

Aero Industries, Inc. and United Steelworkers of America, AFL-CIO-CLC. Cases 3-CA-15570, 3-CA-15688, 3-CA-15758, 3-CA-15920, 3-CA-16065, and 3-RC-9570

August 17, 1994

DECISION, ORDER, AND CERTIFICATION
OF REPRESENTATIVE

BY CHAIRMAN GOULD AND MEMBERS STEPHENS
AND DEVANEY

On September 21, 1992, Administrative Law Judge Howard Edelman issued the attached decision. The Respondent and the General Counsel filed exceptions and supporting briefs. Thereafter, the Respondent filed an answering brief to the General Counsel's exceptions and the Union filed an opposition to the Respondent's exceptions. The General Counsel has filed an answering brief to the Respondent's exceptions, and a brief in reply to the Respondent's answering brief.

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

The Board has considered the decision and the record in light of the exceptions¹ and briefs and has

¹No exceptions were filed to the judge's findings that the Respondent violated Sec. 8(a)(1) by engaging in surveillance of its employees' union activities, by threatening employees with loss of employment or layoffs, and by interrogating employees through its attorney-agent in preparation for the hearing here. Thus we adopt these findings pro forma.

We also note that the Respondent filed no specific exceptions to, nor separately briefed, the judge's findings that the Respondent violated Sec. 8(a)(5) of the Act by laying off employees on four occasions without bargaining, by dealing directly with employees, by unilaterally suspending employees' health insurance, and by unilaterally granting wage increases to some employees. The Respondent's only reference to these separate findings of 8(a)(5) misconduct is contained in its exception challenging its obligation to bargain with the Union as of June 1, 1990, the date on which the judge found, after overruling the Respondent's objections and sustaining the challenges to the ballots cast by Edward Krause and Earl Freeman, that the Union became the collective-bargaining representative of the unit employees by virtue of its receiving a majority of the valid votes cast in the Board-conducted election of that date. We find no merit in this exception or the Respondent's exceptions concerning Objections 1, 2, and 7 and the aforementioned challenges, and we adopt the judge's findings and recommendations in these regards. However, in adopting the recommendation to sustain the challenge to Freeman's ballot, we rely solely on the judge's finding that Freeman did not meet the standard for a regular part-time employee set forth in *Tri-State Transportation Co.*, 289 NLRB 356 (1988), on the voter eligibility date. Accordingly, we find it unnecessary to pass on his additional finding that Freeman was ineligible because he is closely related to an officer of the Respondent. Finally, in the absence of exceptions, we adopt, pro forma, the judge's recommendations to overrule the Respondent's remaining objections and the challenge to Thomas Griswold's ballot, which no longer is determinative and need not be opened and counted. Accordingly, having adopted the judge's conclusion that the Union should be certified as the unit employees' bargaining representative, we shall issue a Certification of Representative to the Union.

314 NLRB No. 123

decided to affirm the judge's rulings, findings,² and conclusions as modified below and to adopt the recommended Order as modified and set out in full below.³

The 8(a)(1) and (3) Allegations Regarding Tom
Griswold

Although we agree with the judge that the Respondent's refusal to accept Tom Griswold's withdrawal of his resignation violated Section 8(a)(1) and (3) of the Act,⁴ we do not agree with his finding that the Respondent also violated the Act by constructively discharging Griswold.

The evidence credited by the judge shows that, shortly before his shift ended on August 9, Plant Manager Hindman handed Griswold a written final warning for faulty work. After some discussion, Griswold refused to sign the warning and told Hindman he would

²The 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), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The General Counsel has excepted to the judge's failure to make any findings and conclusions regarding the complaint allegation that the Respondent violated Sec. 8(a)(1) by impliedly threatening employees with loss of employment or benefits, by circulating to the employees copies of the General Counsel's motion to amend the complaint reproduced in red ink. In this regard, the General Counsel contends that in the December 19, 1990 employees' meeting where the Respondent's president announced the suspension of the employees' health insurance and generally presented the Respondent as in a financial crisis, the Respondent's circulation of the General Counsel's motion to amend in red ink had a coercive effect on the employees because of the "commonly understood meaning" of the term "red ink." The General Counsel also contends, in effect, that by presenting the motion to amend the complaint in red ink during the meeting, the Respondent attempted to place the blame for its financial condition on the Union. We find that the General Counsel's contentions are based more on speculation than on evidence. Accordingly, we find this exception without merit and dismiss this allegation of the complaint.

³The judge's recommended Order and notice have been modified to conform to the judge's findings and conclusions as modified here. Provision also has been added for notices to be mailed to employees.

The General Counsel has excepted to the judge's failure to make findings and conclusions as to whether a *Gissel* (395 U.S. 575 (1969)) bargaining order is also appropriate but has requested the Board to grant such an order only if it finds that the Union was not entitled to certification. Because we find that the Union is entitled to certification, we defer to the General Counsel's position in this case and will not address the issue of whether a bargaining order is also warranted here.

⁴In finding company knowledge of Griswold's union activities, the judge relied in part on the "small-plant" doctrine. Member Stephens would not find that the small size of the plant alone would be sufficient to give rise to an inference that the employer knew of union activities occurring there. He accepts the size of the plant as one factor, however, and finds that the judge here clearly identified sufficient other credible evidence from which to infer that the Respondent knew about Griswold's union activities. See *Almet, Inc.*, 305 NLRB 626 fn. 5 (1991).

quit because of it. At that point, Hindman told Griswold that he would talk with Robert Dart, the Respondent's president, about the possibility of "pulling" the warning letter.

The next morning, April 10, Griswold, still upset about the warning, became further irritated when his supervisor, Bailey, denied his request for time off.⁵ Shortly thereafter, Griswold asked Bailey for a copy of the warning. Later that same morning, Griswold was observed walking among the machines "chanting" that this would be his last day, that he had gotten in his year, that this was it, and that they would be calling him from the front office. Bailey cautioned Griswold about this conduct. When Griswold's chanting continued, he was summoned to Hindman's office.

In Hindman's office, Hindman asked Griswold whether there was "anything they could do to correct it." Griswold repeated his request for a couple of days off to calm down. Hindman offered the time off. At that point, Griswold said "that wouldn't do any good" and stated that he was quitting.

Hindman responded to Griswold by telling him that his attitude "sucked" and that "he couldn't allow him to go back out with such attitude because he was too much of an influence on the rest of the people." Hindman once again asked Griswold if he was serious about quitting. Griswold replied that he felt he was being "harangued" and, as a result, he was quitting.⁶

A constructive discharge occurs when an employee quits because his employer has deliberately made working conditions unbearable for him. Two elements must be proven: "First, the burdens imposed upon the employee must cause, and be intended to cause, a change in his working conditions so difficult or unpleasant as to force him to resign. Second, it must be shown that those burdens were imposed because of the employee's union activities."⁷ The mere existence of discrimination is not sufficient to warrant finding the abandonment of employment to be a constructive discharge.⁸

In finding that Griswold was constructively discharged, the judge recognized that, unlike most cases in which the Board has found a constructive discharge, no affirmative change in Griswold's working condi-

tions had occurred before he quit. He relied by analogy on *American Licorice Co.*, 299 NLRB 145 (1990). In that case, the employer refused the request of an employee, for a transfer to another shift so that she could care for her children. In finding a constructive discharge when the employee quit, the Board found that the employer had deviated from its usual policy of permitting employees to transfer from one shift to another where vacancies then existed. The Board also noted that the refusal was discriminatorily motivated. Here, the judge found that the Respondent's issuing Griswold a final warning on April 9 gave rise to an analogous situation, because that warning represented a departure from the Respondent's established disciplinary practice of a verbal warning, followed by two written warnings, the last of which is "final." The judge also noted that it had been a year since Griswold's last warning.

We view the departure from practice in the two cases as fundamentally different, both from the viewpoint of the employer and the employee. Unlike the employer in *American Licorice*, supra, who knew at the time it rejected the employee's request for a shift transfer that she would be required to choose between leaving her children home alone or quitting her job (299 NLRB at 149), the Respondent here had no knowledge at the time it issued the warning to Griswold that he would decide to quit. Further, *American Licorice's* action forced the employee to make an immediate decision on continuing her employment; by contrast, Griswold could have gone on working as before.

Although the Respondent's issuance of the final warning to Griswold may not have been in accord with its above-described disciplinary practice, it cannot reasonably be found that the Respondent should have foreseen that he would quit because of that warning.⁹ Similarly, no matter how reasonable Griswold's fear of future discharge by the Respondent might have been, it does not permit him to elevate, unilaterally, the issuance of the warning into an unlawful discharge in the circumstances here.¹⁰ In short, we do not find that the Respondent's action rose to the level of creating an in-

⁵ Griswold was due some vacation time but the time had to be approved. Bailey, in denying the request, told Griswold that he needed Griswold until he (Bailey), a new employee, learned the ropes. The record shows that Hindman approached Griswold at his machine shortly after the morning break on April 10 and told him he would receive vacation pay for 2 of the 4 weeks he was due in his next paycheck and asked Griswold to calm down.

⁶ The events that followed, fully described by the judge, related to the Respondent's unlawful refusal to accept Griswold's withdrawal of his resignation. Those events are not relevant to the allegation of Griswold's constructive discharge which culminated when he quit as described above.

⁷ *Grocers Supply Co.*, 294 NLRB 438, 439 (1989).

⁸ *Id.* at fn. 8.

⁹ We note that the complaint does not allege that the issuance of a final warning to Griswold was unlawful, and that there is no finding by the judge that the warning was discriminatorily motivated in violation of the Act. Further, Griswold acknowledged that he was responsible for the mistake described in the warning. His concern centered on its designation as a final warning.

¹⁰ See *Groves Truck & Trailer*, 281 NLRB 1194, 1195 (Barker's quit) (1986).

We also note that Griswold's decision to quit occurred in the context of several actions by Plant Manager Hindman that were responsive to Griswold's complaint, i.e., Hindman's April 9 offer to check on "pulling" the warning letter and Hindman's April 10 clarification of vacation pay and offer of some time off.

tolerable working condition that warrants a finding that Griswold was constructively discharged.¹¹

The Layoffs

The judge found that the Respondent violated Section 8(a)(1), (3), and (4) by laying off employees on August 10, November 26, December 28, 1990, and January 22, 1991.¹² In so finding, the judge relied on credited evidence that showed a pattern of conduct by the Respondent calculated to discourage support for the Union, to retaliate against employees for cooperating with the General Counsel or resorting to Board processes, to divide its employees along pro and antiunion lines, and to send the message to the employees that the Union and its supporters were responsible for the layoffs. Although acknowledging that the Respondent was experiencing economic difficulties during the period of the layoffs, the judge rejected the Respondent's economic defense. He found that the Respondent's records showed a sustained period of production following the August 10 layoff, that each layoff was followed by brief periods of recall, that the Respondent's evidence indicated a "phenomenal jump [as he described it]" in total sales for November 1990, and that the Respondent did not offer any documentary evidence of a decline in customer orders. In all respects, we affirm the judge's findings regarding the layoffs for the reasons stated by him and those set forth below.

The Respondent's exceptions and brief contend that, in reaching his finding, the judge failed to analyze aspects of its economic defense and that he merely concluded that the "economic defense fails to overcome the strong prima facie case" The Respondent asserts that, "even assuming that there were orders, the record establishes clearly that Aero had no money and/or 'credit' available to purchase raw materials needed to make tool boxes." It relies largely on "Section 7 [accounts payable/receivable]" and "Section 8 [cash on hand]" of its "control book" to support its contention.¹³ Specifically, the Respondent claims that, with respect to the August 10 layoff, it "ran out of

money" while waiting for its customers to pay and thus it could not meet its payroll. It also claims that its suppliers would not sell it steel "C.O.D." As for not giving its employees advance notice that a layoff was coming, it asserts that this was consistent with its practice of having a meeting with its employees at which the layoff was announced, and that the decision to have a layoff on August 10 was made on August 10. Concerning the November 16 layoff, it again states that it had no money to meet the payroll, and that it had purchased materials on credit. The December 28 layoff, it asserts, was expected to be for 2 weeks because of a tight pre-Christmas financial situation, but was reduced to 1 week on the receipt of unexpected payments. The January 22 layoff it attributed to "finances," "producing quality and . . . productivity"

We find the Respondent's proffered reasons for the layoffs to be unpersuasive. Regarding the August 10 layoff, for example, the Respondent's control book shows that it had more "cash on hand" at the end of July and August 1990 than at the end of 10 of the previous 16 months.¹⁴ The cash-on-hand figures for July and August 1990 also were substantially higher than those for 5 of the 6 months in the period between March and August 1989; yet no layoff occurred in that 1989 period.¹⁵

The Respondent's reliance on monthly cash-on-hand figures for the timing of the four layoffs is also undermined by the intervening recalls that occurred during the 6-month period in which the layoffs occurred. The Respondent did not show a pattern of progressive layoffs corresponding to a downward spiral of economic conditions. Instead, the Respondent alternated between laying off and recalling significant numbers of employees throughout the period, notwithstanding that the cash flow problems that purportedly necessitated the layoffs still appeared to be present when the recalls were made. In such circumstances, the raw figures for cash on hand each month offer little correlation to these fluctuating employment patterns.

¹¹ In light of this finding, the judge's remedy is modified to reflect that Griswold is entitled to reinstatement and backpay from the date of the Respondent's unlawful refusal to accept his withdrawal of his resignation.

¹² The judge found that the Respondent also violated Sec. 8(a)(1) and (5) by laying off employees on these dates without notifying the Union and without bargaining over the layoffs or their effects, a finding that we have adopted. (See fn. 1, supra.)

¹³ The Respondent's control book (R. Exh. 29) sets forth figures and graphs in 10 categories for the period 1989, 1990, and 1991. These categories are: total sales, sales by type, new customers, reps commission, average profit, personnel, accounts payable/receivable, cash on hand, finished goods, and proposed changes in salary, equipment, and policy. The control book itself offers no further explanation for the raw figures or graphs, i.e., how they were arrived at or how one category relates to or affects another.

¹⁴ The only evidence of a layoff by the Respondent prior to the four layoffs at issue here was in late December 1989, a month when the cash-on-hand figure was less than half of the figures for July and August 1990. The record does not reveal whether advance notice was given the employees before that layoff occurred. In light of the sparsity of evidence concerning its alleged past practice of no notice until layoffs occur, we place little or no reliance on Dart's testimony to the existence of such a practice.

¹⁵ The Respondent has not explained how it was able in 1989, but not 1990, to operate without a layoff despite suffering through far worse cash flow problems in the comparable monthly period in the former than the latter year. Its claim that a built-up inventory helped it to get through April, May, June, and July 1990 without layoffs fails as an explanation. A stored inventory does not appear to have any relevance to a lack of ready cash, which the Respondent asserts stemmed from late customer payments. Nor, for that matter, would such an inventory seem to be material to the Respondent's accounts receivable to accounts payable disparities (see text, *infra*).

The variance between accounts payable and accounts receivable in the control book likewise offers no clear support for the Respondent's contention that its financial difficulties necessitated the four layoffs. Again, using the August layoff as an example, we find that the Respondent's records show it had a slightly more negative variance, i.e., more payables than receivables, in August 1989 than in August 1990; yet no layoff occurred in August 1989. The record also shows that the Respondent recorded seven consecutive negative monthly variances ending in August 1989 without prompting a layoff but that prior to the August 10, 1990 layoff, three of the six monthly variances had been positive, i.e., more receivables than payables.

Finally, we note that the Respondent's control book, on which it so heavily relies, shows that "finished goods" production for the second half of 1990 compared favorably with the "finished goods" production for the first half of the year. Further, the record discloses that there was no decline in orders for the period of August–December 1990 from the earlier part of the year. Both of these circumstances indicate that the economic picture portrayed by the Respondent for the last 5 months of 1990 as justification for the three layoffs occurring there was not significantly different from the first 7 months in which no layoffs occurred. Indeed, the highest "finished goods" production for 1990 was registered in September, and October's production for such goods was above the median figure for the year. The Respondent has offered no reasonable explanation for the need to have layoffs in August, November, and December and not at any other time of the year. In addition, the control book shows a significant increase in total sales in November, thereby casting further doubt on the necessity for a layoff in that month, if not December as well. All of these matters, like the cash flow and accounts payable/receivable discrepancies discussed previously, suggest that as found by the judge, reasons other than economic considerations precipitated the 1990 layoffs. Similarly, the Respondent's reasons for the January 1991 layoff do not withstand scrutiny. Those reasons amount to bare assertions unsupported by documentary or other reliable evidence.

In light of the foregoing, we agree with the judge that the Respondent has not provided a convincing explanation for the pattern of the layoffs here. In sum, we agree, for reasons stated by the judge, that the General Counsel made out a prima facie case that the Respondent's animus against its employees' union activities and their role in the filing and processing of cases before the Board was a motivating factor in the layoffs. Also, for reasons stated by the judge and the additional reasons set out above, we agree that the Respondent did not establish that it would, in any event, have implemented those layoffs for economic rea-

sons.¹⁶ Accordingly, we agree with the judge that the Respondent violated Section 8(a)(1), (3), and (4) as well as 8(a)(5), by the layoffs on August 10, November 16, December 28, and January 22.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set out in full below and orders that the Respondent, Aero Industries, Inc., Mayville, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Cease and desist from

(a) Interrogating its employees about their sympathies for United Steelworkers of America, AFL–CIO–CLC.

(b) Interrogating its employees through its attorney agent in preparation for proceedings.

(c) Engaging in surveillance of its employees' union activity.

(d) Requesting or encouraging its employees to take unspecified action against other employees who joined or supported the Union.

(e) Threatening its employees with loss of employment and/or layoffs because the Union had filed charges under the Act, because its employees had given evidence to the Board, or because the General Counsel sought backpay and reinstatement remedies.

(f) Telling its employees who supported the Union that they should leave the Respondent's employment.

(g) Discharging its employees because of their activities on behalf of the Union.

(h) Reassigning its employees to less desirable work because of their union activities.

(i) Laying off its employees because they joined or supported the Union or to discourage them from doing so, or because the Union had filed charges under the Act, or because its employees had given evidence to the Board.

(j) Refusing to recall employees from layoff because they joined or supported the Union, because they gave testimony before the Board, because a close relative of one employee gave testimony before the Board, or because they attended the Board's proceedings as a spectator.

(k) Laying off its employees without notifying the Union and without bargaining over the layoff or its effects with the Union.

(l) Bypassing the Union and dealing directly with employees with respect to hours of work.

(m) Suspending its employees' health insurance coverage without notifying the Union of the suspension and without bargaining with the Union about the sus-

¹⁶ *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

pension of the health insurance coverage or the effects of the suspension.

(n) Unilaterally granting wage increases to certain employees without notifying and bargaining with the Union.

(o) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their 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, or to refrain from any or all such activities.

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

(a) Offer to Thomas Griswold full and immediate reinstatement to his former or substantially equivalent position of employment, without prejudice to his seniority or other rights and privileges previously enjoyed.

(b) Make the above employee whole for any loss of earnings he may have suffered by reason of the discrimination against him in the manner set forth in the remedy section.

(c) Recall and reinstate all employees laid off on August 10, November 16, December 28, 1990, and January 22, 1991, if not recalled to their former jobs or, if those jobs no longer exist, to substantially equivalent jobs without prejudice to their seniority or other rights and privileges, and make all such laid-off employees whole for any loss of earnings they may have suffered as a result of the discrimination against them until such time as a valid offer of reinstatement has been extended to them, backpay to be computed in the manner described above.

(d) Recall and reinstate Barbara Beck, Danette Gilbert, Timothy Mulholland, and Thomas Zachary if not recalled to their former jobs or, if those jobs no longer exist, to substantially equivalent jobs without prejudice to their seniority or other rights and privileges, and make all such laid-off employees whole for any loss of earnings they may have suffered as a result of the discrimination against them until such time as a valid offer of reinstatement has been extended to them, backpay to be computed in the manner described above.

(e) Concerning the unlawful unilateral changes in terms and conditions of its employees set forth in the Conclusions of Law, reestablish the status quo ante except concerning those changes which have been beneficial to the employees in the appropriate unit described above in the Conclusions of Law. It is further ordered that a determination of whether the changes

have been beneficial to employees, whether employees have lost benefits or money by reason of the changes, and whether there is any money due and owing employees and the amount thereof be deferred to the compliance stage of this proceeding.

(f) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, time-cards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(g) Post at its place of business in Mayville, New York, copies of the attached notice marked "Appendix."¹⁷ Copies of the notice, on forms provided by the Regional Director for Region 3, 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. Additionally, the Respondent shall be ordered to publish the notice immediately in the Jamestown Post-Journal and the Mayville Sentinel, both newspapers of general circulation in the geographical area.

(h) Mail a copy of the attached notice marked Appendix to each of the employees employed by the Respondent as its Mayville, New York facility from August 1990 through August 1991. Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by the Respondent's authorized representative, shall be mailed immediately on receipt by the Respondent to all such employees at their last known address. Sufficient signed copies of the appropriate notice shall be furnished to the Regional Director for posting by the Union affected, if willing.

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

CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots have been cast for United Steelworkers of America, AFL-CIO-CLC, and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

¹⁷ 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."

All full-time and part-time production and maintenance employees including general factory, maintenance, set up, material movers, and hardware/outlet personnel employed at the Employer's Mayville, New York and Harbor Creek, Pennsylvania facilities.

APPENDIX

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

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

Section 7 of the Act gives employees these rights.

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

WE WILL NOT interrogate our employees about their sympathies for United Steelworkers of America, AFL-CIO-CLC.

WE WILL NOT interrogate our employees through our attorney-agent in preparation for proceedings.

WE WILL NOT engage in surveillance of employees' union activity.

WE WILL NOT request or encourage employees to take unspecified action against other employees who joined or supported the Union.

WE WILL NOT threaten employees with loss of employment and/or layoffs because the Union had filed charges under the Act, because our employees had given evidence to the Board, or because the General Counsel sought backpay and reinstatement remedies.

WE WILL NOT tell employees who supported the Union that they should leave our employment.

WE WILL NOT discharge employees because of their activities on behalf of the Union.

WE WILL NOT reassign employees to less desirable work because of their union activities.

WE WILL NOT lay off employees because they joined or supported the Union, or to discourage them from doing so, or because the Union had filed charges under the Act, or because its employees had given evidence to the Board.

WE WILL NOT refuse to recall employees from layoff because they joined or supported the Union, because they gave testimony before the Board, or because a close relative of one employee gave testimony before

the Board, or because they attended the Board's proceedings as a spectator.

WE WILL NOT lay off employees without notifying the Union and without bargaining over the layoff or its effects with the Union.

WE WILL NOT bypass the Union and deal directly with employees with respect to hours of work.

WE WILL NOT suspend employees' health insurance coverage without notifying the Union of the suspension and without bargaining with the Union about the suspension of the health insurance coverage or the effects of the suspension.

WE WILL NOT unilaterally grant wage increases to certain employees without notifying and bargaining with the Union.

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

WE WILL offer Thomas Griswold immediate and 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 and WE WILL make him whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL notify him, her that we have removed from our files any reference to his discharge and that the discharge will not be used against him in any way.

WE WILL recall and reinstate all employees laid off on August 10, November 16, December 28, 1990, and January 22, 1991, if not recalled to their former jobs or, if those jobs no longer exist, to substantially equivalent jobs without prejudice to their seniority or other rights and privileges, and make all such laid-off employees whole for any loss of earnings they may have suffered as a result of the discrimination against them until such time as a valid offer of reinstatement has been extended to them, backpay to be computed in the manner described above.

WE WILL recall and reinstate Barbara Beck, Danette Gilbert, Timothy Mulholland, and Thomas Zachary if not recalled to their former jobs or, if those jobs no longer exist, to substantially equivalent jobs without prejudice to their seniority or other rights and privileges, and make all such laid-off employees whole for any loss of earnings they may have suffered as a result of the discrimination against them until such time as a valid offer of reinstatement has been extended to them, backpay to be computed in the manner described above.

WE WILL reestablish the status quo ante concerning the unlawful unilateral changes described in the Order

except concerning those changes that have been beneficial to the employees.

AERO INDUSTRIES, INC.

Ron Scott, Esq., for the General Counsel.

Robert Landes, Esq., for the Respondent.

E. Joseph Giroux, Esq., for the Union Petitioner.

DECISION

STATEMENT OF THE CASE

HOWARD EDELMAN, Administrative Law Judge. This case was tried before me at Mayville, New York, on August 13–15 and September 24, 1990, and March 25–27, 1991. These proceedings were concluded at Buffalo, New York, on June 17 and August 20, 1991.

On or about April 12, 1990, in Case 3–RC–9570, the United Steelworkers of America, AFL–CIO–CLC (the Union) filed a petition for representation with the Board against Aero Industries, Inc. (the Respondent), under Section 9(a) of the Act. Pursuant to a stipulated election agreement in Case 3–RC–9570 approved on May 2, 1990, a secret-ballot election was conducted on June 1, 1990. Challenged ballots were sufficient in number to affect the outcome of this selection. On June 8, 1990, Respondent filed timely objections to conduct affecting the results of the election. On May 25, 1990, counsel for the General Counsel issued a complaint and notice of hearing in Case 3–CA–15570. On June 20, 1990, an order issued consolidating the postelection matters in Case 3–RC–9570 with the alleged unfair labor practices in Case 3–CA–15570. On July 27, 1990, an order issued further consolidating Case 3–RC–9570 with Cases 3–CA–15688 and 3–CA–15758, and an amended complaint and notice of hearing. On August 13–15 and September 24, 1990, a trial on the consolidated cases commenced at Mayville, New York. On September 20, 1990, the Union filed the charge in Case 3–CA–15920. And on October 15, 1990, a complaint and notice of hearing in Case 3–CA–15920 issued. On October 29, 1990, counsel for the General Counsel moved for an order reopening the record in Cases 3–CA–15570, 3–CA–15688, 3–CA–15758, and 3–RC–9570, for consolidation of the cases with Case 3–CA–15920, and for the staying of briefs until the completion of the consolidated proceedings. On November 6, 1990, an order granting the General Counsel's motion issued. On November 8, 1990, an amended charge was filed by the Union in Case 3–CA–15920. On December 7, 1990, counsel for the General Counsel moved for leave to amend the complaint in Case 3–CA–15920 to allege Barbara "Betty" Beck as a discriminatee within the ambit of the original complaint's allegations that Respondent had violated Section 8(a)(3) and (4) of the Act by laying off and refusing to recall certain employees, which motion was granted. On December 26, 1990, a charge in Case 3–RC–16065 was filed by the Union and on January 11 and 25, 1991, amended charges were filed. Complaint issued on February 28.

Briefs were filed by counsel for the General Counsel, by counsel for the Union-Petitioner, and by counsel for Respondent. On my consideration of the entire record, the briefs, and the demeanor of the witnesses, I make the following

FINDINGS OF FACT

Respondent is a New York State corporation with an office and place of business in Mayville, New York (Respondent's Mayville facility), where it has been engaged in the manufacture, production, and sale of toolboxes for retail and wholesale distribution. During the 12-month period ending April 1, 1990, Respondent, in the course and conduct of its business operations sold and shipped from its Mayville facility products, goods, and materials valued in excess of \$50,000 directly to points outside the State of New York. Respondent admits it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

It is admitted that the Union is now, and has been at all times material, a labor organization within the meaning of Section 2(5) of the Act.

The Discharge of Tom Griswold

Tom Griswold had been employed by Respondent for exactly 9 years on April 10, 1990. On that date, Griswold was the lead "set up" person in the "press and brake" area of Respondent's operation, where toolbox components are cut and shaped to specification. It appears that, among other things, a "set up" person adjusts the gauges on the various machines and makes certain that the correct dies are used for a particular job. Griswold was generally regarded as an excellent setup man and a hard, dependable worker.

In late March or the first week of April 1990, Griswold received a telephone call from Tim Mulholland, an employee organizing on behalf of the Union. Mulholland invited Griswold to a meeting of the Union's organizing committee on April 4. Griswold worked overtime on that date and was unable to attend the meeting that afternoon, but he did attend another committee meeting on April 7. Like several other employees, Griswold agreed to help get union authorization cards signed. Griswold himself signed an authorization card on April 7.

On Monday, April 9, during the morning break, Griswold spoke with two other employees about signed cards. Later that morning, Plant Manager Hindman, a supervisor and agent within the meaning of the Act, came to Griswold at the latter's work area and spoke to him about some shelves that had been bent the wrong way in press and brake. Griswold credibly testified that Hindman set the shelf down and told him that the shelf was bent the wrong way; one surface was textured steel and should have faced down, but the way these particular shelves were bent, the textured side faced up. Hindman told Griswold that Robert Dart, Respondent's president, had brought one of the shelves to him and that Dart was upset about it. Griswold testified that this was the extent of his conversation with Hindman and that nothing was said at that time to indicate that Griswold might face discipline as a result of the error.

Dart later told Hindman to "write up" Griswold. However, he then told Hindman he would do it himself. Ultimately, a written final warning was typed and given to Hindman for Griswold's signature.

Respondent's standard disciplinary practice is to issue a verbal warning as an initial step. If a second warning is necessary, a written warning is issued. The third step is a final warning which *may* result in discharge.

It is admitted that Griswold was an extremely skilled and conscientious worker. The only warning in Griswold's file was over a year prior to the instant incident. Moreover, the evidence conclusively established Respondent was lax in enforcing his progressive discipline practice. For example, Emma Nichols, an employee, made an error similar to Griswold's but was merely given an oral reprimand. Other employees were given more than one written warning without being given a final warning.

On April 9, during the lunchbreak, Griswold openly solicited employees about union cards in Respondent's lunch area where anybody could have observed such activity.

Approximately 15 minutes before the end of the shift on April 9, Griswold was brought into Hindman's office by Mike Bailey, a supervisor within the meaning of the Act, who was Griswold's foreman at the time. The purpose of this meeting was to present Griswold with the written warning. Hindman again showed Griswold the errant shelf and said that Dart wanted him written up for it. Hindman asked Griswold if he would quit as a result of the writeup. Griswold replied that he would not quit and explained why he had bent the shelf as he did; Hindman said that he understood "why [Griswold] thought that way," but that Dart insisted on the writeup. Griswold was then shown the letter but refused to sign it. Hindman then stated that he would go to Dart and see if he could "get the letter pulled."

On April 10, Griswold asked Bailey, for some time off; as April 10 was his anniversary date, Griswold was due some vacation time but evidently the time off had to be approved. Bailey denied the request, telling Griswold that he needed him around until he (Bailey), a new employee, learned the ropes.

Griswold thereafter collected some union cards he had distributed the day before, on the 9 a.m. break. A short time later, Hindman approached Griswold at his machine and told him that he would receive vacation pay for 2 of the 4 weeks he was due in his next check, asked Griswold to calm down, and told him that he would cool off in a couple of days. Griswold was "a little irritated" about the denial of time off and "not very happy" about the final warning of the previous day. Shortly thereafter, Griswold asked Bailey for a copy of the final warning, telling Bailey that he felt that he had a right to have a copy if the document would be in his file. Bailey did not respond, but walked away. Griswold testified that the time of this conversation was about 10 a.m.

Thereafter, Griswold was walking among the machines, "chanting" that this would be his last day, that he had gotten his year in, that this was it, and that they would be calling him to the office. Bailey then approached Griswold to ask him for his cooperation. After about 20 minutes, Bailey again observed Griswold engaged in similar behavior. Bailey asked Griswold a second time to "cooperate, to become part of the group." Griswold simply ignored him. Bailey walked away. Notwithstanding Griswold's strange behavior, he did his work and did not disturb the work of other employees.

After a time, Bailey went to Hindman's office and told the plant manager that he "couldn't tolerate this" and that he "felt that it was time that [they] did something about it." Hindman asked him to "go to the floor again and you know, try to make do with it" telling Bailey that Griswold had been like this before, and he would probably calm down. Bailey said alright and left.

A short time later Bailey returned to Hindman complaining about Griswold's singing or chanting, although there is no evidence that this conduct was disrupting employees. As a result of Bailey's complaints, Griswold was summoned to Hindman's office.

Once in Hindman's office, Hindman then asked Griswold whether there was "anything they could do to correct it," to which Griswold replied with a renewed request for a couple of days off to cool down. Hindman offered the time off, but Griswold said "that wouldn't do any good" and stated that he was quitting. Hindman told Griswold that his attitude "sucked" and that "he couldn't allow him to go back out with such attitude because he was too much of an influence on all the rest of the people." He then asked Griswold if he was really serious about quitting and Griswold replied that he felt he was being harangued, and as a result, he was quitting.¹ Griswold and Bailey returned to the production floor. Griswold, after a matter of minutes, went to Bailey and told him, in substance, that he would not quit, and asked Bailey to convey the withdrawal of his resignation to the office. In the meantime, Hindman had gone to the main office, where he met with Dart, Bonnie Moorehead, vice president, and Bill Dean, company comptroller. Hindman's recommendation was to try and keep Griswold on board. Dart's view, however, was, in Hindman's words:

[H]ow much longer are we going to put up with this stuff . . . his point of view was the fact that how much do you tolerate from an employee?

Ten or fifteen minutes after Hindman arrived in the office, Bailey entered, saying that Griswold had changed his mind, that he had "second thoughts" and would like to "withdraw it." Dart stated that it was too late, and that a letter was being typed. Hindman was asked to go out and get Griswold, which he did, and Griswold was given the then-typed letter to read. The letter stated that Griswold's orally stated intention was accepted, effective immediately. Griswold read the letter and Dart asked him whether he had any questions; Griswold did not. Dart asked Hindman to escort Griswold to pick up his personal effects and out of the plant, and this was done.

Later the same day, Griswold wrote to Dart, stating that he was confused and upset and that he wanted his job back. A day later, Dart replied with a letter stating that:

As you have threatened to quit before, and I had talked with you at great length in our meeting room to convince you to stay, I felt it was in the best interest of Aero to accept your quitting at this time.

As to the passage wherein Dart stated that he had attempted to convince Griswold to stay, Griswold testified that he had no idea what Dart could be talking about.

¹The above evidence concerning the events of April 9 and 10 is based on the testimony of Griswold, Bailey, and Hindman which at times is mutually corroborative, and at other times inconsistent. Where inconsistencies exist, I have generally credited Griswold for the most part because his testimony is consistent with subsequent credible or undisputed testimony of other employees. Moreover, I was impressed with his trial demeanor.

In order to prove that a discharge was discriminatorily motivated, it is necessary to prove that the employer had knowledge of the discharged employees' union activity. *Bayliner Marine Corp.*, 215 NLRB 12 (1974). Although, in this case there is no direct knowledge of Griswold's union activities, I conclude such knowledge can be implied from the circumstances surrounding the discharge, the size and type of Respondent's operation, and the manner in which Griswold's union activities were conducted.

The circumstances surrounding the constructive discharge of Griswold² establish that Respondent was aware of Griswold's union activities. The timing of the constructive discharge is incredible. The same day that Griswold openly solicited employees in the plant lunch area to sign union cards was 2 days before the Union filed its representation petition. Moreover, Griswold was an extremely skilled and hard worker who had a long period of employment with Respondent and was a valued employee. Further, the final warning, which resulted in Griswold's constructive discharge was contrary to Respondent's established disciplinary practice. Under similar circumstances, the Board has implied knowledge of union activity from such circumstantial evidence.

Knowledge of the employee's union activity can also be implied from the Board's small-plant doctrine. The small-plant doctrine may be applied when the facility is small and open, the work force is small, the employees made no great effort to conceal their union conversations, and management personnel are located in the immediate vicinity of the protected activity. *NLRB v. Health Care Logistics*, 784 F.2d 232 (6th Cir. 1986). The facts of this case establish the applicability of the small-plant doctrine. The work force is small, approximately 30 employees. The plant has wide open work and lunch areas and the supervisors move around freely and intimately among the employees. Griswold's union activities took place during working hours in the lunch area. He made no attempt to conceal these activities.

In view of the circumstances surrounding the final warning which resulted in Griswold's constructive discharge, I conclude Respondent had knowledge of Griswold's union activities prior to the issuance of such final warning. Alternatively, I conclude such knowledge can be implied from the Board's small-plant doctrine.

The standards for a finding of constructive discharge are well settled:

First, the burdens imposed upon the employee must cause, and be intended to cause, a change in his working conditions so difficult or unpleasant as to force him to resign. Second, it must be shown that those burdens were imposed because of the employee's Union activities. [*Crystal Princeton Refining Co.*, 222 NLRB 1068, 1069 (1976).]

More recently, in *American Licorice Co.*, 299 NLRB 145 (1990), the Board, in reversing the decision of an administrative law judge, held that *Crystal Princeton* is not to be read so narrowly as to apply only when an employer has made affirmative changes in working conditions. Citing *St. Joseph's Hospital*, 247 NLRB 869 (1980), the Board found that an employee had been constructively discharged even though

the employer had not changed her hours but had refused, for unlawful reasons, to grant her request for a change in hours. In any event, since the employer in *American Licorice* had deviated from its usual policy of permitting employees to transfer from one shift to another where vacancies existed, the Board found that it had in fact changed the employee's working conditions. There is a fair analogy to be made between the departure from its established practice of the employer in *American Licorice* and the departure of Respondent from its own established practice in issuing a final warning to Griswold on April 9.

Applying the legal standards to the instant case, it is argued that the elements of a constructive discharge have been proven. The protected activity by Griswold has been set forth above.

The evidence suggests that Respondent, by issuing a "final warning" on April 9, undertook to pressure Griswold into quitting and, failing that, to lay a "paper trail" for a pretextual discharge at a later date. On either count, the evidence shows that Respondent as set forth above treated Griswold disparately from other employees.

The totality of the evidence points to the conclusion that Respondent's machines were not the only things being set up on April 9 and 10. The timing of events, always a relevant consideration, is remarkable in this case.³ For Respondent to suggest as it does that the timing of events is coincidental pushes the outside of the proverbial envelope. Respondent had employed Griswold for 9 years, and well knew his temperament and personality. If Respondent did not precisely map out the events of April 9 and 10, it certainly seized its opportunity to push Griswold over the line. The dispatch with which Respondent prepared a letter accepting the emotional resignation of a knowledgeable, long-term employee is significant.

Given the timing of the final warning to Griswold, and its disproportionality to the offense, Griswold could have reasonably believed that the handwriting of his ouster was on the wall. Compare *Groves Truck & Trailer*, 281 NLRB 1194, 1196 (1986). Respondent's subjective state of mind, and that of its agents, is less relevant, for the test is not one of specific intent, but whether, under the circumstances, the employer should have reasonably foreseen the natural and probable consequences of its action. *Keller Mfg. Co.*, 237 NLRB 712, 723 (1978). The Board recognizes the general legal principle that one is presumed to intend the natural and probable consequences of his acts. *American Licorice*, supra at fn. 26.

The Board and the courts have held that a refusal to rehire, or to allow an employee to withdraw a resignation, may violate the Act. In *EDP Medical Computer Systems*, 284 NLRB 1232 (1987), an employee and leading union adherent told respondent's agent that if the union lost an election, she would not work for respondent anymore. The union did lose the election and, the following day, the employee gave notice. On the next working day, however, the employee (like Griswold) attempted to withdraw her resignation. Respondent refused, stating only in its defense that it did not permit "unhappy" employees to return to work after resigning. The Board affirmed the administrative law judge's finding that

² As set forth in detail below, I conclude Griswold was constructively discharged.

³ See, e.g., *Lear Siegler, Inc.*, 295 NLRB 857 (1989); *Harrah's Marina Hotel & Casino*, 296 NLRB 1116 (1989).

the employee's union activities were a motivating factor in respondent's refusal to allow her to rescind her resignation; it also found that the employer failed to carry its burden of establishing that it would have taken the same action, absent Section 7 activity. Similarly, where it was established (as here) that the employee's position had not been filled, the Court of Appeals for the District of Columbia was persuaded that an employer's refusal to allow a union adherent to withdraw his resignation, within a matter of hours, violated the Act. *Southwire Co. v. NLRB*, 820 F.2d 453 (D.C. Cir. 1987).

The instant case is not unlike *EDP*, supra. Respondent cannot argue, of course, that Griswold's position had been filled by the time he withdrew his resignation because 5 minutes after he resigned, under pressure, in the heat of the moment or both, Griswold told Bailey that he would not quit and that Respondent would have to fire him. Further, the evidence, including an admission by Dart, establishes that he had an established practice of permitting employees to withdraw their resignations.

Accordingly, I conclude that Respondent constructively discharged Griswold in violation of Section 8(a)(1) and (3) of the Act. I also conclude that, by refusing to accept Griswold's withdrawal of his resignation, he effectively discharged Griswold in violation of Section 8(a)(1) and (3) of the Act.

Interrogation of Employees—May 1990

Over approximately 3 days in May, less than a month before the election, virtually every employee in the plant was summoned to the office area for one-on-one meetings with either Dart or Vice President Moorehead.

On or about May 11, Dart called employee Amy Utegg into his office; no one else was present. Dart told Utegg that he had called the meeting to see whether she had any questions about the company. Utegg did not have any questions. Dart showed Utegg a piece of Steelworkers' literature that had evidently been distributed to employees. This flyer depicted, in cartoon fashion, an employer whose nose grew longer with each "whopper" (as the flyer put it) he told about unions. Dart, demonstrably aggrieved by the Union's propaganda, engaged Utegg with a point-by-point rebuttal of the statements there and asked whether she thought that the cartoon character looked like him. Utegg replied that it did not. Dart then asked whether Utegg thought that the company "needed a third party nosing around." Utegg answered "no." This meeting lasted approximately 45 minutes to an hour.

Employee Mulholland was in Dart's office for about 2 hours during the same weeks. Dart spoke generally about unions and strikes. Again, Dart produced the Steelworkers' "Pinocchio" flyer, asked Mulholland whether he thought the cartoon character looked like him, and took issue at length with the statements made in the flyer. Dart stated that his understanding of the way things worked in a union shop was, in effect, that the union steward had more authority than a foreman. He then asked Mulholland whether he had been in a union shop before, to which Mulholland replied that he had.

Employee Linda Crespo also met with Dart, during the second week in May for about an hour. Again, Dart took issue with the Union's literature. Dart asked her whether she

"thought that [they] needed a third party interfering with decisions on things that went on at Aero."⁴

Dart admitted that during this May period he or Moorehead spoke to each employee on an individual basis.

Under the Board's well-established *Rossmore House*⁵ test, Dart's asking the employees whether they thought they needed a "third party" and his asking Mulholland whether he had been in a union shop constituted coercive interrogation. Both the questions asked and the context in which they were asked suggest this conclusion.⁶ There is no evidence to suggest that Crespo and Utegg were openly an active union supporter, a fact which would, if true, vitiate the coercive impact of the questioning. *Sunnyvale Medical Clinic*, 277 NLRB 1217 (1985). Mulholland's sympathies may or may not have been known at that time. Even so, the testimony of Mulholland and that of Utegg makes it very clear that every employee in the plant was brought in during that week, by either Dart or Moorehead, and the collective testimony of the General Counsel witnesses indicates that the questioning of each employee was more or less a set piece.

Accordingly, I conclude, by Dart, unlawfully interrogated employees in violation of Section 8(a)(1) of the Act.

Employee Mulholland credibly testified that on July 10 he was brought to the office by Supervisor Bailey and introduced by Dart to Respondent's counsel, Robert Landes. Dart and Landes told Mulholland that he could leave anytime, but that he (Landes) was going to ask him a few questions. Mulholland was asked for his recollection of what Bonnie Moorehead had said to the Board agent about the union buttons Mulholland was wearing while acting as an election observer. The witness replied that he could not recall what Moorehead said. Landes then asked if Mulholland noticed a ballot marked "yes" with an asterisk during the count. Mulholland did not remember seeing it.⁷ Landes then asked Mulholland what Dart had said to the assembled employees on June 4, the Monday after the election. At this question, Mulholland hesitated. Landes said something to the effect of "come on, Tim, this is America."⁸ Despite this dubious assurance, Mulholland terminated the interview. Mulholland credibly testified on both direct and cross-examination that Landes never explicitly stated the reason for the interview, nor did he assure Mulholland against reprisals.

On July 10, Landes met with employee Tom Zachary. Landes asked Zachary about union dues or what he had been told in that connection by the Union. Landes then asked Zachary why he thought he was given a job transfer after the election. Landes also asked Zachary what time of day he had

⁴The above findings of fact are based on the credible and uncontradicted testimony of Utegg, Mulholland, and Crespo.

⁵269 NLRB 1176 (1984); whether interrogation is unlawful is to be determined by examining the totality of the circumstances. With respect to the interrogation of Mulholland, see *Philips Industries*, 295 NLRB 717 (1989).

⁶Questioning may be even more coercive than words alone might suggest when conducted in the context of other ULPs. *Great Dane Trailers*, 293 NLRB 384 (1989). The employees were well aware that a charge had been filed with respect to Griswold by the time of the interrogation.

⁷These questions were in connection with Respondent's objections to the conduct of the election described below.

⁸These questions were also asked in connection with Respondent's objections of the election.

signed an authorization card. Zachary testified, as did Gilbert and Mulholland, that Landes advised him of his right to not answer questions. Although Landes told Zachary that his refusal to answer “wouldn’t hurt my working at Aero,” he did not inform the witness of the questioning purpose.⁹

As an attorney, Landes is an agent of Respondent for the purposes of attributing his alleged unlawful conduct to Respondent. *Batavia Nursing Inn*, 275 NLRB 886 fn. 2 (1985). The evidence at trial establishes that, in his questioning of Gilbert, Mulholland, and Zachary, Landes violated one or more of the guidelines set forth by the Board in *Johnnie’s Poultry*, 146 NLRB 770 (1964). It is not sufficient that one or two of the three required disclaimers are given; all three must be observed. *Bill Scott Oldsmobile*, 282 NLRB 1073 (1987).

To the extent that the questioning by Landes related to the representation case, it is noted that *Johnnie’s Poultry* applies with equal force to such proceedings. *Adair Standish Corp.*, 290 NLRB 317 (1988).

The well-settled rule of *Johnnie’s Poultry* is designed to minimize the coercive impact of interrogation by an employer, while allowing the employer to investigate facts concerning issues raised in a complaint in preparation for its defense at trial, or to verify a union’s claimed majority status in aid of an employer’s decision whether to extend recognition voluntarily. *Supra* at 774–775. Having defined the extent of permissible inquiry, the Board in *Johnnie’s Poultry* set forth the required safeguards. An employer:

must communicate to the employee the purpose of the questioning, assure him that no reprisal will take place, and obtain his participation on a voluntary basis; the questioning must occur in a context free from employer hostility to union organization and must not be itself coercive in nature; and the questions must not exceed the necessities of the legitimate purpose by prying into other union matters, eliciting information concerning an employee’s subjective state of mind, or otherwise interfering with the statutory rights of employees. When an employer transgresses the boundaries of these safeguards, he loses the benefits of the privilege.

The Board recently reaffirmed these standards in *Astro Printing Services*, 300 NLRB 1028 (1990).

Assuming that Respondent had observed the above safeguards, the questioning of Mulholland about Dart’s speech to employees on June 4 could be viewed as within one of the permissible areas of inquiry, inasmuch as Dart’s remarks preceded the allegedly unlawful transfers on that date. However, the question to Zachary, as to why *he* thought he was transferred on June 4 was meant to “[elicit] information concerning an employee’s subjective state of mind”; such information is generally irrelevant in Board proceedings and always out of bounds under *Johnnie’s Poultry*.

Whether or not the specific lines of inquiry pursued by Respondent were permissible, the fact remains that the *Johnnie’s Poultry* safeguards were not observed. The purpose of the questioning was not explained to any of the three General Counsel witnesses. Only Zachary was assured that his non-

cooperation would draw no reprisals. Moreover, it could hardly be said that the context of the questioning was non-coercive or that it was conducted in an atmosphere free from hostility to Section 7 rights. Counsel for Respondent, apparently eschewing the option of contacting the employees at home and interviewing them outside of the plant, had the employees brought into the front office. At the time, one of the pending ULP cases directly involved two of the witnesses (Mulholland and Zachary), who were the objects of alleged surveillance and who were allegedly transferred in violation of Section 8(a)(1).

Accordingly, I conclude that Respondent, by his agent and attorney, Landes, unlawfully interrogated employees in violation of Section 8(a)(1) of the Act.

Respondent’s May 31 Surveillance of Employees

A major theme of Respondent’s preelection campaign was its contention that it was losing money and, by implication, that a union contract would further burden Respondent’s financial condition. On May 31, the day before the election, employees Tim Mulholland and Tom Zachary joined union organizers George Prenatt and Bill Pienta in distributing union literature from the public road at the edge of Respondent’s property which literature disputed Respondent’s contention.

After several minutes of this activity, Dart emerged from Respondent’s facility with a camera and walked slowly toward the two employees. At a distance of a few yards, he stopped and took several photographs of Mulholland and Zachary. Dart admitted taking these photographs but explained that he wanted these photographs to augment his “great pictorial history of the place” and that “some day in the far future, maybe I’d like to look back on this.”

The Board has found that photographing employees engaged in Section 7 activity may violate the Act. *Churchill’s Supermarkets*, 285 NLRB 138 (1987). Not all surveillance of this type violates the Act. However, Dart’s activity goes beyond the “mere observation” permitted by the Board. *Impact Industries*, 285 NLRB 5 (1987). Particularly where the Griswold discharge had gone to complaint 5 days earlier and where employees (including Mulholland) had been interrogated by Dart, the pointing of the camera at Mulholland and Zachary was a coercive act. Where a legitimate reason for the surveillance appears, there might not be a violation. This case, however, is to be distinguished from *Ordman’s Park & Shop*, 292 NLRB 953 (1989), *Concord Metal*, 295 NLRB 912 (1989), and related cases. In *Ordman’s Park & Shop*, there was testimony that the employer was attempting to preserve evidence of an alleged trespass. In *Concord Metal* photographs were taken to preserve evidence of secondary boycott activity and the blocking of ingress and egress. None of these circumstances obtain here, and even if motive were a relevant consideration in 8(a)(1) cases, Respondent’s lame explanation for its conduct would not suffice.

Accordingly, I conclude that Respondent engaged in unlawful surveillance in violation of Section 8(a)(1) of the Act.

On June 4, the first working day following the election, Dart held a meeting of all employees shortly after the plant opened. He told the employees that the Union wasn’t in as yet, and it would take up to a year to resolve its status. He

⁹Landes did not testify during the course of this trial. Therefore, the credible testimony of Mulholland, Gilbert, and Zachary is un rebutted.

then stated there were people working here who were unhappy and he was going to make some changes.¹⁰

Shortly after this meeting, Supervisor Bailey approached both Zachary and Mulholland to inform them that they were the aforementioned unhappy people. Bailey told Zachary that he was no longer a mover, but that he was to run a shear.¹¹

Zachary had never operated a shear prior to June 4. The shear operator's job is more physically demanding than that of a material mover. Zachary, who is 5 feet 4 or 5 inches tall and 135 pounds, also testified that he preferred the mover's job and that he pulled muscles in his back after the transfer. Moreover, Supervisor Bailey had not criticized his performance as a mover, but in fact had complimented him.

Bailey told Mulholland that he was the new mover. When Mulholland asked why, Bailey stated that Zachary wasn't "making it." No other reason was given for the shift of Mulholland from his job as a welder, a skilled trade, to the relatively unskilled task of moving material.

In determining whether Respondent discriminatorily assigned employees more arduous work or laid off employees, the General Counsel has the burden of proving that the employees' union activities were a motivating factor in such alleged discrimination. Once such motivating factor is established, the burden of the proof shifts to the employer to establish that the same action would have taken place in the absence of the employees' union activity. *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983); *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). This rationale is like balancing weights on a scale.

Where transfer or reassignment of an employee is motivated by antiunion sentiment, the Board has found violations of Section 8(a)(3). *Danny's Foods*, 260 NLRB 1445 (1982); *Wayne W. Sell Corp.*, 281 NLRB 529 (1986). Mulholland and Zachary distributed prounion literature on May 31, the day before the election; Mulholland was the Union's election observer. Thus, Respondent's knowledge of their Section 7 activity is unquestioned. In addition, the references by Dart in the June 4 employee meeting after the election, to people who were "unhappy" and "[did] not want to work [there]," were common code phrases for employee organizers, and that changes were being made to further evidence Respondent's intention to discriminate. Moreover, no other employees were transferred on June 4. While neither employee lost pay as a result, the transfers resulted in work considerably less agreeable to both employees (and more arduous for Zachary, at least).

It cannot be argued that the transfer of the two employees was motivated by business considerations. Even the uninitiated would find it strange that Respondent took an experienced casemaker and welder (Mulholland), and put him on a job for which the only skill required is to know which material to lug to the welders. Thus, I find Respondent failed to meet its *Wright Line* burden.

Accordingly, I conclude that Respondent, by discriminatorily transferring Zachary and Mulholland to more ardu-

¹⁰The above facts are based on the mutually credible and corroborative testimony of Mulholland and Zachary. Additionally, Dart's testimony concerning this meeting was not significantly different.

¹¹A material mover, Zachary explained, brings material to the welders, presumably from the press and brake area. A shear operator runs a machine which cuts large sheets of metal.

ous and less agreeable jobs violated Section 8(a)(1) and (3) of the Act.

Respondent laid off employees on August 10, November 16, and December 28, 1990, and January 22, 1991.

The General Counsel contends that these layoffs effected by Respondent were in violation of Section 8(a)(5) of the Act.¹²

In the instant case, the finding of an 8(a)(5) violation is conditioned on my finding, after a resolution of objections and challenges filed in connection with the representation case, that Respondent was obligated to bargain with the Union concerning its decision to make such layoffs. As set forth below, I recommend that based on a resolution of the objections and challenges, the Union is entitled to certification.

The Board has held that where objections and challenges are pending which, on resolution could result in a union certification, an employer takes unilateral action (on matters that are mandatory bargaining subjects) at its own peril. See generally *Mike O'Connor Chevrolet*, 209 NLRB 701 (1974), enfd. denied on other grounds 512 F.2d 684 (8th Cir. 1975). It is beyond dispute that layoffs and recall are mandatory bargaining subjects. *Advertiser's Mfg. Co.*, 280 NLRB 1185 (1986); *Lapeer Foundry & Machine*, 289 NLRB 952 (1988).

There is no dispute that the layoffs in issue were effected without notice to the Union. Obviously there was no opportunity to bargain extended to the Union by Respondent.

Where unilateral action involves a mandatory bargaining subject, an employer might be relieved of its duty to bargain by reason of extreme economic circumstances. *Stamping Specialty Co.*, 294 NLRB 703 (1989). However, there appears to be no case in which the Board has accepted this defense. That the Board has said so little about what might be a sufficient quantum of economic disaster suggests that an employer has a high hurdle to overcome. The Board's opinion in *Aquaslide 'N' Dive Corp.*, 281 NLRB 219 (1986), suggests (without so holding) that a pending bankruptcy or a freezing of the employer's assets might be enough. These circumstances, however, did not obtain in the instant case until long after the layoffs alleged as unlawful. The Board rejected the employer's economic defense in *Rocky Mountain Hospital*, 289 NLRB 1370, 1371 (1988). In that case, the respondent cited a decline in its patient census as justification for its unilateral actions. However, the Board observed that trend was neither sudden nor unexpected. Respondent's own economic problems were neither sudden nor unexpected.

Accordingly, I conclude that Respondent violated Section 8(a)(5) of the Act by laying off its employees without notice to the Union and without affording the Union an opportunity to bargain concerning such decision.

The Discriminatory Aspect of the Layoffs

To begin with, the timing of the August 10 layoff is suspicious. The layoff took place the last working day prior to the commencement of this trial.

Where layoffs are effected to retaliate for Section 7 activity, for filing charges or giving testimony under the Act, or to generally discourage employees from joining or supporting

¹²It is also contended that these layoffs were discriminatorily motivated and violated Sec. 8(a)(3) and (4). This issue is set forth and discussed below.

a union, an employer violates Section 8(a)(3) or (4), or both. *Consumers Asphalt Co.*, 295 NLRB 749 (1989); *Alpha Biochemical Corp.*, 293 NLRB 753 (1989). In this case, the evidence establishes that Respondent's layoffs were part of a pattern of conduct by Respondent, calculated to discourage support for the Union, to retaliate against employees for cooperating with the General Counsel or resorting to Board process, to divide its employees along pro- and antiunion lines and to send the message to the employees that the Union and its supporters were responsible for the layoffs.

The August 10 Layoff

On August 10, Respondent laid off 27 employees including Gilbert, Mulholland, and Zachary.

Just as the timing of the Griswold discharge coincided with the start of the Union's organizing activity, the evidence establishes that the timing of the August 10 layoff, at the end of the last working day before this trial commenced, was intended to send a message. The Board viewed a layoff 2 days after a union's election victory as retaliatory (*Alpha Biochemical*, supra). The remarkably timed layoff of August 10 given Respondent's other discriminatory conduct is highly suspicious and may be seen as both a prospective warning to employees, particularly potential witnesses, and an act of discrimination against those who Respondent knew would testify for the Union or the General Counsel.

The activities of Mulholland and Zachary were well known to Respondent by this time. As Respondent's counsel had interrogated Gilbert in July, it surely expected that she would be called as a witness; Gilbert also became part of the Union's organizing committee in April, a fact that Respondent was most likely aware of by August. Both Gilbert and Mulholland testified that they notified Bailey, during the week prior to the layoff, that they had received subpoenas. Bailey rather than instigating a possible layoff, told Mulholland on the morning of the layoff that he expected him on the job Monday morning because the trial was not scheduled to begin until 1 p.m. Thus, Bailey, Respondent's plant manager, would be expected to know of a planned economic layoff. He might very well not know of Dart's intention to lay off employees to discourage union activity.

Further evidence of Respondent's animus toward the Union and toward Mulholland particularly is the conversation between Mulholland and his foreman, Bill Castleberry, early in the week of the layoff. Castleberry had told Mulholland that Moorehead wanted a list of the work he had done that morning, something that neither Mulholland nor any employee, as far as he knew, had ever been asked to do before. According to Mulholland's credible testimony, Castleberry asked him:

"Just what is it that Bonnie [Moorehead] doesn't like about you?" and I said, "Well, I was part of the union organizing." And he had been new there. So I'm not sure that he really knew. He hadn't been there very long. And he said, "Oh, oh, that would do it."

Later the same day, or the next day, Mulholland was summoned to Bailey's office where he met with Bailey and Castleberry. Bailey told Mulholland that Castleberry had some unidentified problem with his work; Castleberry had not expressed any problem with Mulholland's work and took

no part in this conversation. Mulholland told Bailey he thought that "this is just on account of the Union." Bailey denied this, though in the next breath he complained that the Union in its campaign had made out several discharged employees to be "martyrs, or something . . . like Catherine the Great."

The selection of some employees for layoff and the retention of others tend to suggest an unlawful motive.¹³ For example, Gilbert testified that a number of the employees not laid off, particularly in her department, were of shorter tenure than herself and Mulholland (and in some cases Zachary) and openly hostile to the Union. Gilbert also testified that even though the production aspect of Respondent's operation was cut back on August 10, there was still enough work for her to do in the second store. Even so, those duties were given to Jane Bell, another vocal opponent of the Union.

The November 16 Layoff

On November 16 Respondent laid off practically the entire unit, 22 employees including Gilbert, Mulholland, and Zachary. The timing of the November 16 layoff and Respondent's animus toward its prouion employees is very suspicious. The Union filed the original charge in Case 3-CA-15920 on September 20, alleging, among other things, that Respondent's refusal to recall Gilbert, Mulholland, and Zachary from the August 10 layoff violated Section 8(a)(4). At the same time, the Union asked the General Counsel to pursue relief under Section 10(j) of the Act. Part of this relief, of course, would have been the interim reinstatement of these employees. On October 15, the complaint in Case 3-CA-15920 issued, alleging, as did the charge, that Respondent violated Section 8(a)(4). Respondent's answer to the complaint averred, and the record shows, that Gilbert was recalled to work on October 22, Mulholland on October 29, and Zachary on November 5.

Before any of the discriminatees returned to work, Dart called a meeting of employees. The topic of the above discriminatees was discussed. Kathy Sopher, an employee employed by Respondent at that time, credibly testified that Dart told the assembled employees that he was

going to be calling a few people back . . . not that we really needed them, but he had to recall them, he had no choice in the matter.

Undoubtedly, Dart referred to the prospect of 10(j) relief. Dart then went on to ask the assembled employees to:

watch and see if anybody was goofing off, and if we did see any goofing off, that we were to report it to the supervisor.

Sopher further testified that to her knowledge, employees had never before been asked to police the behavior of coworkers.

Sopher further testified that just before Gilbert's return to work, Moorehead spoke to employees in the paint and pack

¹³To be sure, not every employee laid off on August 10 was a known union adherent. However, in *Consumers Asphalt*, supra, the Board held that the fact that more than solely the employees involved in union activity were laid off did not preclude a finding that the Act had been violated. See also *Majestic Molded Products v. NLRB*, 330 F.2d 603 (2d Cir. 1964).

area about Gilbert. Moorehead spoke directly to employees Dori Bell and Deb Wilson, and Sopher credibly testified that she heard Moorehead tell them that Gilbert would be returning to the department. As Sopher testified:

Well, they weren't too happy that she [Gilbert] was coming back in our department, and she [Moorehead] said don't worry about it, as she [Moorehead] put it, that they could say whatever they wanted to Danette and they wouldn't get in trouble for it.

Neither Dart nor Moorehead denied Sopher's testimony.

Actually, Gilbert did not return to paint and pack on October 22. On her first day back, Gilbert was asked to meet with Moorehead, who told her that she was to use the office area restrooms rather than those in the plant as she had in the past as well as other similarly situated employees. The reason given was that these restrooms were closer to the second store, where Gilbert would be working. Gilbert testified that these restrooms were "a little closer." Moorehead also instructed Gilbert to write in her time, instead of punching her card on the clock, which is out in the production area as she and other similarly situated employees had done. The only explanation given to Gilbert was that this would be "easier."

Thus, the evidence established that Respondent staggered the reinstatement of the discriminatees over 2 weeks, effectively isolated Gilbert for that period of time, characterized these employees as "goofing off" to their coworkers, and licensed some employees to engage in verbal abuse of Gilbert. Moreover, Respondent waited until 10 days after the return of the last discriminatee (Zachary) to lay off practically the entire unit on November 16. The timing of this layoff, the proximity of the August 10 layoff to the first day of trial, and the coincidence of the December 28 and January 22, 1991 layoffs coupled with the filing of charges and amended charges, discussed below, indicates a pattern of retaliation.

The December 28 Layoff

On December 26, the Union filed the original charge in Case 3-CA-16065. Two days later, on December 28, Dart called a meeting of employees at 5:15 p.m. The meeting was neither scheduled nor announced ahead of time. Dart said that he had just received a new charge from the NLRB. While he addressed the employees, Dart held a copy of the charge in his hand. Dart said it would cost \$2000 just to answer the charge, and that he pointed to four employees and said, "Just to answer this charge, I could pay you, you, you, and you for two weeks." Dart told assembled employees of a day in November when Respondent's warehouse and outlet stores sold \$2100 worth of toolboxes; later the same day, he opened his mail and found a legal bill for \$2100.

Dart's monologue then turned to the employees who were "helping the company," and those who were not. Dart rhetorically asked what those who felt they were unlawfully laid off (and here Dart named Gilbert, Mulholland, and Zachary) were doing to help. Next, Dart announced that all production employees would be laid off until January 7.¹⁴

The timing, the spontaneity, and the duration of the layoff are all suspicious. As previously set forth, the charge was re-

ceived by Respondent on or before that same day, December 28. The meeting was neither scheduled nor announced. Mulholland testified that employees had no idea that a layoff was imminent. In fact, he testified that earlier in the day, Plant Manager Bailey had specifically denied that there would be any layoffs soon. Gilbert testified that on December 19, Dart had told the employees they would be working on January 2, 3, and 4, but on December 28, the employees were laid off until January 7. Gilbert also testified that four employees had clocked out early on December 28, and were not present for the layoff announcement; two of the four showed up for work on January 2, 1991, to find that there was no work. Evidently, no one advised them of a pending layoff when they clocked out on December 28.

The Layoff of January 22, 1991

On January 22, 1991, Respondent laid off 18 employees, including Mulholland, Zachary, and Gilbert. Again, this layoff closely followed the filing of a charge. On January 11, 1991, the Union filed an amended charge in Case 3-CA-16065, alleging numerous violations and asking that the General Counsel seek *Gissel* and 10(j) relief.

Like the December 28 layoff, the evidence establishes that the decision to lay off was a spontaneous reaction to new ULP charges. For example, the employees had been scheduled to work all day on January 22, 1991. On the day before the layoff, employee Kathy Sopher asked her supervisor, Herb Lines, whether there would be a layoff soon. Lines replied that there would be a layoff, and explained that Respondent's practice was to not order steel until the last minute. On the day of the layoff, Sopher had car trouble and called in at 7 a.m. and spoke with Lines, who did not mention a layoff to her. Sopher called in again at noon to report that her car was still out of service; she spoke to Moorehead at that time. Although the layoff was effected about 2 hours later, Moorehead made no mention of any layoff to Sopher.

At about 1:30 or 1:45 p.m., Respondent gathered its employees by the timeclock. Dart and Moorehead were present, and spoke in turn. Dart began by stating that, due to the earlier layoffs, the Respondent's receipts had fallen off and that everyone would be laid off again. Dart then made reference to the amended charge filed by the Union on January 11, and passed among the employees a copy of his January 16 letter to the Union. He complained that no response from the Union had been received and addressing Mulholland as the Union's "spokesman," asked him to look into it. At this point, Moorehead interjected, screaming and yelling all the while that she had been worried sick and losing sleep over the Company; she pointed in turn to Zachary and Mulholland asked them, "are you worried?" Moorehead then launched into a tirade about the amended charge filed by the Union which concerned Respondent's unilateral change to a 3-day workweek in November. She told the employees that this was the Union they had voted for, and the Union didn't want what they wanted. "There is no Union," Moorehead told the employees; "There is no Union representative here, so somebody in this room is going back and telling them these things, and I wish they would stop." Finally, Moorehead asked those employees who were loyal to Respondent to "get on those peoples' cases" who were not.

Dart then told the employees they were laid off and to leave.

¹⁴The layoff numbered 18 employees including Gilbert, Mulholland, and Zachary.

The apparent spontaneity of the layoff, its timing relative to the amended charge of January 11, and the references made in the layoff announcement to the amended charge all suggest a motive unlawful under Section 8(a)(3) and (4). The singling out of the union adherents by Moorehead and the conveyance to employees by Dart of the impression that the Union had lost interest in bargaining for them suggest that Respondent used the layoff as a means of discouraging employees from supporting the Union, thus violating Section 8(a)(3).

A review of all of the evidence establishes a strong prima facie case that the layoffs were discriminatorily motivated. The evidence throughout this case, described above and below, establishes a sustained pattern of other unfair labor practices throughout the period in which the layoffs took place.

Additionally, there was a series of antiunion statements by Respondent's owners to the employees at the time each layoff was being announced blaming the Union for the layoff and exhorting promanagerial employees to "get on" prounion employees. Such statements amount to a virtual admission that the layoffs were in direct retaliation to charges filed by the Union. The timing of each layoff almost conclusively supports such conclusion.

Respondent contends that the layoffs were economically motivated. There is no question that during the period the layoffs took place Respondent was experiencing some economic difficulties. In this connection, Respondent has offered evidence of a decline in total sales. However, Respondent's layoff pratter remains troubling. Respondent's records show a sustained period of production following the August 10 layoff. This period seems to have ended with the return of the three discriminatees. Moreover, each subsequent layoff was followed by only brief periods of recall, then another layoff, with Respondent through the statements of Dart and Moorhead laying responsibility for these layoffs at the feet of the union adherents. Additionally, Respondent's evidence indicates a phenomenal jump in total sales for November 1990. It seems plausible that even in its financial straits, Respondent was so obsessed with the Union and with ridding itself of its supporters that its business decisions had less to do with remaining profitable than with frustrating the union supporters into going elsewhere and turning their fellow employees against them. Finally, Respondent did not offer any documentary evidence of a decline in customer orders; even Dart's testimony relative to the reasons for the various layoffs does not cite a decline in orders.

In my opinion, Respondent's economic defense fails to overcome the strong prima facie case established by the General Counsel's case and, accordingly, I conclude that the August 10, November 15, and December 28, 1990, and January 22, 1991 layoffs were discriminatorily motivated in violation of Section 8(a)(3) and (4) of the Act.

The General Counsel contends that Respondent violated the Act by its refusal to recall Mulholland, Zachary, Gilbert, and Betty Beck from its August 10 layoff because of their union activities, because they testified during the trial of this case or for both reasons. In the case of Betty Beck, it is contended such discriminatory motivation was to retaliate against her because her son Donald Beck testified on behalf of the Union in the representation case aspect of this trial or,

alternatively, because she attended this trial on August 13-15 as a spectator.

Betty Beck had been employed by Respondent since 1988 and had worked in all areas of Respondent's operation. There is no evidence that Beck engaged in union organizing. However, her son Donald testified in the representation phase of this proceeding. Betty Beck was present in the courtroom throughout his testimony. Don Beck was no longer employed by Respondent at the time he testified nor interested in future employment.

Gilbert had been employed since 1985 in various positions and was versatile enough to be used as a "floater." At one time, Gilbert was a supervisor. The objections filed by Respondent in the representation case and the evidence developed at the instant trial, and set forth below, indicate Respondent's belief that a "yes" ballot marked with an asterisk was that of Gilbert. On August 15, Gilbert testified as a witness for the General Counsel. If credited, her testimony would establish that Respondent's counsel unlawfully interrogated employees about a month before the hearing.

Mulholland was employed by Respondent in 1977-1978 and again from 1982 to date. Mulholland had been a foreman for a time, and has about 10 years' experience as a welder. Mulholland testified on August 14. If credited, his testimony would support allegations of discrimination, interrogation, and surveillance by Respondent.

Zachary testified on August 15. His testimony is essentially corroborative of Mulholland's. Zachary had been employed by Respondent about 2 years at the time of his testimony, and had been a material mover and shear operator. Both Mulholland and Zachary were openly supportive of the Union prior to the election. Mulholland was the Union's election observer.

The evidence established that by mid-September at least 11 of the 27 employees were recalled and that 2 employees were offered recall but refused. The evidence further established that at least four of the recalled employees had less experience than Zachary, Gilbert, or Mulholland. Moreover, during this period a new and inexperienced employee was hired. There is no evidence that employees were usually recalled when work concerning their former job became available. Rather, the evidence tends to establish that the work of the unit employees was generally unskilled labor and that many employees could with little or no training handle most of the unit operations. In fact, many employees had performed different jobs for Respondent over the years.

Dart testified that Beck, Mulholland, Zachary, and Gilbert were not recalled initially because they were the "poorest performers." Dart's credibility as to this contention is totally crushed by the testimony of Plant Manager Hindman who was Respondent's plant manager until May 1990 and Michael Bailey who became plant manager thereafter. Both supervisors testified in detail that all of the above-named employees, including Beck, were excellent workers.

It is clear that discrimination under Section 8(a)(3) or (4) may take the form of a refusal to recall employees from layoff. *Desks, Inc.*, 295 NLRB 1 (1989). Where, as here, the timing of the adverse action is "stunningly obvious," the inference of unlawful motive is warranted. *NLRB v. S.E. Nichols*, 862 F.2d 952 (2d Cir. 1988), *enfd.* as modified 284 NLRB 556 (1987). In *Sweetwater Crafts*, 300 NLRB 18 (1990), the Board found violations of Section 8(a)(3) and (4)

on facts remarkably similar to those presented here. The respondent in *Sweetwater* laid off 11 employees for economic reasons, informing them at the time that the layoff would last 2 to 4 weeks. Eventually, seven employees were recalled, but the other four were not. One of the two alleged as discriminatees had testified adversely to the employer in a representation proceeding. The Board summarily affirmed the administrative law judges's findings that the refusal to recall the employees was motivated by their Section 7 activity and/or their testimony before the Board.

Given Respondent's extensive and severe commission of unfair labor practices and its clear pattern of retaliation against employees who support the Union or gave testimony in this trial in support of the Union coupled with his incredible contention that the employees were not recalled because they were the poorest workers, I conclude that Respondent refused to recall Beck, Zachary, Gilbert, and Mulholland when they should have normally been recalled because of their union activities and because they gave testimony in a Board proceeding and that by engaging in such conduct, Respondent violated Section 8(a)(3) and (4) of the Act.

Other Direct Dealing with Employees

The credible and un rebutted testimony of General Counsel's witnesses established Respondent, by its owner Moorhead, took several employee polls among the unit employees as to whether they preferred to work four 8-hour days or three 10-hour days. The employees voted, and worked the 10-hour days. No notice was given to the Union. In view of my recommendation that the Union be certified as the employees' collective-bargaining representative, I conclude Respondent violated Section 8(a)(5) by failing to give notice to the Union and bargain on request concerning a mandatory subject of bargaining. *Laminated Products*, 294 NLRB 816 (1989).

On or about December 19, at an employee meeting, Dart distributed to the employees an open letter dated December 11. This letter stated to employees that for fiscal reasons, their health insurance coverage would be suspended at the end of December "until things pick up." The coverage was suspended at the end of December 1990.

Major changes on fringe benefits such as health insurance are mandatory subjects of bargaining. In *Venture Packaging*, 294 NLRB 544 (1989), the Board held that the unilateral cancellation of employees' disability benefits was a violation. Respondent did not notify or bargain with the Union about the suspension. For the reasons set forth and discussed above, I conclude that by such unilateral action Respondent violated Section 8(a)(5) of the Act.

Employee Roberta Kneer was hired by Respondent in April 1990. Kneer started at \$3.90/hour, and was told by Hindman, who was plant manager at the time, that she would receive a raise at 30 days and "periodically" thereafter. At 30 days, Kneer was raised to \$4/hour. At 60 days, Kneer was raised again, to \$4.25. Kneer was out from June to December with a compensable injury. When she returned to work, she found that she had received another raise, to \$4.50. In her paycheck of February 27, 1991, Kneer found another raise, of 50 cents, which brought her up to \$5/hour. No one told Kneer she would be getting this raise.

Respondent's payroll records for the pay periods ending February 17 and 24 indicate that at least two other employ-

ees, Tracy Ball and Michael Przepiora, also received wage increases. Respondent did not notify the Union about such wage increases nor did it bargain with the Union.

Respondent was unable to show that it had a previously established wage policy.¹⁵

In the context of union organizing or negotiating for a collective-bargaining agreement, unilateral wage increases granted with the intent or having the effect of undermining a union as the bargaining representative are unlawful. *Mooreville IGA Foodliner*, 284 NLRB 1055 (1987). Where, for the reasons set forth above, I conclude that by such unilateral action, Respondent violated Section 8(a)(5) of the Act.

As set forth above, when Dart spoke to Respondent's employees prior to the November 16 layoff, he told them, among other things, watch the employees and see if anyone was goofing off, and if so report the employee to a supervisor. In view of Respondent's usual pattern of conduct, I find this statement coercive and violative of Section 8(a)(1).

As set forth above, when Dart addressed his employees on December 28 to announce the layoff, he told them that he could pay four employees for 2 weeks what it cost to answer an unfair labor practice charge. I conclude such statement, given the overall pattern of Respondent's unlawful conduct, to be coercive and violative of Section 8(a)(1). *Harrison Steel Castings Co.*, 293 NLRB 1158 (1989).

Mulholland and Zachary, like other production employees of Respondent, are required to keep records known as job cards. On January 21, both employees made book entry errors. On the morning of January 22, the same day that employees were laid off, both Mulholland and Zachary were told to report to Moorhead's office. Moorhead asked them to shut the door, and then she threw the two employees' job cards of the previous day on the desk and began screaming about these errors in particular and other things in general. At one point, Moorhead stated, "If you guys don't like working here, why don't you just get out?" Again, given Respondent's unlawful pattern of behavior, I find such statement violative of Section 8(a)(1). *Hoytuck Corp.*, 285 NLRB 904 (1987); *NLRB v. Nueva Engineering*, 761 F.2d 961 (4th Cir. 1985).

Objections and Challenges

As set forth above, an election was conducted by the Board on June 1, 1990. (G.C. Exh. 1(i).) The tally of ballots indicates that of approximately 35 eligible voters, 16 voted for the Union and 14 voted against the Union.

(a) Thomas Griswold—challenged by NLRB agent as name was not on the voter eligibility list.

(b) Edward Krause—challenged by the Union on grounds that he was not a unit employee as of the voter eligibility date.

(c) Earl Freeman—challenged by the Union as close relative to an officer of Respondent.

On June 8, 1990, subsequent to the election, the Employer filed seven objections to the conduct of the election. These objections alleged that:

¹⁵ Moorhead gave conflicting testimony as to Respondent's alleged wage policy, each version inconsistent with the wage increase received by Kneer.

1. The Steelworkers threatened and coerced employees during the election campaign.

2. The NLRB agent ignored Respondent's attempt to challenge a ballot marked with an asterisk instead of an "x" or check mark.

3. The NLRB agent permitted the union observer at the election to wear a union insignia.

4. Employees "acting on behalf" of the Union defaced the Employer's property.

5. In the 24-hour period prior to the election, the Union intentionally misrepresented Respondent's financial condition.

6. The Union misled employees by claiming that employee Thomas Griswold was improperly discharged.

7. The Union waived their initiation fee to induce employees to sign authorization cards.

Challenged Ballots

Three ballots were challenged in the election; two by the Union and one by the NLRB agent conducting the election. The Union challenged the ballots of Earl Freeman and Ed Drause. The NLRB agent conducting the election challenged the ballot of Tom Griswold because his name did not appear on the voter eligibility list.

The Union contends that the challenges of Freeman and Krause should be sustained, but that the ballot of Griswold should be counted. The three challenges will be dealt with individually.

The Union challenged the ballot of Earl Freeman on the grounds that (1) Freeman was not employed as of the voter eligibility date,¹⁶ and (2) Freeman was closely related to an officer of Respondent.

It is undisputed that Freeman is the father of Bonnie Moorehead, the vice president of the Respondent. Moorehead testified that in the Employer's structure she is on an equal footing with Robert Dart, its president. She further testified that while she was not a stockholder, she has a loan with Respondent. During employee meetings conducted by the Employer at the time of the election campaign, Dart advised employees that both he and Moorehead had put their own money into Respondent. During the election campaign, Respondent issued a series of letters to the employees critical of the Union and requesting that employees vote against the Union. Moorehead signed each of those letters.

Freeman began working for Respondent sometime in April 1990 at a store outlet opened by Respondent some 36 miles from the plant. Don Beck, an employee, testified that he worked at the store when it first opened on April 20, 1990. Beck first learned that Freeman had been hired and would be working in the store during the week after its opening on April 20. The first check to Freeman is dated April 27, 1990. The timecard for this paycheck is handwritten and is not punched on a timeclock. The timecard does not indicate when the 2 hours were worked.

The National Labor Relations Act specifically provides that the term "employee" does not include "any individual employed by his parent or spouse." 29 U.S.C. Sec. 152(3). In *Foam Rubber City #2 of Florida*, 167 NLRB 623 (1967), the Board held that it would exclude from the bargaining unit

¹⁶The Stipulated Election Agreement provided that the payroll period for eligibility was the period ending "Friday, April 20, 1990."

children of principals of a closely held corporation. In *NLRB v. Action Automotive*, 469 U.S. 490 (1985), the Supreme Court was confronted with a Board ruling that the mother of principals of a closely held corporation as ineligible to vote even though there was no showing that she enjoyed any special benefits as an employee because of that relationship.

In *Action Automobile*, 469 U.S. at 496, the Supreme Court noted that:

The very presence at union meetings of close relatives of management could tend to inhibit free expression of views and threaten the confidentiality of union attitudes and voting.

In the instant case Moorehead is the vice president of Respondent, on equal footing with its president. She has loaned money to the Employer and advised employees that she has staked her daughter's college money into the venture. She was outspoken both in letters to the employees and at employee meetings against the Steelworkers. As stated in *Action Automotive*, 469 U.S. at 495:

The greater the family involvement in the ownership and management of the company, the more likely the employee relative will be viewed as aligned with management and hence excluded.

Given Moorehead's involvement in managing the Respondent, her financial stake in the Employer because of her loans, as well as her campaign against the Union, it is only reasonable to assume that Freeman shares his community of interest with his daughter and not with fellow employees.

Moreover, Beck testified that he was assigned the responsibility for the Harborcreek store's grand opening on April 20, 1990. Prior to that opening, he worked at the store on several days getting it ready for the opening. He worked the entire day of the opening (April 20) and the entire following day. It was not until the following week that Respondent informed Beck that it was hiring Freeman to work evenings and Saturdays at the store. Certainly any employment by Freeman on or before April 20 can only be characterized as casual rather than regular, part time. Dart testified that "she's [Moorehead] getting a lot of work out of the guy [Freeman] and hasn't paid him yet." While Respondent's witnesses testified that Freeman was working before April 20, the only record of any such work is the handwritten timecard showing 2 hours of work in the payroll week ending April 20. Under Board precedent, an employee is a regular, part-time employee if he averages 4 hours per week in the calendar quarter preceding the eligibility date. *Tri State Transportation*, 289 NLRB 356 (1988). Freeman clearly did not meet this standard and, at most, could only be characterized as a casual employee as of the voter eligibility date.

Accordingly, I conclude the challenge to Freeman's ballot should be sustained.

Edward Krause was employed by the Employer as a maintenance man in approximately 1988. In December 1989, he was laid off with about 25 other employees. After the layoff, Krause was notified that he may not be recalled and should look for work elsewhere. Respondent contends that Krause was recalled in late March or early April. There was no timecard for Krause for the week ending April 13, 1990. For the payroll period ending April 20, there was a timecard

filled in with Dart's handwriting. Dart is Respondent's president. The handwriting indicated 2 hours. The timecard of another maintenance man, Hollis Anderson, was punched on a timeclock which is used by Respondent's production and maintenance employees. Moorehead testified that there was another person, Arnie Hallim, who did "some" maintenance work for Respondent who did not punch on the timeclock. Hallim's name did not appear on the voter eligibility list.

Two bargaining unit employees, Thomas Zachary and Tim Mulholland, testified that they did not see Krause working at the Employer after his layoff in December 1989 until after the election. At that time Krause was using the timeclock, as all production and maintenance employees are required to do. Between Krause's layoff in December 1989 and the election on June 1, 1990, Zachary saw Krause at Respondent several times walking through to work on his airplane which was hangered at an adjacent airfield owned by Dart. On one occasion during this period Krause told Zachary that he was installing a heater at Respondent's in exchange for some airplane parts.³

Mulholland was the Union's observer during the election. He testified that he reviewed the voter eligibility list prior to the election itself. Employees who had been laid off in December 1989 but recalled appeared on the eligibility list. However, those who had not been recalled by the election date did not appear on the list. Mulholland testified that he did not see Krause working at Respondent's until the Monday following the election.

Dart contends that Krause worked from January to April 1990 in exchange for airplane hangar rent and airplane parts. Dart claims that Krause was recalled in April 1990 but worked "off a toolbox." Dart also testified that after the December 1989 layoff the Employer sent Krause a letter stating:

We do not know if or when you'll be called back and what I'm telling you is that you should be looking for something else. And we understand.

While Krause was "working" for hangar rent, airplane parts, or the toolbox, there were no employee or Employer taxes paid. Dart testified that Krause was his "special project" who he worked until he felt he had earned his hangar rent.

It is clear from all the evidence that at the time of the election Krause had no expectation of recall and had been advised by Respondent that he should look for other employment. It is also clear that he was not regularly reemployed as an employee until after the election. Krause's status from his layoff in December 1989 through the election can hardly be characterized as that of an employee. While Respondent claims that he was working, there is no record of hours worked for the period January through April 1990. For the period April through June 1, the date of the election, the only record is handwritten timecards. This is clearly contrary to other production and maintenance employees who punched in on a timeclock. In addition, for almost the entire period January through June 1990 Krause did not receive any wages. He allegedly was working under a barter system of work in exchange for hangar rent, airplane parts, or a toolbox. Certainly a person working under that type of arrangement does not share a community of interest with employees

³Dart independently owned a small airport close to Respondent's facility.

regularly scheduled who punch a timeclock and receive an hourly wage rate. Furthermore, Moorehead testified that there was another employee, Hallim, who worked like Krause who was not set forth on the voter eligibility list.

Krause had other regular full-time employment. His work for Respondent during the period January through June 1990 appears to be on a casual and sporadic basis. In the instant case the bargaining unit is defined as "all full-time and regular part-time production and maintenance employees." In *NLRB v. Embro Mfg.*, 768 F.2d 151 (7th Cir. 1985), enfg. 272 NLRB NLRB 282 (1984), the court upheld a Board determination excluding an employee who took a job elsewhere but continued to work for the employer on an "on call" or as-needed basis. That employment was sporadic and intermittent as was Krause's. Finally, Krause, apparently working under an agreed-on barter system where no employment taxes or benefits are paid or withheld, hardly shares a community of interest with bargaining unit employees who are paid an hourly wage, punch a timeclock, have regular hours, and enjoy some medical benefits. See *Jakel Motors*, 288 NLRB 730 (1988).

Accordingly, I conclude the challenge to the ballot of Krause should be sustained.

In view of my conclusion that the union challenges be sustained it would not appear necessary to consider the challenged ballot of Griswold. However, in view of my finding that Griswold was discriminatorily discharged. I would conclude that he is an eligible voter and that if necessary his ballot could be opened and counted.

II. RESPONDENT'S OBJECTIONS TO THE CONDUCT OF THE ELECTION

Respondent filed seven objections to the conduct of the election alleging that the Union coerced employees, misrepresented Respondent's financial condition as well as the status of the unfair labor practice charge involving Griswold, and waived its initiation fee to induce employees to sign authorization cards or vote for it. Respondent also alleges that employees acting on behalf of the Union "permanently defaced" Respondent's property with prounion and anti-Respondent slogans. Finally, Respondent alleges inappropriate NLRB conduct by allowing the union observer to wear union buttons or insignia and by refusing to void a ballot marked with an asterisk in the "yes" box.

Objection 1—Threats and Coercion

In support of Objection 1, Respondent introduced a letter from Tom Griswold to fellow employees. That letter was composed by Griswold and sent to his fellow employees prior to the election. In that letter Griswold refers to several instances where employees who were hurt on the job or laid off and were not called back to work. That letter can be characterized as one worker's view of job security—an issue obviously of importance to all employees. It can hardly be characterized as a threat or coercion.

In addition, Respondent apparently contends that Griswold allegedly threatened or coerced employee Diana Ferguson, on the day before and day of the election. The alleged threat consisted of an appeal by Griswold on each day to Ferguson to vote for the Union. Ferguson testified that Griswold said:

I hope you're not going to send me to my execution by voting no.

No other evidence, other than Griswold's letter and Ferguson's testimony were submitted by Respondent in support of this objection.

The Board has set aside elections where the campaign was marked by threats to kill or beat up nonunion adherents. *Electra Food Machinery*, 279 NLRB 279 (1986); threats by prounion adherents to blow up the employer's mine, *Lovila Coal*, 275 NLRB 1358 (1985); or actual physical attacks, *Teamsters Local 703 (Kennicott Bros.)*, 284 NLRB 1125 (1987). Threatening employees with loss of their jobs if they do not support the union may be a basis for setting aside the election. *Lyon's Restaurants*, 234 NLRB 178 (1978).

The conduct alleged in this case is hardly conduct that "created a general atmosphere of fear and reprisal rendering free choice impossible." *Bauer Welding & Metal Fabricators v. NLRB*, 758 F.2d 308 (8th Cir. 1985), enf. 268 NLRB 1416 (1984).

Griswold's letter to fellow employees, which was mailed to those employees by the Union, merely sets forth Griswold's view that the Employer has treated employees unfairly in the past. It contains no threats or coercive or intimidating statements. Likewise, his isolated statements to a fellow employee regarding the importance of the election contain no threats of violence or coercive statements. Griswold, who was the alleged discriminatee in a pending unfair labor practice case, was merely campaigning for the Steelworkers. I conclude there is no evidence to support Objection 1, and recommend it be dismissed.

Objection 2—Improperly Marked Ballot

One of the ballots in the election contained an asterisk in the "yes" box rather than an "x" or checkmark.

Respondent objected to that ballot during the tally procedure on the grounds that the use of the asterisk made the identity of the voter known to the parties.¹⁸

It is undisputed that the NLRB agent counted the asterisk ballot as a "yes" vote. There is a serious question as to whether Respondent raised any objection to the counting of the ballot during the tally procedure. William Pienta, a union representative who was present during the count, testified that no objection was raised with respect to that ballot. In fact, although she claims to have objected to the ballot, Moorehead signed the tally of ballots on behalf of Respondent.

Under Board precedent a ballot should be counted if (1) the ballot evidences the intent of the voter, and (2) it is not marked so as to identify the voter. In the instant case the questionable ballot contained an "x" in the "yes" box with extra lines so that it was configured like an asterisk. In *Kaufman's Bakery*, 264 NLRB 225 (1982), the Board permitted ballots which contained extra markings in the "yes" box. In *George K. Garrett*, 120 NLRB 484 (1958), and *Northwest Packing*, 65 NLRB 890 (1946), the Board invali-

¹⁸ Respondent claimed that employee Danette Gilbert frequently used an asterisk. Danette Gilbert testified that she placed an "x" on her ballot. Another employee, Amy Utegg, testified that she would occasionally use an asterisk on Employer documents known as job tag loads.

dated ballots which contained the voter's signature because they inherently revealed the identity of the voter. In *Standard-Coosa-Thatcher*, 115 NLRB 170 (1956), the Board refused to invalidate a ballot containing a mark resembling the letter "C" in the "No" box since that mark did not inherently reveal the identity of the voter. However, the Board did invalidate the ballot containing the number "417" since that number coincided with the clock number of an employee.

The marking on the questioned ballot does not inherently reveal the identity of the voter. The mark appears similar to an asterisk, a fairly common symbol that is not intrinsic to any particular employee. Such a mark does not inherently reveal the identity of the voter as does a name, clock, number or initials. Since the marking does not inherently reveal the identity of the voter, I conclude that the objection should be dismissed.

Objection 3—Insignia on the Observer

During the election the observer for the Union wore two union insignia and a shirt which had an iron-on Union. During the preelection conference, attended by representatives of the Union and Respondent, Respondent objected to the insignia. The NLRB agent advised Respondent that insignia could be worn. Respondent's observer wore a "Vote No" sticker during the polling.

In *VanLeer Containers v. NLRB*, 841 F.2d 779 (7th Cir. 1988), denying enf. on other grounds 279 NLRB 675 (1986), the court agreed with the Board that:

[T]he mere display of partisan insignia by observers during an election without more, does not warrant setting aside an election. citing *NLRB v. IDAB*, 770 F.2d 991, 999-1000 (11th Cir. 1985); *EDS-IDAS v. NLRB*, 666 F.2d 971, 976 n. 6 (5th Cir. 1982); *NLRB v. Laney Duke Storage Warehouse*, 369 F.2d 859, 864-865 (5th Cir. 1966); *The Nestle Co.*, 248 NLRB 732, 742 (1980), enf'd. without opinion 659 F.2d 252 (C.C. Cir. 1981).

Accordingly, I conclude this objection should be dismissed.

Objection 4—Defacing Employer Property

Respondent contends that employees acting on behalf of the Union permanently defaced Respondent's property. Presumably, although never articulated, the Respondent contends that the defacement destroyed the laboratory conditions.

The alleged defacing was graffiti on a men's restroom wall at the plant. The graffiti was two phrases, "Aero Sucks" and "Union Yes." Respondent does not know who did either piece of graffiti. In addition, some "Vote No" signs were changed to "Vote Yes" signs.

I conclude that the graffiti cannot be attributed to the Union or their adherents. Even if it could, it hardly is conduct that destroys the laboratory conditions or would coerce or intimidate employees. Accordingly, I conclude the objection should be dismissed.

Objection 5—Misrepresentation

Respondent contends that in the 24 hours preceding the election the Union intentionally misrepresented the Respondent's financial condition. On the day prior to the election, from approximately 3 to 5 p.m., union representatives and

employees distributed a letter from the Union Research Department to employees regarding the Respondent's financial condition. One of the Respondent's salesmen was given one of the documents and turned it over to Moorehead almost immediately. Moorehead contends that the statement, "The company advised that sales are now 3.5 million annually," was incorrect and that net worth was overstated by \$31,000. In fact, Respondent acknowledged that the information was taken from a Dun & Bradstreet report on Respondent.

The Board in *Shopping Kart Food Marts*, 228 NLRB 1311 (1971), indicated that it would not set aside an election because of a misrepresentation unless the misrepresentation involved the Board or forged documents were used. For a short period the Board abandoned this view. See *General Knit of California*, 239 NLRB 619 (1978). However, in 1982 in *Midland National Life Insurance*, 263 NLRB 127 (1982), the Board returned to the *Shopping Kart* rule finding that elections will not be set aside solely because of misrepresentations unless that misrepresentation involves the misuse of the Board's election process or a forged document was used.

Arguing, *arguendo*, that the union document which was distributed to employees can be characterized as a misrepresentation, the Board's decision in *Midland Insurance* indicates that it is not a basis for setting aside the election. Although Respondent contends that it had no opportunity to respond, its own characterization of the misrepresentation contained in the document indicates that it could have responded prior to the election through a written rebuttal. Based on *Midland Insurance*, I conclude this objection should be dismissed.

Objection 6—Misrepresentation Regarding Thomas Griswold

Respondent contends that the Union misled employees by implying that Thomas Griswold was improperly discharged. At the trial it became apparent that this objection related to a paragraph in a letter sent by the Union to the employees on May 25, 1990. That paragraph read:

Remember what happened to Tom Griswold, we know that he did not quit. Tom is fortunate because the Union is there to help him obtain his Unemployment Insurance benefits and we are still trying to get him back his job. The charges filed by the Union on behalf of Tom Griswold have been ruled on by the National Labor Relations Board, they have been upheld and a hearing will be scheduled.

A charge related to Griswold's termination of employment was filed in Case 3-CA-15570 on April 10, 1990. The Regional Director reached a determination to issue complaint on that charge and a complaint was issued on May 25, 1990.

Based on these facts, the statements cited above are not a misrepresentation. As of the date of the letter, the charges had been "upheld" and were scheduled for hearing. Even assuming, *arguendo*, that the statement can be characterized as a misrepresentation, it is not objectionable conduct. In *Riveredge Hospital*, 264 NLRB 1094 (1982), supplementing 251 NLRB 196 (1980), *enfd.* as modified 789 F.2d 524 (7th Cir. 1986), the Board found that a misrepresentation of NLRB action was not a basis for setting aside an election so long as a Board document has not been altered to give the

impression that the Board endorses a party to the election. See also *Purolator Products*, 270 NLRB 694 (1984). Accordingly, I conclude this objection should be dismissed.

Objection 7—Union's Initiation Fee

Respondent contends that the Union waived its initiation fee to induce employees to sign authorization cards or vote for the Union. The Union constitution provides that:

The initiation fees shall be Ten Dollars (\$10.00).

The International executive Board may grant dispensations from payment of initiation fees when in its judgment such dispensation will promote the growth or interests of the International Union.

In *NLRB v. Savair Mfg.*, 414 U.S. 270 (1973), the Supreme Court found that a waiver of initiation fees conditioned on signing authorization cards was a basis for setting aside an election. However, in reaching this finding the court specifically found lawful a waiver of such fees if the waiver was extended to those who join after the election as well as before. See 414 U.S. at 272 fn. 4.

During the election campaign, the Union distributed several pieces of literature addressing the initiation fee. In a document characterized as "Whoppers" the Union stated:

WHOPPER 3

BOSS:

All the union wants is a big fat initiation fee and your dues money.

TRUTH:

There is no "initiation fee" for currently working members in new local unions. And the Steelworkers dues are small: just 1.3% of gross wages with a \$5 monthly minimum and a maximum of 2-1/2 times your average hourly earnings. And you don't pay a dime worth of dues until you get your first contract.

In a second document distributed to the employees entitled "THE TRUTH ABOUT USWA DUES," the Union stated:

NO CONTRACT, NO DUES

First of all, no one pays one red cent in dues until after a contract has been negotiated with your employer and approved by you, the membership.

What about an initiation fee?

Our very low \$10.00 fee will be waived for all workers who join up before a contract is signed by the company.

During the campaign one of the employees sent a letter to the Union's organizers. In that letter the following was asked:

I would like to know what this union is going to cost me, what kind of money we're talking about each week. I would like to know if there is an initiation fee for those on disability or on compensation.

On May 17, 1990, the Union responded, stating:

On the issue of Union dues, you will pay no initiation fee nor will any of your fellow workers. The Steelworkers do not charge an initiation fee to newly organized units. . . .

Also there is no dues payment until after a contract is reached with Aero and the workers ratify it. We must deliver or no dues are collected.

During the campaign employees were advised that there was no initiation fee for any of the employees at a plant that the Union is organizing. Griswold recalled that the union representatives stated to employees that, "There was no initiation fee for anyone until the contract was signed and then it was \$10 for anyone after the contract was signed." Zachary, another employee active in the organizing campaign, told employees that, "Anybody that is eligible to vote did not have to pay an initiation fee." Diana Ferguson recalled that, "There was no initiation fee for first time union members."

It is clear that the Union communicated to employees, through their literature, representatives, and employee supporters that there was no initiation fee for the employees employed during the entire election process and beyond. The waiver of the fee did not depend on signing an authorization card or even voting. Nothing in the literature or the statements even suggests that the initiation fee was only waived for persons signing authorization cards.

There was no testimony that any employee was told or even thought that they had to sign an authorization card to qualify for the waiver of the \$10 initiation fee. I conclude that the waiving of the initiation fee for all employees in the bargaining unit was permissible under *NLRB v. Savair*, supra, and this objection should be dismissed.

CONCLUSIONS OF LAW

Having sustained the Union's challenges to the ballots of Edward Krause and Earl Freeman and overruled the Board agent's challenged ballot of Thomas Griswold and having concluded that Respondent's objections to the Union's conduct concerning the June 1, 1990 election are without merit, I recommend that the results of the election be certified and conclude that as of June 1, 1990, the Union was the collective-bargaining representative of all Respondent's full and part-time production and maintenance employees including general factory, maintenance, set-up, material movers, and hardware/outlet personnel employed by Respondent at its Mayville, New York and Harbor Creek, Pennsylvania facilities.

1. Respondent is, and has been, at all times material, an employer engaged in commerce within the meaning of the Act.

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

3. By interrogating employees about their union sympathies, Respondent violated Section 8(a)(1).

4. By interrogating employees through its agent in preparation for this hearing, Respondent violated Section 8(a)(1).

5. By engaging in surveillance of its employees' union activity, Respondent violated Section 8(a)(1).

6. By requesting or encouraging employees to take unspecified action against other employees who joined or supported

the Union on or about December, Respondent violated Section 8(a)(1).

7. By threatening employees with loss of employment and/or layoffs because the Union had filed charges under the Act, because employees had given evidence to the Board, and because the General Counsel sought backpay and reinstatement remedies, Respondent violated Section 8(a)(1).

8. By telling employees who supported the Union that they should leave Respondent's employment, Respondent violated Section 8(a)(1).

9. By discharging employee Tom Griswold because of his activities in behalf of the Union, on April 10, 1990, Respondent violated Section 8(a)(1) and (3).

10. By reassigning employees to less desirable work because of their union activities, Respondent violated Section 8(a)(1) and (3).

11. By laying off employees because they joined or supported the Union or to discourage them from doing so, on August 10, November 16, December 28, 1990, and January 22, 1991, Respondent violated Section 8(a)(1), (3), and (4).

12. By refusing to recall certain employees from the August 10 layoff because they joined or supported the Union, because they gave testimony before the Board, because a close relative of one employee gave testimony before the Board, or because that employee attended the Board's proceedings as a spectator, Respondent violated Section 8(a)(1), (3), and (4).

13. By laying off employees on the dates described above without notifying the Union and without bargaining over the layoff or its effects, Respondent violated Section 8(a)(1) and (5).

14. By bypassing the Union and dealing directly with employees with respect to hours of work, Respondent violated Section 8(a)(1) and (5).

15. By suspending its employees' health insurance coverage without notifying the Union of the suspension and without bargaining about the suspension of the health insurance coverage or the effects of the suspension, Respondent violated Section 8(a)(1) and (5).

16. By unilaterally granting wage increases to certain employees, in February 1991, Respondent violated Section 8(a)(1) and (5).

REMEDY

It having been found that the Respondent has engaged in certain unfair labor practices, it is recommended that it cease and desist therefrom and take certain affirmative action necessary to effectuate the policies of the Act. It also having been found that the Respondent unlawfully constructively discharged Thomas Griswold in violation of Section 8(a)(3) and (1) of the Act, it is recommended that the Respondent remedy such unlawful conduct. In accordance with Board policy, it is recommended that the Respondent offer Griswold immediate and full reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, dismissing, if necessary, any employee hired on or since the date of his discharge to fill the position, and make him whole for any loss of earnings he may have suffered by reason of the Respondent's acts here detailed, by payment to him of a sum of money equal to the amount he would have earned from

the dates of his unlawful discharge to the date of a valid offer of reinstatement, less net earnings during such period, to be computed on a quarterly basis in the manner established by the Board in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest to be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

It having been also found that Respondent unlawfully laid off its employees on August 10, November 16, and December 28, 1990, and January 22, 1991, I shall order Respondent to reinstate all the above employees not recalled to their former jobs or, if those jobs no longer exist, to substantially equivalent jobs without prejudice to their seniority or other rights and privileges, and to make all such laid-off employees whole for any loss of earnings they may have suffered as a result of Respondent's discrimination against them until such time as Respondent makes a valid offer of reinstatement to them, backpay to be computed in the manner described above.

It is further recommended that, concerning the Respondent's unlawful unilateral changes in terms and conditions of employment found here, the Respondent reestablish the status

quo ante except concerning those changes which have been beneficial to the employees in the appropriate unit. It is further recommended that a determination of whether the changes have been beneficial to employees, whether employees have lost benefits or money by reason of the changes, and whether there is any money due and owing employees and the amount thereof be referred to the compliance stage of this proceeding. See *Ogle Protection Service*, 183 NLRB 682 (1970).

This is also a case in which the manner of notice posting should be since Respondent's operations have been ceased since August 1991, many of the employees employed by Respondent during the period of time where the unfair labor practices were committed had left, or may have changed their residences. It is therefore recommended that Respondent be ordered to post an appropriate notice at its facility if and when its operations resume, and that Respondent also be ordered to publish the notice immediately in the Jamestown Post-Journal and the Mayville Sentinel, both newspapers of general circulation. *Workrooms for Designers, Inc.*, 274 NLRB 840 (1985).

[Recommended Order omitted from publication.]