

**Almet, Inc. and United Steelworkers of America,
AFL-CIO-CLC.** Cases 25-CA-19000-1, 25-
CA-19000-2, 25-CA-19104, and 25-RC-8523

November 20, 1991

DECISION, ORDER, AND DIRECTION OF
SECOND ELECTION

BY CHAIRMAN STEPHENS AND MEMBERS OVIATT
AND RAUDABAUGH

On September 21, 1989, Administrative Law Judge William F. Jacobs issued the attached decision. The Respondent and the Charging Party filed exceptions and supporting briefs, and briefs in opposition to the other's exceptions.

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

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

The record shows that the Respondent owns and operates a structural steel fabricating facility in New Haven, Indiana. The Union began organizing the Respondent's production and maintenance employees on November 2, 1987.² On November 10, the Union filed an election petition and, pursuant to a on January 21, 1988.³ The complaint allegations and objections here arise from conduct that occurred during the critical period.

As more fully described in the judge's decision and below, the judge found certain violations, dismissed other allegations, refused to grant a remedial bargaining order, and recommended that the election be set aside and a second election be directed.

We agree with the judge's findings that the Respondent violated Section 8(a)(1) of the Act by soliciting employee Putt to quit his job and threatening him with discharge in order to dissuade him from continuing his prounion campaign, and by threatening employee Sutton with plant closure for the purpose of interfering with his organizational activities.⁴ We also

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

² All dates are 1987 unless indicated otherwise.

³ The tally of ballots reveals that of 50 eligible voters, 18 cast ballots for and 30 cast ballots against the Union. There were three challenged ballots, a number insufficient to affect the results of the election.

⁴ Member Devaney finds it unnecessary to pass on the judge's finding that the Respondent violated Sec. 8(a)(1) by the threat of

agree with his findings that the Respondent violated Section 8(a)(3) and (1) of the Act by suspending employee Sutton, issuing a disciplinary warning to him, and thereafter conditioning his reinstatement on his successful completion of a drug test, because of his union activities.⁵

The judge dismissed a number of other complaint allegations. We find merit in the Charging Party's exceptions to the judge's dismissals discussed below.

1. On November 13, the Respondent's chairman of the board, Richard Greim, allegedly threatened employees with plant closure if the Union persisted in demands opposed by the Respondent. Specifically Greim told the assembled employees:

You all know what kind of man I am and what I stand for. You also know how I feel about the unions. I have never lied to you before, and I'm not going to start now. As I stand here before you I'm here to tell you that I will never agree to any demands that I believe are not in the best interest of this company—and if I have to shut down this plant to maintain those principles—I will shut it down and go out of business.

We analyze these statements under the standard set forth in *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969):

An employer may . . . make a prediction as to the precise effects he believes unionization will have on his company. In such case, however, the prediction must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control.

Applying this standard here, it is plain that Greim made no effort to describe any "objective fact [that conveyed his] belief as to demonstrably probable consequences beyond his control." In stating that he would "shut down this plant" in response to union demands that he believed were "not in the best interest of this company," Greim did not define what he meant by "best interest" or indicate, other than by his subjective belief, how he would determine that the "best

plant closure to employee Sutton inasmuch as such a finding would be cumulative in view of the threat of plant closure by the Respondent's owner Greim to all employees, discussed *infra*.

⁵ In finding company knowledge, the judge relied in part on cases concerning the "small plant" doctrine. Member Raudabaugh does not rely on that doctrine. Chairman Stephens, who notes that the judge did not expressly rely on the small plant doctrine, would not find that the small size of a plant alone would be sufficient to give rise to an inference that an employer knew of any union activities occurring there. He accepts the size of a plant as one factor, among others, that may together give rise to such an inference, as in *Food Cart Market*, 286 NLRB 1016, 1018 (1987), cited by the judge. The judge here clearly identified sufficient credible evidence from which to infer that the Respondent knew the identity of union activists, such as Sutton.

interest” of the Company was at stake. Further, he did not explain why it would be necessary to “shut down” rather than just reject the Union’s demands.⁶ In any event, such bald assertions for closing a business, predicated as they were on undefined beliefs and principles, cannot be evaluated for their legitimacy as “demonstrably probable consequences beyond his control.” In these circumstances, Greim’s “statements crossed the line between informing employees of potential adverse consequences of unionization and threatening that these consequences would occur in retaliation for their having selected the Union to represent them.”⁷ Accordingly, we find that Greim’s statements constituted a threat of closure in violation of Section 8(a)(1) of the Act.

2. On November 17, Robert Winkeljohn, the Respondent’s senior vice president and plant manager, delivered a speech to all the Respondent’s production and maintenance employees. The judge found that he read, *verbatim*, the following written text:

It has come to my attention that certain Almet employees are being bullied and threatened by other employees on company premises. I will not tolerate these activities.

I refuse to stand by while any of my employees are subjected to GOON tactics carried on by gangsters in any attempt to coerce other employees into doing anything they do not wish to do. I have not and will not ever allow this to occur at Almet.

From here on out, if I become aware of any employees using gangster tactics to bully or intimidate other Almet employees for any reason, I will discipline that employee appropriately, up to and including discharge if warranted. This applies to all Almet employees. That means you, you, and you.

Also, if I become aware that any of my employees are bullied or threatened by these GOON tactics and they do not report the occurrences to me, I will discipline those employees for not reporting what happened to them. Believe me, I will

do whatever it takes to eliminate this crap from the Almet shop.

This is not a playground where bullies rule. Each of you has the right to work at Almet, free of this type of abuse and, as long as I am here, this will not change.

The complaint alleges that Winkeljohn’s speech threatened employees with loss of jobs and other unspecified reprisals because they supported the Union. That each time Winkeljohn said the word “you,” he pointed directly at an individual wearing a union button, and then added, “you, you and you are responsible for putting these people’s jobs on the line.” The judge did not otherwise specifically address the legality of the speech. He did, however, find that, although the speech was precipitated by unverified rumors that Winkeljohn claimed he heard concerning employees being threatened to get them to sign cards for the Union, the speech “was not prompted by any legitimate fear of coercive tactics on the part of employee union activists.”

The Charging Party contends, *inter alia*, that by falsely accusing union supporters of misconduct, Winkeljohn threatened them with discharge for their union activities. The Respondent, on the other hand, takes exception to the judge’s failure to find that Winkeljohn’s speech was motivated by a legitimate and substantial reason, *i.e.*, “to get production back on track.” In this regard, the Respondent claims that production levels had declined because of the “back-biting and badgering that had been reported to have been taking place among the shop employees.” For the following reasons, we affirm the judge’s finding that the speech was motivated by mere unsubstantiated rumors of employee pressure on other employees to sign union cards, and we reverse the judge and find that the speech violated Section 8(a)(1) of the Act.

Although there is no reference to the Union or its employee supporters in Winkeljohn’s speech, Winkeljohn admitted that the speech was prompted by rumors of coercive union solicitation engaged in by employees. Even without that testimony, however, we would find that Winkeljohn made the speech in response simply to the union activity of the Respondent’s employees. The speech occurred in the context of the ongoing union campaign and only a few days after the speech in which Greim threatened to close the plant because of employee support for the Union. Further, the speech was directed at purported activity *vis a vis* fellow employees and not a decline in production.

Moreover, we find that the employees understood that Winkeljohn’s remarks were addressed to their engagement in union activities. With the advent of the Union on the scene, the employees were subjected to several speeches by high management officials in

⁶Cf. *Clark Equipment Co.*, 278 NLRB 498, 499 (1986) (employer stated he would not sign a contract which he did not believe was in the plant’s best interest).

⁷299 *Lincoln Street, Inc.*, 292 NLRB 172, 173–174 (1988).

In dismissing the complaint allegation based on Greim’s speech, the judge deemed Greim’s remarks to be protected by Sec. 8(c) of the Act, and cited in support of that finding the Board’s decision in *Oxford Pickles*, 190 NLRB 109 (1971). In *Oxford Pickles*, the employer stated that the plant’s survival chances could be “seriously hurt by a union, and that the employer would have the legal right to move the plant” if it were “put in a position of not being able to compete in the sale of pickles.” *Id.* at 110. The employer did not, however, directly threaten to close the plant if it found any of the union’s demands not in the company’s “best interests” as was the case here.

which the latter made known the Respondent's aversion to its employees' unionization. It would have been reasonable for the employees, therefore, to construe such remarks of Winklejohn as, "Almet employees are being bullied and threatened by other employees," and "GOON tactics carried on by gangsters . . . to coerce other employees into doing anything they do not wish to do," as being directed at employees soliciting for the Union or engaging in related union activity; and consequently, that his instructions to the employees to report on those activities, as being designed to signal out union supporters for retaliation.⁸ Indeed, Winklejohn made it clear that the failure to report such conduct could lead to unspecified disciplinary action for the employees who remained silent, as well as those engaging in the uncountenanced activity.

These conclusions are warranted even if, as the Respondent claims, the speech was prompted by falling production. At no point in his speech did Winklejohn tell the employees that that was the basis for his statements. To the contrary, the only reasons advanced for the statements were the messages contained in those statements. He did not cite a single specific instance of an employee bullying or threatening another employee or of engaging in "GOON tactics." Thus, the employees could reasonably conclude that the Respondent might well equate active union solicitation with bullying and "GOON tactics" and that the Respondent regarded such conduct as grounds for punishment.

The Board has found an unlawful threat of discipline when an employer announces its intention of taking disciplinary "action to stop subjectively offensive activity without regard to whether the reported activity [or that which was expected to be reported]" was protected by the Act.⁹ Such an announcement has the potential dual effect of encouraging employees to identify union supporters based on the employees' subjective view of harassment or intimidation and of discouraging employees from engaging in protected activities.¹⁰

Winklejohn's statements threatening discharge or lesser disciplinary action to stop activity that he never defined had that dual effect. In our view, Winklejohn was alluding to "subjectively offensive conduct," particularly since his remarks were not prompted by any legitimate fear of coercive conduct on the part of em-

ployees who were engaged in union activities. Hence, Winklejohn's remarks were just as likely to elicit the reporting of employee activity protected by the Act as not and thus to discourage such activity in violation of Section 8(a)(1) of the Act. We so find.

3. Finally, the Charging Party has excepted to the judge's failure to find that the Respondent's unfair labor practices make holding a free and fair election unlikely, if not impossible, and urges that the issuance of a bargaining order is required in this case.

It is well settled that the Board will issue a bargaining order when: (1) the union has obtained valid authorization cards from a majority of the employees in the bargaining unit and thus is entitled to represent the employees for collective-bargaining purposes; and (2) the employer's refusal to bargain with the union is motivated not by a good-faith doubt of the union's majority status, but by a desire to gain time to dissipate that status, as evidenced by the commission of substantial unfair labor practices during its antiunion campaign efforts to resist recognition. *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).

The question for the Board is whether the unfair labor practices are sufficient in number and character to warrant issuance of a bargaining order. When an employer's unfair labor practices have the tendency to undermine majority strength and impede the election processes, thereby rendering it unlikely that traditional remedies will erase the effects of the unlawful conduct and ensure the conduct of a fair election, the Board may issue a bargaining order, relying on employee sentiment as expressed through alternative means, such as authorization cards. *Horizon Air Services*, 272 NLRB 243 (1984), quoting *Gissel Packing Co.*, supra at 613, 614-615.

Even assuming that the Union represented a majority of the unit employees based on authorization cards,¹¹ we find no merit in the Charging Party's assertion that a bargaining order is warranted here. While the Respondent engaged in certain conduct that violated Section 8(a)(1), and a single incident that violated Section 8(a)(3), we do not find this conduct sufficiently egregious in all the circumstances here, to find that the Respondent's misconduct has precluded the likelihood of a fair election.¹²

⁸ Although the judge discredited Putt's testimony that Winklejohn pointed at employees wearing union buttons and told them they had put "these people's jobs on the line," he did not find that Putt's connecting Winklejohn's speech to employee union activity was without foundation. Rather the judge's rejection of Putt's testimony was related only to its specifics. He did not find that Putt had no basis for believing that the speech was related to and directed at employee union activity.

⁹ *Hawkins-Hawkins Co.*, 289 NLRB 1423, 1424 (1988).

¹⁰ *Id.* at 1423. See also *Eastern Maine Medical Center*, 277 NLRB 1374, 1375 (1985).

¹¹ Although the judge found that between November 2 and November 6, 27 of the Respondent's employees signed union cards, he made no final determination of whether the Union represented a majority of the unit employees demonstrated by signed authorization cards. We also note that the Respondent has raised objections to the counting of 5 of the 27 union authorization cards in the unit that consisted of, at most, 53 unit employees when the Respondent received the Union's demand for recognition on November 12. In view of our finding that a bargaining order is not warranted, we find it unnecessary to pass on the various unresolved issues involving the composition of the unit or the validity of certain cards.

¹² The single incident involving Sec. 8(a)(3) was the 3-day suspension of Sutton, who the Respondent compensated by reimbursing him with backpay. No other union adherents were discriminated

In reaching this conclusion, we note that all the Respondent's misconduct took place between November 9 and 17¹³ and that no other misconduct occurred thereafter in the 2 months before the election held on January 21, 1988. We also have taken into consideration the Respondent's efforts to ameliorate the effects of its unlawful conduct. Thus, prior to the election, the Respondent issued memoranda to all of its employees promising, in case the Union should win the election, that it would keep operating and bargain in good faith. The Respondent also voluntarily awarded backpay to Sutton to compensate him for the discriminatorily motivated 3-day suspension he suffered. The Respondent's mollifying statements and voluntary backpay reimbursement tip the balance, in what otherwise is a close case, against a finding that a fair election would be rendered impossible.¹⁴ These circumstances coupled with the Board's traditional remedies lead us to conclude that the election process is superior to the use of authorization cards to determine employee sentiments here. We therefore shall set aside the election held in Case 25-RC-8523 and direct that a second election be held.

AMENDED CONCLUSIONS OF LAW

Substitute the following for Conclusions of Law 3:

"3. By threatening employees with plant closure and unspecified disciplinary action to discourage union activities and by threatening employees with discharge and soliciting them to find out other employment for engaging in union activities, the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act."

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent Almet, Inc., New Haven, Indiana, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following as paragraph 1(a).

"(a) Threatening employees with plant closure and unspecified disciplinary action to discourage union activities and by threatening employees with discharge

against for their union activities despite the fact that the Respondent knew about many employees' open support for the Union.

¹³This includes the two additional violations of Sec. 8(a)(1) that we have found in secs. 1 and 2 of this decision.

¹⁴While the ameliorative steps taken by the Respondent lead us to conclude that a bargaining order is not warranted, we do not find that they are sufficient to warrant our finding no violations of the Act under the test in *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978). Thus, we note that the Respondent's memoranda were issued 6 to 8 weeks after the unlawful conduct occurred, they were not specific in identifying the coercive conduct, they did not admit any wrongdoing, and they gave no specific assurances to employees concerning such future coercive conduct. See *Passavant* at 139.

and soliciting them to find other employment for engaging in union activities."

2. Substitute the attached notice for that of the administrative law judge.

IT IS FURTHER ORDERED that the election conducted January 21, 1988, is set aside and that the Regional Director shall direct a second election whenever he deems it appropriate.

APPENDIX

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

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

Section 7 of the Act gives employees these rights.

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

WE WILL NOT threaten employees with plant closure because they have engaged in union activities.

WE WILL NOT solicit employees to find other employment because they have engaged in union activities.

WE WILL NOT threaten employees with unspecified disciplinary action to discourage union activities.

WE WILL NOT discourage membership in United Steelworkers of America, AFL-CIO-CLC or any other labor organization by issuing disciplinary warnings to, suspending, or conditioning reinstatement of employees on their successful completion of a drug test because they have engaged in protected concerted activities on behalf of the Union.

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

WE WILL make employee Frank R. Sutton whole for any loss of pay he may have suffered as a result of his unlawful suspension, with interest.

WE WILL expunge from our records and files any notations or references to the unlawful warnings to employees Sutton and Jeffrey Putt and to unlawful suspension of Sutton and will notify them that this has been done and that the suspension and warnings will not be used against them in any way.

All our employees are free to become or remain, or refrain from becoming remaining, members of any labor organization.

ALMET, INC.

Ann Rybolt, Esq., for the General Counsel.
John Menzie Esq. and M. Scott Hall, Esq. (Gallucci Hopkins & Theisen), of Fort Wayne, Indiana, for the Respondent.
Peter M. Fox, Esq., of Cincinnati, Ohio, for the Charging Party.

DECISION

WILLIAM F. JACOBS, Administrative Law Judge. United Steelworkers of America, AFL-CIO-CLC (the Union), filed the petition for an election in Case 25-RC-8523 on November 10, 1987, to determine if certain employees of Almet, Inc. (the Company, the Employer or the Respondent), desired to be represented by the Union for purposes of collective bargaining.

On November 18, 1987, the Union filed charges in Cases 25-CA-19000-1 and 25-19000-2 and on December 30, 1987, the Region issued a consolidated complaint¹ based on these charges alleging violations of Section 8(a)(1) and (3) of the Act.

Pursuant to a Stipulated Election Agreement approved by the Regional Director for Region 25, a secret ballot election was conducted among the Company's employees on January 21, 1988. The tally of ballots showed 18 votes cast for the Union, 30 votes cast against the Union, and 3 challenged ballots which were not sufficient to affect the results of the election. On January 28, 1988, the Union filed timely objections to the election and the charge in Case 25-CA-19104.

On March 31, 1988, the Regional Director issued a report on objections to conduct affecting results of election, recommendations to Board, an order directing hearing, an order consolidating cases,² and notice of hearing. In this document the Regional Director ordered that a hearing be held to resolve the issues of fact and credibility raised by certain of the Union's objections as well as additional alleged objectionable conduct; that the cases be consolidated³ for the purpose of hearing, ruling, and decision by an administrative law judge; and that thereafter these cases be transferred to and continued before the Board in Washington.

On October 21, 1988, the Region issued an order consolidating cases, complaint, and notice of hearing consolidating Case 25-CA-19104 with the previously consolidated cases and alleging violations of Section 8(a)(1) and (5) in addition to the violations alleged in the earlier complaints and seeking a remedial bargaining order.

These consolidated cases were tried before me on December 13-15, 1988, and January 24-26, 1989, in Fort Wayne, Indiana.

All parties were represented at the hearing and were afforded full opportunity to be heard and present evidence and argument. All parties filed briefs.⁴ On the entire record, my

¹ The complaint was amended on April 1, 1988.

² Cases 25-RC-8523, 25-CA-19000-1, and 25-CA-19000-2.

³ *Ibid.*

⁴ Charging Party's motion for leave to file posthearing brief on March 10, 1989, unopposed, is granted.

observation of the demeanor of the witnesses and after giving due consideration to the briefs, I make the following

FINDINGS OF FACT

I. JURISDICTION

The complaint alleges, the answer admits, and I find that Respondent is, and has been at all times material, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

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

III. THE UNFAIR LABOR PRACTICES

During the last 2 weeks in October 1987⁵ certain of Respondent's employees began to discuss the possibility of acquiring union representation.

Among these half dozen employees were Frank Sutton, Stanley Duckworth, David Gillenwater, Blain Van Allen, and Jeffrey Putt, mostly night-shift employees. After numerous conversations among these and other employees on the subject of union representation, it was decided that Sutton would contact the United Steelworkers to look into the matter and obtain union cards for distribution.

Sutton made a number of phone calls to the Union and to the president of the Steelworkers local at Slater Steel Corporation in order to get the campaign started. Several of these calls were made from the lunchroom at Respondent's plant in the presence of other employees. For one reason or another, however, Sutton was unable to make contact and after receiving complaints from the other interested employees as to where the union cards were, Sutton left the job to Duckworth who thereafter succeeded in making contact with Union Representative Linda Paege.

On November 2, Linda Paege held her first meeting with those of Respondent's employees most interested in union representation. This meeting was attended by Duckworth, Van Allen, Sutton, and Gillenwater. Each of the four signed a union card and received additional cards for further distribution. Later that day, four additional cards were distributed by Van Allen directly or indirectly⁶ to other employees of Respondent, who signed them and returned them to him.

On November 3, Gillenwater, Sutton, and Duckworth obtained the signatures on union cards from five, three and two additional employees, respectively. On November 4-6, Gillenwater obtained nine more signatures. Thus, between November 2 and 6, 27 of Respondent's employees had signed union cards.

On November 5 or 6, Gillenwater approached employee Kevin Handwork while at work on the day shift in the fourth bay and asked him if he was ready to sign a union card. Handwork asked Gillenwater if he had a card and when Gillenwater acknowledged that he did, Handwork became angry. He told Gillenwater that he needed his job and was willing to cross picket lines. He then turned around and stormed off. Gillenwater watched to see where Handwork

⁵ Hereafter, all dates are in 1987 unless noted otherwise.

⁶ Employee Pequignot received his card from Van Allen and gave one to employee Brian Chambliss.

went and saw him go into the management office area where the vice president of Almet, Robert Winkeljohn, the general foreman, Howard Spencer, and other members of management have their offices. This incident is relied upon by General Counsel to support the theory that management probably learned through Handwork that there was union activity among its employees. However, the record does not indicate that any action was taken at this or any other time against Gillenwater.

On November 6, Respondent eliminated the second-shift, effective midnight, and assigned the second shift employees to the first shift. The following day, signed union cards were returned to Paegge at the second union meeting which was attended by employees Gillenwater, Duckworth, Sutton, and Putt.

Winkeljohn testified that by November 9 he had heard "scuttlebutt" about organizing activities. He knew of these activities through comments he had overheard and from some union-related writings which he had seen on the restroom walls. Despite acknowledging a general awareness of union activity by November 9, Winkeljohn nevertheless denied any knowledge of the identity of any union activists.

Employee Lester Steigerwald testified that about a week after union cards were first distributed, he heard from another employee that a sufficient number of cards had been signed to warrant the holding of a representation election. Steigerwald also testified that at sometime during the campaign, Winkeljohn asked him if cards were being signed. When Steigerwald replied, "Not to my knowledge," Winkeljohn commented, "Well, they couldn't have picked a better time." Though Steigerwald did not assign a precise date to this conversation, it probably occurred between November 2 and 5, when the vast majority of union cards were signed.

On November 9, two incidents occurred which eventually gave rise to the inclusion in the complaint of the 8(a)(3) and (l) allegation concerning employee Sutton. On that day, in the morning, before these incidents occurred, employee David Borel approached Blain Van Allen who, in the presence of employees Ed Walters and Jeff Putt, was at his work station in the fourth bay. Borel walked up to Van Allen and, according to the latter, told him "out of the blue" that Fabwell⁷ was hiring. Van Allen asked Borel what he was talking about and why he, Van Allen, had to know about Fabwell hiring since he already had a job. Borel explained that because Van Allen was a union organizer, he should be looking for a job; that union organizers would be the first people fired.⁸ Van Allen testified that he had not told Borel earlier about his involvement in union activity. Borel, who testified that he felt that the Union was not necessary, admitted that the conversation, as described by Van Allen and Putt, may have occurred. Borel also testified that at the time there were rumors that the second-shift employees were transferred to first shift because the union campaign had been started by second-shift employees. Finally, Borel testified that although he did not believe these rumors, he nevertheless knew, through other rumors, which employees were in favor of it.

⁷ Another company not otherwise involved in this proceeding.

⁸ Jeffrey Putt witnessed this conversation and supported Van Allen's testimony.

One of the two incidents which led indirectly to issuance of the 8(a)(3) allegation in the complaint occurred between 1 and 3:30 p.m. on November 9. On this occasion, Richard Greim, chairman of the board of Almet and its majority stockholder, saw Frank Sutton atop a beam on the transverse conveyor system where he was operating the overhead crane by means of a pendant which controlled it. Instead of walking along the beam to complete his task, Sutton skipped between two and four steps. Employee Steve Vaice also witnessed the incident.⁹ Greim testified that he had been in the business for 30 years and had never before seen such "bizarre behavior." Greim, however, did not admonish Sutton at the time, nor did he take any other action. The skipping took 2 to 3 seconds and was over.

Late in the afternoon of the same day the second incident, alluded to above, occurred. On this occasion, Winkeljohn and a foreman, Ben McDonald witnessed Sutton driving a ton forklift at what both considered to be an excessive rate of speed as it entered the plant from outside. Winkeljohn testified that Sutton came roaring through the door over the threshold with the forklift's forks clattering. McDonald testified that he was talking to Winkeljohn at the time when he heard the high pitch of the engine of the tow motor. He turned around and saw Sutton coming through the door, "at a pretty good speed," with the engine of the tow motor revved up and its forks bouncing. Observing Sutton driving, in what McDonald and Winkeljohn both considered at an excessive speed, Winkeljohn asked, "Does he [Sutton] always drive like that?" McDonald replied, "God, I hope not." McDonald had witnessed Sutton driving the tow truck on other occasions but never like that. Despite their avowed concerns, neither Winkeljohn nor McDonald cautioned Sutton about his driving nor, indeed, said a word to him at the time. McDonald went back to work and Winkeljohn about his business. The incident took 12 seconds.

Three rank-and-file employees were called to testify concerning the forklift incident. David Borel, who witnessed the incident, testified in support of management that Sutton's driving was excessively quick; faster than normal; with the motor racing and the forks clattering. Steve Vaice who, as noted supra, testified that he had seen Sutton skip on the beam, testified with regard to the forklift incident, that he witnessed Sutton drive through the doors and that he was not speeding and was neither reckless nor careless. He also testified that, depending on how high the forks are set, they may or may not clatter as the forklift is driven over the threshold. Van Allen testified that he had driven the forklift himself in low gear as Sutton was doing on November 9, and that in low gear the forklift runs very slowly; walking speed at best. He also testified that when the forklift is driven over the threshold without a heavy load, the forks clatter because they are not bolted nor affixed to the chassis, but merely hang over the bar which holds them up off the ground.

Sutton's position, with regard to the forklift incident, is that he did not drive the forklift any differently late on the afternoon of November 9 than he had throughout the day; nor any differently than he had on the night shift previously. He denied that his rate of speed was excessive and explained that when he drove the 40-ton forklift through the doors into

⁹ Sutton denied that he skipped on the beam. I credit Greim and Vaice.

the plant, he was driving off loose rock in low gear, up a grade so that it was necessary "to wind that baby all the way up" in order to achieve walking speed and get the tow motor into the plant. With regard to these two incidents, I find that Sutton did, in fact, skip between two and four steps while on the beam and did, in fact, drive his tow truck at a slightly excessive speed. I also find, however, that since management did not bother to mention these transgressions to Sutton at the time, neither was considered serious.¹⁰

Later still, on November 9, Greim met with Winklejohn. According to Greim, he told Winklejohn about the skipping episode so that Winklejohn could take proper action. When Greim described to Winklejohn Sutton's skipping, Winklejohn, in turn, described to Greim Sutton's "unsafe" operation of the forklift truck. Greim suggested that because of Sutton's "bizarre" behavior of that day, he should be tested for drugs and Winklejohn agreed. No employee had ever before been required by the Company to be tested for drugs.

On the evening of November 9, Winklejohn telephoned Sutton and told him not to report to work the following day at his regular starting time but rather to report to Winklejohn's office at 9:30 a.m. The following morning, Sutton appeared in Winklejohn's office, demanding to know what was going on. Winklejohn advised him that because of the two incidents already described, he was being required to be drug tested. Although Sutton denied that he skipped on the beam or drove the forklift at an excessive speed or in a reckless manner, he was nevertheless taken to a clinic and tested. When Sutton returned to the plant after taking the test, Winklejohn advised him that he was suspended until the results of the test were received. The clinic had advised him that the results would be available in 3 days.

On November 12, Winklejohn received Sutton's test results. These proved negative. The same day, the Company received a copy of the Union's petition. When Sutton returned to work on Monday, November 16, Winklejohn presented him with a written disciplinary warning notice, dated November 13, which indicated that he was receiving a 3-day suspension based on the two incidents described supra, plus a further warning to the effect that recurrence would result in additional disciplinary action, "up to and including discharge." The complaint alleges that Respondent suspended Sutton; issued the disciplinary warning to him; and conditioned his reinstatement upon his successful completion of a drug test, all because of his activities on behalf of the Union. The Respondent takes the position that it took the action described in the complaint because Sutton's behavior on No-

¹⁰ Greim testified that he was concerned for Sutton's safety when he skipped on the beam, in that he was afraid Sutton might fall into the machinery below and sustain injury. However, the conveyor system upon which the beam rested was only 3 or 3-1/2 feet off the ground and was not in operation at the time. There was no movement. Danger to Sutton was minimal. Indeed, if Greim considered Sutton to be in any immediate danger, he certainly would have warned him about it. He did not do so. Greim's explanation as to why he did not bother to caution Sutton is incredible in light of the severity of the action subsequently taken against him for the 3-second, four-step skip.

With regard to the tow motor incident, it is equally clear that if Winklejohn were actually as concerned about Sutton's driving being a danger to fellow workers, he most certainly would have cautioned him at the time of the incident.

vember 9 was "bizarre" and because of "scuttlebutt" about his being involved with drugs.

The record indicates that Sutton was engaged in organizing the plant and in obtaining signatures on union cards. It also indicates that, by November 9, the names of the organizers and of those most active in the campaign were well known among the employees including employees who were opposed to union representation. I therefore draw the inference that the organizers were also known to management by November 9.¹¹

Winklejohn and Greim termed Sutton's behavior on November 9 "bizarre." I do not agree. There are more than 300 volumes of Board cases, each volume containing descriptions of incidents of horseplay far more bizarre than the two incidents in which Sutton had engaged. What truly is bizarre is Winklejohn's and Greim's decision to force Sutton to take a drug test solely because he skipped a few steps and drove his forklift at a slightly accelerated pace. The testing and eventual suspension of Sutton for such trivial reasons is so implausible as to indicate pretextual motivation.¹² But not only do I find the two incidents trivial but so, apparently, did Winklejohn and Greim. For if they truly considered Sutton's behavior a danger to himself and to other employees they would have immediately cautioned him about it. They did not. This is evidence of an ulterior motive.¹³

I conclude that Winklejohn's and Greim's purported suspicion of drug use on the part of Sutton and the actions subsequently taken by them, supposedly based thereon, was a transparent ploy to harass Sutton, a known or suspected union organizer, in an attempt to show that Respondent was capable of manufacturing pretexts to rid itself of union activists such as he, and to dissuade him from continuing his organizational activities. That this is so, is obvious from the trivial nature of the incidents upon which Respondent seized to require the drug test as well as the fact that management had become aware 3 weeks before the incidents which occurred on November 9, that Sutton was not involved with drugs; that it was a different employee altogether who had been arrested on October 6 for processing marijuana on Respondents' property. In short, I find that Sutton was forced to take the drug test, was suspended, and given a written warning for reasons violative of Section 8(a)(3) and (1) of the Act.

The complaint in paragraph 5(a) alleges that Respondent, acting through General Foreman Howard Spencer on November 13: (i) solicited employees to find other employment because they supported the Union and (ii) threatened its employees with discharge if they supported the Union.

The record reveals that during the 2-week period prior to November 13, employee Jeffrey Putt had several confrontations with other employees which came to the attention of Howard Spencer. According to Spencer, these employees complained to him about Putt's attitude toward them and toward the Company in general. Spencer testified that these

¹¹ *Don Swart Trucking Co.*, 154 NLRB 1345 (1965), aff'd. 359 F.2d 428 (4th Cir. 1966); *Wiese Plow Welding Co.*, 123 NLRB 616 (1959); *Food Cart Market*, 286 NLRB 1016 (1987); *Grey's Colonial Acres Boarding Home*, 287 NLRB 877 (1987); *Walter Ridde, Inc.*, 284 NLRB 78 (1987).

¹² *Limestone Apparel Corp.*, 255 NLRB 722 (1981); *Wright Line*, 251 NLRB 1083 (1980).

¹³ *Fountainview Place*, 281 NLRB 26 (1986).

employees complained that Putt had been belittling, intimidating and coercing them to the extent that the incidents almost resulted in fights. Employees who complained to Spencer about Putt purportedly included Jim Webb, Ed Walters, Danny Patterson, and Bob McDowell.

According to Spencer, Walters told him that Putt had told Walters that if the Company told him to wear a purple dress and pink socks, he'd do it, to which Walters replied that if it was part of his job, he would. Walters complained to Spencer that Putt was always picking on him. Spencer testified that he told Walters to be cool, that he, Spencer, would do something about it.

Jim Webb, according to Spencer, complained that he had to walk away from Putt; that Putt had intimidated him so badly, by what he said, that he was going to punch Putt's lights out, and he did not want that to happen. Spencer testified that he did not know what Putt had said to Webb to make him so angry.

On the same or another occasion, according to Spencer, Webb, and employee Danny Patterson stopped Spencer while he was making the rounds. Webb told Spencer that he ought to do something about Putt's mouth; that he had to walk away from him. Then, Spencer testified, Patterson said that he had had the same problem; that he could not even go in and get the plates he needed to work on without Putt harassing him.

Spencer testified that there had been harassment of one employee by another or disputes among them in the past and it had been his job to intervene to keep the peace. Respondent supported Spencer's testimony with record documentation which showed that warnings had been issued in the past when employees got into arguments.

After receiving the complaints from the four or five employees about Putt, Spencer testified, he decided to call him in and discuss the matter with him.

On November 13, about 1:30 p.m., Spencer called Putt into his office. The two were alone. Spencer began the conversation by stating that he had called Putt into his office for two reasons. First, that four people had approached him to complain that Putt had been degrading the company. He asked, "If you are unhappy with your job, why don't you go find another job; seek employment elsewhere? If it were me, and I had to go to work every day and be that miserable, I'd go out and find another job." Putt asked Spencer who the four people were who had complained and what they had said. Spencer refused to answer Putt's questions so Putt said that it was all a bunch of "hearsay bullshit" and that he, Spencer, could not convict anybody on "hearsay and bullshit." Spencer replied, tapping a manila envelope which he was holding, "Jeff, don't you worry, I've got my butt covered." He continued, "Jeff, you know I'm in charge of 52 or 53 employees. I don't need this bull crap." Spencer then said that the second reason he had called Putt in was to discuss his production of plates. He asked, "Jeff, do you know how long its been taking you to mill these plates?" Before Putt could respond, Spencer supplied a figure. Putt challenged, "What do you mean, Howard? Are you trying to accuse me of screwing off? You know I don't screw off." Putt had been milling plates for a month and a half and prior to this conversation had never received any complaints about his work. Putt challenged, "You know why you called me in here?" Spencer looked at Putt, smiled, and asked why.

Putt did not reply, so Spencer continued, "Well, Jeff, with all this stuff I've got in here," tapping the manila file, "I can fire you. I think I will fire you." Then Spencer added, "But I'll tell you what. I'll give you one more chance, but one more screw up; one more complaint and you're history." Putt replied, "You might as well go ahead and fire me because I'm not giving you the satisfaction of quitting."

Before calling Putt in for their discussion, Spencer placed a note in Putt's file:

11/13/87

I've had numerous complaints regarding Jeff in the last couple of weeks.

Mostly making remarks degrading to the company and to any employee who is happy with they're [sic] job here.

I feel at this time Jeff is not an asset to this company with his behavior and attitude toward his fellow employees and to the company.

The note appears to reflect a charge that Putt had been engaged in some heavy-handed campaigning and a not too subtle hint of possible disciplinary action if it continued. The terms "union" or "union supporter" never specifically came up during the conversation.¹⁴

With regard to the allegations contained in paragraph 5(a) of the complaint, the record reflects that on November 13, Howard Spencer told Jeff Putt that if he was unhappy with his job with Respondent he should seek employment elsewhere and threatened him with discharge if he did not refrain from making remarks degrading to the company and to employees who were happy with their jobs. General Counsel alleges that Spencer's statement and threat were made to Putt because he supported the Union and to interfere with his right to continue to support and campaign on behalf of the Union. Respondent takes the position that Spencer was merely trying to keep peace at the plant and prevent Putt from antagonizing fellow employees to the point of the arguments erupting into fights.

First of all, I find that the record is not nearly as complete as it could have been. Although Spencer specifically named the four employees who allegedly had complained about Putt's behavior, none of them were called by Respondent to testify concerning the circumstances surrounding their alleged confrontations with Putt. Moreover, Respondent saw fit to call three of the four to testify on other matters but never asked them about their alleged harassment by Putt. Respondent would prefer that I rely on the hearsay testimony of Spencer rather than the testimony of those employees directly involved in the incidents. I draw from Respondent's failure to examine these witnesses on this subject several inferences. First, that Putt was, as he testified, actively campaigning on behalf of the Union. Secondly, that these four employees, and perhaps others, reported his activities early in the campaign. Finally, I find that Spencer called Putt into his office and solicited him to quit his job and threatened him with discharge in order to dissuade him from continuing his

¹⁴ This conversation between Spencer and Putt, as it appears in the text, reflects the most credible testimony of each of the participants. Where their testimony is in conflict, I credit that of Putt.

pronoun campaign. I find that Respondent has thus violated Section 8(a)(1) of the Act.¹⁵

Paragraph 5(b) of the complaint alleges that Respondent, on November 13, acting through Richard Greim, violated Section 8(a)(1) when he threatened its employees with plant closure, if the Union persisted in demands to which Respondent was opposed.

The record reveals that in November, Greim read, verbatim, a speech to the entire production and maintenance unit. The speech contained the following statement:

As I stand here before you I'm here to tell you that I will never agree to any demands that I believe are not in the best interest of this company—and if I have to shut down this plant to maintain those principles—I will shut it down and go out of business.

I find this statement to be protected under Section 8(c) and not violative of the Act.¹⁶ I recommend dismissal of this allegation.

On November 14, the Respondent received the Union's demand and on November 16 declined recognition. On November 16 also, as noted earlier, Sutton returned from his 3-day suspension. His first day back, after he was given the employee warning notice which he refused to sign, Sutton was assigned a job outside the plant moving a pile of wood from one place to another. The weather, at the time, was bad. It was raining and sleeting and Sutton was assigned to perform this work alone. When Sutton finally completed the job of transferring the woodpile, he received his second assignment from Spencer. He was ordered to pick up the wood from where he had just deposited it and put it back where he had gotten it in the first place. Although the complaint does not allege these assignments to have been discriminatorily motivated, I find that they were.¹⁷ Indeed, I find that these work assignments were pure harassment—and a continuation of the campaign of harassment against Sutton, discriminatorily motivated, which began on November 9 when he was forced to take the drug test for no apparent reason. Indeed, why else would management pay an employee \$6.65 per hour to work out in the sleet and rain to senselessly move pieces of wood back and forth to no apparent purpose.

The third assignment given to Sutton on his first day back was to dig a ditch out in the sleet and rain. While Sutton was digging he was approached by Greim who, after discussing the project with him, said, "What I said to you two years ago still goes." Sutton stopped what he was doing momentarily, and asked what Greim meant. Greim replied, "Well, listen young man, you are not talking to a school boy here." Sutton realized what Greim was talking about, namely, statements made by Greim to Sutton 2 years previously when Sutton had been involved in another union campaign and Greim had made various antiunion statements to him at that time.¹⁸ Greim continued to speak. He told Sutton to look around, at the same time indicating Respondent's newly built

building. He then said that he could do "any damned thing" he wanted to do. He told Sutton to look at the buildings. Then he added that he could sit at home and lease them out by the square foot and make more money without going through all "this fucking shit" with Sutton and everyone else. He said he was tired of "this union shit." Sutton's only reply was to ask, "When are you going to learn you've got to quit threatening people."¹⁹ Greim then walked away.

I find Greim's statement to be a threat of plant closure made for the purpose of interfering with Sutton's organizational activities.²⁰

On the morning of November 17 Respondent's employees, for the first time, reported to work wearing various indicia of union support—buttons in particular. That morning, Respondent suspended employee Stan Duckworth. He had been one of the initial union organizers who had attended union meetings, campaigned, and distributed union cards and obtained signatures thereon.²¹

Later that day, Winklejohn delivered a speech which he read verbatim, in its entirety, from a written text:

It has come to my attention that certain Almet employees are being bullied and threatened by other employees on company premises. I will not tolerate these activities.

I refuse to stand by while any of my employees are subjected to GOON tactics carried on by gangsters in an attempt to coerce other employees into doing anything they do not wish to do. I have not and will not ever allow this to occur at Almet.

From here on out, if I become aware of any employees using gangster tactics to bully or intimidate other Almet employees for any reason, I will discipline that employee appropriately, up to and including discharge if warranted. This applies to all Almet employees. That means you, you, and you.

Also, if I become aware that any of my employees are bullied or threatened by these GOON tactics and they do not report the occurrences to me, I will discipline those employees for not reporting what happened to them.²² Believe me, I will do whatever it takes to eliminate this crap from the Almet shop.

This is not a playground where bullies rule. Each of you has the right to work at Almet, free of this type of abuse and; as long as I am here, this will not change.

Robert Winklejohn—November 17, 1987.

This speech was delivered to all of Respondent's production and maintenance employees who were working that day and was delivered, according to Winklejohn, because he had heard rumors about employees being threatened in order to get them to sign union cards. However, under General Counsel's examination, Winklejohn admitted that the rumors he

¹⁵ *Bill Scott Oldsmobile*, 282 NLRB 1073 (1987); *Hovtuck Corp.*, 285 NLRB 904 (1987).

¹⁶ *Oxford Pickles*, 190 NLRB 109 (1971).

¹⁷ Since it was not alleged in the complaint, I do not find a violation.

¹⁸ Greim denied making such statements 2 years before, but I credit Sutton.

¹⁹ Greim denied that this discussion ever took place, but admitted stating to someone at some point, about this time, that he could rent out 110,000 square feet of space at \$1 per foot. I credit Sutton.

²⁰ *Madison Industries*, 290 NLRB 1226 (1988); *Life Savers, Inc.*, 264 NLRB 1257 (1982); *Long-Airdux Co.*, 277 NLRB 1157 (1986).

²¹ Duckworth's suspension is not alleged as a violation.

²² Encouragement of employees to notify supervisors if they felt that they were being pressured into making a commitment to the Union was not alleged as a violation of Sec. 8(a)(1). But see *Electric Hose & Rubber Co.*, 267 NLRB 488 (1983).

allegedly heard were never verified. He testified that he could not recall who reported the rumors to him but did name three employees who were purportedly victims of coercion. When asked for details of the rumored coercion, Winklejohn could supply none. Of the three individuals named by Winklejohn as the possible victims of badgering, none were called by Respondent to testify to the matter. One, Vaice, was called by General Counsel to testify concerning his signing of a union card and did not support the rumor of coercion. I conclude that Winklejohn's speech of November 17 was not prompted by any legitimate fear of coercive tactics on the part of employee union activists.

Several employees who attended the delivery of Winklejohn's speech on November 17 wore union buttons. When Winklejohn read the third paragraph of his speech and stated, "If I become aware of any employees using gangster tactics to bully or intimidate other Almet employees for any reason, I will discipline that employee appropriately, up to and including discharge if warranted. This applies to all Almet employees. That means you, you and you," each time Winklejohn said the word "you," he pointed at his audience, starting at one side of the room and crossing it as he gestured toward the other side.

According to the uncorroborated testimony of Jeffrey Putt, each time Winklejohn said the word "you," he pointed directly at an individual wearing a union button, then added, "You, you and you are responsible for putting these people's jobs on the line."

It is this last statement, considered in the context of the rest of the speech, which General Counsel urges as an unfounded prediction that unionization creates an inevitable risk of job loss and a violation of Section 8(a)(1) of the Act.²³ However, inasmuch as there were close to 50 employees present, including many union adherents, and Putt was the only one to testify to Winklejohn having made the objectionable statement, I will credit Winklejohn's denial.²⁴ I also credit Winklejohn's statement that when he pointed at the audience he did so in random fashion, not to single out individuals wearing union buttons. The speech was prepared in advance and read verbatim including the "you, you and you" part of it. I recommend dismissal of this allegation.

Paragraph 5(f) of the complaint alleges that Respondent, through Richard Greim, in late November, informed its employees that it was turning down work because of their union activity. Greim denied that he ever made such a statement.

According to Sutton, sometime after the union campaign began, Greim remarked, "You are seeing what I've been saying. We were so busy before, with all this work, now we're not busy." Sutton asked why. Greim replied that there was another large job that Respondent could have bid on but with "this Union stuff" going on, he had to turn it down. He explained, Sutton testified, that with all this commotion, he dare not hire help. Sutton's testimony with regard to this allegation was extremely confused. He could not recall if there were two or more than two conversations on the subject of turning down jobs and the reasons therefor. He could not recall when these conversations took place which, of course, is critical. Moreover, I believe that whatever Sutton was told about the reasons why Respondent turned down cer-

tain jobs, he confused what he was told with his own suspicions as to Respondent's motives. I do not feel comfortable relying upon Sutton's uncorroborated testimony with regard to this allegation and recommend its dismissal.

Paragraph 5(e) of the complaint alleges that on several unknown dates in November and on or about December 7, Richard Greim told employees that it would be futile for them to select the union to represent them because Respondent would not bargain in good faith.

With regard to this allegation, General Counsel again relies on the testimony of Frank Sutton. He testified that on several occasions he discussed health insurance with Greim and that on one occasion, in particular, after walking out of the lunchroom, he and several other employees met Greim who was standing outside. Sutton mentioned to Greim the company committee and the subject of health insurance. Sutton asked Greim if he had looked into the insurance like he had said he was going to do. Greim replied that he had done so and that the employees were not going to get anything better than that which they already had; that their medical insurance was probably the best in the industry. After some discussion of the cost of insurance, the amount being paid for it, and the cost of dependent care, Greim apparently became excited and stated, according to Sutton, "If you guys don't like what your getting around here, we can start from ground zero' [or] from scratch." Although General Counsel alleged this conversation as a violation of Section 8(a)(1), I do not agree. Clearly, the matter had nothing to do with the Charging Party but with an employee committee and Sutton as its representative.²⁵ I recommend dismissal of the allegation to the extent General Counsel relies on this conversation to support paragraph 5(e) of the complaint.

General Counsel cites a second incident in support of the allegation contained in paragraph 5(e) of the complaint. According to Jeffrey Putt, between November 3, 1987, and January 21, 1988, Greim would make his rounds twice a day and stop at Putt's milling machine and talk to him. On one of these occasions, on or about December 7, Greim said, "Jeff, I got another reason I'd never sign a contract with a Union . . . Southco is a union shop and they had to file a chapter 11 [bankruptcy]." Southco, according to Putt, is a unionized company with its employees represented by the United Steelworkers of America.

Later the same day, Putt and employee Jeff Wright confronted Greim in the lunchroom about the statement. Greim denied having made the statement. According to Putt, despite Greim's denial, he thereafter attended union meetings at which he reported what Greim had said about Southco and about never signing a contract.

During the same December 7 conversation which took place at Putt's milling machine, Greim told Putt that if the Union did, in fact, succeed in its organizing campaign, the employee organizers would have to collect the dues because Greim was going to have no part of payroll deductions for union dues. This, too, Putt repeated at union meetings.

In this case also, I believe Greim's denials. Putt believed he had heard Greim say one thing. When he brought Wright back as a witness to have Greim reiterate his statement, long

²³ Par. 5(c) of the complaint.

²⁴ *Life Savers, Inc.*, 264 NLRB 1257 (1982).

²⁵ Sutton could not recall what, if anything, was said about the Union during this conversation. About eight employees were present during this conversation yet General Counsel called none of them to corroborate Sutton's testimony.

before the hearing, Greim denied ever having made the statement. I credit him and recommend dismissal of the allegation. About December 9 Putt and Greim had another discussion at Putt's milling machine. After first discussing possible dates for the forthcoming election, Greim said, "I tell you, if that Union gets in here, we're going to start at minimum wage. We are going to start at no benefits, no profit sharing, no 401(k), no overtime, no night bonuses."

General Counsel argues that Greim's statements amounted to threats that if the Union won the election, Respondent would reduce the employees' wages to the minimum wage level and that bargaining would then start from square one. Respondent, on the other hand, contends that Greim's statements were not threats to reduce wages at all, but merely statements as to where Respondent's position in bargaining would start, namely at the minimum wage level.

The record indicates that Greim visited a number of employees to discuss with them the organizing campaign and I do not believe that Greim would have made this statement only to Putt, a known union adherent, and to no one else. Yet Putt's testimony was not supported by anyone else. I find that the singularity of the incident, as described by Putt, undermines its credibility.²⁶

On December 30 the Region issued a consolidated complaint alleging violations of Section 8(a)(1) and (3). The following day the Employer issued the following memorandum to all of its employees:

TO ALL EMPLOYEES

"ARE YOU CONFUSED OR WHAT"?

Everything the Company has tried to tell you during the course of this election campaign has been branded by the union as a lie or "bullshit." The union has forgotten, however, that in every instance the Company has made available irrefutable evidence to back up its statements—evidence which the union's own organizers have been provided the opportunity to examine. Rather than try to convince you that we are the ones that are telling the truth—and that the union is dealing in lies—we recognize that it must be left up to each of you to reach your own conclusion, following your own examination of the true facts. To assist you in that effort, we have attached copies of two decisions from the National Labor Relations Board.²⁷ This agency of the United States Government is established by federal law to resolve labor disputes and to determine the rights of the Company with respect to union organizing efforts. In these decisions the National Labor Relations Board confirmed that:

- . . an employer is *not required* to agree to all union demands;
- . . after bargaining, an employer is *not required* to retain all current benefits;
- . . existing benefits *may be traded away*;
- . . the employer is legally entitled to *bargain from ground zero*;

²⁶ *Life Savers*, supra.

²⁷ *Cain Co.*, 77 LRRM 1049 (1971); *Histacount Corp.*, 122 LRRM 1334 (1986).

- . . all union promises of improved benefits are not attainable without the Company's agreement;
- . . good faith bargaining can take *weeks, months or even years*;
- . . an employer may *permanently replace* economic strikers.

Please read these decisions from the National Labor Relations Board and decide for yourself who's telling the truth.

Dick Greim

At the hearing the parties stipulated that this memorandum contains no material which is violative or objectionable. However, Respondent contends that this document reflects what Greim told Putt on December 9 namely, that an employer is legally entitled to negotiate from ground zero. Moreover, even if Greim, in fact, made the statement attributed to him by Putt, this memorandum, Respondent argues, is sufficient to overcome the effect of the previous statement because it clarifies that statement; was circulated to all employees rather than stated to a single individual; and was distributed close to the election date whereas Greim's allegedly violative statement was made weeks earlier.

It does not, of course, follow that because Respondent issued a lawful memorandum on December 30 and several thereafter, that Greim did not make an unlawful statement to Putt on December 9. Nevertheless, the isolated nature of Greim's alleged unlawful statement to Putt when considered amid the numerous lawful memoranda issued subsequently by Respondent, convinces me that Putt misinterpreted Greim's statement and that Greim's description of what he said to Putt is the more accurate rendition and is not violative of the Act. I recommend dismissal of this allegation.

On January 15, 1988,²⁸ Respondent distributed another memorandum to all its employees which, the parties stipulated at the hearing, was neither violative nor objectionable. Among other statements contained therein, was a pledge that the Employer would bargain in good faith with the Union (if it should win the election), for as long as it might take to see if they could reach agreement on a mutually acceptable contract.

Respondent contends that the distribution of this memorandum, like that of the December 30 memorandum, had the effect of removing any possible taint to the campaign which Greim's alleged comments to Putt on December 7 and 9 and his speech of November 13, 1987, might have had. The same argument was made with regard to Winklejohn's speech of November 17, 1987. Inasmuch as I have found no violations in connection with the cited incidents, Respondent's argument concerning the possible curative effect of its memoranda need not be considered with respect to those particular matters.

On January 18, the Employer distributed its last campaign memorandum prior to the election. In it the Employer reiterated its intention to bargain in good faith with the Union, if the Union were to win the forthcoming election. Again, Respondent argues that issuance of this memorandum cures any alleged isolated violative statements made earlier which might have given the impression to any employee that Respondent would not bargain in good faith.

²⁸ Hereinafter all dates are in 1988 unless noted otherwise.

The election was conducted, as scheduled, on January 21, between 7 and 8 a.m. in the employee breakroom. Just prior to the opening of the polls a preelection conference was held. Members of management, officers of the Union, observers, and the board agent conducting the election attended. It was agreed at this meeting that the company would continue to operate during the hour that the election was being conducted. A schedule was agreed upon whereby a company and a union observer would go from bay to bay releasing the unit employees to vote in accordance with the schedule. As the meeting was breaking up, either the Respondent's attorney or the Board agent advised one of the union representatives, Linda Paege, not to stay in the polling area. Both she and Winklejohn agreed that neither could be present at the polls during the election. The question arose as to where Winklejohn would be during the polling period. The Board agent, the attorneys, and Jeff Putt, a union observer, noted that Winklejohn's office was quite close to the polling area but the Board agent said that he did not think that there would be any problem as long as Winklejohn stayed in his office. Winklejohn agreed. The Board agent then asked Winklejohn if he had a clock in his office. When Winklejohn stated that he did have a clock, the agent told him that he would be free to leave his office and go out into the plant at 8 a.m. Winklejohn agreed to remain in his office until 8 a.m. Winklejohn then went back to his office and the Union's officials were escorted from the plant.

After the preelection conference, the polls were opened at 7 a.m. Winklejohn waited outside the polling area, by the clock, until it was 7 a.m. At 7 a.m. he went into his office and ordered that the announcement be made that the polls were open. Just before he did so, he saw Duckworth arrive and enter the breakroom, a minute or two before the polls were officially opened. He saw no one else enter the breakroom to cast his ballot during the remainder of the election.

Once in the office, with the door closed behind him, Winklejohn began to do his morning paper work which he did routinely every morning at this time. He completed this work, as he usually did, in 15 or 20 minutes. Then he took the papers to the front office, which led him down a hallway, right past the door to the breakroom where the election was in progress. The route to the front office was the same route he took every morning to deliver his paperwork, and was the only route inside the plant which was both direct and available. When Winklejohn passed by the breakroom, its door was closed. The trip down the aisle from his own office to the front office took between 40 to 45 seconds.

Winklejohn dropped off the paperwork in the general office and remained there for 2 or 3 minutes after which he retraced his steps past the closed door of the breakroom to his office. He entered his office, closed the door behind him, and did routine office work for 15 to 20 minutes until about 7:40 a.m.

At 7:40 a.m. Winklejohn left his office for the second time during the election. This time he carried a pitcher to get water to make coffee, as he did every morning. Ordinarily, Winklejohn would have obtained the water in the breakroom. However, since, at the time, the election was still in progress, he walked past the breakroom door, still closed, to the general office area, and got water in Greim's office where there was a wet bar. With pitcher of water in hand, Winklejohn

began to retrace his steps down the same aisle toward his office when he heard screaming and hollering emanating from the second or third bay from behind the partition. Winklejohn headed in the direction of the commotion fearing someone might be hurt. When he arrived at the opening between the first and second bays where he could see what was going on, he saw Frank Sutton. Spencer, who had also heard the noise, arrived at the same time at the opening, from a different direction. When Winklejohn saw that no one had been hurt, he glared at Sutton whom he suspected of having done the screaming, then returned to his office where he remained until 8 a.m.

Various employees noticed Winklejohn in the vicinity of the breakroom door as he passed it on the way to and from his office and the general offices. On one trip he greeted one employee by merely pronouncing his name.²⁹ Winklejohn was also noticed by Sutton when the former came to his work area to investigate the disturbance.

At 8 a.m. or shortly thereafter, the ballots were tallied. As noted earlier, the results indicated that the unit employees cast 18 ballots in favor of the Union and 30 against. On January 28 the Union filed timely objections. On March 31 the Regional Director ordered that a hearing be held on two of these objections. One concerned the "bargaining from scratch" allegation which has been dealt with up. The other reads as follows:

Objection No. 1

The Employer, by its officers and agents, unlawfully interfered with the voting process by positioning themselves in the avenue of approach to the voting room and conversing with employees immediately outside the voting room.

and has to do with Winklejohn's whereabouts during the election.

With respect to Objection 1, I find nothing in Winklejohn's activities during the election to warrant setting aside the election under *Milchem, Inc.*,³⁰ or any other line of cases. I recommend dismissal of this objection.

Remedial Bargaining Order

I have found that Respondent violated Section 8(a)(3) and (1) of the Act by forcing Sutton to take a drug test, suspending him for 3 days and issuing him a disciplinary warning, all for discriminatory reasons. I have found also that Respondent violated Section 8(a)(1) by threatening Putt with discharge and Sutton with plant closure. These unfair labor practices, having occurred during the critical period, must be

²⁹ Reports that Winklejohn may have spoken to other rank-and-file employees are not credited. Employee Pequinot's testimony that Winklejohn spoke with employees Hawthorne and Didier during the election is rejected in light of his admission that he could not hear what was allegedly said to them and that Winklejohn may only have been singing. Sutton's testimony that Winklejohn called him at 7:40 a.m. to speak with the union representative, Linda Paege, in the voting area, is clearly in error. Paege was not permitted in the voting area during the election and there is no evidence that she was there at that time. Paege was present in the voting area after the close of the polls and likely asked Winklejohn to summon Sutton at that time.

³⁰ 170 NLRB 362 (1968).

considered objectionable.³¹ There remains the question of whether a remedial bargaining order is appropriate.

Although the incidents giving rise to the finding that Respondent engaged in objectionable conduct and committed unfair labor practices were serious in nature, I do not feel that they warrant a bargaining order. The violations occurred between November 9 and 16 and no others occurred between those dates and the election which was conducted on January 21, over 2 months later. Far from exacerbating the effects of the violations committed in November, Respondent attempted to ameliorate the effects thereof by issuing memoranda to all of its employees promising, in case the Union should win the election, to keep operating and to bargain in good faith. Respondent also voluntarily awarded backpay to Sutton to compensate him for the 3-day discriminatorily motivated suspension he suffered. Thus, the passage of time and the action of the Respondent in attempting to lessen the impact of the violations on the election have, in my opinion, rendered the issuance of a bargaining order unnecessary.³² Nevertheless, because of the severity of the violations, which I likewise find objectionable, I shall recommend that the election be set aside and that a second election be directed.³³

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES ON COMMERCE

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

V. THE REMEDY

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

Having found that Respondent unlawfully suspended Frank R. Sutton, I shall recommend that it be ordered to make him whole for any loss of earnings he may have suffered by reason of his unlawful suspension by payment to him of a sum of money equal to that which he normally would have earned during the period of his suspension. Backpay shall be computed in accordance with the method prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950). Interest is to be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

CONCLUSIONS OF LAW

1. 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.

3. By threatening its employees with plant closure and discharge and soliciting them to find other employment because

they engaged in union activities, Respondent has engaged in unfair labor practices within the meaning of Section (a)(1) of the Act.

4. By issuing a disciplinary warning to, suspending, and thereafter conditioning reinstatement of employee Frank R. Sutton upon his successful completion of a drug test, all because he engaged in protected concerted activities on behalf of the Union, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act.

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

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended³⁴

ORDER

The Respondent, Almet, Inc., New Haven, Indiana, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with plant closure and discharge and soliciting them to find other employment because they have engaged in union activities.

(b) Discouraging membership in United Steelworkers of America, AFL-CIO-CLC or any other labor organization by issuing disciplinary warnings to, suspending, and conditioning reinstatement to employees upon their successful completion of a drug test because they have engaged in protected concerted activities on behalf of the Union.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their Section 7 rights.

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

(a) Make employee Frank R. Sutton whole for any loss of pay he may have suffered as a result of his unlawful suspension in the manner set forth in the remedy section of this decision.

(b) Expunge from its records and files any notations or references to the unlawful warnings to employees Sutton and Putt and to the unlawful suspension of Sutton. Notify them in writing that this has been done and that the suspension and warnings will not be used against them in any way.

(c) Preserve and, on 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.

(d) Post at its New Haven, Indiana facility copies of the attached notice marked "Appendix."³⁵ Copies of the notice on forms provided by the Regional Director for Region 25, after being signed by the Respondent's representative, shall be posted by the Respondent immediately upon the receipt

³¹ *Thomas Products Co.*, 169 NLRB 706 (1968); *Kux Mfg. Corp.*, 233 NLRB 317 (1977); modified 614 F.2d 556 (6th Cir. 1980).

³² *Ben Nolter, Inc.*, 276 NLRB 1208 (1985).

³³ *Super Thrift Markets*, 233 NLRB 409 (1977); *Dal-Tex Optical Co.*, 137 NLRB 1782 (1962).

³⁴ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

³⁵ 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."

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 Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

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

IT IS FURTHER ORDERED that the consolidated complaint be, and hereby is, dismissed insofar as it alleges unfair labor practices not specifically found.

IT IS FURTHER ORDERED that the election conducted January 21, 1988, be, and it hereby is, set aside and the Regional Director is directed to conduct a second election whenever he deems it appropriate.