

**Rhee Brothers, Inc. and Ui Dal Kim.** Case 5–CA–  
29127

November 23, 2004

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN  
AND MEISBURG

On January 8, 2003, Administrative Law Judge Leonard M. Wagman issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed an answering brief, and the Respondent filed a reply 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,<sup>1</sup> and conclusions<sup>2</sup> as modified below, and to adopt the recommended Order.<sup>3</sup>

<sup>1</sup> 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), enf. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

<sup>2</sup> It is undisputed that employee Chul Hyun Chong was discharged for his strike activity. We agree with the judge that the remedial issues arising from Chong's unlawful discharge should be left to the compliance stage of this litigation.

Inasmuch as we agree with the judge's finding that Ui Dal Kim made no promise that employees would refrain from striking, we need not address the issue of whether he had any authority to make such a promise.

<sup>3</sup> We agree with the judge that the strike was protected concerted activity under the Act and that the Respondent violated Sec. 8(a)(1) by discharging the strikers for engaging in it. "It is well-settled Board law that concerted employee protests of supervisory conduct are protected under Section 7 of the Act where such protested conduct affects employees' working conditions." *Trompler, Inc.*, 335 NLRB 478, 479 (2001), enf. 338 F.3d 747 (7th Cir. 2003).

We find that the same conclusion would be reached under the standard, applied by some courts, that (1) the protested supervisory conduct must affect employees' terms and conditions of employment; and (2) the strike must be a reasonable response to that conduct. See, e.g., *Yesterday's Children, Inc. v. NLRB*, 115 F.3d 36 (1st Cir. 1997); *NLRB v. Oakes Machine Corp.*, 897 F.2d 84 (2d Cir. 1990); *Dobbs Houses, Inc. v. NLRB*, 325 F.2d 531 (5th Cir. 1963). Thus, the Respondent admits that the supervisory conduct here affected the employees' terms and conditions of employment. Second, the employees' conduct—a strike—was a reasonable response to that conduct. The strike itself was not a sudden and destructive strike, like those found unprotected in other cases. *Dobbs Houses*, supra (finding unreasonable sudden walk-out by wait staff at height of dinner rush hour); *Bob Evans Farms, Inc. v. NLRB*, 163 F.3d 1012 (7th Cir. 1998) (same). Cf. *Trompler*, 338 F.3d at 752 (affirming Board finding that walkout, which shut down second shift, was not unreasonable). The strike was not shown to "disproportionately disrupt the Respondent's operations," which consist of a warehouse that does not directly serve the public. *Accel, Inc.*, 339 NLRB 1052 (2003). Further, the employees struck only after other

The judge found that the Respondent violated Section 8(a)(1) by interrogating employees Sang Hui Yun and Bok Hwan Bae about the strike at the Respondent's facility without providing the safeguards required by *Johnnie's Poultry*, 146 NLRB 770, 775 (1964), enf. denied 344 F.2d 617 (8th Cir. 1965). We affirm the judge's finding that the interrogation of Yun was unlawful.<sup>4</sup> However, we agree with the Respondent that Bae was given the *Johnnie's Poultry* safeguards by Respondent's attorney, Jonathan Ahn. Bae explicitly testified that Ahn told him he did not have to answer the Respondent's questions and would face no repercussions if he chose not to. We therefore reverse the judge's finding and dismiss the allegation that the interrogation of Bae violated the Act.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Rhee Brothers, Inc., Columbia, Maryland, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

MEMBER MEISBURG, concurring.

I agree with all of the majority's unfair labor practice findings, including its finding that the Respondent terminated employees for engaging in concerted activity. I write separately to address the additional issue of whether employee Kim was the agent of other employees when he told Rhee that the employees would refrain from striking. If Kim was not the employees' agent authorized to make that promise, there was no agreement.

It is hornbook law that agency can be created only by the conduct of the principal; the representations of the putative agent to a third party cannot create an agency relationship. See *Communications Workers Local 9431 (Pacific Bell)*, 304 NLRB 446, 446 fn. 4 (1991), citing Restatement 2d, *Agency*, §§ 7, 27. In addition, the bur-

avenues of protest had been used. The employees presented the Respondent's president with a petition seeking the removal of the supervisor who was scheduled to return from leave in 2-day's time. That petition stated that the employees were giving the Respondent an opportunity to take decisive action on the employees' request by the date of the supervisor's scheduled return. It was only if no action was taken that the employees would have "to make a courageous decision." When no action was taken, and the supervisor returned to work, the employees presented another management official with a second petition seeking the immediate transfer of the supervisor. The Respondent failed to take action. Thus, it was only after presenting the Respondent with these two petitions, and warning that action ("a courageous decision") would follow if action were not taken, that the employees commenced their strike.

We modify the notice in accordance with *Ishikawa Gasket America, Inc.*, 337 NLRB 175 (2001).

<sup>4</sup> In so doing, we rely solely on the judge's crediting of Yun's testimony because of his forthright demeanor.

den of proof lies with the proponent of the agency relationship. See, e.g., *Millard Processing Services*, 304 NLRB 770, 771 (1991).

Here, we have only Kim's statement that he was making a promise on behalf of the other employees to delay the strike. There is no record evidence from the *affected employees* that they denominated Kim as their spokesperson, or that they in any manner authorized him to act on their behalf regarding any promise not to strike. I believe that the burden for producing this evidence was, in this case, properly on the Respondent, because it is the Respondent who relies on Kim's agency to establish the purported agreement to delay the strike. Respondent produced no such evidence. Accordingly, I would find that because the record lacks the necessary evidence that the employees authorized Kim to make any such agreement, those employees were not bound by Kim's purported agreement. Hence, their failure to delay the strike until May 31 did not cause them to lose the protections of the Act.

This result on the agency issue accords with the Act's overall purpose and the general proposition that the statutory right to strike is not waived in the absence of clear and unmistakable evidence of the intent to do so. See *Englehard Corp.*, 342 NLRB 46 (2004).<sup>1</sup> It is also consistent with the general requirement, present in cases involving a labor organization, that there be a showing that an uncoerced majority of *employees* authorized the labor organization to speak for them. Here, although Kim was clearly not speaking as a labor organization, Respondent claims that he created an enforceable agreement not to strike on behalf of the other employees. Yet there was no proof at all from the *affected employees* that Kim possessed any authority to speak for them or make such a promise. Thus, similar to a labor organization that has not demonstrated majority support, the record here fails to demonstrate that Kim had any right to bind the other employees to his purported agreement with the Respondent.

Because the record does not establish that Kim represented the striking employees, I would additionally rely on the foregoing in affirming the administrative law judge.

#### APPENDIX

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

<sup>1</sup> This case does not present an issue of contract coverage versus clear and unmistakable waiver, because there was no contractual agreement not to strike.

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 terminate or otherwise penalize any employees because they engage in concerted activity, including a strike, for their mutual aid or protection with respect to wages, hours, or other terms and conditions of employment.

WE WILL NOT threaten employees with economic reprisals including refusal to deal with their grievances, loss of working time and their termination because they engage in concerted activity, including a strike, for their mutual aid or protection with respect to wages, hours, or other terms and conditions of employment.

WE WILL NOT coercively interrogate our employees concerning their own and other employees' concerted activities protected by Section 7 of the Act or about the subject of unfair labor practice proceedings.

WE WILL NOT in any other 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 Ui Dal Kim, Nak Hoon Chong, Kwang Joon Park, Man Ho Kim, and Chul Hyun Chong 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 Ui Dal Kim, Nak Hoon Chong, Kwang Joon Park, Man Ho Kim, and Chul Hyun Chong whole for any loss of earnings and other benefits resulting from their unlawful terminations, 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 terminations of Ui Dal Kim, Nak Hoon Chong, Kwang Joon Park, Man Ho Kim, and Chul Hyun Chong, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the terminations will not be used against them in any way.

RHEE BROTHERS, INC.

*Brenda Valentine Harris and Jun S. Bang, Esqs.*, for the General Counsel.

*James A. Johnson, Jonathan I. Ahn and Ed Gutman, Esqs. (Semmes, Bowen & Semmes)* and *Jae Sung Bae, Esq. (Rhee Bros., Inc.)*, of Baltimore, Maryland, for the Respondent.

*Gabriel A. Terrasa and John M. Singleton, Esqs. (Albertini, Singleton, Gendler & Darby, LLP)*, of Owings Mills, Maryland, for the Charging Party.

## DECISION

### STATEMENT OF THE CASE

LEONARD M. WAGMAN, Administrative Law Judge. This case was tried at Baltimore, Maryland, on May 8, July 9–13, September 4–7, 12–14, and 19–21; November 5–8, 14–16, and 26–28, 2001; and on January 22–25, 28, and 29; and February 19, 2002. Upon a charge filed by Ui Dal Kim, an individual, referred to below as Kim, the Regional Director for Region 5 issued a complaint and notice of hearing on January 31, 2001,<sup>1</sup> against the Company, Rhee Bros., Inc., and an amended complaint and notice of hearing on March 26, 2001. The amended complaint, as further amended at the hearing, alleges that the Company violated Section 8(a)(1) of the National Labor Relations Act (the Act), by threatening or coercing employees in a letter to them because they engaged in concerted activity protected by Section 7, by forcing five employees to fill out resignation forms, and terminating their employment because they engaged in concerted activity protected by Section 7,<sup>2</sup> and by coercively interrogating employees about their concerted activity protected by Section 7 or about such activity of other employees. In its answers to the complaint and the amendments of the complaint, the Company denied that it had committed the alleged unfair labor practices.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel<sup>3</sup> and the Company, I make the following

### FINDINGS OF FACT

#### I. JURISDICTION

The Company, a corporation, warehouses and distributes Asian food products at its facility in Columbia, Maryland. The amended complaint alleges, the Company admits, and I find that, during the 12 months preceding March 26, 2001, the issuance date of the amended complaint, a representative period, the Company, in the course of its business operations, sold and shipped from its Columbia, Maryland facility material and goods valued in excess of \$50,000 directly to points outside the State of Maryland. From this commerce data, I find that the Company is and has been, at all times material to this case, an

<sup>1</sup> Henceforth, unless otherwise stated, all dates referred to in this decision occurred in 2000.

<sup>2</sup> Sec. 7 of the Act guarantees employees the right to engage in “concerted activity . . . for mutual aid or protection.” Sec. 8(a)(1) makes it an unfair labor practice to “interfere with, restrain or coerce employees in the exercise of the rights guaranteed in [S]ection 7.”

<sup>3</sup> The General Counsel’s motion to correct the transcript of the hearing in these cases is granted. The corrections are set forth in appendix “A” attached to this decision.

employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

#### II. THE ALLEGED UNFAIR LABOR PRACTICES ARISING OUT OF THE EMPLOYEES’ SECTION 7 ACTIVITIES

##### A. The Facts

#### 1. The alleged Section 7 activities and the Company’s response to them<sup>4</sup>

On an evening in mid-May 2000, Kwang Joon Park, section manager of the frozen section of the Company’s Columbia warehouse, met with frozen section employee Chul Hyun Chong and Hee Woong Kim, an employee in the warehouse’s pickup section, at Hee’s home to discuss their complaints about the management style of their superior, Warehouse Manager Jung Nam Suh. Hee complained that Suh had required him to write a letter of apology for refusing to perform overtime when he did not feel well. When Hee expressed his refusal, Suh reacted harshly. Hee also complained that Suh show favoritism toward employees who were closer to him. Park agreed that Suh was abusive and not evenhanded. I find from Park’s testimony that Suh had often reprimanded him with harsh language about his work in front of other employees. Park was insulted by this treatment. Park had also witnessed Suh physically abuse an employee. Park had heard from other employees that Suh sent them on errands involving his dog and his wife’s auto, and, in one instance, asked an employee to fix a heat pump in Suh’s home. The three employees agreed to discuss their complaints with other employees and write something to the Company.

On the evening of May 18, Park, frozen section employee Chul Hyun Chong, Assistant Warehouse Manager Kim, Chang Hyun Nam, an employee in the warehouse’s pickup section, and employee Hee Wong Kim met at Hee’s home for 3 to 4 hours. They discussed their complaints about Warehouse Manager Suh’s conduct toward employees at work. Assistant Manager Kim had heard Suh calling male employees “son of a bitch” and calling female employees “f—king bitch.” Kim had also heard that Suh had become “pretty upset” and choked employee Nak Hoon Chong and had kicked another employee while admonishing him. Kim listened as the other participants in the meeting expressed their concerns about Suh’s conduct as warehouse manager and decided to submit a letter to the Company setting them out.

On May 19, Park presented to Kim a letter addressed to the Company, drafted by Assistant Department Manager Nak Hoon Chong, who worked in the warehouses stocking section. Park and Kim found Chong’s draft inadequate. Kim rewrote the draft by hand and gave it to Park. With some revision, employee Duk Nam Yoon produced a printed version of Kim’s letter and gave it to Park on May 20<sup>5</sup> at the Company’s ware-

<sup>4</sup> Except as noted in footnotes below, I have found no issues of credibility regarding the employees’ alleged protected concerted activity and the alleged company conduct in response to that activity.

<sup>5</sup> Kim seemed uncertain when he testified that he gave the letter to Park on May 19 or 20. Park testified that he got the letter back from Duk on May 20. As Park seemed more certain as to this date, I have

house. Park took the letter and began asking employees to sign it.

Park returned to Kim and told him that the other employees would sign the letter only after Kim had done so. Kim's was the first signature on the letter. Park's was the second signature on the letter. Twelve other warehouse employees signed the letter. Among the other signatories were Nak Hoon Chong, Man Ho Kim, and Chul Hyun Chong. Kim asked about 20 employees to read the letter and sign it if they wanted to participate. He obtained several signatures on the letter from employees in the warehouse's frozen section. Kim did not obtain all the signatures appearing on the letter.

Nak Hoon Chong signed the letter<sup>6</sup> on May 20. He wrote his name on the letter, just below Park's name, and initialed it. Nak signed the letter because he wanted the Company to transfer Suh from management of the warehouse to another position.<sup>7</sup>

Before receiving the letter, Nak had discussed Manager Suh's conduct with other warehouse employees. Specifically, Nak was troubled by Suh's use of profanity and his dogmatic management style. In addition, Suh had physically attacked Nak at the warehouse in 1994 and again in 1997, during working hours. In the second incident, Suh called Nak a "son of a bitch" in a loud voice in front of other employees.

After the 1997 attack, Suh changed his treatment of Nak. He stopped inviting Nak to assistant department and section managers' meetings. Suh sent Section Manager Wan Soo Suh to those meetings. Nak saw Warehouse Manager Suh's substitution of Wan as disrespect toward Nak. Nak was also troubled by this treatment at the hands of one who was younger than Nak. Nak also resented Suh's failure to consult with section and assistant department managers before making warehouse management decisions. In Nak's view, under Suh's dogmatic style, anyone who opposed Suh's decision was a traitor.

Section Manager Man Ho Kim seemed uncertain when he testified that he signed the letter, which he referred to as a "petition," on Friday, May 19. However, I have found above that the letter was not ready for circulation until the following day. Accordingly, I find that Man signed the letter on May 20, after

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credited his testimony in this regard. I also take judicial notice that May 20 fell on Saturday.

<sup>6</sup> Contrary to Nak's testimony, I find from Park's credited testimony that Nak signed the letter on May 20. Nak testified that he signed the letter on May 19. He seemed uncertain as he gave this testimony. Park testified with convincing certainty that he did not receive the typed letter until May 20, and that he signed it on that date. Accordingly, I have credited Park's testimony in this regard.

<sup>7</sup> Sang Hui Yun testified that he signed the letter after Nak told him that its purpose was to obtain a wage increase. In his testimony, Nak emphatically denied telling Sang or any company employee that the purpose of the letter was to obtain a wage increase. A reading of the letter reveals that its sole purpose is to persuade the Company to remove Jung Nam Suh as warehouse manager. I also note that there was no showing in the record that the employees raised the matter of a wage increase at any of their meetings or in any of their discussions regarding the letter. Nak's sharp denial, the letter, itself, and absence of any evidence showing that a wage increase was discussed by the employees involved in the effort to remove Jung Nam Suh as manager of the warehouse persuaded me to credit Nak's denial.

he had read it and agreed with its assertions about Suh's dogmatic and very emotional management style.

Man had other complaints about his contacts with Suh at work. When the equipment assigned to Man for his work in the frozen section needed repair, he sought Suh's assistance to repair it. Although equipment maintenance was one of Suh's assigned duties, he often delayed repairing Man's equipment until Man provided him with a soft drink. I find from Man's uncontradicted testimony that other employees experienced the same treatment at Suh's hands.

Man suffered an arm injury early in his employment at the Company's warehouse, which required that he stay home from work. Suh called Man and asked him to return to work before the injury had healed. Man returned to work. After a few days, his arm, which had not healed, incapacitated him and he went home to recover. Soon after his return home, Suh telephoned Man and stated that if Man did not return to work, he would be replaced. Man refused to return to work until he had recovered. Man returned to work thereafter.

On a Friday in May 1999, Man injured his hip when he fell from a truck at work. Though his doctor advised him to stay home, Man went to work on the following Monday. Man found that his injury incapacitated him and asked Suh to excuse him. Suh looked at the doctor's diagnosis and remarked that it did not say that Man should rest at home. Suh refused Man's request.

Suh assigned Man to a task that permitted him to sit down. However, Man was uncomfortable and he complained to Suh. Suh insisted that Man write a statement that if he, Man suffered any side effect from his injury Suh would not be held accountable. Man complied out of fear of reprisal by Suh if he did not do so.

In April, Suh had reorganized the warehouse to consolidate checking and stocking under Assistant Department Manager Bok Hwan Bae. Suh decided upon this change without discussing it with Ui Dal Kim. Kim believed that his rank entitled him to participation in the discussion of the proposed change before Suh implemented it.

At least one of the signatories had no particular complaint against Suh. Employee Joon Geun Ahn signed the letter to support Kim and Kwang Joon Park in their effort to remove Suh as warehouse manager.

On the morning of Saturday, May 20, after 14 employees had signed the Korean language letter of complaint against Warehouse Manager Suh, Ui Dal Kim presented it to the Company's president, Syng Man Rhee, in the latter's second floor office at the warehouse. The letter, as translated into English, read as follows:

We are writing this letter for the company, believing that the company's future is the employee's future.

To make a better company, we believe that it is necessary to maintain close relationships between the department and communications between the departments and the employees. Unfortunately, our reality is often quite different. Many of the problems are attributable to Warehousing Manager Jung Nam Suh. As a manager, he should lead all the employees through communication and

cooperation, and he should take care of the employees and be loyal to the company, but what he has actually done is just the opposite. We should like to write something about what he has done.

1. Discretionary behavior.

Regarding important departmental matters, he does not discuss or consult with the person in charge, the section chief or the assistant manager, but makes decisions at his sole and subjective discretion. He will not accept any comments on his direction or policy.

2. Indistinct separation of personal affairs from business.

Work is affected by his personal and private relationships. He treats the employees unfairly by giving good evaluations to his close friend employees, which causes a lot of complaints from the other employees. He talks too much about private things (mostly golf-related) during working hours, thus discouraging work morale. He also uses employees for personal matters (maintenance of his own car, picking up his family members, etc.) during working hours. He does not allow workers to do overtime, even when it is absolutely necessary.

3. Work based on his mood swings.

He always changes the way of doing work depending on his mood, and insults and threatens employees with violent and abusive language. He treats us as if we were his servants; not like employees of the same company. He always insults and blames us. That's why new employees do not stay at the company for long. The manager repeatedly kicks out employees whom the company has hired and trained with great effort.

4. Communication problems.

He distorts and intercepts employee requests, suggestions and comments at his discretion. But, he escalates the blame from the top management enormously, so as to make employees fearful about getting demoted and terminated. Although the employees make good suggestion for the company, they are never delivered to the top management if he thinks the suggestion may have adverse effects on his job security and personal interests.

But on the other hand, instructions or criticism from the senior management are exaggerated and delivered with anger, without considering their true intent. In this situation, how can employees have affection for the company assets?

We have more to say, but we would like to summarize as above. For these reasons, we strongly ask that *Manager Jung Nam Suh be terminated from his present position*. This request is not made based on personal feelings or interests, but is made in order to make a better company through achieving a good working environment and work efficiency. We believe that we can be successful only when the company is successful. We request that the company *take decisive action by May 22nd (Monday)*. Otherwise, please understand that we will have to *make a courageous decision*. Please forgive us for the disturbance we have made and understand that this is our only choice,

and the choice was made from our love of, and loyalty to, the company.

Kim presented the Korean version of the quoted letter, in an envelope, to President Rhee, with a greeting, but without discussion or comment. Soon after he returned to the warehouse's first floor, a request for his presence in President Rhee's office came over the PA system. Kim returned to Rhee and noticed that he was "somewhat unstable" and took some medicine. Rhee asked Kim if the letter's content was true. Kim answered that it was. Rhee said he had discussed the issue raised by the letter with Managing Director Jae Doh Koh. I find from Kim's testimony, on cross-examination by Company counsel, that Rhee asked that the employees wait until May 31 before taking any action. Kim said "all right" and that he had to consult with his colleagues. He left Chairman Rhee's office and returned to the warehouse's first floor.

Immediately, Kim reported his encounter with Rhee to the employees gathered on the first floor. He was nervous and uncertain about what Rhee had said about delaying employee action. He told the employees that he could not remember whether Rhee asked for delay of their contemplated action until the end of May or the end of June. I find from the testimony of Kwang Joon Park, Man Ho Kim, and Ui Dal Kim that the employees feared Suh's reaction to their effort to remove him, when he returned from vacation on Monday, May 22, and wanted Rhee to remove Suh immediately.

About 30 minutes after reporting to the petitioning employees, Ui Dal Kim returned to Rhee and told him that the employees were willing to wait, but feared Suh's reaction to their letter, when he returned on Monday. Ui Dal Kim said the employees wanted Suh transferred as soon as he returned on Monday. Rhee said he understood and instructed Kim to take the matter up with Managing Director Koh.

By the time Kim arrived with the employees' message, Rhee had shown the employees' letter to Koh. Rhee instructed Koh to find out the facts behind the issue raised by the letter. Kim went to Koh's office. Koh assured Kim that something would be done about the matter raised by the letter. That afternoon, Koh gave the employees' letter to Operations Director Soo Wang Hong with instructions to verify its contents.

Hong took the letter seriously. He wondered if the matters complained of in the letter actually occurred. He also noted the considerable number of employees, who had signed it. When Warehouse Manager Suh returned from vacation on the morning of Monday, May 22, Hong quickly confronted him with questions about the complaints expressed in the letter. Hong questioned Suh about his conduct. Suh insisted upon seeing the letter to learn the substance of the allegations against him. Hong did not reveal the letter's substance. Nor did he reveal the names of the employees who had signed it. Following this discussion, Suh returned to work.

On the evening of May 22, Director Hong met with Warehouse Manager Suh, Assistant Department Manager Bok Hwan Bae, and Section Manager Nam Young Kim. The three discussed the headcounts of those who signed the letter and those who did not and the expected work stoppage of the signatories. The three discussed how they would prevent interruption of the

workflow and full-scale paralysis of the Company's operations. Hong requested that Suh and Nam bring to work as many employees as possible. In this discussion, Hong did not identify the employees who had signed the letter.

President Rhee spoke to Warehouse Manager Suh on May 22. The two did not discuss the content of the employees' letter. Rhee did not show the letter to Suh on this occasion. Instead, they discussed Ui Dal Kim, Nak Joon Park, Nak Hoon Chong, and Man Ho Kim. Suh criticized each of the four.

When Suh arrived at work in May, he had already heard about the letter in a phone call, on Sunday, May 21, from Bok Hwan Bae. In the same phone call, Bae also told Suh that Ui Dal Kim had presented the letter to Syng Man Rhee and that Kwang Joon Park, Man Ho Kim, and Nak Hoon Chong had signed it.

On Monday, May 22, Ui Dal Kim was troubled when he observed that Suh had returned to work and the Company had taken no action to remove Suh from his position. In the afternoon of the same day, Kim composed a petition, in Korean, to the Company, which, according to the English translation, included the following:

First of all, I would like to apologize to the chairman and to all the Rhee Bros family for raising this problem, but it was necessary in order to restore the dignity of the Warehousing Department, improve work efficiency, and correct the unfair treatment of the employees.

This problem came from out affection for the company and our desire to make the company, the Warehousing Department and the employees better.

I am sorry that this happened during Manager Jung Nam's leave, but we had the meeting before he left and didn't know the date of his leave, but we had the meeting before he left and didn't know the date of his leave until the previous day. And coincidentally, this was the same method that he had used in dealing with his business. The integration of Pickup Department and the organizing Department was done during Assistant Manager Nak Hoon Chung's leave, without considering his opinion as the head of the department. I just received notice as the assistant manager after all the decisions had been made.

1. The year-end party incident.

Manager Jung Nam and several other people attempted to boycott the party, ignoring the company's good intentions. They never explained their reasons, but just tried to discourage the whole warehousing department from participating in the party. However, most of the employees actually did participate in the party, so they had bad feeling about this.

2. Recently, resisting Mrs. Jae Hae Lee's order to take an inventory of the tools, the company's assets, he didn't repair the vehicles, so he incurred a loss in work and to the company.

3. Taking care of private matters during working hours.

When I consider the company's size and workload, I can understand Mr. Suh's (as the manager of the Warehousing Department) need to take care of some of his pri-

vate matters during working hours. But, it went beyond the acceptable level, causing work delays and losses to the company.

Mr. Suh ordered Mr. Sang Kyu Park, who is in charge of the inventory work, to do the following private work for him: repair of his own car, housekeeping, errands for his family, and even shaving his puppy, and repairs on his home. He also opened a company account and used it privately. Mr. Sang Kyu Park spent a whole workday taking care of the Manager's personal matters. It has been a quite while now that he has been using an employee as his private secretary.

4. Unfair vehicle repairs based on a close friend relationship with him.

Pickup trucks are the top priority, and then, in the Vegetable, Organizing and Refrigeration Department.

5. Asking something in exchange for doing a repair (an orange juice or soda).

It was not just a token of gratitude, and it became the practice and everybody felt that they had to do it. If someone ignores this, he will definitely get unfair treatment.

6. Unfair treatment of employees based on having a close friend relationship with him (tardiness, early leave, absence without notice, etc.).

7. Employees in the Packaging Department were asked to bring food.

8. Violence and insults to the employees-just to take a few of the more serious victims, Assistant Manager Nak Hoon Chang, Chang Gil Kim, Kyun Duk Moon, Man Ho Kim and Soon Ja Park.

9. Insulted the other department head (Section Chief Kwang Joon Park) and tried to fire him by mentioning the name of senior management and accusing him of not being the proper person for the position.

10. Ignoring the company's system of rank.

In carrying out his work, he ignored the organizational chain of command and inappropriately discussed matters with people who were his friends.

There is a rumor that Manager Jung Nam Suh has his own warehouse inside Rhee Bros's. Since he is considering only his own interests and safety, and doing things that damage the company's interests and future, we request the resignation of Manager Jung Nam Suh.

On the afternoon of May 22, Ui Dal Kim presented the quoted letter to Director Hong. Upon reading the letter, Hong said he understood the situation and that he had suspected that this was happening. In a report of his investigation of the issues raised by the employees' letter, Hong referred to Kim's letter as a "supplementary description."

In the portion of his report referring to May 22, Hong tells of his afternoon interview with Ui Dal Kim. After reporting the discussion of the employees' letter and Kim's supplement, Hong reported telling Kim that it would be "the right thing to wait until 5/31/00 just as instructed by Mr. Chairman, since a personnel action cannot be taken overnight solely based on the unilateral demand of one side." Hong's report shows that Kim

express uncertainty as to how the employee would act. Hong reported that upon hearing Kim's response, Hong concluded that the employees "would deal with the issue by exercise of power." Hong's report stated that he sought to placate Kim by telling him that "it would work out with a nice appearance if wait as instructed."

Ui Dal Kim drafted a petition on May 22, after women employed in the Company's packing department wanted to join in effort to remove Suh as warehouse manager. Kim signed the petition and obtained 26 signatures from other employees, including packing department employees. Among those signing this petition were Kwang Joon Park, Man Ho Kim, Nak Hoon Chong and Chul Hyun Chong. A line was drawn through each of the signatures of employees Hwa Young Kim, Won Soo She, and Bong Soo Kim. Employee Sang Gyu Park's name appears on the petition with "resigned" next to it. The name of employee Jung Yang Ha appears on the petition with "vacation" next to it. Kim signed both Sang's and Hwa's names at their requests. Sang had resigned his employment and Hwa was on vacation. The petition stated:

We are requesting for the department Manager Jung Nam Suh's withdrawal. However, since the company has its procedures and methods, we will conform to it and follow such.

But first, we want the department Manager, Jung Nam Suh, to withdraw from all storage work.

In the event that this problem does not precede, all of those who petitioned will resign.

This is our genuine concern for the company's growth.

The employees, who had signed the petition of May 22, met after work that day at a bowling alley near the warehouse. Among those present were Ui Dal Kim, Nak Hoon Chong, Man Ho Kim, Chul Hyun Chong, Kwang Joon Park, and the packaging employees. The 23 assembled employees discussed the Company's inaction. They mistrusted the Company in light of its failure to remove Suh from the warehouse. Some of the employees favored a strike to show their unity in demanding Suh's removal as warehouse manager. The employees agreed to show their strength and unity by having a meeting at the bowling alley on the following day, at 8 a.m., instead of going to work.

At 8 a.m., on May 23, about 20 of the Company's employees, including Ui Dal Kim, Chul Hyan Chong, and Nak Hoon Chong met at the bowling alley, which was not open. The meeting moved, to a Burger King across the street from the bowling alley. Man Ho Kim and Kwang Joon Park arrived at the Burger King after the others had assembled. Most of the assembled employees, including Ui Dal Kim, Nak Hoon Chong, Kwang Joon Park, Man Ho Kim, and Chul Hyung Chong, agreed that they would not report to the Company that day. Employees Won Soo Suh and Chun Gyu Kim attended the meeting but returned that day to work at the Company's warehouse. None of the frozen section employees worked on May 23. The striking employees remained at the Burger King for 2 or 3 hours and then moved to Chul Hyun Chong's home.

Operations Director Soo Wan Hong became aware of the strike soon after his 8 a.m. arrival at the Company's warehouse.

At around 9:30 a.m., Hong met with Janet Rhee, President Rhee's wife and executive assistant, also known as Choon Ok, and Managing Director Jae Do Koh to discuss the strike. They decided that the strike was reckless and could not be tolerated. They decided to deal with it "sternly" and agreed that Ui Dal Kim, Nak Hoon Chong, Kwang Joon Park, and Man Ho Kim were "front runners" in organizing the strike and "core" participants in it.

During the meeting at the bowling alley, the striking employees designated Ui Dal Kim, Kwang Joon Park, and packing section employee Soon Ja Park to go to the Company with the signed petition and look for President Rhee. When they arrived on the second floor of the warehouse, Kim and his two companions learned that President Rhee was not available. Kim and the Parks met Janet Rhee. I find from Janet Rhee's testimony that the strikers' representatives presented two documents to her, Kim's supplemental letter and the petition.<sup>8</sup> After the meeting she gave them to President Rhee.

After Janet Rhee had read Kim's supplemental letter, Soon Ja Park and Kwang Joon Park detailed for her their complaints against Warehouse Manager Suh. Janet Rhee replied that the employees' walkout would cause great harm and damage to the Company. Kim and the Parks said that as long as Suh was in the warehouse, they were not able to work.

Janet Rhee asked why they had not brought their complaint to her sooner. The three employees did not answer her. They said that Suh had treated them unfairly and that they intended to begin their walkout at once. Janet Rhee asked under what conditions would they be willing to return to work. Kim and the Parks replied that as long as Suh was gone, they would return to work. Janet Rhee said she could not decide this matter on her own. Janet Rhee said she would get in touch with Kim and the Parks. Janet Rhee asked if the employees would return to work if Suh were moved. Kim answered that he could not make that decision on his own and that he would ask the other employees and let her know. Kim gave his cell phone number to Janet Rhee. Janet Rhee said she would talk to Directors Hong and Koh and get back to Kim and his companions. Kim and the Parks returned to the Burger King, where the other striking employees had gone for breakfast.

At approximately 11 a.m., when he had not yet received a call from Janet Rhee, Kim telephoned her. Janet Rhee remarked that the Company's president had asked the employees to wait until May 30 and despite that request, the employees were striking. Continuing, she declared that no matter how harmful the strike might be to the Company, the management was not going to grant their petition to remove Suh. Kim answered that he understood and he hung up.

Kim told the assembled employees at the Burger King what Janet Rhee had said. The employees decided to remain on strike. They moved to Chul Hyun Chong's house, where they had lunch and remained until 5 p.m. Approximately 15 of the strikers agreed to meet the following day.

<sup>8</sup> In their accounts of their meeting with Janet Rhee on May 23, neither Ui Dal Kim nor Kwang Joon Park testified about giving the petition to her. However, Janet Rhee's credited testimony shows that she received the petition and the supplemental letter on that occasion.

After leaving Chul Hyun Chong's home, Ui Dal Kim went to Syng Man Rhee's home. Kim was worried about the emotions on both sides and the impact of those feelings upon the employees' jobs. He arrived at Rhee's house at about 5:30 or 5:40 p.m. Kim met Janet Rhee and immediately apologized on behalf of him and the other striking employees for not telling the Company about their complaints before taking the action. Janet Rhee answered, agreeing with Kim's view. She said the whole thing could have been settled. She added that she had spoken to Directors Hong and Koh and the Company's attorney, Jae Sun Bae. Janet Rhee assured Kim that if the employees returned to work by May 26, there would be no "fuss." Kim said he understood and went home.

Later, the same day, Nak Hoon Chong came to Syng Man Rhee's home and spoke to Janet Rhee. Chong apologized for the employees' action. He said he had signed the petition, but had no intention of quitting the Company.

That evening, packaging department employee Soon Ja Park telephoned Janet Rhee, at home. Soon apologized for "creating a big event." Rhee assured Soon that the chairman would answer the employees by May 31, and urged Soon to return to work on the following day.

Later in the evening, Ui Dal Kim received a phone call from Soon Ja Park. Soon told of her conversation with Janet Rhee and expressed concern Soon not to worry and that he would call her back.

Kim immediately called Janet Rhee and complained that Soon knew about what Janet Rhee had told Kim. Kim had thought that Janet Rhee had shared that information only with Directors Hong and Koh, Kim, and Attorney Jae Sung Bae. Kim's emotional state caused him to say that he was quitting his job<sup>9</sup> and that he would do anything to have the striking employees go back to work. Having stated his intentions, Kim hung up. He then telephoned Kwang Joon Park, Chang Hyun Nam, Duk Nam Yoon, and Chul Hyun Chong to set up a meeting with them, that same evening at Hee Woong Kim's house.<sup>10</sup>

At about 8 p.m., on the night of May 23, Kim, Kwang, Chang, Hee, Duk, and Chul met at Hee's house. Park reported that the striking women feared for their jobs and wanted to return to work. Duk was an office employee and did not have much interest in the warehouse employees' cause. However, Duk joined in the view that the striking women should return to work on the following day. The five warehouse employees at first discussed the continuation of the strike by the warehouse employees until the Company gave in. Kim became incensed and said he could not be responsible for their jobs or their living and could not go on like this. The five warehouse employees agreed that Kim was right and they should all go back to

<sup>9</sup> On direct examination, Kim testified that he told Janet Rhee he was going to quit and that he did so because he was emotional. Two days later, on cross-examination, Kim agreed that he had in fact told her he "quit right then and there." Kim gave this answer with certainty and I have credited it.

<sup>10</sup> On directed examination, Kim omitted Duk Nam Yoon from his account of who attended the Tuesday night meeting. Two days later, on cross-examination, Kim added Duk. As he seemed to be more careful about his testimony on cross-examination, I have credited that testimony in my findings of fact.

work. It was agreed that they would meet with their colleagues on the following day and try to convince them to return to work. The five made phone calls and invited their colleagues to meet on the morning of May 24, at Hee Wong Kim's house. Park, Kim, Chang, and Chul, in separate calls, told the packing department women to return to work on the following day.

On May 24, Nak Hoon Chong and the packing department women returned to work at 8 a.m. The remaining 10 or 11 strikers, including Ui Dal Kim, Chul Hyung Chong, Man Ho Kim, and Kwang Joon Park, met at Hee Wong Kim's house. All but Chong met at 8 a.m. Chong arrived at the meeting at 10 or 10:30 a.m. Some of the strikers wanted to remain on strike. Ui Dal Kim's idea was to return to work, as Janet Rhee had urged. By the time Chong arrived, the early arrivals had decided to end the strike and return to work at the Company's warehouse.

At around 11:30 a.m., on May 24, Operations Director Soo Wan Hong used the warehouse's public address system to summon employee Nak Hoon Chong to Hong's office on the second floor. When Chong arrived, Director Hong handed him a printed notice written in Korean, that Hong had written, himself, on May 23, after consultation and discussions with President Rhee and Managing Director Jae Doh Koh.

I find from Director Hong's testimony that the three met three times on May 23. At their last meeting Hong, Koh, and Rhee decided to adopt an "ultra tough policy" toward those who participated in the strike. I find from Director Hong's testimony that he, Koh, and President Rhee decided to terminate the employment of Ui Dal Kim, Nak Hoon Chong, Kwang Joon Park, Man Ho Kim, and Chul Hyun Chong.

Hong embodied that policy in his notice. In their discussions preceding the drafting of the notice, the president and the two directors agreed that strikers Ui Dal Kim, Nak Hoon Chong, Kwang Joon Park, and Man Ho Kim, because of their managerial positions, would be required to resign. President Rhee and the two directors also agreed to require Chul Hyun Chong to resign because he was a Rhee family member and thus should not have been involved in the strike.

Hong instructed Chong to take 12 copies of the notice to the strikers. Chong arrived at Hee Woong Kim's house at around noon, where they were distributed to the strikers.

The English translation provided by the General Counsel differs slightly from the English translation provided by the Company. Both have been certified as true translations. At the hearing, I received both translations and the original Korean text in evidence. However, the amended complaint in this case relied on the General Counsel's translation as evidence of violations of Section 8(a)(1) of the Act in the Korean version. Accordingly, I am relying on that same translation in making my findings and conclusions in this decision. That translation is as follows:

A Letter of Notice

To: Assistant General Manager Eui-dahl KIM and 19 others—May 23, 2000

You are notified of the company position on the incident of your partial strike of 1) Demand on Replacement of Manager.



We are those who use the same language. We do not have any difficulty at all in communication in general or communication of [your] demands. You are trying to ram through a demand by taking advantage of the means of strike, i.e., the last resort for [resolving] labor-management issues. Furthermore, the issue was not even tried out. Hence it is totally unacceptable.

Also, you unilaterally ignored the promise given by the chief executive officer to wait absolutely only a certain time point. Instead, you are resorting to an extreme method of partial strike. Hence, we cannot accept your demand as something normal.

No matter what the subject may be, no matter what the issue may be, or no matter what the problem may be, it is the position of the company that we shall not compromise even a single step, if instead of trying to solve the problem through a dialogue, you unscrupulously elect to use the method of strike, which should be the last resort after negotiations and compromise.

As a result, we are not in a position to give you any answer whatsoever to your demand, even if the company has its own plans.

(2) Matters to be Notified.

A. You are in the same situation as if you had already voluntarily quit the company. You must know very well that the nature of company business is such that it does not allow many hours unfilled. For those who fail to formally come to the office for work on time on the morning of 5/26/00, we consider them as those who voluntarily quit the company. This [courtesy] notification is out of consideration of the family-like work relationship so far; and you are advised to come to the office for work normally.

B. For those non-managerial level employees who come to the office normally for work by the morning of 5/26/00, we will not hold you responsible at all with respect to this incident; and just post a 3-day absence.

However, those managerial position holders (Assistant General Manager, Manager, and those who served as the source of the problem) are hereby requested to voluntarily submit a letter of resignation.

C. For other matters than those described in the above, you are requested to follow the company's decisions.

May 23, 2000  
Rhee Bros., Inc.

Before it was issued, Syngman Rhee read, and approved, the Korean version of the above-quoted notice drafted. Chairman Rhee was taken aback by the strike and was angered by it. He believed that the employees had promised to wait until May 31 before taking any action. He felt as if he had been "backstabbed."

At about noon on May 24, Nak Hoon Chong delivered the Company's letter of notice to the ten strikers, who were meeting at Hee Wong Kim's house. Chong returned to work immediately after delivering the Company's letter. By the time Chong arrived at the strikers' meeting, they had decided to return to work. After Ui Dal Kim and the other 9 strikers had read the Company's letter of notice, Kim wrote a response, in

Korean. The English translation of the letter's title is "Letter of Resignation." Kim and his nine colleagues wrote their names at the bottom of the letter, but did not execute signatures. The English translation of the letter reads as follows:

Letter of Resignation

The undersigned employees had no intention to destroy our workplace by engaging in the strike.

Now, we have given up on discussion and decided to take action to demonstrate our will.

Therefore, we apologize to the chairman and to all our families.

We will work hard until the company makes a decision about our action.

The 10 remaining strikers returned to the Company's warehouse at about 1 p.m. on May 24. At some point that afternoon, Ui Dal Kim presented the letter of resignation to Director Hong.<sup>11</sup> Soon after Kim's arrival at the Company, Director Hong called him to Hong's office.

Director Hong's intent was to carry out the provision in his notice to the strikers that the striking managers would be required to submit resignations. Hong also included Chul Hyun Chong as "a source of the problem," as described in the Company's notice. Hong and Syng Man Rhee also focused on Chul Hyun Chong because he was a relative of Chairman Rhee.<sup>12</sup> It

<sup>11</sup> According to Janet Rhee, and Director Hong, Janet Rhee received the letter of resignation on May 23, when she met with Kwang Joon Park and Soon Ja Park. Managing Director Koh testified that he received the Letter of Resignation on May 23 from Syng Man Rhee. However, I find from Ui Dal Kim's straightforward testimony that the Letter of Resignation did not exist until the afternoon of May 24. Director Hong seemed to be stretching his recollection when he testified on cross-examination that he received the letter from Janet Rhee prior to the arrival of the strikers on May 24. Director Koh seemed unfamiliar with the content of the letter of resignation that he understood to be a letter of employee complaint. Neither Ui Dal Kim, nor any of the other returning strikers were questioned about when the Company received the Letter of Resignation. However, the timing of the preparation of that letter and Ui Dal Kim's return to the Company's warehouse, and Director Hong's admission that he received it, convinced me that it arrived at the Company that same afternoon.

<sup>12</sup> Jae Doh Koh testified that Hong's decision to terminate Chul Hyun Chong was based in part on Chong's "pretty bad" work performance, his excessive complaints, and the problems he caused. However, Director Hong's frank testimony was that it was Chul Hyun's leadership in originating the petition and in the strike, which caused Hong, Chairman Syng Man Rhee and Managing Director Koh to select Chong for termination. Syng Man Rhee's testimony did not include any reference to the quality of Chong's work, excessive complaints or problems caused by Chong other than his efforts in support of petition to remove Suh from the warehouse and his participation in the strike. The lack of corroboration of Koh's testimony by Chairman Rhee and Director Hong, and the absence of any assertions in Koh's prehearing affidavit that bad performance, excessive complaint and problems were additional reasons for Chong's termination cast serious doubt upon Koh's testimony. I also noted that of the three witnesses on this issue of fact, Hong impressed me as being the frankest in demeanor. Accordingly, I have credited Hong's testimony in this regard.

was their view that as a relative, he should not have been involved in the strike.<sup>13</sup>

At Director Hong's instruction, Ui Dal Kim gathered Kwang Joon Park, Man Ho Kim, Nak Hoon Chong, and Chul Hyung Chong and accompanied them to the director's second floor office. Hong distributed a Company form entitled "Resignation Confirmation Form" and an attached interview form to each of the five employees. Hong instructed them to fill out the forms and return them to him. Kim suggested that the other six employees, who had returned to work that day, should also fill out the same form. Hong brought the six returned strikers into the meeting and had each of them fill out the same forms and return them to him.

When Director Hong distributed the forms, he told the employees that the Company would keep the completed forms and that they should not worry. Hong also said the completed forms would be used to prevent any further incident. Upon completing and submitting the forms to Director Hong, the eleven employees returned to work. Hong gave the forms completed by Kwang Joon Park, Man Ho Kim, Ui Dal Kim, Nak Hoon Chong, and Chul Hyung Chong to the Company's human resources department and kept the remaining forms which he later either returned to the employees, who had completed them, or destroyed them in their presence.

At about 4 p.m., on May 24, Director Hong summoned employees Kwang Joon Park, Man Ho Kim, Ui Dal Kim, Nak Hoon Chong, and Chul Hyung Chong to his office. Hong told the five that there were five employees who were close to Warehouse Manager Jung Nam Suh and would quit if they came back to work. Hong directed them to go home until the issue was settled and that he would contact them later. I find from Nak Hoon Chong's uncontradicted testimony, that Hong assured the five that their departure was not a resignation.

Director Hong's testimony includes the admission that on the afternoon of May 23, he, Syng Man Rhee, and Managing Director Koh had decided to terminate the "managerial-level people, who were involved in [the petition and strike]," and Chul Hyun Chong. Hong also admitted that these five were good workers and that he had delayed the announcement of their termination, hoping to change the Company's mind.

On Friday, May 26,<sup>14</sup> Ui Dal Kim, Kwang Joon Park, Man Ho Kim, Chul Hyun Chong, and Nak Hoon Chong returned to the Company for their paychecks and to find out about their jobs. Ui Dal Kim saw notations on his paycheck that his salary

<sup>13</sup> Syng Man Rhee denied knowing of Chul Hyun Chong's relationship with the Rhee family on May 23, when the Company's notice was prepared. However, Director Hong's testimony was to the contrary. Of the two, Director Hong impressed me as having a stronger recollection of the events and conversations leading up to the decision to insist upon the resignation of Chul Hyun Chong. In assessing the credibility of Hong and Rhee, I also noted that Rhee was evasive at times and seemed to be a reluctant witness. Accordingly, I have credited Hong's testimony regarding the Company's decision to get rid of Chong.

<sup>14</sup> Ui Dal Kim testified that he, Park, Man Ho Kim, and the Chongs returned to the Company at 5 p.m. on Thursday for their paychecks. However, Man Ho Kim and Nak Hoon Chong testified with more certainty that they returned to the Company on Friday morning, May 26. Kwang Joon Park did not testify about this event.

and health insurance would be cut off by a certain date. Nak Hoon Chong concluded that he had been terminated, when he heard that his insurance would be terminated on May 30. Janet Rhee spoke to Nak Hoon Chong and told him he could no longer work for the Company.

Hong's report on the strike and the events between May 20 and May 26 shows that on May 25, Chairman Rhee, Managing Director Koh, and Director Hong decided to move Warehouse Manager Suh from the warehouse department to a new position. A Company announcement issued on May 25 or 26 stated that, effective June 1, Suh would become Maintenance Department Manager. In his new position, Suh was in charge of repairing warehouse and other Company equipment.

On April 27, 2001, the Company offered reemployment to Chul Hyun Chong. Chong returned to work at the Company on June 18, 2001. In May 2000, The Company employed Chong in the frozen foods section at its Columbia, Maryland, warehouse. However, when he returned to work on June 18, 2001, the Company did not reinstate him in his position at Columbia. Instead, the Company employed Chong at Jessup, Maryland, located a few miles away. There was no showing that the Company gave any backpay to Chong for the period between May 25, 2000, and June 18, 2001. I find from Managing Director Koh's testimony that after reemploying Chong, the Company determined that Chong's performance from January 1 until May 23 did not entitle him to a wage increase, which the Company granted to most warehouse employees earlier in 2001. Koh relied on evaluations of Chong's work by a section manager, who had little opportunity to observe Chong's work, and an assistant warehouse manager, who was loyal to Manager Suh. The General Counsel suggests that this withholding of a wage increase is a matter to be reviewed at the compliance stage of this proceeding. I agree and so find. I also find that the Company has failed to reinstate Chong and grant him the backpay due him, assuming that his termination was unlawful.

2. The facts regarding the employment of Ui Dal Kim, Kwang Joon Park, Man Ho Kim, and Nak Hoon Chong

*a. Ui Dal Kim*<sup>15</sup>

The Company hired Ui Dal Kim at the end of 1991, and employed him at its Columbia warehouse as a checker under the supervision of Warehouse Manager Jung Nam Suh. Effective April 1, 1998, the Company designated Kim as assistant department manager and assistant manager in the warehouse department. Kim remained in that position until his termination on May 25. During the last full year of his employment Kim's primary function was to check incoming and outgoing shipments.

Kim normally worked Monday through Friday, 8 a.m. to 5 p.m., and on Saturday from 8 a.m. to 1 p.m. He also worked 2 to 4 hours of overtime weekly. Kim spent 70 to 80 percent of his worktime checking outgoing and incoming goods. Employee Sang Kyu Park assisted Kim checking incoming goods. Most of Kim's time went to checking shipments. He checked

<sup>15</sup> My findings of fact are drawn from the uncontradicted testimony of Ui Dal Kim, Kwang Joon Park, Jung Nam Suh, and Jay Do Koh.

the palletized goods using picking tickets, which identify the goods and the quantity ordered by the customer. After his inspection, Kim sent the ticket to the second floor. Kim checked incoming shipments from documents he received from the second floor. He performed this task either inside the incoming container, or outside the container, while the goods were being unloaded, or after they had been unloaded.

Each week, the second floor's purchasing department gave Kim a weekly schedule of incoming containers and outgoing shipments. Kim used this schedule to make a daily plan showing the locations of scheduled loading and unloading. He contacted incoming drivers through the Company's dispatchers telling them where to spot their trailers at the Company's warehouse. Kim also told the Company's warehouse employees where designated trailers would be spotted for unloading. Kim did not tell employees what to unload and where to put it on the dock. Another employee gave such instructions.

Employee Jae Dong Choi used the information from the second floor to make a plan for arranging shipments in the trailers to facilitate delivery to customers. Kim checked the shipments for correct quantity and proper packaging condition.

Hourly, during the morning of his workday, Kim toured the warehouse to keep track of the arrival of containers. He reported such information to the purchasing department manager on the second floor. Manager Kwang Duk Lee of the purchasing department instructed Kim on which containers were to be unloaded and the order in which they were to be unloaded. Kim passed those instructions on to the employees, who were to unload the containers. After a trailer was opened, Kim distributed the invoices to the unloading employees.

A listing and detailed description of Ui Dal Kim's duties while assistant department manager and department manager shows that in addition to checking outgoing and incoming goods, he managed vehicles for cold storage delivery, checked on the status of the Company retail store's delivery vehicles for efficient delivery of goods, managed the warehouse inventory, fostered cooperation between the warehouse department and the second floor offices, and kept Warehouse Manager Suh informed on the status of incoming and outgoing merchandise and on the status of vehicle management. Kim's most important daily function was keeping track of and inspecting incoming and outgoing shipments.

When Warehouse Manager Suh was not available to conduct a morning meeting with the warehouse employees, Kim, or Assistant Manager Bok Hwan Bae conducted it. They reviewed the coming day's work. They did not give out work instructions to individual employees at these meetings. Each employee already had his or her morning work schedule. Kim or Bok invited the employees to speak out if they had any questions or anything to say.

After he conducted a morning meeting, Kim walked around the warehouse to ascertain that everyone had received an assignment and picking tickets to assemble outgoing shipments. Kim also considered the need for overtime.

Kim received daily requests for overtime from section managers and, after discussion with Assistant Department Manager Bok Hwan Bae, made his own evaluation of such need, all of which he would pass on to either Suh or In-House Sales Man-

ager Lee Byung Joo. In turn, Suh or Lee would talk to Managing Director Koh about the need for overtime. Koh decided the issue, and gave his decision to Suh or Lee. Kim received Koh's decision and passed it on to the appropriate section manager for implementation.

Suh authorized Kim to make routine decisions regarding loading and unloading container or trucks. If, for example three trucks are to be loaded, and the first scheduled truck has not arrived, Kim can tell the employees assigned to this task to load the second scheduled truck, if it has arrived. When Suh was not present in the warehouse, Kim had authority to ask employees to move from one section to another in need of extra help, when requested by an overloaded section. When Suh was present, Kim made such requests on Suh's instruction. When a section manager said he had workers available for assignment, Kim reported that to Suh, who would instruct Kim where to deploy them. If Suh were absent from the warehouse, Kim would send the idle employees to sections in need of help.

I find from Manager Suh and Director Koh's testimony, that in addition to 50 to 60 regular full-time employees, the Company employs from 6 to 22 temporary employees in its warehouse operations, daily. During his tenure as assistant manager, Kim received requests from section managers, who determined their needs from employee requests for help and the weekly schedule of incoming containers. Kim received a daily flow of schedule information from the second floor offices regarding incoming containers. Based upon requests and information from the second floor, Kim made daily requests for part-time employees to executive assistant to the president, Janet Rhee, who called Just Temps for temporary employees. Kim had no authority to select temporary employees.

When the temporary employees arrived, Kim deployed them to the sections in need of help. Upon reaching their assigned section, temporary employees received instructions from section employees as to their tasks.

At the end of the day, Kim signed an invoice for each temporary employee who had worked at the Company's warehouse that day. If Kim found a temporary employee's performance unsatisfactory, he made a note on the employee's invoice that the Company did not want that employee back. Kim's command of English made him the contact man between the Korean speaking employees and the English speaking temporary employees.

Kim's inventory management function required that he go through the warehouse to check the quantities of particular products to see if they were running low. Kim checked inventories in this manner at the request of the purchasing department on the second floor.

Twice annually, the Company did an overall inventory. Kim, acting as a conduit for the second floor, coordinated the collection of inventory data. He told employees which sections needed review and told them to prepare reports for the second floor. The employees submitted inventory reports directly to the second floor.

Kim acted as a conduit between Manager Suh and the warehouse employees regarding changes in container schedules or equipment in need of repair. Kim also reported to Suh other problems raised by the employees. Kim did not have authority

to resolve any problems raised by warehouse employees. He simply passed them on to Suh.

Kim had no authority regarding personnel actions. Nor did he have authority to effectively recommend such actions by his superiors. He had no authority to hire or fire employees or effectively to recommend such action. Kim had no authority to transfer, or effectively recommend the transfer of employees. He could, however, ask section managers to provide assistance to other sections, as needed to accomplish the day's scheduled work. Kim had no authority to grant vacations. Suh scheduled employees' working hours, vacations, and requested leave.

Kim had no authority to write performance evaluations of employees. During the workday, Kim made comments to employees about their performance, sometimes praising, other times criticizing. He did not report his comments to Suh. Kim had no authority to discipline or effectively to recommend the disciplining of an employee. Kim had no authority to resolve either disputes between employees or their complaints.

The Company paid Kim hourly wages starting in January 2000. In mid-May, at Kim's request the Company began paying him a weekly salary. There was no change in Kim's duties when the Company began paying him a weekly salary. His salary was \$900 per week. His hourly wage at the time of the change was \$15.75.

*b. Nak Hoon Chong*<sup>16</sup>

Janet Rhee hired Nak Hoon Chong as a warehouse employee at the Company's Columbia, Maryland warehouse, on October 21, 1984. He began work the following day and worked for the Company at that location until May 24. For the first 6 years of his tenure at the Company, Nak did stocking, picking goods, loading, and unloading. For the last 10 years of his employment, Nak worked only in stocking of both refrigerated and dry goods. He used forklift trucks to move dry stock and his own manual labor to move refrigerated goods.

During his employment at the Company, Nak received two promotions. In 1990, the Company promoted Nak to section manager of the warehouse's stocking section. No change in Nak's duties accompanied this promotion. On January 1, 1995, the Company promoted Nak to assistant department manager. Again, Nak experienced no change in his duties. Nak remained assistant department manager until his termination on May 24.

Nak stored incoming goods according to invoices he received from the second floor. He gave one copy of the invoice to the employee in charge of the incoming container and kept the other copy for himself. From the invoice, Nak determined where to store the incoming item and whether to set some aside for sale or other disposition. He would use his judgment in determining if more space were required for further receipts of a new product. In May 2000, employee Joon Geun Ahn was in charge of unloading incoming containers. Eight to twelve temporary employees assisted Joon, who had no title and was shown on the Company's organizational chart as an employee in the warehouse's frozen section. Nak stored the unloaded

merchandise or otherwise disposed of it based upon the invoice. During the last 10 years of his employment by the Company, Nak's duties did not change. These duties took almost his entire workday. During his employment, the Company adopted Nak's recommendation that the Company's computers show the location of stocked goods.

Nak also kept track of items in stock that had exceeded its expiration date. For example, slow selling noodles or noodle products had expiration dates. Nak filled out a form showing the item and its expiration date. He submitted the completed forms to Warehouse Manager Jung Nam Suh, who sent it to the second floor for decision by upper management. Pending decision, Nak or another stocking section employee, on Nak's instruction, would remove the questioned goods from their current location to another stocking area to avoid accidental shipping.

Chairman Rhee, a director, or the managing director would decide whether to discard the product or continue to sell it. Managing Director Koh usually made the decision. If the second floor decided to discard the item, the deciding officer would instruct Nak to discard it. Nak filled out a form recording the disposition of the item and submitted it to Suh. Nak may have said something to Suh from time-to-time about an expired product. However, Nak never made a decision to discard an item.

Returned goods were Nak's responsibility. Stores returned goods for a variety of reasons. Nak took care of returned items. He, or another stocking section employee on Nak's instruction, restocked them if they were in satisfactory condition. Nak checked the return sheet to see if the quantity shown on the paper corresponded to the quantity actually returned. He removed price tags, checked to see if the packaging was undamaged and if the product had an expiration date that had passed. If the packaging was intact and the contents had not reached their expiration date, Nak routinely told the stocking section employees working with him to shelve the items. Nak worked along with them.

If the packaging was damaged or the product's expiration date had passed, Nak routinely filled out a company form listing the returned product that had failed his inspection and the reason he had set it aside. He submitted the completed form to Warehouse Manager Suh. Pending Suh's instructions, Nak and other stocking section employees shelved the questionable items separately.

Along with the other warehouse employees, Nak performed an inventory once or twice per year, usually in June and December. The second floor issued a list of warehouse locations where the inventory would be done, and a map showing those locations.

In April 1995, after Nak's promotion to section manager, the second floor management discovered errors in the lists the stocking section employees had submitted, after an inventory they had conducted from March 30 to April 2, 1995. Stocking section employee Kyung Duk Moon had done the inventory. The second floor reported the discrepancy to Warehouse Manager Suh. Suh instructed Nak to draft an apology letter, as he was in charge of the section. Nak drafted an apology letter in which he took the blame himself and declared: "I will never

<sup>16</sup> My findings of fact regarding Nak Hoon Chong's employment by the Company are based upon his and Jung Nam Suh's uncontradicted testimony.

make this type of mistakes [sic] again.” On instructions from Suh, Nak discussed the error with Moon. Suh warned Nak to make sure this never happened again.

From the time the Company promoted Nak to assistant department manager until his termination on May 24, he had no authority over personnel dispositions. Nak had no authority to transfer employees from the warehouse. He had no authority to fire employees, hire employees, or effectively to recommend such action by his superiors. Nak had no authority to schedule an employee’s work hours, nor did he have authority to permit employees to stay home from work or leave work early. Warehouse employees calling in sick talked to Manager Suh about staying home. Nak had no authority to schedule vacations for employees. Nak never did a written or an oral evaluation of an employee’s work performance, nor did he have authority to discipline an employee.

The daily work assignments for the warehouse employees originated on the second floor, where company officers drew up schedules of incoming and outgoing shipments of dry and frozen goods. Based upon those schedules, section managers would assign tasks to employees. The second floor also issued a monthly schedule of receipts and shipments. Whenever there was a change to the schedule, Suh would confer with Purchasing Department Manager Kwang Duk Lee and In-house Sales Department Manager Bjung Joo Lee and change work schedules if necessary.

Manager Suh conducted daily meetings with the storage section and the rest of the warehouse’s 45 employees, at which he instructed the employees as to their duties for the day. Suh used the morning meeting to instruct warehouse employees as to where incoming shipments would be stored and as to in-house movement of stored stock. On some occasions, Suh directed the work of stocking section employees using Nak as his spokesman. Suh would tell Nak of incoming shipments and where they should be stored.

Nak made certain that the stocking section employees stored incoming shipments according to their expiration dates. Older stock was on the lower shelf, where the pick-up employees could easily reach it. The newer stock was stored on a higher shelf from where storage section employees moved it to the lower shelf, as needed. Thus, Nak followed a first-in-first-out stock control system. Nak fed information about stock quantity and location into the Company’s computer.

*c. Kwang Joon Park*<sup>17</sup>

Kwang Joon Park began working for the Company in October 1992, in the warehouse’s stocking section. In 1993, the Company transferred him to the warehouse’s freezer section, where he remained until his termination on May 24. Kwang’s immediate supervisor throughout his employment at the Company was Warehouse Manager Suh. When Kwang arrived in the frozen section in 1993, the section’s employees trained him. He received no training from Suh.

<sup>17</sup> Except as to the date of Kwang’s promotion to section manager, my findings of fact regarding Kwang’s employment by the Company are based on his and Manager Suh’s uncontradicted testimony.

Kwang unloaded frozen goods from incoming trucks on pallets and stored the goods in the freezer department. He also assembled frozen goods on pallets for shipment by truck. Kwang worked from instructions he received either from Suh or from the second floor management.

The frozen sections employees loaded trucks according to picking tickets they received from the second floor. Kwang and other frozen section employees used forklifts and battery powered cars to load palletized shipments.

During the last year of his employment, Kwang worked at the Company’s warehouse from Monday to Saturday. He worked a total of 47.5 hours per week and received an hourly wage of \$13.35 for 40 hours and weekly overtime pay for 7.5 hours. Each week, the Company paid Kwang and his frozen section colleagues an extra \$45 for working in the freezer.

Kwang devoted half of his workday to loading and unloading goods. He devoted the rest of his working time to stocking and storing frozen merchandise. He palletized stock, wrapped it as necessary and stored it. Kwang performed these tasks at the Company’s Columbia warehouse, along with employees Man Ho Kim, Cho An Jong, Song Ha Park, and Young Chan Kim. Section Manager Nam Young Kim worked alone at the Company’s freezer at nearby Jessup, Maryland. Each of the freezer section employees at Columbia, including Kwang, had his own daily assignment to pick out and load goods for shipment to a particular nearby Company retail store, based on picking tickets issued by the second floor. As each employee completed his assigned shipment, he began assembling a shipment for a store in Texas, Florida, or some other distant state. Here, again the instructions came from the second floor.

The frozen section employees received instructions for loading assignments from invoices that the second floor sent through a pneumatic tube system to the first floor. Employee Sung Sim Chong made out picking tickets also referred to as invoices, from store orders. She or the manager of in-house sales, Byung Joo Lee, would use the warehouse public address system to tell the frozen section employees that the invoices for a particular company store were ready. The invoices reached the first floor and the assigned employee would take his invoices and prepare the order for shipment. In addition to the p.a. system announcements, the frozen section employees had daily schedules to which they referred. The second floor announced schedule changes over the p.a. system.

Effective January 1, 1997, the Company promoted Kwang from assistant section manager to section manager of the warehouse’s freezer.<sup>18</sup> Kwang retained that title until his termination on May 24. Kwang’s promotion to section manager did not bring about any change in his job duties. A wage increase of \$50 per week accompanied this promotion. Of this amount, \$30 represented Kwang’s participation in an across-the-board wage increase for all warehouse employees. The remaining \$20 was compensation for his promotion to section manager.

Kwang’s 4 years’ experience in the warehouse’s freezer section rendered him the most senior employee there when he

<sup>18</sup> Kwang testified that he believed his promotion to section manager occurred in around 1995. However, the Company’s records show the Kwang was promoted to section manager effective January 1, 1997.

became section manager. His familiarity with the frozen section's operations encouraged Manager Suh to look to Kwang to keep them running smoothly. If anything went wrong in the frozen section, Suh held Kwang accountable.

Warehouse Manager Suh regularly attended Monday morning meetings on the second floor, where problems involving the frozen section, among others were discussed. Kwang never attended any of these meetings. However, when Suh returned to the warehouse after a frozen section problem had come up for discussion at one of these meetings, he took it up with Kwang. Suh passed on the instructions from the meeting to Kwang, who passed them on to the frozen section employees.

Kwang used his greater experience in the frozen section's work to determine the proper storage of goods. He knew that heavier items should be stored on the bottom of storage containers or shelves. The other section employees were aware of the proper procedure. However, Kwang would correct them if they erred. Kwang's experience also taught him the proper unloading and storage of frozen goods. He passed this knowledge on to the other frozen section employees in the course of the day's work. Kwang knew what merchandise to pull from storage for loading on shipments to customers.

Suh directed Kwang to inspect palletized shipments by comparing the assembled goods with applicable picking tickets as to type of goods and quantity. When the section was busy, Kwang shared this work with one or more of his section colleagues. Kwang and his colleagues cross-checked each other to make sure the proper items and quantities were ready for loading.

The Company prepared and promulgated a job description covering Kwang, which stated on its face that he was its drafter. Kwang admitted that he drafted some of its content, which he submitted to the second floor. He did not specify his contribution to the final document. The undated document, entitled "Contents of Operation" listed Kwang's duties as section manager, as follows: "1. Sending out products/delivery receiving; 2. Confirming incoming frozen container; 3. Maintenance of frozen warehouse; 4. Loading; 5. Inspection of packaged merchandise. However, this list omitted some of Kwang's chores. Kwang testified that he could not describe all of them. One example of the unlisted chores involved returned merchandise. Kwang would inspect such merchandise to see if it was useable or should be otherwise disposed of. He would then discuss the item and his observations with Manager Suh.

Kwang had no authority to hire or discharge employees. Nor did he have authority to recommend effectively such personnel actions. The Company encouraged Kwang and all other employees to bring in prospective employees and introduce them to management for consideration. However, there is no showing that Kwang successfully recommended the hiring of such individuals. Nor was there any showing that the Company would accept such a recommendation without further independent investigation of the prospective employee's suitability for employment by the Company.

Section Manager Kwang had no authority to transfer an employee from the frozen section to another section of the warehouse. Nor did he have authority to recommend, effectively, that an employee be transferred. As section manager, Kwang

had no authority to permit employees to leave work early. Such authority resided in Warehouse Manager Suh. Kwang had no authority to approve an employee's request to work overtime. Nor did he have authority to schedule or approve an employee's vacation request. During his tenure as section manager, Kwang did not make any written evaluation of any employee. Nor did he have authority to make such an evaluation. Park had no authority effectively to recommend that an employee be rewarded or promoted. He did not recommend the promotion of Man Ho Kim to section manager in the frozen section, which occurred in January 2000.

Kwang would comment to Manager Suh that a particular employee was doing a good job or was working hard. However, Kwang never told Suh that an employee was not doing a good job. If Kwang found fault with an employee's performance, he would discuss the shortcoming with the employee after work.

In the winter of 2000, Kwang and Section Manager Man Ho Kim requested Manager Suh to transfer employee Joon Keun Ahn from the frozen section. Suh investigated on his own and concluded that there was no reason to transfer Joon. However, after Kwang and Man argued with him, Suh gave in.

#### *d. Man Ho Kim*

The Company hired Man Ho Kim in February 1994, and employed him in the warehouse's freezer section until his termination on May 24. His immediate supervisor throughout his employment was Warehouse Manager Jung Nam Suh. Through the last year of his employment, Man worked a 46-hour week at the Company's warehouse, starting at 8 a.m., Monday through Friday. On Saturday, he worked from 8 a.m. until 1:30 p.m. During that period, the Company paid Man at an hourly rate of \$11.75.

The Company assigned Man mainly to handling poultry in the frozen section of the warehouse. He was involved with the stocking, storage, loading, and unloading of fresh meat and poultry. He prepared poultry and meat for shipment. He took care of retail pickups of poultry and meat. Man also worked in long distance shipping of meat and poultry. He helped Kwang Joon Park, by checking freezer and refrigerator temperatures to comply with FDA regulations and by filling oils. Man also helped Kwang unload, when there was a heavy volume of incoming trucks. When Kwang was absent, Man assumed his duties.

Effective January 17, the Company promoted Man to manager of the frozen section. Neither Manager Suh, nor any other member of the Company's management talked to Man about the significance of Man's new title prior to the publication of the notice of his promotion. There was no change in Man's work after January 17. With Man's promotion, there were three section managers and four nontitled employees in the frozen section. Section Managers Kwang and Man worked at the Columbia warehouse and Section Manager Nam Young Kim worked alone at the Company's Jessup, Maryland facility.

After his promotion, Man continued to devote his workday to meat and poultry related work, including long distance shipments. Monday through Friday, Man devoted roughly the first 5 hours of his day to meat and poultry related work. He also

prepared long distance shipments from 2 until 5 p.m. Other frozen section employees performed the same kind of work, independently. Man worked alone using a pallet truck or a forklift. He usually worked beyond 5 p.m. on those days checking on truck containers parked in the Company's Columbia parking lot. Man checked the condition of the food items stored in these containers and the temperature inside the containers.

Man's meat and poultry related duties involved filling orders for the Company's 40 or 50 pickup customers and for the Company's six retail stores. Four of the stores were located in nearby Maryland. One was located in New York and a second in Los Angeles. The Company had 40 or 50 pickup customers. Man picked out items requested by a pickup customer or by a Company store to make up complete orders. The second floor business office received the pick-up and store orders called picking tickets and handed them over to Man for filling. He took the order and went to frozen or refrigerated stock areas to fill the order. Upon filling a particular store's order, Man loaded it on a designated truck. He also handed pickup orders to the waiting customers.

Man had no authority to direct the work of other employees.<sup>19</sup> Nor did he have authority to discharge or effectively recommend the discharge of an employee. Man had no authority to hire employees and had no authority to effectively recommend discharge of an employee. The Company did not give Man authority to transfer employees from the warehouse. Nor was there any showing that he had authority effectively to recommend the transfer of any employee from the warehouse. Man had no authority to grant vacations to employees. Suh received employee requests for vacations and had authority to grant them. Man had no authority to schedule employees' work hours. There was no showing that Man could either grant employee requests for time off or effectively recommend approval or disapproval of such requests. Manager Suh had authority to grant such requests. Man had no authority either to evaluate or to check an employee's work performance.

The Company's job description for Man, as section manager shows his "Duties" as: "1. Overall meat control; 2. Meat pick-

up at six stores; 3. Frozen products stores and long distance pick-up." A second portion of Man's job description is entitled: "Detailed Description of Duties." The details of Man's duties are number coded to match up with the "Duties" column of the job description, and read as follows: "1.1 Incoming & Outgoing of IBP rib; 1.2 Incoming & Outgoing of BB beef and meat; 1.3 Incoming and Outgoing of MARTIN RIB EYE; 2.1 NY. MD 77. VA 01. MD91. CA11; 3.1 Pick up from Frozen product stores and long distance." Man's job description does not recite any further duties or details of his duties,

#### B. Analysis and Conclusions

Section 7 of the Act protects "concerted activities for the purpose of . . . mutual aid or protection. . . ." Section 8(a)(1) of the Act enforces this protection "by making it an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of rights guaranteed by [S]ection 7." *Halstead Metal Products v. NLRB*, 940 F.2d 66, 69 (4th Cir. 1991). "Congress intended that the protections of [S]ection 7 be 'broadly construed.'" *NLRB v. Parr Lance Ambulance Service*, 723 F.2d 575, 577 (7th Cir. 1983). This broad protection is particularly necessary in cases where, as here, the employees have no bargaining representative and no other representative to present their grievances to the Company and "must speak for themselves as best they [can]." *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 14 (1962).

Employees who collectively engage in a work stoppage to protest over wages, hours, benefits, or other working conditions are engaged in concerted activity protected by Section 7 of the Act for "mutual aid or protection" within the meaning of that section of the Act. *NLRB v. Washington Aluminum Co.*, 370 U.S. at 17, accord: *Halstead Metal Products v. NLRB*, 940 F.2d at 70. An employer violates Section 8(a)(1) of the Act by discharging employees who engage in a work stoppage in protest over such matters. *NLRB v. Washington Aluminum Co.*, 370 U.S. 14-17; *New York University Medical Center*, 324 NLRB 887, 906 (1997).

The right of employees to engage in peaceful strike activity finds further protection in Section 13 of the Act, which provides: "Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike." This provision and Section 7 of the Act, protect the basic right of employees to engage in a peaceful strike. See *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 233-235 (1963). By discharging an employee for engaging in a protected strike, an employer violates Section 8(a)(1) of the Act. *B & D Custom Cabinets*, 310 NLRB 817, 818 (1993) affd. 9 F.3d 108 (6th Cir. 1993).

The General Counsel contends that the Company, violated Section 8(a)(1) of the Act by terminating Ui Dal Kim, Nak Hoon Chong, Kwang Joon Park, Man Ho Kim, and Chul Hyun Chong, in retaliation for their concerted action in the initiation of a petition and the warehouse employees' strike. The General Counsel also contends that the Company's letter of notice, to Ui Dal Kim and the other striking employees violated Section 8(a)(1) of the Act. The Company argues that its treatment of the five alleged unlawful discharges did not violate the Act on the grounds that Kim, Nak, Kwang, and Man were supervisors

<sup>19</sup> Director Koh testified that Man Ho Kim changed the assignments of the warehouse's helpers. Man testified that he had no authority to direct the work of other employees. I have found from Ui Dal Kim's testimony that on instructions from Suh, he moved section employees from a less busy section to a busier section, when necessary. When Suh was present in the warehouse, Kim checked with him for approval of such a transfer. If Suh was absent from the warehouse, Kim, on his own, followed Suh's instruction. Kim provided detailed testimony in an objective manner, in contrast with Koh's bare assertion. Further, in his testimony on cross-examination, Koh admitted that Man Ho Kim needed a Korean interpreter to assist him in answering English questions at the hearing in this case and that at, work, Koh spoke only in Korean to Man. Koh also admitted that none of the six helpers at the warehouse were Korean American. He also admitted that they spoke English, and that none spoke Korean. In the face of Koh's admissions, I find it unlikely that Man Ho Kim was capable of giving vocal instructions to any of the six helpers. In light of Koh's admissions and my finding that Ui Dal Kim and Man Ho Kim's testimony regarding the helpers was more reliable than Koh's, I have credited Kim and Man here.

within the meaning of Section 2(11) of the Act, that these same four individuals were also managerial employees, that the five were not engaged in protected activity when they petitioned and struck to have Jung Nam Suh removed as manager of the Company's warehouse, and that they voluntarily quit. For the following reasons, I find merit in the General Counsel's contentions.

The record shows that on May 23, Company President Syng Man Rhee and Directors Hong and Koh met and decided to adopt an "ultra tough policy" toward those who participated in the strike, which had begun that morning. Director Hong drafted a notice to the 20 strike participants stating, inter alia, "managerial position holders (Assistant General manager, Manager, and those who served as the source of the problem) are hereby requested to voluntarily submit a letter of resignation. Rhee approved the notice that was issued to the strikers on the following morning. Assuming that the strike was concerted activity protected by Section 7 of the Act, I find that the Company's notice interfered with, restrained, and coerced the striking employees in the exercise of their right to strike.

In their discussions preceding the drafting of the notice, the president and the two directors agreed that strikers Ui Dal Kim, Nak Hoon Chong, Kwang Joon Park, and Man Ho Kim, because of their managerial positions, would be required to resign. President Rhee and the two directors also agreed to require Chul Hyun Chong to resign because he was a Rhee family member and thus should not have been involved in the strike.

On May 24, the company issued the notice to the strike participants. The notice told the strikers that their resort to the strike was "totally unacceptable," that the Company would not compromise due to the employees' unscrupulous use of a strike. The notice went on to warn the strikers that "they were in a situation as if they had voluntarily quit the company." The notice told the strikers that those who failed "to formally come to the office for work on time on the morning of May 26" would be considered "as those who voluntarily quit the company." The Company's notice also announced that a 3-day-absence would be posted to the record of striker who returned to work on May 26. Those strikers with managerial titles were "hereby requested to voluntarily submit a letter of resignation."

In his testimony before me, Director Hong admitted that he, President Rhee and Director Koh made the decision to terminate the four managers and Chul Hyun Chong during their discussions on May 23. He inserted the request for voluntary resignations when he drafted the notice to the 20 strikers. I find that Hong used the request for voluntary resignations to disguise the Company's decision to terminate the five leaders of the employees' strike because of their leadership.

I also find that the "Letter of Resignation" signed by Kim and his nine colleagues did not contain any indication that the "undersigned employees" were in-fact resigning or intended to do so. Instead, it showed their intent to return to work. The 10 did return to work on May 24.

I have found that Director Hong terminated the employment of Ui Dal Kim, Kwang Joon Park, Man Ho Kim, Nak Hoon Chong, and Chyul Hyun Chong that same afternoon. As they left, Hong assured them that their departure was not a resignation

Assuming that the strike was concerted activity protected by Section 7 of the Act, I find that the notice to employees, in portions quoted above, interfered with, restrained, and coerced Company employees entitled to such protection by threatening reprisals against them for engaging in the strike on May 23. By telling the striking employees that their resort to the strike was totally unacceptable and that it would not compromise on the employees' complaint, because of their strike, the Company was threatening to withhold any grant of relief for the employees' complaints against Manager Suh. In this context, such a threat to withhold an improvement in the employees' conditions of employment runs afoul of the protection afforded them under Section 7 of the Act.

The notice's statements that the Company was treating the strikers as if they had already quit their jobs and that unless they returned to work by May 26, the Company would deem them to have voluntarily quit, added up to a threat of termination for participation in the strike. The Board has long recognized that such threats violate Section 8(a)(1) of the Act. *Accurate Wire Harness*, 335 NLRB 1096 (2001). Assuming that Section 7 of the Act covered the five leaders, the announcement of their voluntary resignations constituted threats of termination violative of Section 8(a)(1) of the Act. Similarly violative of Section 8(a)(1) of the Act would be the notice's threat to impose a 3-day absence on strikers who returned to work on May 26.

The record does not support the Company's contention that the objective of the five leaders and their fellow strikers was to substitute Ui Dal Kim for Department Manager Jung Nam Suh. In support of this contention, the Company relied upon the allegations in the employees' letter to Dr. Rhee in which they complained of Manager Suh's failure to discuss warehouse matters with, section managers or the assistant department manager, before implementing changes he had devised. They also complained that Suh did not accept comments on his policies. These complaints in the letter to President Rhee produced by the joint efforts of Kim, Kwang, Nak, and employee Duk Nam Yoon, was inserted under the heading, "Discretionary Behavior." Nowhere in that paragraph, nor in any other portion of the letter was there any suggestion that the petitioning employees, who signed the letter wanted Kim or anyone else to take Suh's place as warehouse manager. I find from Kim's frank and forthright testimony that he was not interested in replacing Suh.

Kim's subsequent letter to the Company included a complaint in item 10 that Suh ignored "the company's system of rank." Absent from Kim's letter was any expression of preference for himself or anyone else in the selection of a new warehouse manager. Nor did Kim's or Kwang's conversations with members of the Company's management include any suggestion of a replacement for Suh. In sum, the record shows that the focus of the five leaders and their allies was the removal of Jung Nam Suh as manager of the warehouse.

Assuming that the five leaders and the other employees, who signed the letter and engaged in the strike, were employees entitled to the protection of Section 7 of the Act, I find that their objective, the removal of Suh as manager of the warehouse, was protected. *Avalon-Carver Community Center*, 255



NLRB 1064, 1070 (1981). The Board has recognized that such activity is protected by Section 7 of the Act “where the identity of a supervisor directly relates to terms and conditions of employment, which in turn is based on whether (1) the protest originated with employees, (2) the supervisor dealt directly with the employees on matters of concern to them, (3) the identity of the supervisor directly related to terms and conditions of employment, and (4) the reasonableness of the means of protest.” *Caterpillar, Inc.*, 321 NLRB 1178, 1179, (1996); *Midland Hilton & Towers*, 324 NLRB 1141 (1997).

Assuming that the five leaders were employees, I find that the record testimony of the complaining employees and the contents of the letter and petition show that Manager Suh dealt directly with the employees on matters of concern to them and that the identity of the manager of the warehouse did directly relate to terms and conditions of employment. Through his daily interaction with the warehouse employees and in his encounters with them, as described in their testimony in this proceeding, and in their letter and petition, Suh did deal directly with them. I also find the means of protest in this case, the letter, the petition (*Epilepsy Foundation of Northeast Ohio*, 331 NLRB 676, 681–682 (2000)), and the strike (see *Yesterday’s Children, Inc.*, 321 NLRB 766, 767 (1996)) were reasonable means of protest.

The Company further contends that Section 7 of the Act did not protect the strike because the five leaders knew that a strike would “harm the Company significantly” (Company’s Brief p. 59) and because it was preceded by a sudden ultimatum. The Company also contends that on May 20, Kim waived the employees’ right to strike when he agreed to give Chairman Rhee 11 days, until the end of the month to decide about Suh’s position. I find no merit in these contentions.

That the strike might have harmed the Company did not deprive the strikers of Section 7’s protection. *East Chicago Rehabilitation Center v. NLRB*, 710 F.2d 397, 404 (7th Cir. 1983). In enforcing the Board’s order in *East Chicago Rehabilitation Center*, 259 NLRB 996 (1982), the 7th Circuit declared that to lose the Act’s protection “more must be shown than that the activity caused inconvenience.” 710 F.2d at 404. Continuing, the court noted:

The whole purpose of a strike is to impose costs on the employer, in the hope of making him come to terms; and an effective strike, by preventing the employer from serving his customers, necessarily imposes costs on them as well: it forces them either to turn to other suppliers of the goods or services sold by the employer (thus denying them their first choice) or, as this case, to do without for a time.

Contrary to the Company’s position, the strikers in the instant case were under no general duty to “minimize the disruption” by undertaking the least drastic forms of protest, or by giving the employer advance notice of a work stoppage. *Columbia Portland Cement Co. v. NLRB*, 915 F.2d 253, 257 (6th Cir. 1990). That the strikers did not expressly warn the Company that Jung Nam Suh’s return to his managerial duties at the warehouse on the morning of May 22 would provoke them to strike on May 23 did not remove their strike from Section 7’s protection. *NLRB v. Washington Aluminum*, 370 US at 14. The

Court, in *Washington Aluminum*, recognized that the requirement of specific notice that the Company suggests here “might place burdens upon employees so great that it would effectively nullify the right to engage in concerted activities which Section 7 of the Act protects.” *Id.*

The record does not support the Company’s contention that the strikers violated an agreement with the Company under which they waived their right to strike. I have found above that at the end of their first meeting on May 20, President Rhee asked Kim for assurance that the employees would wait until May 31 before taking any action on their request for Suh’s removal as warehouse manager. I have also found that Kim replied “all right” and that he had to consult with his colleagues. When Kim returned later that same day, he told President Rhee that the petitioning employees wanted Suh transferred from his warehouse duties when he returned from vacation on the following Monday. Rhee said he understood, and told Kim to take this matter up with Director Koh.

I find that Kim did not waive the rights of the petitioning employees to strike before May 31. Instead, he showed understanding of Rhee’s request and added that he had to consult the petitioning employees, who were waiting on the first floor. When he returned to the President’s office, on May 20, Kim said nothing about not striking and told Rhee of the employees’ demand that the Company transfer Suh from the warehouse when he returned from vacation, on May 22. At that point, there was no basis for Rhee’s claim that he had an agreement from Kim that the petitioning employees would give the Company 11 days to ponder Suh’s fate before striking.

It is well settled that a waiver of a statutorily protected right under the Act may not be inferred unless it is “clear and unmistakable.” *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983). Accord: *Gary-Hobart Water Corp.*, 210 NLRB 742, 764–765 (1974), *enfd.* 511 F.2d 284 (7th Cir. 1975). Upon close scrutiny, I find that the two conversations on May 20, between Kim and President Rhee, did not include, on Kim’s part, the “clear and unmistakable” language required by the Board to waive the petitioning employees’ right under Section 7 of the Act to strike for Suh’s removal from management of the Company’s warehouse.

The Company contends that Section 7 of the Act does not protect Kim, Nak, Kwang, and Man because they are either supervisors within the meaning of Section 2(11) of the Act or managerial employees, as described under Board policy. I find that the record does not support these contentions.

Determining whether an individual is an “employee” or a “supervisor” within the meaning of the Act is of critical importance because Section 7 of the Act grants the right to engage in “concerted activities for the purpose of collective bargaining or other mutual aid or protection” only to “employees.” Section 2(3) of the Act states: “The term ‘employee’ . . . shall not include . . . any individual employed as a supervisor.”

Section 2(11) of the Act defines “supervisor” as:

Any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or ef-

fectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

In enacting Section 2(11), Congress sought to distinguish between true supervisory personnel, who are “vested with genuine management prerogatives and employees—such as “straw bosses, leadmen, [and] set-up men”—who enjoy the Act’s protection while they perform “minor supervisory duties.” *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 280–281 (1974). It follows that supervisory status should not be construed too broadly “because the employee who is deemed a supervisor is denied” the protection of the Act. *Chicago Metallic Corp.*, 273 NLRB 1677, 1689 (1985). Accord: *NLRB v. North Carolina Granite Corp.*, 201 F.2d 469, 470 (4th Cir. 1953).

Although the language of Section 2(11) lists supervisory powers in the disjunctive, it also contains the additional requirement that the powers be exercised with “independent judgment” rather than in a “routine fashion. *Hydro Conduit Corp.*, 254 NLRB 433, 437 (1981). Accord: *NLRB v. Hale Container Line*, 943 F.2d 394, 396–397 (4th Cir. 1991). Whether the individuals alleged by the Company to be supervisors were informed of their authority to exercise supervisory power is relevant in determining supervisory status is relevant in determining supervisory status. *Hale Container Line, Inc.*, 291 NLRB 1195, 1197 (1988), *enfd.* 943 F.2d 394 (4th Cir. 1991). The Company had the burden of proving that Kim, Nak, Kwang, and Man were supervisors within the meaning of Section 2(11) of the Act. *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 711–712 (2001).

There was no showing by the Company that Warehouse Manager Suh or any other member of management ever told Kim, Nak, Kwang, or Man that they had authority to exercise any of the powers enumerated in Section 2(11) of the Act. When each of the five was promoted to a titled position, he continued to function as he had prior to the promotion. Kim was, for the most part, a checker of incoming and outgoing shipments from 1991 until May 24. Nak was a stocker in refrigerated and dry goods for the last 10 years of his employment by the Company. Kwang began working in the warehouse’s stocking section in 1992. In 1993, the Company transferred him to the warehouse’s frozen section, where he remained until May 24. Kwang loaded and unloaded, stocked and stored, palletized stock and wrapped it. The Company hired Man in February 1994, and employed him in the warehouse’s freezer section until May 24. Man stocked, stored, loaded and unloaded meat and poultry. His main concern was poultry. He used picketing tickets from the second floor to assemble shipments for customers and for the Company’s retail stores. He handled poultry and fresh meat receipts and shipments. He also worked with Kwang, checking refrigerator and freezer temperatures to comply with FDA regulations and by filling oils. When there was a heavy volume of incoming trucks, Man helped Kwang unload.

According to their assigned work, the four alleged supervisors received daily work plans, weekly container arrival schedules and daily picking tickets to fill orders for shipment, all

from the management group on the warehouse’s second floor. At his morning meetings, Suh went over the day’s work plan for loading and schedules showing the arrival of containers and departures of shipments and answered questions regarding the work.

Kim checked incoming freight and shipments against documentation from the second floor. Kim reported container arrivals to the second floor and used the schedule of arrivals and shipments to spot incoming trailers at the warehouse. With the help of Company dispatchers Kim told incoming drivers of their parking locations. Kim told the warehouse employees where each trailer would be located for unloading. Manager Lee on the second floor instructed Kim as to which containers were to be unloaded and the order in which they were to be unloaded. Employee Choi, on information from the second floor made a daily plan for arranging shipments in the trailers to facilitate delivery to customers. Kim checked shipments for correct quantity and proper packaging condition. Before a trailer was unloaded, Kim gave the proper invoices to the employees assigned to unload it. Kim had duties involving Company delivery vehicles, and warehouse inventories. The company also charged him with fostering cooperation between the warehouse and the second floor and keeping Suh informed on the status of incoming and outgoing merchandise, and of vehicle management. Kim’s most important task was keeping track of and inspecting incoming and outgoing shipments.

When Suh was absent from the warehouse, Kim conducted some of the morning meetings in the manager’s place. Although Kim reported information from the second floor to the employees, he did not make work assignments. Indeed, there was no showing that in Suh’s absence Kim did more than deploy employees from one section to another in accordance with the variations in the volume of work in each section and request by section managers for help. When Suh was present in the warehouse, Kim sought Suh’s approval before moving employees from one section to another.

Kim asked the second floor for temporary employees when requested by section managers, who in turn were acting on requests of section employees. Kim also checked daily schedules from the second floor to see if he needed temporary employees. He made such requests to the second floor.

Nak, Kwang, and Man performed warehouse duties based upon instructions or documents issued from the Company’s management. They spent most of their working time performing the same work the other section employees were doing. They observed the work of the other section employees, corrected their errors and instructed them on proper procedures. If an employee’s performance warranted criticism, they approached the employee, gave the criticism and explained the correct procedure. On occasion such criticism took the form of verbal reprimands. However, the Board has recognized that a verbal reprimand is not “discipline” within the meaning of Section 2(11) of the Act. *Hydro Conduit Corp.*, 254 NLRB at 437.

When instructing section employees to move from one assignment to another, the four alleged supervisors did not use independent judgment. Instead, they followed instructions issued by the second floor management. I find that they acted as leadmen, using their experience and skill to help other em-

ployees perform the warehouse's work more quickly and efficiently.

The work of the Company's warehouse was routine in nature and repetitive. Daily and weekly work assignments for each section came from the second floor. Changes in assignments work assignments also came from the same source. Picking orders and invoices also told employees what to do, where to get the merchandise and where to ship it.

The four alleged supervisors had no authority to take care of tardiness or early departures. If employees were late or needed time off, Manager Suh was the sole source for excuse or release. If the employees had problems or complaints, none of the four alleged supervisors had authority to solve the problem or satisfy the complaint. They were the conduits to Suh for such matters. They had no authority to grant or effectively to recommend vacations. Employees submitted their vacation plans to Manager Suh for approval.

None of the four had authority effectively to recommend personnel actions such as hiring, discharge, or promotion. Their recommendations would go through Suh to the second floor, where an investigation and discussion would follow. If they recommended a transfer out of the warehouse, such a recommendation would rest with Suh, who would conduct his own investigation to see if a transfer was warranted.

In sum, I find that the Company has failed to show that Ui Dal Kim, Nak Hoon Chong, Kwang Joon Park, and Man Ho Kim are supervisors with the meaning of Section 2(11) of the Act.

The Company cited no Board or court case in support of its contention that Kim, Nak, Kwang, and Man are managerial employees. However, the Board and Federal courts have provided guidance in defining "managerial employees" explaining their exclusion from the Act's protection. The Court, in *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 275 (1974), held that "Congress intended to exclude from the protections of the Act all employees properly classified as 'managerial.'" The Court went on to approve the definition of "managerial employees" "as those who" formulate and effectuate management policies by expressing and making operative the decisions of their employer." 416 U.S. at 288. Accord: *NLRB v. Case Corp.*, 995 F.2d 700, 704 (7th Cir. 1993). *Progress Industries*, 285 NLRB 694, 741-742 (1987). In *NLRB v. Yeshiva University*, 444 U.S. 672, 683 (1980), the Court recognized, with approval, that under Board policy "normally an employee may be excluded as managerial only if he represents management interests by taking or recommending discretionary actions that effectively control or implement employer policy" (Citations omitted). Accord: *Ohio River Co.*, 303 NLRB 696, 716 (1991), enf. 961 F.2d 1578 (6th Cir. 1992).

The burden of proving that Kim, Nak, Kwang, and Man were managerial employees at the time they participated in effort to remove Suh rested upon the Company, as the party claiming that the Act did not protect them. *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. at 711. The Company has not sustained that burden. The record shows that these four individuals were engaged in routine warehouse duties involving the receipt, storage, inspection, and shipment of goods, in accordance with directions from the Company's management on the

second floor of the warehouse. Kim checked on cargo and deployed employees in accordance with priorities and directives from the second floor. The Company has not shown that any of the 4 occupied executive positions, closely aligned with management, "who 'have discretion in the performance of their jobs independent of [the Company's] established policy' *General Dynamics Corp.*, 213 NLRB 851, 857-858 (1974)." *Ohio River Co.*, 303 NLRB at 716. Accordingly, I find that none of the four was a managerial employee.

In sum, I find that the Company violated Section 8(a)(1) of the Act, when it terminated Ui Dal Kim, Nak Hoon Chong, Kwang Joon Park, Man Ho Kim, and Chul Hyun Chong on May 24, in retaliation for their participation in concerted activity protected by Section 7 of the Act.

### III. THE ALLEGED FAILURE TO COMPLY WITH THE REQUIREMENTS SET FORTH IN *JOHNNIE'S POULTRY CO.*<sup>20</sup>

#### A. The Facts

Company warehouse employee Sang Hui Yun testified before me on January 22 and 24, 2002. Yun first met with Company attorneys James A. Johnson and Jonathan I. Ahn in connection with this case before Labor Day 2001. Yun had a second meeting with the same attorneys at about the same time. At both meetings, Attorney Johnson and Ahn asked Yun about this case and the strike. They also discussed the possibility that he would be a witness in this case.

At the time of the first meeting, Yun was working at the Company's Jessup, Maryland facility. Section Manager Nan Young Kim told Yun to report to the second floor at the Company's Columbia warehouse. When Yun reported to the Columbia warehouse's second floor, Jae Hae Rhee met him. Jae told Yun that he would be meeting with the Company's attorneys. Jae did not tell Yun the purpose of this meeting. Nor did she tell Yun that he was not required to meet with the Company's attorneys and that he would not suffer adverse consequences if he declined to meet with them.<sup>21</sup>

The first meeting with Attorneys Johnson and Ahn lasted about 1 hour. The attorneys told Yun that they wanted to talk to him about the strike. He answered their few questions about it. At the start of the meeting, the attorneys told Yun that it was up to him whether he would discuss the strike with them. However, they gave Yun no assurance that nothing would happen to him if he decided not to talk to them. The attorneys also asked Yun how he felt about employees' petition that he had signed. At the end of the first meeting, Attorneys Johnson and Ahn thanked Yun.

At the beginning of the second meeting neither Attorney Johnson nor Attorney Ahn told Yun the purpose of the meeting. Nor did either attorney tell Yun that he did not have to talk to them and that if he chose not to, nothing would happen to him.

<sup>20</sup> 146 NLRB 770 (1964).

<sup>21</sup> My findings of fact regarding Jae Hae Rhee's instructions to Yun are based on Yun's uncontradicted testimony. Rhee did not testify about this incident.

They told Yun something about U.S. law.<sup>22</sup> They also asked him a few questions.

Department Manager Bok Hwan Bae met with Attorneys Johnson and Ahn three times, once before October 15, 2001, when Bae was an assistant manager and twice after his promotion to department manager on that date. The Company did not contend that at the first meeting, Bae was a supervisor, and thus unprotected by Section 7 of the Act. On that occasion, before meeting with the 2 attorneys, Bae met with Managing Director Koh.

Managing Director Koh instructed Bae to meet with Company Attorneys Johnson and Ahn. Koh told Bae that the attorneys wanted to talk to him about the events of May 2000. Koh did not tell Bae that Bae was not required to talk to the attorneys unless he wanted to. Nor did Koh assure Bae that the Company would not take any action against Bae if he decided not to talk to the attorneys.<sup>23</sup> The Company's attorneys questioned Bae about the alleged discriminatees' position titles and authority and the situation regarding Manager Suh.

#### B. Analysis and Conclusions

The Board, in *Johnnie's Poultry Co.* 146 NLRB at 775<sup>24</sup> held, in pertinent part:

In allowing an employer the privilege of ascertaining the necessary facts from employees in [preparation for litigation], the Board and courts have established specific safeguards designed to minimize the coercive impact of such employer interrogation. Thus, the employer *must communicate to the employee the purpose of the questioning, assure him that no reprisal will take place, and obtain his participation on a volun-*

<sup>22</sup> Attorneys Johnson and Ahn gave testimony which materially contradicted Yun's account of his two meetings with them. However, Attorney Johnson's testimony shows that he spoke to Yun in English and Attorney Ahn, who is fluent in Korean, translated for Yun, when needed a Korean interpreter at the hearing before me. In his testimony before me, Johnson admitted that he spoke to Yun in English and that Attorney Ahn apparently translated Johnson's remarks into Korean. In his testimony regarding what he said to Yun, Attorney Ahn testified in English, translating what he had said to Yun. Ahn did not testify in Korean, notwithstanding an official interpreter was present and available. Thus, neither Johnson nor Ahn rebutted Yun's Korean language testimony regarding what Ahn and Johnson said to him at their two sessions. I did not have the benefit of Ahn's Korean version of his remarks to Yun. This circumstance and my impression that Yun was trying to provide his best recollection of the two encounters between him and the Company's attorneys persuaded me to credit his testimony. I also noted that at the times of the interviews referred to in the amendment to the complaint in this case, Attorneys Johnson and Ahn were not aware of the Board's policy, as expressed in *Johnnie's Poultry*, covering employer interviews of employees regarding alleged unfair labor practices. This fact raises the strong possibility that they did not satisfy that policy. The final blow to the reliability of Johnson and Ahn's testimony was Attorney Johnson's admission before me that on the day prior to their testimony before me they discussed the substance of Ahn's intended testimony.

<sup>23</sup> My findings regarding Koh's remarks to Bae are based upon Bae's uncontradicted testimony. Managing Director Koh did not testify about this encounter with Bae.

<sup>24</sup> Accord: *Standard-Coosa-Thatcher Carpet Yarn v. NLRB*, 691 F.2d 1133, 1140 fn. 8 (4th Cir. 1982).

tary basis. . . . When an employer transgresses the boundaries of these safeguards, he loses the benefit of the privilege (Emphasis supplied).

In the instant case, there is ample evidence that the Company has exceeded the boundaries that the Board has established in *Johnnie's Poultry*. I find from Jae Hae Rhee's testimony, that at the time she spoke to Yun, she was executive assistant to Managing Director Jay D. Koh and managed the Company's transportation department, including drivers and dispatcher Perry Campbell. I also find from her testimony that at all times material to this case, she was married to Company Director Seung Kwan Rhee, brother of Company President Rhee. The record also shows that at all times material to this case, Jae He Rhee was a director of the Company. Jae's testimony shows that when she discussed matters related to the transportation department with Perry Campbell or the drivers, they recognized that she spoke for the Company and accepted her suggestions.

Given her position in the Company's second floor management group and the importance transportation department employees attach to her instructions, I find that her remarks to Yun carried the weight of the Company's management. Jae Hae Rhee told Yun that he was about to meet the Company's attorneys. However, she did not inform him of the purpose of the meeting. Nor did she tell him that he did not have to meet with counsel and that, if he decided not to meet with them, the Company would not take any adverse action against him.

I also find that in their first meeting with him, Attorneys Johnson and Ahn interrogated Yun about the strike, which was concerted activity protected by Section 7 of the Act. However, they did so without advising him that he would not suffer reprisals from the Company if he chose not to submit to their questions. In light of Jae Hee Rhee's omissions and the attorney's omissions, I find that the Company's questioning of Yun on the first occasion violated Section 8(a)(1) of the Act.

However, the evidence does not support a finding that the Company violated Section 8(a)(1) of the Act, when the two attorneys interviewed Yun on the second occasion. The evidence shows that before interviewing Yun the second time, the attorneys did not tell him the purpose of the meeting. Nor did they give him any assurance of no reprisal by the Company if he elected to forego the interview. However, there was no showing that they asked him any questions regarding Section 7 activity or these proceedings. Thus, there was no coercive interrogation in this instance.

Finally, when Managing Director Koh instructed employee Bae to meet with the Company's attorneys for an interview, Koh did not advise Bae that his participation in the interview was voluntary. Nor did Koh assure Bae that if he declined to be interviewed by the attorneys that the Company would not take adverse action against Bae. By interviewing Bae in these circumstances, the Company violated Section 8(a)(1) of the Act. *WXG*, 330 NLRB 695, 712-713 (2000).

#### CONCLUSIONS OF LAW

1. By terminating Ui Dal Kim, Nak Hoon Chong, Kwang Joon Park, Man Ho Kim, and Chul Hyun Chong because they concertedly complained regarding the abusive treatment of employees by a supervisor, which affected their conditions of

employment, and because they engaged in a strike in support of their complaint, the Company has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

2. By issuing a notification letter to its striking employees telling them that the strike was totally unacceptable, that it would not compromise with its employees due to their unscrupulous use of a strike, that the strikers were in the same situation as if they had voluntarily quit, that the leaders of the concerted activity were required to resign, that the employees who returned to work by May 26 would incur a 3-day absence and advising that employees who failed to return to work by May 26 would be considered as having voluntarily quit, the Company violated Section 8(a)(1) of the Act.

3. By coercively interrogating employees concerning their own and other employees' union activities and about the subject of unfair labor practice proceedings, the Company violated Section 8(a)(1) 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 unlawfully discharged employees, Ui Dal Kim, Nak Hoon Chong, Kwang Joon Park, Man Ho Kim, and Chul Hyun Chong<sup>25</sup> 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). I shall also recommend that the Company be required to remove from its files any references to the unlawful terminations of the five employees named above, and notify each of these employees that it has done so and that it will not use the unlawful terminations against them in any way.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>26</sup>

#### ORDER

The Respondent, Rhee Bros. Inc., Columbia, Maryland, its officers, agents, successors, and assigns, shall

##### 1. Cease and desist from

(a) Terminating or otherwise penalizing our employees because they engage in concerted activity, including a strike, for

<sup>25</sup> I have found that the Company did not reinstate Chul Hyun Chong to his former position at the Columbia warehouse, that the Company rejected him for a wage increase following his reemployment at the Company's Jessup facility, and did not award backpay to him for the period from May 25 until his reemployment on June 18, 2001. Accordingly, I find that the Company has not remedied Chong's unlawful termination.

<sup>26</sup> 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.

their mutual aid or protection with respect to wages, hours, or other terms and conditions of employment.

(b) Threatening our employees with economic reprisals including refusal to deal with employee grievances, loss of working time, and termination of employees because they engage in concerted activity, including a strike, for their mutual aid or protection with respect to wages, hours, or other terms and conditions of employment.

(c) Coercively interrogating employees concerning their own and other employees' union activities and about the subject of unfair labor practice proceedings.

(d) 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 employees Ui Dal Kim, Nak Hoon Chong, Kwang Joon Park, Man Ho Kim, and Chul Hyun Chong 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 employees Ui Dal Kim, Nak Hoon Chong, Kwang Joon Park, Man Ho Kim, and Chul Hyun Chong whole for any loss of earnings and other benefits suffered as a result of their unlawful terminations, in the manner set forth in the remedy section of the decision.

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

(d) Preserve and, within 14 days of a 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, including an electronic copy of the records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Columbia, Maryland, copies of the attached notice marked "Appendix."<sup>27</sup> Copies of the notice, on forms provided by the Regional Director for Region 5 after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. 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

<sup>27</sup> 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."

duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 24, 2000.

(f) Within 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.