Aero Detroit, Inc. *and* International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL–CIO. Cases 7–CA–35824, 7–CA–35513, and 7–RC–20200

August 27, 1996

DECISION, ORDER, AND DIRECTION

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND COHEN

On October 17, 1995, Administrative Law Judge Arline Pacht issued the attached decision. The General Counsel and the Respondent filed exceptions and supporting briefs; the General Counsel, the Respondent, and the Charging Party filed answering briefs; and the Respondent filed a reply 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 exceptions and briefs and has decided to affirm the judge's rulings,[1] findings,[2] and conclusions[3] as modified and to adopt the recommended Order as modified and set forth in full below.[4]

1. We affirm the judge's finding in the final paragraph of section III,B of her decision that the 13-member Continuous Improvement Team (CIT) was a labor organization within the meaning of Section 2(5) of the Act. In so finding, and particularly in finding that the CIT was ''dealing with'' the Respondent within the meaning of Section 2(5), the judge relied in part on the fact, as found in sections III, B and C of her decision, that Research and Development Manager Moore, as a cochairman of the CIT, on some occasions effectively exercised veto power over CIT proposals within the CIT by disposing of some CIT proposals simply by failing to act on them. In affirming the judge's finding that the CIT was ''dealing with'' the Respondent, we also rely on the fact, as found in section II,C of the judge's decision, that proposals that were approved by the CIT for consideration by management were then forwarded to a separate management team (which included Moore and CIT Cochairman/Plant Manager Hendrickson), which in turn would make the final decision on what action the Respondent would take in response to the CIT proposals forwarded to it for consideration.[5]

[1] Contrary to the judge, the transcript of the preelection hearing in Case 7–RC–20200 is part of the record in this case. See Secs. 102.69(g)(1)(i) and 102.68 of the Board's Rules and Regulations.

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

[3] Although the judge correctly found in sec. I of her decision that the Respondent has engaged in commerce within the meaning of Sec. 2(2), (6), and (7) of the Act, and that the Union is a labor organization within the meaning of Sec. 2(5) of the Act, she inadvertently stated in her formal Conclusions of Law 1 and 2, respectively, that the Respondent is an employer engaged in commerce within the meaning of, among others, Sec. 2(5) of the Act, and that the Union is a labor organization within the meaning of Sec. 2(3) of the Act.

We do not rely on the judge's characterization of the 8(a)(1) violations found in this case as involving threats of plant closure to ''groups of employees, not only by supervisors but by the highest levels of management.'' While the judge found that supervisors made such threats to groups of employees, only one such threat by a high-level official, Plant Manager Hendrickson, was established, and that threat was made to a single employee.

In concluding that the Respondent violated Sec. 8(a)(1) by Hendrickson's summoning employee Mansfield to his office and asking him, inter alia, why he felt a third party was necessary, the judge erroneously stated that Hendrickson had acknowledged that summoning an employee to his office was a ''singular'' event. In fact, Hendrickson did not testify at the hearing in this case. However, Mansfield testified without contradiction that it was the first time he had ever been summoned to Hendrickson's office. Moreover, the coercive impact of this encounter was heightened by the fact that it took place in the office of Hendrickson, one of the highest ranking plant officials. Accordingly, we find that Hendrickson's question was coercive under all the circumstances.

In adopting the judge's conclusion that the Respondent coercively interrogated employees about their union sympathies and activities, Chairman Gould and Member Browning note that the interrogations were accompanied by threats or promises of benefits. Accordingly, they find it unnecessary to rely on *Rossmore House*, 269 NLRB 1176 (1984), enfd. sub nom. *Hotel & Restaurant Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985), and *Sunnyvale Medical Clinic*, 277 NLRB 1217 (1985). See *Service Employees Local 434-B*, 316 NLRB 1059 fn. 1 (1995).

[4] The General Counsel has excepted to the judge's failure to resolve the outstanding representation issues presented in this consolidated case. We find merit to these exceptions. Thus, the tally of ballots from an election by secret ballot held among certain of the Respondent's employees on January 6, 1994, shows 79 votes for and 75 against the Union, with 14 challenged ballots, a number sufficient to affect the results. The parties subsequently stipulated that the challenges to the ballots cast by Kenneth Biggs, Kurt Horecki, Dawn Zabik, and Scott Williams should be overruled and the ballots opened and counted, and that the challenges to the ballots of Chris Emery, Thomas Wood, and Frederick Coffey should be sustained.

The Respondent and the Union also stipulated that, in light of timely objections to the conduct of the election filed by the Union, the election should be set aside in the event that it does not result in a certification of representative.

Remaining for disposition are the challenges to the ballots cast by alleged discriminatee Gary Huddleston and by six employees who were laid off on December 17, 1993, also alleged to be discriminatees.

In light of the stipulations and our resolution below of the unfair labor practice allegations concerning the alleged discriminatees, we shall sever and remand the representation case to the Regional Director for further proceedings consistent with this Decision and Order.

[5] *E.I. du Pont & Co.*, 311 NLRB 893, 894–895 (1993) (there is ''dealing'' between a committee and an employer if, inter alia, management members of the committee have the power to reject a committee proposal, regardless of whether the management members of the committee exercise that power inside or outside of the committee structure).

Also in affirming the judge's finding in section III,B of her decision that the CIT was a labor organization within the meaning of Section 2(5) of the Act, we agree with her finding that the CIT performed a representational function. Accordingly, it is unnecessary to the disposition of this case to determine whether an employee group could be found to constitute a labor organization even absent a finding that it acted as a representative of other employees.[6]

2. The judge found that the Respondent violated Section 8(a)(3) and (1) by terminating employee Huddleston on November 17, 1993. We adopt the judge's finding for the following reasons only.

Huddleston was hired by the Respondent in December 1992. As more fully set forth in the judge's decision, at the time of his hire and repeatedly thereafter Huddleston stated to his supervisors that he wanted to take time off in November 1993 to participate in an annual family reunion and deer hunting trip. On each of these occasions, he was assured that there was no problem with his request. Huddleston also was an open supporter of the Union and was the target of three separate threats of plant closure and job loss in October and November 1993.[7] In the last of these incidents, which took place on November 1, Huddleston asked Davitt, a former unit employee and union supporter who had just been promoted to supervisor, why Davitt no longer wore a UAW shirt and hat. Davitt replied that he no longer believed that union organizing was a good idea as it would result in the Respondent's closing the plant.

On or about November 1, Huddleston told his then-supervisor, Davitt, that he would be taking time off later that month. Davitt responded that there would be no problem but directed Huddleston to fill out a written request for leave. Huddleston complied and submitted a formal request on the Respondent's official form later on November 1, requesting time off for Saturday, November 13, Monday, November 15, and Tuesday, November 16.[8]

It is undisputed that the Respondent did not notify Huddleston of the disposition of his leave request until Thursday, November 11, when Davitt advised Huddleston that his request had been denied. Huddleston told Davitt that he intended to take the time off anyway, and Davitt warned him that if he did so, he would be treated as a voluntary quit. Huddleston worked his normal schedule on November 12, and told his coworkers he would be back on the following Wednesday. When he returned to work on November 17, however, Davitt told him that he had been terminated pursuant to the Respondent's policy treating employees as having voluntarily quit if they are absent for 3 days without notice to the Respondent.

We agree with the judge that the General Counsel has established a prima facie case that Huddleston's union activities were a motivating factor in his discharge, based on the abundant evidence of antiunion animus on the part of the Respondent, Huddleston's open support of the Union and the Respondent's knowledge thereof,[9] the unlawful threats of plant closure directed at Huddleston by Davitt, and the timing of the discharge and denial of leave relative, in particular, to Huddleston's November 1 encounter with Davitt. Accordingly, the burden shifts to the Respondent to establish that it would have terminated Huddleston even in the absence of his union activities. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). For the reasons that follow, we find that the Respondent has not sustained that burden.

The Respondent asserts that Huddleston was terminated pursuant to its rule calling for termination of employees who fail to report for work or call in for 3 consecutive days. Indeed, the Respondent states on brief that ''all he [Huddleston] needed to do to protect his job was to phone the Company'' during his absence and advise the Respondent that he would not be at work during that period. In light of the uncontradicted evidence that Huddleston told the Respondent prior to his departure that he would be away on the dates in question, however, we find unpersuasive the Respondent's claim that his failure to reaffirm his absence on those dates was the basis for his termination.

Thus, there is no evidence that the Respondent had ever previously applied this rule to an employee who, like Huddleston, had announced his intention to be absent in advance. To the contrary, with one exception it appears that all other employees previously terminated under this policy had abandoned their jobs, inas-

[6] See *Webcor Packaging*, 319 NLRB 1203, 1204 fn. 6 (1995); *Electromation, Inc.*, 309 NLRB 990, 994 fn. 20 (1992), enfd. 35 F.3d 1148 (7th Cir. 1994).

Chairman Gould agrees with his colleagues that the CIT was a labor organization dominated by the Respondent in violation of Sec. 8(a)(2) and (1) of the Act. He notes that the control exercised by the Respondent over the CIT is such that the freedom of choice and independence of action open to employees is too strictly confined within the parameters of the Respondent's making for the CIT to be a genuine expression of democracy in the workplace. See *Webcor Packaging*, supra at 1205–1206 fn. 13; *Keeler Brass Co.*, 317 NLRB 1110 (1995) (Chairman Gould's concurrence).

[7] As set forth above, we have adopted the judge's finding that these threats violated Sec. 8(a)(1).

Unless otherwise noted, all dates hereafter are in 1993.

[8] We do not rely on the judge's finding that Supervisor Davitt acknowledged that Huddleston had previously submitted a handwritten note requesting time off, as Davitt testified that he ''did not believe'' that Huddleston had done so.

[9] We do not, however, agree with the judge's finding, in the second paragraph of sec. III,D of her decision, that the Respondent's knowledge of Huddleston's support for the Union is demonstrated in part merely by Huddleston's signing of a union authorization card, without more.

much as they made no subsequent effort to return to work. In the one exception, the employee was reinstated after requesting his job back. The Respondent offers no explanation for its disparate treatment of Huddleston, who also asked to return to work.[10] The Respondent similarly offers no explanation for its failure to respond to Huddleston's November 1 request for leave until November 11, 2 days prior to his planned departure for the family reunion/hunting trip.

Under all the foregoing circumstances, we find that the Respondent's termination of Huddleston violated Section 8(a)(3) and (1).

3. Contrary to the judge, we find that the General Counsel has not established that the Respondent's layoff of 23 employees on December 17, 1993, violated the Act. Our reasons follow.

The credited or undisputed evidence shows that the Respondent commenced operations at its 29333 Stephenson Highway facility in June 1993 with a complement of 116 employees engaged in the fabrication of body panels for the Dodge Viper.[11] The Respondent added employees to its work force throughout the summer and fall with a peak work force of 207 in October. The body panels were produced using a process called resin transfer molding (RTM), which the Respondent had previously used only for production of prototype parts in very limited quantities; RTM was thus untested by the Respondent for manufacturing a production model automobile.

The Respondent's successful bid to Chrysler for the work, prepared and submitted in April 1991, specified a total hourly work force of 71 employees when full production was reached. These employees were expected to produce 15 sets of panels (sufficient for 15 cars) per day at a cost of $1,951.43 per set. However, problems with the RTM process resulted in a high initial scrap rate, which resulted in the Respondent having to rework a large proportion of the parts by hand to bring them up to specifications. As a consequence, the Respondent hired many more employees than its bid had contemplated and its cost per unit mushroomed to $6717.[12] Chrysler demanded that the unit cost of the parts be reduced in line with the original bid and threatened to terminate the contract if this was not accomplished.

In response to this situation, the Respondent developed and implemented a plan to reduce its scrap rate so that the same number of parts could be produced with fewer employees. The plan was presented to Chrysler in the spring of 1993 and was implemented in the months that followed. This plan included, in particular, changes in the production process that were expected to—and did—significantly reduce the initial scrap rate by the fall of 1993.[13]

As set forth more fully in the judge's decision, the union campaign at the Respondent's facility began in earnest in August 1993. An election petition was filed on October 26. At the preelection hearing, the Respondent contended, inter alia, that the election should be postponed because it anticipated significant reductions in its work force in light of the productivity improvements described above.[14] In this regard, Miller testified that because there had been a high level of attrition prior to that time, ''we are confident that there will be few, if any, layoffs associated with this projection'' of a reduced work force based on the high rate of turnover in its work force.[15] Miller also stated that ''we have to stay on that downward trend. Or we're not going to have jobs for any of our people.'' On December 17 the Respondent laid off 23 employees.

The judge found that the layoffs violated Section 8(a)(3) and (1) because they were effected for the purpose of demonstrating to employees that the Respondent controlled their job security, thereby discouraging support for the Union.[16] Although never explicitly finding that a prima facie case had been established

[10] The Respondent contends that Huddleston's' termination was justified by his prior record of absenteeism. We find no merit to this contention. Thus, the Respondent's stated reason for terminating Huddleston was his absence for 3 days without calling in, not for accumulated absences. Indeed, under the Respondent's system of progressive discipline a 3-day layoff was called for as discipline for an absence from November 13–16. The Respondent offers no explanation for its failure to apply its openly stated absenteeism policy in Huddleston's case.

[11] The Respondent began production of Viper body panels in January 1993 at another facility in Madison Heights, Michigan. Its initial complement of employees engaged in this operation was 46.

[12] It is undisputed that the Respondent was losing money on its Viper operations at this price.

[13] The Respondent's president, Ralph Miller, testified that the scrap rate was 34 percent in October and had been reduced to 22 percent by November, with further reductions expected as additional planned production changes were implemented.

[14] The Regional Director denied the request to delay the election because the evidence showed that the existing complement was representative of the complement that the Respondent projected after its reduction in employees.

[15] According to Miller's testimony at the preelection hearing, 20–25 employees had voluntarily quit in October.

[16] There is no allegation that the selection of employees for layoff was discriminatory, and the judge specifically found that the selections were based on objective standards and that union sympathies were not an issue in the selection process. There are no exceptions to these findings.

On the other hand, the judge relied on Miller's preelection speech to employees in January 1994 as evidence of union animus on the Respondent's part. There is no allegation that the speech was unlawful, and the judge found that it did not contain any ''unlawful comments.'' We do not rely on Miller's speech as support for any unfair labor practice alleged or found to have been committed.

Member Browning finds that the judge properly referred to Miller's antiunion speech essentially in rejecting the Respondent's claim that it was demonstrably not biased against the Union because it had initially favored having the work in question performed at another location by a unit of employees already represented by the Charging Party.

under *Wright Line*, the judge found that the Respondent's asserted economic justifications for the layoffs were contradictory and unsupported by objective evidence and that the Respondent had failed to explain the timing of the layoffs in relation to the union campaign and the election.

In support of these findings, the judge noted initially that the Respondent had stated to employees in the summer of 1993 that the ''sky was the limit'' as far as hiring and that the future looked ''bright.'' Similarly, on November 13 the Respondent denied to employees rumors that the plant would close, stating instead that customers were looking favorably at the Respondent's products and that it intended to expand its building. The judge found that the layoffs were inconsistent with these statements, and with Miller's testimony at the representation hearing that reductions in force could be accomplished by attrition.[17] Although Miller testified at the hearing in the consolidated cases that the change in plans was necessitated by an unanticipated reduction in attrition, the judge dismissed this testimony because the 2-week period of time between the hearing and the decision to effect layoffs was too short for the Respondent to have drawn ''hard and fast'' conclusions about rates of attrition.[18] The judge also found that the Respondent's continued need for overtime in December 1993 and January 1994 belied its claim that it no longer needed the 23 employees.

Contrary to the judge, we are persuaded by the Respondent's explanations that it would have laid off the employees in December even in the absence of the employees' union activities. Thus, the Respondent has established that it never intended to have a work force of 207 employees, and that it reached that level solely because of unanticipated problems with its untested production process. The Respondent has also shown that it was under severe pressure from Chrysler, its sole customer, to reduce its unit costs, and that it implemented changes in the production process that reduced its scrap rate—and thus its need for employees to rework the scrap—during the summer and fall of 1993. Miller testified that the layoff was implemented in December, as the benefits of these changes began to take effect, in order to reduce the Respondent's losses and to demonstrate to Chrysler that the Respondent had the ability to solve its production problems. In these circumstances, we find that the Respondent has shown that the layoff was a response to pressures from its customer and for improved productivity of its work force, and not to union activity at the plant. *Brandt-Airflex Corp.*, 316 NLRB 315 (1995) (layoff in response to customer pressure lawful); *Ideal Macaroni Co.*, 301 NLRB 507, 509 (1991) (layoff a response to reduced orders and improved productivity), enf. denied on other grounds 989 F.2d 880 (6th Cir. 1993).[19]

Contrary to the judge, the Respondent did provide evidence concerning its turnover rate prior to November. As noted above, Miller testified at the representation hearing that 20–25 employees had voluntarily quit in October. Consistent with this testimony, Miller subsequently testified at the hearing in this consolidated case that in the summer and fall of 1993 the Respondent's turnover rate was 20–30 percent. These figures support the Respondent's position that, had attrition continued at the historic rate, it could have accomplished the needed reductions without resorting to a layoff.

We disagree with the judge's finding that the Respondent's continuing need for overtime after the layoffs contradicts its claim that it needed fewer employees in December. The weekly overtime figures cited by the judge demonstrate that the Respondent's need for overtime actually declined substantially in late December and early January 1994, after the layoffs had taken place.[20] While overtime returned to the prelayoff level by the end of January, this fact does not undercut the Respondent's explanations for the December layoffs.

[17] The judge stated that the December layoffs were inconsistent with its refusal to grant Huddleston the requested time off in November.

[18] The judge found that the Respondent's failure to establish the rate of attrition prior to November was a serious flaw in its case and allowed an inference that the evidence was not adduced because it did not support the Respondent's case, and that the Respondent's witnesses contradicted each other on the date when attrition ceased and the decision to lay off employees was made. The judge also concluded that Miller's testimony that the Respondent expected attrition to continue in December was suspicious as employees were unlikely to quit prior to the holidays.

[19] For the same reasons, we also find that the Respondent's designation of the layoffs as permanent does not establish that they were unlawful. *Ideal Macaroni*, supra at 509–510 (''permanent'' layoff lawful, even though Board found that employees in fact had expectation of recall). No evidence was presented to indicate that the Respondent designated the layoffs as permanent in order to disenfranchise employees, nor was any evidence presented to indicate that the employees had a reasonable expectation of recall. In determining this latter question, the Board examines several factors, including the employer's past experience and future plans, the circumstances surrounding the layoff and what the employees were told about the likelihood of recall. *Apex Paper Box Co.*, 302 NLRB 67, 68 (1991). Here, the employees were told the layoffs were permanent, and the Respondent had stated (at the preelection hearing) that it planned significant reductions in the work force. Moreover, the layoffs took place against a background of technological improvements and declining scrap rates, which would reasonably have called into question the Respondent's need for its existing employee complement. Under these circumstances, we find that the employees did not have a reasonable expectation of recall. In this regard, the fact that seven of the laid-off employees were recalled in June 1994 does not establish that they or any other employees had a reasonable expectation of recall, ''because the occurrence of subsequent events . . . cannot change the expectation of recall that existed during the critical period.'' Id.

[20] The judge found that the weekly overtime hours were 2155 the week of the layoff, and 1467, 2230, 1237, 1646, 1846, and 2270 for the weeks that followed.

Thus, the return to prelayoff overtime levels at the end of January 1994 coincided with further reductions in the Respondent's work force.[21] In these circumstances, we cannot conclude that the overtime worked at the end of January demonstrates that the laid-off employees were needed to maintain production in December. Further in this regard, any increase in overtime was balanced by a decrease in regular hours worked and, accordingly, does not undercut the Respondent's business justification for the layoff. See *Hoffman Plastic Compounds*, 306 NLRB 100, 106 (1992). Indeed, that the Respondent could maintain its desired level of production with fewer regular hours worked and roughly the same amount of overtime supports, rather than detracts from, its business justification for the layoff.

We further disagree with the judge's finding that the Respondent's justifications for the layoff are undermined by Miller's testimony at the preelection hearing in November that he expected that the anticipated reductions in force would be accomplished by attrition. In this regard, the judge's implicit finding that the Respondent should have anticipated that attrition would cease as the holiday season approached was unduly speculative, especially in light of the uncontradicted evidence that the Respondent had previously experienced high turnover at its facility for many months. Similarly, we think that the judge improperly substituted her business judgment for the Respondent's by faulting its decision to implement the layoff when it did, instead of waiting a few weeks to see if attrition would return to normal. In any event, the Respondent's failure to accurately anticipate its future attrition levels alone is insufficient to overcome the substantial uncontradicted evidence set forth above, supporting the Respondent's business justifications.[22]

AMENDED CONCLUSIONS OF LAW

Substitute the following for Conclusions of Law 1, 2, and 6.

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

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

''6. The Respondent violated Section 8(a)(1) and (3) by discharging employee Gary Huddleston on November 17, 1993, because he engaged in union activities.''

AMENDED REMEDY

We find that a bargaining order remains necessary to remedy the violations established in this case and to effectuate the purposes of the Act. The Supreme Court has held that a bargaining order should issue where ''the possibility of erasing the effects of past [unfair labor] practices and ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order.'' *NLRB v. Gissel Packing Co*., 395 U.S. 575, 613–614 (1969).[23] It is undisputed that the Union had valid authorization cards from a substantial majority of unit employees on October 19. We find that the Respondent's many serious unfair labor practices had, and continue to have, an enduring impact on the unit that is unlikely to be dissipated by application of the Board's traditional remedies.

In this regard, we have adopted the judge's finding that the Respondent violated Section 8(a)(2) by establishing and dominating the Continuous Improvement Team (CIT), an employer-dominated labor organization with which the Respondent dealt concerning conditions of work and other Section 2(2) subjects. The Respondent's unlawful establishment of the CIT, and its use of that entity as a vehicle for unlawfully soliciting grievances and promising benefits to employees, in particular, struck at the very heart of the employees' organizational efforts. The Respondent openly held out the CIT to employees as an alternative to the Union, and trumpeted to employees the benefits which they received through the CIT throughout 1993, including during the preelection period. The impact of these unfair labor practices is particularly severe because the benefits afforded employees endure as a lasting reminder of how the employees' demands were met. *Research Federal Credit Union*, 310 NLRB 56, 65 (1993), remanded 25 F.3d 1115 (D.C. Cir. 1994) (table); see also *Skyline Distributors*, 319 NLRB 270 (1995) (recognizing impact of grant of benefits on em-

[21] The week following the layoff the Respondent had 178 unit employees; by the end of January the work force had been further reduced to 169.

[22] Likewise, we perceive no fatal inconsistency between the Respondent's statements to employees about its business prospects and the layoff in December, as the statements in question were either too vague or too remote in time to create in the minds of employees a reasonable expectation that no layoffs would occur in December.

We also find no significant contradiction between the testimony of Miller and Personnel Manager Gubris concerning the timing of the layoff decision. As the judge noted, Miller testified that attrition abruptly ceased about a week before the layoffs were implemented. While Gubris testified that she was asked to oversee the layoff in mid to late November, she also stated that she was ''guessing'' as to the date. In these circumstances, we decline to find that any remaining disparity in the dates testified to demonstrates that the Respondent's explanations were pretextual.

[23] A bargaining order issued under these circumstances is, accordingly, to be distinguished from a bargaining order based on unfair labor practices which are so pervasive and outrageous that their effects cannot be eliminated by the application of traditional remedies, with the result that a fair and reliable election cannot be held. *NLRB v. Gissel Packing Co*., 395 U.S. at 613–614. Accordingly, a bargaining order remains appropriate notwithstanding our dismissal of the allegation that the mass layoff in December 1993 was unlawful.

ployee sentiments). Further, the Respondent subjected employees to many threats of plant closure during the union organizing campaign. The Board has consistently recognized that these ''hallmark'' violations, which threaten the very livelihood of unit employees, have a lasting impact that is also unlikely to be erased by the passage of time. *BI-LO*, 303 NLRB 749, 771 (1991), enfd. 985 F.2d 123 (4th Cir. 1992).[24] Additionally, the Respondent unlawfully terminated employee Huddleston and coercively interrogated an employee. Under all the circumstances, we find that the coercive atmosphere created by the Respondent's conduct cannot be dissipated by the Board's traditional remedies and that employee sentiment will, on balance, be better reflected by the authorization cards than by a second election.[25]

ORDER[26]

The National Labor Relations Board orders that the Respondent, Aero Detroit, Inc., Madison Heights, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against any employee for supporting International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL–CIO, or any other labor organization.

(b) Coercively interrogating any employee about union activities or sentiments.

(c) Threatening employees with plant closure or loss of jobs because they support the Union or any other labor organization.

(d) Promising to redress employees' grievances in order to chill their interest in or support for the Union or any other labor organization.

(e) Dominating, assisting, or otherwise supporting the Continuous Improvement Team created in September 1993 at its Madison Heights facility.

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

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

(a) On request, bargain with the Union as the exclusive representative of employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All full-time and regular part-time production and maintenance employees employed by the Respondent at its Madison Heights facility, including mold employees, paint employees, tool repair and maintenance employees, wet sand employees, quality control employees and shipping and receiving employees, but excluding office clerical employees, guards and supervisors as defined in the Act.

(b) Within 14 days from the date of this Order, offer Gary Huddleston 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.

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

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

(e) Immediately disestablish and cease giving assistance or any other support to the Continuous Improvement Team.

(f) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(g) Within 14 days after service by the Region, post at its facility in Madison Heights, Michigan, copies of the attached notice marked ''Appendix.''[27] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of

[24] The Respondent's contention that a bargaining order is not appropriate because some of the unfair labor practices were committed prior to the date employees signed authorization cards is without merit, particularly in light of the many unfair labor practices that took place after October 19, including the ongoing activity of the CIT. *Massachusetts Coastal Seafoods*, 293 NLRB 496, 499–500 (1989). Likewise, the Respondent's assertions that a bargaining order is not appropriate due to the passage of time and asserted management turnover are without merit. See, e.g., *Skyline Distributors*, supra at 270.

[25] Although we agree with the judge's conclusion that a bargaining order is warranted, we disavow her gratuitous characterization of the Respondent's December layoff as ''Scrooge-like.''

[26] We shall modify the judge's recommended Order and notice in accordance with our decision in *Indian Hills Care Center*, 321 NLRB 144 (1996), and to more closely reflect the violations found.

[27] 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.''

these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 3, 1994.

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

IT IS FURTHER ORDERED that the challenges to the ballots of the following employees be overruled: Kenneth Biggs, Kurt Horecki, Dawn Zabik, Scott Williams, and Gary Huddleston; and that the challenges to the ballots of Chris Emery, Thomas Wood, Frederick Coffey, Arthur Butts, Shane Woodward, Kurt Vanhala, Librado Hererra, Ralph Ruth, and Steven Thornton are sustained.

IT IS FURTHER ORDERED that Case 7–RC–20200 is severed from Cases 7–CA–35824 and 7–CA–35513, and that it is remanded to the Regional Director for Region 7 for action consistent with the Direction below.

DIRECTION

IT IS DIRECTED that the Regional Director for Region 7 shall, within 14 days from the date of this decision, open and count the ballots of the employees listed above, and that he prepare and serve on the parties a revised tally.

If the revised tally in this proceeding reveals that the Petitioner has received a majority of the valid ballots cast, the Regional Director shall issue a certification of representative. If, however, the revised tally shows that the Petitioner has not received a majority of the valid ballots cast, the Regional Director shall set aside the election, dismiss the petition, and vacate the proceedings in Case 7–RC–20200.

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 discharge or otherwise discriminate against any of you for supporting International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL–CIO, or any other labor organization.

WE WILL NOT coercively interrogate you about your union activities or sentiments.

WE WILL NOT threaten you with plant closure or loss of your jobs because you support the Union, or any other labor organization.

WE WILL NOT promise to redress grievances in order to chill your interest in or support for the Union, or any other labor organization.

WE WILL NOT dominate, assist, or otherwise support the Continuous Improvement Team created in September 1993 at our Madison Heights facility.

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, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

> All full-time and regular part-time production and maintenance employees employed by us at our Madison Heights facility, including mold employees, paint employees, tool repair and maintenance employees, wet sand employees, quality control employees and shipping and receiving employees, but excluding office clerical employees, guards and supervisors as defined in the Act.

WE WILL within 14 days from the date of the Board's Order, offer Gary Huddleston 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.

WE WILL make Gary Huddleston whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful termination of Gary Huddleston and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that his termination will not be used against him in any way.

WE WILL immediately disestablish and cease giving assistance or any other support to the Continuous Improvement Team.

AERO DETROIT, INC.

Amy Bachelder and *Amy J. Roemer, Esqs.*, for the General Counsel.[1]
Paul H. Townsend Jr., Esq., Steven M. Schwartz, Esq., and *Dykema Gossett*, of Detroit, Michigan, for the Respondent.
Betsey Engel, Esq., of Detroit, Michigan, for the Charging Party.

DECISION

STATEMENT OF THE CASE

ARLINE PACHT, Administrative Law Judge. On charges filed on February 3 and 4, 1994,[2] in Case 7–CA–35513 and on April 14 in Case 7–CA–35824, by International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL–CIO[3] a consolidated complaint issued on June 2, alleging that the Respondent, Aero Detroit, Inc.,[4] violated Section 8(a)(1), (2), and (3) of the National Labor Relations Act (the Act). On the same date, the Regional Director for Region 7 issued an order consolidating unfair labor practice cases and representation case for hearing (Case 7–RC–20200) to resolve the Charging Party's objections to an election held on January 6, 1994.[5]

Specifically, the consolidated complaint alleges that the Respondent violated (1) Section 8(a)(1) by unlawfully interrogating employees prior to the election about their union sympathies; threatening them with plant closure if the UAW won the election, and soliciting grievances through an employer-sponsored committee (the Continuous Improvement Team or C.I.T.); (2) Section 8(a)(1) and (2) by dominating, interfering with, and lending unlawful assistance to the C.I.T.; and (3) Section 8(a)(1) and (3) by suspending and then terminating employee Gary Huddleston and permanently laying off 23 employees because of their support for the Union. The Respondent filed a timely answer denying all of the substantive allegations.

This case came to trial before me in Detroit, Michigan, on September 19–21, at which time parties examined and cross-examined witnesses, introduced documentary proof, and argued orally.[6] On careful review of the entire record,[7] my observation of the witnesses' demeanor, consideration of the parties' posttrial briefs, and under Section 10(c) of the Act, I make the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a corporation with an office and place of business at 29333 Stephenson Highway, Madison Heights, Michigan (the Madison Heights facility), has engaged in the manufacture of automotive body panels and related parts. During the year ending December 31, 1993, a representative period, the Respondent, in conducting its business described above, received goods valued in excess of $50,000 at its Madison Heights facility from points outside Michigan. The complaint alleges, the Respondent admits, and I find that Aero Detroit has engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.[8]

At all material times, the UAW has been a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *Introduction*

Aero Detroit designs and engineers prototype automobiles. Prior to 1991, the Respondent created a prototype for the Chrysler Corporation named the Dodge Viper. Although manufacturing was not within the scope of its principal operations, at Chrysler's request, the Respondent agreed to produce fiberglass body panels for the Viper.

Initially, the Respondent planned to produce the Viper panels at its Lincoln Park plant, and proposed accreting new employees hired for the project to an existing unit there already represented by the UAW.[9] Accordingly, the parties entered into negotiations and reached tentative accord on a revised labor agreement, but the Lincoln Park bargaining unit employees vetoed the contract. The parties then returned to the bargaining table, but the unit members again rejected the revised contract.

As a consequence, the Respondent moved into a new facility in Madison Heights, a Detroit suburb, and began production there in June with 116 employees, an increase of 46 over its January contingent. After the move, Plant Manager Buck Hendrickson touted the plant's growth, indicating that even more space would be needed; that the future looked ''bright''; and that ''the sky's the limit as far as hiring people.'' (Tr. 418–419.) In keeping with Hendrickson's optimistic outlook, the work force continued to expand throughout most of 1993, reaching a peak of 207 in October.[10] As late as mid-November, management was heralding Aero Detroit's bright prospects. Thus, Sarver testified without controversion that on November 13, the employees in his department were summoned to a meeting at which Production Manager Jim Wagner discounted rumors that the plant would be shutting

[1] Hereinafter referred to as the General Counsel.
[2] All events occurred in 1993 unless otherwise noted.
[3] Hereinafter referred to as the Union or the UAW.
[4] Hereinafter referred to as the Respondent or the Employer.
[5] During the instant hearing, the parties resolved the objections to the election by stipulation and agreed that the election must be set aside.
[6] At the hearing, over the Respondent's objection, I granted the General Counsel's motion to amend the complaint to add two allegations of 8(a)(1) violations. The Respondent denied the new allegations.
[7] Documents offered into evidence by the General Counsel will be cited as G.C. Exh. followed by the relevant exhibit number; while those offered by the Respondent will be designated as R. Exh. References to the transcript will be referred to as Tr., followed by the appropriate page number. In the absence of objections, the General Counsel's motion to correct the record is granted.
[8] Hereinafter abbreviated as Sec., where applicable.
[9] The Respondent has 15 plants, 4 of which have collective-bargaining contracts with unions.
[10] R. Exh. 11 shows that the monthly increments went from 116 in June to 133 in July, 163 in August, 189 in September, 207 in October, and a slight drop to 205 by November 10.

its doors. To the contrary, he assured the assembled workers that different companies were looking favorably at the Respondent, that the plant was running at capacity, that new presses were purchased, and the building would have to be expanded.

B. *The Union Campaign*

In January 1993, a handful of employees, including Tom Mansfield, discussed the utility of forming a union. Although some authorization cards were signed, the organizing effort did not attract sufficient support and by March, lay dormant.

In August, Mansfield, with coworker John Sarver, initiated another union campaign, with aid from UAW International Representative Baxter Marino. Mansfield and Sarver distributed literature widely, discussed the UAW with their fellow employees, encouraged them to attend union meetings, and openly identified themselves as union adherents by wearing buttons sporting the UAW logo and caps embellished with the letters UAW on their brims. These efforts culminated in a drive to obtain signed authorization cards. By October 19, the Union had collected 160 signed cards that were submitted to the National Labor Relations Board (NLRB).

C. *The C.I.T.*

In September, apparently reacting to the union campaign, Hendrickson called Mansfield to his office to talk to him about forming a Continuous Improvement Team (C.I.T.), as a way to address employee concerns and improve conditions in the workplace without the intervention of a ''third party.'' When Hendrickson asked why he supported the Union, Mansfield answered that there was too much favoritism in the plant. Then, Hendrickson asked if he would be interested in joining the C.I.T. Mansfield replied that he was willing to work on anything that promised improved working conditions. Shortly thereafter, Hendrickson appointed him to the committee.

Following this exchange, Hendrickson issued a memorandum dated September 16, introducing the C.I.T. program to the work force and explaining that its purpose was to elicit employees' suggestions to ''find more productive ways to do business.'' (G.C. Exh. 7.) The memo further stated that the Continuous Improvement Team would evaluate employee suggestions to determine which ones were appropriate for adoption. A few days later, Hendrickson and Research and Development Manager John Moore, self-selected as cochairmen of the the Continuous Improvement Program, circulated another memo which announced the names of 11 handpicked committee members and outlined the following priority concerns the C.I.T. would address: workplace safety, product quality, productivity, and production costs. Suggestion forms were distributed to employees which invited proposals addressing improved working conditions, employee-management relations and employee morale would be welcome.

At the C.I.T.'s first meeting on September 27, Hendrickson gave an overview of how the group would operate, explaining that the members would discuss the pros and cons of employee suggestions to determine if they were cost-saving measures. Subsequently, the members received paid time off, but no extra compensation to attend the meetings which were held once a week for approximately an hour in the Company's conference room. A suggestion box was mounted in the facility and forms circulated which indicated that suggestions would be considered which affected productivity, quality, lower costs, safety, training, improving working conditions and morale, and improving employee-management relations. The suggestions were collected and read aloud at each meeting. C.I.T. member Woodward was unaware of any limitations being imposed on the topics which members could consider. After reviewing the suggestions, a vote would be taken, and if approved by a majority of the 13 members, the proposal would be forwarded to a management team which included, among others, Hendrickson and Moore, who would make the final decision. Minutes of the meeting were maintained and circulated to the members prior to the next meeting and a monthly one-page bulletin was distributed to all employees to keep them abreast of the committee's activities.

The minutes of the October 13 meeting set forth the following list of ''qualifying suggestions,'' presumably referring to topics which the committee would consider: ''(a) Maintain/increase productivity and reduce scrap; (b) Quality; (c) Lower cost; (d) Safety; (e) The promotion of a total organizational commitment to quality.'' The record shows that many of the proposals fell within these guidelines in that they concerned ways to perform the production work more effectively and efficiently. Other suggestions dealt with awarding prizes for good attendance records, hiring part-time employees to reduce overtime, improving ventilation and preventing dust contamination in a particular department, purchasing uniforms, employer contributions to 401K plans, the attendance policy, personal time off and sick leave, and installation of lockers and exercise equipment.

A bulletin to the employees dated December 8 lists a number of suggestions that were implemented including relocating telephones to a more quiet location, installation of a clock in the breakroom, dust collection in the prep area, a telephone message system, employee coat racks, price lists in the supply cabinets, and a recycling program. These items did not fall strictly within the December 8 guidelines but were related to other C.I.T. objectives such as ''improv[ing] working conditions and moral as well as . . . employee and management relations.'' (G.C. Exh. 18.) The bulletin also encouraged employees to continue submitting proposals, stating that ''All suggestions are welcome and are looked at by the committee and reviewed every week.'' At the same time, the bulletin also contained the message that ''We are currently directing our efforts in improving quality and productivity in our facility.'' (G.C. Exh. 19.)

Process and Product Development Manager Moore maintained that the focus of C.I.T. was to work toward a more cost-effective production process. He described the committee's procedure as very informal, ''kind of a brainstorming, open up talking, discussion-type atmosphere'' and, contrary to the testimony of three C.I.T. employee-members, was certain that no voting took place. The committee eventually lost momentum and faded out of existence sometime in late February or March due to employee lack of interest.

D. *Alleged Threats and Interrogation*

The record is replete with accounts of allegedly unlawful statements made by the Respondent's supervisors during the preelection period. Among them, as noted above, is Plant

Manager Hendrickson's query to Mansfield as to why he thought a ''third party'' was necessary.

Sarver, another principal in-house union organizer, testified about an incident which he placed in early October when R & D Manager Moore approached him at his workstation and asked what he thought ''the Union could do for us, for the plant.'' (Tr. 156.) Sarver, who was wearing a UAW shirt and button marked ''organizer,'' told Moore he could not speak with him while he was on the clock, but suggested that they talk later at a local fast food shop or after work. When Moore repeated his question, Sarver again declined to answer, pointing out he was on company time, after which Moore walked away. Moore claimed to have no recollection of such a conversation, but admitted that it would not be out of character for him to ask such a question.

Sarver related that some 10 minutes later, Paint Supervisor Dave Doran told him in no uncertain terms, that if he worked in his department, he would ''rip that shirt off your back.'' Sarver protested that Doran could not talk to him in that manner, which prompted the supervisor to ask ''[W]hat did the Union promise you?'' When Sarver again insisted that he could not talk about such matters on company time, Doran countered that he was on his break.

Doran acknowledged that Sarver frequently wore union garb, but he had no recollection of threatening to rip his shirt off. Moreover, Doran asserted that he was Sarver's supervisor at the time and, therefore, would not have suggested that Sarver not in his department. Sarver subsequently refuted Doran's statement, testifying without dispute that his supervisor at that time was Greg Carpenter.

Shane Woodward, another employee who openly declared his union allegiance by wearing a UAW T-shirt and cap, reported that in early or mid-October, while a group of employees was gathered at a table outside the plant during a break period, their supervisor, Mike Defever, warned that ''if the Union came in, they would shut down, we would all lose our jobs, and . . . be standing on the unemployment line.'' (Tr. 240–241.) Woodward bluntly told Defever he was tired of hearing him make such unlawful predictions.

Defever described a similar incident in far more benign terms. He recalled an occasion when some employees, seated in the mezzanine area of the facility, asked him his views about the Union. He testified that he told them about two situations; one involving a plant where the union's advent led to greatly improved conditions; the other, where the plant had closed and become bankrupt close in time to a union election.

Woodward also accused Supervisor Doran of telling employees who had gathered at a bar near the plant in mid-November that the Respondent had not made any money since it opened and that ''the Union would shut the Company down and if we thought things were bad now they were only going to get worse.'' (Tr. 243.) Although conceding that he went to the bar in question on several occasions, Doran said he did not know Woodward and would not have made such a statement because it was untrue.

Employee Gary Huddleston also described a few incidents in which supervisors allegedly made coercive remarks. On one occasion in early October, while cleaning up at the end of the day with other employees, Huddleston said he pointed to the letters, ''UAW'' spray painted on the wall and facetiously asked his supervisor, John Torres, whether he would vote for the Union. According to Huddleston, Torres answered tersely, ''We vote for the Union, we'll all lose our jobs.'' Torres said he did not recall this incident.

Two other allegations involved Michael Davitt, a former rank-and-file employee who had signed a union authorization card prior to his promotion in October to supervisor in the bond department, succeeding Torres. Huddleston testified that on one occasion in late October, employees were gathered in the work area talking about the positive aspects of the Union when Davitt interjected that ''it's not a good thing, the Union coming here. They're going to close the plant down. We'll all lose our jobs.'' (Tr. 299–300.) Huddleston said that he told Davitt he was wrong for he had recently seen a movie popularizing the Dodge Viper. Nevertheless, Davitt repeated that the Respondent would close the plant.

Huddleston described a second encounter on or about November 1 when he asked Davitt why he no longer wore a UAW T-shirt and hat, as he had when he was one of the rank and file. Davitt purportedly answered that he no longer thought that union representation was a good idea in as much as ''They'll shut us down and we'll all be out of work.'' (Tr. 301.) Davitt denied talking about the Union to Huddleston, or anyone else for that matter, after becoming a supervisor.

Former employee, Teresa Kern, testified that just 2 days before the election, she met with Buck Hendrickson to discuss her performance evaluation. Rather tactlessly, Kern told Hendrickson that she was angry it had taken so long to see him, and that although she originally opposed the Union, she now thought it was a good idea. She related that Hendrickson patted her leg and remarked, ''[I]f the union gets in here none of us will have a job.''[11] (Tr. 179–180.)

I am inclined to credit the employees' versions of each of the above incidents for several reasons. First, they provided descriptive details about their encounters which would have been difficult to conjure up. Second, if the employees wanted to fabricate, they easily could have invented many more encounters with supervisors, and attributed far worse behavior to them than they did. Instead, they were quite restrained in relating the various incidents summarized above. Third, in a number of instances, the Respondent's officials either failed to deny or could not recall the accusations attributed to them by the Government's witnesses. Fourth, although the Respondent obtained all affidavits the witnesses provided to the Government, in no case were these statements, recorded when events were far fresher in their minds, used to impeach their accounts about the above-described comments.

E. *The Huddleston Discharge*

Gary Huddleston was hired by the Respondent in December 1992, and was terminated 11 months later on November 17, when he took time off to go deer hunting without the the Respondent's consent, thereby missing 3 days of work. The parties offer widely divergent accounts of the salient facts and the motivation underlying those facts.

Huddleston testified that throughout his employment with the Respondent, he consistently spoke to his supervisors about his desire to take leave in November so that he could participate in an annual family reunion and deer hunting

[11] Kern was fired some months later for making an offensive statement to her supervisor.

party. Thus, he stated he mentioned this matter to an agent of the the Respondent at the time of his employment interview and to his first supervisor, John Moore, both of whom assured him that his absence for this purpose would not pose a problem. Huddleston maintained that he renewed his request for leave in November with his then supervisor, Torres, who also led him to believe it would not be a problem. Huddleston recalled that after submitting a leave request form to Torres, the supervisor asked him to complete another one as he had misplaced the first.

In late October, Huddleston told his new supervisor, Mike Davitt, that he would be taking time off which had been approved by former supervisors.[12] Davitt allegedly indicated there would be no problem, but asked Huddleston to fill out another written request. Huddleston complied, initially submitting a handwritten note. Davitt asked that he complete the Company's leave request form, which he did on November 1. Not until Thursday, November 11, did Davitt advise Huddleston that he would have to work that Saturday, November 13, the first day of his proposed deer hunting excursion. Huddleston indicated that he intended to take leave with or without permission. Davitt testified that he then warned Huddleston that if he did so, he would be treated as a voluntary quit.

Despite Davitt's disapproval, Huddleston absented himself from work on Saturday, Monday, and Tuesday to go deer hunting with family members. When he returned to work on Wednesday, November 17, Davitt told him he had voluntarily quit by failing to show up or telephone in as required by the Respondent's 3-day voluntary quit rule. The rule provides that an ''Absence of 3 working days without notifying management—termination of employment (voluntary quit)'' (R. Exh. 18).

Pleading for his job, Huddleston pointed out that his requests for time off had been approved by previous supervisors. Moreover, he insisted that management knew why he was absent. He also urged the Respondent to consider imposing a less draconian sanction in accordance with its rules, since he had never before been penalized for unexcused absences. Huddleston was referring to the Respondent's employee attendance policy which provided that six unexcused absences in a 12-month period without proper notification would result in ''a 3 day lay-off and a written final warning stating that the next unexcused absence will result in a 5 day lay-off.'' (R. Exh. 18 at p. 4.)

Respondent's witnesses remember these encounters quite differently. Supervisor John Torres recalled that on one occasion in September 1993, Huddleston spoke to him about taking time off in November to go deer hunting. Torres testified that when he told Huddleston he could not authorize any leave at that time, the employee defiantly told him he would take the time off, with or without permission. Torres warned him that taking unauthorized time off would constitute a voluntary quit, but Huddleston indicated he didn't care for he was independently wealthy. Torres could not remember whether Huddleston told him he had requested leave from his former supervisors, nor could he recall if he ever submitted a leave request form. He was certain, however, that four other employees also had requested time off for the same purpose, but he was unable to grant anyone leave at that time because of pressing production needs. Although Huddleston openly sported a UAW cap, Torres maintained that he did not know that he supported the Union.

When Torres was transferred in mid-October, he failed to tell his successor, Davitt, about Huddleston's request for leave. Thus, Davitt testified that Huddleston raised the matter of time off for the first time on or about November 1. Davitt explained that by the time Huddleston submitted a leave request form on November 1, another employee in the same department, Matt Nezich, also had tendered a request form for leave for the same few days. Concerned that the work would not be completed in a timely manner if too many employees took leave during the brief open season on deer, the Respondent decided to grant leave to only one person per department on a first-come, first-served basis. Davitt approved Nezich's request, but waited until November 11 to inform Huddleston that his request was denied and that he would be required to work that Saturday.[13]

Determined to participate in the family hunt, Huddleston did not report to work on November 13, 15, and 16. On leaving work on November 12, he told his fellow workers that he would see them when he returned from his trip. When he reported to work on November 17, Davitt discharged him as a voluntary quit. Huddleston appealed Davitt's decision and, met with Wagner, Hendrickson, and Davitt on November 23. To prepare for that meeting, Wagner reviewed Huddleston's attendance record, noting on the form that he had 6 unexcused absences and 11 instances of tardiness since his date of hire. Unconvinced by Huddleston's explanation of his absence, and unswayed by his entreaty to return to work, Hendrickson testified that he left the final decision regarding Huddleston's employment in Davitt's hands. Davitt upheld the discharge as a voluntary quit.

F. *The Layoffs*

The Union filed a representation petition on October 26, and a representation hearing followed on November 15. At the hearing, the Respondent moved to postpone the election for 3 months, asserting that the size of the work force was temporarily inflated, but would contract by attrition over the next 90 days. The Respondent's president and chief operating officer, Ralph Miller, testified at that hearing that ''we are confident that there will be few, if any, layoffs.'' However, the Regional Director determined that there was no sound legal justification for postponing the election which was scheduled for January 6.

Miller's assertion that there would be few if any layoffs was echoed by other management officials. On November 13, in assuring a group of employees that rumors regarding a plant closure were untrue, Jim Wagner said that ''our future at Aero looks brighter new contracts were on the horizon, that the Respondent had purchased new presses, was operating at capacity and might need to expand.'' In a similar vein, at a meeting for all second-shift employees in late November, Hendrickson announced that the Company was not going to lay off any employees; that other companies were considering giving work to the the Respondent; that the

[12] While a rank-and-file employee prior to his recent promotion, Davitt had signed a union authorization card.

[13] The Respondent admitted that the word ''denied'' which appears on Huddleston's leave request form was written by Hendrickson long after leave was denied orally.

Company was planning to expand the facility, and take on more work so that ''everybody could expect to have their jobs for a long time.'' (Tr. 251.)

Notwithstanding these assurances, and without notice, the Respondent laid off 23 employees on December 17. Woodward testified that shortly after he reported to work on December 17 Hendrickson informed him that the Company was altering the method of building parts and, consequently, was permanently downsizing. Accordingly, he was being terminated and ''could never expect to work for Aero again.'' (Tr. 249.) Hendrickson then admitted to him that he knew it was a bad time of year, after which he was escorted immediately from the building. This was the first time that Woodward had heard anything about the Company's having to downsize.

Miller maintained that the seeds of the layoff were planted almost from the outset. He said that the Company experienced serious technological problems soon after production began, compelling it to expand operations and hire employees beyond the number originally anticipated. Because of these unforeseen costs, the Respondent attempted to raise the price originally quoted to Chrysler from $1951 to $6500 per set of panels. Balking at the increase, Chrysler insisted that the Respondent produce the panels for no more than $3250. To meet Chrysler's demand, Aero contracted with another company, Sora Composites, for help in improving its operations. By the terms of their agreement, Aero assured Sora that the price per car would remain stable at $6500 until May 1, 1994, after which, it would be reduced to $3200.

Miller explained that in order to cut costs, certain efficiencies were introduced which decreased manpower needs. Consequently, in late November, he concluded that the employee complement should be reduced to 180 by mid-December and 150 by mid-March 1994. However, Miller testified that when normal turnover ceased in November, he concluded that layoffs would be necessary. He assigned the Respondent's human resources manager, Carol Gabris, the task of selecting 25 employees for layoff, on the basis of merit rather than seniority.[14]

Plant Manager Wagner admitted that he strongly opposed laying off employees the week before Christmas, and at a time when the Respondent was finally ''getting the process under control.'' However, he said that after being overruled, he worked closely with Gabris to identify the employees who had received the lowest scores on their most recent performance appraisals. As a result of the layoffs, the work force dropped from 208 to 182 by December 19, and the remaining employees were consolidated into a single shift.

Advised that the laid-off employees would not be recalled, Gabris issued layoff notices which read: ''Effective _____, 1993, you are being permanently laid off . . . due to the permanent downsizing of the workforce at that location. At this time, there is no reason to expect that you will be recalled.'' (G.C. Exh. 12.)

Curiously, the loss of employees did not alter the amount of overtime hours worked. During the week of November 14, when the representation hearing took place, employees worked a total of 1717 hours overtime. Compare this with the 2155 hours of overtime accrued during the week of December 19 when the mass layoff took place, or the following week when employees logged 1467 overtime hours, while Chrysler was closed for the Christmas holidays. Although the Respondent claimed that technological improvements led to a declining need for employees, the total amount of overtime accumulated in January—34,801 hours, was greater than the 33,915 overtime hours worked in December when 25 more employees were on the Respondent's roster.

[14] Of the 25 employees 2 left the Respondent's employ for reasons unrelated to the layoff.

G. *The Union Election*

On January 4, Chief Executive Officer (CEO) Miller addressed the production employees, advising them that the Respondent lost $5 million between 1990 and 1993, and that overall, the Company lost $12.3 million in the same timeframe. While noting that Aero Detroit had successful relationships with unions in approximately half of its plants, he stated that in his view, the circumstances then confronting the Company militated against union representation, that a union ''would more likely jeopardize . . . than help your future.''[15] (Tr. 88.)

The election was held 2 days later on January 6. The results were not dispositive for the vote was 79 to 75 in favor of the Union, with 14 challenged ballots.[16] This close return revealed a decline in union support from the initial showing of interest in October when 65 percent of the bargaining unit members signed authorization cards.

III. DISCUSSION AND CONCLUDING FINDINGS

A. *The Respondent's Threats and Interrogation Violate Section 8(a)(1)*

1. The applicable precedents

The complaint alleges that the Respondent's supervisors repeatedly threatened employees with plant closure and loss of employment, interrogated them about their union sympathies and on one occasion, promised a benefit, in order to dissuade them from supporting the Union. Company representatives generally did not recall making such statements. The Respondent argues that even if they occurred, when viewed in context, the comments were isolated, de minimis and noncoercive.

An employer does not automatically violate the Act by asking employees about their union activities. Rather, an employer's statement will be found unlawful where the Government proves that under the totality of the circumstances, and taking into account the realities of the workplace, the statement reasonably tends to restrain, coerce, or interfere with an employee's Section 7 rights. *Sunnyvale Medical Center*, 277 NLRB 1217 (1985); *Rossmore House*, 269 NLRB 1176, 1177–1178 (1984), enfd. sub nom. *Hotel & Restaurant Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). In evaluating whether a particular question is coercive, the Board noted in *Rossmore House*, supra at 1177, 1178 fn. 20, that it is necessary to consider the circumstances of each case in a nonmechanical fashion, including such factors as the background, the identity of the interrogator and the person

[15] The Union did not file objections to any part of Miller's speech.

[16] The parties resolved some of the challenges, leaving at issue ballots cast by alleged discriminatee, Huddleston, and six laid-off employees.

being questioned, the nature of the information sought, the place and method of interrogation, and whether the question was accompanied by a threat or promise of benefit.[17]

2. Unlawful questions, threats, and an implied promise

Respondent's labor relations history does not suggest that its officials were dead set against unions. Respondent had bargaining relationships at a number of its other facilities, and before opening the Madison Heights plant, offered to locate the work at a site where the UAW already represented the employees. For unexplained reasons, and apparently due to no fault of the Respondent, the unit members rejected the offer. Notwithstanding the Respondent's initial efforts to cooperate with the Union, company officials subsequently unlawfully interrogated employees, issued devastating threats of plant closure, and implied that employee grievances would be favorably resolved by a company-sponsored committee.

The allegedly unlawful question cited in paragraph 11(a) of the consolidated complaint refers to Hendrickson's asking Mansfield why he felt a third party (read, Union) was necessary. As the Respondent's vice president, Hendrickson was the highest level official in the plant. Summoning an employee to his office was a singular event, as he, himself, acknowledged. Moreover, his question arose as he was offering Mansfield a seat on the C.I.T., the very organization whose creation was intended to suppress the employees' interest in a collective-bargaining representative.

At the same time, it is necessary to recognize that Mansfield was an overt union advocate who distributed UAW literature broadly and wore UAW caps, T-shirts, and the like, making no secret of his prolabor predilections. Hendrickson posed his question at an early stage of the campaign, yet it did not cause Mansfield to curtail his activities.

Paragraph 11(a)—An employee's willingness to play a prominent role in a union organizing drive is a relevant factor that should not be ignored when assessing the extent to which interrogation serves as a restraint on his or her union activities. However, it will not neutralize an employer's otherwise coercive question. *Sunnyvale*, supra at 1218. In this case, Hendrickson's query, when considered in context, can be seen as part of a transparent effort to lure Mansfield from the UAW's embrace; and thereby interfere with his free choice to engage in union activity. As such it was coercive within the meaning of Section 8(a)(1) of the Act.

Paragraph 11(d)—Sarver, like Mansfield, was a staunch union proponent, but Moore's insistent questions to him came close to badgering. Sarver's refusal to talk with Moore on the clock reveals that this situation had an element of tension in it which surely was exacerbated when not more than 10 minutes later, another supervisor threatened, figuratively speaking, to rip the shift off his back. It appears that these incidents occurred in a belligerent atmosphere which was likely to exercise a restraining effect on the workers' concerted activities.

Paragraphs 11(c), (f), (g), (h), and (i)—A number of the complaint's allegations concern threats of plant closure or job loss. In each such instance, the employee-witness offered certain descriptive details about the circumstances in which the remark was made which instill confidence that the teller's recollection was clear and the account authentic. For example, Sarver's assertion that Darran threatened to rip the shirt off his back, created a graphic impression that would be difficult to forget.

Asked on direct examination if he ever commented about Sarver's UAW garb, Darran lamely answered, ''[N]o, I don't believe I ever did, not that I can recall.'' (Tr. 611.) When asked specifically if he ever said, ''I'd rip the shirt off your back,'' Darran's answer again was an equivocal, ''I don't recall that.'' This is hardly the emphatic denial the Respondent claims it to be.

Respondent contends that even if company officials made the statements about plant closure and job loss attributed to them, they were de minimis. I do not agree. In light of the massive curtailment of production which has devastated the auto manufacturing industry in what is commonly known as the Rust Belt, threats of plant closure and unemployment in the Respondent's workplace was bound to create grave apprehension. This is especially true here where such statements were conveyed to groups of employees not only by supervisors, but by the highest levels of management. Such dire threats were anything but de minimis. Cf. *Metz Metallurgical Corp.*, 270 NLRB 889 (1984).

In sum, by threatening employees with plant closure and/or job loss should the Union win the election, by interrogating them about their union sympathies and promising to resolve grievances through the vehicle of a company-managed committee, the Respondent violated Section 8(a)(1) of the Act.

B. *The C.I.T. Is a Labor Organization*

Paragraphs 12 and 13 of the complaint allege in substance that the Respondent created, sponsored, dominated, and gave unlawful assistance to the C.I.T. for the purpose of undermining the Charging Union in violation of Section 8(a)(1) and (2) of the Act. The issues subsumed in these allegations are the same issues resolved in *Electromation, Inc.*, 309 NLRB 990 (1992), enfd. 35 F.3d 1148 (7th Cir. 1994); that is, whether the C.I.T. is a labor organization within the meaning of Section 2(5) of the Act, and whether the Respondent's conduct vis-a-vis the C.I.T. constitutes domination or interfering with.

The threshold question to be resolved here is whether the C.I.T. is a labor organization within the meaning of the Act. Turning to the statutory definition, Section 2(5) provides that a labor organization is an entity (1) in which employees participate, (2) the organization exists at least in part to deal with the employer, and (3) these dealings address conditions of work, grievances, labor disputes, wages, rates of pay, or hours of employment.

Hendrickson was somewhat artless in telling Mansfield that the C.I.T. was created to obviate the need for ''third party'' representation. Although the representional status of the employee participants was not expressly stated, it cannot be disputed that they were carefully handpicked from each of the departments comprising the Respondent's operation and were given the title of ''team leader.'' Thus, it is reasonable to infer that, sub silentio, they performed a representational function.

The Respondent gave a mixed message to the work force as to the sort of issues the C.I.T. would entertain. On the one hand, the prepared suggestion forms which the Respondent

[17] *Rossmore House* reaffirmed an earlier ruling in *Blue Flash Express*, 109 NLRB 591 (1954).

made available to the employees indicated that proposals concerning quality of production and efficiency of performance would be accorded paramount attention. Indeed, the committee received, discussed, and approved suggestions to improve operations such as installing dust control and water filtration devices. On the other hand, the Respondent specifically stated that all suggestions were welcome; at no time were the committee members or the rank and file told that certain types of suggestions (apart from those which were obscene or frivolous) would not be entertained. Accordingly, the record establishes that from its auspicious beginning to its lackluster end, the C.I.T. solicited, received, reviewed, approved, and proposed to management for implementation, issues that came within the rubric of terms and conditions of employment.

The more problematic question here is whether the C.I.T. was formed and functioned in whole or in part to ''deal with'' the Respondent. The Supreme Court's decision in *NLRB v. Cabot Carbon Co*., 360 U.S. 203 (1959), goes far to resolve this question. There, the Court held that the phrase ''dealing with'' in Section 2(5) is far broader than the term ''collective bargaining'' and does not necessarily involve the give and take that is generally associated with labor negotiations. Rejecting *Cabot Carbon*'s argument that the committees did not deal with it because they merely forwarded recommendations, and left final decisions to management, the Court observed that the power to accept or reject is inherent in all dealings. In *E. I. Dupont & Co*., 311 NLRB 893, 984 (1993), the Board further explained that

> the term ''bargaining'' connotes a process by which two parties must seek to compromise their differences and arrive at an agreement. By contrast, the concept of ''dealing'' does not require that the two sides seek to compromise their differences. It involves only a bilateral mechanism between two parties. That ''bilateral mechanism'' ordinarily entails a pattern or practice in which a group of employees, over time, makes proposals to management, management responds to these proposals by acceptance or rejection by word or deed, and compromise is not required.

The manner in which the C.I.T. functioned brings it within this expansive definition of ''dealing with.'' The committee did not exist to develop its own proposals or to brainstorm; rather they acted as a filter for the ideas of their fellow workers; sifting through them to determine whether they were useful and practicable. The committee was not the final authority; rather, Moore acted as gatekeeper, forwarding proposals approved by the committee to the proper authority. Although the process which the C.I.T. used to approve or disapprove various ideas submitted to it was not clearly articulated in the record, it appears that they either voted on proposals or in some instances, reached agreement by consensus. On some occasions, Moore exercised veto power, disposing of some proposals simply by failing to act on them. As the Board observed in *E. I. Dupont*, supra at 895, ''As a practical matter, if management representatives can reject employee proposals, it makes no real difference whether they do so from inside or outside the Committee.'' Where, as here, management-members of the C.I.T. consider proposals with employee-members, and have the power to reject any proposal, there is ''dealing'' within the meaning of Section 2(5). Based on all the above, I conclude that the C.I.T. was a labor organization.

C. *The C.I.T. Was Employer-Dominated*

It is equally obvious that the the Respondent dominated the C.I.T. The committee would not have been formed nor would it have met were it not for Hendrickson's desire to create an entity which, within limits, would appear to perform the functions of a labor organization and thereby undermine the employees' need for one which was genuinely independent. The number and identity of the employee representatives on the committee was determined by the Respondent's delegate to the committee, Plant Manager Moore, who was much more than a primus inter pares. He had an absolute veto, both as to the suggestions which would be considered and those which would be implemented.

Further, the Respondent provided the venue for the meetings and continued to pay the employees for the time spent on C.I.T. activity during their regular workday. The Respondent generously agreed to produce the minutes for the team participants and distribute a newsletter to all employees about the committee's accomplishments. Little more needs to be said to demonstrate that the C.I.T. bore all the characteristics of a labor organization which Respondent controlled lock, stock, and barrel. The C.I.T. was a paradigm of an 8(a)(2) organization.

D. *Huddleston Was Discriminatorily Discharged*

In order to satisfy its burden of proof in cases alleging a discriminatory discharge, the Government must establish that the alleged discriminatee was engaged in protected concerted activity, that the employer knew of that activity, and was driven by antiunion animus to terminate him. The General Counsel has met this threshold burden.

First, the record unquestionably shows that Huddleston identified himself as a union adherent by wearing a UAW T-shirt at work, signing an authorization card, and attending at least one union meeting at which Davitt also was present prior to his promotion to a supervisory position. Further, by establishing a committee which competed with the Union for the employees' favor, the Respondent displayed its animus toward the UAW. In addition, Huddleston was involved in incidents in which two of his supervisors made unlawful threats of plant closure. Davitt, Huddleston's immediate supervisor who initiated and confirmed his termination, was one of the two. These elements, taken together with the Respondent's invoking an inappropriate excuse, Huddleston's absence to take part in a family deer hunting—to discharge him meets each of the elements necessary to establish a prima facie case.

Where, as here, the General Counsel has met its initial burden, it is incumbent on the the Respondent to prove that it would have terminated Huddleston in any event, even in the absence of his union activity. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

The core question is not whether Huddleston absented himself without management approval, but whether the Respondent terminated him for that reason. On reviewing the record in this matter, I am convinced that Huddleston handed

the Respondent a convenient excuse to fire him, which it seized upon to disguise its true motivation—a desire to be rid of an outspoken union proponent.

Huddleston's supervisors were fully advised about his desire to take leave for a few days—a family reunion and hunting party. He made this known from the first day he was on the job and testified without contradiction that he was told it would be no problem. Torres also conceded that Huddleston requested leave as early as September. He did not recall that Huddleston submitted a leave form, but a memory lapse is not the same as a denial that this did not happen. In contrast to Torres' failure of recollection, Huddleston's recall about this matter was detailed and spontaneous. He told of filling out a request form for Torres, and then filling out a second form that Torres supplied after admittedly misplacing the first one. I do not think Huddleston could have invented this scenario which he related in an entirely unrehearsed manner. When Huddleston pleaded for his job, management surely could have verified whether he had requested leave from Torres long in advance of the days off he requested.

Davitt, too, acknowledged that Huddleston spoke to him about his desire for time off on/before November 1 and gave him a handwritten note to that effect. However, Davitt insisted that he had to use a standard form to submit his request. Although Huddleston apparently was the first one in his department to request leave during this period, both orally and in writing, the Respondent relied on the fact that he failed to submit an official form ahead of a coworker. If the Respondent's agents were less intent on ridding themselves of him, Huddleston's request could have been honored pursuant to what purportedly was a first-come, first-served policy. No one claimed that this policy applied solely to written requests, and if it did, the rule is silent about using the Company's leave request form exclusively.

Moreover, the Respondent's claim that it could not afford to grant leave to more than one employee per unit is suspect. Management said that this policy was adopted to prevent a manpower shortage because a great deal of work was on hand. Yet, just a few weeks after Huddleston's dismissal, the Respondent claimed that by virtue of technological advances, 25 employees were no longer needed.

In their ardor to justify Huddleston's dismissal, his last two supervisors, Torres and Davitt, testified that they each warned him in advance that he would be treated as a voluntary quit if he absented himself without the Employer's consent. It is more than curious that both men leaped to the conclusion that Huddleston would be subject to the voluntary quit rule, when they had no reason to know whether that rule would be applicable. It is the failure to give notice for a 3-day absence that brings an employee within the compass of that rule. Yet, neither Torres nor Davitt could have known whether or not Huddleston would give the requisite notice. Nor did they give any thought to the fact that his discussion of the matter with them could serve as notice, in as much as the rule is silent both as to when such notice must be given and the form in which it was to be submitted. Thus, Huddleston's repeated expressions of interest in taking leave, given both orally and by way of an informal note, which he followed with a formal request on November 1, should have been enough to exempt him from the voluntary quit rule if the Respondent was playing by its own rules.[18] The inconsistencies and contradictions in the Respondent's treatment of Huddleston, expose the pretextual nature of its defense.

If the Respondent honestly believed that some discipline was in order, it had other sanctions other than discharge which were better tailored to Huddleston's circumstances. As Wagner admitted, the voluntary quit rule was invoked when an employee simply failed to appear on the job and, without explanation, never bothered to give notice or reappear. The Respondent had discharged others under this rule, all but one of whom had failed to return to work. The one employee who did return, asked for and was granted his job back. The Respondent's agents knew full well that Huddleston was on a hunting trip and had every reason to believe he would return.[19] Thus, the no-show no-call rule was wide of the mark in his case. The more fitting rule was one which imposed a 3-day layoff for six unexcused absences.[20] This is especially true here, where Huddleston had received a number of warnings but never before was suspended. In fact, prior to his discharge, Huddleston's most recent disciplinary experience was a verbal warning on October 23 which Wagner recorded on a form stating that further violations ''will force me to follow the proper steps of discipline, which will be a written warning which could lead to a suspension.'' (R. Exh. 30.) Judging from Huddleston's attendance record and absence of prior suspensions, it is apparent that the Respondent was very lax in enforcing its attendance policies, at least until after he became a union advocate.

The Respondent asserts in its brief that Huddleston's testimony was so lacking in credibility that his testimony about having obtained approval for time off from Moore, Torres, and Davitt should be discredited. It serves no useful purpose here to delve into the instances which the Respondent cites as proof of Huddleston's alleged lack of credibility, for in the final analysis, it would prove very little. Even assuming that he purposely falsified his prior employment record with the Respondent, or did not obtain Moore's assent as he said he did, it would not alter my finding that he spoke to Torres about taking leave and filed two request forms with him, or that he submitted an informal and then a formal note requesting leave from Davitt. The Respondent did not refute Huddleston's testimony in this regard and thus, it is admitted as true. In sum, Huddleston's purported lack of credibility does not alter the conclusion that the Respondent applied its voluntary quit rule to him in an arbitrary and disparate manner.

The Respondent also submits that its approval of leave for a hunting trip for another employee, Nezick, who also attended a union meeting, demonstrates that it was not motivated by antiunion bias. However, the record does not show whether apart from attending one union meeting, Nezick displayed his union sympathies as openly as Huddleston. In this regard, it is worth noting that Huddleston identified himself as a union sympathizer not only by wearing UAW paraphernalia, he also put some challenging questions to Davitt

[18] The Respondent offered no evidence that it had any policy or practice with respect to the form in which leave was to be requested.

[19] In addition to his conversations with Davitt about his impending absence, Huddleston also told his coworkers when he left work on Friday, that he would see them when he returned from his hunting trip.

[20] The Respondent's rules provide that consecutive absences are treated as a single incident.

which revealed that he had adopted management's attitude on attaining supervisory status. Based on the foregoing considerations, I conclude that the Respondent has failed to prove that it would have terminated Huddleston in the absence of his union activity and therefore, violated Section 8(a)(1) and (3) in discharging him.

E. *The Layoffs Were Unlawful*

Under *Wright Line*, supra, a decision as to whether the layoff of 23 employees on December 17 was unlawful turns on the elusive question of the Respondent's real motive for this action. In answering this question an analysis of the Respondent's explanations of its conduct leaves much to be desired.

In a nutshell, the Respondent's defense is that the layoffs were required to reduce production costs of the Viper body panels as demanded by Chrysler. the Respondent assumed that work force reductions would be achieved though attrition. When the anticipated attrition failed to materialize, the Respondent was compelled to accomplish its objective by permanently dismissing employees. Aware that they were in a sensitive preelection period, the employees were selected for layoff wholly on the basis of objective factors which had nothing to do with their union predilections. The following evaluation of the Respondent's rationalizations for the layoffs reveals that they are exercises in sophistry.

I have no doubt that the Personnel Manager Gabris selected the employees to be discharged with great care, scrupulously applying objective standards to determine which employees would be terminated first. The union sympathies of those chosen were not at issue. Rather, the General Counsel's theory is that the Respondent carefully timed the discharges to make the point just before the union election, that power and job security lay in the Employer's hands, thereby reinforcing the employees' apprehensions that they, too, could lose their jobs if they persisted in supporting the Union. See *America's Best Quality Coatings Corp*., 313 NLRB 470, 472 (1993). There is substantial circumstantial evidence to support the Government's theory.

The record shows that the Respondent moved into a new plant in June because more space was needed. Moreover, at the highest levels of management, officials publicly assured employees that the future looked bright, their jobs were secure, and business was expanding. The Respondent did not and could not deny these statements—too many employees heard them.

At the representation case hearing on November 15, Miller requested a 90-day postponement of the election on the grounds that the staff was artificially inflated and would decline in the next 90 days. However, he indicated that the decline would be accomplished by attrition so that few if any layoffs would be required. To explain why 23 employees subsequently were laid off just 4 weeks after claiming that this would not happen, Miller alleged that attrition unexpectedly had ''dried up.'' In making this claim, he had to be referring to the 2-week period from November 15 to 30, since he asserted that the decision to lay off employees was made at the beginning of December. A 6-week period is hardly sufficient time to draw hard and fast conclusions that attrition is at a standstill or that it is more than momentary.

Significantly, the Respondent failed to produce any data to support its claim regarding one of the key elements of its case; that is, attrition rates in the months prior to November when such comparisons would be most apt. The failure to submit real evidence for this time period, when such information was within its possession and control, is a serious flaw in the Respondent's case, and leads to a reasonable inference that such evidence was not adduced because it did not support the Respondent's defense.

Respondent introduced into evidence a ''waterfall'' graph; that is, descending steps which chart a reduction in the cost of the Viper panels by means of efficiency improvements in the production process. The graph shows the costs falling from $6717 in January 1993 to $5200 in October of that year. Standing alone, this exhibit indicates that the Respondent projected a series of improvements in its operations, rather than a decline in the number of employees, to achieve its economic goals. Respondent's Exhibit 2 also shows that the Respondent assumed that increased efficiencies would permit employees to produce a greater number of car panels, beginning with 2 to 3 pairs of panels in January and expanding to 15 pairs by October. To accomplish this, the Respondent needed to enlarge the size of the work force to 207 employees. It is difficult to comprehend how the Respondent could continue to produce panels in increasing quantities and at the same time reduce the work force by 25 employees in a single month.

This is not to say that the Respondent never could legitimately reduce its work force. It is the curious timing and size of the reduction that casts doubt on the legitimacy of its motives. Miller explained that the Company planned to trim the work force to 145 employees, a decrease of 60 unit employees. However, no one explained why 25 of the 60, that is more than 40 percent of the total work force reduction, were discharged all at once just before Christmas, and at a time when the number of panels produced per worker only recently had risen.[21] Respondent's haste in discharging 23 employees in December strikes one as odd given its refusal to grant Huddleston a brief leave of absence the month before due to the press of business. The abrupt termination of 23 employees in 1 month also contrasts with its decision to further reduce the work force by another 35 employees over a 3-month period.

Testimonial evidence as to when management noticed that attrition had halted also was in conflict. Miller, on the one hand, testified that attrition abruptly ceased approximately a week before the employees were dismissed. Gabris, on the other hand, indicated that she was instructed in mid to late November to initiate a layoff procedure because attrition had halted. Gabris also reported that concern about a low attrition rate was longstanding. Given these conflicts, there is no sound basis for believing either one of them.

Miller's contention that management expected December work force reductions to occur by attrition, arouses other suspicions. Why would an experienced executive be surprised that employees chose to remain on the job during a pre-Christmas period? And, since a slowdown in the pace of attrition was virtually inevitable at that time of year, why did Miller not wait a few weeks before ordering the layoffs until

[21] One official was intrepid enough to suggest that the employees who were discharged on December 17 would be better off by having a headstart in finding another job.

a more normal attrition rate could return and the possibility of tainting the election behind him?

Respondent claims that the employees were laid off permanently due to its need to meet Chrysler's cost objectives. Having found that unlawful motives fueled the employees' premature dismissal, it is equally fair to infer that their layoffs were permanent not because of the Respondent's certainty they would never be rehired, but because the Respondent was intent on denying them the right to vote in the January 6 election. This is borne out by the Respondent's recall in early June of seven employees previously discharged in December.

Additional evidence damaging to the Respondent's purported economic motive for the layoffs is found in the Respondent's business records setting forth the overtime hours employees worked before and after the layoff. They show that during the week of the layoff, employees accumulated 2155 overtime hours; 1 week after the layoff, which encompassed Christmas day, overtime totaled 1467 hours. In the first week of January, with 25 fewer employees, overtime climbed to 2230 hours, higher by several hundred than the overtime worked during the week of the layoff. For the balance of the month, the overtime totaled 1237, 1646, 1846, and 2270 hours. These figures flatly contradict Miller's claim that the amount of overtime plunged after the layoffs.

Respondent submits that its initial efforts to produce the Viper at an organized facility provides strong evidence that antiunion bias did not prompt the mid-December layoffs. Whatever the Respondent's early views about union representation were, they evidently changed by the time the UAW began its organizing campaign. While Miller's preelection speech contained no unlawful comments, it clearly indicated that he was opposed to a union electoral victory. The record does not reveal why the Respondent's position toward the Union changed, but there is ample evidence that change it did. Supervisory threats of plant closure and job loss, interrogation, the formation of the C.I.T. to counteract the employees' interest in the UAW, and the Huddleston discharge, all point in one direction: the Respondent concluded that union representation of its employees was not in Aero Detroit's interests and, therefore, engaged in unfair labor practices designed to ensure the Union's defeat at the polls.

F. *A Bargaining Order is Appropriate*

In *NLRB v. Gissel Packing Co*., 395 U.S. 575 (1969), the Supreme Court affirmed the Board's authority to issue bargaining orders not only in exceptional cases marked by outrageous and pervasive unfair labor practices, but also in less extraordinary cases where there are fewer ''pervasive practices which nonetheless still have the tendency to undermine majority strength and impede the election process.'' In determining whether a bargaining order is appropriate in this second category of cases, it is necessary to consider whether the effects of past unfair labor practices can be erased by resort to traditional remedies and whether there is a likelihood they will reoccur. Id. at 614–615. To this end, the Board has identified certain ''hallmark violations''; that is, pervasive misconduct which is likely to have a long-lasting, chilling effect on a substantial portion of the work force, such as discharges of union supporters, or threats of plant closure and job loss. See *Somerset Welding & Steel, Inc*., 304 NLRB 32, 33–34 (1990); *Avecor, Inc*., 296 NLRB 727, 749 (1989).

Applying these principles to the present case, I conclude, in agreement with the General Counsel, that ''employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order.'' Id. at 615.

It is undisputed that the Union attained the support of well over a majority of unit employees between October 12 and 19. Taking an overly simplistic approach to this matter, the Respondent argues that since a number of the alleged unfair labor practices took place prior to these dates, they could not have had a deleterious effect on the employees' desire for union representation. Pursuant to Board precedent, I reject the Respondent's argument.

It is difficult to conceive of threats more calculated to undermine employee support for a union than those of plant closure repeatedly made here. The fact that most of these threats were made before the employees signed UAW authorization cards, does not diminish their unlawful impact, for it fails to take into account the cumulative toll of an employer's ongoing misconduct in wooing employees away from their original prounion stance. *Massachusetts Coastal Seafoods*, 293 NLRB 496, 499–500 (1989).

Employees initially may discount threats of plant closure and job loss as mere bluster. However, when such threats are followed by the mass layoff of 23 employees, and discharge of a prominent union advocate, they take on an ominous reality. Thus, the fact that the Union attained majority support after a number of threats were made does not eradicate their chilling effect where, as here, the employees could observe that the Respondent was willing to convert its threats into action. Moreover, the Board has posited that unfair labor practices committed before a union has attained a majority, will not immunize an employer from the issuance of a bargaining order, since its own actions have made it uncertain whether the employees can freely elect a bargaining representative. *Brookland, Inc*., 221 NLRB 35, 40 (1975).

In any event, the Respondent's officials, including CEO Hendrickson, continued to intermingle comments about the plant's bright future with threats of plant closure even after a majority of the employees had authorized the Union to act as its collective-bargaining representative. The Respondent points out that Hendrickson, who committed a number of the unfair labor practices alleged in the complaint, no longer is employed at the Madison Heights facility. However, other members of management responsible for commiting unfair labor practices, remain in the Respondent's employ. For example, Wagner, Hendrickson's successor, is not blameless, for he was one of the management officials who in mid-November assured employees that the Company would expand. He also was involved in Huddleston's unlawful discharge.

Even without unlawful antecedents, the layoff of a significant segment of the employee population and the unwarranted discharge of a known union proponent are intimidating enough to have a highly coercive effect, not readily erased by the passage of time. *Somerset Welding & Steel Inc*., 304 NLRB 32, 33–34 (1990). The Respondent's heavy-handed conduct in these matters was certain to receive widespread and long-lasting attention by employees whose very livelihood was at stake. Indeed, the Board finds discharges and threats of plant closure like those in the instant case, '''not only are hallmark violations, but are among the most flagrant of unfair labor practices.''' *Somerset Welding & Steel*, supra at 33; *Avecor, Inc*., supra at 749.

The coercive impact of the mid-December layoffs was augmented by their timing, coming just 1 week before Christmas, and only several weeks before the union election. the Respondent may have intended to reduce the size of the work force by attrition over a period of months, a phenomenon that had proved consistently reliable except for a brief period in the latter half of November.[22] Without waiting to determine if normal turnover rates would return with the new year, and without any notice to the affected employees, the Respondent abruptly dismantled a significant segment of its employee population.[23] By its precipitous action, the Company was able to fulfill its contractual obligations to Chrysler only by continuing to assign significant amounts of overtime to employees, indicating that the layoffs were hasty and premature. In fact, the Respondent broadcast that it was willing to go to almost any lengths to defeat the Union.

I find it highly unlikely that a make-whole remedy and order of reinstatement would suffice to erase from the employees' memories, the indelible imprint of Huddleston's unjust discharge, or the unexpected layoff of 23 employees. Reinstatement and backpay, offered months after discriminatory dismissals, cannot eradicate the harm that was done here. Nor is it likely that a cease-and-desist order, posted under Board and perhaps judicial mandate, would heal the coercive effect on employees of the Respondent's threats of plant closure and job loss, particularly since the threats were given substance by Huddleston's discharge and the wholesale layoffs. In light of these considerations, I find that a bargaining order, effective from October 19, the date on which the Union clearly had majority support, is warranted here. *Rodeway Inn of Las Vegas*, 252 NLRB 344 fn. 3 (1980).

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (5), and (6) of the Act.
2. The Union is a labor organization within the meaning of Section 2(3) of the Act.
3. Beginning on October 19, 1993, and continuing thereafter, the Union was designated by a majority of the Respondent's employees in an appropriate unit as their exclusive bargaining representative for the following appropriate unit:

> All full-time and regular part-time production and maintenance employees employed by Respondent at its Madision Heights facility, including mold employees, paint employees, tool repair and maintenance employees, wet sand employees, quality control employees and shipping and receiving employees, but excluding office clerical employees, guards and supervisors as defined in the Act.

4. The Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) by threatening employees with plant closure and job loss, interrogating them about their union sympathies, and promising to resolve their grievances.
5. The Respondent violated Section 8(a)(1) and (2) by establishing and dominating the C.I.T.
6. The Respondent violated Section 8(a)(1) and (3) by discharging employee Gary Huddleston on November 17, 1993, because he engaged in union activities, and by permanently laying off 23 employees in order to chill the unit employees' support of the Union.
7. By violating Section 8(a)(1), (2), and (3) as outlined above, the Respondent prevented a free and fair election. Therefore, to best serve the purposes of the Act, the Respondent is required to recognize and bargain with the Union as of October 19, 1993, the date by which a majority of employees signed authorization cards designating the Union as their exclusive bargaining agent, concerning rates of pay, wages, hours, and working conditions.
8. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondent engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Affirmatively, having discriminatorily discharged Gary Huddleston on November 17, 1993, the Respondent shall be ordered to offer him reinstatement to the job he previously performed or, if such job no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges previously enjoyed. Further, the Respondent shall be ordered to make him whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Further, having permanently laid off 23 employees on December 17, 1993, in order to chill support for the Union among those employees who remained in its employ, the Respondent shall make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to the date that the Respondent demonstrates in a compliance proceeding that they would have been terminated for legitimate business reasons, less any net interim earnings, as prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

In addition, the Respondent shall be required to officially disestablish the C.I.T. I shall also recommend that the election held on January 6, 1994, be set aside, and that, on request, the Respondent shall be required to bargain with the Union, such bargaining to be retroactive to October 19, 1993,

[22] Between January and April, another 35 workers voluntarily left the Respondent's employ and were not replaced. The Respondent may have intended to reduce the size of its work force by attrition at some future point in time. However, apart from certain exhibits which were produced for purposes of litigation, which I found inherently unreliable for that reason, the Respondent failed to present reliable evidence that the 23 employees who were dismissed permanently on December 17, would have been laid off on at that time were it not for the Respondent's intent to demonstrate its power and instill its employees with fear about job security on the eve of the election.

[23] The Respondent's attempt to characterize its Scrooge-like layoff decision as a charitable act which gave the employees a headstart in job-hunting during the Christmas season, borders on the ludicrous.

the date on which the UAW attained majority support among the Respondent's employees in an appropriate unit.

Respondent also shall be ordered to post a notice to employees, as set forth as the appendix to this decision.

[Recommended Order omitted from publication.]