Daikichi Corp. d/b/a Daikichi Sushi *and* Mohammed Based *and* Mohammed A. Rahman *and* Aporna Deb, *and* Kazi S. Rahman. Cases 29–CA–21362, 29–CA–21391, 29–CA–21397, and 29–CA–21427

August 27, 2001

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN AND WALSH

On July 14, 1999, Administrative Law Judge Stephen J. Gross issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed cross-exceptions and a brief in support of the judge's decision.

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

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

The Respondent owns and operates fast food sushi stores in New York City. The Respondent supplies these stores with sushi prepared at its central kitchen located in Long Island City. On February 20, 1997,[3] Teamsters Local 295 (the Union) filed a representation petition seeking to represent a unit of about 60 of the central kitchen employees. The Board conducted an election among the unit employees on April 7. The Union won the election, and the Board certified the Union on November 4.

The judge found that the Respondent violated Section 8(a)(1) of the Act by making certain statements to employees during and after the campaign. The judge also found that the Respondent violated Section 8(a)(3) and (1) in late August by refusing to recall certain permanently laid-off employees because of their union activity. The Respondent has excepted to these findings. We agree with the judge.

1. The judge found that in a March meeting the Respondent's president, Mr. Watanabe, unlawfully threatened employees with the loss of their jobs if they supported the Union. The judge further found that in the same meeting Watanabe unlawfully promised the employees a wage raise to discourage support for the Union. The judge based these findings on the credited testimony of employees Christopher Gomes, Mohammed Based, and Mohammed Rahman, and the Respondent's failure to call Watanabe, or any other witness, to deny their testimony.

The Respondent argues that the judge erroneously relied on Gomes', Based's, and Rahman's testimony about Watanabe's statements, pointing to the judge's observation that he did not "consider any of the three to be wholly credible witnesses." However, "nothing is more common in all kinds of judicial decisions than to believe some and not all" of a witness' testimony. *NLRB v. Universal Camera Corp.,* 179 F.2d 749, 754 (2d Cir. 1950), revd. on other grounds 340 U.S. 474 (1951). Accord: *General Fabrications Corp.,* 328 NLRB 1114 fn. 1 (1999), enfd. 222 F.3d 218 (6th Cir. 2000). Here, the judge specifically found the relevant portions of their testimony credible.

The Respondent further suggests the judge improperly relied on the Respondent's failure to call Watanabe—the only management representative in the March meeting after Watanabe himself dismissed Fumio Saito, kitchen manager, and Assistant Supervisors Wahab Ahdul (Dipu) and Kien Vi Lu—to controvert Gomes', Based's, and Rahman's testimony. However, it is settled "that when a party fails to call a witness who may reasonably be assumed to be favorably disposed to the party, an adverse inference may be drawn regarding any factual question on which the witness is likely to have knowledge." *International Automated Machines,* 285 NLRB 1122, 1123 (1987), enfd. mem. 861 F.2d 720 (6th Cir. 1988). Although the judge did not use the phrase "adverse inference," he properly applied this principle to infer that, had the Respondent called Watanabe to testify about his own speech, his testimony would have been consistent with the employees' testimony.[4]

Our dissenting colleague concludes that the judge improperly relied on the failure of the Respondent's wit-

[1] The Respondent and the General Counsel have excepted to some of the judge's credibility findings. The Board's established policy is to not 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.

[2] We will modify the judge's recommended Order in accordance with our recent decision in *Ferguson Electric Co.,* 335 NLRB 142 (2001).

[3] All dates are in 1997, unless stated otherwise.

[4] See *Martin Luther King, Sr., Nursing Center,* 231 NLRB 15 fn. 1 (1977) (judge implicitly, and properly, relied on the "missing witness" rule). See also *NLRB v. District Council of California Iron Workers Local 155,* 124 F.3d 1094, 1100 (9th Cir. 1997) (drawing adverse inference against union because officers failed to testify); *Douglas Aircraft Co.,* 308 NLRB 1217 fn. 1 & 1222 (1992) (drawing adverse inference from employer's failure to call officials to explain alleged unlawful actions). The adverse inference rule does not apply when a party fails to call employee witnesses because they "may not reasonably be presumed to be favorably disposed to any party." See *Queen of the Valley Hospital,* 316 NLRB 721 fn. 1 (1995). Accord: *Torbitt & Castleman, Inc. v. NLRB,* 123 F.3d 899 (6th Cir. 1997). Thus, there is no merit in the Respondent's suggestion that the judge should have drawn an adverse inference against the General Counsel based on his failure to call the approximately 47 other employee witnesses to Watanabe's speech.

nesses to testify in crediting Gomes', Based's, and Rahman's version of Watanabe's speech. He reasons that the judge had doubts about the employees' testimony because of "language barriers,"[5] these doubts raised a credibility issue, and "[t]he failure of Respondent's witnesses to testify on the point did not erase or resolve [this] credibility issue." We disagree.

Where demeanor is not determinative, an administrative law judge properly may base credibility determinations on the weight of the respective evidence, established or admitted facts, inherent probabilities, "and reasonable inferences which may be drawn from the record as a whole." *Shen Automotive Dealership Group,* 321 NLRB 586, 589 (1996). This is exactly what the judge did here. The judge was concerned about the employees' testimony because of the language barrier (a legitimate concern, although a witness' difficulties with English should not hastily be equated with unreliability or incompetence). But the judge did not resolve the employees' credibility on this basis alone. Rather, he appropriately considered all the circumstances, including the Respondent's failure to offer available witness testimony to controvert the employees' account of Watanabe's speech. The fact that the Respondent's silence did not resolve all doubts about the accuracy of the employees' testimony is insufficient to warrant upsetting the judge's determination. See, e.g., *Jennie-O Foods,* 301 NLRB 305, 336–337 (1991) (crediting employee witness with a "'serious inability' to comprehend and relate to what she [was] hearing over employer witness who 'retreated' from testifying about disputed matters"). After all, as the judge recognized, the General Counsel was only required to establish that it was "more likely than not" that Watanabe made the statements at issue.[6]

It is reasonable to infer, moreover, that the employees—despite their imperfect command of English—understood the basic thrust of Watanabe's speech. Watanabe presumably believed that his speech could be understood or he would not have made it. And whatever their individual English proficiency, it is unreasonable to assume that the employees who were present for the speech did not speak to each other afterward and did not have the ability and opportunity to jointly develop an understanding of what Watanabe said.

2. The judge also found that the Respondent violated Section 8(a)(1) when Assistant Supervisor Lu told employee Mohammed Rahman, "[I]t's an open secret that you've joined the Union." The judge found Lu's statement unlawfully created the impression of surveillance of Rahman's union activities. We agree. See *Syncor International Corp.,* 324 NLRB 8, 12 (1997).

The Respondent erroneously contends that Lu's statement could not have been coercive because it was made in a "friendly" discussion with Rahman about the pros and cons of union representation. Even if Rahman and Lu discussed unionization generally, there is no indication that Rahman had disclosed his own union membership. In any event, the Board "'does not require employees to attempt to keep their union activities secret before an employer can be found to have created an unlawful impression of surveillance.'" *Tres Estrellas de Oro,* 329 NLRB 50 (1999) (quoting *United Charter Service,* 306 NLRB 150, 151 (1992)). We also reject the Respondent's suggestion that Lu's statement was lawful because Rahman did not perceive it as creating the impression of surveillance. The Board's test is an objective one. See *Tres Estrellas de Oro,* supra.

Further, for reasons stated, we disagree with our dissenting colleague's contention that, given the language barrier, the judge erred in finding that Lu made the statement attributed to him by Rahman. It is true that the judge did not expressly find that Rahman understood Lu's statement. Such a finding, however, is implicit in his ultimate finding, based on Rahman's testimony, that Lu made the unlawful statement attributed to him.

3. The judge further found that the Respondent, through Assistant Supervisor Saito, unlawfully threatened employees with plant closure if they selected representation by the Union. As a factual matter, the Respondent contends that the judge incorrectly stated that Assistant Supervisor Saito told employees that the Respondent "would" close its East Coast operation if they selected union representation, because union demands would increase costs of production. We find merit in the Respondent's contention**.** The record indicates that Saito stated that the Respondent "might" close, rather than that it "would" close.

We nevertheless find that Saito's statement violated Section 8(a)(1). The Supreme Court in *NLRB v. Gissel Packing Co.,* 395 U.S. 575, 616–620 (1969), held that an employer may lawfully communicate to his employees "carefully phrased" predictions based on "objective facts" as to "demonstrably probable consequences beyond his control" that he believes unionization will have on his company. However, the Court cautioned that 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

[5] As the judge found, the native language of Gomes, Based, and Rahman was Bengali, and their understanding of English "was at best hit or miss." Watanabe delivered his speech in English, sometimes with a translator present and sometimes without.

[6] See Sec. 10(c) of the Act (preponderance of evidence standard applies).

him," the statement is a threat of retaliation**,** which violates Section 8(a)(1). In determining how employees might reasonably construe such communications, the Court emphasized that "the economic dependence of employees on the employer" must be factored into the analysis.

Here, Saito failed to cite any objective facts that would tend to show that if the employees voted to unionize, the Respondent would no longer be able to compete and might have to close for reasons beyond its control. In its exceptions, the Respondent points to Gomes' admission that Saito explained the Respondent could go out of business "if all the demands of the union were to be met." However, the Respondent presented no evidence that the Union made any demands at all, let alone demands that, if met, would have the "demonstrably probable consequence" of driving the Respondent out of business. *AP Automotive Systems,* 333 NLRB 581 (2001) (employer engaged in objectionable conduct by conveying to employees that union, if selected, would inevitably make exorbitant demands leading to plant closure). Cf. *Benjamin Coal Co.,* 294 NLRB 572 fn. 2 (1989) (employer's prediction of dire economic circumstances lawful where it was in response to union's pledge to insist on application of an industrywide agreement). Saito's statement, moreover, took place against the backdrop of the Respondent's unfair labor practices, including President Watanabe's substantiated threats to discharge employees who engaged in union activity. In these circumstances, we find that Saito's statements reasonably conveyed the message that the Respondent might decide on its own initiative to shut down operations if the employees selected union representation.

It is no defense that Saito phrased his prediction of plant closure as a possibility rather than a certainty**.** In *Gissel* itself, the employer's unlawful statements were to the effect that the union would probably strike and that a strike "could lead to the closing of the plant." 395 U.S. at 588. See also *McDonald Land & Mining Co.,* 301 NLRB 463, 466 (1991) (finding statement that creditors, upon learning that employees favored unionization, "might get nervous and decide to throw us [into] Chapter 11" violated Sec. 8(a)(1)); *Glasgow Industries,* 204 NLRB 625, 626–627 (1973) (finding statement that "if you all vote this Union in, this plant could move to Mexico" violated Sec. 8(a)(1)); *Mohawk Bedding Co.,* 204 NLRB 277, 278 (1973) (finding that in the context of statements of plant closure, the statement "[i]f the Union wins the election tomorrow . . . then we could all be in for serious trouble," violated Sec. 8(a)(1)). Accordingly, we affirm the judge's finding that Saito's statement that the Respondent might go out of business violated Section 8(a)(1).[7]

Our dissenting colleague disagrees with this conclusion, based largely on his rejection of the judge's unfair labor practice findings involving Watanabe and Assistant Supervisor Lu. As a result, our colleague finds that Saito's statement "was not made in an otherwise 'coercive context'" and therefore did not require substantiation by objective evidence. However, we have affirmed the judge's findings that Watanabe and Assistant Supervisor Lu engaged in contemporaneous violations of Section 8(a)(1).

4. The judge further found that the Respondent violated Section 8(a)(3) and (1) in August by refusing to recall six laid-off hot kitchen employees because of their union activity. The Respondent contracted out the "hot kitchen" portion of its central kitchen on about August 28, 1997.[8] As a result, the Respondent permanently laid off hot kitchen employees Mohammed Rahman, Mohammed Based, Kazi Rahman, Aporna Deb, Mohammed Zaman, and Christopher Gomes on August 28 and 29. As the judge found, the employees, all of whom had experience working in other areas of the central kitchen, asked to be placed in those other areas or otherwise made clear their desire to continue working for the Respondent. The Respondent refused to recall any of them. The judge found that the employees' union activity was a motivating factor in that decision and that the Respondent failed to establish that it would have taken the same action even in the absence of that activity. We agree.

As the judge found, all six of these employees engaged in union activity and the Respondent had knowledge of that activity. The judge's finding of knowledge is substantiated by Assistant Supervisor Dipu's "free-wheeling" conversations with Based and Kazi Rahman about employees' prounion sentiment and Assistant Supervisor Lu's unlawful statement to employee Mohammed Rahman, "it's an open secret that you've joined the Union."

[7] With regard to the prior settlement agreement, we find merit in the Respondent's contention that the judge erroneously stated in his decision that "Daikichi proffered no information about the settlement agreement either at the hearing or on brief." The prior complaint and settlement agreement are in the record, and the Respondent noted this in its brief to the judge. This error, however, does not affect the result herein because the allegations underlying the violations found were not encompassed within the settlement agreement. See *B & K Builders,* 325 NLRB 693, 694 (1998).

[8] The judge dismissed the complaint insofar as it challenged the contracting out of the hot kitchen as unlawful. Contrary to the General Counsel's exceptions, we agree with the judge that the Respondent established that it would have contracted out its hot kitchen operation even in the absence of the employees' union activity.

Contrary to the Respondent and our dissenting colleague's contention, moreover, the record evidence fully supports the judge's finding that the Respondent's refusal to recall the employees was motivated by their support for the Union. As the judge emphasized, the Respondent's union animus is revealed by Watanabe's earlier threat of job loss if employees supported the Union. Significantly, the Respondent's refusal to recall the employees effectively made good on this threat. See *W. F. Bolin Co.,* 311 NLRB 1118, 1119 (1993), enfd. mem. 99 F.3d 1139 (6th Cir. 1996) (employer's unlawful threat to get rid of employees who complained about pay supported finding of animus and unlawful motivation in subsequent layoff of those who continued to complain).

Unlawful motivation is also revealed by General Manager Histo Baba's false statement to employees that he could not place them in other areas of the kitchen "because the operation is full. We have just enough people." In fact, the Respondent did not have enough people. Thus, as the judge found, in September the Respondent hired at least six new employees to staff its "full" operations, and continued to hire new employees in the ensuing months. See generally *Shattuck Denn Mining Corp. v. NLRB,* 362 F.2d 466, 470 (9th Cir. 1966) (falsity of asserted reason for adverse action supports inference of unlawful motive). And as the judge pointed out, the Respondent offered no explanation for its decision to hire new employees rather than recall its experienced workers.

In view of all these facts, we agree with the judge that a reason for the Respondent's refusal to recall the six employees was their support for the Union. We also agree with the judge that the Respondent failed to establish that it would have refused to recall the employees even in the absence of their union activity. Therefore, we affirm the judge's finding of a violation of Section 8(a)(3) and (1). See *Grinnell Corp.,* 320 NLRB 817, 831 (1996) (although employee's layoff was not unlawful, employer's refusal to recall him violated Sec. 8(a)(3)).

The Respondent's argument, based on *Kmart Corp.,* 320 NLRB 1179 (1996), and *Lampi, L.L.C.,* 322 NLRB 502 (1996), that the judge was required to find evidence of disparate treatment is without merit. To be sure, these decisions make clear that the presence or absence of disparate treatment can be important evidence in a case alleging a violation of Section 8(a)(3). Such evidence, however, is not *required* to establish a case of unlawful discrimination. The Board and the courts have recognized that a variety of circumstances may support a finding of unlawful motivation. See *W. F. Bolin Co. v. NLRB,* 70 F.3d 863, 870 (6th Cir. 1995); *NLRB v. Adco Electric, Inc.,* 6 F.3d 1110, 1118 fn. 6 (5th Cir. 1993). Similarly, the lack of "suspicious timing," as the Respondent puts it, is not determinative. See *Flannery Motors,* 321 NLRB 931 (1996) (lapse of time between protected activity and discharges was insufficient to overcome other evidence of antiunion motive), enfd. mem. 129 F.3d 1263 (6th Cir. 1997).

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and orders that the Respondent, Daikichi Corp. d/b/a Daikichi Sushi, Long Island City, New York, its officers, agents, successors, and assigns shall take the action set forth in the Order as modified.

Substitute the following paragraph for paragraph 2(d).

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

CHAIRMAN HURTGEN, dissenting in part.

I agree with my colleagues that the Respondent violated Section 8(a)(1) of the Act based on the statement of Assistant Supervisor Wahab Ahdul (Dipu) to employee Aporna Deb. I also agree that the Respondent did not violate Section 8(a)(3) by contracting out the hot kitchen work. However, I disagree with the conclusions of my colleagues on four other matters.

First, contrary to my colleagues and the judge, I find that the Respondent did not violate Section 8(a)(1) based on the speech by Daikichi's president, Mr. Watanabe. Employees and supervisors in the Daikichi central kitchen spoke a variety of different languages including Chinese, Japanese, Spanish, and Bengali. Watanabe's disputed speech was given in English. However, as found by the judge, the three employee witnesses who testified about the speech understood English "only to a limited extent" and "only with great difficulty." The judge also found that the employees' understanding of English was "at best hit or miss[.]" The judge said that he did "[not] consider any of the three to be wholly credible witnesses."[1] However, the judge nonetheless turned right around and credited the employees. He did so solely on the basis that Respondent's witnesses did not deny the testimony of the General Counsel's witnesses. In these circumstances, I conclude that the judge has not appropriately resolved the credibility issue. As the judge found, the testimony of the three Gen-

[1] It is clear that, in context, the judge inadvertently omitted the bracketed word "not."

eral Counsel witnesses raised a credibility issue. That credibility issue existed by reason of language barriers. The failure of Respondent's witnesses to testify on the point did not erase or resolve the credibility issue. Indeed, it had nothing to do with the credibility issue. Notwithstanding this, the judge purported to resolve the credibility issue. The judge could only bring himself to say that Watanabe said, "[S]omething along the line of." Since the judge cited nothing else to resolve credibility, I find his purported credibility resolution to be lacking in substance.

My colleagues say that the judge drew an adverse inference from Watanabe's failure to testify, i.e., the judge properly inferred that, had Watanabe testified, he would have supported the employees' testimony. In fact, the judge did no such thing. He made no specific reference to Watanabe's failure to testify; he did not say anything at all about an adverse inference; he did not speculate about how Watanabe would have testified. In short, my colleagues' discussion of "adverse inference" is their own creation, designed to build up a shaky case.

In sum, there is insufficient evidence to establish that Watanabe uttered the words attributed to him. Further, there is insufficient evidence to establish that the employees who heard the speech understood the language in which it was made. The judge made no such finding. Moreover, the record contains no evidence that Watanabe's speech was translated for the employees by someone who heard the speech.[2] Although it was unnecessary to prove that the employees were actually coerced, the General Counsel was required to prove that the Respondent's conduct reasonably tended to restrain, interfere with, or coerce the employees' exercise of Section 7 rights. Here, there was no reasonable likelihood of coercing employees who lacked sufficient understanding of the language in which the statements were made. Absent a translation, the statements made by Watanabe in English (to employees whom the judge found did not sufficiently understand English) would not reasonably tend to restrain, interfere with, or coerce the exercise of the employees' rights. I find no basis for my colleagues' apparent assumption that, following Watanabe's speech, the employees jointly developed an understanding of what Watanabe said. Even if they did jointly develop such an understanding, that would not establish the substance of what Watanabe said or whether the understanding was reasonable.

My colleagues also say that Watanabe "presumably believed that his speech could be understood or he would not have made it." However, that obviously does not establish that employees in fact understood what he said. I, therefore, find that the General Counsel failed to prove that the Respondent violated Section 8(a)(1) of the Act based on Watanabe's speech.

Second, contrary to my colleagues and the judge, I find that the Respondent did not violate Section 8(a)(1) based on the statement of Assistant Supervisor Lu to employee Mohammed Rahman. As with Watanabe's speech, Lu's statement to employee M. Rahman that "it's an open secret that you've joined the Union" was made to an employee who spoke a different language. The judge expressed the same concerns about the accuracy of M. Rahman's testimony and his understanding of English as he (the judge) did with respect to the witnesses noted above. Given these concerns, my colleagues' "implicit" finding that M. Rahman understood the statement despite the significant language barrier is not sufficient. There is no actual finding, nor would any such finding be supported by the evidence. Absent a finding by the judge that M. Rahman understood Lu's statement, I find that the General Counsel failed to prove that the statement created an impression of surveillance**,** in violation of Section 8(a)(1) of the Act.

Third, contrary to my colleagues and the judge, I find that the Respondent did not violate Section 8(a)(3) by failing to recall six employees from layoff. Under the test set forth in *Wright Line,*[3] the General Counsel must initially establish a prima facie case that the Respondent's decision not to recall the employees from layoff was motivated, at least in part, by the employees' protected activity. However, the record shows no connection between the Respondent's failure to recall the laid-off employees and any union animus. The judge found that the Respondent's decision to lay off the employees was not motivated by union animus and, for reasons stated above, I find no union animus on the part of Watanabe. Having found no unlawful threat by Watanabe, I disagree with my colleagues' conclusion that the failure of the Respondent to recall the employees "effectively made good on his threat." Further, I reject the majority's reliance on a statement made by East Coast General

[2] The three employee witnesses who testified about the speech spoke Bengali. The judge found that when Watanabe arrived, Assistant Supervisor Dipu, who spoke Bengali and at times translated management's comments for the Bengali-speaking employees, left the room as instructed. Assistant Supervisor Kien Vi Lu left as well. Neither employees Kazi Rahman nor Mohammed Based testified that other supervisors were present during Watanabe's speech or that the speech was translated into Bengali for them. Only employee Christopher Gomes testified that, at some later time, Assistant Supervisors Dipu and Lu were brought in to translate Watanabe's speech into Bengali and Chinese, respectively. No witnesses testified that Dipu heard the disputed speech.

[3] 251 NLRB 1083 (1980), enfd. 622 F.2d 899 (1st Cir. 1981), cert. denied 495 U.S. 989 (1982).

Manager Histo Baba at the time the Respondent lawfully laid off the employees. That statement, even if false, relates to the Respondent's decision to lay off the employees, and does not establish the General Counsel's prima facie case that the Respondent unlawfully failed to recall employees from layoff. The record also contains no evidence concerning the skills of the newly hired employees compared with the skills of the laid-off employees, and no evidence on whether the newly hired employees had a history of union activity. Further, the record contains no evidence that the Respondent has ever recalled any employees from layoff. Thus, I find no basis for inferring that the Respondent's failure to do so here was motivated by union animus.

In these circumstances, I find no connection between the Respondent's failure to recall the laid-off employees and the employees' protected activity and, therefore, I conclude that the General Counsel failed to establish a prima facie case of discrimination under Section 8(a)(3).

Fourth, I conclude that the statement by Kitchen Manager Fumio Saito was not violative of Section 8(a)(1). An employer may lawfully communicate its views to employees about a particular union provided the communications "do not contain a threat of reprisal or force or promise of benefit." *NLRB v. Gissel Packing Co.,* 395 U.S. 575, 618 (1969). I find no threat of reprisal in Saito's statement describing that the Respondent's East Coast operation *might* be unable to continue in the event of unionization because Daikichi would lose its ability to compete successfully. Saito explained that if all the demands of the Union were to be met, the production costs would go up, and closure of the operation might occur. Saito did not imply that the operation would close for retaliatory reasons rather than for economic reasons. Rather, as shown by the record, Saito linked the possible closure of the facility to the conditions of increased costs and loss of competitiveness. These are objective, economic factors beyond the Employer's control. Saito's statement suggested that higher production costs and loss of competitiveness, brought on if the Union's demands were met, could be determinative. There was no implication that the Respondent would take action for reasons unrelated to economic necessities.

I find it unnecessary in the circumstances of this case for Saito to have recited precise economic data to support his statement. Unlike *Glasgow Industries,* 204 NLRB 625 (1973); and *Mohawk Bedding Co.,* 204 NLRB 277 (1973), cited by the majority, Saito's statement was not made in an otherwise "coercive context," and thus the environment in this case did not present an "atmosphere of apprehension in the minds of the [employees.]" *Glasgow,* supra at 627; *Mohawk,* supra at 279.[4] As explained above, I find the evidence insufficient to show that Watanabe made a statement which reasonably tended to coerce employees or that Lu created the impression of surveillance. Moreover, the facility supervisors were specifically trained by a labor consultant on what they were and were not allowed to say to employees during an election campaign and, with one isolated exception, did not otherwise violate the law. Thus, absent other coercive circumstances, I do not interpret Saito's statement as indicating that the Respondent might decide on its own initiative to shut down operations in retaliation for employees' selection of the Union. Rather, I find Saito's statement was protected speech under Section 8(c).

Sharon Chau, Esq., for the General Counsel.
Anthony B. Byergo, Esq. and *Frederic H. Fischer, Esq. (Seyfarth, Shaw, Fairweather and Geraldson, Esqs.),* of Chicago, Illinois, for the Respondent.

DECISION

STEPHEN J. GROSS, Administrative Law Judge. The Respondent, Daikichi Corp. d/b/a Daikichi Sushi, owns and operates fast food sushi stores on both the East and West Coasts.[1] Almost all of Daikichi's East Coast stores are in New York. Beginning in February 1996 Daikichi prepared most of the sushi it sold in its East Coast establishments at a central kitchen in Long Island City. And since May 1997 the central kitchen has prepared all of Daikichi's East Coast sushi. We are concerned here with events that occurred in the central kitchen facility beginning in February 1997.

On February 20, 1997, Teamsters Local 295 (the Union) filed a repesentation petition seeking to represent the approximately 60 bargaining unit employees employed in the central kitchen.[2] At an election conducted by the Board on April 7, Daikichi's central kitchen employees voted to be represented by the Union.[3]

The General Counsel contends that beginning in March 1997 and continuing until after the election, five different Daikichi supervisors and a consultant retained by Daikichi violated Section 8(a)(1) of the Act by reason of statements they made to Daikichi's employees.

In August 1997, Daikichi contracted out some of the kitchen work that had been performed by Daikichi employees. That resulted in Daikichi permanently laying off eight employees.

[4] I also find the statement in *McDonald Land & Mining Co.,* 301 NLRB 463, 466 (1991), referred to by the majority, to be too speculative in that case to have been based on objective facts.

[1] Daikichi admits that it is an employer engaged in commerce within the meaning of the National Labor Relations Act (the Act).

[2] The unit:

> All full-time and regular part time kitchen worker employees employed by Daikichi at its 36-35 35th Street, Long Island City, New York, facility, excluding all other employees, guards and supervisors as defined in the Act.

[3] On November 4, 1997, the Board certified the Union as representative of the unit.

The General Counsel argues that Daikichi contracted out the work in order to rid itself of prounion employees and, because of these employees' prounion stance, refused to reassign the employees or to recall them, all in violation of Section 8(a)(3).

This decision will discuss the alleged unlawful utterances in part I, the contracting out in part II, and in part III, the fact that Daikichi did not recall any of the laid-off employees.

I. THE ALLEGED UNLAWFUL UTTERANCES

The General Counsel alleges that various Daikichi supervisors and a consultant to Daikichi violated Section 8(a)(1) by:

- Because of employees' membership in, activities on behalf of and sympathy for the Union, threatening the employees with more onerous working conditions, with discharge, with loss of jobs, with blacklisting, with plant closure or relocation, with sale of the Company's business operations, and with unspecified reprisals.
- Directing employees not to vote for the Union and to refrain from attending union meetings, from joining the Union, from speaking to representatives of the Union, and from seeking the assistance of the Union.
- Promising employees pay increases and other benefits to induce them to abandon their support for the Union.
- Interrogating employees concerning their membership in, activities on behalf of, and sympathy for the Union.
- Informing employees that it would be futile for them to select the Union as their collective bargaining representative.
- Creating the impression among its employees that it was keeping under surveillance their activities on behalf of the Union.

The General Counsel's contentions about the various supervisors' and the consultant's alleged unlawful remarks depend almost entirely on the credibility of six witnesses called by the General Counsel: Mohammed Based, Aporna Deb, Christopher Gomes, Kazi Rahman, Mohammed Rahman, and Mohammed Zaman.[4] I have concerns about the accuracy of much of their testimony. Most importantly, their understanding of English was at best hit or miss, a problem of considerable significance since, with the exception of but one individual, the Daikichi agents and supervisors who allegedly uttered the unlawful remarks spoken in English.[5] Additionally, the only language of relevance to us here in which the six witnesses were fluent was Bengali even though Bengali was by no means the only language spoken by Daikichi employees. (Spanish and Chinese were also commonplace.) Accordingly, hearing only from Bengali-speaking employees left me with the uncomfortable feeling of being presented with only a narrow and potentially distorted slice of the full picture.

A. The Speech of a California-Based Daikichi Official

General Counsel's witnesses Christopher Gomes, Mohammed Based, and Kazi Rahman testified that sometime in March (that is, in the midst of the Union's campaign), in the middle of the day shift, the facility's supervisors ordered the employees to gather for talk by a California-based Daikichi official. Kazi Rahman testified that the official described himself as Daikichi's president. None of the three remembered being told the official's name. (Other testimony, however, indicates that Daikichi's president is a Mr. Watanabe.)

Gomes credibly testified that this official "immediately on arrival . . . told Mr. Saito [head of the central kitchen] to go away, then he told Mr. Dipu [and] Mr. Lu [lower-level supervisors] to go away from the scene and he said, 'I will talk to the employees myself.'" According to Gomes, this official, speaking English (sometimes without translators being present, sometimes with them), told the employees that—

> I don't want you guys to join the union. After all, why should you join the union? And you know that already four of the people have been fired for joining the union so why should you follow their footsteps and endanger your career or job . . . we could give you better raise and better payment, I find no reason [for you] to join the union.

Based testified that this same official spoke of three central kitchen employees who had joined the Union and, because of that, were fired. According to Based, the official went on to say:

> [L]ook, this is an example for you guys. These three have been fired, so if anybody else joins the union now, they will all be fired . . . we will give you a raise and if we give you a better raise, then what is the point of your joining the union? So don't join the union, stay with us and you'll get a raise.

There is something ghost-like about this speech. Consider that only three witnesses testified about Watanabe and his talk even though about 50 employees were said to have been present, and two of these three (Gomes and Based) did not even claim to know either his name or his position with Daikichi. Further, for the reasons discussed above I do consider any of the three to be wholly credible witnesses. (The affidavit a Board agent took from Kazi Rahman says nothing whatever about a presentation by Daikichi's president; indeed, much of Rahman's testimony conflicts with or is unsupported by his affidavit.)

On the other hand: none of Daikichi's witnesses denied that such an event occurred or otherwise had anything to say about the event; and Daikichi's counsel chose not to cross-examine either Gomes or Based about it.

I have therefore decided to credit Gomes', Based's, and Kazi Rahman's testimony that Daikichi's president, Watanabe, gave a speech to the employees in March 1997 and to find that in that speech Watanabe said something along the lines of:

> You know that four Daikichi employees have been fired for joining the Union. Don't follow in their footsteps. Don't join the Union and endanger your job. Stay with us and you'll get the raise that you want.

Daikichi thereby violated Section 8(a)(1) of the Act. E.g., *County Window Cleaning Co.,* 328 NLRB 190 (1999) (promise of benefits; *NLRB v. Neuhoff Bros., Inc.,* 375 F.2d 372) (5th Cir. 1967) (threats of discharge for union activity).

B. The Labor Consultant's Advice

After the Teamsters filed its election petition, Daikichi retained the services of a labor consultant, Edwin Colon, to assist Daikichi's East Coast management in the Company's effort to keep the facility nonunion. Colon's work included several interrelated tasks: (1) instructing supervisors on what the Act forbids them to say to employees and what it allows; (2) recommending to management strategy and tactics for convincing employees not to support the Union, including recommending reading material that the Company should hand out to employees and topics that supervisors should cover in talks to employees; and (3) speaking directly to employees about why they should not support the Union.

Much of what Colon said—both to management and directly to employees—was entirely commonplace. For example: that union membership dues are costly and that as a result of collective-bargaining employees might end up better off, but they might also find themselves in a worse position. But Colon proposed two lines of argument that are of particular significance. The record does not provide us with Colon's precise words. But it appears that Colon suggested that supervisors tell employees that unionization had caused some employers to shut down. Also, Colon urged supervisors to tell employees that Daikichi had "a right to close the plant for economic reasons." So if Daikichi's New York operations ceased being profitable because unionization caused the costs of those operations to rise to the extent that the Company's prices could no longer be competitive, the employees were to be informed, Daikichi "could sell, it could go out of business, it could merge [or] it could downsize" (to quote from Colon's testimony). The significance: for employees whose understanding of English is limited, it must have been easy to misunderstand these arguments, hearing them as threats that Daikichi would close the New York operations if the employees voted to be represented by a union. I conclude that this is in fact what happened, and accordingly (with one exception to be discussed below) I do not credit the General Counsel's witnesses' testimony that either Colon or any of the Company's East Coast officials threatened employees with plant closure or discharge.

Colon's role in this proceeding is important primarily because his instructions form the backdrop to various utterances by Daikichi supervisors, Saito, Dipu, and Lu. Colon did speak directly to employees, and the General Counsel alleges that many of his utterances violated Section 8(a)(1). But I credit Colon's testimony about what he told employees and conclude that nothing he said violated the Act.[6]

[6] Several of the General Counsel's witnesses testified about talks given by a Daikichi lawyer. The record is clear that in fact the witnesses were referring to Colon. During the course of the hearing Colon stated that he always ensures that he abides by the Act's requirements, that he urges his clients to do the same, and that even though he has participated on behalf of management in many election campaigns, there is no reference to him as a wrongdoer in any of the Board's decisions. That appears to be correct, although management's efforts in an election campaign in which he apparently participated (as a consultant to management) produced numerous violations of the Act. See *Grimmway Farms,* 314 NLRB 73, 84 (1994).

C. Supervisors Wahab Abdul, Fumio Saito, Hisato Baba, and Kien Vi Lu[7]

Wahab Abdul (Dipu). At all relevant times until December 1997 Daikichi employed a first-line supervisor named Wahab Abdul. Everyone called him Dipu. (In December 1997, Dipu left Daikichi without notice. He later asked to return, but Daikichi turned him down. Neither the General Counsel nor Daikichi sought to call Dipu as a witness.)

Like all of the witnesses called by the General Counsel (four of whom constitute the Charging Parties in this proceeding), Dipu had emigrated to the United States from Bangladesh. Dipu figures prominently in this proceeding both for the remarks he allegedly made to employees and for his work as an interpreter: He translated into Bengali many of management's anti-union speeches.

Dipu was a friend of several of the General Counsel's witnesses and on occasion met with them in social gatherings away from Daikichi's facility at which they discussed, among other things, the Union and the election.

Fumio Saito. Daikichi's kitchen manager on the East Coast is Fumio Saito. He heads Daikichi's Long Island City facility. Prior to the election campaign, Saito called employees to 8 a.m. meetings once or twice a week at which he spoke of various matters related to the facility's operations. Starting not long after the Union filed its election petition, Saito doubled or tripled the number of times he met with employees each week and, at those meetings, tried to make the points that Colon had urged on him.

Saito's first language is Japanese. He is not altogether comfortable speaking English. Nonetheless he spoke in English at these meetings. As I have already discussed, on the employees' part many of them spoke and understood English only to a limited extent and only with great difficulty. Accordingly, Dipu translated into Bengali what Saito purportedly said. In other words, the General Counsel's witnesses, who spoke English only poorly, testified about what they thought they heard being said in English by the kitchen manager whose primary language was Japanese and about what Dipu, speaking in Bengali, told them what he understood of Saito's attempts at antiunion speeches in English.

I found Saito to be a credible witness. But it is not clear to me that what he intended to communicate to Daikichi's employees (the arguments taught to him by Colon) and what he in fact did say in English always coincided.

Hisato Baba. Baba is Daikichi's general manager for its East Coast operations. As with Saito, Baba's first language is Japanese. He does not speak English fluently. I found Baba to be a credible witness.

Kien Vi Lu. At all relevant times Lu was a first-line supervisor at the Long Island City facility, except that he ceased working for Daikichi before the election. Lu spoke English and Chinese. (Neither the General Counsel nor Daikichi sought to call Lu as a witness.) The General Counsel alleges that Lu uttered numerous remarks that violated Section 8(a)(1) of the Act.

[7] All parties agree that these four individuals were supervisors within the meaning of Sec. 2(11) of the Act.

Lu is fluent in Chinese (and he translated the speeches of other supervisors and of Colon into Chinese for the benefit of employees who spoke only that language). But he does not speak Bengali. Thus his conversations with the employees who testified in this proceeding—none of whom speak Chinese—were entirely in English.

My findings about the supervisors' unlawful utterances. Having considered the record, including such matters as which witnesses' statements were corroborated and which were not, the nature of Colon's instructions to the supervisors, the likely inability of the General Counsel's witnesses to entirely comprehend much of what was said to them in English, the kinds of misunderstandings most likely to have arisen as the Bengali employees listened to antiunion speeches in English, and obvious inaccuracies in witnesses' testimony even about what was said to them in Bengali, I find that on this record it is more likely than not that Daikichi's supervisors made these unlawful utterances, and only these (in addition to those that Watanabe made):

- Saito told a group of bargaining unit employees, during the election campaign, that Daikichi would be unable to continue its East Coast operation if the employees voted in favor of union representation because Daikichi would lose its ability to compete successfully.
- When Daikichi began providing transportation between the central kitchen and a nearby subway station, employee Deb asked Dipu why the Company was doing this. Dipu responded:

  > This is for two reasons. One is for your safety, your security. And the other reason is so that no members of the union can approach the employees, to come to you and talk to you. They [management] want the employees to avoid the union people and that's why they would like to drop you from work to the subway station.[8]

- Lu told employee Mohammed Rahman that "it's an open secret that you've joined the Union."

See, e.g., *NLRB v. Gissel Packing Co.,* 395 U.S. 575, 618, 620 (1969) (threats of closure); *Syncor International Corp.,* 324 NLRB 8 (1997) (impression of surveillance); *Hearst Corp.,* 281 NLRB 764 (1986), enfd. mem. 837 F.2d 1088 (5th Cir. 1988) (employees "warned . . . to keep away from officers and supporters" of the Union).

I find that the record fails to prove that any Daikichi supervisor or other Daikichi agent made any other utterance that violated Section 8(a)(1) of the Act.

II. DAIKICHI'S CONTRACTING OUT OF ITS "HOT KITCHEN" WORK

Daikichi's central kitchen includes a "hot kitchen" area where rice is cooked and items that Daikichi refers to as "noodle toppings"—such as shrimp tempura and fried chicken—are prepared. The hot kitchen is in a room separate from the rest of the central kitchen's food preparation area. Until late August (1997) about 8 of Daikichi's 60 or so central kitchen employees worked in the hot kitchen.

The rice is cooked in a massive semi-automated machine that produces about 300 pounds of rice per hour. Two of the eight employees were assigned as full-time operators of the rice cooker, and a few other hot kitchen employees operated the rice cooker on an as-needed basis.

Daikichi first began using the rice cooker in late 1994 (when Daikichi's central kitchen was at another location). By 1996 customers were complaining about the rice in Daikichi's sushi. Sometimes it was cooked too much, sometimes not enough. Sometimes the rice was watery, sometimes too hard. Daikichi's management believed that the problem, which appeared to be getting worse, stemmed from both a lack of expertise of its personnel in knowing how to best operate the cooker and in Daikichi's inability to find anyone competent to keep the cooker properly maintained. Needless to say, since rice makes up a considerable proportion of almost all sushi, it is no small matter when a sushi seller is unable to consistently produce tasty rice.

On the West Coast, Daikichi does not itself prepare the rice that it needs. Rather, since the late 1980s Daikichi has purchased all of the rice it uses on the West Coast from a company called California Rice Center (CRC) which, in turn, prepares the rice in commercial cookers akin to the one in Daikichi's East Coast central kitchen, but even larger.

In April—almost surely after the election—Daikichi's management began discussions with CRC with a view to having CRC take over, as a contractor, the Long Island City facility's hot kitchen operations, including the operation of the rice cooker.

In late May or early June those discussions produced an agreement. The result: Beginning on August 29, CRC, after something less than 2 months of preparatory activity (including training one of its supervisors and hiring employees), staffed and operated the hot kitchen part of Daikichi's central kitchen, selling all of its output to Daikichi.

Concomitantly, on August 28 and 29 Daikichi permanently laid off all of its eight employees then working in the hot kitchen: the four Charging Parties in this proceeding (Mohammed Rahman, Mohammed Based, Kazi Rahman, and Aporna Deb); the two other employees who testified on behalf of the General Counsel (Mohammed Zaman and Christopher Gomes); and two other employees about whom the record tells us virtually nothing.

At the time of their layoffs, all six of the employees who testified on behalf of the General Counsel asked Baba (Daikichi's general manager for East Coast operations) that Daikichi retain them as employees elsewhere in the central kitchen. Baba told them that there were no job openings. Baba did, however, give them Daikichi job application forms containing handwritten changes so as to indicate that the forms were for application to CRC. But none of the six employees sought employment by CRC. Nor did the employees ever seek re-employment by Daikichi.

The General Counsel contends that it was Daikichi's union animus that was behind the Company's decision to contract out

[8] The General Counsel contends that Baba made a similar remark. I do not find that to be the case.

its hot kitchen work and to lay off, permanently, its hot kitchen employees.

A. Evidence Supporting the General Counsel's Contention that the Contracting Out was Motivated by Antiunion Considerations

At least six of the eight hot kitchen bargaining unit employees signed union authorization cards (the six employees called by the General Counsel as witnesses). And it is probable that Daikichi knew that. (Deb's rejection of the Company's proffered transportation would have led Dipu to suspect her of prounion sentiments. And I got the impression that Based and Kazi Rahman had free-wheeling conversations with Dipu about the Union in which those two employees made their prounion positions clear and likely spoke of the positions on unionization of other employees, particularly Bengali-speaking employees.)

As for union animus, we have seen that in a speech to the central kitchen's employees during the Union's campaign, Daikichi President Watanabe said something like:

> You know that four Daikichi employees have been fired for joining the Union. Don't follow in their footsteps. Don't join the Union and endanger your job.

As for Daikichi's problems with the rice cooker:

> 1. Those problems had begun in 1996. Years earlier Daikichi and CRC had discussed the possibility of CRC providing cooked rice for Daikichi's East Coast operations. But those talks had not bome [sic] fruit. Daikichi did not again consider the contracting out until after the Union's campaign began. Then, within weeks of the election in which the central kitchen's employees voted in favor of unionization, Daikichi began talking to CRC about CRC taking over the hot kitchen work. Daikichi and CRC reached agreement a month or two after the election.
>
> 2. Daikichi did not contract out just the operation of the rice cooker, but instead contracted out the operation of the entire hot kitchen. On the West Coast Daikichi obtains all of its cooked rice from CRC. But cooked rice is all that Daikichi's West Coast outlets get from CRC, and CRC prepares the rice at facilities entirely separate from Daikichi's. There is no precedent, that is to say, for Daikichi having CRC use Daikichi's own facilities for the preparation of food or for Daikichi getting its noodle toppings from CRC.

Additionally, Daikichi made no attempt to find other employment within the Company for the hot kitchen employees, either before or after the contracting out. Yet: (1) Daikichi does not contend that any of the laid-off employees are poor workers; (2) all had central kitchen experience with Daikichi apart from their hot kitchen work; (3) two of these employees had been with Daikichi for more than a year (Based and Deb), and one had been with Daikichi more than 3 years (Kazi Rahman); and (4) there is substantial turnover among Daikichi's central kitchen staff.

B. Evidence Supporting Daikichi's Contention that Union Animus Played no Part in the Company's Decision to Contract Out the Hot Kitchen Work

First, while Daikichi's president is sufficiently antiunion to threaten employees that prounion employees would be fired, that does not necessarily mean that management was in fact willing to base operational decisions on what its employees' views were about unionization. And a partial shutdown of two of Daikichi's nonunion facilities suggests that management did not permit union issues to play a significant role in such matters. Recall that on April 7, 1997, the central kitchen employees voted in favor of representation by the Union. At the time, two of Daikichi's East Coast outlets still had their own kitchens. The employees of neither of these stores were unionized. Nonetheless, in May Daikichi closed both of these stand-alone kitchens, laying off eight or nine employees in the process. Thereafter these two stores, along with all of Daikichi's other East Coast stores, got their sushi and other prepared foods from the now unionized central kitchen, to that extent strengthening the Union's position.

Second, as of the spring of 1997: (1) Daikichi was having problems with the quality of its East Coast rice and noodle toppings; (2) with respect to the rice, at least, these problems were getting worse; (3) Daikichi had a longstanding business relationship with CRC (on the West Coast) and was aware that CRC has considerable expertise in the preparation of both rice and noodle toppings; (4) Daikichi's East Coast sales were increasing and were expected to increase still further, putting additional pressure on the central kitchen.

Third, nothing in the record suggests that the hot kitchen employees as a group were any more prounion than the central kitchen employees generally. Similarly, while all of the ex-hot kitchen employees whom the General Counsel called as witnesses were prounion, their support for the Union was limited to signing union authorization cards and, for some but not all of the six, attending a union meeting or two.

Fourth, as for Daikichi's failure to shift at least some of the hot kitchen employees to other jobs prior to CRC taking over the hot kitchen operations, management had decided to keep the contracting out a secret until the day CRC began its operations. While that might lead one to grade Daikichi something less than A+ in human resources management, there is nothing suspicious about the decision to proceed that way. And having made that decision, it is unremarkable that Daikichi did not switch any of the hot kitchen employees to other jobs prior to CRC's entry.

C. Daikichi's Contracting Out the Hot Kitchen Work—Conclusion

For some considerable period of time Daikichi's hot kitchen suffered from quality problems. Yet Daikichi did little to deal with the problems. When the union campaigned to represent Daikichi's central kitchen employees, Daikichi's president threatened that the Company would fire employees who supported the Union and Daikichi's East Coast kitchen manager said that unionization would lead to the sale or closure of the facility. Then, within weeks after the employees voted in favor

of unionization, Daikichi entered into a contract to have CRC take over the hot kitchen work.

But I credit Saito in his denial that he intended to threaten employees with the sale or closure of the facility, Daikichi's hot kitchen problems were getting worse, Daikichi had previously looked into having CRC handle its hot kitchen work, business firms routinely take months before arriving at a decision as significant as contracting out a significant part of their operation, and the record fails to show that Daikichi's animus was such that the Company would permit its antiunion views to interfere with whether and how it made operational changes.

As I am about to discuss in part III, Daikichi's failure to recall the laid-off employees probably was a result of its union animus. And that, in turn, surely is a factor to take into account in determining why Daikichi contracted out it hot kitchen operation. But having done so, I remain of the view that: (1) the General Counsel has failed to prove that the contracting out was motivated by union animus, even in part; and (2) even assuming that the record should be read as showing that the contracting out was at least partially a function of union animus, Daikichi proved that it would have contracted out its hot kitchen operations even absent the union animus.

III. DAIKICHI'S FAILURE TO RECALL THE LAID-OFF EMPLOYEES

As touched on earlier in this decision: on August 28 and 29 Daikichi permanently laid off all eight of its employees then working in the hot kitchen, including Based, Deb, Gomes, the Rahmans, and Zaman, all of whom, as Daikichi probably knew, supported the Union; at the time of their layoffs, these six employees made clear their interest in continuing to work for Daikichi; all six had experience with Daikichi apart from their hot kitchen work; and in the months following the layoffs Daikichi continued to hire new employees. (In September alone, Daikichi hired six new employees to do bargaining unit work in the central kitchen.)

On its part, Daikichi gave no explanation whatever about why it hired new employees rather than recalling the laid-off employees.

There is much that the record does not tell us. For example, we do not know whether Daikichi ever recalls employees from layoff. There is no evidence about whether the new employees had experience relevant to the work for which Daikichi hired them. We don't know whether any of the new employees had a history of prounion activity (and, if so, whether Daikichi's management knew about it). And there is no direct evidence that the prounion stance of the six employees had anything to do with Daikichi's failure to recall them. (For example, there is no credible evidence that anyone from management said anything to the employees suggesting that their support for the union was a factor in their layoffs.)

Notwithstanding all these evidentiary gaps, I conclude that it is more probable than not that Daikichi hired newcomers, rather than recalling Based, Deb, Gomes, the two Rahmans and Zaman, because of these six employees' support for the Union.

I reach that conclusion because of three considerations. First, Daikichi's president threatened employees with discharge if they joined the Union. Second, I infer that, all other considerations held equal, employers proceed on the assumption that "seasoned men are better than green hands." *NLRB v. Remington Rand, Inc.,* 94 F.2d 862, 872 (2d Cir. 1938) (L. Hand, J.). And third, Daikichi provided no reasons why it preferred newcomers even though "those reasons lay exclusively within its own knowledge." (Id.)

I have taken into consideration that the employees failed to follow through on Daikichi's suggestion that they apply for jobs with CRC. But the record provides no reason to suppose that Daikichi's failure to recall the employees was related to the employees' unwillingness to apply for jobs with CRC. In addition there is no indication that, at the time of the layoffs, CRC had any job openings. I have also taken into consideration that none of the six employees subsequently sought reemployment with Daikichi. But Daikichi knew that the employees wanted to continue as Daikichi employees. And the manner in which Daikichi laid them off discouraged application for reemployment.

I accordingly find that a reason that Daikichi did not recall bargaining unit employees Based, Deb, Gomes, Zaman, Kazi Rahman, and Mohammed Rahman from layoff was their support for the Union. I further find that Daikichi has failed to show that it would have refrained from recalling the laid-off employees even absent its union animus. Daikichi thereby violated Section 8(a)(3) of the Act. E.g., *N. D. Peters & Co.,* 327 NLRB 922 (1999).

IV. DAIKICHI'S AFFIRMATIVE DEFENSES

A. Section 10(b)

Although Daikichi referred to Section 10(b) in its answer, the Company did not refer to it on brief and thus it is not clear that the Company is pursuing this defense.

The earliest charge against Daikichi was filed on September 9, 1997. It alleged that Daikichi fired Based in August because of his union activities. Mohammed Rahman filed a comparable charge covering him, Gomes, and Zaman on September 11. Deb's charge followed on September 16. The first charge that alleged an unlawful utterance was filed on September 23. The allegation there was that management unlawfully interrogated Kazi Rahman in May 1997.

The complaint's theory is that management discriminated against six employees in August because of the employees' support for the Union during the election campaign in March and April, a campaign in which management expressed its union animus via threats and other unlawful utterances. My conclusion is similar except that I have found that the discrimination (by way of refusals to recall) did not begin until September. The point of both the complaint and my conclusion, that is to say, is that the 8(a)(1) utterances and the 8(a)(3) discriminatory conduct arose out of the "same sequence of events" (to quote *Redd-1, Inc.,* 290 NLRB 1115, 1116, 118 (1988)), and are "factually related" *(Harmony Corp.,* 301 NLRB 578 (1991)). On the other hand, it is hard to think of the election campaign—which ended in early April—as falling within "the

same time period" as the August layoffs and the subsequent refusals to recall the employees (to again quote from *Redd-1*.)[9]

Fortunately I need not determine whether the first three charges filed in this proceeding support the utterances that I have found violated Section 8(a)(1). That's because the September 23 charge, referring to an 8(a)(1) interrogation in May 1997, surely encompasses threats and suggestions of surveillance during the March–April election campaign. Accordingly, 10(b)'s 6-month limitation provides no defense to threats made on and after March 23. As for whether any of the utterances I have found to be unlawful were made before March 23, it was up to Daikichi to prove that. E.g., *NLRB v. J & S. Drywall,* 974 F.2d 1000, 1004 (8th Cir. 1992).[10] Daikichi failed to carry this burden.

B. Prior Settlement Agreement

Daikichi's answer contends that "certain of the General Counsel's allegations are improperly included in the Consolidated Complaint because they were the subject of a prior Settlement Agreement." But Daikichi proffered no information about the settlement agreement either at the hearing or on brief."[11]

REMEDY

Daikichi lawfully laid off Mohammed Based, Aporna Deb, Christopher Gomes, Kazi Rahman, Mohammed Rahman, and Mohammed Zaman when it contracted out its hot kitchen work. But even though the jobs at which the six employees were working at the time of their layoff no longer exist, other central kitchen jobs do, jobs for which the six employees are qualified; and I have found it to be more probable than not that it was for reasons of union animus that Daikichi failed to recall them to fill those jobs as positions in the central kitchen came open. I accordingly shall recommend that Daikichi be ordered to offer full and immediate reinstatement to Based, Deb, Gomes, the two Rahmans, and Zaman, to positions in the central kitchen and to make them whole for any loss of earnings and other benefits that they suffered as a result of Daikichi's failure to recall them. Determination of the date on which each of the six employees would have been recalled but for Daikichi's violation shall be left to the compliance stage. Loss of earnings and benefits shall be computed on a quarterly basis, less any interim net earnings, as prescribed in *F.W. Woolworth Co.,* 90 NLRB 289 (1950), plus interest to be computed in the manner prescribed in *New Horizons for the Retarded,* 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[12]

ORDER

The Respondent, Daikichi Corp., d/b/a Daikichi Sushi, Long Island City, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with discharge if they join Teamsters Local 295 or any other union.

(b) Promising employees improved compensation in order to discourage them from engaging in union or other protected concerted activity.

(c) Threatening employees with plant closure should the employees vote in favor of union representation.

(d) Telling employees that the Company's management wants employees to avoid union representatives.

(e) Creating the impression that the union activities of its employees were under surveillance.

(f) Failing to recall employees from layoff because of their support for Teamsters Local 295 or any other union.

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

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

(a) Within 14 days from the date of this Order, offer Mohammed Based, Aporna Deb, Christopher Gomes, Kazi Rahman, Mohammed Rahman, and Mohammed Zaman, full reinstatement to positions in the Company's central kitchen, without prejudice to their seniority or other rights or privileges previously enjoyed.

(b) Make Mohammed Based, Aporna Deb, Christopher Gomes, Kazi Rahman, Mohammed Rahman, and Mohammed Zaman whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of this decision.

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

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its central kitchen facility in Long Island City, New York, copies of the attached notice marked "Appendix."[13] Copies of the notice, on forms provided by the Regional Director for Region

[9] Compare *Harmony Corp.,* supra, in which the unlawful utterances and the discriminatory action occurred within a few weeks of one another.

[10] Denying enforcement on other grounds to 303 NLRB 24 (1991).

[11] Daikichi also contends, by way of a third affirmative defense, that the utterances that were in part I of this decision I concluded were unlawful "were protected by Section 8(c) of the Act and the First Amendment to the U.S. Constitution."

[12] 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.

[13] 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."

No. 29, after being signed by a representative of Daikichi, shall be posted by Daikichi and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Daikichi shall take reasonable steps 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, Daikichi has gone out of business or closed the facility involved in these proceedings, Daikichi shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Daikichi at any time since March 23, 1997.

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

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

APPENDIX

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

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

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

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

WE WILL NOT threaten that we will fire you if you join Teamsters Local 295 or any other union.

WE WILL NOT promise you better pay or benefits in order to discourage you from engaging in union or other protected concerted activity.

WE WILL NOT threaten you with plant closure for voting in favor of union representation.

WE WILL NOT tell you that we want you to avoid union representatives.

WE WILL NOT say anything that creates the impression that your union activities are under surveillance.

WE WILL NOT fail to recall employees from layoff because of their support for Teamsters Local 295 or any other union.

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

WE WILL offer Mohammed Based, Aporna Deb, Christopher Gomes, Kazi Rahman, Mohammed Rahman, and Mohammed Zaman full reinstatement to positions in our central kitchen, without prejudice to their seniority or other rights or privileges they previously enjoyed.

WE WILL make Mohammed Based, Aporna Deb, Christopher Gomes, Kazi Rahman, Mohammed Rahman, and Mohammed Zaman whole for any loss of earnings and other benefits suffered as a result of our discriminatory failure to recall them, less any interim earnings, plus interest.

WE WILL, within 14 days of the Board's Order, remove from our files any reference to our unlawful failures to recall Mohammed Based, Aporna Deb, Christopher Gomes, Kazi Rahman, Mohammed Rahman, and Mohammed Zaman, and WE WILL, within 3 days thereafter, notify them, in writing, that this has been done and that our failure to recall them will not be used against them in any way.

DAIKICHI CORP. D/B/A DAIKICHI SUSHI