Kathleen's Bakeshop, LLC *and* Workers & Grain Millers International Union, Local 3, AFL–CIO. Cases 29–CA–22254, 29–CA–22291, 29–CA–22321, 29–CA–22837, 29–CA–22855, 29–CA–22923, and 29–CA–22964

August 1, 2002

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN AND BARTLETT

On August 9, 2000, Administrative Law Judge Eleanor MacDonald issued the attached decision. The Respondent filed exceptions, an answering brief, and a reply brief. The General Counsel filed limited cross-exceptions, and an answering brief.

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

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

We adopt the judge's findings and conclusions except with regard to the following: (1) that the Respondent violated Section 8(a)(1) of the Act by creating the impression that Panagiotopoulos' union activities were under surveillance; and, (2) that the Respondent violated Section 8(a)(5) of the Act by failing to provide information requested by the Union concerning the Respondent's last date of operation in Southampton.

1. We reverse the judge's finding that the Respondent, by Night Manager Clark, created the impression that Panagiotopoulos' union activities were under surveillance.

On August 27, 2 weeks after the Union was certified, Panagiotopoulos and employee Karl Stork went to a local pub after work to have a beer. Clark entered the same pub and sat down next to Panagiotopoulos. After Panagiotopoulos introduced himself, Clark said, "You are the guy that started the Union." Clark later said, "You started the union and that's why I'm here." The judge found that these comments created the impression that Panagiotopoulos' union activities were under surveillance.

We do not agree. Panagiotopoulos served as the Union's observer at the July 10, 1998 election, a fact known by Respondent's part owner, Kathleen King, and its president, Robert Weber. Thus, it is clear that Panagiotopoulos was openly identified as a union supporter at that time. Clark directed his comments to Panagiotopoulos more than a month after Panagiotopoulos had been openly identified as a union supporter. We find that Clark's statements expressed that which had been well known, i.e., that Panagiotopoulos was a union supporter. Accordingly, we shall dismiss this allegation of the complaint.

Our colleague says that Clark's remark shows that the Respondent created the impression that it had placed under surveillance the *degree and extent* of Panagiotopoulos' union activity. In fact, the General Counsel has not made that showing. Panagiotopoulos was an active adherent of the Union. He was the one who contacted the Union and he passed out the authorization cards. Indeed, he was so strong an adherent that he was the Union's observer at the critical point of the campaign, i.e., the election. Under these circumstances, we do not find that Panagiotopoulos would reasonably assume that Clark's statement to him was based on surveillance of his union activities.

2. We reverse the judge's finding that the Respondent violated Section 8(a)(5) by failing to provide information concerning the last date of operation in Southampton. During the May 11, 1999 collective-bargaining session, the Union asked Respondent for the date of the last day of work in Southampton. The Respondent advised the Union on June 10, 1999, that it was not certain as to when production would stop but that it would let the Union know the date as soon as it was determined. On June 14, 1999, the Respondent advised the Union that the

[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 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 addition, some of the Respondent's exceptions imply that the judge's rulings, findings, and conclusions demonstrate bias and prejudice. On careful examination of the judge's decision and the entire record, we are satisfied that the Respondent's contentions are without merit.

In adopting the judge's finding that the Respondent violated Sec. 8(a)(1) of the Act by discharging employee Maria Campero, we clarify an apparent conflict in the judge's factual findings concerning Campero's recollection regarding the presence of employee Solis during Campero's October 4, 1998, discussion of work schedules with night manager Clark. Our review of Campero's testimony establishes that she testified that Solis was present during that incident. This clarification does not affect our ultimate finding of a violation.

In adopting the judge's finding that the Respondent constructively discharged employee George Panagiotopoulos, we need not rely on the judge's discussion of the Respondent's application of its progressive discipline system to Panagiotopoulos. There was no allegation or finding that the Respondent actually discharged Panagiotopoulos.

[2] We shall modify the judge's recommended Order in accordance with our recent decision in *Ferguson Electric Co.*, 335 NLRB 142 (2001). Further, we shall substitute a new notice in accordance with our recent decision in *Ishikawa Gasket American, Inc.*, 337 NLRB No. 29 (2001).

drivers would be terminated on June 15 and that production would stop on June 19.

The General Counsel has not shown that the Respondent knew, prior to June 14, the date it would cease operations in Southampton. The Respondent cannot be expected to provide information that it does not have. Thus, since the General Counsel has failed to establish that the Respondent knew the last date of operation in Southampton before June 14, we do not find a violation.

Our colleague asserts that, as of June 10, the Respondent must have been in a position to tell the Union that only a few more days were left for Southhampton. We do not disagree that this is a reasonable surmise, but surmise cannot replace fact in a court of law. The General Counsel, by subpoena and by questions, could have tied down the precise date when the Respondent decided upon the day of closure. The General Counsel did not do so, and he cannot rescue this failure by surmise. Notwithstanding the failure of the General Counsel to present any evidence that the Respondent knew before June 14 when it would cease operations, our dissenting colleague speculates from the timing between the Union's June 10 inquiry and the Respondent's June 14 decision that, by June 10, the Respondent must have known "enough about its own plans" to be responsive to the Union's inquiry. We decline to join this speculation. Although it may be reasonable to infer that the Respondent was discussing concrete plans and scenarios for the shutdown by June 10, it does not follow that the Respondent was obligated to provide the Union with such inchoate information—information that was likely to be incorrect precisely because plans were still evolving.

3. Remedial issues

(a) We adopt the judge's finding that the Respondent violated Section 8(a)(5) and (1) by refusing to bargain over the effects of its decision to relocate production and subcontract delivery operations and the recommended bargaining order. We also adopt the judge's recommended Order of limited backpay to the affected employees, pursuant to *Transmarine Corp.*, 170 NLRB 389 (1968); and we conform the *Transmarine* remedial language to the requirements of *Melody Toyota*, 325 NLRB 846 (1998).[3] Thus, we order that the Respondent shall pay employees backpay at the rate of their normal wages when last in the Respondent's employ, from 5 days after the Board's decision, until the occurrence of the earliest of the following conditions: (1) the date the Respondent bargains to agreement with the Union about those subjects pertaining to the effects on its employees resulting from its partial closing and subcontracting decision; (2) a bona fide impasse in bargaining; (3) the failure of the Union to request bargaining within 5 business days after receipt of the Decision and Order, or to commence negotiations within 5 business days after receipt of the Respondent's notice of its desire to bargain with the Union; or (4) the subsequent failure of the Union to bargain in good faith, but in no event shall the sum paid to any of the employees exceed the amount he or she would have earned as wages from the date on which he or she was terminated to the time he or she secured equivalent employment elsewhere, or the date on which the Respondent shall have offered to bargain, whichever occurs sooner; provided, however that in no event shall this sum be less than these employees would have earned for a 2-week period at the rate of their last normal wages when last in the Respondent's employ, with interest.

Further, we grant the General Counsel's exception to the judge's failure to include this violation in her conclusions of law and to include a backpay provision in the notice to employees.

(b) We adopt the judge's finding that the Respondent violated Section 8(a)(5) and (1) by unilaterally increasing the hours of employment of salaried unit employee Karl Stork and, thereby, effectively reducing Stork's hourly rate of pay. In addition to ordering the Respondent to bargain over the change in Stork's hours, we shall remedy the judge's inadvertent failure to provide a make whole remedy for Stork. We do so conditionally, however, as we find insufficient record evidence to permit a determination whether Stork did, in fact, lose pay as a result of the increase in his hours. For example, there is evidence that Stork's hours could increase or decrease, and at least on some occasions, any decrease in hours did not affect his salary or pay. On the record before us, it is not clear whether, or to what extent, his salary and pay may have changed during past seasonal fluctuations in workhours, which typically did not exceed one additional hour per day. We also note that, if the Respondent had negotiated the change in Stork's hours, a change in his salary or pay could have resulted. We leave to compliance the determination whether any backpay is due Stork as a result of the May 1999 unilateral increase in his workhours.

AMENDED CONCLUSIONS OF LAW

Add the following to Conclusions of Law as paragraph 7 and renumber subsequent paragraphs accordingly:

"7. By refusing to bargain in good faith over the effects of its relocation of production and the subcon-

[3] Although the Respondent excepts to this remedy, it does so only on the ground that no violation occurred. The Respondent does not contest the judge's recommended application of the *Transmarine* remedy as an appropriate remedy for the violation found.

tracting of delivery operations, the Respondent violated Section 8(a)(5) and (1) of the Act."

ORDER[4]

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Kathleen's Bakeshop, LLC, Southampton, New York, its officers, agents, successors, and assigns shall

1. Cease and desist from

(a) Discharging its employees because they engaged in protected concerted activities.

(b) Discharging its employees because they support Bakery, Confectionery, Tobacco Workers & Grain Millers International Union, Local 3, AFL–CIO, or any other labor organization.

(c) Threatening to kill its employees because they support the Union.

(d) Unilaterally increasing the hours of employment of its salaried unit employees without giving the Union notice and an opportunity to bargain.

(e) Failing to supply relevant information requested by the Union relating to wages, benefits, hours, and working conditions of its unit employees and information related to the effects of its decision to move production to Richmond, Virginia, and its decision to subcontract delivery operations.

(f) 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) Within 14 days from the date of this Order, offer Maria Campero and George Panagiotopoulos full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Maria Campero and George Panagiotopoulos whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the amended remedy section of this decision.

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

(d) Make salaried employee Karl Stork whole for any loss of earnings and other benefits suffered as a result of the unilateral increase in his hours, in the manner set forth in the remedy section of the decision.

(e) On request, bargain with the Union concerning wages, hours, and working conditions of the employees in the unit described above.

(f) Furnish the Union with certain information found relevant in this decision to wages, hours, and working conditions and certain information found relevant in this decision to the effects on unit employees of the Respondent's decision to close production in Southampton, New York, and to subcontract its delivery operation.

(g) On request, bargain with the Union over the effects on unit employees of the Respondent's decision to close production in Southampton, New York, and subcontract its delivery operation.

(h) Pay the employees who were terminated as a result of the closing of production in Southampton, New York, and as a result of the subcontracting of the delivery operation, backpay as set forth in the remedy section of this decision.

(i) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(j) Within 14 days after service by the Region, post at its facility in Southampton, New York, copies of the attached notice marked "Appendix."[5] Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all cur-

[4] We order the Respondent, infra, to provide relevant information requested by the Union. To the extent that the Respondent has belatedly supplied the requested information, the Respondent need not duplicate its response.

[5] 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."

rent employees and former employees employed by the Respondent at any time since August 27, 1998.

(k) Within 14 days after service by the Region, mail a copy of the attached notice marked "Appendix" to all employees in the above described unit who were employed by the Respondent at its Southampton, New York facility, at any time from the onset of the unfair labor practices found in this case until the termination of the employees from the Southampton facility. The notice shall be mailed to the last known address of each of the employees after being signed by the Respondent's authorized representative.

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

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

CHAIRMAN HURTGEN, concurring.

I agree with my colleagues in all respects, but I wish to set forth a separate view as to the 8(a)(5) violation concerning the unilateral increase in the hours of employee Stork.

Stork was a salaried employee. In the past, Stork's usual workday was 8 hours (8 a.m. to 4 p.m.), except that, during the summer busy season, it had been increased to 9 hours (7 a.m. to 4 p.m.). In the instant case, Respondent took the unprecedented step of increasing the hours to 11 or 11.5 hours on some days. In these circumstances, I agree that there was a unilateral change of hours, violative of Section 8(a)(5) of the Act.

I agree that the remanded issue of backpay should be left to compliance. However, I would provide some guidance in this regard. It appears that, in the past, Stork's salary may have remained the same per pay period, irrespective of seasonal or other fluctuations (up or down). In the instant case, if the unlawful change had the effect of increasing by "x" percent the hours per pay period, Stork should receive backpay in the amount of "x" percent of his salary for each such period.

MEMBER LIEBMAN, concurring in part and dissenting in part.

My colleagues disagree with the judge with respect to two points, which I believe the judge got right: (1) her finding that the Respondent created an unlawful impression of surveillance of employees' union activity when its new night-shift manager confronted union supporter George Panagiotopoulos in a pub and threatened to kill him; and (2) her finding that the Respondent unlawfully refused to provide the Union with timely notice of its anticipated shutdown date—which turned out to be only a week later. I address each issue in turn.

With respect to the surveillance finding, the majority unaccountably departs from precedent that makes clear there *was* a violation here. As to the shutdown notice, the majority fails to draw what seems to me to be an obvious inference: that the Respondent knew enough about its own plans to provide the Union with information. Accordingly, I dissent from the majority's rulings on these issues.

1. Creation of impression of surveillance

George Panagiotopoulos was a baker on the day shift. He served as an observer for the Union at the July 10, 1998[1] representation election, which the Union won. At the end of July, the Respondent hired Buddy Clark as the new night-shift manager. After finishing work on August 27, Panagiotopoulos and fellow employee Karl Stork went together to a bar. Shortly after they got there, Clark entered and, although the bar was almost empty, he sat right next to Panagiotopoulos, who he had not yet met. Clark introduced himself to Panagiotopoulos and then said to him "You are the guy that started the Union." Panagiotopoulos replied "No, we started the Union." Clark told Panagiotopoulos "You started the Union and that's why I'm here. I'm here to kill you. They came looking for me to come after you and take you out." Clark told Panagiotopoulos that he was a "corporate killer." Later that evening, Panagiotopoulos filed a report of this threat to the local police.

The judge found that Clark's statement to Panagiotopoulos—that he knew that Panagiotopoulos had started the Union—created the impression that Panagiotopoulos' union activities were under surveillance, and thus violated Section 8(a)(1) of the Act. I agree.

My colleagues, on the other hand, dismiss this allegation. In their view, Panagiotopoulos' service as a union election observer had already identified him to the Respondent as a union supporter, and thus, Clark's remarks to Panagiotopoulos in the bar expressed no more than what the Respondent already knew—according to my colleagues, "that Panagiotopoulos was a union supporter." They ignore the obviously coercive effect of Clark's accusation to Panagiotopoulos that he started the Union.

The test for determining whether an employer has unlawfully created an impression of surveillance is whether the employee would reasonably assume from the statement that his union activities had been placed under surveillance. E.g., *Rood Industries*, 278 NLRB 160, 164 (1986). The premise of this violation is that employees should be free to participate in union organizing cam-

[1] All dates in this sec. 1 are 1998 unless otherwise stated.

paigns without the fear that members of management are peering over their shoulders, taking note of who is involved in union activities, *and in what particular ways*. E.g., *Flexsteel Industries*, 311 NLRB 257 (1993). An employer creates an impression of surveillance by indicating that it is closely monitoring the degree of an employee's union involvement. *Emerson Electric Co.*, 287 NLRB 1065 (1988).

In *Emerson*, the Board said, with particular relevance to this case, that:

> Even if it was common knowledge at the plant that [employee] Alsup had attended union meetings, [plant manager] Gilbert's statements [that he did not consider Alsup to be a "pusher" for the union like some of the people on the floor who were wearing union buttons, etc.] went beyond permissible comments. Gilbert stated not only that he knew that Alsup had attended union meetings, but also indicated that he knew *the extent of his involvement*. . . . [Gilbert's statements] would reasonably suggest to Alsup that the Respondent was closely monitoring *the degree of his union involvement*. [287 NLRB at 1065; emphasis supplied].[2]

As in *Flexsteel* and *Emerson*, and contrary to my colleagues' view of this issue, even if it was generally known that Panagiotopoulos was a union supporter, Clark's particularized statement to Panagiotopoulos went far beyond permissible comments. Clark confronted Panagiotopoulos in the bar saying, "You are the guy that started the Union." Panagiotopoulos said, "No, we started the Union." As though correcting him, Clark pointedly replied, "You started the Union and that's why I'm here." Clark then added, "I'm here to kill you." By these coercive remarks, Clark could scarcely have conveyed a clearer impression to Panagiotopoulos and Stork that the Respondent was monitoring and was aware of the degree and extent of Panagiotopoulos' particular union activities—far beyond the mere observation of Panagiotopoulos while he served as a union observer at the election or engaged in general prounion activity.

2. Failure to provide information

On October 22, 1998, the Respondent informed the Union that it was going to shut down its production facilities in Southampton, New York, in January 1999,[3] and relocate them to Richmond, Virginia. The Union immediately requested bargaining over the effects of this shutdown and relocation on the unit employees. The shutdown and relocation were, however, delayed. On May 11 the Union asked the Respondent for, inter alia, the anticipated date of the Respondent's shutdown of production in Southampton. The Union wanted this information so that it could help employees with applications for unemployment benefits and get letters of recommendation for them. The Respondent did not provide this information to the Union at that time or soon thereafter. Rather, about a month later, on June 10, the Respondent told the Union that it was still uncertain when it would shut down production, but that it would let the Union know as soon as the Respondent decided. A few days later, on June 14, the Respondent informed the Union that it was terminating the drivers (unit employees) the next day, June 15, and was shutting down production in Southampton 4 days after that, on June 19. (In fact, however, the Respondent actually stopped using its drivers the *same day*, June 14, and shut down production on June 18.)

The judge found that the Respondent violated Section 8(a)(5) of the Act by failing to provide the Union with timely notice of the date of the shutdown of production in Southampton (section II,E,2,a,b of her attached decision). I agree.

My colleagues, on the other hand, reversed the judge, finding that the Respondent acted lawfully. In their view, the record does not establish that the Respondent knew before June 14 that it was shutting down production on June 19, and the Respondent was therefore not in a position to give the Union this information before June 14. I disagree with my colleagues' assessment.

An employer is obligated to give a union a meaningful opportunity to bargain over the effects on employees of a decision to shut down operations and layoff employees. *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 682 (1981). This requires giving the Union sufficient advance notice of the effective dates of those final actions. The Respondent clearly did not fulfill this bargaining obligation by telling the Union as late as June 10 that it was still uncertain when it would shut down production. Certainly by then, if not significantly sooner, the Respondent must have been in a position to offer the Union at least a considered judgment of how many days were left for Southampton—especially since, as the evidence bears out, only a very few days were in fact left.

Presumably, the Respondent had control over the timing of its termination of the drivers and shutdown of Southampton production. It is hard to imagine that, just a few days in advance of the actual shutdown, the Respondent did not know that it was imminent. No claim is made that some force majeure or act of God had suddenly intervened on June 14, requiring an immediate shutdown and termination of employees. Yet, my colleagues in the majority fail to draw what seems to me to

[2] See also *Acme Bus Corp.*, 320 NLRB 458, 477 (1995) (Gilman's comments to Anderson and Edmond).

[3] All the remaining dates in this sec. 2 are 1999 unless otherwise stated.

be the obvious inference: that the Respondent knew enough about its own plans by June 10 to provide the Union with information.

Thus, I agree with the judge that the Respondent's failure under these circumstances to provide the Union with prior notice of the actual date for the shutdown of Southampton production denied the Union the opportunity to bargain meaningfully over this decision. See *Miami Rivet of Puerto Rico*, 318 NLRB 769, 771–772 (1995), cited by the judge.

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 Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discharge or otherwise discriminate against any of you for supporting Bakery, Confectionery, Tobacco Workers & Grain Millers International Union, Local 3, AFL–CIO, or any other union.

WE WILL NOT discharge you because you engage in protected concerted activities by complaining about wages, hours, and working conditions.

WE WILL NOT threaten our employees' lives because they support the Union.

WE WILL NOT increase our employees' workhours without bargaining with the Union.

WE WILL NOT fail to supply information requested by the Union so that it may carry out its duties to bargain for the employees in the following unit:

All full-time and regular part-time bakers, production employees employed by Respondent at its facility, excluding all office clerical employees, guards, and supervisors as defined in Section 2(11) of the Act.

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

WE WILL, within 14 days from the date of the Board's Order, offer Maria Campero and George Panagiotopoulos 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 Maria Campero and George Panagiotopoulos whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges of Maria Campero and George Panagiotopoulos, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discharges will not be used against them in any way.

WE WILL make Karl Stork whole for any loss of earnings and other benefits resulting from our unilateral increase in his hours of employment, plus interest.

WE WILL supply the Union with relevant information necessary for it to fulfill its duties as bargaining representative of the unit employees.

WE WILL bargain with the Union over the effects of our decision to move production facilities away from Southampton, New York, and to subcontract the delivery operation.

WE WILL pay limited backpay to the unit employees in connection with our failure to bargain over the effects of our decision to move production facilities away from Southampton and to subcontract the delivery operation.

KATHLEEN'S BAKESHOP, LLC

Tracy Belfiore, Esq., for the General Counsel.
Fred G. Groiss, Esq. (Quarles & Brady LLP), of Milwaukee, Wisconsin, for the Respondent.
Thomas M. Murray, Esq. (Spivak, Lipton, Watanabe, Spivak & Moss LLP), of New York, New York, for the Charging Party.

DECISION

STATEMENT OF THE CASE

ELEANOR MACDONALD, Administrative Law Judge. This case was tried in New York, NY, on October 15 and December 9 and 10, 1999. The Complaint alleges that the Respondent, in violation of Section 8 (a) (1), (3) and (5) of the Act threatened employees with death because of their activities on behalf of the Union, created an impression of surveillance among its employees, interrogated employees, constructively discharged George Panagiotopoulos, discharged Maria Campero, refused to provide relevant information to the Union, refused to bargain over the effects of relocating its production operation and subcontracting its trucking operation and increased employees' hours of work resulting in a decrease in hourly pay rates of salaried employees without notice to the Union. The Respondent denies that it has engaged in violations of the Act.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following[1]

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a New York corporation, with its principal office and place of business located at 43 North Sea Road, Southampton, New York, is engaged in the retail sale of baked goods and related products. The Respondent annually derives gross revenues in excess of $500,000 and purchases and receives at its facility goods valued in excess of $5,000 directly from points outside the State of New York. It is undisputed, and I find, that the Respondent is an employer engaged in commerce within the meaning of Section 2 (2), (6), and (7) of the Act and Bakery, Confectionery, Tobacco Workers & Grainmillers International Union, Local 3, AFL–CIO, is a labor organization within the meaning of Section 2 (5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

In June 1998 the Union began its organizational campaign among the Respondent's employees in the Southampton facility. The Respondent conducted a vigorous campaign against the Union. The Union won the election conducted on July 10, 1998 and a Certification issued on August 13, 1998 for a unit including the following employees:

> All full-time and regular part-time bakers, production employees, drivers, store clerks and maintenance employees employed by Respondent at its facility, excluding all office clerical employees, guards, and supervisors as defined in Section 2 (11) of the Act.

Certain of the Respondent's actions led to the signing of agreements settling unfair labor practice charges. Some of these actions were described at the instant hearing and were received for the purposes of background only.

The record shows that the owners of the Respondent are Kathleen King and her brothers Robert Weber and Kevin Weber. It is undisputed that they are agents of the Respondent. Owner and president of the company, Robert Weber, testified in this proceeding both as an adverse witness called by the General Counsel and as a witness for the Respondent. Owner Kathleen King was present in the hearing room during the instant proceeding but she was not called to testify.

Robert Weber testified that when the Respondent operated solely from its Southampton location, it conducted a retail operation that accounted for about 30 percent of the business and a wholesale operation that accounted for 70 percent of the business. In June 1999 the Respondent transferred its wholesale operation to Richmond, Virginia. Deliveries were made from that location. Robert Weber also testified that during a period in June and July 1999 certain wholesale deliveries were made from a location in Kearny, New Jersey. At the time of the instant hearing products such as cakes, pies, cookies and brownies were made in Richmond for wholesale distribution and were shipped to the retail store for sale. Some products were also manufactured in Southampton for sale in the retail store.

Robert Weber testified that the Respondent utilizes a method of progressive discipline. Employees are generally not terminated until after three or more written warnings accumulate in their personnel files. The Respondent's files contain various "report of employee discipline" forms which establish that the bakeshop maintains a "three strikes and you're fired" policy. Thus, on March 26, 1999 Leonides Olivencia was terminated after one unexcused absence and two instances of "no call, no show." On December 9, 1998, Ralph Hunter was given a written warning for lateness after "many verbal warnings" and he was informed that the written report was the first in a sequence of "three strikes you're fired." On October 23, 1998 Patrick Farez was discharged after accumulating six verbal warnings in six weeks. The report of employee discipline for Farez stated the following reasons for his termination "after many attempts" to counsel the employee: "(1) Just recently caught lying about employer permission; (2) Called manager a Fu—ing bastard about scheduling; (3) Made obscene gestures to woman employee by saying he wanted to fuck her in the ass; (4) Same night asked manager to 'Make him a favor by fucking dying.'"

B. Discharge of Maria Campero

Maria Campero began working for the Respondent in June 1994.[2] She worked the night shift beginning at 5 p.m. and ending when the work was done. She averaged 40 to 45 hours of work per week. Campero testified that on Sunday, October 4, 1998, she arrived at work and began preparing the bread. Between 5:30 and 6 p.m. she noticed that the new hourly schedule had been posted. She saw that employees with the most seniority had been given fewer days of work than the newer employees. This was contrary to the past practice whereby the more senior people had been given more hours of work. Campero approached night manager Warren "Buddy" Clark to ask him why he had made that change.[3] Clark is not fluent in Spanish but his mother speaks Spanish and he can say a few words. Campero took the new schedule with her and asked Clark why the more senior people had been given fewer hours. She mentioned senior employees such as "Melva", "Patricia" and herself. According to Campero, Clark started screaming and told her "If you don't like the job you can go home." When Campero questioned him again, he said, "You and your workmates are like hungry dogs." Clark made some gestures with his hands and screamed some words in English. Clark was not holding any muffin pans while he spoke to Campero. Campero testified that she did not yell or curse at Clark and she did not throw the schedule at him. Campero stated that after this inci-

[1] The record is hereby corrected so that at page 15, line 1, the word "newrity" is changed to "seniority"; at page 70, line 1, the second sentence should begin "He said, 'you should put an end to it. . . .'"; at page 216, line 24 the date should read "October 22, 1998"; on page 267, line 13, the last word should read "disparate"; at page 324, line 8, the word "inadmissible" should read "admissible".

[2] Campero's native language is Spanish. She testified through an interpreter.

[3] It is undisputed that Clark was the night manager and an agent of the Respondent.

dent, which lasted four or five minutes, she took the schedule back to the bulletin board and pinned it up again. Campero recalled that Norma Jimenez Solis was there during the incident with Clark but she did not say anything. Campero did not notice any other employees in the vicinity. Campero said that she did not speak to Solis about the schedule or about her decision to confront Clark. Campero stated that retail manager Barbara Toro did not come to the production area and say "shut up" while Buddy was screaming.

Campero testified that on October 6 supervisor Guadalupe Camacho called her on the telephone and said she was fired because of the incident on Sunday. The next day Campero went to the bakeshop and spoke to owner Robert Weber through "Freddy" who interpreted for her. She asked why she was fired and Weber said it was because she had thrown the schedule at Clark. Campero denied that she threw the schedule and she said that Clark had taken an unjust decision because the new schedule gave more senior people fewer days of work. Weber repeated that she was fired. It is undisputed that Campero had an unblemished disciplinary record from 1994 to the day she was fired.

Norma Jimenez Solis began working for Kathleen's Bakeshop in September, 1993. She left the Respondent's employ in June 1999. In the summer of 1998 she was working the night shift from 5pm to 7am. Solis testified that on a Sunday in October 1998 she arrived at work with Maria Campero.[4] When they punched in they noticed that a new work schedule had been posted. This new schedule changed employees' hours of work in order to accommodate the declining production that usually accompanied the end of the summer season. The new schedule provided five days of work per week for the least senior employees but only four days of work per week for those employees with the most seniority. According to Solis she and Campero discussed the new schedule and Campero decided that she would speak to night manager Clark "for all of us." Solis testified that she observed Campero approach Clark at the bread-packing table holding the new schedule which she had removed from the wall where it had been tacked up. Campero said she had a question for him and she proceeded to ask why he had given workers with less seniority five days of work whereas the most senior employees had only four days of work. Campero put the schedule on the table and she pointed at the names of the employees on the list. Solis testified that Campero spoke in a mixture of English and Spanish to Clark. Although Clark does not speak perfect Spanish he can make himself understood because his mother is Spanish. Clark replied in Spanish that he was the boss and that it was none of Campero's concern. Campero replied that "this is not justice" and that he had to fix it up. Clark turned red and became upset. In English he said in a strong voice, "Stupid Spanish people … fuck you." Clark continued yelling in a high voice in English. Campero took the schedule from the table and put it back on the wall. Campero and Solis went about their work for the rest of the evening. Solis testified that Campero did not curse or yell during this incident and she did not throw the schedule. Solis was frightened during this incident because Clark is a tall muscular man who is built like a weight lifter.

Solis testified that no other employees were in the area when this exchange took place. The others were downstairs putting on their aprons. Solis did not see retail manager Toro during this incident. The retail store is in the same building as the production area but it is separate from the production area.

On the next Tuesday Solis was at work but Campero was taking her usual day off. Solis testified that supervisor Camacho summoned her to speak to Clark on Tuesday. Clark spoke to Solis in English and Camacho translated into Spanish. Clark asked Solis to inform Campero that there was no more work for her at the bakeshop. Solis told him that it was not her place to give such information to Campero and that Clark should call her himself. Clark said that Campero was fired because she had been disrespectful to him. Solis responded that this was not true. Clark replied that he had his witnesses. Solis asked him who his witness was; she said there were only two "of us" in the area. Clark said it was not a problem and that he would produce his witnesses.

Barbara Toro has been a manager of the retail area of the bakeshop for 17 months. Toro testified that on October 4, 1998 she was in the production area of the bakeshop and she could see the whole night crew standing near the schedule. Toro stated that they were "complaining." Toro saw Campero and Clark arguing. She saw Campero holding the schedule and waving it at Clark. Toro said that she saw Solis next to Campero "egging her on." Toro heard Campero screaming very loud in Spanish but she did not hear Clark screaming; he was just spraying some muffin pans. Toro told Campero to "shut up." According to Toro she saw the schedule drop to the floor but she did not see how it dropped. During this incident, there were at least five night shift employees near the table. They had not started production because they were all too busy looking at the schedule. Toro stated that she informed owners Kathleen King and Robert Weber of what she had seen.

Robert Weber testified that the Respondent discharged Campero based on a written report of employee discipline prepared by Clark. The report states:

> 10/4/98, 6:00pm Maria upset about another employee's schedule. Confronted me with abusive foul language yelling at the top of her lungs, not allowing me the way out of her pathway, then tearing the schedule sheet off the wall throwing it at my feet swearing in Spanish. After much consideration with also speaking with all three owners we all agreed that termination would be the correct action.

Manager Clark was not called to testify in this proceeding.

In *Meyers Industries (Meyers I)*, 268 NLRB 493 (1984), revd. 755 F.2d 941 (D.C Cir. 1985), cert denied 474 U.S. 971 ((1985), decision on remand 281 NLRB 882 (1986), affd. 835 F.2d 1481 (D.C. Cir. 1987), cert denied 487 U.S. 1205 (1988), the Board set forth the following test to find that an employee engaged in concerted activity:

> we shall require that it be engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself. Once the activity is found to be concerted, an 8 (a) (1) violation will be found if, in addition, the em-

[4] Solis' native language is Spanish. She testified through an interpreter.

> ployer knew of the concerted nature of the employee's activity, the concerted activity was protected by the Act, and the adverse employment action at issue (e.g. discharge) was motivated by the employee's protected concerted activity. (footnotes omitted)

I credit Solis that she and Campero discussed the new schedule and its deleterious effect on senior employees on October 4 when they arrived at work and I find that Campero said that she would speak to Clark about the matter. Both Solis and Toro testified that Solis was with Campero when she confronted Clark about the schedule change. In fact, Toro stated that Solis was "egging on" Campero in her effort to discuss the matter with Clark. Although Campero herself did not recall that Solis was present, I believe that this failure of recollection is not significant in view of the fact that both a unit member and a manager called by the Respondent testified convincingly that Solis supported Campero in her discussion with Clark about the schedules. In addition, I note that Toro stated that all of the night shift employees were standing around the schedule and complaining. I find that after Campero and Solis discussed the new schedule Campero went to tell Clark that his schedule was unfair to the senior employees and contrary to the way things had been done before. Campero's approach was authorized by Solis and was engaged in with her standing by Campero's side "egging her on." Campero's effort to discuss employee schedules with Clark was undertaken on behalf of herself and other unit members. Campero was therefore engaged in protected concerted activity. The Respondent was aware of the unit employees' concern and the fact that Campero was speaking for them because Toro reported to the owners all that she had seen on October 4.

I find, based on the testimony of Solis and Campero, that Clark raised his voice while Campero was talking to him and that he cursed. I find, based on Toro's testimony, that Campero also raised her voice but, in the absence of credible testimony that she cursed at Clark, I do not find that she cursed. Clark did not appear to testify that Campero threw the schedule on the floor and Toro did not see that happen. Campero and Solis deny that the schedule was thrown. I do not find that Campero threw the schedule. A certain leeway is granted to employees engaged in discussions of terms and conditions of employment with their employers. These discussions often become heated and employees do not lose the protection of the Act even if they scream, curse or engage in other spirited acts. *Felix Industries*, 331 NLRB 144 (2000). Thus, I find that Campero did not lose the protection of the Act by raising her voice to Clark while talking about the schedule change. Moreover, even if I had found that Campero cursed and threw the schedule I would not find that her actions were so egregious as to render them unprotected, especially where Clark was screaming and cursing at Campero.

The Respondent does not dispute that it discharged Campero for her conduct in speaking to Clark about the new schedules. Thus, I find that the Respondent violated Section 8 (a) (1) of the Act because it discharged Campero for protected concerted activity.

C. Constructive Discharge of George Panagiotopoulos

George Panagiotopoulos was employed by the Respondent from August 1992 until August 27, 1998. He was the head baker; his duties included making fillings, making crumb, making pies, mixing brownies and working the ovens. Panagiotopoulos worked the day shift. Panagiotopoulos made contact with the Union in May 1998 and he obtained employee signatures on Union authorization cards. He served as the Union's election observer.

Before the election the general manager of the bakery quit. Panagiotopoulos asked owner Robert Weber what was going on. Weber responded, "You know what's going on. You should put an end to it before things get complicated." Panagiotopoulos said he did not know what was going on. Weber said that a union was not necessary in the bakery because it was not as big as Entenmann's and if there were any problems "we can all sit down and talk about it." Weber told him to think it over.

On June 16, owner Kathleen King told Panagiotopoulos that he would henceforth be assigned to make pies.[5] She instructed him to check with her before he did anything in the bakery and not to speak to anyone. King said he was no longer allowed to receive telephone calls or have anything to eat or drink. King called Panagiotopoulos some names and said, "You call yourself a man. You're a pathetic excuse of a person." Whenever King saw Panagiotopoulos speaking to another person she reminded him that he was not allowed to speak to anyone and she said, "Go back to work you bastard."

On July 10, 1998, the day of the election, Panagiotopoulos went to the building where the election was being conducted after Robert Weber told him that he had been requested to act as an observer. As the Board Agent was explaining the procedures, Panagiotopoulos felt someone hit him across the shoulders. King said, "You figure out a way to keep your boss' mouth shut." He said he did not know what she was talking about and began walking away when she grabbed him and said, "You fucking liar. I thought you weren't part of this." Robert Weber apologized for King and took her out of the room. Later Panagiotopoulos told Robert Weber to keep King away from him. Weber replied, "Well, you're trying to destroy this place." Employee Karl Stork testified that before the election took place he was standing outside with a group of employees. Kathleen King was nearby and as she looked at Panagiotopoulos Stork heard her say, "I knew that bastard was involved with the Union."

On Saturday July 11, the day after the election, the Respondent conducted a meeting for its employees. Robert Weber, Kathleen King and plant manager Richard Bartlett attended on behalf of management. The employees present included Panagiotopoulos, Karl Stork, Sean Corbett, a new summer employee named Robert and an employee named Raphael. Byler said that since there was a union there were new rules. He then informed the employees that the new rules included the following:

> No coffee or tea during working hours.

[5] One of his assistants took over his former mixing duties.

No more eating in the bakery.
No more receiving or making telephone calls.
No more radio in the bakery.
No speaking to other employees unless it was work related.
No loafing.

As the meeting ended, King said that she did not want any of this to happen but that the employees had brought it upon themselves by voting in the Union.

Panagiotopoulos recalled that at the end of July a new night manager named Warren "Buddy" Clark was hired. On August 27, 1998 he saw Clark come to work at his usual time of 4:30 p.m. Panagiotopoulos and fellow employee Karl Stork were just finishing their work and they went to the local pub at around 5:15 to have a beer. After about 10 minutes Clark came in, and despite the fact that the bar was essentially empty, he came over to Panagiotopoulos and sat down right next to him and Stork. Panagiotopoulos introduced himself and Clark said "I'm Buddy." Clark then said, "You are the guy that started the Union." Panagiotopoulos replied "No, we started the Union." Clark continued, "You started the Union and that's why I'm here. I'm here to kill you." Clark said, "They came looking for me to come after you and take you out." Clark told Panagiotopoulos that the employees would never get overtime again, they would lose their Christmas bonuses and everything else. Clark said he was a "corporate killer."

Panagiotopoulos left the bar and drove to the Southampton police station about five miles away to file a report. After a series of visits to various local and state police stations where he was repeatedly sent to another location he was eventually permitted to file a report.

The next day Panagiotopoulos did not go to work; instead, he went to the Labor Board. While he was giving an affidavit about the previous day's experience, he was called by Union organizer Larry Atkins who had been contacted by Panagiotopoulos' wife after Robert Weber called his home to find out why he was not at work. Atkins, Robert Weber and Panagiotopoulos then held a telephone conference call. Robert Weber asked what was going on. Panagiotopoulos said that Weber had hired someone to kill him and he related what had happened the afternoon before. Weber said that was ridiculous and that he expected him back to work the next morning. Panagiotopoulos protested that he could not work the next morning. Weber told him that if he did not show up he would be considered to have resigned. Panagiotopoulos said he would come back to work when the authorities could guarantee his safety. Weber replied, "The big shot guarantees your safety." When Panagiotopoulos asked how he could guarantee his safety when he had hired someone to kill him Weber responded that he was "blowing it out of proportion." Weber denied that he had hired a corporate killer.

Panagiotopoulos had been apprehensive about events at the bakery before August 27. A note had been placed on his windshield at work telling him to stop what he was doing "or else." When he showed the note to Robert Weber and Kathleen King, Weber ripped it up and threw it away with the comment that a lot of people were not happy with what Panagiotopoulos was doing. Every time he approached Kathleen King she said, "Go fuck yourself."

Panagiotopoulos was issued an order of protection on November 17, 1998. He said that the local police reported to him that they had trouble finding Clark.

Panagiotopoulos' recital of the encounter was confirmed by the testimony of Stork.[6] Stork testified that the day after Clark made his threats in the bar he went to work with a baseball bat. Stork felt endangered. When Kathleen King asked why he had a bat in the workplace Stork told her that he and Panagiotopoulos had been threatened by the night manager. King said Clark was no longer working in the bakeshop. However, Stork testified without contradiction that he repeatedly saw Clark at the bakeshop premises after this occasion.

Robert Weber testified in response to questions posed by Counsel for the General Counsel that on August 28 Stork informed him that Clark had threatened to kill Panagiotopoulos. Weber stated that at some point Clark told him about the incident. Weber acknowledged that on September 1, 1998 Counsel for the Respondent informed the Regional Office that Clark had no memory of the incident in a letter written at the behest of the company. Following this testimony, Weber testified in response to questions posed by Counsel for the Respondent. Weber persisted in describing the incident as something that happened in the "middle of the night in a bar."[7] Weber said that on August 29 he asked Clark what had happened. Clark said he could not recall anything happening. When Robert Weber persisted in his questioning, Clark said that he "might have had some words" with Panagiotopoulos and Stork but nothing "argumentative." Weber told Clark "you can't do this type of thing" and Clark apologized and said he was very upset because he had a family member that died. The Respondent did not call Clark to testify about the events in the bar on the afternoon of August 27. Weber's second hand description of Clark's version of the conversation is hearsay and, as discussed below, it is inconsistent and incredible.

The evidence that night manager Clark threatened to kill Panagiotopoulos because he brought the Union to the bakeshop is convincing and it is unrebuted. I find that the Respondent violated Section 8 (a) (1) of the Act. *Pioneer Recycling Corp.*, 323 NLRB 652, 658 (1997). Further, the evidence that Clark said that he knew Panagiotopoulos had started the Union is convincing and it is unrebuted. I find that this comment created the impression that Panagiotopoulos' union activities were under surveillance and that the Respondent thus violated Section 8 (a) (1) of the Act. I do not find that Clark unlawfully interrogated Panagiotopoulos about his union activities.

The uncontradicted testimony shows that the Respondent's principals harbored a thoroughgoing antiunion animus which was often directed at Panagiotopoulos. King cursed him and blamed him for his activities on behalf of the Union. Weber thought that he was trying to "destroy" the company by bringing in the Union. The Respondent retaliated against Panagiotopoulos by imposing onerous working conditions on him. Thus when Clark came into the bar on August 27 and told

[6] Stork has been employed as a mixer by the Respondent since 1996.
[7] It is undisputed that the incident occurred shortly after 5 p.m.

Panagiotopoulos that he was a corporate killer who had been hired to kill him and take him out, Panagiotopoulos had every reason to believe Clark. Robert Weber's denials in connection with his demand that Panagiotopoulos return to work were not such as would reasonably reassure an employee whose life had been threatened because of his union activities. Weber denied that he had hired a corporate killer, he said that Panagiotopoulos' fears were ridiculous and that he was blowing the incident out of proportion. This response to Panagiotopoulos was not the serious response of an employer concerned about an employee's safety. Weber did not say that he would investigate the matter and take appropriate steps, he did not say that he would confront Clark and he did not say that he would cooperate with the authorities. Instead he merely dismissed Panagiotopoulos' well-founded fears out of hand. Furthermore, Weber's testimony herein was not forthcoming. At first he testified that he authorized company Counsel to inform the Regional Office that Clark had no memory of the incident. Then he testified that Clark might have had words with the two employees but nothing argumentative. Inexplicably, Weber warned Clark that he "can't do this type of thing." If Clark denied an argument with Panagiotopoulos and Stork then Weber would have had no reason to tell Clark "you can't do this type of thing." Finally, Weber offered the excuse that Clark was upset over the death of a family member. Of course, there is no connection between a death in the family and Clark's threats to kill Panagiotopoulos because he had brought the Union to the company. I find that Robert Weber's testimony about this incident was disingenuous and evasive.

The Respondent's records and Robert Weber's testimony show that the company maintained a system of progressive discipline and that it did not discharge employees for a single instance of absenteeism. Thus Olivencia was not terminated until he had accumulated three absences. In the case of Panagiotopoulos, however, the Respondent seized upon his absence in connection with Clark's threats to issue an immediate warning that if he did not return to work the next day he would be treated as having resigned. The Respondent did not apply progressive discipline and it did not seek to take steps to insure his safety. Weber cavalierly dismissed Clark's threats and insisted that Panagiotopoulos had to return to work. This action on the part of Weber further confirms that the Respondent, having driven Panagiotopoulos from the workplace through a manager's threats on his life, immediately took steps to make his departure final. By threatening the employee's life and failing to take convincing steps to assure him of his personal safety, the Respondent constructively discharged Panagiotopoulos.

Based on ample evidence of the Respondent's antiunion animus, I find that a motivating factor in Panagiotopoulos' discharge was his activity in support of the Union. Further, I find that the Respondent has not shown that if Panagiotopoulos had not engaged in Union activity, he would have been discharged nevertheless. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F. 2d 899 (1st Cir. 1981). Panagiotopoulos had a very good reason for his absence. If he had not been threatened in connection with union activity which the Respondent opposed the company would have reacted with concern to his well-corroborated report of having received a death threat from a supervisor. The Respondent's own records show that the Respondent usually applied a "three strikes" policy in cases of employee absence.

The General Counsel has met the test enunciated in *Crystal Princeton Refining Co.*, 222 NLRB 1068 (1976). The burdens imposed upon the employee have caused and were intended to cause a change in his working conditions so difficult or unpleasant as to force him to resign. Second, the burdens were imposed because of the employee's union activities. I conclude that the Respondent violated Section 8 (a) (3) of the Act when it constructively discharged Panagiotopoulos.

D. Increase in Hours

The Respondent stipulated that in May 1999 it increased the hours of employment of the day shift production employees and that this resulted in a decrease in the hourly pay rates of salaried employees. Karl Stork is the only salaried bargaining unit employee. He has been employed as a mixer since 1996. Stork testified that in the off season he worked from 8 a.m. to 4 p.m. but that in the summer he normally worked from 7 a.m. to 4 p.m. Stork testified that some days in the summer of 1999 the Respondent required him to work 11 to 11 ½ hours per day. Stork stated that this was much longer than he had ever before been required to work during a summer season.[8] It is undisputed that the Respondent did not notify the Union and provide it with an opportunity to bargain about the change in Stork's hours. The Respondent thus violated Section 8 (a) (5) of the Act.

E. The Union's Information Requests

The Complaint alleges that by not supplying requested information to the Union the Respondent failed to bargain in good faith over the effects of moving the production operation and subcontracting the trucking operation. In addition, the Complaint alleges that the Respondent failed to supply information to the Union that was necessary and relevant to its duties as representative of the unit employees.

The first collective bargaining session between the Respondent and the Union took place on October 22, 1998. The spokesman for the Union was Larry Atkins, secretary-treasurer and business agent of Local 3. Robert Weber was the company spokesman. At this meeting, Robert Weber informed the Union that the Respondent was moving its production facilities to Richmond, Virginia. The move would take place about January 1999. Weber said that the cake decorating and retail store operation would remain in Southampton and "maybe" the drivers. Atkins replied that he wanted to bargain over the effects of the move and also to bargain on behalf of the employees remaining in Southampton.

[8] Although Stork had once worked about 50 hours per week, that occurred when he was first hired and while he was also managing the retail part of the operation. After Barbara Toro was hired as retail store manager, Stork did not continue doing this job.

1. Requests for information on April 13 and May 11

By letter of April 13, 1999 the Union requested, *inter alia*, the following information:[9]

> 2. A list of all job titles represented by Local 3 in the Southampton facility that will be relocated to the new facility in Richmond.
>
> 4. A list of all existing job titles that have been filled or will be filled in the Richmond facility, as well as the rates of pay and benefits the company is offering employees in those titles, including vacation, holidays, sick days, health, pension and any other benefits.[10]

Atkins testified that the information about wages and benefits being paid to similar employees in Richmond would have been relevant in formulating a demand for the unit employees in Southampton.

Atkins also testified that he needed this information to bargain on behalf of employees who were relocated to Virginia. The record shows that employee Freddy Ruiz, a former Southampton employee, now works in the new Richmond facility. Furthermore, Southampton employee Guadalupe Camacho has made trips to Richmond to help with recipes. Therefore, the requested information would have been relevant to bargaining concerning the effects of relocating employees to Richmond.

On April 13, 1999 the Union also requested the following information:

> With respect to truck driver job titles, a description of the delivery routes including the geographic scope of the routes, the products delivered on each route and type of customers being serviced (i.e., restaurants, supermarkets, etc.) and the job description of the drivers.
>
> With respect to deliveries contracted out to entities or to persons not employed by Respondent, a description of the delivery routes, including the geographic scope of the routes, the products delivered on each route and type of customers being serviced (i.e. restaurants, supermarkets, etc.) and the job description of the drivers.

Atkins testified that the Union needed this information so that it could determine whether employee Ken Patrick was actually a unit employee or an independent contractor. Although Patrick's name had been on the Excelsior List, Patrick appeared to be distributing work to the other drivers and he kept the best routes for himself.

The Union's April 13 letter also requested the following information:

> A list of all existing job titles, filled and unfilled at any other facilities owned or operated by Respondent.

By letter of April 21, 1999 Robert Weber replied to the Union request for information. His letter said:

> We are not relocating job titles to Richmond. We will be commencing production operations and any of our current employees currently working in that capacity at Southampton are potentially affected. None of our employees have been "offered benefits" prior to your letter.
>
> We fail to see what interest your union has with respect to how we conduct our Richmond operations. Furthermore, that has not yet been finalized.

Weber's April 21 letter also stated:

> There are no other facilities other than those referred to above . . . .

Another collective bargaining session was held on May 11, 1999. At this meeting Atkins asked for the following information:

> Information concerning Respondent's plans to move the operation, including the names of the employees to be moved.
>
> Date of last day of work in Southampton.
>
> What machinery would remain in Southampton.
>
> The cost of subcontracting the drivers' work.
>
> The cost to Respondent to deliver the product.
>
> A copy of the bids in order to negotiate whether the drivers could remain in Southampton.

Atkins testified that on May 11 the negotiators discussed the possibility of keeping the distribution operation in Southampton. The company said that it was receiving bids from a subcontractor for the deliveries and that it would get back to the Union. The Union wanted a chance to provide an alternative to subcontracting the drivers' work and Atkins said that he could devise a less expensive contract. However, Atkins testified, the Respondent never got back to him with the requested information.

Atkins wanted advance notice of the termination of production in Southampton so that the Union could help employees with applications for unemployment benefits and ask for letters of recommendation.

Atkins testified that he wanted a list of the machinery that the Respondent intended to retain in Southampton so that he could negotiate on behalf of the unit employees who would be operating the equipment. The Respondent did not furnish this information.

On June 14, 1999 Robert Weber wrote to Atkins informing him that the Respondent intended "to terminate our driver staff in Southampton on June 15, 1999 and our production in Southampton on June 19, 1999." An attached list named the employees to be terminated. Weber testified that all wholesale operations at Southampton ceased on June 18. Weber had hired various companies to move equipment such as mixers and ovens and he hired companies to hook up electricity, gas and water in the new facility. Weber testified that the Respondent ceased using its own employees as drivers on June 14. The company now uses a distributor located in Florida and it contracts with Ken Patrick, a former employee, who buys products from the company in Richmond and markets them in the New York metropolitan area.

[9] The hiatus between the first bargaining session and the information request occurred because the Union filed a number of charges against the Respondent and it waited to continue the bargaining until the charges were acted upon. Certain of the charges did not result in the issuance of any complaint.

[10] At the instant hearing the General Counsel deleted from the Complaint the reference to item 2 stating that it was duplicative of item 4.

On September 8, 1999 the Respondent's counsel provided information to Atkins about the Richmond operation as follows:

> The job titles for production and maintenance personnel in Richmond are mixer, depositors and packers. Workers are obtained through a temporary agency and are paid rates determined by the agency. We understand this to currently be a minimum of $7.00 per hour. We are unaware of any benefits.

The letter also stated:

> The employer does not have truck drivers. Its former truck drivers did not have job descriptions. Their routes varied depending upon customer orders. . . . The employer's current distribution and delivery system is handled by independent distributors. . . .

In his September 8 letter Counsel for the Respondent noted that the Regional Office was pursuing a case based on the refusal to negotiate effects of the decision to move to Richmond. The letter reiterated Robert Weber's prior statement by saying, "There are no other facilities." In response to a further inquiry by the Union, Counsel for the Respondent stated in a letter dated September 22, 1999:

> As your people must know, the "Kearny Facility" is located at 680 Schuyler Avenue, Kearny, New Jersey. It is an empty warehouse with a freezer. It has not been and is not "operating". There are no plans for its use and if you are aware of anyone who might be interested in purchasing the facility, please let us know.

In connection with the Kearny facility, Robert Weber testified that after production was moved to Richmond the pies were shipped from Richmond to Kearny and then to customers in New York. Although he first stated concerning his product "it was baked in Richmond," he later acknowledged that the pies were assembled in Richmond and baked in Kearny.[11] Weber testified that he looked at the Kearny facility in the spring or summer and that he signed the lease in June 1999. In June and July the Respondent baked pies in Kearny and had them delivered to gourmet shops, restaurants, supermarkets and hotels from that location. Before the setting up of the Kearny facility, the deliveries had taken place from Southampton. Weber admitted that the letter of September 22 was authorized by him and that it "is not literally true."

2. Discussion and conclusions concerning information requests

a. Production jobs in Richmond and terminations in Southampton

The Respondent has a duty to provide the Union with relevant information required for the proper performance of its duties. Information relating to the wages, hours and working conditions of employees in the bargaining unit is presumptively relevant. Information concerning employees outside the unit must be shown to be relevant to bargainable issues. The Union need only demonstrate that the requested information is probably relevant and that it will be of use to the Union in carrying out its statutory duties and responsibilities. A "discovery-type standard" is applied to determine relevance. *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 437 (1967). *Press Democrat Publishing Co.*, 237 NLRB 1335, 1338 (1978), enfd. 629 F.2d 1320 (9th Cir. 1980).

The information concerning the wages and benefits paid to the Respondent's Richmond employees who perform similar work to that performed by the unit employees would clearly be relevant and helpful to the Union in formulating a demand for the unit employees. This information should have been furnished to the Union promptly. *Press Democrat Publishing Co.*, supra, at 1339. The failure to furnish this information from April 13 to September 8 was a violation of Section 8 (a) (5) of the Act.

It has long been clear that when an employer has a duty to bargain over the effects of a managerial decision, the bargaining "must be conducted in a meaningful manner and at a meaningful time" and the union "has some control over the effects of the decision and indirectly may ensure that the decision itself is deliberately considered." *First National Maintenance Corp. v. NLRB* 452 U.S. 666, 682 (1981).

As set forth above, the Respondent's April 21 letter to the Union stated "we are not relocating job titles to Richmond." This answer was not responsive to information the Union was clearly seeking, that is, what kind of work performed by the unit employees was being shifted to the Richmond facility. Although the Union could have guessed that any or all production operations were being moved, the Respondent had a duty to answer the request for information fully. The Respondent's April 21 letter also stated that its plans had not been "finalized." Therefore, the Union could have bargained about job security at this time as part of the effects bargaining. The failure to provide this information precluded meaningful effects bargaining. *First National Maintenance Corp.*, supra. Furthermore, at some point the Respondent did "finalize" the scope of its Richmond operations and it did decide to offer relocation to some employees. Yet the Respondent did not provide this information to the Union. By the time the Respondent provided the information relating to the job titles on September 8, the relocation had already taken place. Thus, the Union was deprived of the opportunity to bargain about the terms of the relocation and about the number of employees to be offered relocation to Richmond. The information was provided too late to permit the Union to bargain over the effects of the Respondent's decision to relocate. This constitutes a separate basis for finding a violation to furnish the information. *Miami Rivet of Puerto Rico, Inc.*, 318 NLRB 769, 771–772 (1995).

As shown above, the Union asked on May 11 for the date of the last day of production in Southampton. The Respondent did not furnish that information until June 14, four days before it terminated the production employees on June 18 and only one day before it terminated the drivers on June 15. The delay in providing information concerning the last date of operation was not only an unlawful refusal to provide information but it also precluded meaningful bargaining over effects. *Miami Rivet of Puerto Rico, Inc.*, supra.

[11] This meant that the Kearny facility contained ovens and other equipment as well as the freezer mentioned in the letter from Counsel for the Respondent.

b. Truck drivers

The information requested on April 13 about the truck drivers including job titles, delivery routes, products and job description was presumptively relevant because it dealt with the working conditions of the unit employees. The request for information about whether any deliveries were being contracted out would have been helpful to the Union to determine the true job status of employee Patrick. This information should have been furnished to the Union promptly. The failure to furnish this information was a violation of Section 8 (a) (5) of the Act.

The information requested on May 11 concerned the subcontracting of the delivery operation including costs of delivery and of subcontracting. The Respondent did not furnish any of this information and it notified the Union on June 14, 1999 that it was terminating the drivers the next day. Although the decision to subcontract the drivers' duties is not alleged to violate the Act, at the time that the Union requested the information the subcontracting decision had not yet been made final and bargaining on the effects of the decision was still possible. In fact, Atkins testified that he was trying to put together a plan that would convince the company to keep its own drivers for deliveries and keep this part of the operation in Southampton. Thus the Respondent's failure to provide this information prevented meaningful bargaining on the job security of the drivers and on the effects of the decision to relocate. The Respondent thus violated Section 8 (a) (5) of the Act.

c. Other facilities

It is clear that the Respondent did not respond accurately or truthfully to the Union's requests for information about other facilities. The Respondent finally acknowledged the existence of the Kearny facility on September 22, after the facility had been abandoned. If the Union had been provided with the information about establishment of the Kearny facility it could have bargained about the relocation of employees to that facility. Further, the information would have been relevant to the Union in formulating its demands on behalf of the unit in Southampton. The failure to provide this information violated Section 8 (a) (5) of the Act.

d. Machinery

The information about machinery to remain in Southampton related directly to the job duties of the unit employees. Thus this information was presumptively relevant to the bargaining. The failure to furnish this information to the Union violated Section 8 (a) (5) of the Act.

CONCLUSIONS OF LAW

1. By discharging its employee Maria Campero because she engaged in protected concerted activities by complaining to management about wages, hours and working conditions the Respondent violated Section 8 (a) (1) of the Act.

2. By constructively discharging its employee George Panatiotopoulos because he supported the Union the Respondent violated Section 8 (a) (3) and (1) of the Act.

3. By threatening to kill its employees because they support the Union and by creating the impression that its employees' activities in support of the Union were under surveillance the Respondent violated Section 8 (a) (1) of the Act.

4. The Union is the exclusive collective bargaining representative of the employees in the following unit within the meaning of Section 9 (a) of the Act:

> All full-time and regular part-time bakers, production employees, drivers, store clerks and maintenance employees employed by Respondent at its facility, excluding all office clerical employees, guards, and supervisors as defined in Section 2 (11) of the Act.

5. By increasing the hours of employment of day shift production workers which resulted in a decrease in the hourly pay rates of salaried employees without notice and an opportunity to bargain to the Union the Respondent violated Section 8 (a) (5) and (1) of the Act.

6. By failing to supply relevant information requested by the Union relating to wages, hours and working conditions of its unit employees and related to the effects of its decision to move production to Richmond, Virginia, and to subcontract delivery operations, the Respondent violated Section 8 (a) (5) and (1) of the Act.

7. The General Counsel has not shown that the Respondent engaged in any other violations of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily discharged employees, it must offer them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Since the Respondent refused to bargain with the Union about the effects of its relocation of production and the subcontracting of delivery operations, the Order must contain a limited backpay requirement designed both to make employees whole for losses, if any, suffered as a result of the violation, and to recreate in some practicable manner a situation in which the parties' bargaining position is not entirely devoid of economic consequences for the Respondent. The Respondent should be ordered to pay backpay to its employees in the manner analogous to that required in *Transmarine Corp.*, 170 NLRB 389 (1968), and *Interstate Fuel Co.*, 177 NLRB 686 (1969). The Respondent shall pay employees backpay at the rate of their normal wages when last in the the Respondent's employ, from five days after the Board's decision until the occurrence of the earliest of the following conditions: (1) The date the Respondent bargains to agreement with the Union about those subjects pertaining to the effects on its employees resulting from its partial closing and subcontracting decision; (2) a bona fide impasse in bargaining; (3) the failure of the Union to request bargaining within five days of the Board's decision, or to com-

mence negotiations within five days of the Respondent's notice of its desire to bargain with the Union; or (4) the subsequent failure of the Union to bargain in good faith; but in no event shall the sum paid to any of the employees exceed the amount he or she would have earned as wages from the date on which he or she was terminated to the time he or she secured equivalent employment elsewhere, or the date on which the Respondent shall have offered to bargain, whichever occurs sooner; provided, however, that in no event shall this sum be less than these employees would have earned for a two-week period at the rate of their normal wages when last in the Respondent's employ.

[Recommended Order omitted from publication.]