

Mid-Mountain Foods, Inc. and United Food and Commercial Workers International Union Local 400, AFL-CIO. Cases 11-CA-17049-2, 11-CA-17162, 11-CA-17261, 11-CA-17262, and 11-RC-6147

September 21, 2000

DECISION, ORDER, AND DIRECTION OF
SECOND ELECTION

BY CHAIRMAN TRUESDALE AND MEMBERS
LIEBMAN AND HURTGEN

On December 22, 1997, Administrative Law Judge Keltner W. Locke issued the attached decision. The Respondent, the General Counsel, and the Charging Party each filed exceptions and a supporting brief. The General Counsel and the Charging Party each filed an answering brief to the Respondent's exceptions. The Respondent filed an answering brief to the General Counsel's and the Charging Party's exceptions, and a reply to their answering briefs.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions² except as modified below and to adopt the recommended Order as modified.³

¹ The Respondent, the General Counsel, and the Charging Party have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The General Counsel excepts to the manner in which the judge articulated the burden borne by the General Counsel in cases involving alleged violations of Sec. 8(a)(3) of the Act. We believe that the judge's formulation does not depart substantively from Board doctrine. In any event, we have reviewed these matters under the standard articulated 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, 399-403 (1983), and we reach the same results reached by the judge.

² In adopting the judge's recommendation that the election be set aside, we do not rely on the Respondent's mid-May 1996 threats that, if the Union won the election, plant rules would be enforced more strictly. We note that these statements were made outside the critical period.

Member Hurtgen agrees with the judge that *Medical Center of Ocean County*, 315 NLRB 1150 (1994) (employer promise to remedy employee grievances), and *Gordonville Industries*, 252 NLRB 563 (1980) (employer letter seeking to influence employee testimony before the Board) are distinguishable from the instant case. He, therefore, finds it unnecessary to pass on the validity of those decisions.

³ We shall modify the judge's recommended Order in accordance with our decision in *Indian Hills Care Center*, 321 NLRB 144 (1996).

The judge found that the Respondent did not violate Section 8(a)(1) of the Act, or interfere with the election,⁴ when its supervisors removed prounion literature from employees' break areas. In one incident, in mid-June 1996, the judge found that Supervisor Tom Campbell, selectively removed prounion leaflets while leaving anti-union leaflets on the picnic tables in the employees' outside break area. The judge concluded that this conduct was lawful. He reasoned that although an employee has the right to distribute prounion literature to other employees during breaks, an employer need not become the custodian of prounion literature and continue offering it after an employee has abandoned possession of it. Otherwise, the judge found, one of the Respondent's tables would become, in effect, a distribution rack for prounion pamphlets. He concluded that, although the Respondent could not lawfully interfere with employees distributing union literature to other employees in the break area during breaks, it had no duty to assist such distribution.

In another incident, in mid-July 1996, the judge found that although Supervisors Tom Campbell, Jeff Mahoney, and Tony Richie had removed literature from employee break areas, there was insufficient evidence that they had selectively removed only prounion literature, as alleged in the complaint. The judge found that even assuming the removal was selective, it was not unlawful.

The General Counsel and the Charging Party have excepted to these findings. We find merit in these exceptions, and conclude that in both instances the Respondent violated the Act. As an initial matter, we disagree with the judge's view that the discriminatory removal of prounion literature from an employee break area is lawful. *Jennie-O Foods*, 301 NLRB 305, 337-338 (1991) (supervisor unlawfully picked up and destroyed union leaflet in nonwork area on nonworktime while leaving other materials undisturbed). We agree with the General Counsel's contention that such selective removal of literature from break area tables is analogous to the removal of prounion propaganda, but not of other postings, from a bulletin board. See, e.g., *Eaton Technologies*, 322 NLRB 848, 853-854 (1997).

Further, even assuming that the removal was not disparate, it was still unlawful. *BJ's Wholesale Club*, 319 NLRB 483, 489-490 (1995) (by removing prounion pamphlets from employee breakroom for no obvious neutral reason, a supervisor violated Section 8(a)(1) of the Act). Simply put, employees have the right to distribute literature in nonworking areas. See, e.g., *United Aircraft Corp.*, 139 NLRB 39 (1962), enfd. 324 F.2d 128

⁴ This conduct was also alleged as objectionable and warranting a new election.

(2d Cir. 1963), cert. denied 376 U.S. 951 (1964). This right would have been contravened in the instant case even if the supervisors involved had removed both prounion and antiunion literature. In the absence of a showing (which has not been made here) that the literature was strewn about in an unsightly or hazardous manner, its removal from employee break areas violates Section 8(a)(1) of the Act.⁵

Our colleague would find that the Respondent also violated Section 8(a)(1) by posting a banner in its warehouse stating "Vote No, It's Your Job." According to our colleague, the banner in effect told employees that their jobs were at stake if they supported the Union. We disagree.

The judge found that the Respondent displayed two banners, one stating "No Lost Time, No Strikes, No Union, Vote No" and the other stating "Vote No, It's Your Job." The judge found the first banner lawful. He noted that although the banner spoke of "lost time," it did so in the context of strikes, and coupled the prospect of lost wages with the advent of a strike. We agree with the judge, as does our colleague.

As to the second banner ("Vote No, It's Your Job"), the judge found that it made no explicit statement about possible job loss and that it did not require the reader to assume such a threat. He also correctly noted that the Respondent's unfair labor practices were relatively isolated and, thus, did not create a context in which the facially benign words "it's your job" would reasonably be understood as a threat of job loss.⁶

The most logical way to place the second banner in its proper context is to consider it in relation to the first banner. From this perspective, the language of the second banner can most readily be understood as indicating that the employees could vote against the Union and, thereby, shield their jobs from the prospect of losing worktime due to strikes. In sum, we agree with the judge that, in these circumstances, the second banner, like the first, did not imply a threat of retaliation and was therefore not unlawful.

⁵ We further find that this removal of union literature, when combined with the June 1996 unlawful threat of discharge, the June 11 interrogation, and the June 19 written warning interfered with employee free choice and warrants a new election.

⁶ We do not agree with our colleague that the Respondent has "engaged in extensive unfair labor practices." Rather, we agree with the judge that the Respondent's unfair labor practices were few in number, relatively isolated, and not pervasive. In this regard we note, *inter alia*, that many complaint allegations have been dismissed and that we have unanimously adopted the judge's finding that a *Gissel* bargaining order is unwarranted in the instant case. Further, since we do not find the banner unlawful, we also disagree with our colleague that the Respondent's use of the banner supports her conclusion that the Respondent unlawfully solicited its employees to revoke authorization cards.

Our colleague would find that Respondent also violated the Act by not permitting employees to show a prounion video on the Respondent's equipment (TV set) located in an employee breakroom. With respect to this issue, our colleague concedes that no precedent stands for the proposition that employees have the right to show a prounion video where, as here, the video is to be shown on the employer's equipment and property. We also note that the record does not show that the Respondent had ever allowed employees to bring in videos of any sort to show at work or that antiunion videos have been shown by employees in employee breakrooms.

We agree with the judge's observation that the employees' request might have been more analogous to a request to engage in protected activity if the employees had sought to distribute videocassettes in the breakroom, as opposed to seeking to bring the video into the facility and show it there. Such distribution would not have involved the use of Respondent's electronic equipment.

We disagree with our colleague's view that traditional doctrines pertaining to workplace communications yield the conclusion that the Respondent's nondiscriminatory refusal to allow the video to be shown was unlawful. Indeed, the law is to the contrary. In this regard, we note that there is no statutory right of an employee to use an employer's equipment or media. For example, there is no right to use an employer's bulletin board. *Honeywell, Inc.*, 262 NLRB 1402 (1982), *enfd.* 722 F.2d 405 (8th Cir. 1983); *Container Corp.*, 244 NLRB 318 *fn.* 2 (1979), *enfd.* 649 F.2d 1213 (6th Cir. 1981) (*per curiam*). Nor is there a statutory right of an employee to use an employer's telephone for personal or nonbusiness purposes, such as union organizing matters. *Union Carbide Corp.*, 259 NLRB 974, 980 (1981), *enfd.* in relevant part 714 F.2d 657, 663-664 (6th Cir. 1983). Similarly, the Board has held that employees are not entitled to use an employer's public address system to communicate their union views. See, e.g., *Heath Co.*, 196 NLRB 134 (1972). From these cases, it appears equally clear that the Union's employee supporters do not have a statutory right to show the video, especially since it has not been established that the Respondent permitted employees to show other videos.

Our colleague seeks to analogize this case to cases involving solicitation and distribution, although she does not resolve which one it is. However, those cases involve forms of solicitation and distribution that do not involve use of an employer's electronic equipment.⁷

⁷ Member Hurtgen deems it necessary to respond further to one of the dissent's arguments. More particularly the dissent asserts that employees are already subjected to the noise and messages that come from the extant television sets. The dissent argues that a union video would

In *Sprint/United Management Co.*, 326 NLRB 397 (1998), cited by our colleague, the respondent promulgated and enforced a rule prohibiting the distribution of union materials in employee lockers. The Board concluded that the rule was unlawful. In doing so, the Board noted that the employer had “ceded the locker space to the personal use of the employees to whom the locker was assigned.” By contrast, in the instant case, Respondent’s television set is not subject to the control and personal use of employees. The television set remains fixed at the Cable News Network. There is no evidence that employees can change channel selections at their whim. Thus, *Sprint* is inapposite.⁸

Finally, our colleague asserts that the Respondent acted in “response to union activity.” The fact is that Respondent acted in response to an employee request to show the video on Respondent’s equipment. There is no showing that the Respondent has permitted other kinds of videos to be shown on its equipment.

Accordingly, and particularly in the circumstances of the instant case, we decline to extend Board precedent to require an employer to allow the showing of prounion videos on its equipment located on its property.

Finally, we disagree with our colleague’s view that the Respondent unlawfully solicited the revocation of authorization cards. We emphasize the judge’s findings that supervisor, Alvin Olinger, merely told employees that revocation forms were available in the break room, without attempting to see whether any employee took or used a form. The judge also found that employees did not have to go to their supervisors to obtain the forms, and thus, did not have to reveal their intentions.

Our colleague finds a violation in this respect, in part because she believes that it occurred in the context of pervasive unlawful conduct. As noted *supra*, we disagree. Thus, in a unit of more than 200 employees, during a period of time exceeding 4 months, the Respondent engaged in three unlawful one-on-one interrogations, made an unlawful threat via one handbill received by one employee, and twice removed union literature from employee break areas. We certainly do not condone the

not be any more disruptive to employees. In Member Hurtgen’s view, these contentions miss the point. Under the principles of *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945), Respondent was required to yield its breakroom to solicitation and distribution. It was not required to yield the use of its television set for the showing of a videotape. Thus, the issue is not the extent to which employees are exposed to noise and messages. Rather, the issue is the extent to which an employer must yield its property rights. Based on the cases cited above, Member Hurtgen finds that Respondent was not required to yield its property rights in the manner sought here.

⁸ Member Hurtgen expresses no view as to whether *Sprint* was correctly decided.

Respondent’s unlawful conduct. Nevertheless, we agree with the judge who, in dismissing the “solicitation” allegation, concluded that the violations in the instant case were relatively isolated. Thus, we disagree with our colleague’s conclusion that Olinger’s actions were “in the context of the Respondent’s pervasive and coercive unlawful conduct.”

We also note that *Hatteras Yachts, AMF, Inc.*, 207 NLRB 1043 (1973), *Vestal Nursing Center*, 328 NLRB 87 (1999), and *Lockwoven Co.*, 245 NLRB 1362 (1979), *enfd.* 662 F.2d 296 (8th Cir. 1980), cited by our colleague, are distinguishable in that, here, the Respondent neither tracked whether employees availed themselves of their right to revoke their union authorizations nor assisted them in the revocation process beyond simply telling them about the forms. Further, in *L’eggs Products, Inc.*, 236 NLRB 354 (1978), *enfd.* in part 619 F.2d 1337 (9th Cir. 1980), also relied on by our colleague, there were numerous and substantial unfair labor practices, including interrogation, surveillance, threats of discharge, soliciting employees to revoke authorization cards, unlawful discharges, and refusals to recognize and bargain with the union. This conduct is far more extensive than that in the instant case. Similarly, in *Escada (USA), Inc.*, 304 NLRB 845 (1991), *enfd.* 970 F.2d 898 (3d Cir. 1992), also cited by our colleague, the number and severity of unfair labor practices far outweighed the instant ones.⁹

For the above-stated reasons, we conclude that the judge correctly found that the Respondent did not unlawfully solicit the revocation of union authorization cards.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below, and orders that the Respondent, Mid-Mountain Foods, Inc., Abingdon, Virginia, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Insert the following as paragraph 1(d) and reletter the subsequent paragraph.

“(d) Removing union literature from employees’ break areas.”

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

⁹ In *Escada (USA)*, the respondent was found to have created an impression of surveillance, solicited card revocation, solicited grievances, and thereby, implicitly promised to remedy them in order to discourage support for the union, told employees (also to discourage union support) that they might receive wage increases on a regularly scheduled basis, threatened to permanently replace unfair labor practice strikers, unlawfully reassigned a supervisor, and unlawfully discharged an employee.

“(a) Within 14 days from the date of this Order, remove from employee Tim Alderson’s personnel file, and from any other records the Respondent maintains, the June 19, 1996 written warning it issued to him, and all references to it, and within 3 days thereafter notify him in writing that this has been done and that the warning will not be used against him in any way. If the Respondent has taken any later disciplinary action against Alderson that was more severe or onerous because of the June 19, 1996 written warning, the Respondent shall rescind that discipline and take only such action as it would have taken if the June 19, 1996 written warning had never existed.”

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

[Direction of Second Election omitted from publication]

MEMBER LIEBMAN, concurring in part and dissenting in part.

I join my colleagues in finding that the Respondent engaged in what are, in my view, extensive unfair labor practices. I depart only in that I would find that the Respondent committed three additional violations of the Act. First, I would also find that the Respondent violated Section 8(a)(1) of the Act by posting a banner in the warehouse during the critical period that proclaimed “Vote No, It’s Your Job.” In my view, the message of the banner was plain, “your jobs are at stake if you support the Union.” By sending that message, the Respondent unlawfully threatened its employees for their union activity.¹

Second, I would find that the Respondent violated Section 8(a)(1) when it refused to permit employees to show a pronoun video in the employee breakroom on non-worktime. By finding to the contrary, the majority confuses the medium with the message and takes an unduly narrow view of employees’ Section 7 right to communicate with each other about unionization in the increasingly electronic workplace. Third, I would find that the Respondent violated the Act by soliciting employees to revoke their authorization cards. My reasoning as to the video and solicitation follows.

¹ I recognize that a remedy based on a finding that the banner violates the Act would be cumulative. Thus, the Board’s Order already requires the Respondent to cease and desist from threatening employees with job loss and plant closure based on the Board’s conclusion that the Respondent violated the Act through a supervisor’s threat of discharge to an employee for supporting the Union (ALJD at § I) and through its distribution of a threatening handbill (ALJD at § AA). This additional unfair labor practice finding is significant, however, because it further supports the “solicitation” violation that I discuss in Sec. B, *infra*.

A. The Refusal to Permit Employees to Show a Pronoun Videotape

On June 10, 1996, employees on the Union’s organizing committee wrote to Mid-Mountain’s president, Harold W. Harwood, requesting permission to show a pronoun video in the employee breakroom during nonworktime. In the letter, the employees offered to supply the video cassette recorder (VCR) and reimburse the Respondent for the cost of electricity to operate it. Four days later, in a written response addressed to all employees, Harwood denied the request, citing three reasons:

(1) Your lunch and break time are the only free time you have during the day. You are entitled to use your free time the way you want.

(2) The place for viewing any video is the employee lunch/break area, and these areas are used by many other people in the company. In addition, they are used by vendors and other outside persons.

(3) If a video is shown in the lunch/break areas, it will interfere with employee personal time. Those not wanting to watch the video would have to leave. You should not have to do that.

The employee breakroom contains two television sets in adjacent corners, but no VCR. Respondent’s director of operations and human resources, John Dollar, testified that the TVs are connected to a satellite dish. Employee Jason Alderson testified that the sets operate continuously, and the judge found that they remain set on Cable News Network.

The question posed here, whether the Respondent may lawfully deny employees access to its electronic equipment in a nonwork area to communicate pronoun messages, is a novel one before the Board. Undoubtedly, we will face this or similar issues with increasing frequency given the expanding prevalence in the workplace of TVs, VCRs, fax machines, email, the internet, and new communication technologies. Clearly, both employers and employees are increasingly using this kind of equipment to disseminate and exchange views on a wide variety of subjects, including the advantages and disadvantages of unionization. The Board has not yet adopted any unique doctrines governing employees’ right of access to the employer’s electronic equipment to communicate with each other about unionization. Accordingly, to analyze this case I look to the Board’s traditional rules for considering employer restrictions on employee workplace communications.

The basic principles are, of course, found in *Republic Aviation Corp.*, 51 NLRB 1186 (1943), *enfd.* 142 F.2d 193 (2d Cir. 1944), *affd.* 324 U.S. 793 (1945), where the Board and the Supreme Court emphasized that under the

NLRA, an employer's property rights, previously paramount under the common law, must be adjusted in order to balance those rights with employees' Section 7 rights. "Inconvenience," the Court stated, "or even some dislocation of property rights, may be necessary in order to safeguard the right to collective bargaining." 324 U.S. at 802 fn. 8. Thus, the Board and the Court concluded that, although an employer has a right to expect that employees' working time is for work, a rule that prohibits oral solicitation by employees on nonworktime, even in work areas, is discriminatory "in the absence of evidence that special circumstances make the rule necessary in order to maintain production and discipline." 324 U.S. at 803 fn. 10. Similarly, in *Stoddard-Quirk Mfg. Co.*, 138 NLRB 615 (1962), the Board addressed the issue of employee distribution of literature, which has traditionally been regarded as posing special issues such as littering, and held that distribution may lawfully be restricted both on worktime and in work areas. Restrictions on literature distribution in nonwork areas and on nonworktime, however, are presumptively invalid absent a showing that the restriction is necessary to maintain plant discipline or production. *Id.* 621-22; see also *Sahara Tahoe Hotel*, 292 NLRB 812 (1989).

I need not decide whether the showing of a prounion videotape on an employee-supplied VCR and employer-supplied TV in a break area is more akin to oral solicitation, or to distribution.² Regardless, the critical fact in this case is that the Respondent's employees attempted to communicate about unionization *in a nonwork area on nonworktime*. Under traditional rules, employer restrictions on *either* oral solicitation or distribution of written messages taking place in a nonwork area on nonworktime are invalid, unless the employer demonstrates that special circumstances support the necessity of those restrictions to maintain discipline or production.

To validate the Respondent's refusal to permit employees to use the break room television to show a prounion video, my colleagues rely on cases holding that employees have no statutory right to use employer-controlled bulletin boards, telephones, or public address

system. To be certain, the Board has held that "it is not unlawful for an employer *to reserve to itself the exclusive use* of its bulletin boards, and to bar any postings by employees." *Sprint/United Management Co.*, 326 NLRB 397, 399 (1998) (emphasis added). In *Sprint*, however, the Board drew a distinction between the bulletin board and locker space which "the Respondent has already ceded . . . to the personal use of the employees to whom the lockers are assigned." *Id.* In this case, as in *Sprint*, the employer has *ceded* the break room to the employees *for their own personal use on nonworktime*. Having previously relinquished the break room to employees solely for their utilization and enjoyment, without any restrictions on the communications permitted therein, the Respondent cannot now justify its conduct by asserting that either the breakroom or the television set is an employer-controlled communication medium, akin to a bulletin board, that it may use and control exclusively.

In addition, the Board holds that it is not unlawful for an employer to bar employee access to the employer's bulletin boards because "[a]n employer that uses a bulletin board as a means of communication with its employees may have a legitimate interest in ensuring that its postings can easily be seen and read and that they are not obscured or diminished in prominence by other notices posted by employees." *Id.* The same "legitimate interest" does not apply here, where the Respondent does not use the television set in the employee breakroom "as a means of communication with its employees," but instead provides it solely for its employees' use and enjoyment. Thus, my colleagues' analogy to the bulletin board cases simply does not work.

Moreover, the Respondent has made no showing of special circumstances. Its reasons for not permitting the employee videotape to be shown in the employee breakroom had nothing to do with maintaining discipline or production. Rather, they dealt only with the inconvenience or annoyance that employees and others might feel if they were subjected to a prounion message. The fact is, however, that employees are already subjected to a continuous stream of noise and messages from the two TVs when they lounge in the employee breakroom. The ongoing broadcasts undoubtedly interfere with some employees' personal time and present content that occasionally engenders dialogue, debate, and even discord among employees. But, the Respondent apparently does not regulate this breakroom communication to maximize employee relaxation or harmony. Rather, the only communication that the Respondent sought to regulate was that pronouncing the advantages of unionization. Indeed, this restriction to protect "employee personal time" was promulgated directly in response to union activity.

² Different rules and presumptions apply to solicitation and distribution. The Board has said that unlike oral solicitation, distribution involves a message of a permanent nature that "is designed to be retained by the recipient for reading or rereading at his convenience. Hence, the purpose is satisfied so long as it is received." *Stoddard-Quirk*, *supra* at 620. Where communication elicits a spontaneous response or reciprocal conversation, it is solicitation. So, for example, the Board has held that solicitation of authorization cards should be treated in the category of oral solicitation. *Rose Co.*, 154 NLRB 228, 229 fn. 1 (1965). New forms of electronic communication involving TVs, VCRs, fax machines, computers, and the like, are not readily placed into these traditional categories.

As stated at the outset, in validating the video restriction, my colleagues mistake the medium for the message. They ignore the plain fact that the Respondent could not lawfully prohibit employees from talking, debating, or even arguing with each other in the breakroom about the union. Nor could it restrict the distribution in the breakroom of union authorization cards or literature, even if it engendered discord. The fact that a VCR was the medium sought by union supporters here should hardly make a difference, especially in our rapidly evolving e-world. As *Republic Aviation* makes clear, “[i]nconvenience, or even some dislocation of property rights, may be necessary in order to safeguard the right to collective bargaining.” 324 U.S. at 802 fn. 8.

In short, whether a video broadcast is categorized as oral solicitation, written distribution, or some novel form of communication, the Board should not permit employer restrictions on playing videotaped messages on nonworktime in a nonwork area, absent special circumstances, not present here, related to production or discipline. Such a restriction unduly limits employees’ rights to communicate with each other about unionization and violates Section 8(a)(1) of the Act.

B. The Solicitation to Revoke Authorization Cards

The Respondent drafted and placed in the employee break room a notice dated May 10, 1996, over the signature of Harwood, the Respondent’s president, that informed employees of their right to revoke their authorization cards. The notice provided a sample revocation letter to the Union and the Union’s address. Employee Youvonne Rodriguez testified that Supervisor Alvin Olinger, reminded him regularly that such forms were available in the breakroom. Olinger acknowledged that he “told everyone” that the revocation forms were available in the breakroom, that he would talk to Rodriguez and other employees after meetings about the Union, and that he told Rodriguez that the Union was not good for the Company. In my view, these were not merely benign communications, but rather amounted to coercive attempts to solicit employees to abandon the Union.

The Board has held that an employer may lawfully *inform* employees of their right to revoke their union authorization cards (*R. L. White Co.*, 262 NLRB 575 (1982)). But, if, considering surrounding circumstances, the employer goes beyond merely providing information and in fact coercively solicits employees to revoke their cards, then it interferes with their Section 7 rights in violation of Section 8(a)(1). Thus, if an employer provides employees with information about the right to revoke authorization cards, while at the same time engaging in other coercive and unlawful conduct, the Board will find that the employer is in fact coercively soliciting employees to revoke

their cards. *L’Eggs Products Inc.*, 236 NLRB 354, 389 (1978) (respondent’s communications to employees regarding authorization cards “were made in an ‘inhibiting setting’” because they were done “in the context of a campaign of interrogations and threats”); *Escada (USA), Inc.*, 304 NLRB 845, 849 (1991) (respondent’s letter regarding card revocation written in the context of other unlawful conduct, including discharge, surveillance, interrogation, threats, and implied promises to remedy grievances, violate the Act).

Likewise, conduct that goes beyond simply informing employees of their rights can show that an employer’s actions were actually coercive solicitation and not merely benign communications. For example, an employer violates the Act when it not only informs employees of their right to seek revocation, but also tracks whether employees avail themselves of that right. *Hatteras Yachts, AMF, Inc.*, 207 NLRB 1043 fn. 3 (1973). Similarly, an employer that actually provides assistance to employees in the revocation process, beyond simply informing them of their rights and giving them ministerial information as to how to effectuate them, violates the Act. *Vestal Nursing Center*, 328 NLRB 87, 102 (1999) (in addition to information and sample revocation forms, employer provided envelopes, postage, and actually mailed the revocation letters for some employees); *Lockwoven Co.*, 245 NLRB 1362, 1371 (1979), *enfd.* 662 F.2d 296 (8th Cir. 1980) (respondent provided paper, pens, envelopes, postage, and mailing).

In this case, the Respondent’s conduct suffered from all of these infirmities. The Respondent notified employees of their right to revoke their cards at the same time that it was engaging in extensive coercive and intimidating conduct that dampened support for the Union. Contrary to my colleagues, I have concluded that the Respondent’s unlawful conduct was pervasive. It included interrogation of employees concerning their union views, threats to more strictly enforce plant rules if the Union prevailed in the election, distribution of handbills that threatened plant closure, threats that employees would lose their jobs, wages, or benefits if the Union prevailed, discriminatory imposition of discipline on union supporters, and removal of prounion literature from the breakroom. In this context, the Respondent’s notice to employees cannot be viewed as simply a benign statement of employee rights made in an atmosphere free of coercion. Instead, it was an unequivocal message that the Respondent encouraged revocation, and that its favor would fall on those who sought it.

Further, the way in which the Respondent “informed” employees of their right to revoke their cards belies any conclusion that it was merely providing them with information. Supervisor Olinger repeatedly told employee

Rodriguez that employees could seek revocation of their cards. Olinger also stressed to Rodriguez that the Union was not good for the company, conveying the clear message that, for the Company's good, and implicitly for their own good, employees should revoke their cards. Particularly in the context of the Respondent's pervasive and coercive unlawful conduct, it clearly did more than simply provide employees with information. In fact, it coercively and affirmatively solicited them to revoke their cards, in violation of Section 8(a)(1) of the Act. I therefore dissent from my colleagues' failure to find this additional violation of the Act.

APPENDIX A

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 employees with respect to their union sympathies or desires.

WE WILL NOT threaten employees with plant closure, loss of jobs, loss of wages, loss of benefits, or stricter enforcement of work rules if they select the Union as their collective-bargaining representative.

WE WILL NOT impose discipline, including written warnings, on employees because they engaged in union activities or other activities protected by the Act.

WE WILL NOT remove union literature from employees' break areas.

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

WE WILL, within 14 days from the date of the Board's Order, remove and expunge from the personnel file of employee Tim Alderson, and from all other files we maintain, the June 19, 1996 written warning we issued to him, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the written warning will not be used against him in any way.

WE WILL undo any and all consequences that written warning may have produced, and WE WILL treat Tim Alderson in all respects as if the June 19, 1996 written warning had never been issued.

MID-MOUNTAIN FOODS, INC.

Donald R. Gattalaro, Esq. and Lisa R. Shearin, Esq., for the General Counsel.

Ronald I. Tisch, Esq. and Bruce D. Burkley, Esq. (Littler, Mendelson, Fastiff, Tichy & Mathiason, P.C.), and Mark M. Lawson, Esq. (Elliott, Lawson & Pomrenke), of Washington, D.C., for the Respondent.

George Wiszynski, Esq. (Butsavage & Associates, P.C.), of Washington, D. C., for the Charging Party.

DECISION

STATEMENT OF THE CASE

KELTNER W. LOCKE, Administrative Law Judge. This case involves an attempt by United Food and Commercial Workers International Union Local 400, AFL-CIO (the Charging Party or the Union) to organize the workers at Mid-Mountain Foods, Inc. (the Respondent or the Company). The General Counsel of the National Labor Relations Board (the General Counsel or the Government) alleges that the Company committed a number of unfair labor practices in violation of Section 8(a)(1), (3), and (5) of the National Labor Relations Act (the Act).

The Government further alleges that at one point during the union's organizing campaign, a majority of bargaining employees supported the Union, but that the Company's violations of labor law created a coercive atmosphere which prevented the August 1, 1996 election, which the Union lost, from being fair.¹

¹ The Union filed timely objections to the August 1, 1996 election. By "Supplemental Decision, Direction, and Order Consolidating Cases," the Regional Director for Region 11 overruled one objection, approved the Union's withdrawal of three others, consolidated Case 11-RC-6147 with the unfair labor practice cases now before me, and referred the remaining eight objections for decision by the administrative law judge. (GC Exh. 1(n); see also Tr. 10-12, amending complaint orally at hearing to include Case 11-RC-6147.) Except for Objection 11, these objections involve the same acts which the complaint alleges as unfair labor practices. They may be summarized as follows:

Objection 1: On or about July 19, 1996, the Respondent disciplined employee Tim Alderson because of his union activities.

Objection 2: The Respondent threatened employees with plant closure if they selected the Union as their collective-bargaining representative.

Objection 5: On or about June 5, 1996, the Respondent disciplined employee Steve Warner because of his union activities.

Objection 6: The Respondent sponsored, encouraged, solicited, and assisted employees in seeking revocation of their authorization cards.

Objection 8: On various dates within the critical period, Respondent's supervisors and managers interrogated employees concerning their union activities and/or support for the Union.

Objection 9: The Respondent discriminatorily refused to allow employees on the union's organizing committee to show a pronoun video during nonworking time and in a nonwork area, while permitting the showing of antiunion videos.

The General Counsel contends that the Respondent's unfair labor practices were so bad that employees still feel the coercive effects. Therefore, the Government argues, the Board should order the Respondent to recognize and bargain with the Union, rather than conducting another secret-ballot election.

I find that the Respondent made certain statements which violated Section 8(a)(1) of the Act and issued a written warning to an employee in violation of Section 8(a)(1) and (3). I do not find that the Respondent violated the Act, otherwise. I recommend that the August 1, 1996 election be set aside, but do not recommend that the Board issue a bargaining order.

I heard this case in Bristol, Virginia, on February 10 through 14, 1997, and in Abingdon, Virginia, from March 10 through 14, 1997.² The parties submitted posthearing briefs, which I have considered.

FINDINGS OF FACT

I. THE ALLEGED UNFAIR LABOR PRACTICE

The Respondent has admitted that it is an employer engaged in commerce and submit to the jurisdiction of the National Labor Relations Act. It has also admitted that the Union is a labor organization within the meaning of the Act. I so find.

For clarity, I will discuss the allegations in chronological order, rather than the order in which they are listed in the complaint.³

A. March 1996—Alleged Interrogation

Complaint paragraph 8(b) alleges in part that in March 1996, Respondent's vice president, Jesse Lewis, interrogated employees about their union sympathies and desires. However, the record does not contain any evidence that Lewis engaged in any such conduct at any time during March 1996. Therefore, I recommend that this allegation be dismissed.

Objection 11: On the day of the election, Respondent utilized a substantially larger than normal force of armed security guards throughout the plant, including near the polling area, as well as locating local and state law enforcement personnel on and near its premises, thereby creating an atmosphere of fear and coercion and rendering a free and fair election impossible.

Objection 12: Respondent threatened employees with job loss, discharge, loss of wages, loss of benefits, and more strict enforcement of plant rules, discriminatorily removed prounion literature from employees' break areas, promised to remedy employee grievances, more closely monitored its employees, bypassed its senior employees who supported the Union and selected less qualified and less senior employees to fill temporary trainer positions contrary to its past practices and in order to discourage employee support for the Union, and refused to bargain collectively with the Union as the exclusive collective-bargaining representative of all employees in the described unit.

² On my own motion, I order the transcript corrected in accordance with the changes set forth in Appendix B to this decision. [Omitted from publication.]

³ By "complaint," I refer to the "Second Order Consolidating Cases, Consolidated Complaint and Notice of Hearing. (GC Exh. 1(q).)

B. March 1996—Alleged Solicitation of Employees to Revoke Authorization Cards

Complaint paragraph 8(c) alleges, in part, that in March 1996, Respondent's vice president, Lewis, solicited employees to revoke their union authorization cards. However, the record does not contain any evidence that Lewis engaged in such conduct at any time during March 1996. Therefore, I recommend that this allegation be dismissed.

C. March 1996—Implicitly Threatening Employees with Job Loss for Having Supported the Union

Complaint paragraph 8(d) alleges, in part, that in March 1996, Respondent's vice president, Lewis, implicitly threatened its employees with job loss for having supported the Union. The record contains no evidence to support this allegation. Therefore, I recommend that it be dismissed.

D. March 24, 1996—Interrogation of Employees about Their Union Sympathies and Desires

Complaint paragraph 8(b) alleges, in part, that on March 24, 1996, Respondent's supervisor, Tom Campbell,⁴ interrogated an employee about his union sympathies or desires. According to employee Eric Miller, on that date, in the Company's warehouse around aisle 57, Supervisor Campbell asked him what he thought about the Union and what the Union could do for him. Miller replied that he did not know much about the Union and did not really want to get into it.

Although Miller testified that Campbell then talked "derogatory toward the union," Miller could not remember specifically what Campbell said. (Tr. 234–235.) Campbell denied asking Miller about the Union. (Tr. 1339.) I credit Miller.

Depending on the entire circumstances, "an employer's questioning open and active union supporters about their union sentiments, in the absence of threats or promises" does not necessarily violate the Act. *Rossmore House*, 269 NLRB 1176, 1177–1178 (1984). However, the evidence does not establish that Miller was an open and active union supporter at the time Campbell questioned him. Therefore, I find that this action interfered with, restrained, and coerced an employee in the exercise of Section 7 rights, in violation of Section 8(a)(1) of the Act.

E. Daily From "Late March 1996 to Mid-July 1996 and Late-June 1996"—Interrogation of Employees Concerning Their Union Sympathies and Desires

Complaint paragraph 8(b) alleges, in part, that Supervisor, Alvin Olinger interrogated employees concerning their union sympathies and desires during the time period "early-July, 1996, mid-July, 1996, daily from late March 1996 to mid-July 1996 and late-June, 1996." At the hearing, the General Counsel withdrew the allegation that Olinger had interrogated employees in late June 1996. (Tr. 14.)

Employee Youvonne Rodriguez testified that in the spring of 1996, "Olinger would approach me and ask me if I was for the Union and what I thought about it." (Tr. 342.) The General Counsel asked Rodriguez to describe "these conversations."

⁴ Campbell's title is "team leader." (Tr. 1338.) Respondent has admitted that Campbell is a supervisor. (GC Exh. 1(u).)

Without being specific as to when, Rodriguez replied, “Alvin [Olinger] would approach me and ask me if I was for the Union and what I thought about it.” Olinger denied ever questioning Rodriguez about the Union. (Tr. 1239.)

I do not credit Rodriguez because his testimony was not specific enough to inspire confidence in it. Indeed, it does not appear that Rodriguez had much confidence in it. Thus, when asked on direct examination if he had any conversations with Olinger about the Union, Rodriguez answered, “Possible.” (Tr. 341.)

The uncertainty conveyed by the word “possible” might have been dispelled if Rodriguez had then provided enough detail to show that the alleged interrogations were concrete events occurring at particular points in time, even if the dates could not be determined with precision. Instead, his testimony had an abstract quality and lacked the sort of solidity on which a finding of illegal conduct needs to be grounded.

Because this testimony is not convincing, I do not credit it. Crediting Olinger’s denial, I recommend that this allegation be dismissed.⁵

F. April 1, 1996—Interrogation of Employees Concerning Their Union Sympathies and Desires

Complaint paragraph 8(b) alleges that Supervisor Tom Campbell interrogated an employee concerning his union sympathies and desires on April 1, 1996. Employee James Gianforte testified that on this date, in the Respondent’s warehouse around aisles 52 and 53, when no one else was present, Supervisor Campbell asked him how he felt about the Union. I credit Gianforte, rather than Campbell’s denial.

At this point, Gianforte had not worn any insignia identifying himself as a union supporter. I find that Campbell’s question restrained and coerced Gianforte in violation of Section 8(a)(1) of the Act.

G. Late-April 1996 Until August 2, 1996—Monitoring Employees More Closely to Discourage Union Activities

Complaint paragraph 8(l) alleges that during the period “late-April until August 2, 1996,” eight of Respondent’s supervisors “more closely monitored its employees to discourage their union activities.” (GC Exh. 1(q).) The Respondent denied these allegations. (See, e.g., Tr. 994–995.)

To support the allegations, the General Counsel relies on the testimony of employee Steven Warner about an incident which may have occurred in April 1996, although Warner was not sure. On this occasion, according to Warner, Manager Honaker watched him at work in the warehouse and said, “Steven, you need to be more careful stacking off product.” Warner testified

that Honaker then said, “[Y]ou need to shut up because you don’t represent anyone in this Company.” (Tr. 511.)⁶

Honaker did not specifically deny making these comments. However, I find that they fall far short of establishing that the Respondent monitored employees more closely at any time, let alone throughout the period late-April until August 2, 1996.

Quite literally, a supervisor’s job entails overseeing work, which the law recognizes as a legitimate management function. The Act defines “supervisor” to include persons, acting in the interest of an employer, with authority to assign employees to work or with responsibility to direct them. 29 U.S.C. § 152(11). The Government does not suggest that a supervisor could direct employees without “monitoring” what they did.

Of course, selecting a particular employee for closer scrutiny because of his union activities, rather than problems with his work, would go beyond the legitimate supervisory function, as would monitoring employees’ activities during breaks to discourage their discussion of the Union. See, e.g., *International Paper Co.*, 313 NLRB 280 (1993). However, the evidence does not establish that the Respondent engaged in such conduct here.

Even assuming that Honaker’s “you need to shut up” comment evidenced animus, and the comment is so vague I do not draw that conclusion, it does not taint the manager’s instruction that Warner needed to be more careful stacking off product. The evidence simply does not establish that Respondent subjected either Warner or other employees to more rigorous supervision during this period.

The General Counsel’s brief alluded to the fact that the Respondent has security cameras in its warehouse, but the complaint contains no allegation regarding the use of security cameras. Moreover, there is no evidence to establish that Respondent installed these cameras in response to the Union’s organizing drive or used them to engage in surveillance of employees’ union activities.

It is not unlawful for the Company to monitor its warehouse to protect the goods stored in it, and it would be unusual to find any commercial warehouse without a security system. Thus, the situation is very different from that presented in *National Steel & Shipbuilding Co.*, 324 NLRB 499 (1997), where an employer installed a new camera, with microphone, in a position to record union rallies.

In sum, the evidence does not establish that the Respondent monitored its employees more closely. Therefore, I recommend that these allegations be dismissed.

H. Mid-May 1996—Threatened Employees with More Strict Enforcement of Plant Rules

Complaint paragraph 8(i) alleges that in mid-May 1996, Respondent’s director of operations and human resources, John Dollar, threatened its employees with stricter enforcement of plant rules. Employee Steven Warner testified that in mid-May 1996, he attended a meeting called by the Company, at which Dollar spoke.

According to Warner, Dollar told the employees that if the employees voted for the Union, “[H]e would enforce the work

⁵ Complaint par. 8(b) alleges that Supervisor Olinger interrogated employees in early July 1996, in mid-July 1996, and “daily from late March 1996 to mid-July, 1996 and late-June, 1996.” It would appear that if Olinger interrogated an employee in early July 1996 and in mid-July 1996, these incidents would fall within the broader category of “daily from late March 1996 to mid-July 1996.” I find that the record does not establish that Olinger engaged in unlawful interrogation of employees at any time.

⁶ The General Counsel did not allege this statement to violate the Act, but offered it as evidence of animus towards the Union. (Tr. 512.)

rules because the Company would make the work rules and they would be very strict and followed to the letter.” Warner further testified that Respondent’s vice president, Jesse Lewis, told employees at this meeting that “when you clock in at 6:30 you will be on your jack ready to work at 6:30 and there will be no more lax time like there is now.” (Tr. 526.)

Rodriguez corroborated Warner, testifying that both Lewis and Dollar “said that if the Union will come into the plant that the employees will have to follow and do things in a strict timely manner. As in going to the bathroom, coming back from break, stuff like that.” (Tr. 344.)

Dollar denied telling employees that working conditions would be stricter if the Union represented them. (Tr. 1102.) However, he testified that during meetings with employees, the Company showed to employees copies of a collective-bargaining agreement covering employees at Kroger and another collective-bargaining agreement covering employees at Valleydale Meat Company.

According to Dollar, the Kroger contract contained a work rule which “got a lot of attention,” because it stated, in essence, “that on working time you cannot even leave your area for personal relief unless you are approved to by your supervisor.” (Tr. 1101.) Dollar testified that this subject “just came up” in a meeting, and he believed that an employee raised it. However, he then testified, “We used [these rules] merely as examples of what was happening in these contracts. We never, ever said that that would be the rule of our Company, we never even implied that.” (Tr. 1102.)

Lewis testified that the Company used these collective-bargaining agreements in the meetings with employees and that “we shared those work rules” in the contracts with the employees. (Tr. 870.) I find that the Respondent did intend to inform its employees that unionized employees at the Kroger plant did work under stricter work rules than they did.

Lewis specifically denied telling employees that if they chose the Union, work rules at the Company would be stricter. (Tr. 873.)

In resolving the conflict in testimony, I credit Warner, based on my observations of his demeanor while testifying. Therefore, I find that Respondent did threaten employees with stricter enforcement of plant rules if they selected the Union. I find that this threat violates Section 8(a)(1) of the Act.

I. Early June 1996—Threatened Employees With Discharge if They Selected the Union as Their Collective-Bargaining Representative

Complaint paragraph 8(e) alleges that in early June 1996, supervisor Teddy Hinchey⁷ threatened employees with discharge if they selected the Union as their collective-bargaining representative. However, the record contains no evidence that Hinchey made such a threat in early June 1996.

The record does include evidence of such a threat a month later. Employee Larry Nunley testified that in early July 1996, when he and Supervisor Hinchey were alone in the cigarette room of the warehouse, Hinchey referred to a written request

that the Respondent allow the union organizing committee to show a pronoun video.⁸

According to Nunley, Hinchey said that if the Union did come in, within 60 days “all those guys would be hunting another job.” (Tr. 125–126.) Hinchey denied making this statement. (Tr. 1059.) I credit Nunley.

The complaint’s error in date does not prejudice Respondent. Nunley testified on February 10, 1997, and, because of an adjournment of the hearing, Hinchey did not testify until March 12, 1997. Thus, Respondent had adequate opportunity to address this allegation, and the issue was fully litigated. I find that Respondent violated Section 8(a)(1) of the Act by making this threat.

J. Early June 1996—Bypassed Senior Employees who Supported the Union and Selected Less Qualified and Less Senior Employees to Fill Temporary Trainer Positions

Complaint paragraph 8(m) alleges that in early June 1996, through its supervisor, Tom Campbell, Respondent bypassed “its same senior employees who supported the Union and selected less qualified and less senior employees to fill temporary trainer positions in violation of its past practice in order to discourage support for the Union.” Although complaint paragraph 8(m) does not identify any employee so bypassed, complaint paragraph 10 alleges that in early June 1996, the Company bypassed employee Jason Alderson,⁹ an order selector, for this temporary duty. The complaint alleges that this conduct violated both Section 8(a)(1) and (3) of the Act.

The record does not prove that the Respondent had an established practice of assigning trainer duty on the basis of seniority. It also contains no evidence to link the Company’s selection of trainers with the union activities or sympathies of any employee. To the contrary, each time Alderson asked for an explanation of why he was not selected for trainer duty, Campbell gave a nondiscriminatory reason which did not refer to the Union.

On one occasion, according to Alderson, Campbell told him that the person selected for trainer duty had been there longer than Alderson. Alderson testified that on another occasion, the person selected had a higher average (that is, had been more productive than Alderson), and on a third occasion, Campbell said the person chosen had been in the right place at the right time. (Tr. 256.)

Since the Company never told Alderson, or anyone, that he had been bypassed for selection as a temporary trainer, I do not find an independent violation of Section 8(a)(1) of the Act. However, if the government establishes that the Respondent unlawfully discriminated against Alderson by bypassing him for duty as a temporary trainer, this violation of Section 8(a)(3) would also constitute a violation of Section 8(a)(1).

Because the complaint alleges that the Respondent’s selection of trainers discriminated against Alderson, in violation of Section 8(a)(3), it should be analyzed under the framework of

⁸ It appears clear that Hinchey was referring to GC Exh. 3, a letter to Respondent’s president, which was signed by seven employees. Nunley’s signature does not appear on this letter.

⁹ The complaint identifies this person as Jason Alderman. From the record, it is clear that the employee’s name is Alderson.

⁷ The supervisor’s name is spelled “Hinchley” in the complaint, but it is clear that the complaint is referring to Teddy Hinchey. Respondent has admitted that Hinchey is its supervisor. See GC Exh. 1(u) at par. 2.

Wright Line, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Under *Wright Line*, the General Counsel must first make a prima facie showing “sufficient to support the inference that protected conduct was a ‘motivating factor’ in the employer’s decision” to take the action which allegedly violated Section 8(a)(3).

Once the General Counsel has made such a showing, the burden then shifts to the employer “to demonstrate that the same action would have taken place even in the absence of the protected conduct.” *Wright Line*, supra at 1089. If the General Counsel does not present evidence establishing such a prima facie case, the respondent does not have to demonstrate that it would have taken the adverse employment action anyway.

The General Counsel may establish the prima facie case by proving the following four elements: (1) The alleged discriminatee engaged in union or protected, concerted activities. (2) The respondent knew about such activities. (3) The respondent took an adverse employment action against the alleged discriminatee. (4) There is a link, or nexus, between the protected activities and the adverse employment action.

Alderson clearly engaged in protected activities. He testified that he became involved in the union’s organizing campaign around the first of April 1996. (Tr. 252.) Thus, the General Counsel has satisfied the first *Wright Line* requirement.

The record also establishes that, at least by June 10, 1996, the Respondent knew that Alderson supported the Union.¹⁰ On that date, the union organizing committee delivered to the Respondent a letter requesting permission to show a pronoun video. Alderson was in this group, and signed the letter. (Tr. 252; GC Exh. 3.) Since June 10 falls within the period of “early June” alleged in the complaint, I find that the General Counsel has satisfied the second *Wright Line* requirement.

The Government must also prove that the Respondent took an adverse employment action against Alderson. Such harm might consist of a reduction in current pay or benefits but the evidence does not establish that Alderson suffered any such reduction. To the contrary, Alderson admitted that he had received two pay raises since his name appeared on letters, in June and July 1996, identifying him as a union supporter. (Tr. 262.) Additionally, the record does not establish that Alderson’s working conditions, as an order selector, became any worse.

Such harm might also consist of being denied an improvement in wages, hours, or working conditions to which Alderson would be entitled because of his position as an order selector. However, the record does not show that temporary duty as a trainer would have been an improvement. On cross-examination, Alderson admitted that neither his pay nor benefits would have risen just because he became a trainer.

Alderson’s testimony on direct examination had suggested that if he had been selected for temporary trainer duty and had worked “really hard” for about an hour each day before the person he was assigned to train reported for work, he could

have increased his “average,” and, therefore, received more incentive pay. (Tr. 256–257.) However, on cross-examination, Alderson admitted that the “average” used to compute incentive pay was based on more than just an hour’s work on a given day. (Tr. 263.) The evidence does not establish that temporary duty as a trainer conferred any appreciable benefit in earning more incentive pay.

The opportunity to serve as a temporary trainer from time-to-time might also be regarded as a perquisite of the order selector position, and, therefore, as a condition of employment. If that were true, denying an order selector this opportunity could amount to a worsening of his conditions of employment, and therefore, be an adverse employment action.

However, the record does not establish such a condition of employment. To the contrary, Alderson testified on cross-examination that most order selectors had not served as trainers. (Tr. 263.) I cannot find that temporary duty as a trainer had become a condition of employment for order selectors.

Additionally, the record does not establish that the Company had, in the past, relied exclusively or predominantly on seniority in choosing order selectors for temporary trainer duty. If anything, the evidence suggests the opposite. Thus, the Respondent’s employee handbook states that in selecting employees for promotion, management would consider “an employee’s performance, education, and length of service.” (See R. Exh. 1(a) at p. 5.)

Since temporary duty as a trainer does not constitute a promotion, it is possible that the Company let seniority rule in this limited case. Alderson did testify that the persons selected to be trainers were “As far as I know . . . usually top senior men. . . . They were the people that had been order selecting the longest.” (Tr. 255.) However, the qualification “as far as I know” indicates less than certainty, and his use of the word “usually” suggests that even Alderson did not believe the Company had an ironclad practice of selecting trainers by seniority. I find that the opportunity to serve as a temporary trainer, depending on seniority, was not a term or condition of an order selector’s employment.

Even assuming that the Respondent bypassed Alderson for selection as a temporary trainer, that action did not adversely affect his employment in any way. Therefore, I find that the government has failed to prove the third requirement of the *Wright Line* test.

Since the General Counsel has not proven the third *Wright Line* requirement, he has not established a prima facie case of discrimination against Alderson, and it is not necessary to go further with the *Wright Line* analysis. However, even if the government had demonstrated an adverse employment action, I would still conclude that the evidence failed to establish a nexus between this action and Alderson’s union activities. Therefore, I recommend that these allegations be dismissed.

K. June 5, 1996—Issued a Written Warning to Employee Steve Warner and Thereafter Failed and Refused to Rescind It

Complaint paragraph 9 alleges that on June 5, 1996, the Respondent issued a written warning to employee Steve Warner, and thereafter failed and refused to rescind it. The complaint further alleges that this action violated both Section 8(a)(3) and

¹⁰ Alderson testified that he first spoke with Supervisor Campbell about selection for trainer around the first of June. (Tr. 255–256.) The evidence does not establish that the Respondent knew about Alderson’s union activities on June 1, 1996.

(1) of the Act. The Company admits that it issued this warning, but denies it did so to discriminate on the basis of union activities, or otherwise violated the law.

Warner's job involves retrieving goods from various parts of the warehouse and taking them to a location for shipment to the customer. He drives a forklift-type vehicle called an "SGX" and receives incentive pay based on the time it takes him to fill such orders.

In the latter part of May 1996, Warner was driving the SGX down an aisle in the warehouse and found his way blocked by two sanitation employees, Michael Roark and Shane Dye, who were taking empty boxes and putting them on another SGX for removal. Warner testified that when he asked them to move out of his way, they did not, but instead moved down the aisle and continued their work.

After Warner sounded his horn, it appeared to him that Roark was going to move his machine out of the way, and Warner started to go around with his SGX. However, Warner testified, his SGX "grazed" the other machine but did not hurt it. According to Warner, such bumping was not uncommon.

On May 25, 1996, Warner complained to Supervisor Campbell that he had learned from another person that Roark had visited Warner's house with the intention of whipping him in a fight. Management began an investigation which did not substantiate the information Warner had received about Roark, but which did disclose the incident with the SGX.¹¹

During the investigation, management interviewed both Roark and Dye, and their account of the SGX incident, as reported in an internal company memorandum, differed from Warner's version. As they described it, Warner had been impatient and pushed the sanitation employees' SGX under a storage rack.

According to the internal memorandum, management also interviewed another employee, Mac Phipps, who had been present during this incident. The memo reported that Phipps corroborated Roark and Dye, and added that Warner had been in such a hurry that Phipps had to move out of the way to avoid being hit by Warner's SGX. (GC Exh. 9.)¹²

Management decided that Warner used his SGX to push another SGX out of the way, and that this action could have put someone in danger or caused property damage. (GC Exh. 9.) On June 6, 1996, in a conference room at the warehouse, Manager Honaker and Supervisor Campbell notified Warner that he would be receiving a written warning.

Warner testified that he told Honaker, "I feel the only reason you're doing this is because I'm a Union organizer." Honaker responded by showing Warner the provision in the employee handbook concerning damage or misuse of company property. (Tr. 527-528.)

¹¹ According to a June 3, 1996 memo, signed by Campbell and Dry Warehouse Manager Honaker, Roark provided an innocent explanation for being in the vicinity of Warner's house. Moreover, management concluded that the Company was not responsible for what employees did away from work on their own time. (GC Exh. 9.)

¹² The information in this memorandum constitutes hearsay, and I do not rely on it to determine what actually happened during this incident in the warehouse aisle. I do rely on it in deciding what motivated management to issue Warner a written warning concerning this incident.

Honaker read the warning to him at that time, but did not give a copy to Warner until about a week later. At that time, Honaker asked Warner if he could have driven his SGX down another aisle and avoided bumping the sanitation employees' SGX. Warner acknowledged that he could have done so, although it would have added 2 minutes to the total time it took him to complete filling the order.

According to Warner, he mentioned to Honaker that although he was "on average," that is, receiving incentive pay based on the average time it took to fill an order, the sanitation people were not, and asked, "Why couldn't he move for me?" Honaker replied, "I think you could have avoided it" and "this incident did not have to happen." (Tr. 532.)

I will apply the four-step *Wright Line* analysis to determine whether the General Counsel has established a prima facie case that the Company unlawfully discriminated against Warner by issuing the written warning to him. The record establishes that Warner engaged in protected activities, and therefore, the General Counsel has satisfied the first requirement.

The Union filed its representation petition on May 28, 1996, so it is clear that the Company knew that at least some employees were engaging in union activity. Warner wore union insignia. Therefore, I find that the Government has established the second requirement, that the Company knew about Warner's affiliation with the Union.

The Government has also established the third requirement. Issuance of a written warning is an adverse employment action.

However, I find that the Government has not established the fourth requirement, that there be a link or nexus between the employee's union activities and the adverse employment action. Warner did testify that in about April 1996, Honaker was watching him at work and told him to be more careful stacking product. According to Warner, on this occasion Honaker also said "[Y]ou need to shut up because you don't represent anyone in this Company." (Tr. 511.)

It is not even clear that Honaker's comment referred to the Union, and I do not find that it establishes a link between the Warner's protected activities and the written warning he received in June. In other respects, the record does not establish such a nexus. Therefore, the General Counsel has failed to establish a prima facie case that the written warning issued to Warner discriminated against him in violation of the Act. I recommend that this allegation be dismissed.

L. June 6, 1996—Unlawfully Promised to Remedy Employees' Grievances

Complaint paragraph 8(k) alleges that on June 6, 1996, Jesse Lewis, who was then the Respondent's vice president, unlawfully promised to remedy employees' grievances. On about that date, Lewis and employee Larry Nunley had a discussion about Nunley's son-in-law, Steven Warner.¹³ According to

¹³ The record is not entirely clear as to when this conversation took place. The General Counsel directed Nunley's attention to a conversation he had with the vice president "on or about June 6, 1996." (Tr. 122.) However, after stating what paragraphs of the complaint would be addressed, the General Counsel then asked Nunley, "[W]hen did this conversation take place?" Nunley replied, "[S]ometime in March or

Nunley, he told Lewis that he believed Manager Honaker was harassing Warner, and asked Lewis to get Honaker off Warner's back.

Nunley testified that he told Lewis he believed that Honaker was harassing his son-in-law as a way of retaliating because Nunley had supported the Teamsters Union when it had tried to organize the employees in 1994. According to Nunley, Lewis responded by saying that "men have fought and died in America to have the free right to be able to support what they want to. The Union or not a Union. He said there would be no harassment because of that." (Tr. 125–126.)

Nunley also testified that Lewis said he "knew what the problems were at Mid-Mountain and if he were given time that he would take care of it." (Tr. 125.)¹⁴ The General Counsel contends that this latter statement constitutes an unlawful promise to remedy employees' grievances, and cites *Medical Center of Ocean County*, 315 NLRB 1150, 1151–1152 (1994), in support of this theory.

I find that Lewis did tell Nunley that he knew what the problems were and if given time would take care of them. However, I do not conclude that this statement, in context, violated Section 7 of the Act.

The case relied on by the General Counsel is based on facts which distinguish it from the situation here. In *Medical Center of Ocean County*, supervisors told two employees, "Why don't [you] give management 6 months to straighten up all [employee] problems. If after the 6 months anything isn't fixed up, you guys can go ahead and start with the Union again and you'll have no problem getting the vote in. You'll have 100 percent of the vote." The Board adopted the judge's finding that this statement constituted an unlawful promise to remedy grievances if employees postponed their support of the Union.

The supervisors in *Medical Center of Ocean County* made this statement after a meeting which apparently had been called to diminish employee support for the Union. Additionally, the supervisors' statement specifically linked a promise to remedy grievances with employees foregoing their support of the Union for 6 months.

In contrast, the record here shows that Lewis did not bring up the subject of union representation of employees. Nunley raised this subject. Moreover, Nunley's own testimony shows that Lewis emphasized that employees had the right to support the Union if they wished. Only after making that statement did Lewis add that he knew what the problems were at Mid-Mountain and, if given time, would correct them. Lewis did not make this statement in the context of trying to get Nunley to abandon or postpone his support of the Union.

Rather, it appears Lewis made this statement as an awkward response to an awkward situation.

Lewis, as a higher management official, would not feel comfortable criticizing his subordinate, Honaker, in a conversation with one of Honaker's employees. Moreover, Lewis had not

yet had the opportunity to discuss the matter with Honaker and satisfy himself as to the facts.

At the same time, Lewis would not wish to leave Nunley with the impression that a complaint of harassment would go uninvestigated or uncorrected. The "knew what the problems were" statement most likely constituted a veiled way of assuring Nunley that any harassment for whatever reason would be ended, without admitting that any harassment actually had taken place.

Lewis' statement must be judged by an objective standard, that is, by how it reasonably would be understood by an employee who heard it, and not by what Lewis may have intended to convey. Applying such an objective standard, I do not find that the statement would reasonably convey to the listener any promise to remedy grievances in return for the employee forgoing his support of the Union. I do not find that the statement violated the Act, and recommend that this allegation be dismissed.

M. June 11, 1996—Interrogated Employees Concerning Their Union Sympathies and Desires

Complaint paragraph 8(b) alleges, in part, that on June 11, 1996, Supervisor Campbell interrogated employees concerning their union sympathies and desires. Employee Brian Blevins testified that on this date, around aisle 60 in the Company's dry warehouse supervisor, Tom Campbell, approached him and asked him what he thought about the Union.

According to Blevins, Campbell went on to tell him that he thought the Union was not good. Blevins responded that he did not really know anything about the Union, and that Campbell then said he appreciated Blevins' time, and left. (Tr. 382.) Campbell denied asking Blevins what he thought about the Union, or about Blevins' union activities. (Tr. 1339.) I credit Blevins.

Blevins testified that he was among a group of prounion employees who went to the company president's office on June 14, 1996, and that he began wearing a union T-shirt around the first of July 1996. (Tr. 384.) I conclude that he had not made his union support known to management on June 11, 1996, when Campbell asked him what he thought about the Union.

I find that Campbell's questioning of Blevins on June 11, 1996, violated Section 8(a)(1) of the Act.

N. June 14, 1996—Unlawfully Denied Employees an Opportunity to Show a Prounion Video

Complaint paragraph 8(n) alleges that on June 14, 1996, the Respondent unlawfully denied its employees an opportunity to show a prounion video in the same manner as Respondent had shown antiunion videos.

It is undisputed that on June 14, 1996, the employees on the union's organizing committee presented to top management a letter asking permission "to show a union video in the same manner as the company did recently." (GC Exh. 3.) It is also undisputed that the Respondent denied this request. In a memo to "all team members," Company President Harwood gave the following reasons for the denial:

April. I'm not specific. I'm not sure about the date." (Tr. 123.) Notwithstanding this uncertainty as to the date, I credit Nunley.

¹⁴ Lewis recalled telling Nunley that there would be no harassment, but he did not recall the statement that he knew what the problems were and would take care of them. (Tr. 868–869.)

1. Your lunch and break time are the only free time you have during the day. You are entitled to use your free time the way you want.

2. The place for viewing any video is the employee lunch/break area, and these areas are used by many other employees in the company. In addition, they are used by vendors and other outside persons.

3. If a video is shown in the lunch/break areas, it will interfere with employee personal time. Those not wanting to watch the video would have to leave. You should not have to do that. [R. Exh. 4(d).]

The Government has cited no authority establishing the right of a union, or of employees supporting a union, to show a prounion video on company property. The General Counsel's brief did cite cases which recognized the right of employees to distribute union literature in the breakroom during breaks, but that is not the same as the right to show a video.¹⁵

I find that the Respondent's denial of the organizing committee's request to show a video did not violate the Act.¹⁶ Therefore, I recommend that this allegation be dismissed.

O. Mid-June 1996—Interrogated Employees

Complaint paragraph 8(b) alleges, in part, that in mid-June 1996, Leadman Barry Blevins interrogated employees concerning their union sympathies and desires. The Respondent has denied this allegation.

Barr testified that in mid-June 1996, he and Blevins were riding on an SGX machine in the warehouse when Blevins asked him if he were for or against the Union. According to Barr, he replied that he did not want to get into it, that he "wasn't going either way," and Blevins replied that the Union would not be good for the Company, that the environment would get rougher and that rounds (the retrieval of goods for shipping to a customer) would get harder. (Tr. 191.)

Blevins denied making the statements Barr attributed to him. (Tr. 977.) Because of differences between Barr's testimony and his pretrial affidavit, I am not convinced that his recollection

¹⁵ The General Counsel and Charging Party assert that videotapes are the "1990's equivalent of handbills." Without having to reach this issue here, I will assume that an employee enjoys the same right to give another employee a video cassette as he has to give that person a pamphlet. However, the Government does not allege that the Company imposed any no-distribution rule on videotapes.

Rather, the General Counsel alleges that the Respondent violated the Act by refusing a union request to bring video equipment into the facility and show a video there, which is different from handing out copies of it. Neither the General Counsel nor the Charging Party has cited any precedent for the principle that an employer has to make its facility a forum for a union in the circumstances present here.

¹⁶ The Charging Party also contends that when Respondent denied the organizing committee's request to show the prounion video, the Respondent was imposing a new restriction on employee conduct. However, the record does not establish that Respondent ever had allowed employees to bring in videos of any sort to show at work. To the contrary, the Respondent kept the television sets in the breakroom tuned to the CNN channel. I reject the argument that denying the request to show the video was equivalent to imposing a new or more stringent no-solicitation rule in response to an organizing campaign.

was reliable, and I credit Blevins. Therefore, I recommend that this allegation be dismissed.

P. Mid-June 1996—Discriminatorily Removed Prounion Literature From Employees' Break Areas

Complaint paragraph 8(j) alleges, in part, that Supervisor, Tom Campbell discriminatorily removed prounion literature from employees' break areas in mid-June 1996. Employee Jason Alderson testified that in mid-June 1996, he saw Supervisor Campbell picking up prounion leaflets left on picnic tables in the employees' outside break area. According to Alderson, there were also antiunion leaflets on the table, which Campbell did not remove. (Tr. 254.)

Employee Howard Osborne Jr. gave testimony similar to Alderson's. (Tr. 1343.) Campbell admitted that on one occasion after a break, he removed campaign literature, which he described as "everywhere" in the break area. He did not admit selectively removing prounion leaflets while leaving procompany leaflets.

I credit the testimony of Alderson, as corroborated by Osborne, and find that Campbell did selectively remove prounion leaflets while leaving antiunion leaflets on the tables. However, this conduct did not violate the Act.

This situation does not involve an employee's right to distribute prounion literature to other employees during breaks. That right is well established and not at issue here.

However, no right has been established which would require an employer to become the custodian of prounion literature and to continue offering it after an employee has abandoned possession of the leaflets. That would be tantamount to converting one of the Company's tables into a distribution rack for prounion pamphlets. Although the Company cannot lawfully interfere with employees distributing union literature to other employees in the break area during breaks, it has no duty to assist. I recommend that this allegation be dismissed.

Q. Mid-Latter June 1996—Threatened Employees with Discharge if They Selected the Union

Complaint paragraph 8(e) alleges, in part, that in mid-latter June 1996, Supervisor Tom Campbell, threatened employees with discharge if they selected the Union as their collective-bargaining representative. The record contains no evidence to support this allegation, and I recommend that it be dismissed.

R. Mid or Latter June 1996—Threatened Employees with More Strict Enforcement of Plant Rules

Complaint paragraph 8(i) alleges that in "mid-or latter-June, 1996," Supervisor Campbell threatened employees with more strict enforcement of plant rules. Charles Barr testified that one night in an aisle in the warehouse, Campbell told him that if the Union "was to come in here . . . the environment would get a lot rougher." Barr was not more specific as to date. (Tr. 192.) Campbell denied making such statement. (Tr. 1343.)

Barr gave a pretrial statement which did not refer to such a statement. (Tr. 200.) I do not credit Barr's testimony, and recommend that this allegation be dismissed.¹⁷

S. June 19, 1996—Issued an Oral Warning to its Employees Because of Their Activities on Behalf of the Union

Complaint paragraph 8(a) alleges that on June 19, 1996, Supervisor Campbell issued an oral warning to employees because of their activities on behalf of the Union. Complaint paragraph 9 alleges that on June 19, 1996, Respondent issued a written warning to employee Tim Alderson and thereafter failed and refused to rescind it. The complaint alleges that this conduct violates Section 8(a)(1) and (3) of the Act.¹⁸

Employee Timothy Alderson was on the union's organizing committee and was among the employees who delivered a letter to Company President Harwood on June 14, 1996. This letter, discussed above, requested permission to show a pronoun video.

On June 18, 1996, Alderson attended an NLRB representation hearing. The Union had subpoenaed him, and Alderson showed the subpoena to Supervisor Tom Campbell before attending the hearing. Alderson recalled that Campbell told him "no problem" but also indicated that the absence would probably be unexcused. (Tr. 206–207.)

On June 19, 1996, in a meeting with Supervisors Campbell and Olinger, Alderson received a written warning for having three "casual absences" in a 12-month period. (R. Exh. 6(b).) Alderson told them he had been summoned to court twice in the previous 6 months, but nothing was said about it. According to Alderson, they did not reply. (Tr. 208.)

I will analyze these allegations under the framework established by *Wright Line*, 251 NLRB 1083 (1980), enf'd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). The record clearly establishes that Alderson engaged in protected activities and that the Respondent knew about those activities. Alderson's presence in the group which visited Company President Harwood on June 14, 1996, clearly signified to management that Alderson was active on the Union's behalf. His presence at the NLRB hearing, as a union witness, also conveyed his union affiliation unmistakably.

The warning issued to Alderson constituted an adverse employment action. Thus, the employee handbook states that an employee who is absent three times in a 1-year period without proper notification or acceptable excuse is subject to discharge. (R. Exh. 1(a) at p. 27.)

The record also establishes a link between Alderson's protected activity and issuance of the warning. The timing itself raises a suspicion. On June 14, Alderson went with other members of the organizing committee to see the Company's president. On June 18 he attended an NLRB hearing as a union witness, and on June 19, he received the warning notice.

Moreover, the Company treated Alderson's attendance at the NLRB hearing differently than it treated his earlier court ap-

pearances. Alderson credibly testified that nothing was ever said about those earlier court appearances, yet Alderson's absence to attend the NLRB hearing was unexcused.

I find that by issuing the written warning to Alderson on June 19, 1996, it unlawfully discriminated against him because of his union activity. Further, I find that this action violated Section 8(a)(3) and (1) of the Act.

T. June 25, 1996—Solicited Employees to Revoke Union Authorization Cards

Complaint paragraph 8(c) alleges that on June 25, 1996, Supervisor Tom Campbell solicited employees to revoke their union authorization cards. The evidence does not establish that Campbell made such statements on or about June 25, 1996.¹⁹

However, the General Counsel adduced testimony from Youvonne Rodriguez that sometime in the "spring of 1996" another supervisor, Alvin Olinger, told Rodriguez that there were forms in the breakroom which Rodriguez could fill out to get his card back. (Tr. 341–342.) Rodriguez also testified that Olinger made those statements before Rodriguez told Olinger that Rodriguez was for the Union. (Tr. 343.) Olinger admitted that he told everyone, including Rodriguez, that the forms were available if they wanted that "option." (Tr. 1243.)²⁰

I find that Olinger did tell Rodriguez that such forms were available in the breakroom. Additionally, I find that when Olinger made this statement, Rodriguez had not asked about rescinding or retrieving his authorization card, and had not expressed any desire to do so.

The Respondent had full opportunity to meet this allegation with evidence and argument. I do not find it fatal to this allegation that the complaint named Campbell, rather than Olinger, as the supervisor who engaged in this activity.

However, I do not find Olinger's conduct to be violative. *LIR-USA Mfg. Co.*, 306 NLRB, 298, 304 (1992), relied on by the General Counsel, is distinguishable. In that case, a manager not merely told employees that such forms were available, but asked them to sign, without reading them, in his presence. In this case, Olinger merely told employees that such forms were available in the breakroom, but made no attempt to see whether or not any employee actually took or used such a form.²¹

¹⁹ The General Counsel's brief refers to another incident, which did involve Supervisor Campbell, but which allegedly occurred in July 1996 rather than on June 25, 1996. I will discuss this incident under heading "U," below.

²⁰ To the extent that Olinger's testimony conflicts with that of Rodriguez, I credit Olinger's. I do not find that Olinger interrogated Rodriguez about his union sympathies or affiliation.

²¹ In *Adair Standish Corp.*, 290 NLRB 317 (1988), the Board noted that it was lawful for an employer to inform employees of their Sec. 7 rights in an atmosphere free of coercion, intimidation. However, in *Adair Standish*, the respondent had solicited employees to revoke their authorization cards "in the context of contemporaneous violations of Section 8(a)(1), (3), and (5)" and required employees to go to supervisors to obtain the revocation forms. Those facts made the solicitation unlawful.

Although the record establishes certain violations in this case, they were relatively isolated. Unlike *Adair Standish*, the record here shows no pattern of violations contemporaneous with solicitations of employees to revoke the union authorizations they previously had signed.

¹⁷ Barr also testified that Campbell made a similar statement at an unspecified time in July 1996. (Tr. 191.) This instance was not alleged in the complaint but in any event, I do not credit Barr.

¹⁸ The Respondent's answer admitted that it disciplined Alderson, but denied that this action violated the Act.

I recommend that this allegation be dismissed.

U. June 25, 1996, and "Mid-July, 1996"—Interrogation of Employees

Complaint paragraph 8(b) alleges, in part, that Supervisor, Tom Campbell interrogated employees on June 28, 1996, and in mid-July 1996. At the hearing, the General Counsel orally moved to amend paragraph 8(b) to allege that Campbell engaged in this interrogation on June 25, 1996, rather than June 28, 1996. I granted that motion. (Tr. 13-14.)

At the same time, the General Counsel withdrew the allegation in paragraph 8(b) that Campbell interrogated an employee in mid-July 1996. (Tr. 14.) It is not clear why the General Counsel withdrew the allegation pertaining to mid-July 1996 rather than the allegation pertaining to June 25, 1996. The record does not establish that Campbell interrogated any employee on June 25, 1996. However, there is evidence that he did so in July.

Employee Charles Barr testified that in July 1996, Campbell asked him if he had signed a union card, and Barr replied no. According to Barr, Campbell then said, "[I]f you had signed a union card you can get it back just by asking for it." Barr testified that Campbell went on to say that "the union wouldn't be good for the company" and that "the environment would change and it would get rougher in there . . . a lot rougher, harder on us if the union did come in." (Tr. 191.) Campbell denied making these statements. (Tr. 1340.)

I do not credit Barr. However, since the allegation has been withdrawn, I need make no findings about it. I recommend that the allegation that Campbell interrogated an employee on June 25, 1996, be dismissed.

V. Mid-July 1996—Solicited Employees to Revoke Their Union Authorization Cards

At the hearing, the General Counsel orally amended complaint paragraph 8(c) to add the allegation that in mid-July 1996, Supervisor Alvin Olinger solicited employees to revoke their union authorization cards. (Tr. 15-16.) However, the record does not establish that Olinger engaged in such conduct, and I recommend the allegation be dismissed.

W. 3-4 Weeks in July 1996—Implicitly Threatened Employees with Job Loss for Having Supported the Union; Threatened Employees with Loss of Wages if They Selected the Union; and Threatened Employees With Loss of Benefits if They Selected the Union

Complaint paragraph 8(d) alleges that through banners it displayed, the Respondent implicitly threatened its employees with job loss for having supported the Union. Complaint paragraph 8(g) alleges that through banners, the Respondent threatened employees with a loss of wages if they selected the Union as their collective-bargaining representative. Complaint paragraph 8(h) alleges that through banners, the Respondent threat-

ened its employees with loss of benefits if they selected the Union as their representative.

The Company did hang banners in its warehouse before the election, but there is some conflict as to exactly what the banners said. Jason Alderson testified that in July 1996, the Respondent displayed banners stating, "Vote No, It's Your Job" and "No Union, No Strikes, No Lost Benefits, No Lost Wages, It's Your Job." (Tr. 245.)²² Youvonne Rodriguez testified that the Company displayed banners stating, "Vote No, No Lost Wages, No Lost Benefits." (Tr. 345.) According to Brian Blevins, the banners stated "No Union, It's Your Job" and "No Union, No Lost Wages, No Lost Benefits." (Tr. 385.)

Employee James Gianforte testified that one banner stated, "No Union, No Lost Jobs, No Strikes," and the other stated, "No Union, It's Your Job." (Tr. 408.) Howard Osborne Jr. testified that one banner stated, "No Union, No Lost Wages, No Lost Benefits," and that the other said, "No Lost Time, No Strikes, No Union, Vote No." (Tr. 476.)²³

Employee Eric Miller testified that he saw three banners. One of them said, "Vote No, It's Your Job." Another said, "No Lost Wages" and something else which Miller could not remember. He could not remember what was on the third banner at all. (Tr. 236.) Employee Brian Rasnake recalled a banner stating, "Vote No, Your Family Matters, something like that." (Tr. 1371.)

I find that the Respondent displayed two banners, one stating "No Lost Time, No Strikes, No Union, Vote No" and the other stating "Vote No, It's Your Job." I do not find that the Respondent displayed banners with the other phrasings described by some witnesses.

In arguing that Respondent's banners violated Section 8(a)(1) of the Act, the General Counsel cites *Laser Tool, Inc.*, 320 NLRB 105, 111 (1995), and *BI-LO*, 303 NLRB 749 (1991). However, I conclude that the facts in those cases make them inapposite here.

In *Laser Tool*, the employer displayed a poster showing pickets with "on-strike" signs in front of a building marked "closed." The poster asked the viewer, "Do You Want This to Happen To You? VOTE NO." The posters contained no objective basis for a conclusion that unionization would lead to plant closure or job loss.

In *BI-LO*, the employer sent copies of newspaper articles to employees. These articles concerned plants which had closed, but not all of the articles indicated that some action by the union involved, such as calling a strike, had caused the closings. The Board found that the articles failed "to provide the necessary objective basis for the Respondent's implicit claim that

²² I credit Alderson's testimony on cross-examination, rather than his testimony on direct examination, regarding what the banner said. On cross-examination, his memory had been refreshed by reading a pretrial statement.

²³ On cross-examination, Osborne disagreed with a question, by Respondent's attorney, suggesting that a banner stated, "No Union, No Strikes, No Lost Wages" and recalled the wording as being "No Lost Time, No Strikes, No Union, Vote No." (Tr. 490) This recollection was similar to Osborne's testimony on direct examination, except that the order of the phrases was slightly different, as might be expected in trying to remember precise wording 1½ years.

Moreover, employees here did not have to go to their supervisors to obtain revocation forms and thus, did not have to reveal to management their intentions about union representation. Therefore, I conclude that *Adair Standish* should be distinguished.

unionization would imperil employee job security for reasons beyond its control. Absent such a basis, the . . . mass mailing and the followup usage of it reasonably tended to threaten employees with the Respondent's willingness to close the . . . store if employees voted for the Union." *BI-LO*, supra at 750.

Neither of the banners displayed by the Respondent mentioned plant closing. The first banner did speak of "lost time," but in the context of strikes. The parallel structure of the phrases "No Lost Time" and "No Strikes" clearly couples the prospect of lost wages with the advent of a strike. It therefore did not constitute a threat of retaliatory action by the Respondent, but rather provided the kind of objective basis which was lacking in *BI-LO*.

The second banner, stating, "Vote No, It's Your Job" did not make any explicit statement about possible job loss. The Respondent contends that this language is equivalent to the language, "Protect Your Jobs: Vote No," found not to be violative in *Gupta Permold Corp.*, 289 NLRB 1234 (1988). The General Counsel argues that *Gupta Permold Corp.* is inapposite because, unlike the banner here, the "Protect Your Jobs" banner in that case included other language linking the possibility of job loss to an objective factor, competitive conditions outside the employer's control.

I find that the phrase "Vote No: It's Your Job" does not constitute a threat, but do not rely on *Gupta Permold Corp.* in reaching that conclusion. Rather, I simply do not find that these words clearly articulate a threat of job loss.

In *Gupta Permold Corp.*, the word "protect" unavoidably implied a threat or risk against which protection would be needed. The inference of danger is chained just as firmly to the word "protect" as the *attache* case is handcuffed to a diplomatic courier. It is necessary baggage.

Because the message "protect your job" can be understood only in the context of some threat or risk to the job, the *Gupta Permold* banner had to include a reference to objective factors, not controlled by the employer, to banish any implication that jobs needed to be protected from the possibility of employer retaliation.

In comparison, the phrase "It's Your Job" does not require the reader to assume such a threat. Although the phrase is ambiguous and can be interpreted in that way, it is not chained to the possibility of such risk and can travel innocently without it. It therefore requires no kind of disclaimer.²⁴

²⁴ Thus, if the Union had said, "Vote Yes, Protect Your Job," the words suggest a risk to job security which the words "Vote Yes, It's Your Job" do not. Of course, it must also be kept in mind that the words at issue here came from the Company, not the Union. An employer's statements about job security carry added weight because the employer has the power to hire and fire, that is, the power to make a threat of job loss come true.

If an employer has committed unfair labor practices which give employees reason to be anxious about their jobs, a statement which even hints at the possibility of job loss will convey that meaning to employees. Such unfair labor practices chain the threat to words which otherwise would appear innocent.

Although the record establishes that the Respondent committed certain unfair labor practices, they are relatively isolated, rather than pervasive. I do not find that they created a context in which the facially

One witness testified that he considered this language to be a threat. (Tr. 238.) However, the Board applies an objective standard in determining whether a statement interferes with, restrains, or coerces employees in the exercise of protected rights. I must decide what the language in question reasonably will be understood to mean, rather than how someone, who may be a partisan, subjectively interpreted it.

I find that when the words "Vote No: It's Your Job" are considered objectively, they do not constitute a threat of job loss. Therefore, I do not find that display of this banner violated Section 8(a)(1).²⁵

The other banner did allude to the possibility of lost wages. However, I find that this statement did not constitute a threat because it associated the possibility of wage loss with an event not within Respondent's control, a strike by the Union.

In these circumstances, the statements on the banners did not violate the Act. Therefore, I recommend that these allegations be dismissed.

X. Mid-July 1997—Discriminatory Removal of Prounion Literature From Employees' Break Areas

Complaint paragraph 8(j) alleges that in mid-July 1996, Supervisors Campbell, Mahoney, and Richie discriminatorily removed prounion literature from employees' break areas. I have found above, that Campbell engaged in such action in June 1996, but that it did not violate the Act.

Howard Osborne Jr. testified that on at least one occasion after a break was over, he saw Supervisor Campbell gather prounion pamphlets from tables in the breakroom and put them in the trash. Osborne's testimony also indicates that on this occasion, he saw Mahoney and Richie gathering up the prounion leaflets and throw them in the trash. (Tr. 471-473.)

Richie admitted that on one occasion, after a break was over, he removed some literature because the breakroom was messy. (Tr. 990.) Mahoney also admitted that on occasion, he would clean up tables in the break area. (Tr. 1256-1257.)

Neither Mahoney nor Richie admitted removing only prounion literature while leaving antiunion leaflets, and I find that the evi-

benign words "It's Your Job" would reasonably be understood as a threat of job loss.

²⁵ The Supreme Court stated in *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969), that an employer "even [may] make a prediction as to the precise effect he believes unionization will have on his company. In such a case, however, the prediction must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control or to convey a management decision already arrived at to close the plant in case of unionization. See *Textile Workers v. Darlington Mfg. Co.*, 380 U.S. 263, 274, fn. 20 (1965). If there is any implication that an employer may or may not take action solely on his own initiative for reasons unrelated to economic necessities and known only to him, the statement is no longer a reasonable prediction based on available facts but a threat of retaliation based on misrepresentation and coercion, and as such without the protection of the First Amendment." 395 U.S. at 618.

I do not find that the words "Vote No: It's Your Job," imply employer retaliation. They do suggest that the outcome of the election would have an effect on the work environment, but that suggestion does not imply that the employer might or might not "take action solely on his own initiative for reasons unrelated to economic necessities and known only to him."

dence is insufficient to conclude that they did select in this fashion. Since Osborne testified about an incident which took place after the break was over, I have some doubt that he could stay long enough to watch the supervisors complete their cleanup of the break area.

However, even assuming for analysis that the supervisors did throw away only pronoun pamphlets which were lying around the break area, such action did not violate the law. Therefore, I recommend that this allegation be dismissed.

Y. July 24, 1996—Threatening Employees with Discharge if They Selected the Union as Their Collective-Bargaining Representative

Complaint paragraph 8(e) alleges that on July 24, 1996, Supervisor Jeff Mahoney threatened employees with discharge if they selected the Union as their collective-bargaining representative. On this date, employee Calvin Saltz testified, he wore a union T-shirt to work for the first time, and Supervisor Mahoney "hollered at me and said, Have you found you another job?" (Tr. 366.)

Saltz testified that Mahoney asked this question in the presence of Rodney Moretz, William Garber, and Bernie Gobble. Of those three, only Moretz testified, and he denied hearing Mahoney make such a statement. (Tr. 947.) Mahoney denied saying it. (Tr. 1256.)

In sum, one witness testified that Mahoney made the statement in question, Mahoney denied it, another witness did not recall Mahoney making it, and two other witnesses were not called even though the General Counsel knew their names. In these circumstances, I do not have a lot of confidence in Saltz' uncorroborated testimony and do not credit it. Therefore, I recommend that this allegation be dismissed.

Z. July 24, 1996—Interrogation of Employees

Complaint paragraph 8(b) alleges, in part, that on July 24, 1996, Supervisor Jeff Mahoney interrogated employees concerning their union sympathies and desires. The record does not establish the basis for such an allegation, and I recommend that it be dismissed.

AA. Critical Period Before Election—Implicitly Threatening Employees with Job Loss for Having Supported the Union

Complaint paragraph 8(d) alleges, in part, that during the critical period before the election,²⁶ the Respondent published and distributed a handbill which implicitly threatened employees with job loss for having supported the Union. Complaint paragraph 8(f) alleges that the handbill threatens employees with plant closure if they selected the Union. Complaint paragraph 8(g) alleges that the handbill threatens employees with job loss, and complaint paragraph 8(h) alleges that the handbill threatens employees with loss of benefits if they selected the Union as their collective-bargaining representative.

The record establishes that at some point, employee, Steven Warner, received an undated handbill with his paycheck. This handbill was captioned "NO JOB! NO PAY! NO BENEFITS!" and stated, "The UFCW petitioned these companies and they are now OUT OF BUSINESS!" The handbill then listed a number of

companies, and concluded with the words "Vote No," showing a check mark in a box. (GC Exh. 2.)

However, the record does not establish when the Respondent distributed this handbill. Employee Warner testified, "I received it with my paycheck one morning." (Tr. 560.) That testimony does not indicate whether Warner received it before or after the Union filed its representation petition.

The record as a whole would not contradict an assumption that the Respondent distributed this handbill in July 1996, at the time it displayed the banners discussed above. However, a finding should be based on more than a reasonable assumption; it should be based on evidence. The record does not contain such evidence.

The Respondent became aware of the union organizing campaign well before the Union actually filed its representation petition. The General Counsel has proven that three violations (two instances of interrogation and one threat of stricter rule enforcement) took place in May 1996, before the filing of the Union's representation petition.

The date when Warner received the handbill cannot be deduced from its content or by how long it would take the Respondent to prepare it. Unions affiliated with the United Food and Commercial Workers Union have tried to organize the Respondent's employees a number of times in recent years. The handbill in question does not refer specifically to Local 400, the Charging Party here, so it is not certain whether the Respondent prepared the handbill particularly in response to the most recent organizing drive, or whether it had been prepared at some earlier time.

Moreover, although the General Counsel called 20 witnesses (21, counting the custodian of the documents subpoenaed from the Respondent), only Warner testified that he received such a handbill. The fact that other witnesses did not testify about the handbill, and the fact that Warner only pinpointed the date as "one morning," make me wary of assuming that Respondent issued it within the critical period, or that Respondent distributed it to employees other than Warner.

I will make neither assumption. Instead, I find only that the Respondent distributed this handbill to Warner, and did so at some time after the union organizing drive began in March 1996.²⁷

The General Counsel contends that this handbill constitutes a coercive threat of job loss which is unlawful because it does not link this prospect with economic factors such as the give and take of the bargaining process. I agree. See *BI-LO*, 303 NLRB 749 (1991); *Quamco, Inc.*, 325 NLRB 222 (1997). I find that the handbill violates Section 8(a)(1) of the Act.

BB. November 5, 1996—Encouraging Employees to Fail and Refuse to Cooperate in a Board Investigation, and Attempting to Influence its Employees' Testimony in a Board Proceeding

Complaint paragraph 8(o) alleges that by a November 5, 1996 letter, the Respondent encouraged its employees to fail and refuse to cooperate in a Board proceeding. Complaint paragraph 8(p) alleges that this letter attempted to influence its

²⁶ By "critical period," the complaint refers to the period between the date when the representation petition was filed, May 28, 1996, and the election on August 1, 1996. See, e.g., *Vemco, Inc.*, 315 NLRB 200 (1994) (violations committed during the "critical period between the date the petition was filed and the date of the election").

²⁷ Although the record indicates that company leaflets had been present in the breakroom, the evidence does not establish that this literature included the handbill received by Warner.

employees' testimony in a Board proceeding. The complaint alleges that these actions violated Section 8(a)(1) of the Act.

It is undisputed that the Respondent issued a November 5, 1996 letter, to its employees. The entire text of this letter was capitalized, and stated as follows:

DEAR FELLOW MID-MOUNTAIN EMPLOYEE:

RECENTLY THE NATIONAL LABOR RELATIONS BOARD SENT OUT "AFFIDAVITS" TO CERTAIN EMPLOYEES WHO SIGNED UFCW AUTHORIZATION CARDS PRIOR TO OUR AUGUST ELECTION. THE "AFFIDAVIT" SEEKS INFORMATION—BY ASKING VERY PERSONAL QUESTIONS THAT WILL BE PUT INTO A GOVERNMENT FILE! YOU NEED TO KNOW WHY THE GOVERNMENT IS ASKING FOR VERY PERSONAL INFORMATION AND WHAT THE GOVERNMENT PLANS TO DO WITH YOUR INFORMATION.

NO DOUBT, WHEN THE UFCW UNION ASKED MANY OF YOU TO SIGN MEMBERSHIP/AUTHORIZATION CARDS, THEY ASSURED YOU THAT SIGNING A UNION CARD MEANT NOTHING EXCEPT TO "GET MORE INFORMATION" OR POSSIBLY TO "GET AN ELECTION"—THAT IT WOULD BE CONFIDENTIAL, AND "NOBODY WOULD EVER KNOW WHO SIGNED A CARD". IF YOU WERE TOLD THAT, YOU HAD BETTER READ THE COVER LETTER AND THE "AFFIDAVIT" FROM THE NATIONAL LABOR RELATIONS BOARD...

—"YOUR COOPERATION ... MAY ELIMINATE THE NECESSITY OF OUR CAUSING A SUBPOENA TO BE ISSUED COMPELLING YOUR ATTENDANCE [sic] AT A PUBLIC HEARING."

—"THIS STATEMENT WILL BE KEPT CONFIDENTIAL BY THE UNITED STATES GOVERNMENT UNLESS AND UNTIL IT BECOMES NECESSARY FOR THE GOVERNMENT TO PRODUCE IT IN A FORMAL PROCEEDING."

DOES THIS SOUND CONFIDENTIAL TO YOU???

THE TRUE REASON WHY THE NLRB IS SO INTERESTED IN ALL THE DETAILS SURROUNDING WHO SIGNED CARDS IS THAT ON AUGUST 1, 1996, THE UFCW UNION LOST THE ELECTION AT MID-MOUNTAIN FAIR AND SQUARE BY A SCORE OF 135-77. WHAT THIS MEANS IS YOU REJECTED REPRESENTATION BY LOCAL 400 OF THE UFCW BY A RATIO OF ABOUT 2 TO 1!

NEVERTHELESS, THE UFCW REFUSES TO ACCEPT YOUR DECISION! THEIR ATTITUDE IS THAT THEY WILL ACCOMPLISH THROUGH POLITICS WHAT THEY COULD NOT ACCOMPLISH AT THE BALLOT BOX. THE UFCW UNION HAS OFFICIALLY DEMANDED THAT THE NLRB ISSUE A BARGAINING ORDER AGAINST MID-MOUNTAIN FOODS! THIS MEANS THAT THE UFCW IS TELLING THE NLRB TO ORDER YOU TO BE REPRESENTED BY THE UFCW WHETHER YOU WANT THEM OR NOT! SO MUCH FOR DEMOCRACY!

UNDER ITS OWN RULES, THE NLRB CANNOT ISSUE A BARGAINING ORDER UNTIL IT HAS VERIFIED THE SIGNATURES ON THE UNION MEMBERSHIP/AUTHORIZATION CARDS. THIS IS WHY THEY HAVE SENT OUT "AFFIDAVITS" AND WHY THE NLRB HAS ORDERED MID-MOUNTAIN TO SEND THEM COPIES OF YOUR W-4 FORMS THAT CONTAIN YOUR NAME, YOUR

SIGNATURE, YOUR HOME ADDRESS, YOUR NUMBER OF DEPENDENTS AND YOUR SOCIAL SECURITY NUMBER.

THIS ACTION MAKES US QUESTION OUR RIGHTS AND FREEDOMS WHEN THE UNION DEMANDS THE NLRB TO IGNORE YOUR WISHES SO THAT THE UNION WILL REPRESENT YOU—WHETHER YOU WANT THEM TO OR NOT. IT MAKES US VERY UNCOMFORTABLE WHEN, IN RESPONSE TO THIS UNION DEMAND, THE NLRB BEGINS DEMANDING AND ASSEMBLING CONFIDENTIAL DATA ON EACH ONE OF YOU AND PLACING IT INTO THEIR FILES.

IN ORDER FOR ALL THIS TO WORK OUT THE WAY THE UFCW WANTS, THEY HAVE TO CONVINCE THE NLRB THAT MID-MOUNTAIN FOODS HAS COMMITTED MANY SERIOUS UNFAIR LABOR PRACTICES. ALL OF THE CHARGES THAT THE UFCW HAS MADE AGAINST MID-MOUNTAIN ARE FALSE AND MOST ARE ABSOLUTELY LAUGHABLE. ONE OF THE PROBLEMS WE HAVE IS NOT KNOWING WHETHER OR NOT THE NLRB WILL BE FOOLED BY THE UFCW LIES. DURING THE COMING WEEKS, WE WILL BE SHARING WITH YOU THE EXACT NATURE OF THESE TRUMPED UP UNION LIES. IN THE MEANTIME, YOU NEED TO KNOW WHAT THE UFCW IS UP TO. HOW THEY PLAN TO OVERRULE YOUR AUGUST VOTE ... AND ... SNEAK INTO MID-MOUNTAIN FOODS THROUGH THE BACK DOOR.

THE MANAGEMENT TEAM.

[GC Exh. 6.]²⁸

In effect, the General Counsel contends that this letter constituted a kind of quasi-subliminal persuasion, putting the idea in a reader's mind that whoever asked him to sign a union authorization card had assured the reader it was only to "get more information" or to "get an election." The General Counsel's brief cites *Gordonsville Industries*, 252 NLRB 563 (1980), in support of that theory. In that case, the Board adopted a judge's finding that somewhat similar language in a letter to employees could only be intended to "plant a seed in the minds of employee-witnesses as to the character of the testimony which they were expected to give under Respondent's watchful eye at the hearing." 252 NLRB at 581.

However, the letter to employees in *Gordonsville Industries*, unlike the letter to employees in this case, told the employees "we know you will respond honestly and responsibly," and the judge viewed the word "responsibly" with suspicion, as possibly suggesting that the employees should tailor their testimony to keep out the Union and thereby retain their jobs.

The language at issue here does not suggest to employees how they should testify. It also does not suggest to employees that they should respond to the Board's request for affidavits in any particular way. Thus, *Gordonsville Industries*, should be distinguished.

Moreover, Section 8(c) of the Act prevents me from considering this letter as evidence of an unfair labor practice. That provision states as follows:

²⁸ Certain of the material in this letter was underlined. However, the document in evidence is a photocopy of a facsimile. Although the words are legible, it is not entirely clear which words are underlined and which are not. Therefore, the underlines have been omitted here.

The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefits. [29 U.S.C. § 158(c).]

I find that the Respondent's November 5, 1996 letter, does not contain any threat of reprisal or force or promise of benefits. Therefore, under Section 8(c), it does not constitute an unfair labor practice or evidence of an unfair labor practice.

I recommend that this allegation be dismissed.

CC. November 6, 1996—Discharge of and Refusal to Reinstatement Employee James Gianforte

Complaint paragraph 11 alleges that on November 6, 1996, the Respondent discharged James Gianforte and thereafter refused to reinstate him. The complaint alleges that this action discriminated against Gianforte in violation of Section 8(a)(3) and (1) of the Act. The Respondent denied this allegation.²⁹

Gianforte was an order selector. His job involved driving an SGX machine to various locations in the warehouse, and retrieving the goods listed on an order for shipment to a customer.

On November 1, 1996, he saw another employee Bryant Salyers, go up to the shipping office, and came to the conclusion that Salyers had complained that Gianforte had been "laying back," that is, not working with the speed expected. (Tr. 410.) According to Salyers, whom I credit, over the next 2 days, Gianforte told Salyers he would get even, and engaged in harassing conduct.

Specifically, on November 2, 1996, Gianforte confronted Salyers in the warehouse and said, "You ratted on me yesterday." When Salyers denied it, Gianforte responded, "I should bring a gun and shoot at ten at you all yellow backs—" (Tr. 1291.)

Later that same day, Salyers saw Gianforte at work in the warehouse and said, "[L]et's just blow it off and work together and forget about it." According to Salyers, Gianforte said no, that he would carry a grudge for years. (Tr. 1293.)

The next day, according to Salyers, when he saw Gianforte at the warehouse, Gianforte "would stomp and blow kisses" and call Salyers a back stabber and a rat. When Salyers asked him, "Can't we just blow this off?", Gianforte replied, "No. I will get even even if I have to go to jail." (Tr. 1294.)

Gianforte also used his SGX to tailgate Salyers. After letting Gianforte pass by, Salyers called management on the intercom. His complaint started an investigation which led to Gianforte's suspension, followed by discharge on November 6, 1996.

I will evaluate this discharge in accordance with *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). The Government has

²⁹ Respondent's answer also raised, as an affirmative defense, that "based on evidence acquired after his discharge, Jim Gianforte engaged in unprotected conduct for which the Employer would have discharged any employee, and therefore he is not entitled to reinstatement or to back pay." (GC Exh. 1(u).) In view of my findings here, I need not reach the issues presented by this affirmative defense.

established the first requirement of a prima facie case, that Gianforte engaged in union activity. Gianforte was an open supporter of the Union, and was a member of the Union's organizing committee in the plant.

The General Counsel also has established the second requirement, that the Respondent knew about Gianforte's union activities. Most obviously, Gianforte's name appears on the June 14, 1996 letter, from the union organizing committee to the Company's president. Gianforte also wore union T-shirts.

The Government also has proven the third *Wright Line* element. Gianforte's discharge is an adverse employment action.

However, I find that the General Counsel has not demonstrated a link or nexus between Gianforte's protected activity and his discharge. There is no evidence that any manager or supervisor made any statement which would associate the discharge with Gianforte's union activity. Moreover, the discharge took place 3 months after the election.

In sum, I conclude that the General Counsel has failed to prove the fourth *Wright Line* requirement, and, therefore, has failed to make a prima facie case. However, even assuming for analysis that the Government had established such a prima facie case, I find that the Respondent would have discharged Gianforte in any event, and regardless of his protected activities.

Employers increasingly have been held liable for violence committed by one employee against another in the workplace.³⁰ Failure to take action, after becoming aware that an employee might become violent, could expose the Respondent to considerable liability.

Here, according to Salyers' credited testimony, Gianforte had threatened to bring a gun to work and shoot not just Salyers but "about ten" employees. Gianforte also said that even if it meant going to jail, he would get even.

Additionally, Gianforte demonstrated a troubling persistence. Two days after he perceived that Salyers had complained about his "laying back," Gianforte was still harassing Salyers by threatening to get even and tailgating Salyers' SGX. His apparent fixation on a seemingly minor incident also raised a legitimate cause for concern.

Moreover, the Respondent did not discharge Gianforte precipitously, but first conducted a thorough investigation. In these circumstances, and considering the increasing legal exposure of companies for incidents of violence in the workplace, I find that the Respondent would have discharged Gianforte in any event, regardless of whether he had engaged in protected activities. Therefore, I recommend that this allegation be dismissed.

II. OBJECTIONS TO THE ELECTION

As stated above, the Board conducted an election at the Respondent's facility on August 1, 1996.³¹ The Charging Party

³⁰ See, e.g., Levin, "Workplace Violence: Navigating Through the Minefield of Legal Liability," 11 *Labor Lawyer* 171 (1995).

³¹ Employees in the following unit were eligible to vote: All warehouse department employees, including plant clerical employees employed by the Employer at its Abingdon, Virginia warehouse, excluding all office clerical employees, transportation department employees, temporary employees, guards, and supervisors as defined in the Act. (GC Exh. 1(n).)

did not receive a majority, and filed timely objections. (GC Exh. 1(m).)³² The Regional Director disposed of certain of these objections and consolidated the remaining objections with the unfair labor practice cases. (GC Exh. 1(n).) All of these objections except one arise from the same actions which the complaint alleges to be unfair labor practices.³³

I have found that the Respondent committed certain unfair labor practices during the critical period between the filing of the representation petition and the date of the election. Specifically, in mid-May 1996, the Respondent threatened employees with stricter enforcement of work rules if the Union were selected; in early June 1996, it threatened an employee with discharge; on June 11, 1996, it interrogated an employee concerning his union sympathies; and on June 19, 1996, it issued a written warning to an employee because of his union activities.

These violations interfered with, restrained, and coerced employees in the exercise of rights guaranteed by Section 7 of the Act. I recommend that the election be set aside.

III. REQUEST FOR BARGAINING ORDER

The General Counsel seeks a bargaining order pursuant to *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969). The Government may demonstrate the appropriateness of such a bargaining order by showing that at some point, the Union enjoyed support among a majority of employees in the bargaining unit, and that the Respondent committed "hallmark" violations of the Act.

Such "hallmark" violations are serious unfair labor practices which dissipate a union's majority. The coercive effect of hallmark violations persists, thus, interfering with the freedom of employees to make an uncoerced choice in a rerun election.

The handbill which employee Warner received with a paycheck contained an implicit threat of plant closure. The Board has held that threats of plant closure are "one of the most coercive actions which a company can take in seeking to influence an election." *Long-Airdux Co.*, 277 NLRB 1157, 1160 (1985).

However, the evidence does not demonstrate that any other employee besides Warner received such a handbill. Therefore,

³² The tally of ballots showed the following results:

Approximate number of eligible voters.	225
Number of void ballots.	0
Number of votes cast for United Food and Commercial Workers Union, Local 400.	77
Number of votes cast against participating labor organization(s).	126
Number of valid votes counted.	203
Number of challenged ballots.	9
Number of valid votes counted plus challenged ballots.	212

The challenged ballots are not determinative of the results of the election. (GC Exh. 1(n).)

³³ The single objection not alleged to involve an unfair labor practice concerns whether or not the Respondent increased the number of security personnel at its facility on the date of the election, and if so, whether the presence of additional security personnel interfered with the laboratory conditions necessary to assure employees uncoerced freedom of choice in casting their ballots. Because I find that other objections warrant setting aside the election, I need not reach these issues.

even though the handbill contained an implicit threat of plant closure, I do not find that the threat was communicated to anyone but Warner. In these unusual circumstances, I cannot conclude that this violation produced a persistent coercive effect making a bargaining order necessary.

Additionally, the other violations established by the record are relatively isolated in nature and most involved few of the employees in the bargaining unit. I do not find a pervasive pattern of unfair labor practices which typify cases in which the Board deems a bargaining order appropriate. Therefore, I do not recommend that the Board issue a bargaining order in this case.

IV. CONCLUSIONS OF LAW

1. Mid-Mountain Foods, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. United Food and Commercial Workers Union, Local 400, AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent violated Section 8(a)(1) of the Act by the following acts. On an unascertained date in the month of March, April, May, June, or July 1996, giving an employee a handbill which implicitly threatened plant closing, loss of employment, and loss of benefits if employees selected the Union to represent them; on March 24, 1996, interrogating an employee about that employee's union sympathies and desires; on April 1, 1996, interrogating an employee about that employee's union sympathies and desires; some time in mid-May 1996, threatening employees with stricter enforcement of work rules if they selected the Union to represent them; on June 11, 1996, interrogating an employee about that employee's union sympathies and desires; and on June 19, 1996, giving a written warning to employee Tim Alderson because he engaged in union or other activities protected by the Act.

4. The Respondent violated Section 8(a)(3) of the Act on June 19, 1996, by giving a written warning to employee Tim Alderson because he engaged in union or other activities protected by the Act.

5. The Respondent did not violate the Act in any other manner alleged in the complaint.

REMEDY

To remedy the unfair labor practices found here, I recommend that Respondent be ordered to rescind the warning it issued to employee Tim Alderson on June 19, 1996. If that warning formed the basis, in whole or in part, for any later discipline of Alderson under a system of progressive discipline, the Respondent should also be ordered to rescind such subsequent disciplinary actions and to treat Alderson in all respects as if the June 19, 1996 written warning, had never been issued to him.

I further recommend that Respondent be ordered to post at its Abingdon, Virginia facility, the notice to employees set forth in Appendix A of this decision.

I further recommend that the election conducted on August 1, 1996, be set aside, and that the Board order that a new election be conducted.

On these findings of fact and conclusions of law and on the entire record in this case, I issue the following recommended³⁴

ORDER

The Respondent, Mid-Mountain Foods, Inc., Abingdon, Virginia, its officers, agents, successors, and assigns, shall

1. Cease and desist from
 - (a) Interrogating its employees with respect to their union sympathies and desires.
 - (b) Threatening employees with plant closure, loss of jobs, loss of wages, loss of benefits, and stricter enforcement of work rules if they select the Union as their collective-bargaining representative.
 - (c) Imposing discipline, including written warnings, to employees because they engaged in union activities or other activities protected by the Act.
 - (d) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights to self-organization, to form, join, or assist any labor organization, to bargain collectively through representatives of their own choosing, or to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities.
2. Take the following affirmative action necessary to effectuate the policies of the Act.
 - (a) Remove from employee Tim Alderson's personnel file, and from any other records the Respondent maintains, the June 19,

³⁴ 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.

1996 written warning it issued to him, and all references to it. If the Respondent has taken any later disciplinary action against Alderson, which later disciplinary action was more severe or onerous because of the June 19, 1996, Respondent shall rescind that discipline and take only such action as it would have taken if the June 19, 1996 written warning had never existed.

(b) Within 14 days after service by the Region, post at its facilities in Abingdon, Virginia, copies of the attached notice marked "Appendix A."³⁵ Copies of the notice, on forms provided by the Regional Director for Region 11, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately on receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 21, 1996.

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

³⁵ 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."