

**Abramson, LLC and United Brotherhood of Carpenters and Joiners of America, Local 127 and Curtis Young.**

**Abramson, LLC and United Brotherhood of Carpenters and Joiners of America, Local 127, Petitioner.** Cases 10–CA–33153, 10–CA–33368, and 10–RC–15230

August 26, 2005

DECISION, ORDER, AND DIRECTION OF  
SECOND ELECTION

BY CHAIRMAN BATTISTA AND MEMBERS SCHAUMBER  
AND LIEBMAN

On July 8, 2002, Administrative Law Judge Lawrence W. Cullen issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed an answering brief and the Respondent filed a reply brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,<sup>1</sup> and conclusions as modified<sup>2</sup> and to adopt the rec-

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

Member Schaumber joined by Member Liebman agree with the judge that the Respondent coercively interrogated employee Allen when supervisor Harris asked him if he thought the Union could get him a raise before Harris could. As noted by the judge, Allen did not respond to Harris' question. Harris then asked Allen, "what if [the Respondent] took the van away, what if you lose your job." Again, Allen did not respond. We recognize that Allen was an open Union supporter and was wearing a union t-shirt at the time of the questioning. This fact is relevant to the question of whether the interrogation was coercive, but it is not determinative. Rather, in determining whether such questioning is coercive, the Board considers all the circumstances. *Reeves Bros., Inc.*, 320 NLRB 1082, 1084 (1996), citing *Rossmore House*, 269 NLRB 1176, 1178 fn. 20 (1984), aff'd. 760 F.2d 1006 (9th Cir. 1985). Here, Harris pressed his questioning after Allen refused to answer his first inquiry, and included threats of job loss and loss of benefits with his questioning. Under all the circumstances, we agree with the judge that the interrogation was coercive.

Chairman Battista would find that the Respondent did not coercively interrogate employee Eddie Allen when its supervisor, Wayne Harris, approached Allen and asked him if he thought the Union could get him a raise before Harris could. Allen was an open supporter of the Union, and Harris thus was not asking him to reveal his sentiments. Rather, Harris was trying to persuade him otherwise by suggesting that the Union could not get him a raise more quickly than Harris could. Although this effort to persuade included threats, it did not include coercive interrogation.

Member Schaumber joined by Member Liebman agree with the judge that the Respondent violated Sec. 8(a)(1) when its co-owner, Greg Abramson, told employees that it would be hard for the Respon-

commended Order as modified and set forth in full below.<sup>3</sup>

dent to get work if the Union came in because most general contractors do not want union workers on the job. Under the standard set forth in *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969), such predictions are unlawful unless they are "carefully phrased on the basis of objective fact to convey an employer's belief as to the demonstrably probable consequences beyond his control or to convey a management decision already arrived at to close the plant in case of unionization." Here, the basis for the prediction was that two of Respondent's customers indicated that their willingness to contract work with the Respondent might be affected. Abramson, however, told the employees that it would be harder for the Respondent to get work because *most* general contractors do not want union workers on the job. Under these circumstances, we agree with the judge that Abramson's prediction did not satisfy the *Gissel* standard.

Chairman Battista would also find that the Respondent did not violate Sec. 8(a)(1) when Abramson told employees that if the Union came in it would be hard to get work because "most" general contractors do not want union workers on the job. Abramson based that opinion on fact, i.e., conversations that he had with two customers. Although the opinion may have been wrong (two customers does not necessarily represent a majority of customers), it was an opinion, and even "incorrect" opinions are protected by Sec. 8(c).

The judge additionally found that the Respondent violated Sec. 8(a)(1) when Greg Abramson told employees Walter Williams and Jimmie McMillan that they "might" lose transportation privileges if the Union came in. We find it unnecessary to pass on this finding made by the judge because a finding of an additional unlawful threat would be cumulative and would not affect the remedy.

<sup>2</sup> The judge found that the Respondent's failure to return Curtis Young to work following a layoff violated Sec. 8(a)(4) as well as Sec. 8(a)(3). We find it unnecessary to pass on the Sec. 8(a)(4) portion of the complaint because any remedy based on a finding that the Respondent's failure to return Young to work also violated Sec. 8(a)(4) would be essentially the same as the remedy for the 8(a)(3) violation. See *United Parcel Service*, 327 NLRB 317, 317 fn. 4 (1998).

<sup>3</sup> We have modified the Order and notice to more accurately reflect the violations found.

The Board has broad discretionary authority to fashion remedies that will best effectuate the purposes of the Act. *NLRB v. J.H. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 260–263 (1969). Further, it is "firmly established that remedial matters are traditionally within the Board's province and may be addressed in the absence of exceptions." *Indian Hills Care Center*, 321 NLRB 144 fn. 3 (1996), and cases cited therein. Therefore, we shall order the Respondent, in addition to posting copies of the attached notice marked "Appendix" at its jobsites and facilities, to mail copies of the notice to all its present employees and to all employees on its payroll since June 18, 2001, when the Respondent began its unlawful conduct. This remedy is particularly appropriate to the work situation of the unit employees, who work on individual construction jobsites across Alabama and Florida. See *Technology Service Solutions*, 334 NLRB 116, 117 (2001) (requiring employer to mail notices to employees who did not regularly report to one of its facilities).

Chairman Battista would not award the additional and special remedy of mailing copies of the notices. No such remedy was requested, and thus no-one showed the necessity for such a remedy. Although the Board has the power to enter these remedies, it should not do so absent a showing of necessity.

Finally, we deny the Respondent's Motion to Supplement the Record with a copy of the *Excelsior* list and a copy of the General Counsel's Report on the Election. While it appears from the record that

### Introduction

The Respondent is a highway construction contractor. The Union's efforts to organize certain of the Respondent's employees commenced in April 2001.<sup>4</sup> After obtaining signed authorization cards from a majority of the unit employees, the Union requested recognition on June 18, and the Respondent denied the request. The Union filed a representation petition on July 5.

The election occurred on August 17. The Union lost the election by a margin of 5 ballots for, and 68 against representation, with 4 nondeterminative challenged ballots. The Union filed timely objections to the election. The Regional Director found that the objections were coextensive with certain conduct alleged in the unfair labor practice cases and consolidated the objections with the unfair labor practice cases for a hearing.

In his decision, the judge found that the Respondent committed a number of unfair labor practices before and after the election, and that these violations impeded the election process and prevented the possibility of ensuring a fair rerun election. The judge accordingly recommended that the Respondent be ordered to bargain with the Union pursuant to *NLRB v. Gissel Packaging Co.*, 395 U.S. 575 (1969).

As set forth below, we affirm in part and reverse in part the judge's unfair labor practice findings. We further find that the coercive effects of the Respondent's unlawful conduct can be alleviated, and a fair rerun election held, by use of the Board's traditional remedies. We accordingly reverse the judge's recommendation that a *Gissel* bargaining order be issued and we direct a second election. We address these matters in turn below.

1. Contrary to the judge, we find that the Respondent did not coercively interrogate employee Eddie Allen when its superintendent Bruce Webb asked him "what about this union." As more fully discussed in the judge's decision, the conversation was initiated by Allen, who approached Webb at the jobsite and asked him for a loan. Webb loaned Allen money and the two began to talk. During this conversation, Webb asked Allen, "what about this union" and told Allen that he knew the Union had bid on the job. Allen told Webb that he did not know anything about the Union and Webb responded that it did not matter to him. The conversation ended. Relying on *SALA Motor Freight, Inc.*, 334 NLRB 979 (2001), the judge found that the interrogation of Allen by

Webb violated Section 8(a)(1). The Respondent excepts to the judge's finding, arguing that the judge's reliance on *SALA Motor Freight* is misplaced. We find merit in this exception.

In *SALA Motor Freight*, the supervisor asked one employee, "what's this I hear about you holding a union meeting at the Skyline Restaurant," adding that he knew about the meeting and which employees attended. The supervisor asked a second employee whether anyone had spoken to him about the union and if he had heard any rumors. Finally, a couple of days later, the same supervisor asked a third employee if he had attended a union meeting. The nature of these questions is substantially different from the spontaneous off-the-cuff question attributed to Webb, "what about this Union?"

Webb's question is more akin to the supervisor's question in *Rossmore House*, 269 NLRB 1176 (1984), aff'd. sub nom. *Hotel Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). In the latter case, the supervisor, after receiving a mailgram stating that the employees were forming a union organizing committee, asked an employee named in the mailgram "what's this about a union?" The employee replied that they were going to have a union to address the employees' concerns over issues such as benefits and job security. The supervisor then said that the owners of the company would fight against the union and that he, as a supervisor, likely would too. The Board found that such a verbal exchange did not constitute an unlawful interrogation: "Because production supervisors and employees often work closely together, one can expect that during the course of the workday they will discuss a range of subjects of mutual interest, including ongoing unionization efforts. To hold that any instance of casual questioning concerning union sympathies violates the Act ignores the realities of the workplace." *Rossmore House*, 269 NLRB at 1177 (quoting *Graham Architectural Products v. NLRB*, 697 F.2d 534, 541 (3rd Cir. 1983)).

We find that the questioning here has not been shown to be coercive. There were no threats or promises made by Webb. The conversation occurred informally at the jobsite and was initiated by Allen with his request for a loan. Our dissenting colleague is correct that it was Webb and not Allen who brought up the topic of the Union. However, according to Allen, Webb cited a job bid as the basis for the question. Thus, it is not clear that the question sought Allen's views about the unionization of the Respondent, or that Allen would reasonably have placed that interpretation on it. Furthermore, Webb asked his question only after giving Allen the loan. Thus, under the totality of the circumstances, we cannot find that Webb's questioning of Allen was coercive.

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these documents were discussed at the hearing, the Respondent did not introduce these documents into evidence. It would be inappropriate in these circumstances for the Board to consider evidence that was not available to the judge. See *Franklin Iron & Metal Corp.*, 315 NLRB 819 (1994).

<sup>4</sup> All dates are 2001 unless otherwise indicated.

Therefore, relying on *Rossmore House*, we dismiss the complaint allegation that Webb unlawfully interrogated Allen.

2. We also reverse the judge's finding that the Respondent violated Section 8(a)(1) when its co-owner, Alan Abramson, questioned employee Rodney Jones about papers he had filed in connection with a Title VII case. As more fully set forth in the judge's decision, Jones was laid off with his entire work crew on August 24 after completing a project at the Galleria jobsite and was recalled with his crew in late September. Jones worked until October 8, when he became ill and was hospitalized. After leaving the hospital, Jones called the Respondent seeking to return to work and was told no work was available. Jones called a second time seeking work and spoke to co-owner Alan Abramson. During their conversation, Abramson asked Jones what kind of papers he and employee Curtis Young had signed that required him to go to court.<sup>5</sup> In response, Jones told Abramson that he had signed papers received from the Union,<sup>6</sup> not to hurt the Respondent, but to better himself and make more money.

Section 7 provides: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . ."<sup>7</sup> In order for employee conduct to fall within the ambit of Section 7, it must be both "concerted" and engaged in for the purpose of "mutual aid or protection." These are related but separate elements that the General Counsel must establish in order to show a violation of Section 8(a)(1).

In the *Meyers* cases,<sup>8</sup> which refined the scope of conduct that constitutes concerted activity, the Board discussed and adhered to a longstanding distinction between "concerted activity" on the one hand and "mutual aid or

protection" on the other. Thus, in *Meyers I* and *II*, the Board noted that earlier Board cases "had, with court approval, distinguished between the two clauses and regarded them as separate tests to be met in establishing Section 7 coverage."<sup>9</sup> The Board reaffirmed that "concerted activity" included "circumstances in which individual employees seek to initiate or to induce or to prepare for group action,"<sup>10</sup> and "activity which in its inception involves only a speaker and a listener, for such activity is an indispensable preliminary step to employee self-organization," so long as what is being articulated goes beyond mere griping.<sup>11</sup> Consistent with treating the two elements as separate but indispensable requirements of Section 7, the Board in *Meyers II* then discussed "mutual aid or protection" separately, noting that "the Supreme Court regarded proof that an employee action inures to the benefit of all simply as proof that the action comes within the 'mutual aid or protection' clause of Section 7."<sup>12</sup> See *Holling Press, Inc.*, 343 NLRB 301, 301 (2004), for a general discussion of the requirement that an employee's conduct must be both "concerted" and engaged in for the purpose of "mutual aid or protection" to fall within the ambit of Section 7.<sup>13</sup>

Where employees concertedly band together to seek from their employer an improvement in terms and conditions of employment, or protection against an adverse change in the same, they are engaged in Section 7 activity. That is, their activity is concerted, and it is for mutual aid or protection. *Holling Press*, supra.

In the instant case, however, Jones did not engage in "concerted activity" within the meaning of Section 7. Rather, he sought only to pursue his personal Title VII claim before the EEOC. The judge does not point to any evidence that Jones was engaged in "concerted activity" or "seeking to initiate or to induce or to prepare group action."<sup>14</sup> There is no evidence that Jones discussed his wage concerns that served as the basis for his Title VII

<sup>5</sup> Abramson testified that he was referring to the thirteen separate EEOC Discrimination Charge Notices, including the one filed by Rodney Jones alleging wage discrimination, he received a few days before his telephone conversation with Jones.

<sup>6</sup> Jones testified that the only paper he signed was a discrimination statement alleging wage discrimination based on race, and that after he signed the statement he handed it to a union representative. Furthermore, he testified that he signed the statement before the NLRB matter came up and that the discrimination statement had nothing to do with the NLRB matter.

<sup>7</sup> Sec. 8(a)(1) makes it an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of their Sec. 7 rights.

<sup>8</sup> *Meyers Industries (Meyers I)*, 268 NLRB 493 (1984), remanded sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 948 (1985), decision on remand sub nom. *Meyers Industries (Meyers II)*, 281 NLRB 882 (1986), affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988).

<sup>9</sup> *Meyers I*, 268 NLRB at 494-495, 496 (1984) *Meyers II*, 281 NLRB at 884, 885 (1986) citing *NLRB v. City Disposal Systems*, 465 U.S. 822 (1984), and *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978).

<sup>10</sup> *Mushroom Transportation v. NLRB*, 330 F.2d 683 (3d Cir. 1964).

<sup>11</sup> *Meyers II*, 268 NLRB at 493, citing *Root-Carlin, Inc.*, 92 NLRB 1313, 1314 (1951).

<sup>12</sup> 281 NLRB at 887.

<sup>13</sup> Member Schaumber also relies on his concurring opinion in *IBM Corp.*, 341 NLRB 1288, 1295-1305 (2004), for its discussion of the Board's present definition of "concerted activity" set out in *Meyers I* and *II*, supra.

<sup>14</sup> *Mushroom Transportation*, supra.

Our dissenting colleague appears to imply that this action was concerted because a number of employees, including Jones and Young, signed discrimination statements at roughly the same time. However, the record does not demonstrate that Jones and Young signed their statements simultaneously or in each other's presence, or even that they discussed their discrimination claims with one another.

claim with other employees, nor was there any evidence that he sought the support or assistance of other employees in remedying the alleged discrimination. Furthermore, on direct examination, Jones testified that in filing his EEOC charge, he was trying to only “better himself.” Similarly, on cross-examination, Jones testified that his EEOC charge was part of a “personal campaign” and not part of the Union’s campaign. Thus, the record evidence clearly establishes that Jones did not engage in concerted activity within the meaning of Section 7 by asserting an individual statutory right. *Myers II*, supra.<sup>15</sup> Accordingly, Abramson’s questioning of Jones about his unprotected activity did not violate Section 8(a)(1).

We also reject the judge’s apparent finding that Abramson’s inquiry was unlawful because it was broad enough to include “all papers Jones had filed regarding his union activities.” Contrary to the judge and our dissenting colleague, we find that the record evidence does not support this finding. Rather, the most reasonable reading of Abramson’s question is that it referred to his EEOC charge. Indeed Jones testified that he assumed Abramson was talking about the discrimination statement for his EEOC charge, not the pending NLRB matter. Furthermore, Jones testified that the discrimination statement was the only paper he had signed prior to his conversation with Abramson and that the discrimination statement had nothing to do with the NLRB matter. Thus, it is clear from the record that Abramson’s inquiry was focused exclusively on the EEOC charge and was not broad enough to include the pending NLRB matter. Therefore, we dismiss the complaint allegation that Abramson unlawfully interrogated Jones.

3. We also do not agree with the judge’s finding that the Respondent violated Section 8(a)(1) by threatening employees with discharge for using a company van to attend union meetings. As more fully set forth in the judge’s decision, the Respondent’s co-owner Greg Abramson met with the I-459 work crew on July 11 to discuss the union organizing campaign. The judge found that Abramson threatened employees with job loss and to rescind benefits if the Union won the election, and also threatened to discharge employees for using a company van to attend union meetings. We adopt the judge’s finding that the threats of job loss and threats to rescind benefits violated Section 8(a)(1). However, we do not adopt the judge’s finding that the Respondent’s threat of discharge for using a company van to attend union meetings violated Section 8(a)(1).

<sup>15</sup> Our dissenting colleague seeks to link Jones’ actions and the Union’s campaign talk about racial discrimination. However, as noted above, Jones himself testified that his EEOC charge was a personal matter and was “not part of the union’s campaign.”

Record testimony from witnesses otherwise credited by the judge established that the Respondent had a long-established rule that prohibited employees’ personal use of company vehicles. Walter Williams testified that as long as he has been an employee, there has been a company policy that company vehicles are not to be used for personal use and that this policy had been stated over and over to the crew long before the union organizing campaign. George Pelt testified that he was aware of the Company’s policy prohibiting personal use of company vehicles. Joe Colvin and Jimmie McMillan also confirmed the existence of the policy. They were well-situated to have knowledge of the Company’s rules regarding the use of company vehicles because they were responsible for transporting work crews to and from company jobsites.

Our dissenting colleague argues that some employees, such as Young, testified that they were unaware of the Respondent’s restrictions on the use of company vehicles. That may be, but as shown above, the preponderance of the evidence shows that there was such a rule. Because Abramson’s statements about using the company van to attend union meetings were merely a restatement of this lawful rule, we dismiss the complaint allegation.

4. We also reverse the judge’s finding that Respondent violated Section 8(a)(3) and (4) by refusing to return Rodney Jones to work following a period of sick leave. As more fully set forth in the judge’s decision, Jones was laid off with his entire work crew on August 24 after completing a project and was recalled in late September. He returned to work on October 1 and continued to work until October 8, when he became ill and was hospitalized. The record does not reflect any effort on the part of Jones to notify Respondent of his illness or his hospitalization. Rather, Jones simply stopped coming to work. After he was discharged from the hospital, Jones twice called the Respondent seeking to return to work and on both occasions was told there was no work available.

In order to prove a violation of Section 8(a)(3) and (1) under *Wright Line*,<sup>16</sup> the General Counsel must first prove, by a preponderance of the evidence, that the employee’s protected conduct was a substantial or motivating factor in the employer’s adverse action.<sup>17</sup> Thus, the General Counsel must offer evidence that the employer was aware of the employee’s protected conduct, and that animus against the protected activity motivated the em-

<sup>16</sup> 251 NLRB 1083, 1089 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982).

<sup>17</sup> *Manno Electric, Inc.*, 321 NLRB 278, 280 (1996).

ployer's alleged discrimination.<sup>18</sup> Once the General Counsel makes a showing of discriminatory motivation by proving the employee's prounion activity, and animus against the employee's protected conduct, the burden "shift[s] to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct." *Wright Line*, supra 251 NLRB at 1089.

In this case, we agree with the judge's finding that Jones was engaged in protected activity and that the Respondent had knowledge thereof. However, contrary to the judge and our dissenting colleague, we find that the General Counsel has failed to meet its initial burden of demonstrating that the Respondent's alleged refusal to return Jones to work was motivated by Jones' protected activity. First, the initial layoff of Jones with his entire crew on August 24 was lawful and consistent with the Respondent's past practice. Second, Jones was recalled with his crew in late September after the election. Third, Jones' filing of an EEOC charge cannot be an unlawful motivating factor in the Respondent's decision because, as discussed earlier, it did not constitute protected activity. Finally, the General Counsel presented no other evidence linking the Respondent's decision to Jones' union activity.

In these circumstances, the evidence does not establish that protected activity by Jones was a substantial or motivating factor for the Respondent's decision not to return him to work.<sup>19</sup> While the General Counsel may rely on circumstantial evidence from which an inference of discriminatory motive can be drawn, the totality of circumstances must show more than a "mere suspicion" that protected activity was a motivating factor in the decision. *International Computaprint Corp.*, 261 NLRB 1106, 1007 (1982). Here, the General Counsel's case rests on little more than suspicion, surmise, and conjecture. In sum, we find that the General Counsel has failed to adduce evidence to establish that Jones' protected activity was a motivating factor in the Respondent's decision not to return Jones to work following his initial recall.

Alternatively, assuming *arguendo*, that the General Counsel satisfied his initial *Wright Line* burden of establishing that Jones' protected activity was a motivating factor in the decision not to return him to work, we find, contrary to the judge, that the Respondent proved that it

would not have returned Jones to work in any event because he abandoned his job in mid-October.

Supervisor Wayne Harris testified that Jones was recalled with his crew, returned to work for 1 week, and then just stopped showing up. Jones testified that he returned to work the first week of October and then became ill and was hospitalized for a couple of weeks. As discussed above, the record does not reflect any effort by Jones to notify the Respondent of his hospitalization. In the Respondent's view, Jones failed to report for work after his initial recall and this was the basis for their decision not to return him to work. Furthermore, there was no evidence in the record that the Respondent treated other employees who stopped showing up for work differently than the Respondent treated Jones.<sup>20</sup> We conclude, therefore, that the Respondent met its *Wright Line* burden of showing that it would not have returned Jones to work, even in the absence of his union activity and dismiss this 8(a)(3) complaint allegation.

Finally, Section 8(a)(4) makes it an unfair labor practice for an employer "to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act." The purpose of this section is to insure the proper functioning of the Board in its administration of the Act by providing protection to employees who seek access to Board processes to remedy violations or supposed violations of the Act or to employees who furnish information relating to such violations. Section 8(a)(4) does not extend protection to employees who resort or threaten to resort to the processes of any agency other than the Board in support of claims against their employer, even though their claim might arise out of the employment relationship. See *Inked Ribbon Corp.*, 241 NLRB 7 (1979). As discussed earlier, the record shows that Jones did not file a charge with the NLRB, but rather, signed a statement outlining an individual allegation of wage discrimination that was used as a basis for an EEOC charge. Jones' action in signing the statement is not protected by Section 8(a)(4). Therefore, we shall dismiss the 8(a)(4) complaint allegations regarding employee Rodney Jones.

5. The judge found, and we agree, that the Respondent's unlawful conduct interfered with the August 2001 election and that the election results should be set aside.

<sup>18</sup> *Farmer Bros. Co.*, 303 NLRB 638, 649 (1991), enfd. mem. 988 F.2d 120 (9th Cir. 1993).

<sup>19</sup> The link between Jones' protected activity and the Respondent's decision not to return him to work following his hospitalization is further diminished by the intervening decision of the Respondent to recall Jones with his entire work crew in late September.

<sup>20</sup> Our dissenting colleague suggests that the Respondent's actions were inconsistent with its prior treatment of Jones. In support of this view, the dissent cites testimony by Abramson that Jones was known for "coming and going" by working for a few months and then being gone for a few months. We find this testimony unpersuasive and vague and insufficient to show that the Respondent previously excused him of the specific conduct involved here. Considering all the evidence in this case, this testimony is insufficient to establish that the failure to recall Jones in October was unlawful.

The judge further found, relying on *Gissel*, supra, 395 U.S. at 575, that the Respondent's unfair labor practices so tainted the workplace atmosphere that the possibility of assuring a fair rerun election was slight, and therefore that a bargaining order was warranted. Contrary to the judge and our dissenting colleague, we find that the unlawful conduct engaged in by the Respondent does not warrant the imposition of a *Gissel* bargaining order because a fair rerun election can be held after the entry of traditional remedies.

Under *Gissel*, the Board will issue a remedial bargaining order, absent an election, in two categories of cases. The first category is "exceptional" cases, those marked by unfair labor practices so "outrageous" and "pervasive" that traditional remedies cannot erase their coercive effects, thus rendering a fair election impossible. 395 U.S. at 613-614. The second category involves "less extraordinary cases marked by less pervasive practices which nonetheless still have a tendency to undermine the majority strength and impede election processes." *Id.* at 614. In the latter category of cases, the "possibility of erasing the effects of past practices and of ensuring a fair election. . . by use of traditional remedies, though present, is slight and that employee sentiment once expressed [by authorization] cards would, on balance, be better protected by a bargaining order." *Id.* Our dissenting colleague relies solely on the second category. For the reasons set forth below, we respectfully disagree.

In determining the propriety of a bargaining order, the Board examines the seriousness of the violations and the pervasive nature of the conduct, considering such factors as the number of employees directly affected by the violations,<sup>21</sup> the size of the unit, the extent of the dissemination among employees,<sup>22</sup> and the identity and position of

<sup>21</sup> Where an employer's unfair labor practices are widespread and egregious, the possibility of holding a fair election decreases. *Cogburn Healthcare Center*, 335 NLRB 1397, 1399 (2001). Unfair labor practices that are not pervasive, in contrast, do not support a bargaining order. See, e.g., *Be-Lo Stores v. NLRB*, 126 F.3d 268, 281 (4th Cir. 1997) ("In order to be considered 'pervasive,' a company's unfair labor practices must, as the word connotes, be felt throughout all, or virtually all, of the bargaining unit"); *Somerset Welding & Steel, Inc. v. NLRB*, 987 F.2d 777, 780 (D.C. Cir. 1993); *Pyramid Management Group*, 318 NLRB 607, 609 (1995), *enfd.* 101 F.3d 681 (2d Cir. 1996).

<sup>22</sup> Serious employer misconduct that is widespread and directly reaches all or nearly all unit employees may support a bargaining order. See, e.g., *Power, Inc. v. NLRB*, 40 F.3d 409, 423 (D.C. Cir. 1994), *enfg.* 311 NLRB 599 (1993) (unfair labor practices directly reached nearly every employee in the bargaining unit); *NLRB v. General Fabrications Corp.*, 222 F.3d 218, 233 (6th Cir. 2000), *enfg.* 328 NLRB 1114, 1115 (1999) (serious unfair labor practices directly affected the entire bargaining unit); *M.J. Metal Products*, 328 NLRB 1184 (1999), *affd.* 267 F.3d 1059 (10th Cir. 2001) (same). The Board also considers the extent of the dissemination of serious unfair labor practices to employees not personally affected by them in determining whether the unlawful con-

duct committed the unfair labor practices. *Garvey Marine, Inc.*, 328 NLRB 991, 993 (1999), *enfd.* 245 F.3d 819 (D.C. Cir. 2001). Accord: *Holly Farms Corp.*, 311 NLRB 273, 281 (1993), *enfd.* 48 F.3d 1360 (4th Cir. 1995), *cert. denied* in pertinent part 516 U.S. 963 (1995). A *Gissel* bargaining order, however, is an extraordinary remedy. The preferred route is to order traditional remedies for the unfair labor practices and to hold an election, once the atmosphere has been cleansed by the remedies ordered. *Hialeah Hospital*, 343 NLRB 391, 395 (2004), citing *Aqua Cool*, 332 NLRB 95, 97 (2000).

After carefully considering the nature of the Respondent's unfair labor practices and their impact on employees, we find that the General Counsel has failed to show that the Board's traditional remedies are insufficient and this extraordinary remedy necessary. The Respondent threatened employees with job loss, loss of benefits, and plant closure if the Union won the election. These are serious violations that the Board has properly found to be "hallmark" violations.<sup>23</sup> However, the commission of "hallmark" violations does not necessarily require the imposition of a bargaining order where as in *Pyramid Management Group*, supra at 609, citing *Phillips Industries*, 295 NLRB 717, 718 (1989), and here, the "hallmark" violations did not impact a significant portion of the bargaining unit.

The Respondent's unfair labor practices occurred either in one-on-one situations or during individual jobsite meetings of a few of its crews and they were not disseminated further. Specifically, the Respondent's unfair labor practices affected three of the Respondent's eight work crews. Moreover, assuming every crew member attended the meetings and was attentive to all that was said,<sup>24</sup> approximately 35 employees out of a bargaining unit of approximately 80 eligible voters were subjected to the threats.<sup>25</sup>

duct created a "legacy of coercion" likely to poison the atmosphere in which any new election would take place. See *Garvey Marine Inc. v. NLRB*, supra, 245 F.3d at 827 (court found that Board reasonably concluded that news of the respondent's unfair labor practices would be disseminated among the employees).

<sup>23</sup> *Garvey Marine Inc.*, supra, 328 NLRB at 994 (1999); *General Fabricators Corp.*, 328 NLRB 1114 *fn.* 7 (1999); *Garney Morris, Inc.*, 313 NLRB 101, 103 (1993), *enfd. mem.* 47 F.3d 1161 (3d Cir. 1995).

<sup>24</sup> Employee Eddie Allen testified that he attended the Pawnee Road facility meeting in July 2001 but could not hear much of what was said.

<sup>25</sup> In finding that a *Gissel* bargaining order is not an appropriate remedy in this case, Member Schaumber notes that there has been a substantial passage of time between the 2001 election and the issuance of this decision rendering its enforceability problematical. See *Cooper Hand Tools*, 328 NLRB 145, 146 (1999); *Wallace International de Puerto Rico*, 328 NLRB 29 (1999). Chairman Battista relies on delay as a factor in denying a *Gissel* order.

Our dissenting colleague points out that two or three of the eight crews were represented at the jobsite meeting on Pawnee Road. However, it is unclear as to the number of crew members present at this meeting. Furthermore, the employees who testified about it were the same employees who attended the two meetings at the I-459 jobsite, as part of that I-459 crew. Thus, contrary to the dissenter's view, this is not a case where it has been shown that the Respondent's unfair labor practices directly affected most or all of the bargaining unit employees.

Moreover, any lingering effects due to the Respondent's discriminatorily refusing to return Curtis Young, a principal union supporter, to work following a postelection layoff in violation of Section 8(a)(3) will be remedied by the reinstatement and back pay we order today. The imposition of these remedies will undoubtedly send a strong message to both the Respondent and its employees, that employer interference with its employees' Section 7 activities will not be tolerated.

Our conclusion that a *Gissel* bargaining order is unjustified is consistent with Board precedent. In *Hialeah Hospital*, supra, the Board declined to impose a *Gissel* bargaining order against an employer that committed a retaliatory discharge and multiple Section 8(a)(1) violations directly affecting the entire unit, including threats, surveillance, promise of benefits, and removal of benefits, in a unit of only 12 employees. Likewise, in *Jewish Home for the Elderly of Fairfield County*, 343 NLRB 1069 (2004), the Board found that a *Gissel* bargaining order was unjustified where the employer, among other things, granted a unit-wide wage increase, discharged a leading union activist the day before the election, threatened employees with plant closure, and engaged in surveillance. Similarly, in *Desert Aggregates*, 340 NLRB 289 (2003), no bargaining was imposed against an employer that unlawfully solicited and promised to remedy employee grievances and laid off two leading union supporters in a unit of 11 employees. In sum, in these cases, the Board found its traditional remedies adequate to redress more serious and more pervasive unfair labor practices than those committed by the Respondent. Consistent with this extant precedent, we find that the coercive effects of the Respondent's conduct can be adequately remedied by the notice posting and mailing of an order specifically identifying the Respondent's unfair labor practices, ordering it to cease-and-desist from such conduct and any like and related conduct in the future, and ordering it to reinstate Curtis Young with backpay for its unlawful refusal to return him to work due to his proun-

ion activities. Accordingly, we direct that a new election be held.<sup>26</sup>

#### AMENDED CONCLUSIONS OF LAW

1. The Respondent is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent violated Section 8(a)(1) of the Act by:

(a) The threats of job loss and loss of benefits for engaging in union activities made by co-owner Greg Abramson at the I-459 jobsite.

(b) The interrogation of employee Eddie Allen by supervisor Wayne Harris concerning the Union and the threats issued to Allen by Harris of loss of benefits and loss of his job for his support of the Union.

(c) The threats issued to employee Eddie Allen by Superintendent Bruce Webb of job loss and the loss of benefits if he continued to support the Union.

(d) Threats of job loss, layoffs, and loss of benefits if the Union won the election, issued to employees at the I-459 jobsite by Supervisor Wayne Harris.

(e) Threats issued to employees at the I-20/59 jobsite by Supervisor Dennis Quesenberry that Greg Abramson would probably fold down the Company (close the business) if the Union won the election, and that employees would probably lose benefits and that Respondent's vehicles would be parked at the office if the Union won the election.

(f) The threats issued to employees at the Pawnee Road facility by co-owner Greg Abramson that the Company would stay nonunion, that jobs and benefits would be lost, and that daily overtime pay calculations would end if the Union won the election.

(g) Threats issued at the Lincoln, Alabama Honda Plant by co-owner Greg Abramson to employees of loss of benefits if the Union won the election.

(h) Threats issued to employees by co-owner Greg Abramson at the I-20/59 jobsite meeting of plant closure, and loss of benefits if the Union won the election.

(i) Threats issued to employee Alfonso Hayes by co-owner Greg Abramson of loss of benefits if the Union came in.

<sup>26</sup> Consistent with our finding that a *Gissel* bargaining order is not warranted, we reverse the judge's finding that the Respondent violated Sec. 8(a)(5) and (1) of the Act by failing and refusing to recognize and bargain with the Union and by unilaterally laying off employees, "because at that time the Respondent was not obligated to bargain with the Union." *Fiber Glass Systems*, 278 NLRB 1255, 1256 (1986). Also, we need not pass on the Respondent's contention that the Union did not enjoy the support of a majority of the unit employees.

(j) Threats issued to employees Walter Williams and Jimmy McMillan by co-owner Greg Abramson at the I-459 jobsite that he did not want any union on the jobsite and employees might lose their jobs if the Union came in.

4. Respondent violated Section 8(a)(3) and (1) of the Act by its refusal to return Curtis Young to work following a layoff.

5. The aforesaid unfair labor practice affect commerce within the meaning of Section 2(6) and (7) of the Act.

6. The Respondent has not violated the Act in any other manner except as specifically found herein.

#### ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth below and orders that the Respondent, Abramson, LLC, Birmingham, Alabama, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating its employees concerning their engagement in union activities and those of their fellow employees.

(b) Threatening its employees with job loss, loss of benefits including transportation benefits and out of town traveling expenses, lodging, meals, and per diem benefits.

(c) Refusing to return employees from layoffs or otherwise discriminating against any employee for supporting United Brotherhood of Carpenters and Joiners of America, Local 127, or any other labor organization.

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

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

(a) Within 14 days from the date of this Order, offer Curtis Young full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Curtis Young whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, with interest, in the manner set forth in the remedy section of the judge's decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful refusal to reinstate Curtis Young and within 3 days thereafter notify him in writing that this has been done and that this unlawful action will not be used against him in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place desig-

nated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of the records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its jobsites and facilities the attached notice marked "Appendix,"<sup>27</sup> and duplicate and mail, at its own expense, a copy of the notice to all its carpenters, laborers, finishers, operators, truckdrivers, mechanics, and leadmen. Copies of the notice, on forms provided by the Regional Director for Region 10, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that the Respondent has gone out of business or closed the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time after June 18, 2001.

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

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

IT IS FURTHER ORDERED that the election held in Case 10-RC-15230 is set aside and Case 10-RC-15230 is severed from Cases 10-CA-33153 et al. and remanded to the Regional Director for Region 10 for the purpose of conducting a new election.

[Direction of Second Election omitted from publication.]

MEMBER LIEBMAN, dissenting in part.

Contrary to my colleagues, I would affirm the judge's findings that: (1) Supervisor Bruce Webb coercively questioned employee Eddie Allen about the Union; (2) co-owner Alan Abramson coercively questioned employee Rodney Jones about papers he had signed; (3) the Respondent unlawfully threatened employees with dis-

<sup>27</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

charge for using company vehicles to attend union meetings; (4) the Respondent unlawfully failed to recall Jones; and (5) a bargaining order pursuant to *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969), is appropriate to remedy all of the Respondent's unfair labor practices.<sup>1</sup>

1. The judge correctly found that the Respondent violated Section 8(a)(1) of the Act when, in June 2001,<sup>2</sup> Superintendent Webb asked employee Allen "what about this Union?" Allen stated that he did not know anything about the Union, and Webb replied that it did not matter to him. Contrary to the majority's characterization of this question as "spontaneous" I would find it coercive considering the totality of the circumstances, as required by *Rossmore House*, 269 NLRB 1176 (1984), *enfd.* sub nom. *Hotel Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). Webb's inquiry occurred at the jobsite, immediately after Allen asked Webb, a high-ranking manager, for a loan of \$100. When Webb granted the personal loan to Allen and then immediately asked him about the Union, Allen reasonably would be sensitive to the economic power the Respondent had over him and reasonably would feel obligated to respond and disclose the information. The fact that Allen denied knowledge of the Union indicates he felt coerced into hiding his union involvement and may have anticipated reprisal if his involvement with the Union became known. See, e.g., *Jefferson National Bank*, 240 NLRB 1057, 1071 (1979) (employees' denial of union involvement shows coercive effect of interrogation and fear of reprisal), *enfd.* 633 F.2d 211 (3d Cir. 1980) (table).

The majority asserts that Allen started the conversation. Although Allen did approach Webb, it was Webb who brought up the topic of the Union. Further, although Allen wore a union t-shirt approximately 1 month after this incident, there is no evidence that Allen had disclosed his union sympathies at the time this questioning occurred.

2. The judge correctly found that the Respondent violated Section 8(a)(1) of the Act when the Respondent's co-owner Alan Abramson asked employee Jones what kind of papers he and coworker Young had signed that required Abramson to go to court. Jones assumed that Abramson was referring to an EEOC prefiling assistance request that Jones had signed and turned in to a union representative.

The judge concluded that the inquiry, while NLRB charges were pending, was broad enough to include all papers Young had filed regarding his union and other protected concerted activities. I agree. Abramson's ques-

tion broadly referred to litigation, and Jones responded that he had signed papers from the Union to better himself and make more money. Jones' understanding that Abramson was referring to an EEOC matter does not alter the fact that the question itself was directed at litigation generally.

But, even if Abramson's question was limited to the EEOC matter, it was still directed at Jones' protected concerted activities. Jones testified that the Union had talked to employees about race discrimination during the organizing campaign and that the Union got him to sign the request for prefiling assistance. In addition, Abramson's question referring to papers signed by Jones and Young—indicates the concerted nature of the employees' activity. Abramson admitted that he knew a number of employees had filed with the EEOC at the same time and generated a stack of EEOC correspondence for him. Thus, the evidence establishes that the employees acted concertedly and with the Union in their filings and that the Respondent was on notice of such concerted activity.

In dismissing this allegation, the majority claims that Jones was not engaged in "concerted activity" within the meaning of Section 7 of the Act in that he sought only to pursue his personal Title VII claim before the EEOC. The majority also asserts that there is no evidence that Jones discussed the wage concerns underlying his Title VII claim with other employees or that he sought the support or assistance of others in remedying the alleged discrimination. As demonstrated, neither claim is accurate.

3. The judge found that the Respondent violated Section 8(a)(1) of the Act when Greg Abramson threatened employees at a July 11 meeting with the loss of their jobs if they used company vehicles to attend union meetings. The judge found that there was no prior rule prohibiting the personal use of company vehicles. This finding is fully supported by the record.

It is undisputed that there is no written rule or policy governing vehicle use. Several employees testified that they were unaware of any restrictions on vehicle use. Long-term employee Curtis Young testified that he was not aware of any restrictions on what the company van could be used for and that he saw company vehicles all the time around where he lived at grocery stores and different places. According to employee Allen, Greg Abramson told them at the July 11 meeting that they would be eliminated on the spot if they drove the company van to a union meeting, but he had never heard Abramson say "nothing else" about the purposes they could use the van for. Employee Joe Colvin testified that he was last told in 1997 or 1998 about the consequence of using a company vehicle for personal use.

<sup>1</sup> In all other respects, I agree with the Board's decision.

<sup>2</sup> All dates are 2001 unless otherwise indicated.

Contrary to the majority's assertion that the Respondent had a rule concerning the personal use of vehicles, the evidence in fact establishes that there was no such rule or, at the very least, that such a rule was not enforced until the Union arrived on the scene. Such conduct violates the Act. See *Lincoln Center for the Performing Arts, Inc.*, 340 NLRB 1100, 1110 (2003) (employer's change from lax and sporadic enforcement of policy to more vigorous enforcement is unlawful when change is motivated by protected conduct).

4. The judge correctly found that the Respondent violated Section 8(a)(3) and (4) of the Act by refusing to return employee Rodney Jones to work following a period of sick leave. Jones and his whole crew were laid off on August 24 upon completion of a project and were recalled in late September. He returned to work on October 1 and worked until October 8 when he became ill and was hospitalized. As the judge found, Jones missed 2 weeks of work and then called Greg Abramson to return to work. He was told there was no work for him. He phoned again and talked to Alan Abramson. As discussed above, during that conversation Alan Abramson unlawfully asked him what kind of papers he and Young had signed. Jones was never recalled to work following this conversation. Applying *Wright Line*,<sup>3</sup> it is clear, as the judge found, that the Respondent violated Section 8(a)(3) of the Act when it failed to recall Jones.<sup>4</sup>

First, the General Counsel established that Jones was engaged in protected concerted activity. He was an active union supporter, wearing union T-shirts on the jobsite and attending union meetings. As discussed above, and contrary to the majority's view, he also engaged in protected concerted activity by signing and giving to the Union an EEOC prefilling assistance request. Abramson's interrogation of Young demonstrates the connection between his protected concerted activity and the refusal to return him to work, which the majority claims is missing.

The Respondent's animus is further demonstrated by the many threats of loss of jobs and benefits, as well as by its refusal to recall employee Young. The majority contends that even if the General Counsel carried his initial burden of showing that antiunion animus was a motivating factor, the Respondent proved "that it would not have returned Jones to work in any event because he abandoned his job in mid-October." The evidence establishes otherwise. Greg Abramson testified that Jones was fairly well known for working for a few months and then being gone for a few months. "He sort of comes and

goes." Yet Jones had always been returned to work until he exhibited support for the Union. See, e.g., *Topside Construction, Inc.*, 329 NLRB 886, 894 (1999) (failure to recall employees because of their actual or suspected union activities violates Sec. 8(a)(3)).

5. Unlike the majority, I agree with the judge that the nature and extent of the Respondent's unfair labor practices warrant the imposition of an affirmative bargaining order pursuant to *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969). These unfair labor practices included such powerful acts of coercion as repeated threats of plant closure and loss of jobs.<sup>5</sup> The Board has emphasized, with court approval, that threats of plant closure and discharge not only are "hallmark" violations but are "among the most flagrant" of unfair labor practices." *Action Auto Stores*, 298 NLRB 875, 875 (1990) (citing *Indiana Cal-Pro, Inc. v. NLRB*, 863 F.2d 1292, 1301-1302 (6th Cir. 1988), enfg. mem. 287 NLRB 796 (1987)). "[T]hese violations, which threaten the very livelihood of employees, are likely to have a lasting impact not easily eradicated by the mere passage of time or the Board's usual remedies." *Garney Morris, Inc.*, 313 NLRB 101, 103 (1993), enfd. 47 F.3d 1161 (3d Cir. 1995).

The Union's wholesale loss of support following the commencement of the Respondent's unlawful conduct underscores that a *Gissel* bargaining order is appropriate. "[T]he pernicious effect of the employer's unfair labor practices [is] evident in the dramatic decline in union support between obtaining majority support" on June 21, and August 17, when employees voted 68-5 against union representation. *NLRB v. Eagle Material Handling, Inc.*, 558 F.2d 160, 167 (3d Cir. 1977). It is clear that the Respondent's unlawful conduct struck at the very core of the employees' organizational efforts. In light of the Union's otherwise-unexplained overwhelming loss of support, the majority's assertion that the Respondent's unfair

<sup>3</sup> 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

<sup>4</sup> There is no need to pass on the judge's finding that the Respondent violated Sec. 8(a)(4) by not recalling Jones.

<sup>5</sup> I agree with the judge that the Respondent violated Sec. 8(a)(1) when: (1) Supervisor Wayne Harris asked employee Allen if he thought the Union could get him a raise before Harris could; (2) co-owner Greg Abramson threatened employees by the crane on I-459 with loss of jobs and benefits; (3) Supervisor Webb told Allen that he could lose his job and the Respondent could take away benefits; (4) Supervisor Harris threatened employees on the I-459 jobsite with the loss of jobs and benefits; (5) Supervisor Dennis Quesenberry threatened employees on the I-20/59 jobsite with closing the business and the loss of benefits; (6) Greg Abramson threatened employees at the Pawnee Road facility with job loss and the rescission of benefits; (7) Greg Abramson threatened employees at the Honda plant with loss of benefits; (8) Greg Abramson threatened employees at the I-20/59 jobsite with plant closure and loss of benefits; and (9) Greg Abramson threatened employee Alphonso Hayes with loss of benefits.

labor practices “did not impact a significant portion of the bargaining unit” is unsupportable.<sup>6</sup>

The Respondent’s “hallmark” threats of plant closure and job loss were not the Respondent’s only violations of the Act. They were accompanied by repeated threats of loss of travel, lodging, and meal benefits. Given the Respondent’s practice of working at remote jobsites, often for extended periods of time, these threats, if implemented, would drastically reduce the employees’ compensation package, and would likely result in the constructive discharge of some employees. Several employees testified about the importance of, and their dependence on, the Respondent’s benefits. Thus, when considered in context, these threats of loss of benefits are tantamount to threats of job loss.

Nor did the Respondent cease its unlawful conduct after the Union lost the election. It refused to recall leading union supporter Young beginning on about August 27, and it refused to return Jones to work following his October hospital stay. Where an employer continues unfair labor practices even after employees have voted against the Union in a Board-conducted election, the postelection unlawful conduct “evidences a strong likelihood of a recurrence of unlawful conduct in the event of another organizing effort.” *Garney Morris*, supra, 313 NLRB at 103.

Further, the severity of the Respondent’s unlawful conduct is exacerbated by the involvement of its high-ranking officials. Here, co-owner Greg Abramson personally made repeated threats that employees would lose their jobs and substantial benefits if they selected the Union. “When the anti-union message is so clearly communicated by the words and deeds of the highest levels of management, it is highly coercive and unlikely to be forgotten.” *Consec Security*, 325 NLRB 453, 455 (1998), enfd. 185 F.3d 862 (3d Cir. 1999).

The majority cites *Hialeah Hospital*, 343 NLRB 391 (2004); *Desert Aggregates*, 340 NLRB 289 (2003); and *Jewish Home for the Elderly of Fairfield County*, 343 NLRB 1069 (2004), as cases in which the Board declined to impose *Gissel* bargaining orders. I dissented from the Board’s failure to impose *Gissel* bargaining orders in *Hialeah Hospital* and *Desert Aggregates*. I did not participate in *Jewish Home*, but find the dissent in that case persuasive that a *Gissel* order should have been imposed.<sup>7</sup> For all of these reasons, the Respondent’s

<sup>6</sup> Further, the evidence establishes that the meeting at Pawnee Road—when Greg Abramson threatened loss of jobs and benefits—was a multiple crew meeting. Thus, a large percentage of the unit was exposed to these threats at least once.

<sup>7</sup> In denying the *Gissel* order here, Chairman Battista relies on “delay.” Member Schaumber notes that there has been “a substantial pas-

unfair labor practices make it unlikely that a fair election can be held. Accordingly, I would adopt the judge’s recommended *Gissel* bargaining order.<sup>8</sup> I would similarly adopt the judge’s finding that the Respondent violated Section 8(a)(5) of the Act by refusing to bargain with the Union and by unilaterally laying off employees.

#### 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 Federal labor law and has ordered us to post and obey this notice.

#### FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT threaten you by telling you that you will lose your job if you select a union to represent you.

WE WILL NOT threaten to take away your benefits because of your union activities.

WE WILL NOT threaten you with retaliation for your union activities.

WE WILL NOT refuse to recall you to employment or otherwise discriminate against you based on your support of the Union or any other labor organization.

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.

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sage of time.” In my view, “[t]he passage of time between the Union’s election campaign and our decision today, though regrettable, does not detract from the necessity for restoring the status quo ante regarding the employees’ desires for union representation that the Respondent dissipated through unfair labor practices.” *Cogburn Healthcare Center*, 335 NLRB 1397, 1401 (2001), 342 NLRB 98 (2004) (denying motion for reconsideration). Further, while “some courts are of the view that the passage of time between a *Gissel* order and the unfair labor practices that justified it . . . must be taken into account in assessing the propriety of such an order, the Board consistently has held that the validity of a bargaining order depends on an evaluation of the situation as of the time the unfair labor practices were committed, and that to hold otherwise would reward rather than deter unlawful conduct by employers during organizing campaigns.” *State Materials, Inc.*, 328 NLRB 1317, 1317 (1999) (footnote omitted).

<sup>8</sup> In the absence of a majority to impose a *Gissel* bargaining order, I join Member Schaumber in ordering the Respondent to mail copies of the notice to all employees.

WE WILL offer employee Curtis Young full and immediate reemployment in his former job, or if that job no longer exists, to a substantially equivalent position without prejudice to his seniority or other rights and privileges previously enjoyed.

WE WILL make employee Curtis Young whole for wages and benefits lost on account of our unlawfully refusing to recall him, with interest.

WE WILL remove from our files all reference to our refusal to return Curtis Young to work and

WE WILL inform him in writing that we have done so, and that we will not use the unlawful refusal to return him to work against him in any way.

#### ABRAMSON, LLC

*John D. Doyle Jr., Esq.* and *Katherine Chahrouri, Esq.*, for the General Counsel.

*Barry V. Frederick, Esq.* and *Brett Adair, Esq.*, for the Respondent.

*Robert Weaver, Esq.*, for the Charging Party.

#### DECISION

##### STATEMENT OF THE CASE<sup>1</sup>

LAWRENCE W. CULLEN, Administrative Law Judge. These consolidated cases were heard before me on March 11, 12, 13, and 15, 2002, in Birmingham, Alabama. The complaint as amended at the hearing was issued by the Regional Director of Region 10 of the National Labor Relations Board (the Board) and is based on charges brought by the United Brotherhood of Carpenters and Joiners of America, Local 127 (the Union or the Charging Party) in Case 10-CA-33153 and by Curtis Young, an individual and alleges that Abramson, LLC (the Respondent or the Company) has engaged in and is engaging in certain unfair labor practices in violation of Section 8(a)(1), (3), (4), and (5) of the National Labor Relations Act (the Act). The Respondent has by its answer, as amended, denied the commission of any violations of the Act and has raised affirmative defenses thereto. Additionally, the Regional Director for Region 10 of the Board issued his Order directing the consolidation of objections filed by the Union to an election held on August 17, 2001, among the unit employees.

On the entire record, including testimony of the witnesses and exhibits received in evidence and after review of the briefs filed by the General Counsel, Charging Party Union and the Respondent, I make the following

##### FINDINGS OF FACT AND CONCLUSIONS OF LAW

###### I. JURISDICTION

The complaint alleges, Respondent admits and I find that at all times material Respondent has been an Alabama Limited Liability Company with an office and place of business in Birmingham, Alabama, and has been engaged in the business of performing road, bridge and highway construction work, that

during the past 12-month period, Respondent, in conducting its aforesaid business operations, purchased and received goods valued in excess of \$50,000 directly from suppliers located outside the State of Alabama, and that at all material times Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

###### II. THE LABOR ORGANIZATION

The complaint alleges, Respondent admits and I find that at all times material herein, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

###### III. THE APPROPRIATE UNIT

The complaint alleges, Respondent denies and I find on the basis of the Regional Director's Order of the Election that the following employees, (the unit), constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All carpenters, laborers, finishers, operators, truck drivers, mechanics and lead men employed by the Respondent, but excluding office employees, guards and supervisors as defined in the Act.

###### IV. THE ALLEGED UNFAIR LABOR PRACTICES

In April of 2001, the International Union in conjunction with Local 127 commenced a campaign to organize certain of Respondent's employees. After having collected the signatures of certain of Respondent's employees on union authorization cards, the Union appeared with Steve Dummitt who is the Director of Organizing and Field Operations for the Alabama Carpenters Region along with Local 127 Business Manager Michael Anderson and the Executive Secretary Treasurer of the Alabama Carpenter Regional Counsel Michael Lemay, at Respondent's office to request voluntary recognition as the collective bargaining agent of the employees in the unit and bargaining on June 18, 2001. Upon being advised that the management was not available, Union Representative Dummitt telephoned and reached Greg Abramson, one of the two owners of the Respondent and requested recognition and asked to meet with Greg Abramson to discuss the matter. Respondent is a highway construction contractor performing miscellaneous concrete work. It is owned by two brothers through a limited company. The owners are Greg and Alan Abramson. The business was formerly owned and operated by their father as a nonunion company for years. Greg Abramson did not contact the Union after this telephone call and the Union filed a petition for an election, which was ordered by the Regional Director for Region 10 of the Board and held on August 17, 2001. Although the Union had obtained a majority of signed authorization cards, its support dissipated drastically by the time of the election which the Union lost by a vote of 5 for and 68 against the Union and four challenged ballots of approximately 79 eligible voters. The complaint alleges a variety of unfair labor practices which the General Counsel urged at hearing had undermined the Union's support and made the running of another election an inadequate remedy as the General Counsel urges that the unfair labor practices were hallmark violations and that the violations were pervasive so as to destroy the possibility for

<sup>1</sup>All dates are in 2001 unless otherwise indicated.

another election which would afford the employees a fair opportunity for the rerun of another election. The complaint as amended at the hearing alleges violations of Section 8(a)(1), (3), (4), and (5) of the Act. It alleges that coercive interrogations and statements were made by Respondent's management and supervisors in violation of Section 8(a)(1) and (4) of the Act, unlawfully motivated refusals to recall employees in violation of Section 8(a)(1), (3), and (4) of the Act and unlawful refusals by Respondent to recognize and bargain with the Union in good faith and unilateral layoffs of employees without affording the Union notice and an opportunity to bargain with it on behalf of the employees in violation of Section 8(a)(5) of the Act.

Respondent performs its concrete work in Alabama and Florida. It has several crews of employees which generally work independently of each other but sometimes work in conjunction with each other. It is generally engaged in several projects at the same time with the crews working independently of each other. The crews are provided transportation from their homes to the jobsites by Company vehicle with one employee assigned to drive a truck and pick up employees in the same or nearby towns. Some of these daily commutes can be up to a hundred miles or more each way. In addition when employees are required to travel greater distances and work out of town, they are housed in motels and given expense money all at Respondent's expense. This is crucial to the ability of the employees to travel to work and to receive expense money in order to enable them to work. As one employee put it, it would be difficult for employees to travel these long distances and pay for their own travel, lodging and expenses for \$10-per-hour wage with a 10-year-old vehicle.

After the election Curtis Young, a union supporter was not returned to active employment following a layoff. Rodney Jones a union supporter was not recalled following an absence for illness although both contacted Respondent requesting their return to work.

The Complaint alleges that Respondent's commission of the violations of the Act render the holding of a fair election impossible. General Counsel seeks imposition of a *Gissel* bargaining order, *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969), in reliance on the Union's majority as demonstrated by the authorization cards.

*A. June 2001 Interrogation by Superintendent Bruce Webb at the I-459 Hoover Jobsite, Paragraph 8 of the Complaint*

Employee Eddie Allen, who had signed a union authorization card on April 16, 2001, testified that in June 2001, he was working at the I-459 jobsite near the Galleria Mall and approached Superintendent Bruce Webb (an admitted supervisor) and asked Webb for a loan of \$100. There was testimony on the record that Respondent made loans to employees from time to time. Webb loaned Allen the money, told him he was a good worker and asked him "what about this Union," Allen denied knowledge of the Union and Webb then said it did not matter to him. While acknowledging that he gave Allen the requested loan, he denied having told Allen he was a good worker on this occasion and specifically denied having asked Allen about the Union.

I credit Allen's testimony. Allen remains employed by Respondent. His testimony was candid and the inquiry by Webb about the Union is consistent with Respondent's interest in the outcome of the union campaign. I find that the inquiry of Allen by Webb, a high-level official, concerning the Union violated Section 8(a)(1) of the Act as unlawful interrogation which tended to interfere with, coerce and restrain Allen in the exercise of his rights under Section 7 of the Act. *SALA Motor Freight, Inc.*, 334 NLRB 979, 980 (2001)

*B. The July 11, 2001 Meeting by the Crane on I-459, Paragraphs 9, 10, and 11 of the Complaint*

On July 11, 2001, Wayne Harris gathered the crew together for a meeting conducted in the vicinity of a crane by Greg Abramson who arrived on the I-459 jobsite. Greg Abramson managed the Respondent's antiunion campaign. Several employees testified concerning what took place at this meeting. Counsel for the General Counsel called employees Rodney Jones, Michael Sloan, Curtis Young, and Eddie Allen to testify concerning this meeting. Respondent called employees Marvin White, Daniel Isbell, Gerald Oliver, John Winters, and Greg Abramson to testify concerning the meeting. Respondent also called supervisor Wayne Harris as a witness but did not question him concerning this meeting although he was present on the jobsite and had gathered the employees for the meeting.

Rodney Jones testified that Greg Abramson told the employees that he had heard that employees had been talking to the union people who were trying to form a union. He told them to make sure they knew what they were doing as Respondent had not been organized for many years and "would not be organized." Greg also said the employees would probably lose their transportation, hotels and expenses for food. He also told them he could not stop them from going to a union meeting as long as they did not go in a company vehicle and that if they did go in a company vehicle they could lose their job. He then asked them "... do you want the Union or do you want the job?" Greg Abramson then turned to Rodney Jones and "asked me, don't I help you out when you get in a bind." He then asked Jones if he had ever borrowed money from the Company and Jones said that he had borrowed some last week. Abramson also said, "... if we get the Union, we will probably not have a job" because the contractors they get jobs from do not allow union workers on the job. Jones testified that he did not receive copies of Respondent's campaign literature at this meeting and that none was passed out. Jones testified that at the time of this meeting he was living in Eutaw, Alabama, which is 100 miles from the I-459 jobsite and was transported back and forth by a company van. Jones testified further that he works on out-of-town jobs from time to time and the Company provides the hotels. On cross-examination in response to Respondent Counsel's questions Jones testified that when Greg Abramson spoke at this meeting he said we would probably lose benefits (the van, hotel, and food), as they would be taken away. "He did not say they would stay the same. He said we probably would lose them." He confirmed that Greg Abramson had said at a meeting that benefits could go up, down or stay the same. The record does not disclose what meeting Jones was referring to.

Michael Sloan who worked at the I-459 jobsite attended the July meeting at which Greg Abramson spoke in the vicinity of the crane. He testified that Abramson told the employees that if the Union came in he would take the transportation away and the employees would not be paid overtime on an 8-hour daily basis but would have to wait until they had worked 40 hours and that if they went out of town, they would have to cover their own expenses. Abramson said, "We needed to decide if we want our jobs or the Union." He also told the employees that if the Union came in it would be hard for him to get work because most general contractors (for whom the Respondent performs work which is subcontracted to it) do not want union workers on the job and that a "bunch" of layoffs would occur. Abramson also said that if the employees were caught going to a union meeting in a company truck, they would be "fired" and the company vehicle would be taken. On cross-examination Sloan testified in response to questioning by Respondent's attorney, that Greg Abramson did not say at the meetings that it has always been a rule that you do not use company vehicles for personal use but only for company business. He also repeated that Abramson had said at this meeting that his contractors were not union and did not want union workers on the job. He denied having seen company campaign literature (R. Exh. 1-5) at the meeting which was shown to him by Respondent's counsel during cross-examination. He testified further that on two occasions of meetings (unspecified) Abramson spoke about bargaining but did not say transportation, out of town meals and such could go up or down or stay the same. He said benefits could be taken. Abramson said (unspecified at what meeting) that if the Union wants to increase your pay they could negotiate away benefits to pay for the pay increase. He also testified on cross-examination that (at some unspecified meetings) Abramson said everything was on the table and described the give and take of bargaining.

Employee Curtis Young testified concerning the July 11 meeting at the I-459 jobsite near the crane. He testified that Wayne Harris called the employees to the meeting at which Greg Abramson spoke to about 12 to 15 employees for 10 minutes. Abramson said the Company had been good to them by furnishing them with rides to and from work and furnishing them with meals and expenses when they worked out of town. Abramson said that company vehicles were not to be used for union meetings and the use of vehicles to go to union meetings would be grounds for immediate dismissal. He said that if they had a union, it would be hard to get work as the contractors were not union and did not like union people on their jobs and they would probably be laid off half the time. Abramson said think about whether you want the Union or your jobs. Abramson said the Company was good to them by letting them borrow money and pointed to Rodney Jones and said, "Ain't that right Rodney." Young testified that prior to this meeting he was not aware of any restrictions on the use of vehicles by supervisors or any member of management. He sees the company vehicles around where he lives at grocery stores and different places. Abramson did not speak of the use of vans for other than union business.

Eddie Allen testified he attended the July 11 meeting by the crane at the I-459 jobsite. Greg Abramson said the company

has been in business for 50 years and he tried to treat them right. He asked the employees who they could get money from, him or the Union. He told the employees they could be laid off. He asked if the van were taken away, who would pay the out of town expenses, him or the Union. He told them the contractors wouldn't have Union people on the job and he would be losing a lot of money. He pointed to Rodney Jones and said, "right Rodney" and Rodney said, "yes" that he had been treated fair. All of the employees were wearing union t-shirts including Rodney Jones. There were two crews totaling about 20 to 25 employees at the meeting. Allen testified that he lives in Eutaw, Alabama and gets back and forth to the company's jobs in a company van. He does not have his own reliable transportation. Greg Abramson also said that if the employees drive the company vans to union meetings, they would be "eliminated on the spot." On cross-examination Allen testified he did not recall Greg Abramson saying anything about bargaining and stated, "Greg Abramson said words I said," and stated that Abramson said the contractors wouldn't allow the Union on the job and the employees would be laid off if the Union came in. Abramson named Jones Brothers, Raycon, and J. W. Newell as three contractors that would not allow union employees on their jobs.

Employee Marvin White who was called to testify by the Respondent, testified that he was present at the meeting held by Greg Abramson near the crane at the I-459 jobsite. Abramson said that if the Union won the election work may get slow because Respondent gets work from nonunion contractors. He testified that Abramson did not say anything else at the meeting, "Not that I know." He testified that Abramson did not talk about benefits, pay scale, and that he did not say anything about company trucks or hotels or meals. He identified Respondent's Exhibits 1-5 as papers (antiunion campaign pamphlets) that were passed out to the crew at the meetings. He testified that Abramson read all of them at the meeting. White testified that Abramson did not talk to his crew about benefits, Company trucks, meals or hotels and did not tell them that if the Union won, that Company vehicles or extras the Company provides would be taken away.

Employee Daniel Isbell, who was called by Respondent, testified concerning the meeting near the crane at the I-459 jobsite at which Greg Abramson spoke to the crew. He testified that Abramson in answer to questions by the employees concerning what might happen, said he did not know because everything would be up for negotiation. He did not say anything about benefits at the meeting. He does not recall Abramson saying anything about the contractors being union or nonunion, nor about company vehicles or company paid meals or per diem expenses. He testified that Curtis Young left the meeting shortly after its commencement.

Employee Gerald Oliver, who was called by Respondent testified concerning the meeting near the crane on the I-459 jobsite. Abramson gave them all some papers which look like Respondent's 1-5. Curtis Young walked off and did not attend the whole meeting. He testified that Abramson never threatened loss of benefits, company vehicles, motel rooms or anything and never said Respondent would close down if the Union won the election. Abramson did tell the employees that if

the Union came in he might not be able to get work because the contractors he worked for did not want union people on their jobs and specifically mentioned “Newell” as a contractor who did not want union people on the job. On cross-examination he reiterated that Abramson had told the employees it would be hard to get jobs if the Union came in. He did not view this statement as a threat.

Employee John Winters also called by Respondent testified he attended the meeting by the crane but could not recall what Abramson had said at the meeting, including telling employees they would lose benefits, company vehicles, hotel rooms or meals. He testified he did not hear Abramson ask the employees to choose the Union or their jobs. He testified that no one left before the meeting was over. As of the date of the hearing he had been laid off the last couple of weeks and was to go back to work the following Monday. All of the employees who ride in the van together (McMillian, Allen, and Williams) had also been laid off the last few weeks.

#### Analysis

I find that Respondent violated Section 8(a)(1) by the threats issued to its employees by co-owner Greg Abramson at the meeting held on July 11, 2001, at the I-459 jobsite. I credit the specific testimony of employees Rodney Jones, Michael Sloan, Curtis Young, and Eddie Allen as set out above and as corroborated in part by employee Gerald Oliver with respect to the threats of layoff by Abramson and by Greg Abramson himself that he informed them that layoffs could concur as the nonunion contractors would not subcontract to Respondent if it became a union contractor and by Greg Abramson that he specifically threatened to fire employees for use of the company’s vans to attend union meetings. I found the testimony of employees Marvin White, Daniel Isbell and Gerald Oliver to be vague and lacking in specific detail as to what was said at the meeting. I do not credit Greg Abramson’s attempt to cast his testimony (concerning what occurred at this meeting when he allegedly followed an outline which was not adduced at the hearing) as merely a factual explanation of the consequences of the employees’ selection of the Union. Rather I find that even assuming he followed an outline, he did not discuss only possibilities as to what would happen if the employees chose union representation. Rather he asserted in specific language as testified to by the above credited testimony of Jones, Allen, Young, and Sloan that employees would lose benefits such as payment of hotel expenses and meals allowances when working out of town and the use of the Company van and the elimination of overtime for in excess of 8 hours per day in less than a 40-hour week. I further find he threatened them with the loss of their jobs by telling them that nonunion contractors would not permit union employees on their jobs. He also pointed to the borrowing of money by employees as a benefit to be lost. I find he gave the employees a Hobson’s choice, choose the Union or your jobs. I find the evidence is uncontroverted that he threatened the employees with the loss of their jobs if they used company vehicles to attend union meetings although there had been no prior rule prohibiting the personal use of company vehicles. I draw an adverse inference that the testimony of Harris would not have been favorable to Respondent’s position

in this case. I further note as significant in this case that this meeting took place on July 11, 2001, prior to the filing of charges by the Union arising out of Greg Abramson’s conduct at this meeting.

I conclude that Respondent violated Section 8(a)(1) of the Act by:

- (a) Its threat to rescind benefits *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618–[6]19 (1969).
- (b) Threats of job loss *CPP Pinkerton*, 309 NLRB 723, 724 (1992); *Reeves Bros., Inc.*, 320 NLRB 1082 (1996).
- (c) Threat of discharge for using a company van to attend union meetings.

#### C. *The July 13, 2001 Conversation between Wayne Harris and Eddie Allen. Paragraphs 12 and 13 of the Complaint*

On Friday, July 13, 2001, only 2 days after the July 11th meeting held by Greg Abramson at the I-459 job, supervisor Wayne Harris approached employee Eddie Allen on the jobsite. He told Allen that he wanted to talk to him about the Union because Allen was wearing a union T-shirt. Allen testified that Harris then asked him if he thought the Union could get him a raise before Harris could. Allen did not reply. Harris then commenced to ask Allen, what if Abramson took the van away, what if you lose your job. At the hearing Harris admitted having had this conversation with Allen but testified he told Allen, he would not be able to come to him for a raise if the Union came in but that Allen would have to go through the Union for raises. He admitted that Allen had not asked him any questions. Harris denied mentioning the union T-shirt or the use of the company van.

#### Analysis

I credit Allen’s testimony as set out above. Allen was a current employee at the time of the hearing and his testimony was adverse to the company’s position in this case and was against his own pecuniary interest. This follow-up conversation was consistent with the terms Greg Abramson had used in his prior meeting with the employees at the I-459 jobsite and was delivered by Supervisor Harris who was also present at that meeting. I find that Harris’ interrogation of and threats issued to Allen were violative of Section 8(a)(1) of the Act. I find that Harris’ questioning of Allen (although Allen was an open union supporter), was coercive and carried an implied threat that Respondent would take benefits away and that Allen could lose his job if the employees selected the Union as their collective bargaining representative. *SALA Motor Freight, Inc.*, 334 NLRB 979 (2001); *Rossmore House*, 269 NLRB 1176 (1984), affd. 760 F.2d 1006 (9th Cir. 1985); *Reeves Bros. Inc.*, supra; *Naomi Knitting Plant*, 328 NLRB 1279, 1280 (1999), citing *Williamhouse of California, Inc.*, 317 NLRB 699, 713 (1995).

#### D. *The July 13, 2001 Conversation Between Bruce Webb and Eddie Allen, Paragraph 14 of the Complaint*

Eddie Allen testified that on July 13, 2001, which was 2 days after the July 11th meeting held by Greg Abramson at the I-459 jobsite, he was approached by Superintendent, Bruce Webb, that evening. Webb asked him what was over at the Union.

Allen asked Webb, "what Union?" Webb then said he had seen Allen wearing a union t-shirt and knew he had been to a union meeting. Allen testified that Webb then told him, he could lose his job and stated that Greg Abramson could take away the van, gas costs and expenses. Allen then asked Webb why, because he had worn a shirt. Webb did not respond and walked away. Webb denied that the conversation took place.

#### Analysis

I credit Allen's specific testimony who as noted above was a current employee at the time of the hearing. *Flexsteel Indus.*, 316 NLRB at 745 (1995). I find that Webb's inquiry of Allen and his issuance of the statement that he knew about Allen's having worn a union t-shirt and that he knew Allen had attended a union meeting coupled with the possibility of Abramson taking away the van, gas costs, and expenses and his refusal to respond to Allen's questions why, because he had worn a union t-shirt all combined to constitute an unlawful threat of job loss and the loss of benefits. I find Respondent thereby violated Section 8(a)(1) of the Act. *Naomi Knitting Plant*, 328 NLRB at 1280; *Williamson of California, Inc.*, 317 NLRB at 699.

#### E. Wayne Harris' Statements to Employees at the I-459 Jobsite, Paragraph 15 of the Complaint

Employee Michael Sloan testified that in about July 2001, at the I-459 jobsite supervisor, Wayne Harris, stated in the presence of his crew that if the Union came in, there would be a bunch of layoffs or else employees would be fired, that Greg Abramson's dad had operated the company nonunion and Greg wanted to do the same. Sloan also testified that if the Union came in, employees would have to provide their own transportation and pay their own expenses when working out of town. Employee Curtis Young testified that about a week or two prior to the election, Harris distributed papers (antiunion pamphlets) and read from them. Young testified Harris told the employees that if they invested the money in the company's 401k plan it would cost to join the Union and pay dues, they could save a lot of money for retirement. Harris also told the employees that Greg Abramson did furnish vans, hotels and expense money but did not have to do so. He concluded by telling the employees they "better vote no when it comes to this election." Harris denied having made such threats and other employees testified they recalled Harris reading from the documents distributed by Respondent but did not recall the threats testified to by Sloan and Young.

#### Analysis

I credit the specific testimony of Sloan and Young which I found to be reliable. As the General Counsel points out in brief, it is possible that other employees were absorbed in the literature distributed by Respondent and did not pay attention to all that Harris had to say. I find that Respondent thereby threatened the employees with job loss and loss of benefits in violation of Section 8(a)(1) of the Act.

#### F. Supervisor Dennis Quesenberry's Statements on the I-20/59 Jobsite While Speaking to Employees, Paragraphs 16(a) and (b) of the Complaint

Employee Alphonso Hayes testified that about 2 to 3 weeks before the election held on August 17, 2001, Superintendent Dennis Quesenberry made some statements in the presence of the crew on the I-20/59 jobsite. The statements did not take place in a formal meeting but were made in the presence of the crew. Quesenberry told the employees present at the time that Greg Abramson would probably fold down if the Union was to take effect. He then told the crew that they would probably lose transportation rights if the Union were to come in and that Respondent's vehicles would be parked at the office.

Hayes testified that Leon Smith, Lee King, Carl Hartley, Joe Colvin, Wiley Emmet, Walter Smith, Timothy Maze, and Leonard Johnson were present at the time Quesenberry made the foregoing statements. He did not know if the other employees had heard the statements. Hayes acknowledged that Quesenberry also talked in general terms about bargaining which information had been given to them previously in written campaign materials.

Supervisor Quesenberry testified that he held a group meeting with the employees concerning the Union where he read some of Respondent's campaign literature to the employees. He testified he was asked questions by employees on several occasions and that he told them to ask the Union whether they could guarantee promises being made by the Union. He testified that during one of the group meetings he had not threatened that the Respondent would close if the employees selected the Union. General Counsel points out in brief that Quesenberry did not make any general denial of the statements attributed to him by Hayes and did not deny that he may have made the statement in employees' presence on another occasion. No other witnesses testified concerning these alleged statements by Quesenberry.

#### Analysis

I credit Hayes' testimony concerning these statements made by Quesenberry. Hayes was a current employee at the time of the hearing and freely acknowledged that he had recently been returned to work after a short suspension for attendance problems and that the suspension was proper. He was a cooperative witness who testified in a straightforward manner. I find that Respondent violated Section 8(a)(1) of the Act by Supervisor Quesenberry's statement to employees that Greg Abramson probably would fold down (close the business) if the Union were to take effect. *NLRB v. Gissel Packing Co.*, 395 U.S. at 618-619, *Reeves Bros. Inc.*, 320 NLRB at 1083. I find that Respondent violated Section 8(a)(1) of the Act by supervisor Quesenberry's statement to the employees that they would probably lose transportation rights if the Union came in, and that Respondent's vehicles would be parked at the office. This was an unlawful threat of the loss of benefits. *Plastronics, Inc.*, 233 NLRB 155, 156 (1977).

*G. The Meeting at the Pawnee Road Facility,  
Paragraphs 17 and 18*

This was a meeting of two to three crews held in July 2001, at which Greg Abramson spoke. Rodney Jones testified that at the meeting Greg Abramson again told the employees that he had given them good benefits and that there had not been a union and he did not want a union. Jones testified that Greg Abramson said Respondent would not be able to get jobs if the employees chose union representation because the contractors would not allow union workers on the jobs and so the Respondent would stay nonunion. He also told the employees that if they unionized, the vehicles would stay at the office and the employees would be required to come to the office to drive them.

Michael Sloan testified that at the shop meeting, Greg Abramson said if the Union came in, it would be hard for Respondent to obtain jobs and the employees would be out of work as the contractors would not allow union workers on their jobs. He also testified that if the Union came in, the employees would be required to bear the expense of out of town travel and that Abramson did not say the benefits could go up or down but rather said they would be taken away.

Curtis Young testified that at the shop meeting Greg Abramson said that even if the employees had a union, he would have the last say because he was the owner. He told them they could lose their jobs, their rides to and from work and the meals and expenses for out of town stays if the Union came in.

Eddie Allen testified he attended the meeting at the shop but could not hear much of what was said.

Gerald Oliver testified that Greg Abramson said the same things at the shop meeting that he had said at the meeting by the crane.

Marvin White testified he attended the shop meeting at which Greg Abramson handed out papers and told the employees to look them over but did not otherwise provide any details of the meeting.

David Isbell testified that at the shop meeting Greg Abramson said the employees' jobs depended on the Respondent's obtaining work. He did not hear him tell employees that Respondent would take away motel room benefits, expenses money, meals or vehicles if the Union won the election. Greg Abramson testified that at the shop meeting he distributed campaign literature to the employees and read some of it to them. He denied having said anything about transportation, hotels, meals or expenses. He testified he did not remember having said anything about losing business from contractors. He denied having told the employees that they would lose their jobs or benefits if they chose union representation. He denied telling the employees it would be hard to keep the doors open if they chose union representation. He denied having told the employees to choose between the Union and their jobs.

*Analysis*

I credit the testimony of employees Jones, Sloan, and Young which were specific in detail and mutually corroborative of each other. I find that Greg Abramson did make the statements attributed to him by these employees, rather than just reading from campaign literature as he testified. I find the statement

attributed to him by these employees concerning loss of work, jobs and benefits were all consistent with similar statements attributed to him at the prior meeting near the crane on the I-459 jobsite. I conclude that Respondent thereby violated Section 8(a)(1) of the Act by Greg Abramson's threats of the loss of benefits, *Plastronics, Inc.*, 233 NLRB at 156, and loss of jobs, *Reeves Bros. Inc.*, 320 NLRB at 1083.

*H. Statements Made by Greg Abramson at the Lincoln, Alabama Honda Plant (Paragraph 19 as Amended at the Hearing)*

Employee George Pelt testified concerning a meeting held by Greg Abramson at the Lincoln, Alabama Honda Plant that Greg Abramson told the employees there was a possibility they could lose their rides to work and company provided motel rooms if the Union came in. He also testified that Greg Abramson did not inform the employees that they could gain anything from collective bargaining or that benefits might stay the same.

Employee J. D. McMillan testified concerning this meeting that he did not recall Greg Abramson speaking about benefits or that he would take away the vehicles for rides to work. Employee Lorenzo Jones testified that he recalled the meeting but did not recall what Greg Abramson had said.

Greg Abramson testified that during meetings in Lincoln, Alabama, he repeated what he had said at other meetings but did not testify to what meetings he referred. He denied having said that employees could lose their rides or motel rooms.

*Analysis*

I credit George Pelt's testimony which was specific and was contrary to his own pecuniary interest as a current employee as it was contrary to that of Greg Abramson over the lack of recall of witnesses J. D. Millan and Lorenzo Jones and over the denials of Greg Abramson who testified that he told the employees the same things he had said on other unspecified occasions. I also draw an adverse inference from Respondent's failure to call the crew's supervisor Junior Leard to testify, that his testimony would not have been favorable to Respondent's position.

I find that Respondent violated Section 8(a)(1) of the Act by the threats issued to the employees at this meeting that they could lose their transportation, and meal and lodging benefits in the event that the Union won the election.

*I. Greg Abramson's Statement to a Group of Employees at the I-20/59 Jobsite—Paragraph 19*

Employee Lester Fluker who worked for Respondent at the I-20/59 jobsite in Bessimer, Alabama, testified that his crew and a tie end crew were working on this jobsite about 2 to 3 weeks before the election when they were called to a meeting by Supervisor Quesenberry. Greg Abramson then pulled up and handed out flyers and addressed the employees of both crews. Abramson said the Union said we (Respondent) are making this or that and there is no way we (Respondent) are making that kind of money. He said if we have to go through all this, there is no way we will be able to stay open and meet all these demands. Abramson said Respondent had been good to the employees all these years. He also said Respondent would not be able to continue to pick up and transport employees from their homes to and from work and the employees would have to pay for their own room and board and get their

own transportation for out-of-town assignments if the Union went through. Fluker testified there were 10 to 15 employees from his crew and 6 to 7 employees from the tie end crew. Only Alphonso Hayes was not at the meeting as he was running late.

On cross-examination Fluker acknowledged receiving some of the pamphlets that were handed out by Abramson but testified he threw them in the backseat of his vehicle without looking at them. Abramson did read off some of them. He does not recall Abramson saying anything about bargaining. He does recall that Abramson said the Union may decide to trade existing benefits for other benefits. Greg Abramson said if the Union comes in and wants to raise everything, the lunch and trucks and a lot of stuff was going to be cut as the Respondent could not keep the business running and do all this. Abramson said that if the Union comes in and raises prices and dues they would not be able to afford to keep the Company going. He further acknowledged on cross-examination that benefits like transportation and out of town room and board were a hot topic and Greg Abramson spoke about them several times. He did not say it was on the bargaining table. Fluker testified Abramson, "said a lot of this stuff would be cut and you will have to get your own transportation from to these places, and some of the motels, you will have to come up with your own—all the lunch and this would be cut out."

Employee Lee King who worked at the I-20/59 jobsite in Bessimer, Alabama, testified he drives his own vehicle from the Greensboro, Alabama area and that Respondent pays for his gas and pays for his lunch. He asked Greg Abramson if these benefits would continue if the Union were selected as the collective bargaining representative of the employees. Greg Abramson told him that they might change because he was not required to furnish them. In answer to inquiry by Respondent's counsel whether these statements were made in the context of discussing bargaining or negotiations, King denied that bargaining was discussed. King also testified that Greg Abramson told the employees that contractors such as Apac for whom Respondent does concrete work would probably want to use nonunion companies which would result in fewer jobs if Respondent were unionized.

Employee Carl Hatley who worked at the I-20/59 jobsite in Bessemer, Alabama testified that Greg Abramson held a group meeting with employees at the jobsite and told employees that he did not have to provide transportation and hotel rooms for employees. Hatley testified he did not remember much about the meeting.

Employee Lee Smith testified he did not recall Greg Abramson talking to employees at the jobsite. Employee Joe Colvin testified that Greg Abramson told the employees "everything would be up for grabs" during a meeting at the jobsite. He testified he did not remember what took place at the meeting. Employee Wylie Emmet testified that at a jobsite meeting several weeks before the election, Greg Abramson told the employees Respondent could lose a little work if the employees were unionized because some contractors would not allow Respondent on the job if it were unionized. He could not recall Greg Abramson saying anything about benefits. He testified

Abramson did say that if the employee were unionized, there would be collective bargaining and wages could go up or down.

Dennis Quesenberry testified that Greg Abramson came to the jobsite on several occasions and read from some documents to the employees. Respondent did not otherwise inquire of Quesenberry concerning what Greg Abramson said to the employees.

Greg Abramson testified he held two meetings at the I-20/59 jobsite and said the same thing he had said at the I-459 meeting held by the crane in early July 2001. He denied telling employees they would lose transportation, meals, lodging or per diem benefits if the employees selected the Union as their collective bargaining representative. He denied telling the employees he knew they had been talking to the Union or that it would be hard to keep the doors open. He testified he did tell them benefits such as transportation would be up for negotiations.

#### Analysis

I credit the testimony of Lester Fluker and Respondent's witnesses Lee King, Carl Hatley, and Wylie Emmet that Greg Abramson told the employees that Respondent did not have to provide benefits as it did such as transportation, lodging and meals and that he also threatened them with loss of employment if the employees unionized. These statements regarding the loss of benefits were couched in terms of what action Respondent might take independently rather than on the give and take of negotiations and collective bargaining. With respect to Respondent's predictions of a loss of work due to the unwillingness of contractors to use Respondent's services if the employees unionized, I find that they were not based on objective facts and clear statements by the other contractors that they would not utilize Respondent's services but were rather conjecture on the part of Greg Abramson calculated to discourage the employees' support of the Union. I find that Respondent violated Section 8(a)(1) of the Act by each of these threats. *Reeves Bros. Inc.*, 320 NLRB at 1083.

#### *J. Conversations between Greg Abramson and Alphonso Hayes—Paragraph 19*

Employee Alphonso Hayes, who is currently working for Respondent in Florida, testified he works on the crew of Supervisor Dennis Quesenberry and worked on the I-20/59 jobsite in 2001. He testified that about 2 to 3 weeks before the election Greg Abramson talked to him individually on the jobsite and told him that if the Union came in, the employees could lose their privileges and would have to buy their own lunch, transportation and pay for their own hotel. In a second conversation before the election he and another employee spoke with Greg Abramson and he asked if the Union came in whether the employees would lose their rights such as Respondent buying their meals and Greg Abramson said yes. Greg Abramson denied speaking with Hayes in any one on one or small meeting on the I-20/59 jobsite. However, current employee Joe Colvin testified that he observed Hayes and Greg Abramson in a one on one meeting on the jobsite which is corroborative of Hayes testimony that he engaged in such a meeting.

### Analysis

I credit the testimony of employee Alphonso Hayes as corroborated in part by employee Joe Colvin. I find that Greg Abramson did tell Hayes on two occasions that the employees could lose benefits as set out above if the employees unionized and that Respondent thereby violated Section 8(a)(1) of the Act. *Plastronics, Inc.*, 233 NLRB at 156.

#### K. Greg Abramson's Statements to Employees Walter Williams and Jimmy McMillan at the I-459 Jobsite—Paragraph 19

Employees Walter Williams and Jimmie McMillan worked on the crew assigned to the I-459 site in July 2001. However, they were not present at the group meeting of employees conducted by Greg Abramson at that jobsite on July 11. Greg Abramson returned to the jobsite to meet with Williams and McMillan concerning the union campaign and the upcoming election. Williams testified on direct examination by the counsel for the General Counsel that Greg Abramson told them he did not want any union on the job and that they might lose transportation and their jobs if the Union came on the job. On cross-examination Williams testified that Abramson distributed literature and told employees that benefits could go up or down or stay the same in bargaining. On cross-examination Respondent's counsel asked Williams if he had been "threatened" with job loss or loss of benefits if the Union came in and Williams testified he had not. Prior to the opening of the hearing Williams refused to give General Counsel a signed statement concerning Greg Abramson's conduct during the campaign and told General Counsel he would not do so because he believed Abramson would fire him if he did so.

Jimmie McMillan testified concerning the meeting held by Greg Abramson with Williams and McMillan that Abramson told them that if the Union came in, it would be difficult to obtain jobs from contractors. However, he testified that Abramson did not threaten him with job loss or loss of benefits or that he would lose transportation, meals or hotel rooms if the Union came in.

Greg Abramson initially testified he did not recall this meeting but when reminded by General Counsel that Williams and McMillan had not been present for the July 11th meeting, he did recall the meeting with Williams and McMillan and testified he covered the same material with them as he had at the group meeting near the crane. He testified he did not tell Williams and McMillan that Respondent would close or that they would lose benefits if the Union won the election.

### Analysis

I credit the specific testimony of Williams as corroborated in part by McMillan concerning the predicted difficulty in obtaining work from nonunion contractors if the Union won the election. I find this clear testimony by Williams, who is a current employee and who was concerned about being fired if he signed a statement for the General Counsel, is compelling and the significance of it was not diminished by the negative response in answer to the question by Respondent's counsel as to whether he had been "threatened." I found that Greg Abramson did not have specific recall of this meeting and merely an-

swered in the negative to questions propounded to him by Counsel for Respondent.

I find that Greg Abramson did threaten Williams and McMillan with the loss of their jobs and the loss of benefits including transportation if the Union won the election. *Flexsteel*, supra I find that Respondent thereby violated Section 8(a)(1) of the Act.

#### L. A Telephone Conversation between Alan Abramson and Rodney Jones—Paragraph 21

Employee Rodney Jones was laid off at the conclusion of the Galleria job on August 25 and recalled on October 1. He worked for 2 weeks, became ill and was hospitalized and missed 2 weeks of work. When he called Respondent seeking to return, he was told there was no work available. He called again about a month and a half after the election in mid-October and asked for Greg Abramson who was not in the office. He spoke with co-owner Alan Abramson who asked him what kind of papers he and Curtis (Young) had signed and said he would have to go to court as a result. Jones assumed that Alan Abramson was referring to a request for prefiling assistance for the Equal Employment Opportunity Commission (EEOC) that he had signed and turned into a union representative. He told Alan Abramson he had signed papers from the Union, not to hurt the Respondent but to better himself and make more money. Abramson recalled the conversation and said he was referring to materials he had received from the EEOC for prefiling assistance for about 13 employees but did not recall mentioning the name of Curtis Young.

### Analysis

I credit the specific testimony of Jones and find that the inquiry by Alan Abramson while NLRB charges were pending was broad enough to include all papers he had filed regarding his union activities and other concerted protected activities and was coercive and that Respondent thereby violated Section 8(a)(1) of the Act. *SAIA Motor Freight, Inc.*, supra.

#### V. THE ALLEGED UNLAWFUL REFUSALS TO RETURN EMPLOYEES YOUNG AND JONES TO ACTIVE EMPLOYMENT

The complaint as amended at the hearing, alleges that Respondent unlawfully refused to return employees Curtis Young and Rodney Jones to employment because of their engagement in protected concerted activities. Both Young and Jones were long-term employees. Young was initially employed by Respondent in 1978. He voluntarily left his employment with Respondent and returned in 1995. He was employed in April 2001, when the union campaign commenced. Young testified he was a cement finisher, steel tearer and did carpentry work. He was able to perform any job his crew did. Prior to April 2001, there had been quite a few layoffs but they never lasted long and ranged from 3 days to 2 weeks and never more than a month. In April he was working at the I-459 jobsite by the Galleria in superintendent Bruce Webb's crew under the supervision of Wayne Harris. He lived in Eutaw, Alabama, which is about 80 miles from the Galleria jobsite and was driven to and from work to his home in Eutaw in a company van that was used to transport several of the crew members from the Eutaw area including Rodney Jones. He also worked out of town on

Respondent's projects from time to time. He wore union t-shirts primarily on Saturdays and Mondays during the union campaign. He worked about 4 or 5 days after the August 2001 election and then the entire crew from Eutaw, Alabama was laid off. He was not recalled until 2 to 3 weeks prior to the hearing. He was then working elsewhere and declined the job.

Rodney Jones commenced work for Respondent in 1986. He worked on the same crew as Curtis Young and rode in the same company van to and from work and back to Eutaw, Alabama. He worked on out of town jobs from time to time. This crew was laid off for a couple of weeks after the finish of the Galleria job after the election. The crew, including Jones but not Young, was recalled to another job and Jones worked there for a couple of weeks when he became ill and went into a hospital. He missed 2 weeks of work. He called Greg Abramson to return to work and was told there was no work for him. He subsequently phoned again and talked to Alan Abramson in Greg's absence who asked him what kind of papers he and Curtis Young had signed referring to the EEOC filing request forms discussed *supra*. He acknowledged having signed papers for the Union in order to better himself and make more money. He has never been recalled to work. This was the first time he has been laid off for this length of time. He testified he has no idea why he has not been recalled. Greg Abramson told him there was nothing for everybody to do.

The General Counsel has established prima facie cases of violations of Section 8(a)(3) and (4) of the Act by the refusals to return employees Young and Jones to active employment because of their union and concerted activities. Under *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir 1981), *cert. denied* 455 U.S. 989 (1982), the General Counsel has the initial burden to establish that:

1. The employees engaged in protected concerted activities.
2. The Respondent had knowledge or at least suspicion of the employees protected activities.
3. The employer took adverse action against the employees.
4. A nexus or link between the protected concerted activities and the adverse action, underlying motive.

Once these four elements have been established, the burden shifts to the Respondent to prove, by a preponderance of the evidence, that it took the adverse action for a legitimate non-discriminatory business reason. Both Young and Jones were open and active union supporters, signing union cards, wearing union T-shirts on the jobsite and attending union meetings. Young met with other employees at their home on behalf of the Union. Jones signed an EEOC pre-filing assistance request and acknowledged to Alan Abramson that he had signed papers on behalf of the Union. Thus *Young and Jones engaged in protected activities. The Respondent had knowledge of the engagement of Young and Jones in protected activities* as noted above. Greg Abramson acknowledged that he was aware that employees from Eutaw were involved in the union campaign. Alan Abramson was also aware that Young and Jones had signed papers that could lead to litigation against Respondent.

*The failure to return Young and Jones to active employment following the layoff of the Eutaw crew was an adverse action taken against them.* In addition, two new employees were hired for this crew to replace Young and Jones.

*The animus of Respondent toward the Union and its supporters has clearly been established by the numerous 8(a)(1) violations found above.*

The Respondent has failed to establish its *Wright Line*, defense by showing that it would have taken the adverse actions against Young and Jones in the absence of their engagement in protected concerted activities. In the case of Young it contends that he was not recalled because he was not putting forth a full effort as testified to by his Supervisor Wayne Harris. Young denied that he was not putting forth a good effort and was supported by two current employees who had worked side by side with him and testified he was a good worker. Additionally, Superintendent Webb who supervised the Galleria job although called to testify, was not questioned concerning Young's alleged poor work performance. Moreover there was no evidence presented that Respondent or its supervisors had ever called Young's attention to the alleged poor work performance or taken action in any way to correct the problem. I find Respondent has wholly failed to establish its defense with respect to Young.

Similarly, Respondent has failed to establish its *Wright Line* defense with respect to Jones. At the hearing Greg Abramson attempted to justify the refusal to recall Jones by testifying that his behavior on the telephone was erratic and that he sounded as if he had been drinking. However, here again there was no notice provided to Jones as to the purported reason for failing to recall him. Moreover two new hires were made to replace two long-term experienced employees. Respondent's defense fails here also.

I conclude that the General Counsel has established a prima facie case of discrimination against Young and Jones committed by Respondent and that Respondent has failed to rebut the prima facie case by the preponderance of the evidence and that Respondent thereby violated Section 8(a)(1)(3) and (4) of the Act.

#### VI. THE BARGAINING ALLEGATIONS

The complaint alleges that Respondent has refused to recognize the Union and bargain in good faith with the Union. It also alleges that Respondent has unilaterally laid off employees without affording the union notice and opportunity to bargain prior to the implementation of the layoffs. Respondent concedes that it has not recognized the Union or bargained with it but contends it had no obligation to do so in reliance on the election results wherein the Union lost the election. The Union and General Counsel seek a bargaining order retroactive to June 2001, in reliance on the Union having attained majority status through single purpose authorization cards and the Respondent's unlawful conduct, which the complaint alleges was so outrageous and pervasive as to preclude the holding of a fair rerun election. The finding of the Section 8(a)(5) violations are dependent on the existence of a bargaining obligation. Prior to reaching these issues, it is necessary for the undersigned to determine whether the objections to the election filed by the

Union should be sustained and that the election would then be invalidated as they occurred because of the Respondent's commission of the 8(a)(1), (3), and (4) violations as set out above. In the event that I conclude that the elections should be set aside, I am urged by General Counsel and Charging Party Union to consider the appropriateness of a *Gissel* bargaining order, *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969), and the attachment of a retroactive collective bargaining obligation, compounded with the Respondent's refusal to recognize or bargain with the Union thus, establishing the Section 8(a) (5) refusal to bargain allegations. In the event that a bargaining obligation is found to have attached, it will be necessary to determine whether the layoffs were unlawful unilateral changes in the terms and conditions of employment of the unit employees.

#### The Election

The petition in Case 10–RC–15230 was filed on July 5, 2001. Pursuant to a stipulated election agreement approved on July 23, 2001, an election by secret ballot was conducted on August 17, 2001, among the employees in the stipulated appropriate unit. The tally of ballots showed that of approximately 79 eligible voters, 5 cast valid votes for the Petitioner Union and 68 cast valid votes against the Petitioner. There were 4 challenged ballots which were not sufficient to affect the results of the election. On August 20, 2001, the Petitioner filed timely objections to the conduct of the election. In his Report On Objections, Order Consolidating Case and Order Directing Hearing On Objections issued on February 5, 2002, the Regional Director of Region 10 of the Board found that the objections are primarily coextensive with certain conduct alleged in the complaint in Cases 10–CA–33153 and 10–CA–33368 and consolidated the objections with these cases for hearing before a designated Administrative Law Judge and transferred Case 10–RC–15230, and continued it before the Board. By letter dated February 4, 2002, Petitioner requested withdrawal of objections 7 and 9 only which was approved by the Regional Director. The objections and my rulings are as follows:

Objection 1—Greg Abramson threatened to retaliate against employees if they supported the Union or designated the Union to be their representative. I find this objection should be sustained in view of my findings that Greg Abramson threatened employees with loss of benefits and loss of employment.

Objection 2—Greg Abramson interrogated employees about their union activities. This objection is sustained.

Objection 3—Bruce Webb interrogated employees about their union activities. This objection is sustained.

Objection 4—Threats by Wayne Harris that the employer would rescind benefits in retaliation for employee union activities. In view of my findings of unlawful threats of loss of benefits engaged in by Harris, this objection is sustained.

Objection 5—Bruce Webb's threats to employees of job loss because of their union activities. In view of my findings of threats by Webb, this objection is sustained.

Objection 6—Various other threats of employees made by employer's supervisors and agents. In view of my findings of other threats, this objection is sustained.

Objection 7—Withdrawn.

Objection 8—called employees at their homes and asked who showed up for the Union meetings. No evidence presented. This objection is overruled.

Objection 9—Withdrawn.

Accordingly, I find that the objections should be sustained as set out above as the underlying objectionable conduct was pervasive and occurred during the critical period prior to the election and rendered the holding of a fair election impossible. I find the election should be set aside.

#### The Card Majority

At the hearing I received 54 authorization cards into the record. Nine cards were authenticated by the card signer and 43 cards were authenticated by the card solicitor. I authenticated 2 cards by a comparison of the employees' signature on the cards with the signature of the employee on records maintained in Respondent's files. These methods of authenticating authorization cards have all been acceptable to the Board. There were three types of cards used, some of which were in Spanish as a number of the employees spoke Spanish.

The language on the 'Authorization Card' is:

I hereby authorize the United Brotherhood of Carpenters and Joiners of America to act as my collective bargaining agent in dealing with my employer in regard to wages, hours, and other conditions of employment. All previous authorizations made by me are revoked.

The language on the 'Tarjeta de Autorizacion' is:

Autorizo por este medio a LA HERMANDAD DE CARPINTEROS Y ENSAMBLADORES DE AMERICA, para actuar como mi unico agente al negociar con mi patron jornales horas y otras condiciones de trabajo. Todo otra autorizacion previa queda revocada.

The language on the 'Authorization for Representation' is:

I authorize \_\_\_\_\_ of the UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA ('The Union') to represent me in collective bargaining with any employer for whom I may work within the jurisdiction of the Union. This authorization shall remain in effect until such time as I submit a written revocation.

All of these cards were "single purpose" cards whereby employees explicitly authorized the Union to act as their bargaining representative and were self validating. There was no evidence that any solicitor of the authorization cards informed the employees that they could or should disregard the language on the cards.

All of the English language cards were signed in cursive on the signature line as were eight of the Spanish language cards. Five of the Spanish language cards had the name printed in full on the signature line but were not signed in cursive. One has the first name only on the signature line but the name printed in

full on the “Nobre” (Name) line. One has no marking on the signature line but the name is printed in full on the “Nombre” line. Union representative Dan O’Donnell who speaks Spanish fluently testified he read the cards to each of them in Spanish and told them they should only sign the card if they wanted the Union to represent them and bargain on their behalf. He testified that he personally solicited and received back from the Hispanic employees each of the Spanish language cards. I credit his un rebutted testimony. I find that each of these cards was properly authenticated. To rule otherwise would be to exalt form over substance. I also note that there was no testimony by any employee that they were misled by anyone in order to obtain their authorization cards. See *McEwen Mfg. Co.*, 172 NLRB 990, 993 (1968), *enfd. sub nom. Amalgamated Clothing Workers of America v. NLRB*, 419 F.2d 1207 (D.C. Cir. 1969), with regard to the name of the card signer printed on the signature line with only the solicitor authenticating the card. See the administrative law judge’s decision in *Montgomery Ward & Co.*, 288 NLRB 126, 166 (1988), *remanded* 904 F.2d 1156 (7th Cir. 1990), where the administrative law judge held in reliance on *McEwen* and court decisions cited therein, that cards with no markings on the signature line and printing on the name line were properly counted when authenticated by the solicitor.

Respondent contends that the authorization cards can not establish the majority status of the Union because the cards entitled “Authorization Card” and “Tarjeta de Autorizacion” specify the United Brotherhood of Carpenters and Joiners of America as the designated bargaining representative and the cards entitled “Authorization for Representation” have a blank line for the designation of a local or district number. None of the cards admitted into evidence in this case contain the number of the Local Union.

I reject Respondent’s argument in its brief that the authorization cards do not authorize Local 127 to Act as a bargaining representative but rather authorize only the International as exclusive bargaining representative. In the *Nubone Co., Inc.*, 62 NLRB 322 (1945), at page 326 fn. 9 the Board held: “Designation of a parent organization is a valid designation of its affiliate,” citing *NLRB v. Bradford Dyeing Assn.*, 310 U.S. 318; *NLRB v. Franks Bros. Cos.*, 137 F.2d 989 (1st Cir. 1943). See also *L.C. Cassidy & Son, Inc.*, 171 NLRB 951 (1968); *New Hotel Monteleone*, 127 NLRB 1092 (1960); where the Board stated at 1094, “Contrary to the contention of the Employer and our dissenting colleague, we find the Petitioner’s showing of interest is adequate. The Board has always accepted showing-of-interest cards designating a labor organization, affiliated with, as here, the labor organization appearing on the ballot.” Citing at fn. 6 *U.S. Gypsum Co.*, 118 NLRB 20 (1957); *Cab Service & Parts Corp.*, 114 NLRB 1294, fn. 2 (1955); *Louis Pezitz Dry Goods Co.*, 71 NLRB 579 (1946), *Up-To-Date Laundry, Inc.*, 124 NLRB 247 (1959) where the Board stated at page 248. “. . . the Board is satisfied that the designation of a parent labor organization is, for the purpose of determining the sufficiency of a petitioner’s showing of interest, a valid designation of a petition affiliate.” In *Cam Industries*, 251 NLRB 11 (1980), the Board at page 11, stated the Board has long held, with court approval, that an authorization card designating a

parent labor organization serves as a valid designation of its affiliate,” citing *NLRB v. Bradford Dyeing Associate*, *supra* and *NLRB v. Franks Bros. Co.*, *supra*.

#### Scope of the Unit

The Parties entered into stipulations agreeing to the size of the unit except for five individuals whose status are disputed. General Counsel and Union contend that foremen David Lawley, James Lawley, Leonard Merit, and George Vanderslice are supervisors within the meaning of Section 2(11) of the Act and are excluded from the Unit. Respondent contends these foremen are not supervisors and should be included in the Unit. The burden of proving supervisory status rests with the parties contending that the individuals are supervisors under the Act. *Ohio Masonic Home, Inc.*, 295 NLRB 390, 393 (1989). Supervisory duties are listed in the disjunctive and an individual with authority over only one supervisory function may be held to be a supervisor within the meaning of the statute. However, the exercise of authority must be made with the use of independent judgment.

In the instant case co-owners Greg and Alan Abramson manage the Company. Superintendent Bruce Webb is a manager with several crews reporting to him. Robert Nolan, Rickey Gibles, Junior Leard, Wayne Harris, and Dennis Qusenberry are first line supervisors. In addition however each crew is assigned to a foreman who completes “Foreman’s Weekly Time Sheet” forms on a weekly basis. These foremen work with their tools whereas the first line supervisors do not generally work with their tools and generally manage larger crews than do the foremen. Additionally, the first line supervisors are paid on a salaried basis as are the managers whereas the foremen are paid by the hour.

However, the foremen perform duties which distinguish them as supervisors as opposed to rank and file employees. They make recommendations for hire of employees and for increases in pay for other employees and their recommendations are followed. The foremen also are charged with ensuring that work assigned to the crews is completed. The foremen also make decisions whether to cancel work because of inclement weather. They are in charge of small self-contained crews and work separately from other crews and assign and direct the employees in these crews. They thus are required to exercise independent judgment in the performance of these responsibilities. Secondly they perform the same paperwork as is performed by the admitted Section 2(11) supervisors and they are viewed by other employees as the boss or in charge.

With respect to employee Gloria Carter, her un rebutted testimony established that she was a unit employee during the Union campaign up to and including the date of the election. On June 30, 2001, her mother suffered a heart attack and was hospitalized. On July 3, she underwent quintuple bypass surgery. Carter telephoned Respondent’s paymaster Brenda Hines at Respondent’s office and told her she would be off because of her mother’s illness. Hines told her to keep Respondent informed and to call again the following Friday. Carter did so. She spoke with Greg Abramson on two occasions. On July 17, Greg Abramson told her she would be returned to work after Respondent moved some of its equipment to a new jobsite. On

the last Friday in August, Abramson told Carter he still did not have any work for her, but he would call her if he did get work. She then told Abramson that she would be applying for unemployment and did so on September 2, and showed on her unemployment form her last day of work was August 24. I find that up until the late August telephone conversation with Greg Abramson, Carter had a reasonable expectation of returning to work and remained an employee of Respondent. I find that Hines employment continued at least through August 24, when Greg Abramson told her he did not have any work for her. *Mercedes-Benz of Orlando Park*, 333 NLRB 1017, 1037 (2001), citing *Lawrence Rigging, Inc.*, 202 NLRB 1094, 1095 (1973). I thus find that Carter's signed authorization card should be counted toward majority status on any date from June 18 through August 24, 2001.

#### Measurement of the Majority

I have found that foremen David Lawley, James Lawley, Leonard Merit, and George Vanderslice should be excluded from the unit. I conclude the Union obtained majority status on June 21, 2001, when the Union had signed cards from 46 of the 82 unit employees including Gloria Carter. The Union's strength peaked on July 11, when Greg Abramson held the meeting by the crane. Since that date the Union obtained no additional cards. There were 54 cards received in evidence in this hearing. However, the cards of Lester Fluker, Jimmie McMillan, Jose Ruiz, Roman Marquez, Cornelio Marquez, Javier Marquez, Ronald Merritt, and Lovell Catlin were all signed after June 21 and could not be counted as of that date. Moreover, Leonard Merritt has been excluded from the unit as a supervisor. Thus there were 46 cards signed by eligible unit employees by June 21, following the date of the demand for representation by the Union.

#### Bargaining Order

I find that a bargaining order should be issued retroactive to June 21, when the Union first obtained majority status following the Union's initial request for recognition on June 18. In *NLRB v. Gissel Packing Co.*, the Supreme Court decided there were two categories of cases in which a bargaining order is appropriate. Category I are exceptional cases warranting the issuance of a bargaining order because the employer's unfair labor practices are so outrageous and pervasive that their coercive effects cannot be erased by traditional remedies above, thus precluding a fair and reliable election. Category II cases are "less extraordinary cases marked by less pervasive practices which nonetheless still have the tendency to undermine majority strength and impede the election processes." I find this is a category I case as there were hallmark violations committed by Respondent including threats of plant closure and job loss, and threats of loss of substantial benefits by the elimination of transportation benefits, hotels, expense money, and per diems on out of town assignments. In addition the discriminatory refusal to return Curtis Young from layoff and Rodney Jones from sick leave drove home the message of what would happen to union supporters. I find these threats and actions emanated from the highest level of management and resulted in a substantial reduction in union support as evidenced by the overwhelming loss of support for the Union on election day from the peak

of 54 cards signed in support of the Union. I further find that in the event the Board does not find this case to call for a Category I bargaining order, it would nonetheless call for a Category II bargaining order.

I conclude that Respondent violated Section 8(a)(5) of the Act by its admitted refusal to recognize and bargain with the Union. I further find that the unilateral layoffs by Respondent violated Section 8(a)(5) of the Act. As the bargaining order is retroactive to June 21, the unilateral layoffs were unlawful as they occurred after the date of the retroactive bargaining order. *Lapeer Foundry & Machine*, 289 NLRB 952 (1988), *Atlas Microfilming*, 267 NLRB 682 (1983); *Parts Depot, Inc.*, 332 NLRB 670 (2000). I thus conclude Respondent violated Section 8(a)(1) and (5) of the Act since on or about the date of June 21, when the Union obtained majority, by unilaterally laying employees off without providing notice and an opportunity to bargain to the Union.

#### CONCLUSIONS OF LAW

1. The Respondent is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

The Union is a labor organization within the meaning of Section 2(5) of the Act.

The Respondent violated Section 8(a)(1) of the Act by:

(a) The threats of job loss, loss of benefits for engaging in union activities and discharge for using a company van to attend union meetings made by co-owner Greg Abramson at the I-459 jobsite.

(b) The interrogation of employee Eddie Allen by supervisor Wayne Harris concerning the Union and threats issued to Allen by Harris of loss of benefits and loss of his job for his support of the Union.

(c) The interrogation about the Union of employee Eddie Allen by Superintendent Bruce Webb and by threats issued to Allen by Webb of loss of his job and the loss of transportation, gas costs and expenses if he continued to support the Union.

(d) Threats of layoffs and discharge and loss of transportation benefits and out of town expenses benefits if the Union came in, issued to employees at the I-459 jobsite by supervisor Wayne Harris.

(e) Threats issued to employees at the I-20/59 jobsite by supervisor Dennis Quesenberry that Greg Abramson would probably fold down the Company (close the business) if the Union won the election, and that the employees would probably lose transportation benefits, and that Respondent's vehicles would be parked at the office if the Union came in.

(f) The threats issued to employees at the Pawnee Road facility meeting by co-owner Greg Abramson to the employees that the Company would stay nonunion and of loss of jobs and transportation benefits and out of town expenses and the loss of paid overtime pay being computed on a daily basis.

(g) Threats issued at the Lincoln, Alabama Honda Plant by co-owner Greg Abramson to employees of loss of transportation benefits and out of town expenses of meals and lodging if the Union won the election.

(h) Threats issued to employees by co-owner Greg Abramson at the I-20/59 jobsite meeting about 2 to 3 weeks prior to the election of plant closure, and loss of transportation benefits

and out of town lodging and meal expense benefits if the Union won the election.

(i) Threats issued to employee Alfonso Hayes by co-owner Greg Abramson of loss of transportation benefits and out of town lodging and meal expense benefits if the Union came in.

(j) Threats issued to employees Walter Williams and Jimmy McMillan by co-owner Greg Abramson at the I-459 jobsite that he did not want any union on the jobsite and employees might lose their transportation benefits and their jobs if the Union came in.

(k) Interrogation of employee Rodney Jones by co-owner Alan Abramson concerning Jones' and Curtis Young's engagement in Union and concerted protected activities.

2. Respondent violated Section 8(a)(3), (4) and (1) of the Act by its refusal to return Curtis Young to work following a layoff and by its refusal to return Rodney Jones to work following a period of sick leave.

3. Respondent violated Section 8(a)(5) and (1) of the Act by its refusal to recognize and bargain with the Union.

4. Respondent violated Section 8(a)(5) and (1) of the Act by its unilateral layoffs of employees without providing notice and opportunity to bargain to the Union following June 21, 2001, which is the retroactive date of the Union becoming the collective bargaining representative for the unit employees as imposed by the *Gissell* bargaining Order.

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

6. The election should be set aside.

#### THE REMEDY

Having found that the Respondent has engaged in numerous violations of the Act, it will be recommended that Respondent cease and desist therefrom and take certain affirmative actions designed to effectuate the purposes and policies of the Act and post the appropriate notice.

It is recommended that Respondent offer immediate reinstatement to employees Curtis Young and Rodney Jones for the unlawful failure to reinstate them and to any employees who were unlawfully laid off as a result of the unilateral layoffs engaged in by Respondent. The employees shall be reinstated to their prior positions or to substantially equivalent ones if their prior positions no longer exist. The employees shall be made whole for all loss of backpay and benefits sustained by them as a result of Respondent's unfair labor practices.

These amounts shall be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950) with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987) at the "short term Federal rate" for underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. Section 6621.

It is recommended that the election be set aside.

It is further recommended that upon request by the Union the Respondent shall within 10 days of said request commence bargaining in good faith with the Union on behalf of the unit employees for a reasonable time and if an understanding is reached, embody the understanding in a signed agreement. *Raven Government Services*, 331 NLRB 651 (2000); *Nicholas County Health Care Center*, 331 NLRB 970 (2000).

[Recommended Order omitted from publication.]