did not want Osuna recalled.

****10** Similarly, the maintenance foreman, J. Gonzalez, receives a higher hourly wage rate than the two employees working under his direction. He also exercises his independent discretion as to when employees working for him require counseling and when to issue written warnings. As the Regional Director noted, Gonzalez independently determines what repair and maintenance work must be accomplished, in light of the production demands, and draws up the work schedules for the two employees in his department. In addition, he grants time off to the employees in his department without seeking prior approval by higher level management.

Finally the warehouse and shipping foreman, Avila, exercises the same responsibilities as the maintenance foreman in directing the work in his department. He too prepares schedules for the assignment of work to warehouse employees and the delivery drivers without prior consultation with higher management. He reassigns drivers to warehouse duties when there are no deliveries to be made. He can independently authorize time off for the employees in his department and like the other foreman, he can decide when overtime work is required and authorize employees to work it on a voluntary basis. Again like all the foreman, he is paid a higher hourly wage rate than the employees under his direction and has an office and desk available for his use.

Thus, the record fully supports the Regional Director's finding that Respondent's shift, maintenance, and warehouse and shipping foremen are statutory supervisors within the meaning of Section 2(11) of the Act.[23] This being the case, it follows that the knowledge gained by Avila, J. Gonzalez and Rosas, prior to the layoff, concerning the employees union activities can be imputed to the Respondent. *Pinkerton's Inc.*, 295 NLRB 538 (1989).

Having determined that the foremen are statutory supervisors, the next issue to be decided is whether the conversation between Avila and Arauz and that between Rosas and Mejia tended to coerce, interfere with, or restrain the employees in violation of their rights under the Act. On consideration of the totality of the circumstances involved in each of these conversations, *Rossmore House*, 269 NLRB 1176 (1984);[24] *Sunnyvale Medical Clinic*, 277 NLRB 1217 (1985), I find that the

statements made to Arauz and M. Gonzalez by Avila and Rosas, respectively, constitute violations of the Act.

***106** It is evident from the unrefuted testimony of the employees that they sought to keep their union activities concealed from members of management and generally from the foremen. With the exception of Arauz' and Moises Gonzalez' revelations to Javier Gonzalez about the union activity, there is no indication in the record that any of the employees openly advocated their support for the Union. The General Counsel, for reasons best known to him, specifically stated he was not alleging the conversations with J. Gonzalez to be a violation of Section 8(a)(1) of the Act but, rather, the testimony was offered for the limited purpose of establishing knowledge of the union activity on the part of Respondent. Nonetheless, J. Gonzalez' statements to his brother and Arauz are part of the circumstances to be considered under the *Rossmore* doctrine when evaluating the comments of Avila and Rosas.

****11** In considering the totality of the circumstances, I find the questioning of Arauz and M. Gonzalez by the foremen to be coercive and restraining. Neither of the employees had openly displayed support for the Union at the time each was questioned. Each had spoken to Foreman J. Gonzalez and had been told they could get into trouble or be fired for the union activity. Thus, when Avila called Arauz into his office and asked whether the employee was a union activist, his questioning served no useful purpose other than to ferret out information regarding Arauz' support for the Union. Similarly, while Rosas' question to M. Gonzalez was more vague, I find, in light of the employee's prior conversation with J. Gonzalez, that the questioning was no more than an attempt to find out about the employee's sentiments and activities on behalf of the Union. Accordingly, I find, in the totality of the circumstances, that the interrogations of Arauz and M. Gonzalez violated Section 8(a)(1) of the Act. *Great Dane Trailers*, 293 NLRB 384 (1989); *DeCasper Corp.*, 278 NLRB 143 (1986). See also *Timsco Inc. v. NLRB*, 819 F.2d 1173 (D.C. Cir. 1987). Cf. *Jennmar Corp.*, 301 NLRB 623 (1991).

Regarding the layoffs on January 31, the General Counsel's argument seems to be twofold: (1) that the layoff was a pretext to mask Respondent's true motive of ridding itself of the union supporters; and (2) that the selection of the employees to be laid off was unlawful. In support of the first contention, the General Counsel points out that while the Respondent claimed to be considering the need for layoffs in mid-December 1988, the record establishes that two employees were in fact hired in January 1989. These employees were Cecilio Camacho-Farrera (a compounder hired January 7 for the graveyard shift) and Juan M. Rodriguez Hernandez (an extruder operator hired January 16 for the swing shift). (See G.C. Exh. 4.)[25] Further, that Respondent's own records demonstrate that after the lay off, the remaining employees were required to work large amounts of overtime in order to keep up with the production needs. Contrary to the arguments of the General Counsel, I find that the layoff of nine employees on January 31 was for economic reasons and would have occurred regardless of the union organizing activity.

In so finding, I am not unmindful of the fact that Hoffman testified Respondent did not hire any new employees until March and the evidence demonstrates that two production employees were hired on January 7 and 16, respectively. This discrepancy between the testimony of Respondent's principal owner and the Respondent's own records bears not only on the overall veracity of Hoffman but also on the credence to be accorded the claim of economic necessity for the layoff. Nonetheless, I find the record does support Respondent's contention that it was experiencing a slow down in orders during the last 2 months in 1988 and the first weeks in January when the layoff decision was made. Therefore, the objective evidence supplied by the uncontested production and income records of Respondent supports the testimony of Held, Respondent's accountant, and that of Hoffman concerning the need to reduce labor costs. In these circumstances, I do not find the arguments of the General Counsel to be sufficient to overcome Respondent's evidence and testimony demonstrating that the layoff was for economic reasons.

****12** The selection of the four union supporters to be included among the employees to be laid off, however, is another matter. I find the General Counsel has established a prima facie case demonstrating that the layoff of these four employees was for unlawful reasons. First, they were the only employees who were actively involved in the Union's organizing effort. Next, through the conversations of Arauz and M. Gonzalez with Avila and J. Gonzalez, knowledge of the union activity and the identity of the employees involved is imputed to the Respondent. Finally, all four of the union adherents were included in the list of nine employees selected for the layoff, and the selection was made after Respondent acquired knowledge of their union activity. Thus, it is apparent that the General Counsel has established a prima facie case that Respondent acted unlawfully.

Under the Board's doctrine in *Wright Line*,[26] the burden shifts to Respondent to demonstrate that the four employees would have been selected for layoff regardless of their union activity. I find, on the basis of the record here, that the Respondent has failed to persuasively meet this burden.

While both Hoffman and Wilkerson were articulate witnesses who testified concerning the layoff, I find that the record

contains objective evidence on this and other matters which belie their statements or cast doubt on the reliability of their testimony. For example, Hoffman denied that Respondent had a "Help Wanted" sign displayed in its front office window in December 1988 (during the time Respondent was experiencing a decline in business), or that any employees were hired until business increased in March. However, as noted, Respondent's own records establish that two production employees were hired in January—the very month that the layoff decision was finalized.

Similarly, both Hoffman and Wilkerson testified they considered three factors in making their selection of the employees to be laid off; i.e., seniority, job category, and warning notices. However, when the layoff notice was received by the employees, it stated the layoff selection was based solely on two factors: seniority and job classification. The fact that Respondent chose at the time of the hearing to assert the number of warning notices as an additional factor gives rise to the strong inference that it was a means to enable Respondent ***107** to include at least three of the union adherents in the layoff process—Arauz, M. Gonzalez and Mejia.[27] Thus I do not credit the testimony of either Hoffman or Wilkerson in which they state the union activity of the four employees was not the motivating factor in their selection for layoff. In this regard I also note that Osuna's little league activity on the weekends did not become a matter of concern or make him an undesirable employee until after he engaged in union activities.

In sum, I find that Respondent has failed to meet its *Wright Line* burden by persuasively demonstrating by a preponderance of the evidence that it would have laid off the four employees in any event, regardless of their union activities. *Centre Property Management*, 277 NLRB 1376 (1985). Accordingly, I find that Respondent selected the four union adherents to be included in the layoff on January 31 in order to rid itself of those employees it knew to be supporters of the Union. In so doing, Respondent has violated Section 8(a)(3) and (1) of the Act.

CONCLUSIONS OF LAW

****13** 1. Respondent Hoffman Plastics Compound, Inc. is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. United Rubber, Cork, Linoleum and Plastics Workers of America, AFL-CIO is a labor organization within the meaning of Section 2 (5) of the Act.

3. By unlawfully interrogating employees Casimiro Arauz and Moises Gonzalez concerning their union activities and sympathies, Respondent has violated Section 8(a)(1) of the Act.

4. By laying off Casimiro Arauz, Moises Gonzalez, Mauricio Mejia, and Manuel V. Osuna, on January 31, 1989, because the employees were engaged in activities on behalf of the Union, Respondent has violated Section 8(a)(3) and (1) of the Act.

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

THE REMEDY

Having found that Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act, it shall be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. Because I have found that Respondent unlawfully laid off Casimiro Arauz, Moises Gonzalez, Mauricio Mejia, and Manuel V. Osuna on January 31, 1989, it shall be ordered to offer them, with the exception of Mejia, full and immediate reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges.[28] In addition, Respondent shall make them whole, with interest, for any loss of earnings and other benefits they may have suffered as a result of the discrimination against them, less any interim earnings. Backpay shall be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950); see generally *Isis Plumbing Co.*, 130 NLRB 716 (1962). Interest thereon shall be calculated in the manner set forth in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[29]

ORDER

The Respondent, Hoffman Plastics Compounds, Inc., Paramount, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unlawfully interrogating employees about their union activities and sympathies.

(b) Laying off employees because they are supporters of a union or are engaged in activities on behalf of a union.

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

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

(a) Offer Casimiro Arauz, Moises Gonzalez, and Manuel V. Osuna immediate and full reinstatement to their former jobs or, if those positions no longer exist, to substantially equivalent jobs without loss of their seniority or other rights and privileges previously enjoyed.

****14** (b) Make whole, in the manner set forth in the remedy section of this decision, the above-named employees and Mauricio Mejia for any loss of earnings and other benefits they may have suffered as a result of the discrimination against them.

(c) Remove from its files all references to the unlawful selection of the above-named employees for layoff. Further, notify them, in writing, that this has been done and the evidence of this unlawful action will not be used in any manner as a basis for future personnel action against them.

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

(e) Post at its Paramount, California facility copies of the attached notice marked "Appendix."[30] Copies of the notice, ***108** on forms provided by the Regional Director for Region 21, in both Spanish and English, after being signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

SUPPLEMENTAL DECISION

GORDON J. MYATT, Administrative Law Judge.

****15** The initial decision in this case was issued on February 28, 1991. There it was determined that the Respondent discriminatorily selected four employees, who were union supporters, for layoff. On June 6, 1991, the Board issued an Order remanding proceeding for a determination of whether another of the alleged discriminatees (Jose Castro) was or was not discriminatorily selected for layoff by the Respondent.

Pursuant to the remand, and on a further review of the entire record and the initial decision, I make the following

FINDINGS OF FACT

Of the three employee witnesses who testified at the hearing (Casimiro Arauz, Moises Gonzalez, and Mauricio Mejia), only M. Gonzalez mentioned Castro as being one of the employees passing out union authorization cards during the Union's organizing effort in late December 1988 and early January 1989.[1] Having credited the testimony of M. Gonzalez in the initial decision concerning his conversation with his brother, Maintenance Foreman Javier Gonzalez, it follows that Castro was one of the union supporters identified by Moises to Javier. Consequently, on the basis of my finding in the initial decision that the foremen were statutory supervisors, knowledge of Castro's union activities is imputed to the Respondent. Thus, I find that at the time the employees were selected for layoff the Respondent was aware of Castro's union sentiments and activities.

The remaining question here is whether Castro would have been selected for layoff on January 31, 1989, in any event without regard to his union activities? *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). On the basis of the record evidence, I find that he would not have been.

Respondent's records reveal that Castro was hired on May 17, 1988 (G.C. Exh. 4). He was classified as a compounder/operator; which indicates he possessed sufficient skills not only to operate the blenders that "mixed and cooked" the formulas but also to operate the extruder machines. Although Respondent's owner, Hoffman, testified that Castro had no versatility and was only a trainee on the extruder machines, Respondent's records do not place any such limitation on his extruder experience. In addition, while Hoffman testified that Castro had "little seniority," the record further reveals that two other employees, who only possessed compounder skills, had less seniority and were retained. (G.C. Exh. 4: Fernando Fernandez, hired July 8, 1988; Jose Luis Navarrete, hired August 30, 1988).[2] Therefore, Respondent's own records belie Hoffman's testimony and I do not credit him in this regard.

Accordingly, I find that the Respondent has failed to persuasively demonstrate that employee Jose Castro would have been selected for layoff regardless of his involvement in the union activities. I conclude, therefore, that the Respondent discriminatorily selected Castro for layoff on January 31, 1989, in violation of Section 8(a)(3) and (1) of the Act.

CONCLUSIONS OF LAW

****16** 1. By laying off employee Jose Castro on January 31, 1989, because Castro was engaged in activities on behalf of the Union, the Respondent has violated Section 8(a)(3) and (1) of the Act.

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

THE REMEDY

The Respondent shall be ordered to apply all the provisions of the remedy section set forth in the initial decision issued in this matter (relating to the reinstatement and backpay requirements for the four employees found to be unlawfully laid off) to employee Jose Castro.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[3]

ORDER

1. Paragraph 2(a) of the Order issued in the initial decision in this matter shall be amended to include the name of Jose Castro as one of the employees entitled to immediate and fulll reinstatement to his former job or a substantially equivalent position, without loss of seniority or other rights and privileges previously enjoyed.

2. The notice marked "Appendix," issued in the initial decision in the matter, shall be amended to include the name of Jose Castro along with the other employees stated to be entitled to immediate and full reinstatement.

Footnotes

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.
In addressing the allegation that the Respondent through its Supervisors Antonio Avila and Ramon Rosas unlawfully interrogated employees, the judge correctly stated that the issue was whether the conversations between Avila and Arauz and between Rosas and Mejia constituted unlawful interrogation. Thereafter, however, in both his concluding findings and in his conclusions of law, the judge confused Mejia with Moises Gonzalez. We correct this inadvertent error but find that it makes no difference in the result in this case. We also note that there were no exceptions to the judge's finding that two employees were unlawfully interrogated.
In his supplemental decision, the judge found that two employees classified as compounders had less seniority than Jose Castro and were retained. Accepting as true the Respondent's statement that Fernando Fernandez resigned prior to the layoff, we find that it makes no difference in the result in this case. Jose Castro had sufficient seniority, even considering that Fernandez had resigned, that he would not have been laid off but for the Respondent's discrimination against him.

[2] The judge found that Mejia was recalled in March 1989. Thus, it is unnecessary to order that he be reinstated.

[1] All dates herein refer to the year 1989 unless otherwise indicated.

[2] The other employees alleged in the complaint were:Jose M. Avila; Jose Castro; Cecilio Camacho-Farrera; Moises A. Gonzalez; Juan M. Rodriguez Hernandez; Mauricio Mejia; Manuel V. Osuna; and Felipe R. Venegas.

[3] The Union filed its petition on January 30, 1989. The Regional Director held a hearing on the petition and directed an election to be held on July 14, 1989. Respondent filed a request for review of the Decision and Direction of Election with the Board. Prior to action by the Board, however, the Union withdrew its petition on July 13, 1989.

[4] Counsel for the General Counsel stated at the hearing that he was not alleging that the purported statements of J. Gonzalez violated Sec. 8(a)(1) of the Act. Rather, the testimony was offered to establish knowledge on the part of Respondent through an alleged supervisor. The issue of the supervisory status of J. Gonzalez and others is discussed, infra, in this decision.

[5] Arauz' testimony concerning his conversations with J. Gonzalez and Avila is unrefuted in the record. Neither of these individuals testified at the hearing.

[6] Arauz began his employment with Respondent in 1985. He worked as compounder until 1987 when he was assigned to operate a forklift in the warehouse. Other than his testimony that he had experience on extruders, there is no record that Arauz was ever classified as an operator on that type of equipment.

[7] The testimony indicates that Respondent secured its employees by means of the "Help Wanted" sign or by "word of mouth."

[8] Respondent's accountant came to the plant the third week of each month to review the records and make the reports for the prior month's operation.

[9] Summaries of Respondent's production and sales records were introduced into evidence as R. Exhs. 2 and 3.

[10] Wilkerson was in charge of quality control, the laboratory, maintenance, and personnel.

[11] The record establishes that Respondent had a previous layoff of production employees in November 1986 due to a decline in business. According to Hoffman, he used the same criteria to select the employees to be laid off at that time.

[12] The record shows that S. Gonzalez was hired in August 1983 and Arauz was hired in March 1985. G.C. Exh. 4. According to Hoffman's testimony, he considered all warning notices issued to employees since the inception of their employment. The record further discloses that Arauz had accumulated 15 warnings since the beginning of his employment and Gonzalez had accumulated 7 warnings. R. Exhs. 4 and 5.

[13] At the time of instant hearing, Mejia had been recalled by Respondent and was a shift foreman.

[14] Respondent's former plant manager was terminated by Respondent sometime in May 1988.

[15] Hoffman did not question M. Gonzalez about working for Etheridge while on the timeclock nor did he place any notation to this effect in the employee's file. At the hearing, M. Gonzalez admitted working for Etheridge while on the clock, but stated he did so only on one occasion and the arrangements were made by his brother, Javier. Moises further stated he performed this work for Etheridge because he feared he would lose his job if he refused.

[16] The testimony indicates that Osuna did not have any written warning notices.

[17] Although this change in the production operation meant more overtime pay for employees, Hoffman asserted that Respondent's overall labor costs were less because the faster machines were constantly turning out product. It also avoided the loss of 80 pounds of product per machine when the equipment was shut down and cleaned on the weekends, as well as the loss of 4 hours of production time needed to get the machines heated up for operation. Respondent placed into evidence a summary purporting to show that its labor costs did in fact decrease after this change in the method of its operation. See R. Exh. 3.

[18] According to the testimony, Respondent did not reactivate the two slower extruder lines which were taken out of production at the time of the layoff. Hoffman stated he was seeking to replace with faster machines which were more economical.

[19] See R. Exh. 14(a) for a copy of the recall letter sent to Arauz. Similar letters were sent to all the other employees except Osuna.

[20] Gonzalez never returned to his employment with Respondent and at the time of the hearing was employed elsewhere.

[21] As noted, Respondent requested Board review of the Regional Director's decision in this regard, but the Union withdrew its petition before the Board acted on the request.

[22] My findings in this regard are not only based on the fact that the testimony of the three employees is unrefuted in the record but also on the fact that I credit them concerning their conversations with the foremen involved.

[23] See the cases cited in the Regional Director's Decision and Direction of Election. G.C. Exh. 2.

[24] Affd. sub nom. *Hotel & Restaurant Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985).

[25] Each of these employees was among those laid off on January 31.

[26] *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

[27] I note at this point that while Hoffman asserted he learned that M. Gonzalez had been performing work for Respondent's former assistant plant manager while on the clock, the testimony shows that Hoffman acquired this information in late September or October 1988 but took no action against the employee until after his involvement in the union activity.

[28] Although the record indicates Respondent sent recall letters to all of the laid-off employees except Osuna, I do not deem it necessary here to determine the effect of the recall offers on Respondent's obligation under the Act. This is a matter for the compliance stage of this proceeding. Regarding Mejia, however, it is evident that this employee returned to work in March in response to the recall letter. Therefore, Respondent shall be required to make him whole for the period he was unlawfully laid off.

[29] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

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

1 The fact that Arauz and Mejia failed to mention Castro as one of the employees involved in the union activity and M. Gonzalez recalled that Castro was involved does not present a conflict, nor does it undermine the integrity of M. Gonzalez' recollection.

2 I also deem it significant that Respondent made no claim that Castro was one of the employees who received numerous warnings during the course of his employment.

3 If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

306 NLRB No. 17 (N.L.R.B.), 306 NLRB 100, 140 L.R.R.M. (BNA) 1073, 1991-92 NLRB Dec. P 17074, 1992 WL 14561