Clark Equipment Company *and* United Steelworkers of America, AFL–CIO–CLC. Cases 11–CA–8746, 11–CA–9454, and 11–RC–4447

11 February 1986

DECISION, ORDER, AND CERTIFICATION OF RESULTS OF ELECTION

BY CHAIRMAN DOTSON AND MEMBERS DENNIS, JOHANSEN, BABSON, AND STEPHENS

On 27 January 1982 Administrative Law Judge Henry L. Jalette issued the attached decision. The General Counsel and the Respondent each filed exceptions and a supporting brief.[1] The Respondent also filed an answering brief to the exceptions of the General Counsel.

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,[2] and conclusions only to the extent consistent with this Decision, Order, and Certification of Results of Election.

The judge found numerous violations of Section 8(a)(1) of the Act. After deciding that the Union established its enjoyed majority support at the time it demanded recognition from the Respondent, the judge concluded that the severity and pervasiveness of the Respondent's unfair labor practices warranted the issuance of a bargaining order under the principles of *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969). In so doing, he sustained a number of the Union's objections to conduct affecting the election held on 13 July 1979 and, in light of his recommended bargaining order, found that the petition for election should be dismissed. We disagree.

As more fully set forth below, we disagree with many of the judge's findings of violation. The remaining unfair labor practices which we find the Respondent committed may be remedied by traditional means and do not warrant the extraordinary remedy of a bargaining order. We further find that these unfair labor practices, which are also the subject of objections in the representation case, are too isolated to rise to the level of objectionable conduct affecting the election in a unit of over 800 employees. Accordingly, we overrule the Union's objections and issue a certification of results of election.

Before addressing the substantive allegations of the complaint, we must resolve a procedural issue. As noted by the judge, the complaint in Case 11–CA–8746 alleges numerous independent violations of Section 8(a)(1), despite the absence of any specific allegations of independent 8(a)(1) conduct in the original and the amended charge which contained only allegations of 8(a)(3) and (5) conduct. Thus, the independent 8(a)(1) allegations of the complaint are dependent solely on the printed language of the charge form NLRB–401 that "[b]y the above acts and other acts, the above-named employer has interfered with, restrained and coerced employees in the exercise of rights guaranteed in Section 7 of the Act." The Respondent contended before the judge, and now in its exceptions to the judge's decision, that the printed language of the charge form is insufficient to support the allegations of the complaint. The judge rejected the Respondent's contention, citing *Texas Industries*, 139 NLRB 365 (1962), enfd. in relevant part 336 F.2d 128 (5th Cir. 1964). We agree with the judge's ruling and adopt his findings that the 8(a)(1) allegations were properly raised by the complaint and were not time-barred by Section 10(b) of the Act.[3]

A. *The 8(a)(1) Allegations*

1. A significant portion of the 8(a)(1) violations found by the judge involved the Respondent's distribution of eight pieces of literature in the 16 days preceding the election. The complaint alleged, and the judge found, that the Respondent through this literature unlawfully conveyed: threats of loss of

[1] We find no procedural defect in the Respondent's exceptions and brief, and deny the General Counsel's "Motion to Strike Portions of Respondent's Exceptions to the Decision of the Administrative Law Judge and Respondent's Brief in Support Thereof."

[2] The General Counsel and the Respondent 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.

In adopting the judge's finding that the announcement and the implementation of a job evaluation system were not unlawful, we do not rely on his gratuitous comment that the Respondent could have delayed the announcement and implementation of the program until after the election but was not required to do so. The implementation of the program was already planned and the employees informed of its imminent announcement when the Union filed its request to proceed In these circumstances, a delay would have been unlawful. (In this connection, we find merit to the Respondent's assertion that the Union's request to proceed was filed on 12 June 1979, rather than on 8 June, as found by the judge This finding does not affect our ultimate conclusion.) In addition, we note that Charles Smith, director of employee relations, testified that the new system resulted from *both* a linear regression analysis and managerial judgment Thus, we disagree with the judge's inaccurate characterization of Smith as "less than candid" on this point.

[3] Notwithstanding the result here, we wish to stress the importance of following the guidelines set forth in the Casehandling Manual. Sec 10064 5 of the manual specifically provides that "[i]f the allegations of the charge are too narrow," an amendment should be sought, and that if an amendment is not filed, "the case should be reappraised in this light, and the complaint issued, if any, should cover only matters *related* to the specifications of the charge "

benefits, plant closure, and the inevitability of a strike if the Union won; threats of discharge in reprisal for union activities; promises of benefits for rejection of the Union; and the message that it would be futile to select the Union as the employee's representative. In its exceptions, the Respondent essentially contends that its campaign was a truthful and lawful response to the Union's extensive leafleting campaign. It further contends that its references to benefits in progress before the campaign began and the possible undesirable effects of unionization do not amount to unlawful promises or threats, and that its literature otherwise falls within the protection of Section 8(c) of the Act. We agree with the Respondent's contentions and dismiss all allegations relating to the Respondent's literature.

At the outset, we note that the General Counsel conceded, and the judge found, that the Respondent's literature did not contain any express threats or promises. Instead, the judge agreed with the General Counsel's contention that unlawful threats and promises could be implied from the body of literature read as a whole. We find no such implications in the Respondent's literature.

With respect to the finding of unlawful threats of loss of benefits, the judge relied on the following statements by the Respondent:[4]

> Neither the Company nor the Union can predict what will be in the contract. Your wages and benefits could turn out to be higher, lower, or the same as they are now.
>
> . . . .
>
> I'm sure the Union will try to tell you there is some sort of law that will prevent the Company from negotiating for anything less than you now receive. That statement is simply not based on facts. I've given your supervisors copies of a decision in which *the Court upheld the employer's right to inform his employees that he may not even have to agree to the continuance of existing wages and benefits.* [Emphasis added.]
>
> . . . .
>
> These facts may seem harsh, but I think it's important that you know the truth about the collective bargaining process before you vote. Remember *bargaining means putting everything on the table, including the benefits you already have.* [Emphasis added.]
>
> . . . .
>
> Bargaining with a union can be a complicated and time consuming process during which the Union and the Company negotiate to get an agreement that both sides are satisfied with. And bargaining starts from scratch, which means that everything is negotiable.
>
> As I have told you, we would bargain in good faith. But, I would not sign a contract which I did not believe was in this plant's best interest. Sometimes, when a company takes this position, the union tries to force a settlement. This usually leads to a breakdown in bargaining and can result in a strike—which hurts everyone.
>
> . . . .
>
> You should know, however, that the benefit package given Rockingham employees by Clark from the time this plant opened was better than those at Clark's unionized plants. You were given greater benefits voluntarily by the Company than those in unions bargained repeatedly with Clark for more than 20 years for their benefits.
>
> . . . .
>
> Your pay increases are a result of the fair and responsible compensation policy we follow at Rockingham. There is no question in my mind it is better than the union approaches to wages that I've seen in the contracts of other companies in our area.
>
> A vote of no union is a vote to continue the pay practices we have committed to at Rockingham since the day we began operations.

The judge found that the only reasonable construction of these remarks is that if the Union won, the employees' benefits will be reduced, and that the Respondent thereby violated Section 8(a)(1) by making an implied threat of the loss of benefits. He further found that the remarks, viewed in the context of the Respondent's frequent reference to a strike and its favorable comparison of Rockingham plant wages with those at its unionized plants, amounted to a threat to adopt a regressive bargaining posture.

The Respondent contends that these statements are factually accurate, truthfully reflect the bargaining process, and were made in direct response to union promises. Thus, it argues that it fully discussed the bargaining process, including the possibilities that wages and benefits could go up, down, or stay the same. It also argues that the statements it made about wages and benefits at other plants were in response to the Union's extensive literature which referred to improved benefits at some unionized plants. (Twenty-two of the thirty-three leaflets

[4] The full text of the Respondent's statements is set forth in sec. II,A,1, of the judge's decision. To avoid lengthy repetition, we refer here only to excerpts, which we believe fairly characterize the general thrust of the Respondent's literature.

distributed by the Union, the Respondent alleges, contained this kind of claim.) We find merit to the Respondent's contentions. The statements on which the judge relied accurately reflect the obligations and possibilities of the bargaining process. They do not contain any threats that the Respondent will not bargain in good faith, or that *only* regressive proposals will result. We conclude that the Respondent has not impliedly or otherwise threatened that it will bargain regressively or take away benefits should the Union win the election. The leaflets contain permissible campaign materials within the protection of Section 8(c), and we, accordingly, dismiss this allegation.

In finding that the Respondent violated Section 8(a)(1) by impliedly promising employees improved benefits if they rejected the Union, the judge relied on the following statements made in leaflets circulated by the Respondent, and written by George Guttschalk, the Respondent's plant manager:

> I admit, no employer is perfect. However, I am totally convinced that we can best resolve our differences *without* the Steelworkers union and the adversary relationship the organizers have tried to develop. In order to move ahead, we must work together—not fight each other.
>
> . . . .
>
> Unions are known chiefly for:
>
> —extracting dues from you
> —calling strikes
> —making promises
> —causing confusion among employees.
>
> I am asking for a vote of confidence and a chance to prove what we can accomplish by working together—without interference by a union. I am asking for a chance to continue the improvements we have underway in Rockingham—without interference by the union.
>
> . . . .
>
> I know that mistakes have been made, the fact that we are having a union election at this time indicates to me that some of you felt it was necessary, at one time, for an outsider to represent you—that management was not responsive to your needs and concerns.
>
> It has been difficult to bring back to Rockingham the positive feelings that most of you had about the company, but I sincerely feel we have turned the corner. I am aware of your frustrations with machine problems, material flow problems, overtime problems, inconsistent interpretation of company policies, pay inconsistencies, and management in general. Also the personnel function has not been as sensitive to your needs as it should have been or could be. I admit that these things could have been diagnosed sooner and acted upon. However, we all know it is easy to quarterback Friday night's football game on Monday morning.
>
> I believe today we are building a management team which is willing to recognize its shortcomings and is actively working to correct them. It is not an easy job, but with your help it can be done. Programs have been developed to:[5]
>
> 1) Improve scheduling in the plant.
> 2) Reduce scrap.
> 3) Provide foremen training development.
> 4) Improve quality of our product.
> 5) Purchase required machinery.
> 6) Improve our housekeeping.

Although the judge noted that no specific benefits were promised in these statements, he concluded that taken as a whole they conveyed a willingness to do things differently and better if the employees rejected the Union. The judge stated he could place no other construction on statements about resolving differences without the Union and references to past mistakes coupled with a request for time.

The Respondent contends that it was permissibly reminding the employees of how good conditions were at the plant, including ongoing improvements it had instituted prior to the union campaign. We find merit in the Respondent's contentions. The record shows that a new management team was introduced in November 1978, when no election was pending, and that the Respondent had indeed begun those improvements it specified. Similarly, the Respondent's appeal for the employees' confidence, i.e., requesting them to give it another year "to work together," falls within the scope of permissible 8(c) statements.[6] We, therefore, also dismiss this allegation.

With respect to the threat of the inevitability of strikes, the judge again found that no single statement in any of the Respondent's literature contained such a threat. However, he concluded that taken as a totality the Respondent's literature led the employees to believe their choice was between no Union or striking. In addition to the mention of strikes in the materials discussed above, the judge also relied on the following references in various leaflets distributed by the Respondent:

[5] This portion of this exhibit inadvertently was omitted in the judge's decision.

[6] *National Can Corp.*, 159 NLRB 647, 659–660 (1966)

BARGAINING IS A TWO WAY STREET. Both the company and the union may present proposals at the bargaining table.

The Law does not require either the company or the union to agree to any proposal. NOTHING REQUIRES THE COMPANY TO AGREE TO ANY SPECIFIC UNION DEMAND OR TO MAKE ANY PARTICULAR CONCESSION TO THE UNION.

THE LAW DOES NOT PROVIDE FOR ANY ARBITRATOR TO RESOLVE BARGAINING DISPUTES.

BARGAINING with any union is an UNCERTAIN PROCESS at best. If that BARGAINING BREAKS DOWN, the union can call you out on STRIKE.

. . . .

Unfortunately, when a union campaigns to get into a plant, it may tell you anything to get your vote—ignoring the fact that all bargaining demands are subject to negotiations and the company cannot be required to agree to any particular demand made by the union. At best, bargaining with a union is a human process and subject to breakdown, that's when strikes occur—without the threat of that weapon, the union is powerless at the bargaining table.

. . . .

Let's review for a moment what has been discussed lately. The union in its attempt to get your vote has made promises of Jackson, Alcoa and Schlitz wages. They have tried to convince you that collective bargaining starts where you presently are and can only result in more. They have further implied not to worry about strikes and if one does occur you will not have a problem.

HOWEVER! What they have FAILED to tell you is that all wages, benefits and working conditions are subject to give and take of COLLECTIVE BARGAINING where NOTHING IS GUARANTEED, NOTHING IS AUTOMATIC and the RESULTS AT BEST ARE UNCERTAIN. Also, that strikes are always possible when a company and union negotiate.

. . . .

IF THE UNION IS VOTED IN WILL THERE BE A STRIKE?

I know that with a union the threat of a strike will always be with you.

I also know the only way the Union can try to force Clark to agree to what they may be promising you is to call you out on strike. Promises are cheap—strikes are real and would be expensive to you.

In 1978 unions in the United States called 4,300 strikes involving 1.6 million employees totalling 39 mill man days of lost work—and lost paychecks.

The judge concluded that there was no suggestion in any of this literature that in the collective-bargaining process minds could be changed without the necessity for striking. While he acknowledged that the Respondent was not obligated to make such a suggestion, he nevertheless found that by its theme of strikes and a reference to the nature and risks of collective bargaining in the context of other unlawful statements, the Respondent threatened employees with the inevitability of a strike if they selected the Union.

The Respondent contends that it never referred to strikes as more than a possibility; it referred to them in response to the Union's repeated mention of strikes in October 1978 and June 1979 leaflets and 8 and 9 July 1979 radio announcements;[7] and it included only accurate information about strikes that had occurred and the Respondent's rights and obligations during a strike. We find merit to the Respondent's position. Although the Respondent repeatedly referred to the possibility of strikes, it also repeatedly referred to its obligation to bargain in good faith. It permissibly pointed out the possibility of a strike, the facts surrounding strikes elsewhere (without insisting they would occur at the Rockingham plant), and certain economic realities, i.e., that the Union could only try to force *certain* conditions by striking. It is well settled that an employer is permitted by Section 8(c) to present its views of the economic realities of unionization, and we do not find that the Respondent has exceeded the rights afforded it by that section of the Act. We, therefore, find that the Respondent did not violate Section 8(a)(1) by threatening employees with the inevitability of strikes.

Finally, the judge made additional findings of 8(a)(1) violations in the Respondent's literature solely on the basis of his above-described analysis. Thus, he found that because the literature contained threats of loss of benefits and the inevitability of a strike, it also unlawfully conveyed the futility of selecting a collective-bargaining representa-

[7] In these leaflets and radio announcements, the Union told the employees that an authorized strike at Clark would not occur without a majority vote of the union members, and that strikes in the steel industry did not occur frequently or last long. The Union pointed out that 98 percent of all contracts are settled without a strike and there has not been a strike over contract issues in the basic steel industry since 1959.

tive. Similarly, he found that the Respondent's references to job security and plant closures amounted to unlawful threats of plant closure when viewed in the context of unlawful threats of loss of benefits, the inevitability of strikes, and the futility of selecting the Union as a bargaining representative. Finally, he found that the Respondent's references to the permanent replacement of strikers amounted to unlawful threats to discharge solely because they occurred in the context of the unlawful statements about the inevitability of a strike and the futility of unionization. As we have adopted none of the judge's conclusions from which he derived these additional findings, we necessarily dismiss the findings of unlawful threats of the futility of selecting a bargaining representative, plant closure, and discharge.

2. The judge found that the Respondent, by its supervisors, Ray Simmons and Robert Frank, unlawfully interrogated employee Marshby Covington, an open and active union supporter, and impliedly threatened him with loss of benefits. He based these findings on the credited evidence that the day before the election, Simmons and Frank asked Covington why he was voting for the Union, if he thought the Union could give him as many evaluations and raises as the Respondent had, and made comments similar to those in the Respondent's literature, described above, about the bargaining process and the possible loss of benefits. We disagree with these findings.

After the judge's decision issued, the Board revised its position on interrogations. The Board no longer finds inquiries directed at employees unlawful unless under all the circumstances the interrogation reasonably tends to restrain, coerce, or interfere with rights guaranteed by the Act.[8] Here, Covington was an open and active union adherent. Undisputed evidence shows he wore a union button and passed out union leaflets and cards on the Respondent's premises. Further, the circumstances surrounding his interrogation were not coercive. Thus, the judge credited the testimony that the supervisors' comments concerning loss of benefits were similar to the alleged threats in the Respondent's literature, which, as discussed above, we do not find unlawful. We, accordingly, dismiss the allegations that the Respondent violated Section 8(a)(1) of the Act by interrogating Covington and threatening him with the loss of benefits.[9]

3. The judge also found that the Respondent violated Section 8(a)(1) by its supervisor Ronnie Williams' interrogating and making a threat to employee Livingston Bridges. Thus, he credited testimony that about 2-1/2 weeks before the election, Williams first asked Bridges what he thought the Union could do for him, and then made statements to him that "if it came down to where y'all went out on strike and they had people out, they could go out and hire"; the Respondent had 100 to 200 people waiting for jobs; "if it came down to bargaining, they couldn't get anything for nothing; it would be more like a trade"; and "they would use us as examples for other Clark plants here in the South." Applying *PPG Industries*, 251 NLRB 1146, 1147 (1980), the judge found it irrelevant that Bridges was an open union supporter, and concluded that the Respondent unlawfully interrogated him and threatened him with job loss and reprisals for engaging in union activity.

We agree that the interrogation was unlawful, but rely instead on *Rossmore House*, supra, which overruled *PPG Industries*, on the ground that it had improperly established a per se rule concerning the interrogation of open union supporters.[10] Here the interrogation of Bridges was accompanied by coercive comments, most particularly the unlawful threat to make examples of the employees at this plant.[11] In these circumstances, we find the interrogation was unlawful and adopt the judge's conclusions that the Respondent violated Section 8(a)(1) by interrogating Bridges and threatening him with job loss and reprisals for union activity.

4. The judge found that the Respondent violated Section 8(a)(1) by its supervisor Brad McInnis' comments to employee Richard Diggs. Thus, about 1 week before the election McInnis first asked Diggs how he was going to vote and when Diggs replied for the Union, McInnis then inquired whether Diggs was sure he was doing the right thing. McInnis further asked Diggs if he knew that if the Union won he could lose his benefits and told him he should think twice about voting for the Union. Diggs was an active union adherent and McInnis admitted his knowledge of this. The judge found that these comments amounted to an implied threat of loss of benefits and that the interrogation, in the context of this threat, was, therefore, also

[8] *Rossmore House*, 269 NLRB 1176 (1984), enfd sub nom. *Hotel & Restaurant Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985).

[9] Member Dennis finds it unnecessary to pass on the question whether the Covington interrogation violated the Act because the finding of such an additional violation could be cumulative and would not affect the Order.

[10] Member Babson finds it unnecessary to pass on the issue of whether the interrogation of Bridges violated the Act since the finding of an additional violation merely would be cumulative and would not affect the Order.

[11] Indeed, it is this threat which colors Williams' statements about the Respondent's readiness to hire in the event of a strike, and renders unlawful what otherwise could have been a statement concerning the economic realities of the bargaining process.

unlawful. These findings are consistent with *Rossmore House*, and we, accordingly, adopt them.[12]

5. The judge found that the Respondent, by its supervisor Carter Kelly, unlawfully interrogated employee Willie Moore, threatened him with discharge, and indicated it was futile to select the Union as the employees' collective-bargaining representative. Thus, in the period before the election, Supervisor Kelly distributed some of the Respondent's literature, which dealt mostly with strikes, to employee Willie Moore, and asked Moore to come talk to him if he had any questions. In response to a question from Moore, Kelly stated that "if the Union would come in that they could not make the Company give nothing. All they could do was negotiate, and they could not give us better wages and benefits if the Company does not want to give them to us." Kelly added that if an employee was out on strike he could be replaced if the Company was falling down on productivity. In a later incident, while distributing more of the Respondent's campaign literature, Kelly asked Moore if he thought the Respondent needed a union. Kelly told Moore he did not need to answer the question, but Moore responded, saying he did not know. Kelly then asked if Moore thought the Union could give him more benefits than the Respondent.

The judge found the interrogation was unlawful and the other comments amounted to unlawful threats to discharge and demonstrated the futility of selecting the Union as a collective-bargaining representative. With respect to the interrogation, he found that, although Kelly told Moore he did not have to answer, Kelly nevertheless immediately followed Moore's reply with another question to get him to reveal his union sentiments. As to the threats, the judge relied on the repetition of similar comments in the Respondent's campaign literature, which he had found unlawful.

We agree that the interrogation was unlawful. No evidence was presented that Moore was an active union adherent. Further, we agree with the judge's finding that Kelly's repeated questioning of Moore was, in the circumstances, coercive.[13] However, we disagree with the judge's findings that Moore's remarks were unlawful threats of discharge and demonstrated the futility of selecting the Union. Moore's remarks, as the judge found, were essentially restatements of comments made in the Respondent's campaign literature. For the reasons presented in our discussion of the literature, we do not find these comments go beyond the protection of Section 8(c). We, therefore, dismiss the allegations that Kelly's comments amounted to unlawful threats.

6. The judge found that the Respondent also engaged in 8(a)(1) misconduct by two incidents of creating the impression of surveillance. Thus, he found that about a week before the election, Foreman James Freeman mentioned to employee Michael Grant that "not many people were attending the union meetings on Sunday and he heard that about only 500 people had signed cards." When Grant asked him how he knew this, Freeman responded that was what he had heard.

In a second incident, about 3 days before the election, Supervisor Randy Tunstall told employee Donald Pettigrew that he had heard about Pettigrew passing out union leaflets that day and he was disappointed in him. When Pettigrew asked how he had found out, Tunstall replied that "one of the guys" had seen him.

The judge found no merit to the Respondent's contentions that because the first comment did not refer to specific individuals, and because Pettigrew's leaflet distribution was open, these statements were not coercive. We disagree. Freeman's statement to Grant contained only general or known facts which he had "heard" (i.e., on 4 June, more than a month before Freeman's comments, the Union made a demand for recognition with a showing of 470 cards). An employee to whom this kind of statement was directed could not reasonably believe from it alone that the Respondent had intentionally embarked on a course of monitoring the Union's activity. We, therefore, find the statement did not create the impression of surveillance, was not coercive, and did not violate Section 8(a)(1).

As for the second incident, the open union activity of an employee was witnessed and commented on. This cannot reasonably convey the impression that the Respondent had placed union activity under surveillance. Employers are not required to make themselves oblivious to what employees have chosen to make known and obvious, and their failure to do so is not coercive. We, accordingly, also dismiss the allegation that, by Tunstall's comment, the Respondent created the impression of surveillance in violation of Section 8(a)(1).

7. The judge dismissed an allegation that the Respondent violated Section 8(a)(1) by engaging in surveillance. He credited the testimony of employees Jimmie Stubbs and Richard Harris that 1 week before the election, Supervisor Dean Meachum

[12] Chairman Dotson does not agree. He does not find that McInnis' statement about benefits was coercive, but that it was instead, an accurate reflection of one possibility of the negotiation process. In the absence of any threat, he also does not find the interrogation of the known union adherent Diggs unlawful under the rationale of *Rossmore House*.

[13] Cf. *Sunnyvale Medical Clinic*, 277 NLRB 1217 (1985), applying the principles of *Rossmore House* to the interrogation of an employee who was not a known union adherent. Member Dennis adheres to her *Sunnyvale* dissent.

raised the lid of Stubbs' wooden toolbox in the work area and briefly leafed through the materials which it contained. The box was Stubbs' personal property and contained union literature, buttons, and stickers. Union materials were also taped on the outside of the box. Meachum told Harris, who was standing nearby, that he had better shut the box and that it looked like it belonged to Jimmie Stubbs. Stubbs, who was standing across the room, witnessed the incident. The judge concluded that Meachum's inspection was not unlawful because the materials attached to the outside of the box openly advertised that it contained union materials. We disagree.

Meachum testified that he inspected the box because the Respondent had a rule against putting stickers on those boxes which it supplied its employees, although stickers were allowed on employees' personal property. However, Meachum also testifed that the only boxes that the Respondent supplied its employees were wheeled carts, which Stubbs' wooden box clearly was not. Meachum offered no other explanation for his conduct. Further, although the judge characterized Meachum's conduct as "a fleeting glance," we note that Meachum did more than open the lid and look inside; he also leafed through the union papers that were inside the box. We have no reasonable alternative but to infer that Meachum looked into the toolbox because he wanted to observe evidence of employee union activity. This action thereby had a tendency to coerce the employees in the exercise of their Section 7 rights, and we, accordingly, find that Meachum's conduct amounted to unlawful surveillance in violation of Section 8(a)(1).[14]

B. *The 8(a)(5) Allegation and the Recommended Bargaining Order*

The Union made a request for recognition on 4 June 1979, on the basis of 470 signed single-purpose union authorization cards in a unit stipulated to include 820 employees. The judge found that, as of 4 June 1979, 426 of the cards were valid designations of the Union as the collective-bargaining representative of the unit employees. The judge further found that the Respondent's unfair labor practices were sufficiently egregious and pervasive to warrant a bargaining order. He, therefore, found that the Respondent had a duty to bargain with the Union as of 4 June 1979, and because it has not done so has thereby violated Section 8(a)(5) and (1) since that date. We disagree.

Although, as found above, the Respondent has engaged in violations of Section 8(a)(1), we do not find that they are sufficiently egregious either in nature or number to warrant a bargaining order. Thus, in the weeks before the election the Respondent violated the Act by interrogating three employees about their union activity, threatening two of these same employees with the loss of benefits or other reprisals, interfering with the distribution of campaign literature, threatening two employees with arrest for distributing campaign literature, and engaging in surveillance of an employee's personal property for evidence of union activity. In addition, after the election, it further violated Section 8(a)(1) by interfering with the Board's processes by advising an employee twice that he was not legally required to honor Board subpoenas.

Considering the nature of the violations, especially in the context of the large size of the unit, and the lack of evidence of any dissemination of the misconduct which involved only nine employees, we do not believe that the effects of the Respondent's misconduct will linger to prevent a fair election. It is significant, although not dispositive, that the misconduct was exclusively in violation of Section 8(a)(1). No union adherents were discriminated against for their union activities despite the fact that the campaign was an open and active event, with many employees involved (e.g., approximately 450 signed cards) and with the Respondent knowing about many employees' open support for the Union. Based on all the above factors, we do not find that the Respondent's misconduct has precluded the likelihood of a fair election. We, therefore, do not adopt the judge's recommendation that a bargaining order should issue,[15] or his corrollary finding that the Respondent violated Section 8(a)(5) by refusing to recognize and bargain with the Union.

C. *The Objections*

In its objections, the Union essentially contended that the election should be set aside on the basis of the same misconduct which it alleged amounted to preelection violations of Section 8(a)(1). On the basis of the evidence, which the judge found amounted to preelection violations of Section 8(a)(1), he also found the Respondent engaged in the following objectionable conduct: threatening employees in its campaign literature, inter alia, with the loss of benefits, plant closure, and the in-

[14] See *Intertherm, Inc.*, 235 NLRB 693, 694 (1978), enfd in relevant part 596 F 2d 267 (8th Cir. 1979)

Chairman Dotson does not agree and would adopt the judge's dismissal of this allegation for the reasons the judge provided

[15] In light of this conclusion, we find it unnecessary to address the validity of the authorization cards used to establish majority support.

In finding a bargaining order inappropriate, Member Dennis relies on her concurring opinion in *Regency Manor Nursing Home*, 275 NLRB 1261 (1985)

evitability of strikes, and making promises; interfering with the distribution of union literature in nonwork areas and on nonworktime; interrogation; and creating the impression of surveillance.[16] He, therefore, recommended setting aside the election.

We do not agree. Thus, not only have we reduced the number of preelection findings of 8(a)(1) misconduct from that found by the judge, but we conclude that those that did occur do not warrant setting aside the election. In reaching this determination, we are cognizant that it is the Board's usual policy to direct a new election whenever an unfair labor practice occurs during the critical period since "[c]onduct violative of Section 8(a)(1) is, *a fortiori*, conduct which interferes with the exercise of a free and untrammeled choice in an election."[17] However, the Board has departed from this policy in cases where it is virtually impossible to conclude that the misconduct could have affected the election results. In determining whether misconduct could have affected the results of the election, we have considered "the number of violations, their severity, the extent of dissemination, the size of the unit, and other relevant factors."[18] Thus, in *Coca-Cola Bottling Co.*, 232 NLRB 717, 718 (1977), the Board declined to set aside the election despite interrogations affecting 2 employees out of a unit of 106 employees, in violation of Section 8(a)(1).

Here, the Respondent engaged in the above-described incidents of preelection misconduct involving eight different employees. However, these incidents occurred in a unit of over 800 employees and in the midst of an active and open campaign. (It is also relevant that the incidents of interference with the distribution of union literature and the surveillance were momentary only.) Further, all incidents involved only one or two employees, and no evidence of dissemination was presented. Taking these factors into consideration, we cannot conclude that this misconduct could have affected the results of the election, which with a tally of 391 for, and 489 against, the Union, cannot be characterized as close. We, accordingly, overrule all the objections and certify the results of the election.

AMENDED CONCLUSIONS OF LAW

The Conclusions of Law shall be amended as follows:

1. Substitute the following for Conclusion of Law 4.

"4. By threatening employees with loss of benefits and other reprisals if they selected the Union as their collective-bargaining representative; by interrogating employees about their union sentiments; by interfering with employees in the distribution of union literature in nonwork areas during nonworktime; by threatening the arrest of employees for distributing union literature in nonwork areas during nonworktime; by engaging in surveillance of the union activities of its employees; and by interfering with the Board's processes by telling employees they do not have to honor Board subpoenas, the Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act."

2. Substitute the following for Conclusion of Law 5.

"5. The Respondent has not refused to bargain with the Union, as the exclusive representative of its employees in the appropriate unit, within the meaning of Section 8(a)(1) and (5) of the Act as alleged in the complaint."

ORDER

The National Labor Relations Board orders that the Respondent, Clark Equipment Company, Rockingham, North Carolina, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with loss of benefits and other reprisals if they select United Steelworkers of America, AFL–CIO–CLC or any other labor organization as their collective-bargaining representative.

(b) Interrogating employees about their union sentiments in a manner or under circumstances constituting interference, restraint, or coercion.

(c) Interfering with employees in the distribution of union literature in nonwork areas during nonworktime and threatening the arrest of employees for distributing union literature in nonwork areas during nonworktime.

(d) Engaging in surveillance of the union activity of employees.

(e) Interfering with the Board's processes by telling employees they do not have to honor Board subpoenas.

(f) 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 the Union, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, and to refrain from any or all such activities.

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[16] No exceptions were made to the judge's overruling of the Union's Objections 3, 4, and 18, and these findings are adopted pro forma

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

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

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

(a) Post at its Rockingham, North Carolina plant copies of the attached notice marked "Appendix."[19] 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 upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

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

IT IS FURTHER ORDERED that the allegations of unlawful conduct not found to be violative of the Act shall be dismissed.

CERTIFICATION OF RESULTS OF ELECTION

IT IS CERTIFIED that a majority of the valid ballots have not been cast for United Steelworkers of America, AFL–CIO–CLC and that it is not the exclusive representative of these bargaining unit employees.

[19] 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."

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 you with loss of benefits or other reprisals if you select as your collective-bargaining representative United Steelworkers of America, AFL–CIO–CLC or any other labor organization.

WE WILL NOT interrogate you about your union sentiments in a manner or under circumstances constituting interference, restraint, or coercion.

WE WILL NOT interfere with your distribution of union literature in nonwork areas during nonworktime and threaten to arrest those of you who distribute union literature in nonwork areas during nonworktime.

WE WILL NOT engage in surveillance of the union activities of employees.

WE WILL NOT interfere with the Board's processes by telling you that you do not have to honor subpoenas of the National Labor Relations Board.

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

CLARK EQUIPMENT COMPANY

Calvin W. Sharpe, Ann B. Wahl, and *George Carson, Esqs.*, for the General Counsel.

Jules I. Crystal and *Neil G. Gaffney, Esqs. (Pope, Ballard, Shepard & Fowle)*, of Chicago, Illinois, and *George H. Plaut, Esq.*, of Buchanan, Michigan, for the Respondent.

Michael Krivosh of Stoneville, North Carolina, and *Harold McIver*, of Riverdale, Georgia, for the Charging Party.

DECISION

STATEMENT OF THE CASE

HENRY L. JALETTE, Administrative Law Judge. This consolidated proceeding involves allegations that Respondent Clark Equipment Company engaged in conduct violative of Section 8(a)(1) and (3) of the Act, and that certain conduct interfered with the holding of a free election. By reason of such conduct, and pursuant to an allegation that a majority of Respondent's employees had designated United Steelworkers of America, AFL–CIO–CLC as the collective-bargaining representative, the General Counsel contends that Respondent's refusal to recognize and bargain with the Union, on request, was violative of Section 8(a)(1) and (5) of the Act.

The proceeding is based on a charge in Case 11–CA–8746 filed by the Union on November 13, 1979, and amended on November 29, 1979. Pursuant thereto, complaint issued on December 31, 1979. By order dated April 11, 1980, Case 11–CA–8746 was consolidated with Case 11–RC–4447 for the purpose of hearing objections filed by the Union to conduct affecting the results of an election held among Respondent's employees on July 13, 1979. On September 10, 1980, an amended complaint was issued. On October 10, 1980, the Union filed a charge in Case 11–CA–9454, which charge was amended on No-

vember 5, 1980, and pursuant to which, complaint issued on the same date. During hearing on the prior charge, motion was made to consolidate Case 11–CA–9454 with Case 11–CA–8746. The motion was granted. Between October 6, 1980, and March 26, 1981, hearing was held at Rockingham, North Carolina.

On the entire record,[1] including my observation of the witnesses, and after consideration of the briefs of the parties, I make the following

FINDINGS OF FACT

I. THE FACTUAL SETTING

Respondent is a Delaware corporation with plants in several States of the United States, including a plant at Rockingham, North Carolina, the plant involved herein, where it is engaged in the manufacture of transmissions for heavy-duty equipment.[2] The plant employs about 900 employees. In mid-1977, the Union began an organizational campaign among such employees and on November 25, 1977, a petition for an election was filed in Case 11–RC–4447. On February 2, 1978, an election was held in which 249 votes were cast in favor of union representation and 355 votes against. Timely objections to conduct affecting the results of the election were filed by the Union and on February 1, 1979, the Board set aside the election and directed a second election. A second election was held on July 13, 1979, wherein 391 votes were cast in favor of union representation and 489 against. On July 20, 1979, the Union filed timely objections and on September 14, 1979, the Regional Director issued a second report on objections in which he overruled certain objections, sustained others, and found that others raised material and substantial issues best resolved by a hearing. As noted earlier such objections were consolidated for hearing with the unfair labor practice allegations.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Alleged Interference, Restraint, and Coercion*[3]

1. The campaign literature

About June 19, 1979, agreement was reached between Respondent and the Regional Director on an election date of July 13. Thereafter, beginning on June 25 and ending on July 10, Respondent distributed eight pieces of literature to its employees expressing its opposition to the Union. (G.C. Exhs. 2–9.)

The complaint alleges that in this volume of literature, all of which was signed by Plant Manager George Guttschalk, Respondent violated Section 8(a)(1) of the Act in that Respondent therein: threatened its employees with loss of benefits, plant closure, and the inevitability of a strike if they selected the Union as their collective-bargaining representative; threatened its employees with discharge for engaging in protected concerted activity; promised its employees benefits if they rejected the Union as their collective-bargaining representative; and informed its employees that it would be futile to select the Union as their collective-bargaining representative.

In support of these allegations, the General Counsel is not relying on express threats or promises; rather, the counsel for the General Counsel is contending that the threats and promises are to be implied from the entire body of the literature. Respondent, for its part, contends that all of the statements appearing in the literature were true, were made in response to campaign literature of the Union, contained no threats or promises of benefit, and were statements protected under Section 8(c) of the Act.

The allegation that Respondent threatened its employees with loss of benefits if they selected the Union as their collective-bargaining representative appears to be predicated on statements in the Company's literature on the subject of collective bargaining. In General Counsel's Exhibit 9, under the heading "If the Union wins the election, will it automatically give you more money?" the statement is made "And bargaining starts from scratch, which means that everything is negotiable."

While this piece of literature is the only one in which the phrase "bargaining starts from scratch" appears, this idea of a possible loss of benefits appeared in other forms in other pieces of literature. Thus, in General Counsel's Exhibit 2, Respondent stated, "Neither the Company nor the Union can predict what will be in the contract. Your wages and benefits could turn out to be higher, lower, or the same as they are now." And "I'm sure the Union will try to tell you that there is some sort of law that will prevent the Company from negotiating for anything less than what you now receive. That statement is simply not based on facts. I've given your supervisors copies of a decision [*Bendix Corp.*] *in which the Court upheld the employer's rights to inform his employees that he may not even have to agree to the continuance of existing wages and benefits.*" (Emphasis added.) The letter ended, "These FACTS may seem harsh, but I think it's important that you know the truth about the collective bargaining process before you vote. Remember, *bargaining means putting everything on the table, including the benefits you already have.*" (Emphasis added.)

In the argument relative to Respondent's threats of loss of benefits, the General Counsel has adverted not

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[1] After close of hearing, Respondent moved to reopen the record to receive certain documents relative to Respondent's policy with regard to employee claims for unemployment compensation. The issue of Respondent's policy is collateral to an allegation of independent 8(a)(1) conduct and the proffered material is offered essentially for credibility purposes. I deem it of insufficient probative value to warrant reopening the record and Respondent's motion is denied. The General Counsel's motion to correct the record is granted.

[2] Jurisdiction is not in issue Respondent admits, and I find, that it meets the Board's $50,000 direct outflow standard for the assertion of jurisdiction.

[3] The complaint in Case 11–CA–8746 alleges a variety of independent 8(a)(1) conduct such as threats, a wage increase, surveillance, interrogation, promises of benefit, and the solicitation of grievances. Neither the original charge, nor the amended charge, specified any independent 8(a)(1) conduct in the body thereof, containing only specification of 8(a)(3) and (5) conduct. Thus, the independent 8(a)(1) allegations of the complaint are dependent wholly on the printed language of the charge (form NLRB–401) that "By the above acts and other acts, the above-named employer has interfered with, restrained, and coerced employees in the exercise of rights guaranteed in Section 7 of the Act." Respondent contends this is insufficient to support the allegations of the complaint. I find no merit to the contention *Texas Industries*, 139 NLRB 365 (1962), enfd. in relevant part 336 F.2d 128 (5th Cir 1964)

only to the statements quoted above, but to statements which he says conveyed the idea that strikes were inevitable, and to statements that Respondent's employees in Rockingham were receiving good wages and benefits whereas employees at Respondent's unionized plants were not doing as well. The General Counsel argues, "The combined effect of all these statements were to impress upon the employees that if the Union were selected as their bargaining representative Respondent could take away the benefits it had bestowed upon them just as easily as they had been given and could deny them future benefits." I find merit in the General Counsel's position.

In *Coach & Equipment Sales Corp.*, 228 NLRB 440–441 (1977), the Board stated:

> Thus, where a bargaining-from-scratch statement can reasonably be read in context as a threat by the employer either to unilaterally discontinue existing benefits prior to negotiations, or to adopt a regressive bargaining posture designed to force a reduction of existing benefits for the purpose of penalizing the employees for choosing collective representation, the Board will find the violation. Where, on the other hand, the clearly articulated thrust of the bargaining-from-scratch statement is that the mere designation of a union will not automatically secure increases in wages and benefits, and that all such items are subject to bargaining, no violation will be found. A close question sometimes exists whether bargaining-from-scratch statements constitute a threat of economic reprisal or instead constitute an attempt to portray the possible pitfalls for employees of the collective-bargaining process. The presence of contemporaneous threats or unfair labor practices is often a critical factor in determining whether there is a threatening color to the employer's remarks.

In the statements adverted to above, I do not find that Respondent made an express threat to unilaterally discontinue existing benefits, but I do find a clear threat, in the words of the Board, "to adopt a regressive bargaining posture." I base this finding on the following statements in the pamphlet (G.C. Exh. 9) distributed on July 8 or 9:

> Bargaining with a union can be a complicated and time consuming process during which the union and the Company negotiate to get an agreement that both sides are satisifed with. And bargaining starts from scratch, which means that everything is negotiable.
>
> As I have told you, we would bargain in good faith. But, I would not sign a contract which I did not believe was in this plant's best interest. Sometimes, when a company takes this position, the union tries to force a settlement. This usually leads to a breakdown in bargaining and can result in a strike—which hurts everyone.
>
> CAN YOU COUNT ON IMPROVEMENTS IN BENEFITS IF THE EMPLOYEES VOTE IN THE UNION?
>
> No one can predict that!! Once again bargaining would take place to determine whether you would gain, lose or maintain your present benefits.
>
> You should know, however, that the benefit package given Rockingham employees by Clark from the time this plant opened was better than those at Clark's unionized plants. You were given greater benefits voluntarily by the Company than those in unions bargained repeatedly with Clark for more than 20 years for their benefits.
>
> HAVE THE PAY CHANGES FROM THE TIME YOU WERE HIRED AT ROCKINGHAM BEEN FAIR AND MEANINGFUL?
>
> One of the most impressive things about our pay plan is the income progress you have made since being hired at Clark.
>
> Please take the time to measure your own pay increases resulting from the pay progression steps of your grade, promotions you have earned, salary structure adjustments from our surveys, and job evaluation.
>
> Your pay increases are a result of the fair and responsible compensation policy we follow at Rockingham. There is no question in my mind it is better than the union approaches to wages that I've seen in the contracts of other companies in our area.
>
> A vote of no union is a vote to continue the pay practices we have committed to at Rockingham since the day we began operations.

In my judgment, the ony reasonable construction of these remarks is that if employees select the Union their benefits will be reduced. This is evident when one juxtaposes the ideas that "bargaining starts from scratch" and "everything is negotiable" with the reminder that existing benefits are better than those at Clark's unionized plants after 20 years of bargaining. The clear implication in this is that Respondent grants better benefits to employees who are not represented by a union than to employees who are; in effect, the statement implies that it discriminates against employees in its unionized plants because they are unionized. When one adds to this message, the statement "A vote of no union is a vote to continue the pay practices we have committed to at Rockingham since the day we began operations," the implied threat of loss of benefits is apparent and a finding of a violation of Section 8(a)(1) of the Act is warranted.

In support of the allegation that Respondent made unlawful promises of benefit, the General Counsel adverts to statements in General Counsel's Exhibits 2, 4, 5, 7, 8, and 9. In my judgment, when Respondent's statements are considered in their totality and context, a finding is warranted that Respondent impliedly promised employees benefits if they rejected the Union. I base my finding on the following: In General Counsel's Exhibit 5, which

had as its principal theme the dissension associated with unions, Guttschalk stated:

> I admit, no employer is perfect. However, I am totally convinced that we can best resolve our differences *without* the Steelworkers union and the adversary relationship the organizers have tried to develop. In order to move ahead, we must work together—not fight each other.

General Counsel's Exhibit 9 contained the following:

ON UNIONISM

GEORGE GUTTSCHALK'S ATTITUDE ON UNIONS

I appreciate talking directly with each of you and hope you value talking with me direct—not through a third party.

Unions are known chiefly for:

—extracting dues from you
—calling strikes
—making promises
—causing confusion among employees

I am asking for a vote of confidence and a chance to prove what we can accomplish by working together—without interference by a union. I am asking for a chance to continue the improvements we have underway in Rockingham—without interference by the union.

A UNION IS NOT NEEDED IN OUR PLANT!

. . . .

In any manufacturing business there will continue to be challenges for us. Don't believe it if the union tells you they can solve them—only you can I as members of the Company working together have and will solve them. We don't need a third party to cause confusion our divert our best efforts.

In summary, our rockingham plant is on the move. we know where we have been. Working together we will continue to show improvements. I value my direct relationship with each of you and the trust that we have in one another. I ask you not to permit a union to put themselves in the middle of our relationship. Vote no to their efforts. Vote no to the union.

In General Counsel's Exhibit 7, Guttschalk wrote:

> I am asking you in all sincerity to CONSIDER THE FACTS. Sure we have problems and much needs to be done. But lets first be done with all the upset and argument we have put up with this past year and a half. Your "No" vote will give us a one year opportunity to work together—without having to worry about union dues, bargaining breakdowns, strikes and picket lines. After all, if I fail you in the next year, bringing a union in then will be much easier than trying to get rid of this one if it doesn't work out.
>
> I have learned an awful lot. I honestly believe we can solve our problems. I appreciate your patience, support and continuing high level of work which you have performed during those trying times.

Finally, in General Counsel's Exhibit 8, Guttschalk wrote:

> I know that mistakes have been made, the fact that we are having a union election at this time indicates to me that some of you felt it was necessary, at one time, for an outsider to represent you—that management was not responsive to your needs and concerns.
>
> It has been difficult to bring back to Rockingham the positive feelings that most of you had about the company, but I sincerely feel we have turned the corner. I am aware of your frustrations wth machine problems, material flow problems, overtime problems, inconsistent interpretation of company policies, pay inconsistencies, and management in general. Also the personnel function has not been as sensitive to your needs as it should have been or could be. I admit that these things could have been diagnosed sooner and acted upon. However, we all know it is easy to quarterback Friday night's football game on Monday morning.
>
> I believe today we are building a management team which is willing to recognize its shortcomings and is actively working to correct them. It is not an easy job, but with your help it can be done.
>
> 1) Improve scheduling in the plant.
> 2) Reduce scrap.
> 3) Provide foremen training development.
> 4) Improve quality of our product.
> 5) Purchase required machinery.
> 6) Improve our housekeeping.

In my judgment, the foregoing statements clearly imply that the employees will receive benefits, albeit unspecified, if they reject the Union. I can place no other construction on statements about resolving differences without the Union, working together, and not fighting each other; statements requesting a vote of confidence and "a chance to prove what we can accomplish"; and references to past mistakes, which are blamed for the employees' desire for union representation, coupled with a request for time ("a one year opportunity to work together").

In arguing against a finding of unlawful promise, Respondent contends that all that it was telling the employees was how good conditions were at its plant, what it had done, and what its policies were and would continue to be. I do not believe such a reading of Respondent's literature is accurate. To the contrary, the idea conveyed is one of a willingness to do things differently and better if the employees reject the Union. While the promises are not specific, they are nevertheless promises.

As to the matter of strikes, there is the allegation that Respondent threatened its employees with the inevitability of a strike. The Respondent's references of to strikes,

and strike violence, are so numerous that I am loathe to set them forth here. In its totality, Respondent's literature lends itself to no other construction than that it threatened employees with the inevitability of a strike, although no single statement can be said to contain such a threat. In the analysis that follows, I have excerpted some statements which, in my judgment, support a finding of a violation. At the outset, however, I would explain that the rational for my conclusion is that articulated by the Board in *Amerace Corp.*, 217 NLRB 850, 852 (1975). The Board stated:

> In arguing against unionism, an employer is free to discuss rationally the potency of strikes as a weapon and the effectiveness of the union seeking to represent his employees. It is, however, a different matter when the employer leads the employees to believe that they must strike in order ot get concessions. A major presupposition of the concept of collective bargaining is that minds can be changed by discussion, and that skilled, rational, cogent argument can produce change without the necessity for striking. When an employer frames the issues of whether or not the employees should vote for a union purely in terms of what a strike might accomplish, he demonstrates an attitude of predetermination that bargaining itself will accomplish nothing. Employees should not be led to believe, before voting that their choice is simply between no union or striking.

In my judgment, Respondent's employees have been led here to believe that their choice is simply between no union or striking. The literature, it will be noted, does refer to collective bargaining and Respondent did state it would bargain in good faith. (G.C. Exh. 9, p. 3.) But giving lip service to the collective-bargaining process does not mean that a finding of threats of the inevitability of a strike is not warranted.

Among the statements made by Guttschalk in the literature are the following:

> ALL UNION CONTRACTS ARE NOT THE SAME. Contracts are decided by the give and take of bargaining, and in bargaining, NOTHING IS AUTOMATIC.
>
> If the union wins the election, the ONLY OBLIGATION the company would have would be to sit down and BARGAIN in good faith with the union.
>
> The union CANNOT GUARANTEE any gains in wages or benefits, nor can it guarantee any improvements in working conditions.
>
> Neither the company nor the union can predict what will be in a contract. Your wages and benefits could turn out to be higher, lower, or the same as they are now.
>
> BARGAINING IS A TWO WAY STREET. Both the company and the union may present proposals at the bargaining table.
>
> The LAW does not require either the company or the union to agree to any proposal. NOTHING REQUIRES THE COMPANY TO AGREE TO ANY SPECIFIC UNION DEMAND OR TO MAKE ANY PARTICULAR CONCESSION TO THE UNION.
>
> THE LAW DOES NOT PROVIDE FOR ANY ARBITRATOR TO RESOLVE BARGAINING DISPUTES.
>
> BARGAINING with any union is an UNCERTAIN PROCESS at best. If that BARGAINING BREAKS DOWN, the union can call you out on STRIKE.
>
> Unfortunately, when a union campaigns to get into a plant, it may tell you anything to get your vote—ignoring the fact that all bargaining demands are subject to negotiations and the company cannot be required to agree to any particular demand made by the union. At best, bargaining with a union is a human process and subject to breakdown, that's when strikes occur—without the threat of that weapon, the union is powerless at the bargaining table. [G.C. Exh. 4.]
>
> —BARGAINING?—It means nothing is automatic and nothing is guaranteed. Under the law, you can lose as a result of bargaining. Bargaining at any time can be complicated and time consuming process and can be even worse on a first contract. [Leaflet, G.C. Exh. 6.]
>
> Let's review for a moment what has been discussed lately. The union in its attempt to get your vote has made promises of Jackson, Alcoa and Schlitz wages. They have tried to convince you that collective bargaining starts where you presently are and can only result in more. They have further implied not to worry about strikes and if one does occur you will not have a problem.
>
> HOWEVER! What they have FAILED to tell you is that all wages, benefits and working conditions are subject to give and take of COLLECTIVE BARGAINING where NOTHING IS GUARANTEED, NOTHING IS AUTOMATIC and the RESULTS AT BEST ARE UNCERTAIN. Also, that strikes are always possible when a company and union negotiate. [July 9 letter.]
>
> IF THE UNION WINS THE ELECTION, WILL IT AUTOMATICALLY GET YOU MORE MONEY?
>
> I know the Union would have you believing, but in dealing with a union any pay change depends on the give and take of bargaining.
>
> Bargaining with a union can be complicated and time consuming process during which the union and the Company negotiate to get an agreement that both sides are satisfied with. And bargaining starts from scratch, which means that everything is negotiable.
>
> As I have told you, we would bargain in good faith. But, I would not sign a contract which I did not believe was in the plant's best interest. Sometimes, when a company takes this position, the union tries to force a settlement. This usually leads to a breakdown in bargaining and can result in a strike—which hurts everyone.

> IF THE UNION IS VOTED IN WILL THERE BE A STRIKE?
>
> I know that with a union the threat of a strike will always be with you.
>
> I also know the only way the Union can try to force Clark to agree to what they may be promising you is to call you out on strike. Promises are cheap—strikes are real and would be expensive to you.
>
> In 1978 unions in the United States called 4,300 strikes involving 1.6 million employees totalling 39 mill man days of lost work—and lost paychecks. [G.C. Exh. 9 (on pay).]

Is there even the slightest suggestion in the foregoing that in the process of collective bargaining "minds can be changed by discussion, and that skilled, rational, cogent argument can produce change without the necessity for striking?" I find none. Respondent may argue that such is not its obligation, and rightly so. But that is not the point; the evil lies not in what it failed to say, but in what it said, and, in that regard, the idea it conveyed was precisely the opposite of that quoted above.

This is readily seen when one considers that with these statements about collective bargaining Guttschalk was making the statements considered earlier that unionized employees of Clark were receiving less benefits than the Rockingham employees, that the employees should give the Company a chance, and that it and the employees could work out their problems without the Union. Confronted with such rhetoric, and the repeated refrain about strikes and strike violence, employees could form no other conclusion than that if they voted for the Union a strike was inevitable. Accordingly, I find that by its theme of strikes and its references to the nature and risks of collective bargaining, in the context of other unlawful statements, Respondent threatened employees with the inevitability of a strike if they selected the Union and thereby restrained and coerced employees in violation of Section 8(a)(1) of the Act.[4]

As noted, the General Counsel contends that Respondent's literature conveyed to employees that it would be futile for them to select the Union as their collective-bargaining representative. In support of the contention, he adverts to General Counsel's Exhibits 5, 6, and 8, but he does not indicate which statements therein support such a finding. Essentially, his argument is that the statements which support a finding of threats of loss of benefits and inevitability of strikes supports a finding that Respondent conveyed the idea to employees that it would be futile for them to select a collective-bargaining representative.

I agree. When an employer threatens employees with the loss of benefits, reminds them of the failure of the Union to obtain better benefits as its other plant (G.C. Exh. 8), reminds them of the complexity and time-consuming process of collective bargaining and the inevitability of a strike if the Union is selected as their collective-bargaining representative, it conveys at the same time an idea of utter futility of selecting a collective-bargaining representative, and I find, based on the statements quoted earlier, that Respondent thereby violated Section 8(a)(1) of the Act.

As to allegation of threats of plant closure, it is based on the entire body of literature with particular reference to statements on job security (G.C. Exh. 3), and to the closing of plants of Clark in other locations where the employees had been represented by the Union (G.C. Exh. 9). Respondent contends that its statements were true, did not attribute the plant closings to the Union, but rather to economic considerations, and were in response to union literature.

In my judgment, Respondent's statements about job security and its references to plant closings are unlawful only if my earlier findings of threats of loss of benefits, the inevitability of strikes, and the futility of selecting the Union as bargaining representative are valid. In the context of such other unlawful statements, the statements about job security and references to plant closings cannot be construed as other than implied threats of plant closure. I so find.

The last threat alleged to have been contained in the literature is a threat of discharge for engaging in protected concerted activity. In support of this allegation, the General Counsel adverts to General Counsel's Exhibit 5 and statements about job security and strikes. The statements are part and parcel of Respondent's statements of the inevitability of strikes and threats of plant closure which I have already found to be unlawful. While plant closures result in loss of jobs, to extrapolate from such a finding a further finding of a threat of discharge appears to me to be unwarranted.

Perhaps I have misread the General Counsel's position because there is support for a finding of a threat of discharge for engaging in protected concerted activity in Respondent's references to the permanent replacement of strikers in view of the Respondent's prediction of inevitability of a strike and the futility of selecting the Union as the collective-bargaining representative. In light of such other unlawful conduct, Respondent's statements about permanent replacements constitute unlawful threats of discharge. *Progressive Supermarkets*, 259 NLRB 512 (1981).

2. The job evaluation program

As noted earlier, on June 19, 1979, agreement was reached between Respondent and the Regional Director for an election date of July 13. On June 27 Respondent posted a notice that beginning June 29 it would conduct employee meetings to discuss the results of a job evaluation program. On June 29 Guttschalk conducted several meetings with employees, at each of which he gave the same talk describing the results of the job evaluation program. In that talk, he told the employees, among other things, that new grades and wage ranges would become effective July 9 and that after his meeting the supervisors would inform each individual employee what his job grade was and review the wage-range structure. As a result of the job evaluation, 840 employees out of 874 received wage increases.

[4] The General Counsel's request for reconsideration of my ruling at the hearing rejecting G C. Exhs. 10 and 11 for identification and for their receipt into evidence is denied. His arguments continue to overlook the fact that no employee could testify to having been shown the documents.

In accordance with Respondent's pay schedule, employees would not have been paid any increases until Friday, July 20; however, when they were paid on July 13, the day of the election, they received their higher rate of pay of one day of the preceding week.

The complaint alleges that Respondent announced and granted a wage increase to its employees in order to discourage union activities. This is a very straightforward allegation, but it depends on congeries of facts and circumstances which render decision quite difficult. Thus, in the brief, the General Counsel contends that the violation is composed of "the timing of the announcement of the job evaluation results; the concomitant alteration of the existing grade and wage structure and the accompanying wage increase; and the inclusion in the employees' election day paychecks of one day's pay at the new rate."

As to the timing, it is the General Counsel's contention that the job evaluation process was prolonged in order to permit announcement and implementation of the results to coincide with the election. I find the contention lacking in merit.

It is undisputed that a job evaluation review was begun in December 1978, and that it had an estimated completion date of March 30, 1979, at which time the employees were to be appraised of the results. (R. Exh. 21.) Respondent's witnesses testified to the delays in meeting that estimated completion date and there is no reason to reject that testimony. While it is true that as of February 1, 1979, Respondent knew of an impending election, it did not have any idea when an election would be held because the Union had withdrawn a request to proceed it had filed earlier. The delay in completion of the job evaluation program could not in the circumstances be attributed to an impending election (unless one is willing to infer that Respondent had determined to delay the matter indefinitely until the Union made its next move, an inference I am unwilling to make).

After March 30, the record indicates the various steps that remained to be performed to complete the job evaluations and that they culminated in an announcement on June 8 that Respondent expected to present the program to the employees at the end of the month. As of that date, although the Unon had demanded recognition on June 4, there was still no election in the picture. However, on the same date of that announcement, the Union filed a request to proceed that triggered the election arrangements. It is after this point that the timing of the announcement must be evaluated. In my judgment, Respondent was warranted on and after June 8 to continue the process it had begun in December. I find that is what it did and that if the timing of its actions was coincident with the election it was attributable to the fact that the Union filed a request to proceed when it knew that Respondent had completed the evaluation and was about to announce the results.

Actually, Respondent had not completed the evaluation process before June 8. Mathematical calculations had been made and grades had been restructured, but the final wage rates had not yet been approved and were not approved until sometime after June 8. In my judgment, this does not render Respondent's conduct unlawful. What was done was a finalization of a process of several months. While Respondent could have delayed announcement and implementation until after the election, it was not required to do so.

The General Counsel's second point, that there was "concomitant alteration of the existing grade and wage structures and the accompanying wage increase," is the most difficult facet of the job evaluation program to understand and resolve. The first difficulty with the issue is the fact that 840 out of 874 employees received a wage increase. In light of such numbers, it would appear to be appropriate to denominate the action of Respondent as the grant of a general wage increase and, when one considers that Respondent had granted a general wage increase only 10 weeks before (May 1), the inference that the wage increases effective July 9 were for the purpose of eroding employee support for the Union appears justifiable. Yet, on reflection, a conclusion based on such an approach substitutes a label such as "general wage increase" for an analysis of the facts that assertedly produced the wage increase. This is the central question: on what facts were the wage increases based?

It is not disputed that the job evaluation program was based on the National Electrical Manufacturers Association (NEMA) job evaluation plan, a plan recognized throughout the industry as a tool for establishing a job evaluation system. According to this plan, each job is evaluated on a number of factors to which points are assigned and the total points within a certain range are given a grade. Before the job evaluation here in question, Respondent had nine grades with a specified range of job evaluation points for each grade. After the job evaluation, there were only eight grades and the range of points had been changed:

GRADE	*OLD EVALUATION POINTS*	*NEW EVALUATION POINTS*
1	1—150	1—134
2	151—172	135—151
3	173—194	152—187
4	195—216	188—222
5	217—238	223—258
6	239—260	259—293
7	261—282	294—328
8	283—304	329+
9	305+	

As to the wage ranges in existence before and after the changes, they were as follows:

GRADE	*OLD WAGE RANGES*			*NEW WAGE RANGES*		
	START	*3 MOS.*	*9 MOS.*	*START*	*3 MOS.*	*9 MOS.*
1	$4.26	$4.54	$4.75	$4.46	$4.75	$5.06
2	4.52	4.76	5.03	4.67	4.97	5.30
3	4.77	5.05	5.34	4.89	5 21	5.55
4	5.07	5.35	5.61	5.13	5.46	5.82
5	5.37	5.67	5.97	5.37	5.72	6.09
6	5.68	5.98	6.56	5.91	6.29	6.70

GRADE	OLD WAGE RANGES			NEW WAGE RANGES		
	START	3 MOS.	9 MOS.	START	3 MOS.	9 MOS.
7.....	5.74	6.27	6.81	6.48	6.90	7.35
8.....	5.91	6.54	7.08	7 10	7.56	8.05
9.....	7.20	7.54	7.89			

As is readily seen, the job evaluation review produced substantial changes: the point ranges for each grade were different, there was one less grade, and the rates of pay were higher, in some cases, significantly so. For example, it will be noted that the range of points for grade 1 was changed from 1–150 points to 1–134 points, and for grade 2 from 151–172 points to 134–151 points. In effect, this change raised grade 1 jobs to grade 2 jobs, grade 2 jobs to grade 3, etc., without raising the point value of the jobs. As to rates of pay, the 9-month rate for grade 2 jumped from $5.03 to $5.30 per hour, and increases appear for every other grade.

According to Charles Smith, who was director of employee relations for Respondent in July 1979, and who completed the job evaluation review after all the jobs had been evaluated and assigned point totals, such results were not based on management judgments; rather they were obtained by performing a linear regression analysis, a widely used statistical method to determine the relationship, or the "line of best fit," between two variables. In so testifying, however, Smith was not completely candid. The regression data did not produce the wage rates appearing above. This was made clear by Dennis Bankowski, Respondent's director of personnel policies and programs, who described how he recapitulated what Smith had done and according to his recapitulation the 9-month wage rates appearing above were not the product of a regression analysis. Bankowski compared what he had described was the regression data with the wage rates above in the following manner:

Grade	Regression Data	Implemented Pay	Comparison
2	$5.09	$5.30	$.21 higher
3	5.44	5.55	11 higher
4	5.90	5.82	.08 lower
5	6.38	6.09	.29 lower
6	6.84	6.70	.14 lower
7	7.30	7.35	.05 higher

It is evident from this that the wage rates put into effect by Respondent did not result solely from the application of a mathematical formula, but rather represent the results of management judgments. Respondent does not dispute that and ascribes the judgments to one of the elements involved in any job evaluation review, namely, smoothing the curve. On this score, I must confess to a great deal of skepticism, but I am persuaded by the data in the record that whatever name is given to the process, be it smoothing the curve or something else, the conclusion that the figures were manipulated to affect the results of the election is not warranted.

For one thing, Respondent's Exhibits 49(k) and (l) indicate a greater consistency in wage rates after the changes, one of the objectives of the job evaluation review. More importantly, in my judgment, is the way in which the changes impacted on the various grades and the population in each grade. For example, grade 2 which was implemented 21 cents higher than the regression data had a population of 52 employees; grade 3 was implemented 11 cents higher and had a population of 194; grade 4 was implemented 8 cents lower and had a population of 320; grade 5 was implemented 29 cents lower and had a population of 169.[5] Consideration of this data compels the conclusion that the deviations between the implemented pay and the regression data were not for the purpose of eroding employee support for the Union. If that had been Respondent's purpose, one would expect deviations aimed at the greatest number for the greatest impact. There is no rhyme or reason to the deviations unless they are attributable to the explanation offered by Respondent.

I am mindful of the fact that not only were wage rates increased but also that by changing grade cutoff points some employees received substantial wage increases. However, as I understand the evidence in the record, this combination of circumstances is to be expected when jobs are reevaluated. An examination of the population in each grade before and after the change does not tend to support any finding that the grade cutoffs were so altered as to have the greatest impact on the greatest number.

In concluding that a finding is not warranted that the wage rates were unlawfully raised, I have considered the testimony of the General Counsel's witness Joseph Marrotti and I find nothing in his testimony to support a different conclusion.

The third point in the General Counsel's argument for finding the announcement and implementation of the job evaluation program unlawful is based on the inclusion of 1 day's pay at the new rate in the employees' election day paychecks. I find this circustance insufficient to warrant a finding of a violation.

Harry Warner, systems analyst for Respondent, testified that the inclusion of 1 day's pay at the new rates in the election day paychecks was attributable to the way in which Respondent prepares its payroll and how the computer works. The paychecks of the employees on July 13 were in payment for work performed the preceding week, which included the holiday of July 4 for which employees were entitled to holiday pay. Respondent uses a computer to prepare the payroll and it is programmed to "Create Holiday Pay." However, the new rates of pay resulting from the job evaluation review had been loaded into the computer before the "Create Holiday Pay" program was activated and when the program was activated it picked up the new rates for 1 day.

In short, according to Warner's testimony, the payment of 1 day at the new rate was a mistake attributable to the way the computer was programmed. Respondent submitted evidence of similar prior "mistakes," but such

[5] These figures were extracted from G C. Exh. 34.

evidence is not very impressive. Nevertheless, I credit Warner. I simply cannot believe that Respondent consciously undertook to pay 1 day at the new rate for the purpose of affecting the results of the election when the employees already knew that which was important to them; namely, that they were getting a wage increase; and 1 day's pay at the new rate would only be buried in the entire week's paycheck.

In short, for all the foregoing reasons, I find that the General Counsel has failed to establish by a preponderance of the evidence that the announcement and implementation of wage increases in the period preceding the election was for the purpose of affecting the results of the election.

3. Threats and interrogation by supervisors

The complaint alleges a number of threats by supervisors which are related to statements in Respondent's campaign literature. Thus, paragraph 8(b) of the complaint alleges that Supervisors Ray Simmons and Robert Frank threatened employees with loss of benefits if they selected the Union as their collective-bargaining representative. The allegation is based on the testimony of former employee Morasby Covington that on the day before the election, Supervisors Simmons and Frank came up to him on the job and started a conversation. Covington testified that they asked him why he was voting for the Union and if he thought the Union could give him as many job evaluations and raises as the Company had. Simmons also said that if the Union came in Covington would lose all his benefits and have to have a bargaining order to get them back.

Simmons and Frank denied the statements attributed to them by Covington. Neither Simmons nor Frank impressed me favorably for their candor, and except as to the remarks that if the Union came in he would lose all his benefits and have to have a bargaining order to get them back, I credit him. As to those remarks, I am persuaded that Covington was testifying truthfully, but that his version of the remarks was an interpolation of what Simmons or Frank said. I am persuaded that what was said to him was similar to the statements about bargaining and loss of benefits such as have been described above in any analysis of the Company's campaign literature. In that analysis, I found an implied threat of loss of benefits and I find that Simmons or Frank conveyed to Covington the same implied threat contained in the Company's literature and thereby violated Section 8(a)(1) of the Act.

The testimony of Covington quoted above also reveals that he was interrogated about his union sentiments. Paragraph 8(i) alleges such interrogation to have been violative of Section 8(a)(1) of the Act. Apart from any other considerations, inasmuch as the interrogation was accompanied by an unlawful threat of loss of benefits, I find that it had a tendency to coerce and was violative of Section 8(a)(1) of the Act.

Employee Livingston Bridges testified that about 2-1/2 weeks before the election, Supervisor Ronnie Williams approached him on the job and asked him what he felt the Union could do for him. Bridges answered job security. Williams said, "Well, if it came down to where y'all went out on strike and they had people out, they could go out and hire." He said there were approximately 100 or 200 people waiting for jobs at Clark. He also said that, "If it came down to bargaining, they wouldn't get anything for nothing; it would be more like a trade." Williams also said, "that they would use us as examples for other Clark plants here in the south." Employees Hurley Perkins overheard Williams' last remark.

The foregoing is undenied and on that basis the General Counsel contends that a finding is warranted of unlawful interrogation and a threat of discharge. Respondent argues that a finding of unlawful interrogation is not warranted; because Bridges was an avowed union supporter who wore union insignia in the plant. The fact that Bridges was an avowed union supporter is no defense to the interrogation. As the Board indicated in *PPG Industries*, 251 NLRB 1146, 1147 (1980), such questioning conveys an employer's displeasure with employees' union activity and thereby discourages such activity in the future. In this case, the coercive tendency of the interrogation was enhanced by remarks that can only be construed as an implied threat that Bridges' support of the Union would cost him his job. Respondent denies that Williams' remarks constituted threats, preferring to label them a recitation of Respondent's right to replace economic strikers. As noted earlier, in light of Respondent's statements about the inevitability of strikes and the futility of selecting the Union as collective-bargaining representative, remarks about replacement of strikes were unlawful. Be that as it may, there is no reference to the replacement of strikers in Williams' remarks. What appears are remarks that Respondent could go out and hire, coupled with a representation (whether true or false does not appear in the record) that there were 100 or 200 people waiting for jobs, to which was added an implied threat of reprisal in the remark that Respondent could use the Rockingham employees as examples for other Clark plants. In my judgment, this conversation in its entirety compels findings of coercive interrogation and an implied threat of loss of job and does not require analysis of cases dealing with misrepresentation of the rights of economic strikes. I make such findings.

Former employee Richard Diggs also testified about a conversation with his supervisor, Brad McInnis, about 1 week before the election in which McInnis assertedly asked him how he was going to vote. Diggs told him for the Union and McInnis asked him if he was sure he was doing the right thing. McInnis asked him if he knew that if the Union got in he could lose his benefits and he should think twice about voting for the Union.

McInnis denied having a conversation with Diggs about 1 week before the election, and denied making the remarks attributed to him by Diggs. He based his denial on the fact that he knew how Diggs felt because Diggs wore union insignia, and he had been told to stay away from employees known to be union supporters. I do not credit McInnis who, somewhat inconsistently, admitted that he may have told Diggs "everything was negotiable." Accordingly, despite my conclusion that Diggs was not credible in other matters, as hereinafter described, and inasmuch as the remarks attributed to McInnis are of

a piece with those earlier discussed, I credit Diggs, and I find that McInnis impliedly threatened Diggs with the loss of benefits if the Union was selected by the employees as their collective-bargaining representative. I also find that McInnis' inquiry about how Diggs was going to vote, occurring in the context of an unlawful threat, had a tendency to coerce and constituted unlawful interrogation as alleged in paragraph 8(i) of the complaint.

According to employee Willie Moore, in the period before the election, Supervisor Carter Kelly distributed literature to him which he recalled dealt mostly with strikes. Kelly asked Moore to read the literature and come to him if he had any questions. On one occasion, Moore did ask a question (not described in the record) and Kelly told him, "if the Union would come in that they could not make the company give nothing. All they could do was negotiate, and they could not give us bettr wages and benefits if the Company did not want to give them to us." Kelly went on to say if a person was not out on strike that they could be replaced in their job if the Company was falling down in productivity. On another occasion, when Kelly was distributing company campaign literature, he asked Moore if he thought Clark needed a Union. Kelly told Moore he did not have to answer the question, but Moore nevertheless did, saying he did not know. Then Kelly asked him if he thought the Union could give him more benefits than Clark. Moore said he did not know.

The foregoing is undenied and forms the basis of allegations of a threat of discharge, the futility of selecting the Union as collective-bargaining representative, and unlawful interrogation. I find merit in the allegations. The remark about replacements was made in the course of the repetition of remarks of the futility of selecting the Union as collective-bargaining representative, and the distribution of literature which, as found earlier, contained the same theme and threatened employees with the inevitability of a strike if they did select the Union as their collective-bargaining representative. As to the interrogation, I find that in the circumstances it had a tendency to coerce and was unlawful. Respondent contends it was not unlawful because Kelly told Moore he did not have to answer. However, Kelly immediately followed Moore's reply with another question designed to get him to reveal his union sentiments. *PPG Industries*, supra.

Another alleged threat, arising indirectly out of the distribution of company campaign literature, is attributed to Supervisor Debbie Lear. According to former employee Morasby Covington, on the day before the election Supervisor Lear told him there would be no more talk about the Union and if there was she was going to take him to the office, so the best thing for him was to be quiet about the Union.

Lear denied having any such conversation with Covington. From my observation of the witnesses, I credit Covington. Nevertheless, I shall dismiss the allegation that there was an unlawful threat. While I credit Covington that Lear did make remarks to him about being quiet and threatening to take him to the office, a review of his entire testimony leads me to conclude that a finding of a violation is not warranted. As I reconstruct Covington's testimony, on direct and cross-examination, it appears that on the day in question Lear was passing out company literature relative to the election and she gave him a copy. She also passed literature to other employees and apparently a discussion started among the employees and Lear came over and said something about which Covington disagreed. Thereupon, she told him to be quiet and to get on his job or she would take him to the office. From this, it appears as likely that Lear's remarks were directed to Covington's being away from his job and discussing the leaflets as much as they were directed to any prounion sentiments he expressed. Whatever the case, the facts were insufficiently developed to support a find that Lear's remarks were unlawful.

4. Interference with distribution of literature

Paragraph 8(e) of the complaint alleges that about July 12, 1979, Respondent, by six named supervisors and an agent, interfered with the distribution of union literature in nonwork areas during nonworktime. The allegation is based on conduct occurring on the eve of the election before the start of the third shift in the period between 11 o'clock or 11:15 p.m. and 11:30 p.m.

During that period, employees Roger Mudd and Gary Thompson were distributing union literature on company property at one entrance to the plant, and employees Zeb Cox and Curtis Goodwin were distributing union literature at another. The record indicates that both twosomes were told either explicitly or in effect that they could not distribute literature at the entrance but would have to remove themselves to the plant gate. Both twosomes left the entrances and went to the plant gate where they were advised by the union representative that they had the right to distribute literature at the plant entrances. They returned and resumed distribution without interference, having been away from the entrances for only a few minutes.[6]

Respondent does not dispute the right of the employees to distribute literature at the time and places here in question. Its defense to the alleged interference is that it was too inconsequential in its effect on employees' handbilling activities to warrant a finding of interference. I do not agree. In *Tri-County Medical Center*, 222 NLRB 1089 (1976), cited by Respondent, the supervisor who had threatened to write up an employee for engaging in activity protected by Section 7 of the Act apologized to the employee on being advised that she had been mistaken in interfering with the protected activity. In *Redcor Corp.*, 166 NLRB 1013 (1967), the employee who had been told he would be disciplined for handing out union cards on company premises was, in fact, violating a valid rule against solicitation during working time.

In the instant case, the employees were not violating any rule, nor was any apology made to them for causing them to remove themselves.[7] In the circumstances, in-

[6] The foregoing are conclusionary facts, but I see no need to repeat precisely what was said to the employees at either entrance, because it cannot be seriously disputed that the employees were told they could not distribute union literature at the entrances and, as a result, they removed themselves for a few minutes.

[7] According to Supervisor Dean Meachum, who was one of the supervisors who had interfered with the handbilling during the work shift that

Continued

cluding the facts that a security officer threatened two of the employees with arrest and escorted them to the plant gate,[8] and that a succession of supervisors approached Mudd and Thompson about their activities, I am persuaded that a finding of interference is warranted. In this connection, it bears repeating that the test of interference is not whether or not it was successful.

5. Impression of surveillance

Paragraph 8(f) of the complaint alleges that Supervisors James Freeman and Randy Tunstall created among its employees an impression of surveillance of their union activities. In support thereof, former employee Mike Grant testified that about 1 week before the July 13, 1979 election, Foreman James Freeman came over to his machine and they had a conversation wherein Freeman mentioned that "not many people were attending the union meetings on Sunday and he had heard that about only 500 people had signed cards. Grant asked him how he knew and Freeman said that was what he had heard. Freeman denied making the remarks attributed to him by Grant. I am not persuaded that Freeman was entirely candid about his conversations with Grant and about the Union and I credit Grant.

Former employee Donald Pettigrew testified that about 3 days before the July 13 election, Supervisor Randy Tunstall told him he had heard that Pettigrew was handing out leaflets (Pettigrew had passed out union leaflets that day) and he was disappointed in him. Tunstall admitted the foregoing remarks. According to him, Pettigrew asked how he found out and Tunstall replied one of the guys had seen him.

Respondent contends that the remarks of Freeman, if found to have been made, and those of Tunstall, which are admitted, do not warrant a finding of the creation of the impression of surveillance; in Grant's case, because Freeman did not say he knew who had attended the union meetings and, in Pettigrew's case, because Pettigrew's leaflet distribution was done openly. I find no merit to the contentions. Remarks relative to the size of the attendance at union meetings convey the same impression of surveillance as remarks about the identity of those in attendance. As to the openness of Pettigrew's activities, that would be relevant to a charge of surveillance, but what is asserted to be unlawful here are Tunstall's remarks about Pettigrew's union activities. In my judgment, remarks of a supervisor about his awareness of an employee's union activities, not known by the employee to have been observed by the supervisor, evince to the employee an interest in such activities on the part of his employer which can only tend to coerce him in the continuation of such activities.

I find that in both the Grant and Pettigrew incidents Respondent violated Section 8(a)(1) of the Act.

6. Surveillance

Paragraph 8(g) of the complaint alleges surveillance of union activities. The allegation is based on two incidents, one of which (alleged surveillance of leaflet distribution at the plant gate) was dismissed at the hearing. The other incident involved the act of Supervisor Dean Meachum in raising the lid of the toolbox of Jimmie Stubbs in the work area and briefly leafing through papers in it. There are variances in the testimony of the General Counsel's witnesses and Meachum in the matter, but I was not favorably impressed by Meachum and I credit the General Counsel's witnesses (Stubbs and employee Richard Harris). Nevertheless, I shall dismiss the allegation. Stubbs' own testimony indicates not only that the toolbox contained contracts, union buttons, stickers, and literature; but also, that some of the literature was taped on the outside of the box as were union stickers. In light of this open advertising by Stubbs, I cannot conceive how Meachum's fleeting glance into the toolbox can be denominated surveillance and tend to coerce employees.[9]

7. Solicitation of grievances

Paragraph 8(o) alleges that Respondent solicited grievances among its employees in order to discourage their support for the Union. The allegation is based on an opinion survey questionaire distributed to all employees by Respondent.

The survey was announced in a May 20, 1980 Synchronizer,[10] and all currently employed employees completed the questionnaire in the plant cafeteria. On June 26, 1980, the questionnaire was sent to employees in layoff status with a request that they complete it and return it to Respondent. Whatever the results of the survey, they had not been communicated to the employees.

As noted above, the gravamen of the complaint is that the taking of the survey constituted the solicitation of grievances in order to discourage employee support for the Union. However, the General Counsel's brief has not addressed the issue as one of unlawful solicitation of gre-

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night, he had a conversation with Thompson in which he acknowledged to Thompson that he had the right to handbill at the plant door However, he did not say this to Mudd and, in any event, this was not an apology As a matter of fact, according to Mudd and Thompson, Meachum spoke to them individually during the work shift and said "that the only thing he could have done to us was to have us both arrested" and telling Thompson that "the worst we could do is to lock you up but we are not going to do that" The General Counsel contends that these remarks constituted unlawful threats I fail to see any threat. To the contrary, the message conveyed by Meachum was just the opposite; namely, that he would not do that. Accordingly, I shall dismiss par. 8(q) of the complaint.

[8] According to employee Cox, Security Officer Lieutenant Linker told him and Goodwin they would have to move away from the plant entrance and said, "that we would be fired or arrested for handbilling on the company property." In his brief, the General Counsel requests that these remarks, although not alleged to be unlawful in the complaint, as amended, be found to be unlawful on the theory that the matter was fully litigated According to employee Goodwin, Linker said nothing about firing, he spoke only of an arrest. Linker denied threatening an arrest. In my judgment, Linker was not a reliable witness and I credit the testimony that he threatened Cox and Goodwin with arrest. As the matter was fully litigated, I find the threat to arrest employees for engaging in protected activity was violative of Sec. 8(a)(1) of the Act

[9] Although I do not rely on employee Harris' testimony in finding that Meachum's conduct had no tendency to coerce, it is noteworthy that as a witness of Meachum's conduct Harris told Stubbs that he did not think Meachum was looking for anything, that he did not think Meachum knew the toolbox was Stubbs' property.

[10] The Synchronizer is the same name of a company newsletter issued monthly

vances;[11] rather, it argues for a finding of unlawful interrogation. Since he has not expressly abandoned the allegation of solicitation of grievances, it requires disposition. In my judgment, the allegation should be dismissed.

In order for a solicitation of grievances to be held unlawful, it must be accompanied by an express or implied promise to remedy the grievances disclosed. There was no express promise made here and there is no evidence to warrant a finding of an implied promise. A promise may be implied when it appears that the solicitation of opinions had never been done before and the solicitation occurs in the context of an organizational campaign. See *Gordonsville Industries*, 252 NLRB 563, 568 (1980).

In the instant case, Respondent argues that it had a practice of conducting opinion surveys and the record supports its argument to a degree in that surveys had been submitted to supervisors in 1976 and to a randomly selected group of 77 employees in 1977. In addition, in April 1978, a questionnaire had been completed by an undefined and indeterminate number of employees. In March 1979 employee opinions had been solicited relative to the company handbook, and in April 1979 the Company surveyed employees relative to their desire to know more about company products. All of the foregoing are substantially different from the survey here in question both as to the scope of inquiry and the scope of distribution. Nevertheless, it can be said that Respondent had a practice of conducting surveys.

Whatever Respondent's practice, or lack thereof, there is still the element of timing. In *Gordonsville Industries*, supra, the survey was taken at the very outset of a union campaign and it was found to have been conducted as a specific, calculated response to the employees' union campaign. Such cannot be said here. At the time of the survey in question, nothing was pending at the Rockingham facility except the instant litigation. The situation was essentially similar to that in *Leland Stanford Jr. University*, 240 NLRB 1138 (1979), wherein the survey was found not to be unlawful.

In short, none of the circumstances in this case warrant an inference that the survey was taken for the purpose of eroding employees' support for the Union. Accordingly, I shall dismiss the allegation in paragraph 8(o) of the complaint.

As noted earlier, the General Counsel's brief argues for a finding that the survey constituted unlawful interrogation. The complaint does not so allege, but the facts relative to the survey were fully litigated so that a finding of a violation, if there be one, under some alternate theory is not precluded. *Gordonsville Industries*, supra at fn. 7. In my judgment, however, a finding of unlawful interrogation is not warranted.

In *Gordonsville Industries*, supra, the Board found that a survey substantially identical to the survey here in question constituted unlawful interrogation. Thus, the survey, although asserted to be confidential, required employees to reveal information relative to their department, work shift, sex, and length of employment. Such information destroyed any claim of anonymity. The survey here likewise contains questions relative to employees' opinions, the answers to which could readily disclose employees' union sentiments. For example, employees were asked whether the Company had unfair rules or policies, was it a good place to work, and did employee complaints get prompt attention. In marked similarity to the survey in *Gordonsville Industires*, the questionnaire asked, "If you could, what changes would you make in this company?"

Nevertheless, I am not persuaded that a finding of unlawful interrogation is warranted. Again, it must be noted that the survey was taken in June 1980, 11 months after the election, and at a time when there was no special union activity. In the circumstances, there is no basis for inferring that the employees would associate the survey with their union activities or that they would view the survey as an inquiry into their union activities.

8. Miscellaneous interference

Paragraph 8(n) of the complaint alleges that Respondnet promised to assist a prospective employee with gaining employment if such prospective employee persuaded another employee not to support the Union. The allegation is based on the testimony of Judy Perkins, wife of employee Hurley Perkins, that on Sunday, July 8, she telephoned Supervisor Ronnie Williams and asked him about getting a job with Respondent. In the course of the conversation, Williams allegedly asked her, in return for his help, if she would persuade her husband to vote against the Union.

Williams admitted to a telephone conversation with Judy Perkins about her obtaining employment with Respondent. According to him, however, it was she who introduced the idea of her husband's union sentiments and who suggested that if he helped her get a job, she could talk her husband into voting for the Company. He did not accept the suggestion.

Williams is a third-shift supervisor, a relatively minor position with Respondent with no hiring functions, and I deem it highly implausible that he would have volunteered to involve himself in an application for employment for the purpose of influencing one employee's vote. I credit him and I shall dismiss the allegation.

Paragraph 8(p) of the complaint alleges that on July 8, 1979, Supervisor Charles Ratliff solicited a former employee to inform management of the union activities of its employees. The allegation is based on the testimony of former employee Alex Washington, who had been discharged on May 8, 1979. According to Washington, Ratliff solicited him to attend a union meeting and report back to him, offfering him $25. Washington said he would, but he did not. Ratliff denied Washington's allegation against him. I credit Ratliff. Not only did Ratliff appear to be a very truthful witness, the circumstances of the case make Washington's story very implausible.

Paragraph 8(x) of the complaint alleges that on November 1, 1980, Respondent violated Section 8(a)(1) of the Act by the conduct of Supervisor Jimmy Newton in informing an employee that Respondent would not have

[11] The General Counsel adverts to the letter to laid-off employees accompanying the questionnaire and states that comments therein constituted a barely veiled promise to recall if they answered the questionnaire and a promise to resolve the problems they raised I find no such promises in the letter.

opposed his claim for unemployment compensation if he had not filed an unfair labor practice charge. The allegation is based on testimony of Richard Diggs, as alleged discriminatee in Case 11–CA–9454. I see no need to recite particulars, because I do not credit Diggs. All the circumstances of the case argue against crediting him, and Newton appeared to me to be a truthful witness. Accordingly, I shall dismiss the allegation.

9. Interference with Board processes

Paragraphs 8(r), (s), and (t) relate to employee cooperation with Board agents in connection with the hearing in these cases.

Employee Jimmy Tickle had received a letter dated September 3, 1980, which referred to his having been subpoenaed to testify in these cases and which requested him to make arrangements to meet with attorneys from the Board at a local motel. The letter listed the dates and times the attorneys would be available. Tickle testified he went to Employee Relations Director Ron Dickinson and showed him the letter and asked him about it. Dickinson told him that was not a legal document and that he did not have to go to talk to the attorneys. He said the letter was not a subpoena, that a subpoena would be sent later. When Tickle asked what he should do in the event he was subpoenaed, Dickinson told him that was a legal binding document, but there was a question whether it would be enforced. Dickinson said it would be up to Tickle to decide whether or not to appear.

Tickle received a second and identical letter dated September 5, 1980, which he took to Dave Hogan, employment relations manager. He told Hogan he had been told earlier he did not have to go, and he referred to a notice Respondent had posted on the bulletin board that they were not legally obligated to go talk to attorneys. Tickle had received a subpoena, and apparently he had brought the subpoena with him which he showed to Hogan. Hogan told him it was "not a legal subpoena like a criminal subpoena." It was a legal document, but if you did not appear they usually did not enforce it like a criminal subpoena. Hogan left Tickle to consult further on the matter and returned to tell Tickle that, as far as he knew, none had ever been enforced and if an individual did not appear they did not do anything to him. Tickle asked what could they do to him if he did not appear. Hogan said the worst thing would be to send him another subpoena and ask him why he did not appear the first time. Tickle asked who it was that was subpoenaing him and Hogan said the Labor Board, but the Labor Board was acting as an agent of the Union. Tickle said he thought the Labor Board was a neutral party and Hogan told him, "In the beginning they were a neutral party, but in this case they are an agent of the Steelworkers."

The notice referred to by Tickle states:

23 SEPTEMBER 1980

MANY OF YOU HAVE ASKED YOUR SUPERVISORS WHETHER YOU HAVE TO GO TO MEETINGS CALLED BY THE NATIONAL LABOR RELATIONS BOARD AND/OR UNION REPRESENTATIVES OVER AT THE REGAL INN THIS WEEK, AND ALSO WHETHER YOU HAVE TO SIGN PAPERS PREPARED BY THE NLRB REPRESENTATIVE OR THE UNION.

CLARK TAKES NO POSITION WHATSOEVER WITH RESPECT TO YOUR OWN PERSONAL DECISION TO GO ALONG WITH THIS REQUEST OF THE NLRB AND THE UNION HOWEVER, YOU SHOULD KEEP IN MIND THAT YOU ARE UNDER NO LEGAL OBLIGATION TO GO TO ANY OF THESE MEETINGS OR TO SIGN ANY PAPERS IF YOU DON'T WANT TO.

THE CHOICES ARE YOURS ENTIRELY.

IF YOU HAVE ANY QUESTIONS DON'T HESITATE TO CONTACT EMPLOYMENT RELATIONS.

The statements to Tickle about the subpoena and the notice to employees about meeting at the motel with Board attorneys present distinct, albeit related issues. It appears to be settled law that statements to employees expressly or impliedly telling them they do not have to honor Board subpoenas are unlawful. *Winn-Dixie Stores*, 128 NLRB 574 (1960); *Clothing Workers v. NLRB*, 420 F.2d 1296 (D.C. Cir. 1969); *Mr. F's Beef & Bourbon*, 212 NLRB 462, 466 (1974); *Delta Faucet Co.*, 251 NLRB 394 (1980). Respondent contends such is the case only where the statements are accompanied by direct or veiled threats of reprisal. *Bauer Aluminum Co.*, 152 NLRB 1360, 1367 (1965). I do not agree.

Bauer Aluminum Co. was decided in 1965 and, in my judgment, has been superseded by the pronouncements in the cases since *Winn-Dixie Stores*, supra, which are cited above. Statements by supervisors which denigrate the Board's subpoenas and in any way suggest that they need not be honored have only one purpose; namely, to obstruct the Board in its investigation and presentation of cases brought before it and interfere with the vindication of employee rights guaranteed by Section 7 of the Act. Accordingly, I find that Dickinson's statements to Tickle, as admitted by Dickinson, that there was some question as to whether the subpoena would be enforced and that it was up to Tickle's discretion, were violative of Section 8(a)(1) of the Act. I find further that Hogan's statements to Tickle, as described by Tickle, whom I credit, were likewise unlawful in that they falsely suggested that honoring the subpoena was a matter of discretion and could be ignored with impunity.

Insofar as the notice is concerned and statements relative thereto, I am of the view that such conduct was not unlawful. In support of the contention that it is, the General Counsel cites *Garry Mfg. Co.*, 242 NLRB 539 (1979). However, in that case, the notice mischaracterized the purpose of the Board's investigation and it appears that it was an unsolicited communication. In this case, the notice itself indicated that it was in response to employee inquiries, and it did not misrepresent the role of the Board.[12] Moreover, the notice indicated clearly that the

[12] The notice referred to meetings called by the Board "and/or Union representatives" and there is no evidence that union representatives were calling any meetings I am not persuaded, however, that this warrants a finding that it mischaracterized the role of the Board

choice was the employees. It is true that in *J. W. Mortell Co.*, 168 NLRB 435, 437 (1967), enf. denied in relevant part 440 F.2d 455 (7th Cir. 1971), the Board held that a notice garnered no immunity simply because it advised employees they were free to cooperate or not to do so; however, it is clear that the finding of a violation was predicated on the notice as a whole, for example, the employer's attempt to attribute the General Counsel's pretrial communications to "union pressure tactics." There is no similar conduct here.

In *Certain-Teed Products Corp.*, 147 NLRB 1517 (1964), the notice was solicited and intemperate and the employer had made statements expressing disbelief and annoyance at employees who had testified at an earlier hearing. These circumstances are not present here.

In short, inasmuch as the notice was in response to employee inquiries, that it did not mischaracterize the Board's role, and contained no remarks to suggest to employees that Respondent would look with disfavor on anyone who cooperated with the Board, and was not a false statement about the nature of the obligation imposed on employees receiving it, a finding of interference with the Board's processes is not warranted.

During the period of the hearing, one of Respondent's attorneys, Neil Gaffney, interviewed employees in preparation of Respondent's defense. Employee Billy Gulledge was one of those employees and he testified that he met with Gaffney in a conference room where he was asked whether he had been approached to sign and had signed an authorization card. Gulledge refused to answer and referred to the notice to employees discussed above and, in effect, complained that Respondent had Gaffney there to do the same thing. Gaffney said that the Labor Board had Clark post the notice. A few more remarks were exchanged and Gaffney then told Gulledge, "Well, you want to make up your mind what you want to do, because there are 600 employees out there that don't want the Union."

The complaint alleges in paragraphs 8(u) and (v) that Respondent coerced and interfered with employees by Gaffney's remarks about the notice and his statement that Gulledge make up his mind.

Initially, there was a dispute between Gulledge and Gaffney as to precisely what was said in the interview. It should be noted, however, that the allegations are not predicated on a failure to meet the *Johnnie's Poultry* safeguards.[13] Rather, the allegation relative to the notice appears to be one of misrepresentation and interference with the Board's processes. The General Counsel has not articulated a rationale for a finding of interference with the Board's processes and it is difficult to extract one from Gulledge's testimony, because he was not inquiring of Gaffney whether or not he had to meet with the Board's attorneys. In any event, I am persuaded that Gulledge misunderstood Gaffney's remarks about the notice. At the time in question, a Board notice to employees was posted on Respondent's bulletin boards in compliance with a decision and order in *Clark Equipment Co.*, 250 NLRB 1333 (1980). Gaffney testified that this was the only notice to employees he was aware of and, when Gulledge referred to a notice, he asked, "the NLRB Notice?" and Gulledge just looked at him questioningly.

I credit Gaffney. I cannot believe that he would misrepresent to an employee the source of a notice. That Gulledge may have had in mind one notice and Gaffney another does not render Gaffney's remarks unlawful.

As to a remark that Gulledge make up his mind, any factual dispute is as to the context in which it was made. According to Gaffney, he may have told Gulledge to make up his mind, but in some harmless context. That is only his opinion, however, and leaves unanswered the question of what context. It is abundantly clear from observing Gaffney at the hearing and a review of his testimony that he was irritated by Gulledge. It appears to me, however, that his irritation was over Gulledge's attempt to enter into a discussion with him and his indecision about whether to cooperate with Gaffney. Gulledge's own testimony that Gaffney said, "make up your mind what you want to do" indicates that Gaffney's remarks had nothing to do with the Board's processes. If anything, one might argue that they infringed on the safeguards of *Johnnie's Poultry*, supra, and had a tendency to coerce Gulledge into giving Gaffney a statement. However, there is too much ambiguity about the remarks to support even such a finding.

For the foregoing reasons, I shall dismiss the allegations of paragraphs 8(u) and (v) of the complaint.

B. *Alleged Discriminatory Discharge*

Richard Diggs was hired on December 13, 1976. He was discharged on September 22, 1980, for poor attendance. On August 8 Diggs had been spoken to about his attendance and had been advised, in writing, that failure to improve could result in his termination. On August 22 Diggs was late 40 minutes and on September 22 he was late 13 minutes. As noted, he was discharged.[14]

Diggs was a known union adherent. His supervisor, Brad McInnis, admitted that in the preelection period Diggs had worn union insignia and that he was aware of Diggs' union sentiments.

The General Counsel contends that Diggs was discharged because of his union activities. I find no merit to the contention.

It is clear from an examination of Digg's attendance record that he had a poor attendance record. It is also clear that he was warned, but his attendance did not improve. Nevertheless, the General Counsel contends that his discharge was unlawful, apparently on a theory of disparity of treatment. Thus, he asserts that Supervisor McInnis "discriminated between union and nonunion adherents in determining when to proceed to the next step of the [counseling or discharge] process." To support this assertion, he adverts to the attendance record of one employee he describes as antiunion, namely, Randy Jacobs. Whether Jacobs is antiunion or prounion is debatable; he appears to have wavered from day to day. In any event, his record does not appear to be as bad as

[13] *Johnnie's Poultry Co*, 146 NLRB 770 (1964).

[14] This matter is alleged in the complaint in Case 11-CA-9454, which was consolidated for hearing during the hearing.

Diggs'. Apart from that, a comparison with only 1 employee in a plant of about 800 employees is insufficient to support a finding of disparity.

In the final analysis, what appears here is the case of an individual with a poor attendance record who is discharged after warning. The only basis for a finding of a violation is that he was a union supporter. This is not sufficient, particularly when the union activity had occurred over a year earlier, was indistinguishable from like activity by several other employees, and there is nothing in the timing of the discharge to suggest a discriminatory motive.[15]

In short, I conclude the General Counsel did not make a prima facie case. In reaching this conclusion, I have considered the background evidence concerning use of a forklift by Diggs and an instance when he was ordered to stay on the job. I deem the evidence to have no probative weight whatsoever on the issue of the discharge.

C. *The Refusal to Bargain*

1. The obligation to bargain

The complaint alleges that since about June 4, 1979, the Union has been designated by a majority of the employees in an appropriate unit as their representative for the purpose of collective bargaining, that about June 4, 1979, the Union requested Respondent to bargain with it, and that Respondent refused. Based on these allegations and the unfair labor practices of Respondent as described earlier, the General Counsel asserts that a finding is warranted that Respondent violated Section 8(a)(5) of the Act and that a bargaining order is appropriate pursuant to the principles of *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).

The demand for recognition and refusal was established by the Union's letter of June 4, 1979, and Respondent's reply of June 7, 1979. As to the appropriate unit, the parties stipulated that the unit described in the complaint and hereinafter set forth was appropriate. The parties further stipulated that the appropriate unit consisted of 820 employees, and the General Counsel contends that 470 of the cards received into evidence were valid designations of the Union as collective-bargaining representative and that a finding of majority status is therefore warranted.

a. *Majority status*

The issue of the Union's status was the issue which consumed most of the hearing time. Respondent admits to the validity of only nine of the cards: Thomas Jacobs III (211), William E. Wright, Jr. (225), James A. Lindsay (303), Robert S. Lyles (305), Bruce G. Platt (417), Alex L. Eaves (432), Clay Thomas (573(a)), Sarah Haywood (588), and James Cleveland Breeden (590).[16]

As to the remaining cards, Respondent asserts a variety of defenses:

1. Misrepresentations: Respondent's major attack on the cards is based on alleged misrepresentations. The attack is in two parts:

(1) Membership in the Union

The language of the card used by the Union is as follows:

> I hereby request and accept membership in the UNITED STEELWORKERS OF AMERICA, and of my own free will hereby authorize the United Steelworkers of America, its agents or representatives, to act for me as collective bargaining agency in all matters pertaining to rates of pay, wages, hours of employment, or other conditions of employment, and to enter into contracts with my employer covering all such matters.

This is, according to labor law parlance, a single purpose card in that it refers to authorization of the Union to act as collective-bargaining representative, but does not refer to an election. However, because the card also stated "I hereby request and accept membership" in the Union, Respondent contends that 415 cards are invalid on the theory that this was a misrepresentation in that the signing of the card did not confer membership and by such language the Union purported to confer an "illusory benefit." The contention is, in my judgment, so patently without merit that it requires no discussion. It is rejected.

As a matter of fact, the question of union membership appears to have posed a problem for some employees as evidenced by the fact that a number of them inquired about the membership language on the card. The record indicates that when they did so they were assured they did not become members by signing the cards, but would have to sign another card. Respondent contends that this circumstance, coupled with representations that the card was for an election, amounted to an indirect misrepresentation of its purpose. In this connection, Respondent cites *Silver Fleet Motor Express*, 174 NLRB 873 (1969), in which the Board held cards to be invalid for purposes of majority status when the cards designated the Union as bargaining agent and then contained the following statement in bold letters: "THIS DOES NOT OBLIGATE ME IN ANY WAY." In my judgment, *Silver Fleet* is distinguishable in that when there is no similar language on the face of the card in this case, and when solicitors stated to signers that their signing did not oligate them in any way, it is clear that they were responding to questions about membership obligations, in some instances, the obligation to pay dues, and their answers did not cancel out or contradict the express language of the card, but explained that an additional step was required to become a member. I therefore reject contentions of Respondent addressed to the membership language of the card and to the statements of solicitors relative to the obligations connected with signing a card.

[15] The General Counsel appears to contend that the timing of the discharge can be related to the fact that at the time of the discharge the General Counsel was known to be conducting interviews with Clark employees and Diggs' discharge was bound to have a chilling effect on other employees. There is not a scintilla of evidence to support such a contention

[16] The number after each name is the exhibit number of the individual's cards

(2) Only for an election

In *Gissel Packing*, supra, the Supreme Court approved Board law on determining the validity or invalidity of authorization cards, as set forth in *Cumberland Shoe Corp.*, 144 NLRB 1268 (1963), enfd. 351 F.2d 917 (6th Cir. 1975), and reaffirmed in *Levi Strauss & Co.*, 172 NLRB 732 (1968). The Court described Board law in the following terms (395 U.S. at 584):

> Under the *Cumberland Shoe* doctrine, if the card itself is unambiguous (i.e., states on its face that the signer authorizes the Union to represent the employee for collective bargaining purposes and not to seek an election), it will be counted unless it is proved that the employee was told that the card was to be used *solely* for the purpose of obtaining an election.

Respondent contends that the evidence in this case indicates that 79 cards were solicited on the direct or indirect misrepresentation that the card was to be used solely for an election, and that they are therefore invalid as proof of majority status. To decide this issue, however, consideration has to be given to more than the use or nonuse of magic words. As the Board stated in *Levi Strauss*, supra, quoted with approval by the Supreme Court in *Gissel Packing*, 395 U.S. 608 fn. 27:

> It is not the use or nonuse of certain key or "magic" words that is controlling, but whether or not the totality of circumstances surrounding the card solicitation is such, as to add up to an assurance to the card signer that his card will be used for no purpose other than to help get an election.

In weighing the circumstances, however, the trier of fact must not ignore the principle approved by the Supreme Court in *Gissel Packing*, 395 U.S. at 606, that:

> [E]mployees should be bound by the clear language of what they sign unless that language is deliberately and clearly canceled by a union adherent with words calculated to direct the signer to disregard and forget the language above his signature.

Moreover, the trier of fact must take into account the observation accepted by the Supreme Court (395 U.S. at 608), "that employees are more likely than not, many months after a card drive and in response to questions by company counsel, to give testimony damaging to the union, particularly where company officials have previously threatened reprisals for union activity in violation of Section 8(a)(1)."

It is with the foregoing principles in mind that I have reviewed the entire testimony of the witnesses whose cards are challenged by Respondent on the grounds of misrepresentation. However, I will not set forth the testimony of such witnesses, because I see no useful purpose in doing so. In many of the cases, the predicate for the challenge to the card is the fact that the solicitor of the card stated as its purpose that it was for an election. Such a statement of purpose does not invalidate a card tendered for proof of majority status. In a number of cases, where the testimony might lend itself to a finding of a misrepresentation of purpose I explain the basis for my finding. Whether to explain one card and not another is a question of judgment about which some might differ; suffice it to say that as to any given card my conclusion as to its validity is based on the sense I find conveyed by the testimony of the card signers themselves taken as a whole rather than on specific questions and answers.

For example, Lester Edwards authenticated the card of Tim Murphy (262). He testified he told Murphy, "if we got a large majority of card signed that we could get a union election."

> Q. And you told him that was the only purpose you were asking him to sign the card?
>
> A. Yes, sir.

To invalidate a card on the basis of such a leading question and answer would be to apply the *Cumberland Shoe* rule mechanistically. It seems to me to be very clear that such a question and answer distorts the truth by the placement of the word "only." It is one thing to tell employees of only one purpose for a card; it's another thing to tell them that the only purpose of the card is for an election. I am convinced that witness after witness did not understand that distinction, including Edwards.

Based on the foregoing, I find that the cards listed below were not invalidated by representations to the card signers that the purpose of the cards was only for an election, nor were they encouraged and directed to disregard the language of the card which authorized the Union to act as collective-bargaining representative.

Jimmy D. Tickle (101)
Roger Mudd (103)
Thomas Garney (104)
Jessie W. Goins (105)
James L. Roberts (106)
Gary L. Thompson (107)
Curtis W. Brewington (108)
Samuel E. Cumber Jr. (109)[16]
Clarence England (110)
Curtis Steve Goodwin (112)
James M. Napier (113)
Walter Covington (114)
Zeb D. Cox (115)
David T. Roller (116)
Maynard Dutton (117)
Charles Pait (118)
Donald L. Pettigrew (119)
Joseph Clark (120)
Eddie Cloniger (121)
Mike E. Grant (123)
William S. Hogan Jr. (124)
Leroy Jefferson (125)
Robert T. Johnson (126)

[16] Respondent contends that card 109 is a duplicate of card 546 as both are signed by Ed Cumber of the same address However, the stipulated list includes two Cumbers, and the dates of hire, department, and rates of pay, appearing on the two cards indicate that the cards are not duplicates

Robert J. Leviner (127)
John I. Maness III (129)
Charles T. Mathis (130)
Joseph D. McCormick (131)
Robert H. Nelson (132)
Bennie Robbins (133)[17]
Clayton M. Smith (134)
Floyd Smith (135)
Kenneth E. Stubbs (136)
Dean Treadway (137)
Michael A. Williams (138)
Becky D. Benson (140)
Jeffrey L. Benson (142)
Bundy K. Berry (144)
Sam Breedew (145)
Aldie Cobbler Jr. (147)
Gary Dennis (148)
Sam Fields (150)[18]
Lenier E. Furr (151)
L. Gibbs Goodwin (152)
Ronald W. Hawks (153)[19]
Steve K. Marlin (157)
William N. Maske (158)[20]
Floyd C. Carpenter (171)
Jimmy Stubbs (173)
Wanda Turner (174)
Kenneth Turner (175)
Richard Harris (176)
Willie Moore (177)
Livingston Bridges (178)
Melvin L. Stroman (180)
Hurky E. Perkins (181)
Ricardo Steek (182)
Luther E. Grant (183)
Morasby Z. Covington (184)
William R. Galbreath (185)
William Gerald (186)[21]
Doris H. Gerald (187)
Billy C. Brown (188)[22]
Tony S. Conner (189)
Warren F. Deaton (192)[23]
Van Rush (193)
Fred A. Dennis Jr. (194)
Phillip Gilliam (195)
Tony Puckett (196)
Daniel Wayne Smith (198)
Malcolm Stubbs (200)
Curtis Therrell (201)
Allison B. Wiggins (203)
Carlton Wade Williams (204)
Reginald Dumas (206)
Charlie A. Ellerbe (207)
Walter Cameron (208)
Ronald Covington (209)
Kenneth Hawks (210)[24]
Stephen Wayne Jenkins (212)
Ronnie Tarlton (213)
Larry Harold Blue (214)
J. Harold Dawkins Jr. (215)
Earl De Berry (216)
Johnnie Hughes (217)
Steve Thompson (219)
Mark Hewitte (222)
Rober Montgomery (223)
Robert M. Welch (224)
Kenneth M. Allen (226)
Ernest B. Dawkins (227)
Tony W. Sanford (228)
Douglas B. Stancil (229)
Jack Stogner (230)
Willie H. Wall (231)
Willie James Wall (232)
Kenneth Allen Yates (233)
Randy Ammons (234)
Wallace H. Freeman (235)
Don L. Hammann (236)
E. Milton Player (237)
Willie Ellerbe (239)
Mary C. Ratliff (240)[25]

[17] Robbins signed cards 133 and 604 Only card 133 is counted for majority status.

[18] Fields testified he did not read the fine print on the card (which contains the authorization language) and that he was told that the card was "mainly just to get a vote for the Union." He also testified that he was told "after we got the Union in . . . you had a choice to sign a union membership card." In my judgment, it is clear and I find, that Fields knew the purpose of the card was to get the Union in and he signed the card intending to authorize the Union to represent him.

[19] Hawks testified he was told the card was just for an election. He further testified the card was read to him and that he asked no questions about the language The reading of the card to him evidences a desire that employees understand what they are doing, and I am persuaded there was no misrepresentation of purpose in Hawks' case.

[20] Maske testified he was told the purpose of the card was to have a vote and that he did not read the card. Yet, he admitted he had the card in his possession overnight and "looked" it over. I reject his testimony insofar as he suggests he did not know what the card said

[21] Gerald's card was authenticated by Union Representative Constance LeVier who testified that she went to his home and witnessed him sign card 186 and his wife Doris sign card 187 Respondent contends a signature comparison warrants a finding that both card were signed by Doris and that William Gerald's card is invalid for failure of proof he authorized his wife to sign for him Assuming Doris to have signed both, as she did so in her husband's presence, according to LeVier's testimony, an inference is warranted it was with his authority.

[22] Brown's card is dated February 1, 1978, the day before the election The testimony of Sam Grant, which I credit, is that the card was signed on February 2, 1978, after the election.

[23] Deaton testified he was told the purpose of the card was to get a vote, but it is clear, and I find, that he was not told that was the only purpose of the card. As he testified he did not read the card, a representation that the card was for a vote might invalidate it for any other purpose. See *Gordonsville Industries*, 252 NLRB 563 (1980). However, Deaton also testified that the card may have been read to him In the circumstances, I conclude he should be bound by his signature.

[24] Hawks testified he was told the purpose of the card was for an election and that he signed without reading it. Hawks did not say that he could not read. In the circumstances, he should be bound by the language of the card.

[25] Ratliff testified she was told the purpose of the card was to get an election and that she did not read the card. I do not credit her. She had signed two other cards (601(a) and 601(b)), and I am persuaded she knew that the card authorized the Union to represent her and she signed with that knowledge

Michael Baker (242)
Robert G. Beck (243)
David Cobbler (244)
Larry M. Jenkins (248)
Mark McCaskill (249)
Ralph N. McDonald (250)
Cog Mills (251)
Michael Otis Orr (252)
Donnie M. Poplin (253)
Brian Puckett (254)
Steve W. Reynolds (255)[26]
Horace G. Shoe III (256)
William Ronald Snead (257)
Daniel Wayne Wright (260)
Lester Edwards (261)[27]
Tim Murphy (262)
Larry Grooms (263)
Thomas G. Hamilton (264)
Lacy Jackson Jr. (265)
Burnett E. McRae (267)
Charles Morman (268)
Vance Waddell (270)
Robert Caudle (272)
J. Keith Croke (273)
Donald Gilliam (275)
Charles Jenkins (276)
James L. Young (277)
Robert Lee Zeigler (278)
Nelson David (279)
Robert Joey Lisk (280)
Cleyce E. Almond (283)
Kevin M. Baxley (285)
Albert Lee Brown (286)
Jimmy Brown (287)
Eugene Clark (288)
Thaddeus Collins (289)
Walter Covington III (290)
Napoleon Davis (291)
Edward Hill (293)
James House Jr. (295)
Albert Ingram (296)
Dennis C. Ingram (297)
Clarence D. King (298)
Clifton Lee King (299)
Carol L. Leake (300)
Leroy D. King (301)
Kenneth Lockhart (304)
Eddie Lee McIntyre (306)
Johnny Miller (307)
Roy C. Minninall (308)
George Morman (309)[28]
George Nicholson (310)
Danny Rainwater (312)[29]
Addie Robinson (313)
Alexander Robinson (314)
Leo Robinson (315)
Nathaniel Rose (316)
Gregory D. Short (317)
Harrison D. Smith (319)
Prentice J. Strickland (321)[30]
Michael T. Wallace (322)
Marvin Blake (323)
Stephen Cranford (325)
Fred Lathan (326)[31]
Vernon Lee Henderson (327)
Albert Lee Nicholson (329)
James T. Burnett (330)
Talley Covington Jr. (332)
Woodrow Dunn (334)
Harvey Gales (336)
Henry Issac Jr. (337)
John Jackson (338)
Arallen Jones Jr. (339)
Terry Wayne Lamont (340)
Cranford Wilson Lampley (341)
Roger Lampley (342)
Jimmy D. Maynor (344)
James McDonald (345)
Mortimer McLaughlin (346)
Charles A. McLendon (347)
Lawrence Moore (348)
John E. Nelson (350)
Frank Nicholson (351)
William T. Nicholson (352)
Theodore Robinson (353)
Edward Terry (355)
Benjamin Wall (356)
Michael Gerald Wall (357)
Thomas Ray Webb (358)
Stephen Webb (359)[32]
Raymond Wayne Abrams (360)[33]

[26] Reynolds testified he was told the purpose of the card was for an election and he just glanced at the card. Reynolds had signed a card before the first election and I am persuaded he knew that in signing the card he was indicating his desire to be represented by the Union.

[27] Edwards' testimony suggests he was told the purpose of the card was just to get an election. I have adverted above to Edwards' testimony relative to the authorization of the card of Tim Murphy and I have commented on the distortion of truth which can result from the wrongful placement of the word "only." I believe Edwards' case exemplifies the process, because it is difficult to believe that Edwards would have been soliciting other employees to sign cards just to get an election.

[28] Morman appeared to me to have a very poor understanding of the questions posed by counsel and clearly had a very poor recollection. I note that at some point the solicitor told him if the Union got a majority they would ask for recognition. In the circumstances, I deem his card valid.

[29] Rainwater testified he was told the card would not obligate him in any way. I find the statement related only to the question of union membership.

[30] Strickland testified he was told, among other things, "the only way we would get the Union in here was to have another election, for him to sign a card if he wanted the Union in." His signature, in the circumstances, indicates he wanted to get the Union in and was authorizing it to act as collective-bargaining representative.

[31] I do not credit Lathan's testimony about his solicitation and what he was told about the purpose of the card, because Lathan did not appear to me to be truthful.

[32] Webb testified he was told the purpose of the card was for an election and that he did not read the card. Webb did not testify that he could not read. In the circumstances, he should be bound by the language of the card.

[33] Abrams signed two cards: 360 and 546. While part of his testimony suggests he was told the purpose of the card was only to get an election, a review of his entire testimony indicates he was offering his understanding of the purpose of the card and that he really had no recollection of what was said. I am persuaded he was not told to ignore the language of the card. Respondent also challenges 360 on the ground it was dated

Continued

Arlis O. Atkins (363)
Robert K. Singletary (364)
Louis Hodges (365)
Tony Rush (366)
Charles Collins (371)
Henry C. Pratt (372)
Curtis Robson (373)
Cleveland Terry (374)
Eddie Fesperman (375)
Donnie Franklin (376)[34]
Ronald Singletary (377)
LeLand Dane Clark (378)
Charles Wesley Griggs (379)
Clyde B. Hunt (380)
Bennie C. Saunders (381)
William Allred (384)
David Benson (385)
Tommy Cline Jr. (387)
Warren Cox (388)
Gerry W. Crenshaw (389)
Howell G. Darnell (390)
Larry W. Davis (391)
John E. Ewing (394)
Scott Freeman (395)
Paul Gibson (396)
Willam W. Goins (397)
Dan Griggs (398)
Danny C. Hawks (399)
Kent Hoover (400)
Donald K. Jackson (401)
William H. Jackson (402)
Leonard P. Jones (403)
Kerry M. Little (404)
Vinh Phuouc Luong (405)
Clark McBride (406)[35]
Albert McDonald (407)
Joseph McDuffie (408)
James E. McLaughlin Jr. (409)
Raymond F. McRae Jr. (410)
Jimmy W. Martin (411)
Alexander Mason (412)
Jerry F. Paker (413)
Jacqueline W. Patterson (414)
Boyd Steve Paul (415)
Luther W. Reynolds (419)
Melvin Robinson (420)[36]
Guy H. Smith (421)
James K. Spivey (422)
Jimmy E. Steen (423)[37]
Richard E. Steen (424)
Phyllis Stubbs (425)
Ulysses O'Neill Thomas (426)
James M. Thompson (427)
Dwight Lee Wall (428)
Roger Webster (429)
Kevin P. Withers (430)
Ronald W. Young (431)
Danny R. Allen (433)
Boyd A. Braddock (434)[38]
Al Kaurin (436)
James D. Liles (437)
Owen Glenn Taylor (438)
Kenneth R. Bostick (439)
Daniel H. Potts III (443)
Brady Baldwin (444)
Flemming A. Byrd (445)
Coy Doughlas Jr. (446)
Sandra V. Lilby (448)
Tommy B. Green (449)
Edward Pate Parson (450)
Michael Thomas Hudson (452)
Lacy A. Johnson (453)
James Woodrow Lynch (454)
Donald C. Whitley (456)
Adam Dansel Allen (457)
Ray Douglas (458)
Mildred D. Green (459)
Donald Wayne Grooms (460)
Scottie J. Harris (461)
Nathan P. Jacobs (462)
Dale Riley Nuttal (463)
Richard Diggs (465)
J. A. Bolton Jr. (467)
Bobby B. Hornbuckle (468)
John Dennis (469)
Johnny Chappel (470)
Todd Young Burgess (472)
Robert R. Caudle Jr. (473)
Richard Dean (474)
Gary Hooks (476)
Robert C. Berry (477)
Paul R. Layton Jr. (480)
James T. David (481)
Boyce Carpenter (482)
James Herman Godwin (483)[39]

after the demand for recognition, a challenge hereinafter rejected. As to Abram's other card, 546, I will not count it, counting 360 instead as Abrams' most recent card.

[34] The testimony of Franklin is not entitled to any weight. He clearly had no recollection of what he was told when he was solicited.

[35] McBride's testimony is neither clear, nor coherent. I am persuaded from his entire testimony that no statements were made to him to ignore the language of the card.

[36] Robinson signed cards 420 and 602. Only card 420 is counted for majority status.

[37] Steen testified he did not read the card and that he was told it was just for an election. He could not identify who told him that and adverted to general talk among employees. Steen had also signed card 605 before the first election. In the circumstances, I conclude he should be bound by the language of the card. I shall count card 423 for majority status, and not card 605

[38] A review of Braddock's testimony indicates that he was confusing the word "election" for "Union." For example, he testified he was told "if the election was passed, you would sign another card" and you would have to sign more papers "if the election went in." I am persuaded the authorization language of the card was not canceled out by misrepresentations of the solicitor.

[39] Card 483 bears the name of Herman Godwin, signed March 8, 1979. James Herman Godwin testified he was the one who signed card 483, using a fictitious named to avoid harassment by solicitors. He signed a second card about 3 weeks later which he turned in at a union meeting. Neither the General Counsel, nor the Union, could find the card On the basis of Godwin's testimony, which I credit, I find that he authorized the Union to represent him and count his "lost" card. *Hedstrom Co.*, 223 NLRB 1409 (1976).

Johnny R. Chavis (485)
George Gibson (486)
Arthur D. Collier (487)
Harry Davis (488)
William H. Horne (489)
Tyrone Covington (491)
Elijah Cooper (493)
Jeff Gregory (494)
John R. Lampley (495)[40]
John D. Lassiter (496)
Bruce McDonald (498)
Mike McNeill (499)
Gary F. Martin (500)
Michael Patterson (502)
Boykin E. Stewart (504)[41]
Joey Stogner (505)
Charles H. Tarlton (506)
Edwin S. Wilson (508)
James Randall Thomas (509)
Bobby Terry (511)
Jeffrey Scott Patrick (512)
John Kenneth White (515)[42]
Charles McPherson (516) [43]
James T. Lisk (517)
David Randy Watson (518)
Ronnie E. Steen (519)
James T. Thompson (520)
Jerry W. Ludlum (522)
Claude Morgan Jr. (523)
Robert M. Thomas (524)
James G. Shepard (525)
Melton Robinson (526)
Luere D. Little (528)
Jimmy Waynes Liles (529)
James Curtis Caskwell (530)
Ricky D. Sweatt (531)
Vinston Littles (532)
Michael Legrand (533)
Douglas G. Wheeler (534)
Buddy Joe Cox Jr. (537)
Robert Lee McLaughlin (539)
Raymond Ellerbe (542)[44]
Mitchell Reddick (543)
Henry James Everett (544)
Billy Gulledge (545)
Charles Terry (549)
Phyllis A. Wall (550)
William F. Singletary (552)
Charles Bright (553)
Wayne Mason (555)
Neil Douglas McLaughlin (556)
James Young Jr. (557)
John Eddie Harris (558)
Aaron D. Little (559)
Charles Patterson Jr. (561)
Keith O' Neal (565)
Vernon G. Gardner Jr. (556(a))
William R. Grooms (567(a))
Clarence Jackson (568(a))
Gerald Littlejohn (569(a))
George Redmond (570(a))
Willie J. Fairley (571(a))
Elvis Charles Little (572(a))
Clatis M. Thomas (574(a))
Arthur Nicholson (575)[45]
Jackson L. Dawkins (576)[46]
James Coble Jr. (577)[47]
James Rushing (578)[48]
Willie Watts (579)[49]
Edward F. Singletary (580)[50]
Jimmy Cain (582)[51]
William D. Robinson (583)[52]
Marvin Locklear (584)[53]
Charles Rankin (585)
Gary Gregson (586)[54]
Michael Dawkins (587)[55]
Roger Mills (589)
Tommy Deberry (591)
Larry L. Lovin (593)
Robert McCormick (594)
Dale Treece (595)
James Miller (598)[56]

[40] Lampley signed cards 495 and 603. Only card 495 is counted for majority status.

[41] Stewart signed cards 504 and 606. Only card 504 is counted for majority status.

[42] Any suggestion in White's testimony that the card was represented to be only for the purpose of an election is rejected as a reflection of his understanding and not of any statements to that effect by the card solicitor. The challenge to his card on the ground of staleness is rejected hereinafter.

[43] It is clear, and I find, from McPherson's testimony that any suggestion that the only purpose of the card was for an election was in talk among employees and that no card solicitor made such a misrepresentation to him. The challenge to his card on the ground of staleness is rejected hereinafter.

[44] Ellerbe's card is dated before the first election and is challenged on the ground of staleness This challenge is rejected hereinafter, but in Ellerbe's case, he testified he signed a second card after the first election and such testimony is additional ground for validating his card. He also testified he did not read the card, but that he was told its purpose was to get a union in.

[45] Nicholson signed cards 575 and 442. Only 575 is counted for majority status.

[46] Dawkins signed cards 576 and 191. Only card 576 is counted for majority status.

[47] Coble signed cards 577 and 160. Only card 577 is counted for majority status.

[48] Rushing signed cards 578 and 197. Only card 578 is counted for majority status.

[49] Watts signed cards 579 and 362. Only 579 is counted for majority status.

[50] Singletary signed cards 580 and 166. Only card 580 is counted for majority status.

[51] Cain signed cards 582 and 478. Only card 582 is counted for majority status.

[52] Robinson signed cards 583 and 154. Only card 583 is counted for majority status.

[53] Locklear signed cards 584 and 172. Only card 584 is counted for majority status.

[54] Gregson signed cards 586 and 247. Only card 586 is counted for majority status.

[55] Dawkins signed cards 587 and 246. Only card 587 is counted for majority status.

[56] Miller signed cards 598 and 369. Only card 598 is counted for majority status.

James Pressley (600)[57]
Keith Diggs (607(a))[58]

The foregoing are the cards which I deem were not invalidated by misrepresentation purposes. The cards that follow are cards which I find, in all the circumstances, were not valid.

Card 220 was signed by William Thompson who testified he was told it was for a reelection. Thompson can not read and the card was not read to him. I deem the card invalid.

Card 259 was signed by Wesley Webb who testified the solicitor told him not to pay any attention to the language on the card, that all it was being used for was an election. I credit Webb and find the card invalid.

Card 503 was signed by Joseph Spivey who testified he was told he could vote like he wanted to, either way, and "all it meant was that they had to have so many signed just so they could have an election." On the basis of this testimony, which I credit, I deem his card invalid for purposes of majority status.

Card 513 was signed by Pattie M. Long who testified she was told "if you sign this card it does not mean the Union is coming in, it only means that if we get enough cards signed then it will be brought to a vote." On the basis of the testimony, which I credit, I deem the card invalid for purposes of majority status.

2. Lack of proof that the card signer was on the list of eligible employees: The record indicates that four of the cards received in evidence were signed by individuals whose names are not on the stipulated eligibility list. These are: Terry Conklin (161), Allen Lee Porter (164), Jesse Lee FLowers (292), and Roy Stephen (320). They are therefore invalid in support of majority status.

Respondent adverts to the cards of Calvert LeGrand (302) and Jerome McDonald (521) as cards of individuals not on the stipulated list. However, LeGrand's name was added at the hearing by stipulation of the parties, and I find that Jerome McDougald's name is erroneously spelled on the stipulated list as Jerome McDonald. I base this finding on McDougald's testimony he was employed during the eligibility period and he gave as his address the same adress as that listed for McDonald in the stipulated list. As there are no other grounds for invalidating card 302 and 521, they are found to be valid designations.

Respondent contends that nine cards are invalid, essentially because there is a variance between the name of the individual as it appears on the card and as it appears on the list; e.g., 527 bears the name Ralph A. Shepheard, Jr. and the list has Ralph Arlie Shepherd; 333 bears the name James R. Dockery and the list has J. Richard Dockery.

I find no merit in Respondent's argument. The totality of the circumstances, including the coincidence of names, initials, addresses, and the authenticating testimony of either the solicitor or the card signer himself, supports a finding that the cards in question are those of the employees whose names appear on the stipulated list. Accordingly, as I find no other grounds for invalidating them, they are found to be valid designations. The cards are:

Keith Cloninger (146)
W. B. Barrington (156)
Charles R. Treadaway Sr. (168)[59]
Charles R. Tyler (258)
Walter Mark Bryant (281)
James Edward Campbell (282)
Stewart B. Nicholson (311)
James R. Dockery (333)
Charles R. Treadaway Jr. (382)
Roger Boone (386)
Johnnie D. Diggs (392)
Henry J. Eddings (393)
Roger Pemberton (416)
James G. Campbell (435)
Henry R. Davis (464)[60]
James Kenneth Brown (466)
Ralph Arlie Shepherd (527)[61]
Howard Lee Miller Jr. (554)[62]
Thomas A. Little (592)

3. Insufficient proof cards signed before the critical date: Respondent contends that there is insufficient proof as to 20 cards that they were signed before the critical date. The cards in question are: 139, 141, 155, 179, 241, 245, 284, 318, 329, 331, 343, 360, 367, 368, 370, 418, 451, 455, 497, and 501. All of these, except 155, 455, and 501, have one thing in common; they are dated between June 5 and July 10, 1979. Thus, they were signed after the Union's demand for recognition. However, it is clear that the Union's demand was a continuing one and as the cards bear the names of individuals on the stipulated eligibility list, I find no merit to Respondent's contention. Accordingly, except for card 451, as I find no other grounds to invalidate the following cards, I find them to be valid designations:

Timothy D. Barbour (139)
Cherry J. Chavis (141)[63]
Brady Speight (155)[64]

[57] Pressley signed cards 600 and 447. Only card 600 is counted for majority status.

[58] Diggs signed cards 607(a), 149, and 607(b). In addition to the claim of misrepresentation, Respondent contends Diggs' card is invalid by reason of staleness or implied revocation, contentions which I find lacking in merit. Card 607(a) is the card counted for majority status.

[59] Treadaway's card is dated before the first election. As noted hereinafter, that circumstance alone is an insufficient basis to invalidate the card.

[60] Davis' card is challenged on the ground of misrepresentation, a challenge I find lacking in merit.

[61] The totality of Shepherd's testimony indicates, and I find, that he was not told the only purpose of the card was to get an election.

[62] Card 360, signed by Abrams, was found to be valid above.

[63] Chavis' card is also challenged on the ground of misrepresentation as to its purpose. I find no merit to the challenge

[64] Speight's card is dated September 9, 1979, but it is clear that it was signed in 1978. Authenticating witness Marshall Reynolds gave testimony to that effect, which I credit, and Speight's card shows a rate of pay not in existence after May 1, 1979. As I find on the basis of Speight's testimony as a whole that there was no misrepresentation as to the card's purpose, I find the card valid.

William C. Covington (179)
Sherman Everett (241)
Gary Davis (245)
Michael Banks (284)[65]
Terry Lee Singleton (318)
James A. Mudd (328)[66]
Francis L. Covington (331)
Connie L. Little (343)[67]
Henry James Everett Jr. (367)
Ernest L. Daughtery (368)
Donald Greene (370)
William Olin Player (418)
Dennis Smith (455)[68]

Respondent contends that these cards are invalid by reason of staleness. I find no merit in the contention. If the cards are old, it is because Respondent interfered with the conduct of two elections.

Respondent contends that, in any event, the Union should be estopped from relying on these cards for majority status because its activities in soliciting signatures to new cards led employees to believe the first card they signed was invalid and for that reason they forebore acting to revoke their cards. Absent a showing that any employee forebore to revoke his card because of the Union's statements or conduct regarding the signing of new cards, the contention is rejected.

On the basis of the foregoing, and finding no other grounds for invalidating them, I shall count the following cards in support of majority status:

Johnny Sellers (102)
Henry Justin Sale (170)
William W. Currie (190)
Stephen F. Smith (199)
Bobby House (294)
Fred S. Caudle Jr. (324)
William D. Edwards (335)
Otis Stanback (354)
Claudius D. Boyd (440)
James S. Ingram (490)
Franics Covington (492)
Charles N. Tyler (507)
Thomas M. Williams Jr. (514)
Gary Goodwin (536)[69]
Willie King (540)
Eddie Edwards Jr.[70]
Robert E. Stogner (560)
Rickey W. Knight (562)

A number of employees who signed cards before the first election testified that they were requested to sign cards after the first election and refused. Respondent contends that their cards are therefore invalid on the theory that the refusal of an employee to sign a second card, on request, constituted an express revocation of the card previously signed. I do not know that the term "revocation" is the appropriate term to use in assessing the validity of the card, but in my judgment, where employees have testified that they were asked and refsued to sign a second card after the first election, it is a reasonable inference that this objective conduct reflected that the employee no longer desired the Union to represent him. Accordingly, I conclude that the following cards are not valid:

Donald J. Grigss (122)[71]
George D. Lisk (128)
Stephen Abbott (143)
Jack T. Hudson (163)
Gary L. Pressley (165)
Branson Smith (167)
Bobby Wall (169)
William Paul Webster (238)
Terry McCumber (266)
Robert W. Carpenter (271)[72]
Johnny Ray Inman (441)
Randy E. Jacobs (475)
Paul Bittle (479)
Joseph F. Gilliam (484)
Austin K. William (510)
Pattie M. Long (513)
Jim Lucy Doby (535)
Ed Cumber (546)
Dewey W. Grooms (548)
B. Fran Driggers (563)
Joseph Michael Steagall (581)

5. Miscellaneous challenges:

a. *Not signed on signature line*: The cards of Edward Saunders (381), David Gillis (538), and James Gerry Covington (551) were not signed on the signature line. For this reason, Respondent contends they are not valid designations. I reject the contention. The three cards were authenticated by the card signers, and all indicated by their testimony an intent to authorize the Union to act as their collective-bargaining representative. Accordingly, I find their cards are valid.

b. *Cards signed under the influence of alcohol*: Respondent contends three cards are not valid designations because they were signed while the employee was under the influence of alcohol. In the case of William W.

[65] The challenge to Banks' card on the ground of misrepresentation is rejected.

[66] Mudd did not date his card, nor did Fred Caudle, the solicitor, Caudle had no independent recollection of the date he received the card from Mudd, but he testified that it was before the second election I deem his testimony sufficient to validate the card.

[67] Little also signed card 541 before the first election. Only card 343 is counted for majority status.

[68] Smith authenticated his card. He could not verify the date on the card, but testified he signed the card before the second election

[69] Goodwin did not sign on the signature line. His testimony indicates a clear intent to do so.

[70] In his brief, Respondent did not challenge Edward's card for being dated before the first election, but he did so at the hearing.

[71] Griggs' card is challenged on the ground of misrepresentation, a challenge I deem to have no merit. However, Griggs testified he was solicited to sign a second card and, although he signed one, he did not deliver it to the Union. In the circumstances, I deem his first card invalid.

[72] Carpenter not only refused to sign a second card, but his testimony, which I credit, puts into question whether he ever delivered his first card to the Union.

Goodwin (162), Goodwin admitted to drinking, but disclaimed being drunk. Accordingly, I reject the challenge to the validity of his card based on that ground.[73] In the case of the cards of James Therrell (202) and Thomas Woolard (205), their testimony supports a finding that they did not have the capacity to know the meaning of their act, and I find their cards are not valid designations.

c. *Revocation*: Card 274 was signed by Eddie Dean who testified that 3 weeks after he signed the card he asked the solicitor for its return. I credit Dean who appeared to me to be a truthful witness and I deem his request for the card's return a revocation of the card.

Summary

On the basis of the foregoing, I conclude that 442 cards are valid designations of the Union as collective-bargaining representative of the employees in the appropriate unit.

b. *The propriety of a bargaining order*

In the foregoing, it has been found that as of June 4, 1979,[74] a majority of Respondent's employees had designated the Union as their collective-bargaining representative in an appropriate unit, and the Union requested and was refused recognition. It is also established that such refusal occurred in the context of unfair labor practices. In these circumstances, a bargaining order is warranted if the unfair labor practices are deemed sufficiently serious or pervasive that the possibility of erasing the effects of such practices and insuring a fair election by the use of traditional remedies, though present, is slight and employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order.[75]

In my judgment, Respondent's unfair labor practices as herein found were both pervasive and serious. They were pervasive in that they reached all employees in the form of a barrage of campaign literature. They were serious because they consisted of threats of plant closure, discharge, loss of jobs and benefits, and threats which strike at the very heart of employee concerns. Incorporated with these threats were the repeated reminders of the inevitability of a strike if the employees selected the Union as collective-bargaining representative and that it would be futile for them to do so, reminders that are unlikely to be erased through the traditional remedies of a cease-and-desist order and the posting of a notice. Contemporaneously with the threats were promises of benefit which cannot but linger in the minds of the employees and preclude the holding of a fair election.

Respondent's conduct was such that had this been the first time it so conducted itself in an election campaign, a bargaining order would be appropriate. What makes a bargaining order particularly compelling in this case, however, is the demonstrated purpose on the part of Respondent to prevent its employees from ever exercising a free choice on the issue of a collective-bargaining representative. I state this because the free election which Respondent fouled by its unfair labor practices in the period before July 13, 1979, was the second one it fouled. Not only that, its objectionable conduct in the second election was similar to, and even more egregious than, its objectionable conduct in the first election.

I refer particularly to the fact that one of the grounds for setting aside the first election was one speech to assembled employees which impliedly threatened employees with plant closure while reminding them of their existing benefits. Substantially, the same conduct was repeated in the campaign literature in this case and the threats were even enlarged upon. In these circumstances, the conclusion that a bargaining order is necessary in this case is compelling, and the finding is warranted that by refusing to recognize and bargain with the Union, on request, Respondent since about June 4, 1979, has violated Section 8(a)(1) and (5) of the Act.

Respondent contends that a bargaining order here is not appropriate for a number of reasons, principal of which is that the unfair labor practices alleged even if found are not sufficiently serious or pervasive that their effects may not be dissipated by traditional remedies. For the reasons given above, I reject Respondent's contentions.

2. The unilateral conduct

Paragraph 8(w) of the complaint in Case 11–CA–8746 alleges that since about October 30, 1979, Respondent refused to bargain with the Union by unilaterally adopting a new attendance policy; paragraph 14 alleges that pursuant to said policy Respondent issued disciplinary warnings to Richard Diggs, Charles Ellerbe, and others known to Respondent; and paragraph 15 alleges that pursuant to said policy Diggs, Ellerbe, and employees presently unknown were discharged on or after October 30, 1979.

The same allegations appear in paragraphs 12, 13, and 14 of the complaint in Case 11–CA–9454, apparently in anticipation of arguments that the allegations in Case 11–CA–8746 are barred by Section 10(b) of the Act. Such arguments have been presented. Respondent contends that the allegations in question, insofar as they appear in the complaint in Case 11–CA–8746 are barred because no such allegations appear in the original charge, nor in the amended charge, and are not closely related to the general refusal-to-bargain allegation in the amended charge. I do not agree. In my judgment, an allegation of unilateral conduct is closely related to an allegation of general refusal to bargain. Accordingly, I find that the allegations in paragraphs 8(w), 14, and 15 of the complaint, as amended, in Case 11–CA–8746 are not time-barred.

[73] Goodwin's card is also challenged on the ground of staleness, a challenge I have rejected earlier

[74] As of June 4, 1979, the date of the demand for recognition, the Union had 426 cards. Accordingly, the refusal to bargain herein found shall be found to have occurred on and since June 4, 1979. Should any of these 426 cards be deemed invalid on review to reduce the number below 411, the 16 cards dated after June 4 but before July 13, which I have found to be valid, would be added to determine majority status and the refusal to bargain would be found to have occurred on and since July 13, 1979.

[75] *Gissel Packing*, 395 U.S. at 614, 615

As to the identical allegations in Case 11–CA–9454, I find that they also are not time-barred. Although the charge in that case was filed more than 6 months after the alleged unilateral change in policy, the 10(b) period was tolled by the Union's lack of knowledge of the unilateral action. In this connection, Respondent argues that the Union had constructive notice, at least, inasmuch as the alleged change was the subject of a notice distributed to employees about the date it went into effect. In my judgment, this cannot be deemed notice to the Union where the Union is being denied its lawful status as bargaining representative. In such a situation, a Union has no stewards to whom it can look to police working conditions, and members of an in-plant organizing committee are not the same as stewards. Moreover, the change in issue here is a slight change, the nature of which could only be appreciated by one privy to the attendance policy and procedure in existence before the change. There is no showing the Union was privy to the old policy and procedure. Finally, although the policy was asserted to have gone into effect on October 30, 1979, there is no showing that any employee affected by it was himself aware how it affected him and that the Union was made aware of the enforcement of the policy. In these circumstances, I find the 10(b) period was tolled and that the complaint is not time-barred.

While the allegations here in question may not be time-barred, I conclude that a finding of a violation of Section 8(a)(1) and (5) of the Act is not warranted, because the changes in question did not constitute a material, substantial, or significant change from Respondent's prior practice. *Rust Craft Broadcasting*, 225 NLRB 327 (1976); *Peerless Food Products*, 236 NLRB 161 (1978). This conclusion I based on the credited testimony of Ron Dickinson that the change in question was rather a change of procedure than policy, and that it removed negative connotations in the word "warning" by substituting counseling, including an additional counseling step.

The General Counsel, in effect, argues such is not the case. Counsel for the General Counsel concedes that the attendance procedure before October 30, 1979, was honored more in the breach than in the practice, and refers to the practice as chaotic and at the whim of individual supervisors. However, he argues that after October 30, 1979, the new procedure was closely adhered to. An examination of the records submitted leaves me unpersuaded. It appears at most that Respondent was attempting to bring some order into its procedure, but there is no basis for holding that the attendance policy was made more stringent or substantially altered. Accordingly, I shall dismiss the 8(a)(5) allegation relative to this issue.[76]

III. THE OBJECTIONS

Before the Board will issue a bargaining order based on authorization cards where there has been an election pursuant to a representation petition, timely objections to conduct affect the results of the election must have been filed and have been found meritorious so that the election results are set aside. *Irving Air Chute Co.*, 149 NLRB 627 (1964). As noted earlier, timely objections to the election of July 13, 1979, were filed and, by order of the Board, the objections discussed below were consolidated for hearing with Case 11–CA–8746. They are disposed of as follows:

> (3) The Employer and/or Agents of the Employer instituted wage increases in order to influence the outcome of the election.
>
> (4) The Employer and/or Agents of the Employer paid employees at the newly instituted wage rate prior to the effective date of the increase in order to influence the outcome of the election.

It is recommended that these objections be overruled in accordance with the findings above relative to the job evaluation program.

> (7) The Employer and/or Agents of the Employer interfered with the distribution of Union literature in non-work areas and on non-work time in order to influence the outcome of the election.

It is recommended that this objection be sustained in accordance with the findings above that Respondent interfered with the distribution of union literature at the plant entrances on the night before the election.

> (9) The Employer and/or Agents of the Employer threatened employees with loss of benefits in order to influence the outcome of the election.
>
> (10) The Employer and/or Agents of the Employer threatened employees with plant closure in order to influence the outcome of the election.
>
> (11) The Employer and/or Agents of the Employer threatened employees with the inevitability of strikes in order to influence the outcome of the election.
>
> (14) The Employer and/or Agents of the Employer threatened employees for engaging in protected activity in order to influence the outcome of the election.

It is recommended that these objections be sustained on the basis of the findings above relative to the statements in Respondent's campaign literature, the statements of Simmons or Frank to Covington, the statement of Williams to Bridges, the statements of McInnis to Diggs, and the statements of Kelly to Moore.

> (12) The employer and/or Agents of the Employer interrogated employees regarding their union activity in order to influence the outcome of the election.

It is recommended that this objection be sustained on the basis of the findings above relative to the interrogation of Covington, Bridges, and Moore.

[76] The General Counsel contends that the change in attendance policy was violative of Sec 8(a)(1) of the Act, because it was made during the pendency of the objections in Case 11–RC–4447. I find no merit in this contention There is no evidence whatsoever that Respondent's action was designed to erode union support among the employees

(13) The Employer and/or Agents of the Employer implied surveillance of protected activity in order to influence the outcome of the election.

It is recommended that this objection be sustained on the basis of the findings above realtive to statements to employees Grant and Pettigrew.

(18) The Employer and/or Agents of the Employer denied employment to relatives and friends of known adherents in order to influence the outcome of the election.

It is recommended that this objection be overruled on the basis of the findings above relative to Judy Perkins and her conversation with Supervisor Williams.

The objections included an allegation of interference with the conduct of the election by "other acts and conduct." Under this heading the Regional Director found that statements in Respondent's campaign literature warranted a finding of objectionable conduct consisting of a promise of benefits. On the basis of my own findings above of implied promises of benefits in Respondent's campaign literature, I shall recommend that the objections "other acts and conduct" be sustained.

The objections which I have herein found to have merit warrant setting aside the election held on July 13, 1979, and I shall so recommend and, in view of the recommendation that a bargaining order be issued, I shall recommend that the petition for election be dismissed.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

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

V. THE REMEDY

Having found that Respondent has engaged in unfair labor practices in violation of Section 8(a)(1) and (5) of the Act, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act, including, for reasons set forth above, a recommendation that Respondent be ordered to recognize and bargain with the Union as the representative of its employees to remedy the serious unfair labor practices which it committed by which it has rendered the possibility of holding a fair election slight.

CONCLUSIONS OF LAW

1. Clark Equipment Company is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. United Steelworkers of America, AFL–CIO–CLC is a labor organization within the meaning of Section 2(5) of the Act.

3. All hourly full-time and regular part-time production and maintenance employees, including material handlers, quality control department employees, tool room and tool crib employees, met lab technicians, and outside drivers employed at the employer's Rockingham, North Carolina facility located at Highway 74 W. Rockingham, North Carolina, excluding all office clerical, plant clericals, production schedulers, plant schedulers, sales coordinators, gear technicians, material planners, truckdrivers not employed by the employer and janitors not employed by the employer, sales employees, managerial employees, professional employees, guards and supervisors as defined by the Act, and all other employees, constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act.

4. By threatening employees wth discharge, loss of jobs, loss of benefits, and plant closure if they selected the Union as their collective-bargaining representative; by threatening them with the inevitability of a strike and the futility of selecting the Union as their collective-bargaining representative; by promising employees benefits if they rejected the Union as their collective-bargaining representative; by interrogating employees about their union sentiments; by interfering with employees in the distribution of union literature in nonwork areas during nonwork time; by threatening the arrest of employees for distributing union literature in nonwork areas during nonwork time; by conveying the impression of surveillance of the union activities of its employees; and by interfering with the Board's processes by telling them they do not have to honor Board subpoenas, Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

5. By refusing since June 4, 1979, to recognize and bargain with the Union as the exclusive representative of its employees in the appropriate unit set out above, Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(1) and (5) and Section 2(6) and (7) of the Act.

[Recommended Order omitted from publication.]