The Hertz Corporation *and* United Automobile, Aerospace, Agricultural Implement Workers of America, UAW. Cases 34–CA–5684, 34–CA–6104, and 34–RC–1108

March 9, 1995

DECISION AND ORDER

BY MEMBERS BROWNING, COHEN, AND TRUESDALE

On September 27, 1994, Administrative Law Judge Jesse Kleiman issued the attached decision. The Respondent filed exceptions and a supporting brief.

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

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order as modified.[3]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, the Hertz Corporation, Windsor Locks, Connecticut, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(c).

''(c) Threatening employees with layoffs and other loss of employment and with loss of benefits including health benefits if they engaged in union activities, solicited the Union to represent them in collective bargaining, or became represented by a union.''

2. Delete paragraphs 1(l) and 2(b) and reletter the subsequent paragraphs.

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

APPENDIX

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

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

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT interrogate our employees concerning their union activities and the union activities of other employees.

WE WILL NOT create the impression that we are keeping under surveillance the activities of our employees on behalf of the Union or any other labor organization.

WE WILL NOT threaten our employees with layoff or other loss of employment and with loss of benefits including health benefits because of the union activities of our employees or if they solicit and/or become represented by the Union or any other labor organization.

WE WILL NOT inform our employees that it would be futile for them to select the Union or any other labor organization as their bargaining representative.

WE WILL NOT solicit grievances from our employees with explicit and implicit promises to rectify them.

WE WILL NOT discriminatorily enforce our rule prohibiting noncompany business during working time or in working areas against our employees.

WE WILL NOT promulgate and enforce a rule prohibiting our employees from engaging in union activities during working hours.

WE WILL NOT inform our employees that they are being disciplined because of their union activities on behalf of the Union or any other labor organization.

WE WILL NOT promise employees benefits and no layoffs if our employees refrain from engaging in union activities on behalf of the Union or any other labor organization.

WE WILL NOT suspend or otherwise discipline our employees if they assist the Union or any other labor organization and engage in concerted activities.

[1] The Respondent asserts that the judge was biased against the Respondent. After full consideration of the record and the judge's decision, we find no evidence of bias.

[2] We adopt the judge's recommendation to set the election aside because the two-page summary of the Respondent's 401(K) plan that was distributed to employees during the campaign conveyed the impression that the employees would lose the 401(K) plan immediately on choosing union representation. The Respondent's oral explanation of the negotiation process was insufficient to dispel this impression. Cf. *E & L Plastics Corp*., 305 NLRB 1119, 1120 (1992) (finding 8(a)(1) violation where similar impression conveyed and not dispelled). The Respondent's explanation suggested that the employees would lose the plan on becoming unionized, subject to possible restoration on the completion of negotiations. Thus, the impression remained that unionization itself would trigger the loss of the plan, and that loss would continue throughout negotiations unless and until it was restored.

[3] Because the threat of the loss of the 401(K) plan was not alleged as an unfair labor practice, we shall delete the references to the plan from the Order and notice, and from the remedy and conclusions of law section of the judge's decision.

WE WILL NOT discharge or otherwise discriminate against our employees in order to discourage our employees' union activities or their participation in proceedings conducted by the Board.

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

WE WILL make whole Samuel Divine for any loss of earnings he may have suffered because of his suspension and subsequent termination together with interest.

WE WILL remove from our personnel records any and all references to the suspension and termination of Samuel Divine, and WE WILL notify him in writing that this has been done, and that evidence thereof will not be used against him in any way.

THE HERTZ CORPORATION

William E. O'Connor, Esq., for the General Counsel.
Fred S. Lerner, Esq. and *H. Reed Ellis, Esq. (De Maria, Ellis, Hunt, Salsberg, & Friedman, Esqs.)*, for the Respondent.
Robert Monahan and *Linda K. Lewis*, for the Charging Party.

DECISION

STATEMENT OF THE CASE

JESSE KLEIMAN, Administrative Law Judge. On the basis of a charge and amended charge filed on May 11 and June 25, 1992, respectively in Case 34–CA–5684 by United Automobile, Aerospace, Agricultural Implement Workers of America, UAW (the Union), a complaint and notice of hearing was issued on June 25, 1992, against the Hertz Corporation (the Respondent), alleging that the Respondent had engaged in certain unfair labor practices within the meaning of Section 8(a)(1) and (3) of the National Labor Relations Act (the Act). By answer received July 9, 1992, at the Board, the Respondent denied the material allegations in the complaint.

On September 17, 1992, the Board conducted an election among the Respondent's employees in an appropriate unit in Case 34–RC–1108. The Union lost the election by a vote of 18 for and 22 against the Union. Objections to the election were filed by the Union on September 30, 1992, and on October 27, 1992, the Regional Director for Region 34 issued his Report on Objections to the election. By Order issued on November 9, 1992, Cases 34–CA–5684 and 34–RC–1108 were consolidated for hearing. A hearing on these consolidated cases was held before me on March 17, 18, 19, 30, and 31, 1993, at the end of which the hearing was closed.

On May 6, 1993, a complaint and notice of hearing issued in Case 34–CA–6104 alleging that the Respondent violated Section 8(a)(1), (3), and (4) of the Act. By answer received May 20, 1993, the Respondent denied the material allegations in this complaint. By Order issued on June 4, 1993, I granted the General Counsel's motion to reopen the record in the above proceedings and consolidated Cases 34–CA–5684, 34–CA–6104, and 34–RC–1108 for hearing on the complaint allegations in Case 34–CA–6104. The hearing was held before me on September 8 and 9, 1993. Subsequent to the close of the hearing, the General Counsel and the Respondent filed briefs.

On the entire record and the briefs of the parties and on my observation of the witnesses, I make the following

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

The Respondent, at all times material, is and has been a Delaware corporation with an office and place of business in Windsor Locks, Connecticut, engaged in the operation of a car rental business at Bradley Airport in Windsor Locks, Connecticut. During the preceding 12 months, the Respondent in its business operations derived gross revenues in excess of $500,000 and purchased and received at its Bradley Field facility products, goods, and materials valued in excess of $50,000 directly from points outside the State of Connecticut. I therefore find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

United Automobile, Aerospace, Agricultural Implement Workers of America, UAW is a labor organization within the meaning of Section 2(5) of the Act.

III. THE APPROPRIATE UNIT

It is undisputed and I find that the following employees of the Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time counter sales representatives, vehicle service attendants, mechanics and bus drivers employed by the Employer at its Bradley Airport, Windsor Locks, Connecticut facility; but excluding all office clerical, transporters, and other employees, and all guards, professional employees and supervisors as defined in the Act.

IV. THE ALLEGED UNFAIR LABOR PRACTICES

The complaint in Case 34–CA–5684 alleges that the Respondent unlawfully interrogated employees regarding their union activities, asked employees to ascertain and disclose the union membership, activities, and sympathies of other employees; created the impression among employees that their union activities were under surveillance; threatened employees with layoffs or discharge and loss of benefits such as health benefits if they engaged in union activities; informed its employees that it would be futile to select a union as their bargaining representative; promulgated and maintained a rule prohibiting employees from engaging in union activities during working hours on the Respondent's property; informed employees they would be disciplined because of their union activities; solicited employee complaints and grievances and promised employees increased benefits and improved terms and conditions of employment; and suspended employee Samuel Divine in violation of Section 8(a)(1) and (3) of the Act.

The complaint in Case 34–CA–6104 alleges that the Respondent unlawfully interrogated employees about their pro-

tected concerted activities and terminated employee Samuel Divine in violation of Section 8(a)(1), (3), and (4) of the Act.

A. *The Evidence*

Sometime in February 1992, garage workers Roberto Diaz and John Youhees informed lead courtesy busdriver Samuel Divine that they had contacted a Teamsters Union and arranged a meeting with employees. When Divine was told by another employee that Erlene Fitzpatrick, the Respondent's Hartford City manager, knew about the meeting Divine apprised Diaz of this and the meeting was canceled. Fitzpatrick acknowledged that she had heard talk among ''people'' in January and February 1992 about union meetings.

Divine then contacted the Greater Hartford Council of Unions in order to help the employees ''make an informed decision'' regarding the choice of a union. On March 23, 1992, Divine met with Union Representative Joseph Calvo and a meeting with employees was arranged for April 2, 1992, to be held at Friendly's Restaurant in Enfield, Connecticut, at 10 a.m. Subsequently, but prior to the date of this meeting, Divine spoke to about 12 employees about the April 2, 1992 meeting, particularly with those employees who worked on the night shift with him, including William Davis, Chris Vachon, Maxine White, Robert Diaz, John Youhees, John Connelly, and Jerry Peletier. Divine testified that these conversations took place primarily in the breakroom since his position as lead busdriver made it difficult to speak with employees elsewhere.

Also prior to the April 2, 1992 meeting, Divine spoke to a gathering of employees in the lunchroom about the Union. One of the employees asked Divine to explain what a ''closed shop'' was and Divine responded that it was ''where everybody joins the union'' and ''if people didn't join the union they might have to look for employment somewhere else.'' Employee John Connelly asked Divine if he was threatening him and Divine answered, ''John, I'm not threatening you at all. I'm explaining what a closed shop is.'' Connelly testified that he could not recall being at any meeting wherein Divine discussed a ''closed shop.'' Connelly had been employed by the Respondent as a station manager from October 13, 1989, until March 23, 1992, when he was laid off but given the opportunity to accept a job as a busdriver again. Connelly had been lead busdriver before he became a station manager and his return to a busdriver's position reduced him to a rank lower than Divine who was now the lead busdriver at the Bradley Field facility.[1]

Divine also testified that he asked employees Jerry Pelletier in the breakroom if he was still interested in the Union and that Pelletier said that he was. Divine then told him about the April 2, 1992 meeting with the Union at Friendly's Restaurant. However, Pelletier denied ever having a conversation with Divine in the breakroom about the Union.

Maxine White, a counter service representative (CSR) testified that Divine had advised her about the union meeting on April 2, 1992, and that she then told CSRs Lisa Holmes, Lisa Scribner, and Nichole Chalifoux about the meeting. White related that she spoke to these employees in the breakroom or at the counter when there were no customers present. White stated that the Respondent had placed no restrictions as to what subjects the employees could discuss among themselves at work. Scribner testified similarly as to the lack of any restrictions regarding topics of conversation between employees at work or at work stations. White added that Scribner advised her that she was not interested in attending the meeting with the Union, and White could not recall Chalifoux's response. Chalifoux denied speaking to White about the April 2, 1992 meeting and Scribner testified that she was not told about the meeting ''until the day that they had one.''

1. The events of April 2, 1992

Seven employees met with Union Representatives Calvo and Robert Monahan on April 2, 1992, at 10 a.m. in Friendly's Restaurant, including Divine and White. The union representatives discussed the Union, distributed authorization cards, and gave employees an ''Organizing Information'' pamphlet which included ''do's and don'ts'' for employee organizers. All seven employes signed the union cards and Divine was given extra cards to obtain additional employee signatures thereon.

Erlene Fitzpatrick acknowledged that prior to April 2, 1992, she knew that there was going to be a union meeting but not the actual date or place thereof, but she could not recall who had told her this. Fitzpatrick then informed Scott Sider, the Respondent's regional vice president, New England region, about it. Fitzpatrick testified that on April 2, 1992, she was informed by ''two or three people'' that a union meeting had taken place that day. While Fitzpatrick was unsure and uncertain as to who had told her about the meeting, she did mention ''Lisa Scribner, but I'm not certain.'' Fitzpatrick related that she spoke to several employees during the morning and afternoon of that day, in her office and in the upstairs breakroom, to make sure that no employee, ''Felt threatened about their job . . . as far as the union is concerned.''

Lisa Scribner testified that on April 2, 1992, she was directed by one of the managers to see Fitzpatrick in the upstairs breakroom which she did. Fitzpatrick asked her how she felt about ''what was going on,'' and Scribner understood this to be an inquiry about the union activity taking place at the Respondent's Bradley Field facility. Scribner told Fitzpatrick that she ''was sick and tired of hearing about all the stuff that's been going on with the union,'' and that she was against the Union and didn't want to hear anything more about it. Fitzpatrick told her that she couldn't understand how people that worked for her would want to pay to have to come to work, and, that she would be talking to other employees about how they felt about what was going on. Scribner added that no mention was made of employees Sam Divine or Maxine White in this conversation which was the only one she had with Fitzpatrick about the Union.

Regarding this conversation, Fitzpatrick testified that she had met with Scribner because Station Manager Jeff Wilcox had told her that Scribner felt threatened about the Union and Fitzpatrick wanted to make sure that no employee felt threatened regarding their employment status. Fitzpatrick admitted that she had not asked Scribner as to who it was that allegedly threatened her, and Scribner, herself, denied being harassed or threatened at all although she did acknowledge tell-

[1] Connelly tesitifed that about ''three months'' prior to his appearance as a witness for the Respondent in this case he had been promoted again to a station manager's position by the Respondent.

ing Wilcox that she was sick and tired of all the talk about the Union.

Ann Marie Meyers, a busdriver at the time, was also instructed to meet with Fitzpatrick in the upstairs breakroom by a station manager. Meyers testified that Fitzpatrick asked her if she had heard anything about a union. After Meyers responded that she had heard talk about it but didn't know what was going on, Fitzpatrick asked her why she felt the employees wanted a union. Meyers explained to Fitzpatrick that it was because of the layoff of two managers one of whom was rehired as a busdriver, presumably fearing other employee layoffs. Fitzpatrick asked Meyers if she had signed ''any kind of a card or something,'' and then told Meyers that some of the other major companies in the area who had unions were laying off employees and that the ''union would not secure our jobs.'' In a prior written statement concerning this conversation, given to Divine, Meyers did not mention that Fitzpatrick had asked her if she signed ''a card or something.''

Fitzpatrick also questioned CSR Nicole Chalifoux[2] on two occasions about the Union presumably on April 2, 1992, since Chalifoux, although unsure of the date of these conversations, appeared to testify that they occurred on the same day that ''a lot of people'' were called up. The first conversation occurred at the back entrance of the facility and Fitzpatrick asked Chalifoux if anybody was bothering her about the Union. After Chalifoux answered, ''[N]o,'' Fitzpatrick told her that her concern was that someone might be bothering or harassing Chalifoux. Fitzpatrick told Chalifoux that she could not understand why anyone would come to work and pay to do so, and Chalifoux agreed to not understanding this either. Later that day, Fitzpatrick called Chalifoux to her office and for a second time asked her if anyone was bothering her about the Union to which Chalifoux again said, ''[N]o.'' Chalifoux told Fitzpatrick that it was annoying that people were angry at each other because of the Union, and that employees were being secretive, and that everybody was tense. According to Chalifoux no names of other employees were mentioned in either conversation and Chalifoux stated that Fitzpatrick was ''the one concerned to see if anybody was being bothered.''

Fitzpatrick also called a number of garage workers to the upstairs breakroom that day to view a safety video. Diaz testified that at the conclusion of the video, Fitzpatrick told the employees that if they think that with a union they could not get laid off they were wrong, that even with a union employees with three warnings could be terminated. Fitzpatrick listed several prominent companies with unions representing their employees who were experiencing layoffs. She also told them that if they wanted union representation to go ahead since they would be paying with their own money for it. Fitzpatrick advised them that if anyone was going around to employees with ''green cards'' and threatening them to sign it, to report this to the station managers or herself personally and she would take care of it. Fitzpatrick acknowledged showing safety videos in the breakroom ''at the same time all this was going on.''

[2] Chalifoux was promoted from CSR to group leader on March 10, 1993, about 1 week before her appearance as a subpoenaed witness for the General Counsel in these proceedings.

It is unclear as to how many other employees were questioned by Fitzpatrick that day, April 2, 1992. Scribner testified that CSR Debbie Cambra told her that she also had been called upstairs to speak to Fitzpatrick that day.

As regards Fitzpatrick's account of the events described above, to say the least it was contradictory, equivocal, inconsistent, and contrary to the testimony of other witnesses and evidence in the record, and also as to her own prior statements. For example, contrary to her own testimony given at the hearing and to that of Scribner's, in a dictated statement of the events of April 2, 1992, dated April 3, 1992, Fitzpatrick recorded that:

> On April 2, 1992, Judy Williams advised me that she was being harassed by some of the people who were going to a union meeting at 10 a.m. I was walking through the lot and Lisa Scribner seemed concerned about something, so I told her to come to my office and I would speak with her. She said people told her that if she didn't sign the Union card and it came in, she would be laid off. Neither employee mentioned any names.

Additionally, in an affidavit given to a Board agent on June 2, 1992, in Case 34–CA–5684, Fitzpatrick claimed that Nichole Chalifoux and Lisa Scribner had complained to her that Maxine White was bothering them about the Union. However, in Fitzpatrick's above statement she had stated that Scribner had mentioned no names of employees allegedly engaged in such conduct. Moreover, Williams testified that she had identified Maxine White to Fitzpatrick as being the person who was bothering her by constantly talking to her about the Union. Fitzpatrick's affidavit also states that Scribner or a garageman complained to her that Sam Divine and someone else had harassed them to attend a meeting with the Union and that they didn't want to go, and that Scribner had also told her that people had threatened her during the afternoon of April 2, 1992, again contrary to at least Scribner's testimony at the hearing as well as Fitzpatrick's April 3, 1992 statement. Additionally, Fitzpatrick failed to mention either Judy Williams or Jeff Wilcox in her affidavit.

Fitzpatick testified as a witness for the Respondent after hearing the testimony of the General Counsel's witnesses, Scribner and Chalifoux, who had each denied that Maxine White's name was mentioned during their conversations with Fitzpatrick on April 2, 1992, and at least Chalifoux had told Fitzpatrick that she was not being bothered by anybody about the Union when asked about this by Fitzpatrick. Fitzpatrick now testified that it was a station manager who had apprised her that some employees were upset since they heard talk that ''[i]f they didn't sign a [Union] card, they wouldn't have their job.'' Fitzpatrick identified Station Manager Jeff Wilcox as having told her that Lisa Scribner was ''visibly shaken and upset,'' and that she therefore called Scribner in ''and asked her if she was being threatened or anything like that.'' However, Fitzpatrick had also testified that Scribner, Judy Williams, and perhaps Chalifoux had come to her to complain that they were being constantly spoken to at their counterpositions about the need to sign the Union's authorization cards, although also admitting that she had requested Scribner to speak to her not the other way around.

Fitzpatrick testified that she specifically spoke to Ann Marie Meyers in the breakroom and Nicole Chalifoux in her office because she wanted to make sure that they did not feel ''threatened or had to do anything that they didn't want to do.'' However, she later testified that she did not question employees about alleged threats until after Divine's suspension (when she told them that they had nothing to worry about and assured them that Divine's suspension was not because of his union activity, but was instead ''for threatening employees).'' Instead, she asserted that in the afternoon of April 2, 1992, she was not inquiring about any ''threats,'' but was concerned that a few employees, Lisa Scribner, Judy Williams, and Nicole Chalifoux, were upset about being harassed at their counters with constant talk about the Union.

Fitzpatrick's testimony continued to be contradictory, inconsistent, and confusing during cross-examination after her reference was directed to her prior statements. She testified that Scribner had told her that she was being bothered about signing a union card and had identified White as having done so to Wilcox, but not to Fitzpatrick. Fitzpatrick then could not recall if Scribner or Wilcox had actually used the word ''threat'' when they individually reported this to her. She subsequently stated that Wilcox ''could have. I don't remember exactly.'' After testifying that neither Scribner nor Wilcox had said that White had threatened Scribner, Fitzpatrick said that the only employees who had told her that they were threatened if they didn't sign an authorization card were John Connelly and Jerry Pelletier.

Confronted with her April 3, 1992 statement, Fitzpatrick testified that Scribner did tell her that she had been threatened but did not name any employee who had done so, and Fitzpatrick had not asked her for any names. While Fitzpatrick identified Wilcox as having told her that White was the employee bothering Scribner about the Union, Fitzpatrick, in her affidavit, had stated that Scribner and Chalifoux had disclosed White's name as the employee bothering them about the Union, also contrary to both Scribner's and Chalifoux's testimony here. Perhaps in an attempt to explain these contradictions and inconsistencies regarding White's name, although unsuccessfully, Fitzpatrick stated that Wilcox had also told her that Scribner and ''the others that were working with Maxine . . . didn't want to state her name because they had to work side-by-side with her.'' However, neither Fitzpatrick's April 3, 1992 statement nor her Board affidavit mentions Wilcox in regard to this.

When questioned as to which employee had informed Fitzpatrick that White was bothering them about the Union, Fitzpatrick now identified Judy Williams as having done so. But Fitzpatrick had not mentioned Williams in her affidavit, and in her April 3, 1992 statement Fitzpatrick had stated that Williams had not mentioned any names. When Fitzpatrick was reminded about these inconsistencies she then testified that Williams had mentioned White's name on a date other than April 2, 1992, which she cold not remember, although her April 3, 1992 statement would appear to contradict this. Fitzpatrick then testified that either Scribner, Chalifoux, or Williams had identified White as bothering them about the Union on April 2, 1992, but could not say which one, although it would appear from the record evidence that it was Williams who had done so and that Williams also informed Fitzpatrick the morning of April 2, 1992, that employees were attending a union meeting that morning.

Regarding this, Williams testified that she had in fact gone to Fitzpatrick to complain about people harassing her about the Union. However, her testimony about whether she had also mentioned anything about a union meeting at 10 a.m. that morning was somewhat contradictory.[3] At first she testified that she never mentioned the meeting to Fitzpatrick. After being read Fitzpatrick's April 3, 1992 statement of what William's had told her, Williams then admitted telling Fitzpatrick that she was being harassed by people attending a union meeting but did not mention the time of the meeting. Finally, Williams admitted making the entire statement to Fitzpatrick, ''that she was being harassed by some of the people who were going to a union meeting at 10 a.m.''

Finally, Fitzpatrick testified that Scribner did tell Wilcox on April 2, 1992, that she ''had felt threatened as far as the Union is concerned . . . and that's why that whole thing took place.'' Fitzpatrick added that Judy Williams and ''a couple of other employees'' had informed her about threats of layoff made to them on the morning of April 2, 1992, but that no names were mentioned.

On the afternoon of April 2, 1992, Fitzpatrick left to go to the Respondent's facility in Groton, Connecticut, Divine testified that about 2:30 p.m. that day, he received a telephone call at home from CSR Chris Vachon who informed him that Fitzpatrick ''was questioning employees upstairs about the Union and who was involved.'' According to the testimony of both Divine and White, when they arrived at work in the late afternoon of that day, and during a brief conversation Divine informed White that Fitzpatrick knew about the union meeting and advised her not to ''even talk about the Union or do anything,'' while White added that Divine also told her that someone had told Fitzpatrick that White was responsible for bringing in the Union. A short while later CSR Kay Ouellette told White the same thing and advised her to watch out for herself.[4]

Divine testified that at about 5 p.m. that evening, he received a customer complaint against busdriver Jerry Pelletier who had allegedly failed to wait to pick up a customer/passenger. Divine hailed Pelletier's bus and told him that this had happened before and not to leave customers just standing and waiting. Pelletier asked Divine about the union meeting and Divine said that he would tell him what had happened at the meeting during their breaktime, since he could not speak to him at that time because it was ''against the rules.''

However, Pelletier gave a different account of what had transpired between him and Divine on April 2, 1992. Pelletier testified that when he came to work that day, everyone was talking about the union authorization cards, ''green cards,'' and whether or not to sign them. Later that evening

[3] Williams was promoted to the position of dispatcher about a week before the heaing commenced in these proceedings.

[4] The Respondent in its brief asserts that this shows that Divine lied to White concerning this conversation as affecting his credibility, I do not agree. Whatever Divine seems to have omitted from this conversation in his testimony it did not contradict or oppose what White had testified to since it appeared that Divine was in effect summarizing what the jist of the conversation was, that basically he was ''pre-warning her'' not to talk about the Union or do anything because Fitzpatrick knew about the union activity. Other than a lack of recall, Divine would have no reason to ''lie'' about the content of this conversation since White was an active union adherent as he was.

Divine approached Pelletier in his bus and gave him a card and asked Pelletier to ''please'' sign it and that this was important and in his best interests to do so. Pelletier responded that he had to think about this.

Pelletier stated that on prior occasions Divine had told him that because of what was occurring, managers leaving and different other issues, ''that in order to secure my job or our jobs there, that we needed a union there, protect your rights.'' Pelletier continued that Divine had indicated that he was privy to inside information that some people would be laid off or have their hours cutback and having a union would secure his position. According to Pelletier Divine also said that the Respondent was unhappy with his work performance and ''this would help more or less guarantee that I had a position with the company.'' Pelletier then testified:

> But I felt I didn't have a position either way and that's why I became very upset with him over the whole situation because I felt either way I didn't have a job.
>
> Because he always made me feel inadequate about my position, about my work. He was constantly complaining to me about management said this to him or management said that to him. So I felt more or less that—he was indicating to me that the only way for me to keep my job was to sign that green card. . . . He said if I did not go along with the majority, that I would be out of a job. I had no job.

Pelletier added that Divine also told him on many occasions that if he didn't sign a union authorization card he would not have a job because Divine ''had the majority vote of everyone there and . . . if it came to a majority vote and I didn't vote yes, that I would lose my job; I'd be out the door.'' However, Pelletier testified that Divine had not made the above statements to him on April 2, 1992, but ''just said he wanted the card back signed and the importance of signing the card. . . . He indicated to me that in order for me to keep my job it was in my best interest to sign that card.'' Pelletier stated that he ''felt again, like on many occasions that I was being coerced into making a decision I did not want to make.'' Later that evening Divine again asked Pelletier to sign the card but Pelletier said he needed more time to consider the request.

According to Pelletier, Divine ''always bitched, pissed and moaned and groaned'' about things Pelletier had done, and not only to Pelletier directly but also to other employees as well. Pelletier stated that, therefore, he felt threatened by Divine since Divine was using his poor work performance as ''leverage'' to get him to sign a union card. Pelletier explained that he had not complained about Divine's behavior to management before because he believed that management would support Divine instead of him, but after he suffered damage to his automobile, flat tires, and key scratches, which he appears to have attributed to Divine and the Union, and with Divine pressuring him to sign a union card on April 2, 1992, he overcame his fear and decided to speak to Fitzpatrick about this. Pelletier therefore asked Senior Station Manager David Corris to arrange a meeting between Fitzpatrick and himself because he ''didn't trust anybody at that point.'' Corris advised Pelletier that Fitzpatrick was away but would return later that evening. Pelletier did not advise Corris that he wanted to speak to Fitzpatrick about Divine.

Pelletier also testified, however, that in the past, when John Connelly had been a station manager, he had spoken to Connelly on several occasions complaining about Divine's complaints about Pelletier's job performance. Pelletier related that Connelly said that he should not feel alone since Divine complained constantly about everyone, whereupon Pelletier felt more secure and that Divine's threats were hollow. Pelletier added that this feeling of security was shattered when Divine began to talk to him about the Union and Pelletier's need to sign an authorization card to protect his job whereupon he lost trust in everybody including Connelly.

Divine testified that at about 8:30 p.m. on April 2, 1992, as he was taking his break period, busdriver John Connelly asked him how things had gone at the union meeting. Divine told Connelly that he could have attended the meeting and that he couldn't talk to Connelly at the time since Connelly was on worktime and this was against the rules. Divine gave Connelly a section of the Union's pamphlet on organizing ''do's and don'ts,'' asked him to read it, and then left the scene.

Connelly testified that Divine had boarded his bus twice on April 2, 1992, once to give Connelly a union pamphlet, and again to retrieve the pamphlet. Divine started to talk about the Union, but Connelly said he wasn't interested in hearing this. According to Connelly, Divine then told him that if he didn't sign a union card Divine would tell management about things that had occurred when Connelly was a station manager that could lose him his job, but did not specify what these were. Connelly reported this threat to Corris and Greg Lindberg another station manager and said that Fitzpatrick should be apprised of this.

Fitzpatrick testified that when she arrived back from Groton, Corris informed her that Connelly and Pelletier ''were very shaken up'' and wanted to talk to her because they had been threatened and ''without Sam Divine seeing them.'' Fitzpatrick spoke to Connelly with Corris present and Connelly related what had occurred that evening and how he felt threatened by Divine. Fitzpatrick asked him to put in writing the events he related telling him, ''If you are that sincere about being threatened as far as your livelihood is concerned, then I want you to . . . produce something in writing to me.'' On April 5, 1992, Connelly gave a written statement to Fitzpatrick of what had occurred.

Fitzpatrick stated that she also spoke to Pelletier who told her that Divine had gotten on his bus and insisted that Pelletier sign a union authorization card and if he didn't sign the card and the Union got in, there was a good possibility that he would not have a job. Pelletier said that ''it was one of many times that he was really upset with [Divine] that night and he felt he didn't have to be threatened every day when he came to work.'' Fitzpatrick then told Pelletier that ''if you're that sincere about someone threatening you, then you'll have to give it in writing to me.'' Pelletier gave Fitzpatrick such a statement on April 4, 1992.

On April 2, 1992, at about 9:30 p.m., White was instructed by Station Manager Greg Lindberg to see Fitzpatrick which she did. White testified that Fitzpatrick told her that four people had accused White of ''threatening and harassing them to join a union.'' White denied doing this and Fitzpatrick offered to bring the four people in and White

''just put my hands up and shrugged and like, you know, whatever.'' However, Fitzpatrick did not identify the ''four people'' nor bring them in to confront White. Fitzpatrick asked White why anyone would want to pay to work there, and White said she didn't know. Fitzpatrick said that UTC had a union and they were laying employees off. Fitzpatrick told White that her job would be easier if there was a union since she would only have to follow the contract, and if there was a union White would not be allowed to have coffee or a cigarette.

Fitzpatrick also told White not to talk to employees who don't want to hear about the Union at their counters while they are working. Fitzpatrick said to White that ''carrying on union activities while on the clock or on Hertz property . . . that distributing or talking about the union on company time in the premises was against the rules.'' Fitzpatrick acknowledged to White that ''she did know we had had a meeting at Friendly's that day.'' According to White, Fitzpatrick had started to say during this conversation that, ''I could sus__,'' but White interrupted her in midsentence and told Fitzpatrick that she was tired and didn't care anymore. White testified that Fitzpatrick had started to state that she could suspend her when White interrupted her. White received no discipline at all as a result of her conversation with Fitzpatrick. Fitzpatrick did not deny in her testimony that she had begun to tell White she could be suspended. Fitzpatrick admitted that she told White that she knew about the union meeting.

Later that evening, at about 10:45 p.m., Fitzpatrick called Divine to her office with Corris present. Fitzpatrick told Divine that she was relieving him of his duties because four people had called her during that day to accuse him of threatening them with loss of their jobs if they refused to sign union cards. Divine said, ''[T]hat's not true. I didn't threaten anybody to sign union cards to join the union.'' Divine testified that he asked Fitzpatrick to produce his accusers but she wouldn't do that. Divine mentioned several employees first names including Judy Williams and Fitzpatrick only responded that Williams ''speaks very highly of you.'' Fitzpatrick discussed unions at UTC and the Respondent's Boston facility and that the union did nothing for the people in Boston, that the employees in Hartford have better benefits and if a union came in some employees could lose their jobs if it was a closed shop and they didn't want to join a union. Fitzpatrick asked him why he would want to pay for the privilege of working there if it meant having a union, and that the employees could lose all their benefits.

Divine continued that Fitzpatrick asked him to identify the Union and the employees involved with it, and while Divine mentioned no employees' names he did disclose the UAW as the Union. Fitzpatrick asked Divine why he wanted to get involved with the Union and he explained that the garagemen were complaining about Jeff Wilcox and how he treated them and the employees wanted to make sure that things were done right. Fitzpatrick finally asked him if he had anything more to say and after answering, ''No,'' he offered that if he had ''hurt anybody or hurt the company, I apologize.'' Fitzpatrick then instructed Divine to leave without punching out, that she would take care of his timecard and to call her the next day to see if he still had a job since she now had to report the situation to ''Park Ridge.''

Fitzpatrick testified that she first asked Divine what was going on since she had been told by a ''couple'' of employees that he had threatened them if they didn't sign union cards. Divine denied this and explained ''how the whole thing got started.'' Divine then offered that ''some of the people running to you now are the ones who came to me for help and now they've got cold feet and they're backing out. I guess I got a little hot under the collar. I probably shouldn't have, but I did get hot under the collar.'' Fitzpatrick told Divine that she had no problem with his union activity if it ''doesn't happen during working hours and while you're working on the bus and you can't threaten people.'' Divine expressed employees' concerns about losing health benefits and the layoffs of managers as the reasons for their interest in union representation. Fitzpatrick denied that she questioned Divine about the Union and as to the employees involved in the organizing effort or that they had discussed a ''closed shop.'' Fitzpatrick did admit, however, that she told Divine that she was aware of the union meeting. Divine was instructed to leave for the day and to call her before he came into work the next day since Fitzpatrick wanted to speak to personnel ''to see where we'd go from there because it was serious.''

Corris testified that Fitzpatrick advised Divine that ''a couple of employees ''had accused Divine of threatening them with the Union. Corris related that Divine did not deny this and while Divine did not admit to making such threats, he did say that he got ''hot under the collar, that he wasn't the one who brought the Union, and he only wanted to help them make sure they were doing it correctly.'' Corris added that Fitzpatrick did not explain to Divine what the supposed threats were. Corris' recollection of what was said during this conversation appeared limited.

I note that nowhere in her direct testimony did Fitzpatrick mention the names of Jerry Pelletier or John Connelly or of their allegations against Divine. However, on cross-examination, Fitzpatrick claimed she did identify Pelletier and Connelly to Divine. Moreover, Fitzpatrick also testified that Pelletier and Connelly did not want Divine to know that they had spoken to her. Corris also failed to mention the names of Pelletier and Connelly when he was testifying as to what had been said between Fitzpatrick and Divine on April 2, 1992.

On April 3, 1992, Divine was called to Fitzpatrick's office and with Corris present, Fitzpatrick advised Divine that while the Park Ridge management had recommended she fire Divine, Fitzpatrick told them that he was a good worker and that he should be suspended only. Fitzpatrick gave Divine a letter of suspension dated April 3, 1992, suspending him for 3 days. Divine testified that after signing ''the papers,'' Fitzpatrick ''said as a friend'' that he ''shouldn't get involved with other people's problems at our location.'' The suspension letter stated that Divine had violated two ''related work rules'' and reads in pertinent part:

> Conducting non-Hertz business involving any and all Hertz employees while you or said employees are on working time and/or in working areas will not be tolerated.
>
> Action on the part of any individual or group of employees disrupting harmony, intimidating fellow employees, or to interfere with the normal and efficient operation will not be tolerated.

Further actions of this type will not be tolerated, and upon review, will result in serious and immediate disciplinary action up to and including termination.[5]

2. What occurred thereafter

Roberto Diaz testified that a few days after the meeting with union representatives at Friendly's Restaurant on April 2, 1992, Fitzpatrick, while in her car, approached Diaz at a garage gas pump and said, ''Roberto, you get ready for a long trip.'' Diaz responded, ''not me, I don't know what you're talking about.'' After Fitzpatrick and leadman Jimmy Hartford drove around the garage lot, Fitzpatrick then said to Diaz, ''Roberto, you're the treasurer of the Union.'' Diaz told her that he was ''no treasurer for nobody,'' and didn't know what she was talking about. Diaz added that Fitzpatrick just smiled and then drove away. Hartford then said to Diaz, ''Buddy, if you think you got my vote, you're wrong.'' Diaz told Hartford that he did not know what he was talking about.

While Fitzpatrick admitted stating to Diaz, ''Roberto, you're going to be the treasurer, right?'' and then leaving without saying anything else to him, she testified that this occurred later on in the year and was part of joking around with the garagemen wherein she assigned various official positions to them such as president and secretary.

After Divine returned to work on April 8, 1992, on conclusion of his suspension period, Fitzpatrick told the service managers to make sure that Divine and other employees do not threaten employees and to have employees report such threats to their managers so that the employees don't feel threatened. Moreover, as testified to by both Maxine White and Divine, after April 8, 1992, whenever Divine and White took their breaks together as they had done at times previously, Station Managers Jeff Wilcox or Gary Lindberg would take their lunchbreaks at the same time and for the full period that Divine and White were together, which Wilcox and Lindberg had not done before. Neither Wilcox nor Lindberg testified at the trial.

Divine testified that on May 11, 1992, while attending a meeting between the employees and the Union held at the Holiday Inn in Windsor Locks, Connecticut, he observed Jeff Wilcox in a silver Ford Taurus circling the parking lot and stopping behind his van and White's car. Diaz testified that on that same day and at the building where the union meeting was taking place he observed Wilcox in a gray Taurus taking down license plate numbers of those employees attending this meeting.

White testified that on April 17, 1992, Fitzpatrick approached her at check-in and said to her that Divine was concerned about health benefits and if the Union came in the Respondent would not have to give him health coverage. White replied that she understood his concerns because of his wife's serious health problems and that White was attending union meetings to be informed so she could make intelligent decisions affecting her future and livelihood.

3. The April 8, 1992 meeting

By posted notice to its employees the Respondent held a meeting with employees on April 8, 1992. Scott Sider, regional vice president, testified that in March 1992 Fitzpatrick informed him that there had been talk among employees about the need for union representation because of their concerns about their jobs in view of the Respondent's layoffs of some managers, and in order to address these employee concerns and since he had not as yet met with the Hartford employees, Sider decided on the April 8, 1992 meeting. This meeting was unprecedented in several aspects. No employee meeting had been held at the Respondent's Bradley Field facility by any corporate vice president in recent memory. The Respondent provided a buffet luncheon for employees at this meeting which was also unprecedented. Moreover, Fitzpatrick told employees that the purpose of this meeting was to hear the employees, ''concerns, ideas . . . it was an open-ended meeting.'' The meeting was open for employee questions to management which had also never been done before on such a scale. Fitzpatrick spoke about companies like ''UTC'' and ''Caterpillar'' having unions, and that despite the unions these companies were still having layoffs, and explained that although the Respondent was eliminating some managerial positions, returning them to nonmanagement positions, there would be no employee layoffs or firings at the Respondent's Bradley Field facility.

Sider introduced himself and opened the meeting to employee questions regarding their concerns or complaints and said that he would try to answer the questions if he could then and there and, if not, then he would get back to them. Employees asked questions about seniority, pay differentials, the employee health plan, and the ''fleet'' size at Bradley Field. Divine testified that he identified himself as the ''the fellow that got suspended 'cause of my activity for the union'' and stated that he was concerned that new managers were not being trained as to how to treat employees better. Divine told Sider that the concerns being expressed by the employees at this meeting were the reasons they felt they needed to contact a union. White testified that Sider responded that part of the reason for this meeting was to find out what the employees' concerns and problems were and to see if they could be ''ironed out and worked out.'' After the meeting the employees ''ate the buffet.'' Both White and Divine testified that Sider had indicated that he could make no promises or guarantees regarding the employees' concerns expressed at this meeting.

4. The April 30, 1992 meeting

Announced by posted notice on April 14, 1992, the Respondent held another meeting with employees on April 30, 1992. The notice indicated that this meeting would ''be similar to that held on April 8th,'' and that ''immediately following the meeting Mr. Sider will be available to meet on an individual basis with those employees who would like to further discuss any issues/concerns.'' Sider and Regional Employee Relations Manager David Almeda conducted this meeting. Sider told the employees that management wanted to hear their questions, concerns, and ideas and go over

[5] The two rules in the Respondent's employee rules and regulations on which Divine's suspension was based state:

6. Soliciting or distributing and collecting any papers, materials or contributions on working time or in work area.

. . . .

24. Action on the part of any individual or group of employees to disrupt harmony, intimidate fellow employees or to interfere with normal and efficient operations.

them. Employees asked about the sick call-in policy and supplying doctors' notes for sick leave, how vacation leave is set as to who goes when, and how personal days were allowed. Sider related that he gave no immediate answers to these concerns although he may have answered other questions and told the employees that he would consider their concerns and get back to them.

5. The May 15, 1992 meeting

By posted notice on May 12, 1992, the Respondent announced another meeting to be held on May 15, 1992, wherein the ''[c]oncerns presented by employees at the last such meeting will be addressed.'' This notice also indicated that Sider and Almeda would be meeting with employees on an individual basis afterwards to ''further discuss any issues or concerns.'' At the meeting Sider and Almeda distributed a memorandum which set forth ''proposals initiated by employee concerns voiced at prior meeting.'' This memorandum clarified vacation scheduling, personal day requests, sick day policies, and announced that ''Smoking/Non-smoking breaks; Staffing; Others as needed,'' would be topics for further discussion later on.

From the end of April to the middle of May 1, 1992, Fitzpatrick was out and Sider visited the Bradley Field facility frequently to fill in for her. During this period he met with employees individually to discuss their concerns. In August 1992 Sider held approximately 38 individual meetings with employees, these occurring after the Union had filed a representation petiton with the Board. Divine testified to one of these meetings involving himself wherein Sider and Almeda asked Divine what his concerns were. Divine raised the issue of his suspension as being unfair and a denial of his ''rights.'' Divine asked Sider if he had investigated this and had determined who his accusers were. Sider replied that he had been told that four people had accused Divine of threatening them to join the Union and harassing them. Divine denied this to Sider as untrue and Sider told him that if only two people had accused him he would not have been suspended, but since four people did, the Respondent had to take action against him. Divine just answered, ''[O]K.'' Sider said, ''[T]hat's water under the dam'' and the discussion turned to other matters.[6]

6. The discharge of Sam Divine

The hearing in Cases 34–CA–5684 and 34–RC–1108 closed on March 31, 1993. Divine had assisted counsel for the General Counsel O'Connor throughout the trial and sat alongside him at the counsel table. During the trial Divine heard the testimony of the other witnesses and saw Fitzpatrick's April 3, 1992 memorandum in evidence, in which she stated, ''On 4/2/92, Judy Williams advised me that she was being harassed by some of the people who were going to a union meeting at 10 a.m.'' Williams had not testified at the hearing in the above cases.

Divine testified that on March 31, 1993, when he reported to work after the hearing had closed, he met Judy Williams who asked him how the case went and was it over. Divine answered yes it was over and then Williams asked him why he was being unfriendly toward her. Divine replied that since his suspension Williams had maintained that she had never talked to Fitzpatrick about the Union, but that Fitzpatrick had testified at the trial that Williams had told her that she was fearful of people going to the union meeting. Williams became angry and said, ''I never went to Erlene, Erlene has no fuckin' right to use my name at all.'' Divine related that later that evening employees Ann Marie Myers and Maxine White also advised him that Williams was upset about Fitzpatrick's testimony concerning her at the trial. Later, Williams herself again told Divine that she hadn't told Fitzpatrick anything and wasn't involved in this.

Williams' testimony regarding her conversation with Divine was different. Williams testified that after she had asked Divine how things were going he had said, ''I can't believe that you did this to me.'' Divine told Williams that Fitzpatrick had testified at the hearing that Williams had met with her at 10 a.m. and identified employees who were attending a union meeting and had told Fitzpatrick that she felt that her life was being threatened. Williams responded that this was ''bullshit,'' and said that she would have been asleep at 10 o'clock in the morning and could never have told this to Fitzpatrick. According to Williams, Divine told her that the Respondent and Fitzpatrick were just using her, had created the job of dispatcher for her in order to lower her seniority status, and would fire her after the case was over. Divine said that Fitzpatrick would deny everything Williams had said. Divine also told Williams that the people she worked with were not going to want to continue working with her because they wouldn't trust her as being a ''spy.'' Williams added that Divine called Sider and Fitzpatrick ''two-faced,'' and that at the conclusion of the conversation she was so upset that she left work early and cried while driving home.

Williams testified that on April 1, 1993, at about 6 p.m., she went to Fitzpatrick and told her that she was upset because people would not want to work with her since Fitzpatrick had testified at the hearing that Williams had given her the names of employees who had attended a union meeting and the place of the meeting. Williams stated that Fitzpatrick denied doing this and Williams then recounted to her most of what Divine had said to her on March 31, 1993, excluding his remark about Sider and Fitzpatrick being ''two-faced.'' Fitzpatrick then told Williams that her job was not in jeopardy and that she had nothing to worry about. Williams was not a supporter of the Union.

However, while Fitzpatrick's version of her conversation with Williams on April 1, 1993, was somewhat similar to Williams' (what Divine had said about Fitzpatrick's testimony concerning Williams at the hearing, about losing her job, and about employees not wanting to work with her because she ''ratted'' on them), it did differ in that Fitzpatrick, after reviewing her affidavit given to a Board agent on April 22, 1993, 2 weeks after Divine was terminated, stated that Williams did tell her that Divine had called Fitzpatrick and Sider ''two-faced.'' Fitzpatrick added that later she called Sider to apprise him of what had occurred and Sider instructed her to monitor the situation and keep him informed.

Divine testified that about 9:30 p.m. on April 1, 1993, Williams approached him and asked if they were going to the casino again and if he intended to go to the Kentucky Derby with her. After Divine responded that if he didn't

[6] Divine's testimony as to this conversation was unrebutted and therefore supports his testimony that he had been told by Fitzpatrick that there were four accusers who were not identified to him.

have any plans he would go, Williams then said, ''I can't believe Erlene mentioned my name in the testimony.'' Divine told her that a lot of the employees did not trust her because they were afraid that she might be reporting to Fitzpatrick ''that they've done something wrong.'' Williams responded that ''I never tell Erlene anything.'' Divine stated that he mentioned to Williams that employees might no longer help her out by loaning her money or giving her a ride when needed. Williams' reply was only that she was going to the race track on Saturday and Divine wished her ''good luck.''

Again Williams' version of her conversation with Divine on April 1, 1993, differed from his. Williams related that Divine initiated this conversation which she said occurred at her work station counter at about 9 or 9:30 p.m. Williams related that Divine told her that he couldn't believe that the Respondent had done this to her, that Hertz would not stand behind her, and to remember that he was her friend. Divine also said that other people had heard Fitzpatrick's statement that Williams had come to her with the names of people and that they were disappointed in her and wouldn't want to work with her. While Williams testified that she then went upstairs to speak to Fitzpatrick, the record evidence indicates that she instead had actually spoke to Fitzpatrick earlier that evening.

Williams testified that she contiuned to work but became ''very upset'' and ''a little angry'' and went outside to ''confront'' Divine by his bus. Divine told her that the Respondent was using her for its own selfish reasons, that Fitzpatick was a ''liar'' and using Williams ''to save her own ass'' and ''didn't give a shit about what happened to me,'' that nobody was going to want to work with her any longer, and that the Respondent was going to fire her. Williams recounted that she then told Nicole Chalifoux what Divine had said to her and Chalifoux said, ''[T]hat she had heard that before.'' Williams also related that Maxine White had told her that she was disappointed in Williams because she had heard that Fitzpatrick's testimony included the statement that Williams had disclosed to Fitzpatrick the names of people who had gone to the union meeting.

Williams testified that on April 2, 1993, on her day off, she went to see Fitzpatrick at 10 a.m. and told her that Divine called Fitzpatrick and Sider ''two-faced,'' and that she was still upset that people would not want to work with her. Fitzpatrick told her that employees should not have to come to work and be upset, and asked Williams if she wanted ''to file a complaint.'' Williams responded that she would have to think about it.

Fitzpatrick testified that Williams had told her in this conversation on April 2, 1993, that she had previously been embarrassed to state the ''vulgarities'' that Divine had used in their conversation on April 1, 1993, but would now do so. Williams told Fitzpatrick, besides reiterating her being upset about people not wanting to work with her because of Fitzpatrick's disclosure of her name at the hearing, that Divine had said that the Respondent and Fitzpatrick were ''fucked up,'' that the Respondent and Sider were ''two-faced,'' and that ''Dave Corris should be concerned about coming back to work because his testimony was an embarrassment.''

Fitzpatrick again called Sider to report that Williams was still upset about Divine's remarks to her regarding Fitzpatrick's testimony naming Williams as a source of information regarding employees' union activities. Sider testified that he told Fitzpatrick ''to gather the details'' regarding Williams' assertions about Divine. While Fitzpatrick acknowledged that she considered Divine's actions as ''misconduct,'' she did not confront Divine about this ''because I had no formal complaint.'' Moreover, Fitzpatrick admitted that there is no requirement in the Respondent's procedural manual for the filing of a ''formal complaint'' before considering and implementing any discipline.[7]

Williams testified that on April 5, 1993, she came to work early having suffered a damaged car battery cable, and met with Fitzpatrick to complain that her battery cable had been cut occurring sometime over the weekend and off the Respondent's premises. She then again complained about Divine's prior statements to her and asked to speak to Sider. Later that afternoon Williams met with Sider and Dave Almeda, who had come to the Bradley Field facility, in Fitzpatrick's office with Fitzpatrick present. Williams told Sider that because of Fitzpatrick's statement at the hearing she was having problems with other employees and was not going to be able to work with them. Williams reiterated to Sider what she had previously told Fitzpatrick about what Divine had said to her, and indicated to him that she was afraid of losing her job and reiterated that other employees would not want to work with her.

Concerning this conversation on April 5, 1993, Sider testified that Williams also mentioned that Maxine White had expressed disappointment in Williams presumably stemming from Fitzpatrick's statement at the hearing, and that Chalifoux had told Williams that Divine had told her about Fitzpatrick's testimony that Williams had named people who went to the union meeting. Sider related that Williams was ''visibly shaken'' and he told her that she would have to make a written statement regarding Divine's conduct toward her before the Respondent would proceed any further.

On April 6, 1993, Williams arrived at work early, at 10 a.m., to speak to Fitzpatrick and then wrote out a statement complaining about Divine while in Fitzpatrick's office. Williams stated that Fitzpatrick was ''in and out'' of the office while she wrote out her statement. Williams explained that she decided to give the Respondent a written statement because Divine had lied to both her and her friends and had hurt her. She was unable to perform her job and Divine was harassing her at work and she couldn't take it anymore. Williams ''hoped they would fire him.'' Williams' statement was then faxed to the Respondent's counsel.

Also on April 6, 1993, Sider and Almeda again appeared at the Bradley Field facility and at about 4:30 that afternoon called Divine to the upstairs breakroom where they met with him. Fitzpatrick was also present. Divine testified that Sider gave him a copy of his prior suspension notice to read and then told Divine that another employee had come forward to complain about Divine threatening her. Divine denied threatening anybody. Sider asked Divine if he had spoken to anybody about the case and Divine replied that he had talked to Judy Williams, and told her among other things that Fitzpatrick had said in her testimony at the hearing that Wil-

[7] I note that Divine's prior 3-day suspension was imposed on April 3, 1992, by Fitzpatrick, while what may be considered as written ''formal complaints'' were not made by Pelletier and Connelly until April 4 and 5, 1992, respectively.

liams had told her ''she was fearful of people attending the union meeting.'' Sider admonished Divine that he was still under oath and had no right to discuss that with Williams, but Divine said that he was no longer under oath since the case had ended on March 31, 1993. Divine admitted to Sider that he had also mentioned Fitzpatrick's testimony concerning what Williams had said to her, to Maxine White as well. Divine disclosed to Sider that during Fitzpatrick's testimony he learned that one of her written statements said that Williams had gone to her about being fearful of people going to the union meeting and Divine read the first line of that statement which had been placed in evidence at the hearing.

However, Sider testified that what Divine told him was that ''he was disappointed in Judy Williams, that at the recent hearing . . . he had read a statement by Erlene [Fitzpatrick] that was given to her by Judy, the information was given to her by Judy, that said that Judy had given Erlene names of people who went to a 10:00 o'clock union meeting at Friendly's and that she had been harassed.'' Sider stated that he now left the room to determine what document Divine had referred to and to speak to the Respondent's counsel. Sider also spoke to Williams to ascertain whether Divine had referred to Fitzpatrick's ''testimony'' or to a written statement, and Williams said it was her testimony. When he returned, Sider handed Divine a blank piece of paper and asked him to write what he had read at the hearing. Divine told Sider he could not do this verbatim but did write down what he remembered seeing. After he handed back the paper to Sider, Sider, Almeda, and Fitzpatrick left the room.

After a while, Sider returned and asked Divine if he had threatened Williams by telling her that if the Union came in she would lose her job, and Divine said that this was untrue. Divine told Sider that he was very upset with Williams because since his suspension she had expressed support for him and hoped that Fitzpatrick got everything she deserved, and that Williams had said that she never told Fitzpatrick that she was afraid of people attending union meetings. According to Divine, after he told Sider that he was upset because Williams lied to him and Sider responded sarcastically, ''what's the difference,'' Divine said, ''well it sounds like—do you want me to resign?'' When Sider responded that it was up to Divine, Divine refused stating, ''no sir, I don't because I don't want to lose my health benefits.''

Sider testified that he asked Divine if he had told Williams that she would lose her job on the decision rendered in this case, that people would refuse to work with her and she would lose her job, that she was a ''scape-goat'' for the company, that she got ''fucked'' by the company, and that he had called Sider and Fitzpatrick ''two-faced,'' to all of which Divine answered ''no.'' Divine also responded that he didn't use that type of language around female employees referring to the word ''fucked.''

Sider stated that he also spoke to Nicole Chalifoux because he remembered that Williams had mentioned Chalifoux when she spoke to him. Sider stated that Chalifoux told him that Divine had said to her that Fitzpatrick had testified at the hearing that Williams told Fitzpatrick the names of employees who went to union meetings. However, on her direct testimony Chalifoux at first testified that Divine had told her ''what Erlene had said, but I don't know if it was about Judy . . . that Erlene had testified the names that were at the union meeting.'' After the Respondent's counsel mentioned Williams in the next question, decidedly leading in nature, Chalifoux now indicated that it was Williams who had given Fitzpatrick the names. Later on in her testimony she could not remember if Divine mentioned Williams' name at all in their conversation. Chalifoux appeared somewhat confused about her conversation with Divine regarding Fitzpatrick's testimony at the hearing. Chalifoux also testified that she told Sider that Divine'' was talking about what Erlene had testified to,'' and that she thought the employees were not supposed to talk about the case until it was over. She could not remember if she told Williams that Divine had said that Williams gave Fitzpatrick the names of people who had gone to a union meeting. Chalifoux also denied that Fitzpatrick had ever approached her to inquire about what Divine had said to Chalifoux.

When Sider finally returned to the room in which Divine waited, he told Divine that he wa suspended indefinitely until the Respondent's investigation was completed, and that Fitzpatrick would call him to apprise him of the results. On April 7, 1993, Fitzpatrick called Divine and told him to report to her at 12:30 p.m. which he did. Fitzpatrick in the presence of Dave Corris advised Divine that he was fired and wished him ''good luck.'' Nothing further was said and Divine subsequently received a ''pink slip,'' which stated that he was terminated for ''repeated willful misconduct.''

As to the decision to terminate Divine and the reasons asserted by the Respondent for such decision, in an affidavit dated April 22, 1993, given by Fitzpatrick to a Board agent in Case 34–CA–6104, Fitzpatrick claimed that it was she and Dave Almeda who decided to terminate Divine. Fitzpatrick gave various factors for the decision including that Divine said that she and Sider were ''two-faced,'' that Divine had spread rumors about Corris' testimony, that Divine had told employees that Williams was a ''rat'' and a ''company spy,'' and that Williams was the third employee to file a written complaint against Divine in the past year (the first two being Pelletier and Connolly, which led to Divine's suspension).

At the reopened trial, Fitzpatrick testified that she had used a poor choice of words in her prior affidavit, since she and Almeda had only recommended Divine's discharge but that Sider made the actual decision to fire him. Sider testified that he made the decision to terminate Divine, but that Fitzpatrick's and Almeda's recommendations were a factor in this decision. Sider admitted that the only ''further investigation'' conducted by the Respondent after suspending Divine indefinitely on April 6, 1993, was ''to think about it and ''talk to counsel.'' He gave as other factors for his decision to terminate Divine as:

> that Sam had lied to Judy Williams and other employees of Hertz, and through his lies tried to build mistrust between Judy Williams and the Hertz Corporation and also fellow employees against Judy Williams; that through his lies caused intentional emotional assault on Judy similar to if he had hit [her] or something to that degree. Sam Divine through his lies caused emotional distress on Judy Williams to the point that she had a tough time doing her job, her daily job and that she felt that she was going to be terminated from the Hertz Corporation. Sam also lied to myself during the investigation.

> In sum, Sam Divine intentionally intimidated Judy Williams. He disrupted the harmony of the work force, he disrupted the work place. He violated work rule number 24, which in itself is termination, it's a terminable offense. This is the second such time that he violated this rule, he was suspended prior for it. I concluded that I had to terminate Sam Divine.

While Sider denied that Divine's ''pro-union'' position influenced his decision to terminate Divine, Sider did admit that he was aware of this when he met with Divine on April 6, 1993. Moreover, among the purported ''lies'' made by Divine to Williams was his statement to her that Fitzpatrick had testified at the hearing that Williams had named the persons who were attending the union meeting on April 2, 1992, at 10 a.m. and Divine's harassment of her. However, on cross-examination Sider acknowledged that Divine could have been mistaken regarding Fitzpatrick's testimony and what he had read in her statement, rather than lying about it to Williams, although he also testified on redirect that since Fitzpatrick's statement said nothing about Williams' naming names, that Divine could not be mistaken but had instead lied to Williams about this.

B. *Analysis and Conclusions*

1. The 8(a)(1) violations—Case 34–CA–5684

Section 8(a)(1) of the Act provides that it shall be an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of their statutory right to engage in, or refrain from engaging in, concerted activity. This provision is modified, however, by Section 8(c) of the Act, which defines and implements the First Amendment right of free speech in the context of labor relations. *NLRB v. Four Winds Industries*, 530 (1969). Section 8(c) permits employers to express ''any views, arguments or opinions'' concerning union representation without running afoul of Section 8(a)(1) of the Act if the expression ''contains no threat of reprisal or force or promise of benefit.'' *NLRB v. Marine World USA*, 611 F.2d 1274 (9th Cir. 1980); *NLRB v. Raytheon Co*., 445 F.2d 272 (9th Cir. 1971). The employer is also free to express opinions or make predictions, reasonably based in fact, about the possible effects of unionization on its company. *NLRB v. Gissel Packing Co*., 395 U.S. 575 at 618 (1969). In determining whether questioned statements are permissible under Section 8(c), the statements must be considered in the context in which they were made and in view of the totality of the employer's conduct. *NLRB v. Marine World USA*, supra; *NLRB v. Lenkurt Electric Co*., 438 F.2d 1102 (9th Cir. 1971). Also recognized must be the economically dependent relationship of the employees to the employer and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear. *NLRB v. Gissel Packing Co*., supra at 617; *NLRB v. Marine World USA*, supra.

a. *Interrogation*

The complaint in Case 34–CA–5684 alleges that the Respondent violated Section 8(a)(1) of the Act when its supervisor, Erlene Fitzpatrick, on April 2, 1992, interrogated employees about their union and protected concerted activities. The Respondent denies this allegation.

In *Rossmore House*, 269 NLRB 1176 (1984), affd. 760 F.2d 1006 (9th Cir. 1985), the Board reiterated the basic test for evaluating whether interrogations violate Section 8(a)(1) of the Act established in *Blue Flash Express*, 109 NLRB 591 (1954): whether under all the circumstances the interrogation reasonably tends to restrain, coerce, or interfere with rights guaranteed by the Act. The Board then stated in *Rossmore House*, supra at 1177:

> Our view is consonant with that expressed by the Seventh Circuit, Court of Appeals in *Midwest Stock Exchange v. NLRB*, [635 F.2d 1255, 1267 (7th Cir. 1980)]:
>
> > It is well established that interrogation of employees is not illegal per se. Section 8(a)(1) of the Act prohibits employers only from activity which in some manner tends to restrain, coerce or interfere with employee rights. To fall within the ambit of Section 8(a)(1), either the words themselves or the context in which they are used must suggest an element of coercion or interference.

Thus, the surrounding circumstances of the interrogation determines its unlawfulness and the Board will consider the time, place, personnel involved, and the known position of the employer, in making such a determination. *Teamsters Local 633 (Bulk Haulers) v. NLRB*, 509 F.2d 490 (D.C. Cir. 1974).

According to the evidence herein, soon after learning that a union meeting had taken place on that morning of April 2, 1992, Fitzpatrick had employee Lisa Scribner summoned to the upstairs breakroom where she asked Scribner how she felt about ''what was going on.'' Scribner understood this to be and it was in reference to the union activity occurring at the Bradley Field facility. Scribner told Fitzpatrick that she was tired of hearing about the Union and that she was against the Union and the reason why. Fitzpatrick then said that she couldn't understand why employees who worked for her would want to pay to come to work, obviously a reference to union dues payments, and that she would be talking to other employees about how they felt concerning what was going on.

Fitzpatrick also had employee Ann Marie Meyers called to the upstairs breakroom whereupon Fitzpatrick asked her if she had heard anything about a union and as to why she felt that the employees wanted a union. Meyers also testified that Fitzpatrick asked her if she had signed ''any kind of card or something.'' Fitzpatrick then told Meyers that other major companies in the area whose employees were represented by a union were laying off employees and that the Union would not ''secure our jobs.''

Fitzpatrick questioned employee Nicole Chalifoux twice on April 2, 1992, asking her if anybody was bothering her about the Union, first at the back entranceway and second in Fitzpatrick's office. Fitzpatrick told Chalifoux that she could not understand why anyone would come to work and pay to do so. Chalifoux agreed and indicated that she was annoyed that other employees seemed angry and were secretive as a result of the union activity occurring at the Bradley Field facility.

Fitzpatrick also spoke to a number of garage employees who were being shown a safety video at the time in the upstairs breakroom. At the conclusion of the video, Fitzpatrick told these employees that they could be terminated even with a union if they accumulated three warnings, and that she knew of several big companies whose employees were represented by unions who were laying off employees. Fitzpatrick asked them to report to management any employees who threatened them to sign union authorization cards, ''green cards.''

Fitzpatrick gave as her reasons for questioning employees, that she wanted to make sure that no employees felt threatened about their jobs because of the union activity occurring, or was being harassed by other employees regarding the Union. However, neither Scribner, Meyers, Chalifoux, nor any of the garage workers testified that this had happened to them. Instead, Scribner and Chalifoux only indicated annoyance at all the talk about the Union and the union activity taking place around them.

With regard to this issue, I credit the testimony of Scribner, Meyers, Chaulifoux, and Diaz[8] over that of Fitzpatrick. Their testimony was given in a forthright manner and was generally consistent with each other, while as set forth hereinbefore, Fitzpatrick's testimony on occasion was contradictory, inconsistent, and equivocal. Moreover, Scribner, Meyers, and Chalifoux were still employed by the Respondent at the time of the hearing and their testimony, apparently adverse to the Respondent on this issue, would be entitled to additional weight in support of their credibility. *Shop-Rite Supermarket*, 231 NLRB 500 (1977).

The record evidence shows that when Fitzpatrick learned that a union meeting had taken place on the morning of April 2, 1992, she began a systematic interrogation of employees. See, for example, *Basin Frozen Foods*, 307 NLRB 1406, 1415 (1992). In this case neither Scribner, Meyers, nor Chalifoux was an open and active supporter of the Union at the time that Fitzpatrick questioned them about their feelings regarding the union activity, Fitzpatrick's questioning did not occur in the context of a ''casual'' and ''friendly'' converation, was limited solely and precisely to the employees' personal sympathies and interplay with the Union, was accomplished by the highest placed management supervisor at the Respondent's Bradley Field facility, occurred at work and on worktime, in Meyers' case concerned disclosure of her own union activity if any[9] and none of these employees were self-proclaimed union adherents, and therefore constituted unlawful interrogation of these employees. *Hudson Neckware*, 302 NLRB 93 (1991); *H.S.M. Machine Works*, 284 NLRB 1482 (1987); *Sunnyvale Medical Clinic*, 277 NLRB 1217 (1985); *Rossmore House*, supra.

Moreover, where an employer seeks to have an employee disclose his/her union sentiments without communicating a valid purpose and an assurance against reprisal, such questioning will be held to be coercive. *Monroe Mfg. Co*., 200 NLRB 62 (1972). Not only did Fitzpatrick's interrogations of employees not contain such assurances against reprisals, but the interrogation of Meyers also included in the same conversation unlawful implied threats of job loss as will be discussed more fully hereinafter.

From the above, I find and conclude that under all the circumstances present in this case, the Respondent's interrogation of Scribner, Meyers, and Chalifoux was unlawful and violated Section 8(a)(1) of the Act because it reasonably tended to restrain, coerce, and interfere with their rights guaranteed under the Act. Rossmore House, supra. Also see *Hudson Neckwear*, supra; *H.S.M. Machine Works*, supra.

Regarding Fitzpatrick's statement to the garage workers to report anyone going around with ''green cards'' and threatening employees to sign the card, I do not find that this constituted a violation of Section 8(a)(1) of the Act as alleged by the General Counsel. In *Arcata Graphics*, 304 NLRB 541, 542 (1991), the Boad held that where a request by an employer for employees to report the identify of union card solicitors is not limited to reports on matters that could properly be within the employer's legitimate concerns such as ''threats,'' such a request is unlawful since it has the ''potential dual effect of encouraging employees to report to Respondent the identity of union card solicitors who in any way approach employees in a manner subjectively offensive to the solicited employee, and of correspondingly discouraging card solicitors in their protected organizing activities.'' In *Arcata Graphics*, the Board cited *Liberty House Nursing Homes*, 245 NLRB 1194, 1197 (1979), wherein it held that while requesting employees to report instances of ''harassment'' violated Section 8(a)(1) of the Act, asking them to report if they were ''threatened'' in connection with the union activities is sufficiently specific as to constitute a lawful exercise of management's right to enforce plant discipline. Fitzpatrick confined her request to the garagemen for disclosure to those union card solicitors who ''threatened'' employees to sign the cards.

However, Fitzpatrick's questioning of Nicole Chalifoux regarding those employees who were ''bothering'' her about the Union was ''tantamount to a request that the employee report persistent attempts to persuade and would therefore tend to restrain the union proponent from attempting to persuade any employee through fear that such conduct would be reported to management.'' *Sunbeam Corp*., 287 NLRB 996, 997 (1988). I therefore find and conclude that the Respondent violated Section 8(a)(1) of the Act when Fitzpatrick asked Chalifoux to disclose the names of employees bothering her about the Union. *Arcata Graphics*, supra; *Colony Printing & Labeling*, 249 NLRB 223 (1980), enfd. 651 F.2d 502 (7th Cir. 1981).

Fitzpatrick also called Sam Divine to her office during the evening of April 2, 1992, with regard to complaints by employees that Divine had allegedly threatened them with job loss if they failed to sign a union authorization card. Divine testified that Fitzpatrick asked him to identify the Union and the names of the employees involved with it and as to why

[8] I am aware that Diaz was discharged by the Respondent for allegedly trying to run over another employee with his car. However, his testimony appeared consistent with that of the other considered employees whose credibility is more certain.

[9] While Meyers testified that Fitzpatrick had asked her if she signed a union authorization card, Meyers had failed to include this in a ''note'' she gave to Divine regarding her conversation with Fitzpatrick on April 2, 1992. Meyers testified credibly that while she had not written this down, Fitzpatrick did ask her about signing a card. I credit Meyers' testimony since there appears in the record no reason for her to lie about this, especially since she was still employed by the Respondent at the time she testified in this case. See *Georgia Rug Mill*, 131 NLRB 1304 fn. 2 (1961).

Divine wanted to engage in activities for the Union. While Fitzpatrick denied such interrogation of Divine, I do not credit her denial. In addition to the reasons previously set forth hereinbefore for crediting the testimony of other witnesses over that of Fitzpatrick when in conflict is the fact that David Corris, who was present during this conversation between Fitzpatrick and Divine, did not corroborate Fitzpatrick's testimony in some instances, i.e., both Fitzpatrick and Divine testified that Divine had denied having threatened employees to sign union cards, while Corris stated that Divine had not done so. Additionally, while Fitzpatrick testified on cross-examination that she had identified Pelletier and Connelly to Divine as the employees who had reported that Divine had threatened them, Corris did not corroborate this. Moreover, I do not credit the testimony of Corris which appeared directed solely toward establishing the implication that Divine admitted threatening employees since he acknowledged having gotten ''hot under the collar'' with fellow employees, regardless of the questions being asked him, especially on cross-examination.

Therefore, I find and conlcude for much the same reasons as set forth above concerning the Respondent's engaging in unlawful interrogation of other employees here that the Respondent violated Section 8(a)(1) of the Act when Fitzpatrick questioned Divine as to who was involved in the union activity and why the employees wanted union representation. *Rossmore House*, supra. Also see *Hudson Neckwear*, supra; *H.S.M. Machine Works*, supra.

Additionally, I do not find the cases cited by the Respondent in its brief to be persuasive in support of its contentions here. For example, in *Premier Rubber Co*., 272 NLRB 466 (1984), the employee questioned about attending a union meeting was a ''known union supporter''; in *Flint Provision Co*., 219 NLRB 523 (1975), unlike the instant case, the questioning there did not occur against a background of the employer's antiunion campaign calculated to intimidate and coerce its employees; and *Liquitane Corp*., 298 NLRB 292 (1980), and *Classe Ribbon Co*., 227 NLRB 406 (1976), actually tend to support the General Counsel's case more than the Respondent's regarding unlawful interrogation as alleged in the complaint.

b. *Surveillance*

The complaint in Case 34–CA–5684 alleges that the Respondent violated Section 8(a)(1) of the Act when it created the impression that it was keeping under surveillance the union activities of its employees. The Respondent denies this allegation.

In determining whether a respondent has created an impression of surveillance, the Board applies the following test: whether employees would reasonably assume from a statement or action in question that their union activities have been placed under surveillance. *United Charter Service*, 306 NLRB 150 (1992); *South Shore Hospital*, 229 NLRB 363 (1977); *Schrementi Bros*., 179 NLRB 853 (1969).

The evidence here shows that on April 2, 1992, in separate conversations with Maxine White and Sam Divine, Erlene Fitzpatrick told them that she knew that they had a union meeting that day. This meeting was held at a nearby restaurant, not on the Respondent's premises, the record strongly suggests that the employees did not engage in union activities openly, and Fitzpatrick's statements were made along with threats of loss of benefits if a union came in within the same conversations, as will be more fully discussed hereinafter.

Accordingly, I find that Fitzpatrick's statements to White and Divine created the impression that the employees' protected concerted activities were under surveillance and the Respondent thereby violated Section 8(a)(1) of the Act. *United Charter Service*, supra; *Spring City Knitting Co*., 285 NLRB 426 (1987); *Hamilton Avnet Electronics*, 240 NLRB 781 (1979).

Moreover, according to the unrebutted testimony herein, Station Manager Jeff Wilcox was observed by employees recording license plate numbers in the parking area of the Holiday Inn in Windsor Locks, Connecticut, on May 11, 1992, wherein a union meeting was taking place with some of the Respondent's employees. There was no good cause shown by the Respondent for Wilcox's action. Such conduct inhibits employees in their communication with a union, thereby restraining and coercing employees in the exercise of their rights guaranteed by Section 7 of the Act. The same rationale would apply here as the Board found applicable in *Crown Cork & Seal Co*., 254 NLRB 1340 (1981). Therefore, I find that the Respondent violated Section 8(a)(1) of the Act by this conduct.

Additionally, Station Managers Wilcox and/or Greg Lindberg began a pattern of sitting in the breakroom whenever White and Divine appeared there together beginning on April 9, 1992, and remained there for the whole time that White and Divine were present, which these supervisors had never done before. The Respondent produced no evidence to show that this practice had occurred previous to the advent of these employees' union activities. While Fitzpatrick had advised the Respondent's supervisors that they should make sure that Divine and White do not threaten other employees regarding the Union, this does not justify the obvious monitoring and surveillance of White and Divine together on break. The Respondent offered no evidence to show that the action of its supervisors in this respect occurred only when other employees than White and Divine were present in the breakroom or that there was any justifiable reason for such conduct other than to overhear what White and Divine were saying and to place under surveillance their activities regarding the Union. I therefore find that the Respondent's actions in observing what was occurring and/or listening to the conversations of these employees, in the context of a vigorous antiunion campaign, constituted surveillance of its employees in violation of Section 8(a)(1) of the Act. *Belcher Towing Co*., 265 NLRB 1258 (1982), enfd. in pertinent part 726 F.2d 705 (11th Cir. 1984); *Alexander's Restaurant & Lounge*, 228 NLRB 165 (1977), enfd. 586 F.2d 1300 (9th Cir. 1978).

c. *Threats*

The complaint in Case 34–CA–5684 alleges that the Respondent violated Section 8(a)(1) of the Act by threatening employees with layoffs and other loss of employment, and with the loss of benefits if they engaged in union activities or solicited the Union to represent them in collective bargaining; and informed employees that it would be futile for them to select the Union as their bargaining representative. The Respondent denies these allegations.

As the Board and the courts have recognized, in the course of organizational campaigns, statements are sometimes made

of a kind that may or may not be coercive, depending on the context in which they are uttered. In order to derive the true import of these remarks, it is necessary to view the circumstances in which they are made. *Shaw's Supermarkets*, 289 NLRB 844 (1988).

The evidence here indicates that during her conversations with employees Ann Marie Meyers, Maxine White, and Sam Divine and with the garage employees on April 2, 1992, Fitzpatrick told them that UTC and other major companies in the area having unions were laying off employees and, in effect, that a union could not secure or save their jobs. First, I credit the testimony of these employees over that of Fitzpatrick for the reasons set forth hereinbefore and also because their testimony was generally forthright and corroborative of each others regarding this issue. Moreover and significantly, this statement was made to Meyers, White, Divine, and the garage employees only, and while Fitzpatrick spoke to other employees as well, such as Judy Williams, Lisa Scribner, and Nicole Chalifoux, she did not repeat this statement to them. Williams, Scribner, and Chalifoux each indicated to Fitzpatrick during their conversations that they did not support union representation. Also, Fitzpatrick appears to have made this statement as an adjunct to her unlawful interrogation of these employees and in the case of the garage employees, in connection with other seemingly negative remarks about union representation.

In effect the Respondent implied to its employees that the selection of a union to represent them could result in layoffs which the Union could do nothing about. I therefore conclude that the Respondent violated Section 8(a)(1) of the Act when Fitzpatrick made the above unlawful statements to employees. *Minette Mills*, 305 NLRB 1032 (1991). Contrast *Liquitane Corp*., 298 NLRB 292, 296–297 (1990), wherein the employer explained in some detail the reasons for mentioning plant closings and layoffs by other companies, unlike the instant case wherein the unlawful statement was made without more or any explanation.

At the general meeting with employees on April 8, 1992, Fitzpatrick repeated, this time to all the employees, that UTC and ''Caterpillar'' have unions and, despite this, these companies were laying off employees. Again this statement implied that the selection of a union could result in employee layoffs which the Union would be ineffectual in preventing. Therefore, for the same reasons as above, excluding Fitzpatrick's selective choice as to whom she would make such statements when meeting individually with employees, I find that the Respondent violated Section 8(a)(1) of the Act.

Additionally, Fitzpatrick also told White during their April 2, 1992 conversation that if there was a union, she would not be allowed to have coffee or a cigarette. Fitzpatrick also told Divine during their April 2, 1992 conversation that the employees could lose all their benefits if a union came in.[10] Fitzpatrick spoke in absolute terms concerning the consequences of unionization. In effect, the Respondent told its employees that the selection of a union to represent them would result in dire disadvantages such as loss of benefits and this was attributed solely to union representation. This is also true of Fitzpatrick's statement to White on April 17, 1992, that if the Union came in the Respondent would not have to give health benefits to Sam Divine.

I therefore find and conclude that the Respondent violated Section 8(a)(1) of the Act when Fitzpatrick made the above unlawful statements. *South Carolina Baptist Ministries*, 310 NLRB 156 (1993); *Minette Mills*, supra; *Standard Products*, 281 NLRB 141 (1986).

Also, Fitzpatrick's statements to Divine on April 2, 1991, that if there was a union, the employees could lose all their benefits, that the Union doesn't do anything for the employees at the Respondent's Boston facility, and that employees at the Hartford facility have better benefits than the Boston employees, in effect informed employees that it would be futile for them to select the Union as their bargaining representative. I therefore find that the Respondent violated Section 8(a)(1) of the Act by such statements.

Moreover, within a few days after April 2, 1992, while Diaz was standing near an outside gasoline pump, Fitzpatrick drove up and advised Diaz to ''get ready for a long trip.'' A short while later she told him that he was the Union's treasurer. After she drove away, leadman James Hartford who had been present in Fitzpatrick's car when this occurred then told Diaz that in effect he should not count on Hartford's vote in favor of the Union. While Fitzpatrick testified that she only asked Diaz if he were the Union's treasurer as a joke, I do not credit her testimony for the reasons set forth hereinbefore. Additionally, Hartford did not testify here to corroborate her testimony regarding this. Thus, a top-level manager telling an employee to get ready for a long trip, and then telling him that he is the Union's treasurer, followed by a leadman who witnessed this and asserting to the employee that he cannot count on a favorable vote for the Union from him, strongly implies a threat of layoff or some discipline for that employee's union activities. No other implication makes sense in such a sequence. Even if it is argued that the statement implying layoff is somewhat ambiguous, it would still constitute an unlawful threat of discipline because of union activity, since an employer's words may be ambiguous and still constitute a violation of the Act. *Webb's Industrial Plant Service*, 260 NLRB 933, 939 (1982). I therefore find that the Respondent violated Section 8(a)(1) of the Act regarding Fitzpatrick's statements to Diaz.

d. *Solicitation of grievances*

The complaint in Case 34–CA–5684 alleges that the Respondent, by Scott Sider, violated Section 8(a)(1) of the Act by soliciting employee complaints and grievances and promising employees increased benefits and improved terms and conditions of employment on April 8 and 30 and May 15, 1992. The Respondent denies these allegations.

In *Reliance Electric Co*., 191 NLRB 44, 46 (1971), the Board stated:

> Where, as here, an employer, who has not previously had a practice of soliciting employee grievances or complaints, adopts such a course when unions engage in organizational campaigns seeking to represent employees, we think there is a compelling inference that he is implicitly promising to correct these inequities he discovers as a result of his inquiries and likewise urging on his employees that the combined program of inquiry

[10] For the reasons stated hereinbefore, I credit the testimony of White and Divine over that of Fitzpatrick.

> and correction will make union representation unnecessary.

Furthermore, in *Uarco Inc*., 216 NLRB 1 (1974), the Board, on reference to the holding in *Reliance Electric Co*., supra, stated:

> However, it is not the soliciation of grievances itself that is coercive and violative of Section 8(a)(1), but the promise to correct grievances or a concurrent interrogation or polling about union sympathies that is unlawful; the solicitaiton of grievances merely raises an inference that the employer is making such a promise, which inference is rebuttable by the employer.

The promise is implied from the circumstances of the case, including the timing of the solicitation and the announced purpose thereof. *Lasco Industries*, 217 NLRB 527 (1975). Also see *Mast Advertising & Publishing*, 286 NLRB 955 fn. 2 (1987).

By posted notice to employees, the Respondent held meetings with its employees on April 8 and 30 and May 15, 1992, in groups and then individually with employees from April 30 through mid-May 1992. The evidence here shows that these meetings at the Bradley Field facility were unprecedented in that they were held by a top-level corporate regional vice president, Sider, were opened to employee questions on a scale never done before, and at the April 8, 1992 meeting followed by a buffet luncheon for the attending employees, which was also unprecedented. Moreover, these meetings were a direct response to the union campaign and were admittedly held to address employee concerns, complaints, and problems regarding their job security and working conditions and to see if they could be ''worked out.'' However, Sider also told the employees that the Respondent was making no promises or guarantees regarding such concerns or complaints.

Furthermore, the solicitation of grievances at preelection meetings, especially where an employer has not had a practice of soliciting employee grievances or complaints before, as is true at the Respondent's Bradley Field facility, carries with it the inference that the employer is implicitly promising to correct these inequities, even though the employer merely states it would look into or review the problems but did not commit itself to corrective action or promise to remedy them. *Permanent Label Corp*., 248 NLRB 118, 130 (1980), and cases cited therein.

Additionally, at the May 15, 1992 meeting the Respondent distributed a memorandum to the employees which set forth ''proposals initiated by employee concerns voiced at prior meetings.'' The Respondent characterizes this as ''merely clarifying'' its administrative policies on issues raised by employee questions. However, I believe that such ''clarification'' tended toward indicating to the employees that their concerns or problems raised at these meetings regarding such policies would be ameliorated, at the least by implication, and suggested to them that other voiced concerns would be discussed and considered in the future. *Stride Rite Corp*., 228 NLRB 224 (1977).

From all the above, I find and conclude that the Respondent violated Section 8(a)(1) of the Act by soliciting grievances from its employees with implicit promises to rectify them. *Vinyl-Fab Industries*, 265 NLRB 1097 (1983); *Hamilton Avnet Electronics*, 240 NLRB 781 (1979); *Reliance Electric Co*., supra. Also see *General Electric Co*., 264 NLRB 953 (1982).

The Respondent cites *Kinder-Care Learning Centers*, 284 NLRB 509, 516 (1987), in support of its contention that this allegation should be dismissed. However that case is distinguishable from the instant case. In the case at bar, the meetings held were unprecedented in nature and scope and the statements made were not only that these concerns and grievances would be ''looked into,'' but ''worked out'' if possible, although no promises were being made to remedy them, unlike, as in the *Kinder-Care* case. Moreover, the Respondent's memorandum distributed at the latter group meeting with employees, which addressed some of their concerns and problems raised, could reasonably be interpreted by the employees as carrying the implication that the Respondent would correct these grievances and complaints along the way.

e. *Restrictions on union activities*

The complaint in Case 34–CA–5684 alleges that the Respondent violated Section 8(a)(1) of the Act by promulgating and maintaining a rule prohibiting employees from engaging in union activities during working time on the Respondent's property. The Respondent denies this allegation.

During their conversation on April 2, 1992, Fitzpatrick told White not to talk about the Union to other employees working at their counters, and that engaging in union activities such as distributing union literature and talking about the Union on companytime on the Respondent's premises was ''against the rules.'' Additionally, the Respondent informed Divine on April 3, 1992, that he was being suspended for violating a work rule: ''Conducting non-Hertz business involving any and all Hertz employees while you or said employees are on working time and/or in working areas will not be tolerated.''

The record evidence here shows that the Respondent had enforced no restrictions on what employees could say to one another at their counters or elsewhere when customers were not present including work areas and on working time. Fitzpatrick admitted that she had not enforced the rule against such talk. Enforcing a rule which prohibits discussion of the Union or distribution of union materials on working time or in working areas, where there has been no enforcement of restrictions on other subjects or materials, is discriminatory and violates Section 8(a)(1) of the Act and I so find in this case. *Capitol EMI Music, Inc*., 311 NLRB 997 (1993), enfd. mem. 23 F.3d 399 (4th Cir. 1994) ; *New Process Co*., 290 NLRB 704 (1988); *Our Way, Inc*., 268 NLRB 394 (1983).

Moreover, when Fitzpatrick told Divine that he could engage in union activities but not during ''working hours'' she was in effect promulgating a rule that was presumptively invalid because that term connotes periods from the beginning to the end of work shifts, periods that include the employee's own time. This violated Section 8(a)(1) of the Act. *Our Way, Inc*., supra. Also see *Chicago Metallic Corp*., 273 NLRB 1677 (1985). While the Respodnent's no-solicitation rule may have been presumptively valid, Fitzpatrick had unlawfully modified it in appplication. *Our Way, Inc*., supra at fn. 6.

f. *Additional 8(a)(1) violations*

The complaint in Case 34–CA–5684 alleges that the Respondent violated Section 8(a)(1) of the Act when it informed employees that they were being disciplined because of their union and other protected concerted activities.

On April 3, 1992, Fitzpatrick told Divine on his suspension for 3 days without pay, that he should not get involved in other people's problems. From the content of the conversation the previous day between Divine and Fitzpatrick regarding the possibility of discipline for his alleged actions, the conclusion is inescapable that Fitzpatrick's mention of other people's problems meant the employees' unhappiness with the Respondent and their decision to seek union representation to resolve this. Coming right after Fitzpatrick's notification to him of his suspension, this in effect amounted to her informing him that he was being disciplined because of his union activities. I therefore find and conclude that the Respondent violated Section 8(a)(1) of the Act in this regard.

Additionally, while the complaint in Case 34–CA–5684 does not specifically allege a violation of Section 8(a)(1) of the Act by the Respondent promising benefits if the employees refrain from engaging in union activities, the General Counsel so asserts in his brief. However, I find that this matter was fully litigated at the hearing and is closely related to other allegations in the complaint. See, for example, *Soltech, Inc*., 306 NLRB 269 (1992).

At the April 8, 1992 meeting with employees, Fitzpatrick spoke about area companies with union representation who were laying off employees and explained that while the Respondent was eliminating managerial positions, there would be no layoffs or firing of employees at the Respondent's Bradley Field facility. In connecting these occurrences there arises a strong inference that the Respondent was impliedly promising the benefit of no employee layoffs if its employees refrained from engaging in union activities to bring in a union. I therefore find that the Respondent violated Section 8(a)(1) of the Act by such conduct.

2. The 8(a)(3) violations—Case 34–CA–5684

Section 8(a)(3) of the Act makes it an unfair labor practice for an employer to discriminate ''in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.'' Under the test announced in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), and approved by the Supreme Court in *NLRB v. Transportation Management Corp*., 462 U.S. 393 (1983), a discharge is violative of the Act only if the employee's protected conduct is a substantial or motivating factor for the employer's action. If the General Counsel carries his burden of proving unlawful motivation, then the employer may avoid being held in vioaltion of Section 8(a)(1) and (3) of the Act only if it can show that ''the same action would have taken place even in the absence of the protected conduct. *Wright Line*, supra, 251 NLRB at 1089. Also see *J. Huizinga Cartage Co. v. NLRB*, 941 F.2d 616 (7th Cir. 1991). In establishing a prima facie case of unlawful motivation as the first part of the *Wright Line* test, the General Counsel is required to prove not only that the employer knew of the employee's union activities, but also that the timing of the alleged reprisal was proximate to the protected activities and that there was antiunion animus ''to link the factors of timing and knowledge to the improper motivation.'' *Hall Construction v. NLRB*, 941 F.2d 684 (8th Cir. 1991). It is also well settled, however, that when an employer's stated motives for its actions are found to be false, the circumstance may warrant an inference that the true motivation is an unlawful one that the employer desires to conceal. *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466 (9th Cir. 1960). The motive may be inferred from the total circumstances proved. Moreover the Board may properly look to curcumstantial evidence in determining whether the employer's actions were illegally motivated. *Associacion Hospital del Maestro*, 291 NLRB 198 (1988); *White-Evans Service Co*., 285 NLRB 81 (1987); *NLRB v. O'Hare-Midway Limousine Service*, 924 F.2d 692 (7th Cir. 1991). That finding may be based on the Board's review of the record as a whole. *ACTIV Industries*, 277 NLRB 356 (1985); *Heath International*, 196 NLRB 318 (1972).

The complaint in Case 34–CA–5684 alleges that the Respondent violated Section 8(a)(1) and (3) of the Act when it suspended Samuel Divine for 3 days on April 3, 1992. The Respondent denies this allegation.

The record establishes ample evidence of Divine's union activities. Between March 23 and April 2, 1992, Divine spoke to employees about the Union and the union meeting scheduled for April 2, 1992. At this meeting he signed a union authorization card and later that day, at the Respondent's Bradley Field facility, distributed authorization cards to other employees requesting them to sign the cards. That the Respondent had knowledge of Divine's support for the Union is also confirmed in the record. On April 2, 1992, Fitzpatrick called Divine to her office and spoke to him about employee complaints against him for allegedly threatening them if they refused to sign union authorization cards and then Fitzpatrick proceeded to unlawfully interrogate Divine about his activities on behalf of the Union and the union activities of other employees. Additionally, Fitzpatrick admitted that she was aware of union activity among the Respondent's employees prior to April 2, 1992.

The Respondent's animus toward the Union is also clearly demonstrated by the numerous unfair labor practices found here, engaged in by the Respondent in violation of Section 8(a)(1) of the Act. *Roure Bertrand Dupont, Inc*., 271 NLRB 443 (1984). The Respondent unlawfully interrogated its employees regarding their union activities and those of other employees, threatened employes with layoff and discharge if they engaged in union activities, created the impression that employees' union activities were under surveillance, solicited employee grievances, and implicitly promised increased benefits, etc.

Moreover, Divine was suspended 1 day after the Respondent learned of his union activities. In fact, the evidence here tends to show that the Respondent could then have well believed that Divine was the leading union adherent at its facility. Thus the timing of Divine's suspension in close proximity to his union activities gives rise to a strong inference that it was unlawfully motivated. *Health International, Inc*., 196 NLRB 318 (1972).

As found here, the Respondent engaged in numerous violations of Section 8(a)(1) of the Act at times relevant and material regarding the employees' union activities including Divine's. This together with the Respondent's knowledge of

Divine's union activities evidences that the General Counsel has established a prima facie case that a reason for the Respondent's suspension of Divine was his union activities and was discriminatorily motivated. *Wright Line*, supra; *Roure Bertrand Dupont, Inc*., supra.

In order to rebut the prima facie case, the Respondent must show that it would have suspended Divine even in the absence of his union activities. The Respondent has the burden of presenting ''an affirmative defense in which the employer must demonstrate by a preponderance of the evidence that the same action would have taken place even in the absence of the protected conduct.'' *Equitable Gas Co*., 303 NLRB 925 (1991); *Chelsea Homes*, 298 NLRB 813 (1990).

As set forth in its letter dated April 3, 1992, the Respondent suspended Sam Divine for 3 days because he violated two ''related work rules,'' by conducting non-Hertz business involving Hertz employees while Divine or the employees were on working time and/or in working areas, and by disrupting harmony, intimidating fellow employees, or interfering with the normal and efficient operation of the Employer's business. The first reason is based on rule 6 of the Respondent's rules and regulations which prohibits ''Soliciting or distributing and collecting any papers, materials or contributions on working time or in work areas.''

As found hereinbefore, the Respondent violated Section 8(a)(1) of the Act when it selectively enforced a non-solicitation rule only as against union activities, where no such restriction had been enforced before. Suspending an employee for violating such a rule violates Section 8(a)(3) of the Act as well as it constitutes discriminatory action because an employee is engaging in union solicitation. See *New Process Co*., supra at 722.

As also found hereinbefore, the General Counsel has sustained his burden under *Wright Line* of establishing that Divine's union activity was a motivating factor in the Respondent's decision to suspend him. The above finding that one of the two reasons offered in support of Divine's suspension, that his union activity violated the Respondent's no-solicitation rule, actually referred to conduct which in this case was protected by the Act, and additionally supports the conclusion that the General Counsel sustained his burden under *Wright Line* regarding motivation[11] notwithstanding the Respondent's denial in its brief that this played a part in its decision to suspend him. *Mark Industries*, 296 NLRB 463 fn. 2 (1991). Also see *Chicago Metallic Corp*., 273 NLRB 1677 (1985).

Pursuant to *Wright Line*, the burden of proof now shifts to the Respondent to show that it would have suspended Divine even in the absence of his union activity. The Respondent asserts that its actual reason for suspending Divine was that he threatened employees with loss of their jobs if they failed to support the Union by signing union authorization cards. In *NLRB v. Burnup & Sims*, 379 U.S. 21 (1964), the Supreme Court held that an employer violates Section 8(a)(1) of the Act when it disciplines an employee for misconduct arising out of a protected activity, despite the employer's honest belief that such misconduct occurred, when it is shown that the misconduct never occurred. Where it is additionally shown that the employer disciplined the employee in such circumstances with an antiunion motivation, then the employer has also violated Section 8(a)(3) of the Act. *Elk Brand Mfg. Co*., 253 NLRB 1038 (1981). The Respondent's good-faith belief that Divine engaged in misconduct in connection with his union activities is no defense to the violation, if in truth, Divine did not engage in such misconduct. *Grant Food*, 252 NLRB 1308 (1980); *Classe Ribbon Co*., 227 NLRB 406 (1976). However, the burden of going forward with evidence to prove that Divine did not, in fact, engage in the misconduct alleged is on the General Counsel. *Burnup & Sims*, supra at 23 fn. 3.

Misconduct, however, will not be found readily, for both the Board and the courts have granted considerable latitude to employees for argument and counterargument in preelection situations, recognizing the ''strong emotions'' generated by union activity. *Burnup & Sims*, supra at 23. Thus, relatively minor incidents of misconduct, such as name-calling or somewhat ambiguous or veiled threats will not serve to divest employees of their statutuory protection. *Twilight Haven, Inc*., 235 NLRB 1337, 1342 (1978).

Additionally, as the Board stated in *YMCA of the Pikes Peak Region*, 291 NLRB 998 (1988):

> It is true that, under certain circumstances, concerted activity for the mutual aid and protection of employees may lose the Act's protection. [Citations omitted.] Those circumstances include public disparagement of an employer's product, a strike in breach of a collective bargaining agreement, conduct that contravenes the basic policies of the Act, or violence.

While the Board has also affirmed decisional language that threats of job loss for not supporting a union made by one rank-and-file employee to another are not objectionable, and that such statements can be readily evaluated by employees as being beyond the control of the union, this has been considered in the context of setting aside an election and the impact on employees free and uncoerced choice regarding their election votes, and not for the purposes of the justification for disciplinary action against an employee who allegedly has engaged in such conduct. See *Pacific Grain Products*, 309 NLRB 690 (1992); *Bonanza Aluminum Corp*., 300 NLRB 584 (1990); *Duralam, Inc*., 284 NLRB 1419 fn. 2 (1987).

According to the credited testimony of Sam Divine, during the evening of April 2, 1992, he was called to Fitzpatrick's office where she informed him that he was being relieved of his duties because four employees had told her that Divine

[11] In addressing the Respondent's assertions in its brief regarding this, the fact that the Respondent only disciplined one of four employees engaged in union soliciting activities does not, without more, support an inference that the Respondent's motivation for such discipline was lawful. *Nachman v. NLRB*, 337 F.2d 421 (7th Cir. 1964). Moreover, Fitzpatrick had discovered on April 2, 1992, that Divine was perhaps the most active union adherent among the Respondent's employees. Additionally, even assuming arguendo, that the Respondent had established that Divine's solicitations resulted in employee work interference, Divine's suspension would still be unlawful since it was based on a personnel rule that was enforced discriminatorily against union activity by employees. Also, while advancing as one of the reasons for Divine's suspension, that he engaged in union activities while on working time or in working areas, the Respondent failed to indicate to Divine that this reason encompassed his interfering with specifically identified employees or adequately explained what lawful solicitation entailed as to proper time and place for such solicitation. See *New Process Co*., supra at 722.

had threatened them with loss of their jobs if they failed to sign a union authorization card. After Divine denied engaging in such conduct and requested that Fitzpatrick produce his accusers or disclose their names, Fitzpatrick refused to do so. On April 3, 1992, Fitzpatrick advised Divine that he was being suspended for 3 days instead of being discharged because he was a good worker and his suspension letter stated two reasons for such discipline, as discussed above.

The record evidence shows that the Respondent, through Fitzpatrick, had knowledge that Divine was engaged in protected activity, that of contacting the Union and soliciting other employees to support the Union. Additionally, the Respondent accused Divine of campaigning for the Union on working time and in working areas and engaging in misconduct during his union activity. After Fitzpatrick learned that Divine had allegedly threatened employees Jerry Pelletier and John Connelly, she questioned them about the incidents and asked them to submit a written statement of what had occurred with Divine. Fitzpatrick then asked Divine about the alleged threats and, although she would not divulge the names of the employees involved or produce them for confrontation with Divine, she did disclose the nature of these threats. Fitzpatrick also consulted with higher management regarding the complaints against Divine before concuding that some discipline should be imposed. Moreover Divine told Fitzpatrick near the end of their conversation that if he had ''hurt anybody or hurt the company, I apologize.'' While such a statement by Divine seems ambiguous and is subject to various meanings being read into it, this could be considered as some support for concluding that the Respondent could reasonably have a good-faith belief that Divine had engaged in the alleged misconduct. Fitzpatrick's relieving Divine of his duties for the rest of his work tour that evening on April 2, 1992, appears more cautionary than discriminatory at the time, while she consulted with higher management as to what to do, based on the nature of the alleged misconduct.

From all of the above, I find and conclude that the Respondent, despite its obvious opposition to the Union and unhappiness with Divine's union activities, could also honestly have believed that Divine had threatened employees while soliciting their support for the Union, an activity which without the alleged threats, would otherwise have been protected. *Classe Ribbon Co*., supra; *Chicago Metallic Corp*., supra. Contrast *Northway Manor Nursing Home*, 243 NLRB 544 (1979).

The next factor to be considered under the *Burnup & Sims* guidelines is whether, in fact, Divine was guilty of the alleged misconduct. The Respondent contends that it suspended Divine because it believed that he had threatened at least four employees, two of whom, Pelletier and Connelly, had told Fitzpatrick directly that Divine had threatened them with the loss of their jobs if they failed to sign a union authorization card. As it appears from the record, at the time of Divine's suspension Pelletier and Connelly were the only employees who had actually registered such complaints against Divine.

Under the circumstances present in this case, I cannot possibly credit the testimony of Pelletier and Connelly regarding the alleged threats made to them by Divine. Pelletier and Connelly were obviously biased witnesses with every reason to testify adversely against Divine and in support of the Respondent, regardless of the truth. I am aware that the Respondent challenges Divine's credibility pointing out in its brief some discrepancies in Divine's testimony including his affidavit given to a Board agent which the Respondent asserts warrants a finding that he is not a credible witness. I have reviewed these and find that while inconsistencies do exist, some of these are subject to counterinterpretations, some were explained by Divine in the record, and as a whole these inconsistencies were insufficient to affect the exceedingly strong evidence of bias against Divine displayed by Pelletier and Connelly in their testimony, and as to other facts brought out in the record. Also, I previously credited Divine's testimony regarding other issues in this case, finding him to have testified in a forthright manner and to be supported by other evidence present here. Moreover, Connelly's testimony was at times also contradictory, and that of Pelletier at times unclear.

Concerning Pelletier, the record evidence clearly establishes that he intensely resented and feared Divine even before the start of the Union's organizing campaign. During his testimony, Pelletier exhibited a great deal of bitterness and animosity toward Divine that was striking. Pelletier asserted that Divine constantly criticized his work and he blamed Divine for management's unhappiness with his job performance which Divine often reminded him of, and he truly disliked Divine for additionally telling other employees of Pelletier's work deficiencies, especially in view of Divine's position as lead busdriver over him. Pelletier admitted being very concerned about the security of his job because of Divine's statements regarding his disfavor with management and he ''felt'' that Divine was using this as ''leverage'' to compel him on April 2, 1992, to sign an authorization card even if he might not want to do so.

From the evidence here it is reasonable to assume that Pelletier was aware that the Respondent opposed the Union even before April 2, 1992. This was highlighted by all the talk among employees on April 2, 1992, about the signing of union authorization cards. Additionally, it is clear from the nature of Pelletier's testimony that whatever Divine said to him that day about the Union and signing a card, Pelletier ''felt'' that this amounted to a threat of job loss if he failed to sign the card and interpreted it as such.

Divine denied threatening Pelletier with loss of his job if he failed to sign a union authorization card. Divine did acknowledge having previously spoken to employees about the need and advantages of union representation. At one meeting of employees prior to April 2, 1992, Divine discussed his interpretation of the meaning of a ''closed shop'' indicating that if people failed to join the Union they could lose their jobs. Thus, even assuming that Divine told Pelletier on April 2, 1992, that it was in Pelletier's best interest to sign the union authorization card in order to keep his job, as Pelletier testified, I do not regard this as a clear and unambiguous threat egregious enough to constitute misconduct sufficient to deprive Divine of the protection of the Act while engaged in union activities. See *Twilight Haven, Inc*., supra; *Classe Ribbon Co*., supra at 408–409. According to Pelletier, Divine had often on prior occasions told him that he needed the Union for support in view of the Respondent's unhappiness with his job performance and that if Pelletier did not go along with the majority in voting for the Union he would lose his job. Moreover, Pelletier's testimony as to what Di-

vine actually told him on April 2, 1992, was at times unsure and shaky.

It is noteworthy that until April 2, 1992, when Fitzpatrick commenced her interrogation of employees regarding any threats or harassment made against them by other employees, Pelletier had never complained before to management about the alleged threats Divine was constantly directing at him regarding loss of his job if he failed to support a union. Pelletier's complaints to ''manager'' Connelly apparently were in regard to Divine's incessant criticism of Pelletier's work performance and, if also in regard to Pelletier's job security, where not taken seriously by Connelly who told Pelletier so. Connelly was a station manager at that time. Therefore the Respondent's display of interest in finding union adherents who had allegedly threatened other employees regarding their lack of support of the Union and its known opposition to union representation of its employees set the stage for Pelletier and, as will be discussed hereinafter, also for Connelly to significantly curry favor with the Respondent by asserting that threats had been made against them by Divine, perhaps the most active of the union adherents.

Regarding Connelly, his employment history with the Respondent is revealing. Connelly had been lead busdriver until October 13, 1989, when he was promoted to a station manager's position. On March 23, 1992, in a reduction of managerial staff, Connelly was reduced to a busdriver's position. Meanwhile Divine had become the lead busdriver after Connelly became a station manager which now placed Connelly in a subordinate position to Divine when he became a busdriver in March 1992. It strongly appears from the evidence that Connelly resented his reduction in position and also Divine's not only being placed in a position above him, but as to Divine's activities on behalf of the Union and in support of union representation of the Respondent's employees, which Connelly was unequivocally opposed to. According to Divine's credited testimony, during an employee meeting to discuss the need for union representation, Connelly belligerently accused Divine of threatening him about not supporting the Union when Divine discussed the meaning of a ''closed shop'' in response to an employee's question about this. Moreover, prior to the advent of the Union's organizing campaign, he and Divine had been on friendly terms and he had not felt ''threatened'' by Divine before.

Connelly alleged that Divine had threatened him on April 2, 1992, telling him that if Connelly failed to sign an authorization card Divine would tell management about things Connelly had done while in the position of station manager that would result in Connelly being fired. Divine did not specify what these things were. Divine denied making such a threat. Even assuming he had, I do not find that this would constitute misconduct sufficient to deprive Divine of the protection of the Act, while he was engaged in union activity. Moreover, and of more than passing interest, Connelly was promoted back again to the position of station manager approximately 3 months prior to his appearance as a witness for the Respondent in this case.

Of additional significance is the fact that while Fitzpatrick told both Pelletier and Connelly on April 2, 1992, that to prove that they were ''sincere'' about being threatened by Divine about their jobs they would have to give written statements to the Respondent regarding such threats, the Respondent suspended Divine the very next day April 3, 1992, prior to the receipt of any such written statements from Pelletier and Connelly, which were not submitted until April 4 and 5, 1992, respectively. Moreover, Fitzpatrick admitted that the allegations against Divine made by Pelletier and Connelly were not in character and that Divine was a good employee. Finally, as noted by the General Counsel in his brief, when Fitzpatrick told Divine that he was being suspended, after Divine had explained to her the reasons for his union activities, she told him that he shouldn't involve himself in other people's problems, obviously meaning the employees' desire for union representation and Divine's activities regarding the Union on their behalf, thus ''[giving] the game away.''

From all the above, I find and conclude that when the Respondent suspended Divine because of his union activities it thereby violated Section 8(a)(1) and (3) of the Act.

3. The 8(a)(1), (3), and (4) violations—Case 34–CA–6104

The complaint in Case 34–CA–6104 alleges that the Respondent violated Section 8(a)(1), (3), and (4) of the Act when it terminated Samuel Divine on or about April 7, 1993, becaue he engaged in union activities and to discourage employees from so doing, and because Divine participated in the unfair labor practice hearing before the Board in Case 34–CA–5684. The Respondent denies these allegations.

The Respondent's purported reasons for discharging Divine were that he disrupted the harmony of the work force and continued to intimidate fellow employees, conduct for which he had previously been suspended. Both Fitzpatrick and Sider elaborated on these reasons by listing factors such as Divine's lying to William's and other employees about what had occurred at the prior hearing and the consequences resulting therefrom which involved testimony given by Fitzpatrick and Corris, his lying to Sider regarding the employees he had spoken to about this, Divine's negative remarks made to Williams concerning the Respondent and Fitzpatrick and Sider, and that Williams was the third employee to file a complaint against Divine because of his allegedly having threatened them.

Thus it is clear that the termination of Divine flows directly from his participation in the unfair labor practice hearing and his conversations with employees about the testimony at that hearing. Moreover, the discharge was also explicitly based in part on the Respondent's previous suspension of Divine, which I found to be unlawful. With this in mind and for the same reasons I hereinbefore found that the General Counsel had made out a prima facie case under the test set forth in *Wright Line*, supra, the burden now shifts to the Respondent to show that it would have terminated Divine absent the unlawful reasons. *Mark Industries*, supra.

A primary reason given at the trial by Sider for Divine's termination was that he lied about Fitzpatrick's testimony at the hearing to employees Williams, Chalifoux, and White. Divine had a protected right to speak about what took place at the unfair labor practice hearing since at the time the case had been concluded and closed. The Board has held in a variety of contexts that employees have a right to speak to other employees about such matters. See, for example,

*P*I*E* Nationwide, Inc*., 295 NLRB 382 fn. 1 (1989); *Titanium Metals Corp. of America*, 251 NLRB 1180 (1980); *Teamsters Local 705*, 244 NLRB 794 (1979). The only way for an employee to lose the protection of the Act for making specific statements against an employer related to unfair labor practice proceedings is where the statements made are so ''reckless or maliciously untrue.'' *Phoenix Newspaper*, 294 NLRB 47 (1989). To hold that an employer could punish employees for speaking to other employees or publicizing the events in an unfair labor practice case would undermine and frustrate the very purpose of the Act. The question then to be decided is whether the statements attributed to Divine were so reckless or maliciously untrue as to cause the loss of the Act's protection.

Divine denied threatening or harassing Williams or that he lied to her or that he had criticized the Respondent's managers in an obscene and nasty manner as alleged by Williams. I credit the testimony of Divine over that of Williams and, in fact, over that of Fitzpatrick and Sider as well, not only for the reasons set forth in finding his testimony credible on other issues here, but additionally because Williams' testimony appeared at times contradictory and seemed memorized and rehearsed. She did not come across as a credible witness. Moreover, Williams had received a promotion to the position of dispatcher on March 10, 1993, shortly before the commencement of the initial case, although she was not called as a witness for the Respondent until after the case was reopened in September 1993. As regards Sider's testimony he exhibited instances of evasiveness and consistently long periods of silence before answering questions on cross-examination by counsel for the General Counsel which had not been in evidence during his direct testimony by the Respondent's counsel.

As discussed hereinbefore, Fitzpatrick's testimony at the March hearing was so contradictory as to make unsure what exactly occurred on April 2, 1992. Even assuming arguendo that Divine did tell Williams and other employees that Fitzpatrick testified that Williams had named employees who had attended the union meeting on April 2, 1992, the evidence in the record could well support such an assertion or inference. Fitzpatrick did testify that in her April 3, 1992 memorandum she stated that on ''April 2, 1992 Judy Williams advised me that she was being harassed by some people who were going to a Union meeting at 10 a.m.'' While Fitzpatrick also asserted in that memorandum that Williams had not mentioned any names that day she contradicted this in her testimony claiming that Williams had told her that employee Maxine White was bothering her about the Union. Subsequently she changed her testimony saying that Williams was one of three employees who might have told her about such harassment but wasn't sure which one had done so. However, the evidence here is conclusive that it was Williams who had mentioned White's name.

The record evidence shows that Williams and Divine had been close friends. Divine had been told that he was being suspended for having threatened four employees but the names of his accusers had not been disclosed to him. Williams had strongly denied to Divine that she had been involved as one of his accusers. At the initial hearing Divine had read the first sentence of Fitzpatrick's April 3, 1992 memorandum, listened to her testimony at one point asserting that Williams had told her that Maxine White was harassing her about the Union, heard the testimony of Lisa Scribner and Nicole Chalifoux denying that they had told Fitzpatrick that White had been harassing them about the Union, heard testimony that Fitzpatrick had failed to mention Williams in her affidavit to a Board agent, and had to be aware that although Williams' name arose as a potential player in the events which occurred on April 2, 1992, she was not called as a witness for the Respondent, and it is entirely reasonable that Divine could infer that Judy Williams had informed Fitzpatrick about the union meeting on April 2, 1992, and named employees who had gone to the meeting. As it turns out from the record evidence as a whole, the truth was that Williams had informed on Maxine White additionally supporting such an inference drawn by Divine as to Williams' role in these events and the possibility that she had lied to him. Thus, there appears no basis for finding that Divine acted recklessly or maliciously.

From all the above, I find and conclude that when the Respondent terminated Divine because of what he stated took place at the unfair labor practice hearing it violated Section 8(a)(4) of the Act.

Moreover, another reason given by the Respondent for terminating Divine was his negative remarks to Williams concerning the Respondent's loyalty to her and that of Fitzpatrick and Sider. In reviewing the statements made by Divine to her in his credited testimony, I also do not find them to be ''recklessly or maliciously untrue'' as to cause Divine to lose the protection of the Act, also enforcing a finding of an 8(a)(4) violation by the Respondent. *P*I*E Nationwide, Inc*., supra; *Phoenix Newspapers*, supra.

Further, the Respondent's other asserted reasons for terminating Divine are similarly unlawful ones, and do not constitute a *Wright Line* defense. The Board has held that an employee has a protected right to warn other employees about informers in their ranks. *Bakersfield Memorial Hospital*, 305 NLRB 741 (1991); *Somerset Shirt & Pajama Co*., 232 NLRB 1103 (1977). The only exception again would be where the statements or allegations were maliciously untrue. *Bakersfield Memorial Hospital*, supra. I do not find that to be the case here. Therefore, Divine was engaged in protected activity when he spoke to employees about what he had learned at the unfair labor practice hearing. Whether he was warning other employees about Williams' being an informer, or confronting Williams about her conduct and arguing to her that she was being used by the Respondent and should rely on her friends and the Union instead, Divine was engaged in protected activity, and his termination by the Respondent violated Section 8(a)(3) as well. *Bakersfield Memorial Hospital*, supra; *Somerset Shirt & Pajama Co*., supra. Moreover, the Respondent's hostility toward Divine was cumulative and as a result of his union activities and supports a violation of Section 8(a)(3) of the Act.

Sider listed as another factor in Divine's discharge that he had lied to Sider by failing to identify Nicole Chalifoux as an additional employee with whom he had discussed what occurred at the initial hearing. As will be discussed hereinafter, that interrogation was unlawful, and a discharge cannot be lawful when it is based on an employee's failure to fully respond to an unlawful interrogation.

The record as a whole clearly establishes that the Respondent's alleged reasons for Divine's discharge were unlawful ones, even assuming the Respondent believed that Di-

vine had engaged in misconduct. With regard to Divine's suspension, the General Counsel asserted that the reasons for the Respondent's action in this regard were pretextual and while there was a gnawing suspicion that this was so, I felt that suspicion was inadequate to support such a finding and resolved that issue on other grounds. However, as concerns Divine's discharge, the evidence here shows that the given reasons for Divine's termination were pretextual. The varying reasons given for his discharge, wherein the Respondent indicated during the investigative stage of these proceedings that it was Fitzpatrick and Dave Almeda who had made the decision to fire Divine and the reasons therefore, but at the hearing the Respondent attributed this decision to Sider based on other reasons, provides strong evidence of pretext.

Moreover, the evidence here regarding the Respondent's requirement of a ''formal complaint'' from Williams before proceeding to investigate her charges against Divine where there is actually no rule or regulation in its disciplinary procedure which requires this, considered with the Respondent's suspension of Divine previously before receiving any written ''formal complaint,'' from his two accusers, Pelletier and Connelly, and what appears to be Fitzpatrick's attempts to conceal Williams' identity as an informer about employee union activities which was obviously uncovered and exposed by Divine, and this in connection with the Respondent's antiunion activities, all reinforce a finding of pretext.

From all of the above, I find and conclude that the Respondent violated Section 8(a)(1), (3), and (4) of the Act when it unlawfully terminated Samuel Divine.

I additionally find and conclude that the Respondent also violated Section 8(a)(1) of the Act when Fitzpatrick and Sider interrogated Divine and Nicole Chalifoux about Divine's statements regarding Williams' role as an informer disclosed at the initial hearing in Fitzpatrick's testimony. The questioning of Divine especially and Chalifoux extended far beyond any purpose of ascertaining whether or not threats were being made to employees.

V. OBJECTIONS TO THE ELECTION

The complaint and notice of hearing in Case 34–CA–5684 was issued on June 25, 1992. Pursuant to a Stipulated Election Agreement approved by the Regional Director for Region 34 on August 14, 1992, an election by secret ballot was conducted on September 17, 1992, in an appropriate unit wherein the Union lost the election by a vote of 18 for and 22 against it. The Union filed timely objections to the election on September 30, 1992, and of its four listed objections subsequently withdrew three of them. The remaining objection to the election states:

> 3. Throughout the election period the employer has stated and/or implied that the employer would ''bargain from scratch'' if the union won, thereby threatening employees with cancellation of existing benefits. An example of management's threats was the employees' 401(K) plan. Many employees were afraid of losing this benefit and were advised that this benefit existed ''only for non-unionized Hertz shops.'' Clearly, this threat effected the election.

In his Report On Objections dated October 27, 1992, the Regional Director noted that the allegations in the complaint issued on June 25, 1992, of violations of ''Section 8(a)(1) and (3) of the Act'' was ''inter alia, conduct encompassed by Objection No. 3.' and that the objection raised substantial and material issues of fact, including credibility issues that may best be resolved on the basis of record testimony at a hearing. By Order dated November 9, 1992, Cases 34–CA–5684 and 34–RC–1108 were consolidated for hearing. By Order dated June 4, 1993, these cases were consolidated with Case 34–CA–6104 for a reopened hearing.

A. *The Facts*

The record evidence shows that the Respondent held meetings with its employees on August 10 and 11, 1992. These meetings were held at the Sheraton Hotel in Hartford, Connecticut, and conducted by Irwin Pollack, manager of labor relations, and David Almeda, employee relations manager for the New England region, with small groups of employees (five to eight) in attendance at each meeeting. Almeda testified that the purpose of these meetings was to clear up employee confusion at the Bradley Field facility since ''there was a lot of statements going around the location, rumors, misinformation, a lot of things like that'' regarding the Union and the upcoming Board election. Almeda stated that he and Pollack discussed the election procedure and answered employee questions about union membership requirements in case the Union was voted in, dues payment requirements, etc. Pollack related that he also told employees what their rights were under the Act and what the Respondent could or could not lawfully say and do with regard to the election, including that the Respondent could not threaten employees with loss of their jobs or benefits because of their union activities and/or support of the Union.

Pollack continued that he advised the employees that the Respondent had collective-bargaining agreements with other unions in other locations throughout the country and, in this connection, stated that if the Union won the election ''Everything is negotiable. You could end up with more money, you could end up with less money. You could end up with more holidays, less holidays. Better benefits, worse benefits. It's based on whatever was negotiated at the time.''

Pollack recounted that he discussed the Respondent's 401(K) plan (income savings plan) with the employees since some of the employees said that they were unaware of such a plan, and issued a two-page summary of the plan in existence at the Hartford facility which indicated that the plan ''applies to non-union weekly and bi-weekly salaried employees.'' Pollack told the employees that ''all organized employees do not have this benefit,'' along with the statement that ''everything is negotiable and you could get it, you could lose it, you could keep the same.'' According to Pollack only 11 of the 41 employees in the appropriate unit at the time were enrolled in the 401(K) plan.

However, Almeda testified that ''a pretty large percent of the employees'' were enrolled in the 401(K) plan. Regarding this Almeda testified that:

> [T]here was a lot of concern with the 401(K) Plan during the discussions. A lot of them asked what happened to their 401(K) Plan. And basically told them that, again, during the negotiation process, nothing is—you can lose pay or benefits, you can gain pay or benefits. Nothing is determined or guaranteed prior to sitting

> down to negotiate, but I also told them they should be aware that out of 197 or so contracts that the Hertz Corporation has presently, none of those contracts have a 401(K) Plan.

Almeda recalled that it was also said to employees that the 401(K) plan ''was certainly [a] negotiable item like everything else was.''

Moreover, this was the first time that the Respondent's 401(K) plan was discussed by management directly with the employees as a group and that the meetings between Pollack and Almeda with groups of employees was generated by the Union's filing of its petition with the Board for an election in the appropriate unit for the Respondent's employees at its Bradley Field facility. Both Pollack and Almeda denied telling employees that if the Union won the election, the Respondent would ''bargain from scratch'' or that bargaining would start ''from the bottom up.''

However, Samuel Divine testified that at the first meeting with employees at the Sheraton Hotel in Hartford in August 1992 Pollack told the employees that ''in negotiation you could start from scratch. . . . It's a brand new ball game. You know, you start from scratch.'' Divine related that Pollack also said that during negotiatons, ''you can get more, you can get less, you can get the same thing,'' depending on how the contract is negotiated, and that ''the company would negotiate with the union,'' but Divine could not remember whether Pollack had used the term ''in good faith'' or not in this connection. Divine added that the Union had advised him that negotiations would start at the present level of wages and benefits and go from there up, and Divine raised this with Pollack at the meeting.

Called as a witness by the General Counsel, Maxine White who attended the August 1992 meeting with Divine, testified as follows:

> Q. Did [Pollack] ever use the term that Hertz would bargain from scratch?
>
> A. There was something to that effect at one of the meetings. I don't remember exactly what it was.
>
> Q. You don't remem—something to that effect, but not necessarily those words?
>
> A. Not in those particular words maybe, but it was—
>
> Q. Would negotiate all the benefits but you could get more, you could get less, you can get the same thing?
>
> A. Uh-huh. Yes.

White also stated that Pollack had told the employees that the Respondent would negotiate with the Union in good faith.

B. *Analysis and Conclusions*

In *Zeiglers Refuse Collectors v. NLRB*, 639 F.2d 1000, 1004–1005 (3d Cir. 1981), the United States Court of Appeals for the Third Circuit stated:

> The purpose of holding representation elections is to provide a means whereby workers may fairly and freely choose their bargaining representative if indeed they want one. See *NLRB v. A. J. Tower Co*., [329 U.S. 324 (1946)]. A representation election should be ''a laboratory in which an experiment may be conducted, under conditions as nearly ideal as possible, to determine the uninhibited desires of the employees.'' *General Shoe Corp*., 77 NLRB 124, 127 (1948). . . . The Board has an obligation to insure that an election is held ''under such conditions as well be conducive to the sort of free and untrammeled choice of representatives contemplated by the Act.'' *Methodist Home v. NLRB*, 596 F.2d 1173, 1183 (4th Cir. 1979). . . . Hence, extreme care must be taken that the laboratory conditions have not become so tainted that employees may have based their vote not upon conviction, but upon fear or upon any other improperly induced consideration. The Board and the courts have emphasized that the existence of a coercive atmosphere, regardless of how such an atmosphere came about, is the critical fact upon which the Board should focus in determining whether a fair and free election was impossible. *Diamond State Poultry Co*., 107 NLRB 3, 6 (1953); *Cross Baking Co. v. NLRB* 453 F.2d 1346, 1348 (1st Cir. 1971).

As previously found here, the Respondent engaged in numerous unfair labor practices as alleged in the complaints in violation of Section 8(a)(1), (3), and (4) of the Act. While these unlawful acts on the part of the Respondent were not also alleged as objections to the election timely filed by the Union, the law is clear that such allegations may serve as the basis for setting aside an election even when they were not specifically included in the Union's election objections. *White Plains Lincoln Mercury*, 288 NLRB 1133 (1988); *American Safety Equipment Corp*., 234 NLRB 501 (1978). However, to serve as a basis for setting aside an election such conduct must have occurred between the date the petition was filed and the date that the election was held. *Gold Shield Security*, 306 NLRB 20 (1992); *Ideal Electric & Mfg. Co*., 134 NLRB 1275 (1962). It appears from the record that the Union filed its representation petition in late July or early August 1992. The election was conducted on September 17, 1992. Therefore, the Respondent's unlawful conduct, having been engaged in both before and subsequent to the critical period, cannot serve as the basis for setting aside the election.[12]

This leaves for consideration the remaining Objection 3. For conduct to warrant setting aside an election, not only must that conduct be coercive, but it must be related to the election as to have had a probable effect on the employees' actions at the polls. *Valley Rock Products v. NLRB*, 590 F.2d 300 (9th Cir. 1979). The burden of proving that an election should be invalidated because of objectionable conduct rests with the party filing the objections, in this case, the Union. *Flintkote Co*., 260 NLRB 1247 (1982). The party challenging the outcome of the election bears the heavy burden of ''producing evidence sufficient to mandate a result different from that obtained through the casting of ballots.'' *NLRB v. Krafcor Corp*., 712 F.2d 1268, 1269 (8th Cir. 1983); *Valley*

[12] In truth, had the Respondent's unlawful conduct occurred during the critical period I would surely recommend that the election results be set aside and a new election ordered. Of course only those violations which occurred prior to the election would be considered. Be that as it may, unless the Board reconsiders the parameters of its definition of the ''critical period'' with regard to violations alleged in the complaint and not encompassed in objections to the election, the above remains the law. See *Ideal Electric Co*., supra at 1277–1278.

Rock Products v. NLRB, supra at 302. The Union, as the party challenging preelection conduct, must establish that such conduct impaired employees' freedom of choice. *NLRB v. Enrodrive, Inc*., 724 F.2d 556 (6th Cir. 1984); *NLRB v. Basic Wire Products*, 516 F.2d 261 (6th Cir. 1975). Thus, when preelection conduct is challenged on the basis that it interfered with the election, the critical inquiry is whether employees were able to exercise free choice. Ibid.

The Union's Objection 3 to the election alleges that the Respondent stated and/or implied throughout the election period that it would ''bargain from scratch'' if the Union won the election, thereby threatening employees with cancellation of existing benefits. The Respondent denies this allegation. According to the record evidence, the statement ''bargain from scratch'' was alleged to have been made by Pollack at the August 10, 1992 meeting with employees. Both Pollack and Almeda denied that such a statement was made. Divine testified that Pollack had made the statement and White's testimony indicates that something like that was said but not in those exact words, more akin to the statement that the Respondent and the Union would negotiate all the benefits, but the employees could end up with more, less, or the same thing.

While I credited Divine's testimony on other issues considered here, there is a question in my mind as to whether Pollack made the statement that the Respondent would ''bargain from scratch.'' The above four witnesses all agreed that Pollack did state that the parties would negotiate and the employees could get more, get less, or get the same as they have. From such a statement White concluded that Pollack had said that the Respondent would ''bargain from scratch.'' Divine could have also interpreted the statement as such. Moreover, while it seemed that during cross-examination, Divine had the opportunity to assert that Pollack had made the ''bargain from scratch'' remark, he did not do so until on questioning by the Union's representative, he was asked directly whether Divine had ''ever heard management use the phase 'negotiate from scratch'?'' whereupon Divine alleged that Pollack had made such a statement.

Be that as it may, even assuming that Pollack did make such a statement, under the circumstances present in this case I would not find it unlawful. In this case the Respondent consistently stated that if the Union won the election everything is negotiable and the employees could end up with more money and benefits, less money and benefits, or the same as they presently had. Additionally, the Respondent indicated that it would negotiate with the Union in good faith as testified to by White, Pollack, and Almeda. While Divine testified he could not recall this being said, it seemed based on his lack of remembrance rather than that it definitely was not said. Under similar circumstances the Board has found that such comments in context did not indicate that the employer would unilaterally discontinue existing benefits if the employees selected union representation, but rather that existing benefits may be lost as a result of bargaining, *Histacount Corp*., 278 NLRB 681 (1986), *Computer Peripherals*, 215 NLRB 293 (1974), explaining ''the realities of negotiations [and] the give-and-take of bargaining,'' *La-Z-Boy*, 281 NLRB 338 (1986); had not threatened not to bargain in good faith nor that ''only regressive proposals will result, *Clark Equipment Co*., 278 NLRB 498 (1986); or was in answer to a union's claim as to gaining increased benefits for employees, *Ludwig Motor Corp*., 222 NLRB 635 (1976). Also see *Campbell Soup Co*., 225 NLRB 222 (1976); *Wagner Industrial Products Co*., 170 NLRB 1413 (1968).

I am aware that the Board has found in other cases that a ''bargaining from scratch'' statement was unlawful and this usually occurs when the statement is accompanied by serious unfair labor practices. See, for example, *Mississippi Chemical Corp*., 280 NLRB 413 (1986); *Belcher Towing Co*., 265 NLRB 1258 (1982); *Plastronics, Inc*., 233 NLRB 155 (1977). And although I did find that the Respondent here committed serious unfair labor practices in violation of the Act, these unlawful actions occurred before and after the ''critical period'' regarding the election.

The other segment of the objection to be addressed is the allegation that the Respondent threatened employees with cancellation of its 401(K) plan since they were advised that this benefit existed ''only for non-unionized Hertz shops.''

It is well settled that an employer violates Section 8(a)(1) of the Act through a provision in, or a statement about, a plan that suggests that coverage of employees will automatically be withdrawn as soon as they become represented by a union or that continued coverage under the plan will not be subject to bargaining. *Niagara Wires*, 240 NLRB 1326 (1979), and cases cited therein. As the Board stated in *Handleman Co*., 283 NLRB 451, 452 (1987):

> Such plans interfere with, restrain, and coerce currently unrepresented employees because the exclusionary clauses automatically eliminate the benefits on selection of a representative and do not allow for their continuation pending negotiations. What is unlawful is the suggestion inherent in the exclusionary language that unrepresented employees will forfeit the plan's benefits if they choose union representation. In other words, the plans constitute threats to discontinue the benefits or to refuse to bargain over continuation of the benefits. Such threats violate the Act. *Como Plastics*, 143 NLRB 151 (1963).

On the record in this case, I find and conclude that the Respondent violated Section 8(a)(1) of the Act when it maintained a benefit plan excluding employees who join a union, choose union representation, or are members of a bargaining unit, or are covered by a bargaining agreement. *Lynn-Edwards Corp*., 290 NLRB 202 (1988); *Lynn-Edwards Corp*., 282 NLRB 52 (1986); *Niagara Wires*, supra; *Melville Confections*, 142 NLRB 1334 (1963), enfd. 327 F.2d 689 (7th Cir. 1964), cert. denied 377 U.S. 933 (1964). While the complaints herein contain no allegation to this affect, the objection to the election raised the issue of the unlawfulness of the Respondent's actions in this regard and the issue was fully litigated at the hearing. *Soltech, Inc*., 306 NLRB 269 (1992).

The Respondent argues that its statements regarding the 401(K) plan, in both its two-page summary distribution to employees and those made by Pollack and Almeda at meetings with employees, were lawful since the employees were specifically told that the 401(K) plan was a negotiable item, that employees may gain, lose, or get the same in pay and benefits as a result of negotiations, and that the Respondent would bargain with the Union in good faith. The Respondent also asserts that no changes were made in employee benefits

during the pendency of negotiations and that the employees do not automatically lose a benefit if they vote for the Union. I do not agree.

Initially, the exclusionary language regarding eligibility in the Respondent's summary of its 401(K) plan distributed to employees at the August 1992 meetings contained no indication that coverage for represented employees was subject to negotiations or that the Respondent would negotiate this in good faith with the Union. *Contrast Handleman Co*., supra at 452, in which the Board found that the employer's plan did not cut off the benefit prior to negotiations, but contemplated the continuation of benefits during the negotiations where such could be inferred from the langauge in the plan. Also see *Sarah Newman Nursing Home*, 270 NLRB 663 (1984); *Rangaire Corp*., 157 NLRB 682 (1966).

Moreover, while it is true that both Pollack and Almeda did tell employees that those represented by a union would not have the 401(K) plan benefit along with the statement that all pay and benefits were negotiable, and that the Respondent would bargain with the Union in good faith, those statements were followed by the admonition that employees should ''be aware that out of 197 or so contracts that the Hertz Corporation has presently, none of those contracts have a 401(K) Plan.'' As the Supreme Court in *NLRB v. Gissel Packing Co*., 395 U.S. 575, 617 (1969), reminded, ''Also recognized must be the economically dependent relationship of the employees to the employer and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear. Therefore, the employees, being told that the 401(K) plan was not available to represented employees and not being told that those already in the plan or any other employee eligible would not lose this benefit during negotiations, with the Respondent additionally indicating that no union had ever been successful in negotiating such a plan for its represented employees with the Respondent, could reasonably and strongly assume that if they voted the Union in, either coverage of employees would automatically be withdrawn as soon as they voted for the Union or that negotiations for continued coverage under the plan would be futile and unsuccessful.

The final question to be resolved is whether this unlawful action by the Respondent is sufficient to warrant setting aside the election.

In *Clark Equipment Co*., 278 NLRB 498, 505 (1986), the Board held that:

> [I]t is the Board's usual policy to direct a new election whenever an unfair labor practice occurs during the critical period since ''[c]onduct violative of Section 8(a)(1) is, a fortiori, conduct which interferes with the exercise of a free and untrammeled choice in an election.[17] However, the Board has departed from the policy in cases where it is virtually impossible to conclude that the misconduct could have affected the election results. In determining whether misconduct could have affected the results of the election, we have considered ''the number of violations, their severity, the extent of discrimination, the size of the unit, and other relevant factors.[18]

[17] *Dal-Tex Optical Co*., 137 NLRB 1782, 1786 (1962).

[18] *Enola Super Thrift*, 233 NLRB 409 (1977).

The Respondent's unlawful conduct found above occurred during the critical period between the filing of the petition in Case 34–RC–1108 in or about late July or early August 1992 and the Board-conducted election on September 17, 1992. The Respondent's unlawful acts involved most if not all of the Respondent's employees in the appropriate unit over a 2-day period. The two-page summary handout of the 401(K) plan might even be said to have a continuing effect on employees up to the election. Moreover, the appropriate unit of employees was 41, a comparatively small number, and the vote was a close one, 18 for and 22 against the Union. Additionally, the Respondent's unlawful conduct cannot be said to be de minimus. Almeda testified that there was a lot of concern among employees about the 401(K) plan and what would happen should the employees obtain union representation, and the unlawful statements were made by two of the Respondent's top-level managers from the Company's headquarters. Nor under the circumstances present in this case, do I believe it can be said that the unlawful acts occurred at so remote a time as to have little or no effect on employee freedom of choice or that the Union's denial that the 401(K) plan could never be negotiated into a collective-bargaining agreement dissipates the coercive atmosphere created by the Respondent concerning the election.

Since the standard for interference necessary to set aside a Board-conducted election is substantial interference with the ''laboratory conditions,'' I recommend that the Board set aside the election in Case 34–RC–1108 and that the Regional Director for Region 34 direct the holding of a second election at such time as he deems appropriate. *Dal-Tex Optical Co*., supra.

VI. THE EFFECT OF THE UNFAIR LABOR PRACTICES ON COMMERCE

The activities of the Respondent, set forth in section IV, above, occurring in connection with the Respondent's operations described in section I, above, have a close and intimate relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow thereof.

VII. THE REMEDY

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

Having found that the Respondent unlawfully suspended and then terminated Samuel Divine, the Respondent shall be ordered to offer him immediate reinstatement to his former position, discharging if necessary any replacement hired since his termination, and that he be made whole for any loss of earnings or other benefits by reason of the discrimination against him in accordance with the Board's decision in *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest computed as in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). See also *Florida Steel Corp*., 231 NLRB 651 (1977), and *Isis Plumbing Co*., 138 NLRB 716 (1962).

Having found that the Respondent violated Section 8(a)(1) of the Act, the Respondent shall be ordered to amend its 401(K) plan eligibility provision and any existing handbook

or summary plan documents so as to eliminate therefrom any language which indicates that weekly and biweekly salaried employees who are represented by a union automatically will be excluded from the Respondent's 401(K) plan.

Because of the nature of the unfair labor practices here found, and in order to make effective the interdependent guarantees of Section 7 of the Act, I recommend that the Respondent be ordered to refrain from in any like or related manner abridging any of the rights guaranteed employees by Section 7 of the Act. The Respondent should also be required to post the customary notice.

CONCLUSIONS OF LAW

l. The Respondent, the Hertz Corporation, is now and has been at all times material, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union, United Automobile, Aerospace, Agricultural Implement Workers of America, UAW is a labor organization within the meaning of Section 2(5) of the Act.

3. The following employees of the Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time counter sales representatives, vehicle service attendants, mechanics and bus drivers employed by the Employer at its Bradley Airport, Windsor Locks, Connecticut facility; but excluding all office clericals, transporters, and other employees, and all guards, professional employees and supervisors as defined in the Act.

4. The Respondent, in violation of Section 8(a)(1) of the Act, has interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed them by Section 7 of the Act by interrogating its employees concerning their union activities and the union activities of other employees, by creating the impression that it was keeping under surveillance the union activities of its employees, by threatening its employees with layoffs and other loss of employment and with the loss of benefits, including health benefits and its 401(K) plan, if they engaged in union activities or solicited the Union to represent them in collective bargaining or become represented by a union, by informing its employees that it would be futile for them to select the Union as their bargaining representative, by soliciting employee complaints and grievances promising its employees' increased benefits and improved terms and conditions of employment, by discrim- inatorily enforcing a rule prohibiting noncompany business during working time and/or in working areas only as against employee union activity and promulgating and enforcing a rule prohibiting employees from engaging in union activities during working hours, by informing an employee that he was being disciplined because of his union activities, and by promising benefits to and no layoffs of employees if they refrain from engaging in union activities.

5. The Respondent has violated Section 8(a)(1) of the Act by maintaining in its 401(K) plan eligibility provision and those portions of any employee handbook and summary plan documents, language specifying that the Respondent's 401(K) plan excludes automatically union represented weekly and biweekly salaried employees.

6. The Respondent engaged in unfair labor practices in violation of Section 8(a)(3) and (1) of the Act by discriminatorily suspending employee Samuel Divine because he assisted the Union, and engaged in concerted activities, and to discourage employees from engaging in these activities.

7. The Respondent engaged in unfair labor practices in violation of Section 8(a)(1), (3), and (4) of the Act by terminating employee Samuel Divine because he testified and participated in the unfair labor practice hearing before the Board in Case 34–CA–5684, thereby interfering with, restraining, and coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act, discriminating in regard to hire or tenure or terms or conditions of employment of its employees thus discouraging membership in a labor organization, and discriminating against employees for filing charges or giving testimony under the Act.

8. The aforesaid unfair labor practices are unfair labor practices within the meaning of Section 2(6) and (7) of the Act.

9. The Respondent has not otherwise violated the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[13]

ORDER

The Respondent, the Hertz Corporation, Windsor Locks, Connecticut, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating its employees concerning their union activities and the union activities of other employees.

(b) Creating the impression that it was keeping under surveillance the union activities of its employees.

(c) Threatening employees with layoffs and other loss of employment and with loss of benefits including health benefits and its 401(K) plan if they engaged in union activities, solicited the Union to represent them in collective bargaining, or become represented by a union.

(d) Informing its employees that it would be futile for them to select the Union as their bargaining representative.

(e) Soliciting grievances from its employees and promising increased benefits and improved terms and conditions of employment.

(f) Discriminatorily enforcing a rule prohibiting noncompany business during working time and/or in working areas.

(g) Promulgating and enforcing a rule prohibiting employees from engaging in union activities during working hours.

(h) Informing employees that they are being disciplined because of their union activities.

(i) Promising benefits and no layoffs if the employees refrain from engaging in union activities.

(j) Suspending or otherwise disciplining employees because they assisted the Union and engaged in concerted activities and to discourage employees from engaging in these activities.

(k) Discharging or otherwise discriminating against employees in order to discourage union activity or employee

[13] 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.

participation in proceedings conducted by the National Labor Relations Board.

(l) Maintaining in its 401(K) plan and those portions of any employee handbook and summary plan documents language specifying that the Respondent's 401(K) plan excludes automatically union-represented weekly and biweekly salaried employees.

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

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

(a) Offer employee Samuel Divine immediate and full reinstatement to his former job or, if his position no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and make him whole for any loss of earnings and other benefits suffered by him as a result of the discrimination against him in the manner set forth in the remedy section of this decision, and expunge from the Respondent's personnel records any references to his suspension and termination and notify him, in writing, that this has been done and that evidence thereof will not be used as a basis for any future personnel action against him.

(b) Amend its 401(K) plan and any existing employee handbook and summary plan documents so as to eliminate therefrom any language that indicates that union-represented weekly and biweekly salaried employees will be automatically excluded from the Respondent's 40lK plan.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order and further to ensure that the terms of this Order have been fully complied with.

(d) Post at its Bradley Field Airport in Windsor Locks, Connecticut, copies of the attached notice marked ''Appendix.''[14] Copies of the notice, on forms provided by the Regional Director for Region 34, 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.

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

IT IS FURTHER RECOMMENDED that the election in Case 34–RC–1108 be set aside, and that this case be severed and remanded to the Regional Director for Region 34 for the purpose of conducting a new election at such time as he deems the circumstances appropriate.

[14] 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.''