Salt Lake Division, a Division of Waste Management of Utah, Inc.[1] *and* International Brotherhood of Teamsters, Local No. 222, AFL–CIO.[2] Cases 27–CA–10940, 27–CA–11130, 27–CA–11141, and 27–RC–6962

March 29, 1993

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND RAUDABAUGH

Exceptions filed to the judge's decision in this case[3] present a procedural issue, a number of substantive issues, and a remedial issue. The first issue is whether the complaint allegations were barred by Section 10(b) of the Act. The substantive issues are whether the Respondent in the context of a union organizing campaign: solicited employee grievances with the implied promise of correcting them; made threats of plant closure, job loss, and loss of benefits; interrogated employees as to their union support; made statements conveying the futility of union representation; formed and dominated employee committees which were labor organizations; and issued warnings and discharged an employee because of their union activities. Finally, the Respondent questions whether a bargaining order is an appropriate remedy.

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,[4] and conclusions and to adopt the recommended Order.

We agree with the judge that the Respondent violated Section 8(a)(2) by ''dealing with'' the employee committees established in response to the union campaign. While the subject matter of some of the committees, i.e., routing and productivity, and safety, might under other circumstances indicate that the avowed purposes of these committees might place them outside the ambit of Section 8(a)(2), it is plain that under our recent decision in *Electromation, Inc.*, 309 NLRB 990 (1992), these committees were dominated labor organizations tacitly held out to employees as an employer-approved alternative to representation by an organization of the employees' own choice.[5]

We find no merit in the Respondent's contention that the imposition of a bargaining order is not warranted in light of turnover in employees and the passage of time. Such factors are irrelevant under Board law concerning factors governing the issuance of *Gissel* bargaining orders. See *Astro Printing Services*, 300 NLRB 1028, 1029 (1990); *F & R Meat Co.*, 296 NLRB 759 (1989); *Highland Plastics*, 256 NLRB 146, 147 (1981).

Even assuming the relevance of these factors, we find that the evidence in this case would not warrant a finding that employee turnover and passage of time have dissipated the lingering effects of the unfair labor practices to the extent that a fair election could be held. In light of the serious nature of those unfair labor practices, the small size of the unit, the continuing

[1] The Respondent's unopposed revised motion to correct its name is granted.

[2] The name of the Charging Party has been changed to reflect the new official name of the International Union.

[3] On March 31, 1992, Administrative Law Judge Richard J. Boyce issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

[4] 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.

In its exceptions, the Respondent contends, inter alia, that the judge's finding that the Respondent violated Sec. 8(a)(5) and (1) by failing and refusing to recognize and bargain with the Union after May 11, 1989, was barred by Sec. 10(b) of the Act. We agree, for the reasons stated by the judge, that a remedial bargaining order under *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969), is appropriate and that the bargaining order attaches as of May 11, 1989, the date the Respondent embarked on its course of unfair labor practices. However, inasmuch as an 8(a)(5) violation is not a sine qua non for a remedial bargaining order, and inasmuch as an 8(a)(5) violation would not add to the remedy, we find it unnecessary to pass on whether the judge was correct in finding an 8(a)(5) violation as of May 11, 1989. See *Peaker Run Coal Co.*, 228 NLRB 93 (1977).

The Respondent contends that the judge's finding that the Respondent violated Sec. 8(a)(2) and (5) by its formation and domination of employee committees was barred by Sec. 10(b). The conduct concerning the committees began in July 1989. In addition to the reasons stated by the judge for finding no merit in the Respondent's contention, we note that the unfair labor practice charge filed by the Union on November 17, 1989, explicitly referenced the pending representation case, 27–RC–6962. In that case, the Union on August 10, 1989, had filed objections based in part on the Respondent's formation and domination of these employee committees.

[5] For the reasons stated in his concurrence in *Electromation*, Member Raudabaugh agrees with his colleagues' adoption of the judge's finding that the employee committees formed by the Respondent were labor organizations within the meaning of Sec. 2(5) of the Act and that the Respondent's conduct in forming and dominating the employee committees violated Sec. 8(a)(2). With particular respect to the 8(a)(2) allegations, Member Raudabaugh considers four factors in evaluating the Respondent's conduct: (1) the extent of the employer's involvement in the structure and operation of the committees; (2) whether the employees, from an objective standpoint, reasonably perceive the employee participation program as a substitute for full collective bargaining through a traditional union; (3) whether employees have been assured of their Sec. 7 right to choose to be represented by a traditional union under a system of full collective bargaining; and (4) the employer's motives in establishing the employee participation program.

Here, as in *Electomation*, the Respondent completely dictated the structure of the committees and controlled their operations, the employees could reasonably view the committees as a substitute for collective bargaining through traditional union representation, and the employees were never given assurances of their right to choose collective bargaining through traditional union representation. In addition, antiunion motive was established. Under these circumstances, Member Raudabaugh finds that the Respondent's conduct was unlawful.

presence of unit employees who had been subject to the Respondent's unfair labor practices, the continuing presence of the management officials who committed the unfair labor practices, and the discharge of a leading union activist after the representation election, we find that the present deleterious effects of the Respondent's misconduct remain essentially the same as when it occurred. The possibility of erasing the effects of the Respondent's unfair labor practices and of conducting a fair election by the use of traditional remedies is slight.

Finally, we note that no exceptions were filed to the judge's finding that the Union had signed authorization cards from a majority of unit employees on May 11, 1989.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Salt Lake Division, a division of Waste Management of Utah, Inc., West Jordan, Utah, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Michael W. Josserand, Eqs., for the General Counsel.
John D. McLachlan, Eqs., of San Francisco, California, and *Thaddeus Sobieski, Eqs. (Fisher & Phillips)*, of Atlanta, Georgia, for the Respondent.

DECISION AND REPORT ON OBJECTIONS

STATEMENT OF THE CASE

RICHARD J. BOYCE, Administrative Law Judge. This consolidated matter was tried before me in Salt Lake City, Utah, over 9 days in 1990.[1]

The complaint as now constituted, based on charges filed by Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO, Local 222 (Union) issued on April 26, 1990, and was amended during the trial. It alleges that Salt Lake Division, a division of Waste Management, Inc. (Employer) violated the National Labor Relations Act (Act) as follows:

(a) Section 8(a)(5) and (1) since early May 1989 by failing to recognize and bargain with the Union as the exclusive collective-bargaining representative of its truckdrivers, mechanics, parts employees, and welders.[2]

(b) Section 8(a)(5), (2), and (1) as follows:

(1) On and after about July 6, 1989, by forming and negotiating with employee committees concerning terms and conditions of employment;

(2) In late July 1989, by announcing the likely adoption of certain changes in terms and conditions of employment as a result of committee negotiations; and,

(3) In early August 1989, by announcing that it had instituted said changes.

(c) Section 8(a)(5), (3), (2), and (1) in early August 1989 by instituting said changes.

(d) Section 8(a)(5), (3), and (1) by thereafter retracting said changes.

(e) Section 8(a)(3) and (1) in August and November 1989 by warning, suspending, discharging employee Jim Jacketta, and by classifying certain incidents involving Jacketta as ''chargeable.''

(f) Section 8(a)(3) and (1) in January 1990 by reprimanding employee Ron McQuiston, and by classifying an accident involving McQuiston as ''chargeable.''

(g) Section 8(a)(1) between early May and late August 1989 by numerous instances of verbal conduct by various of its management personnel.

An election in Case 27–RC–6962 was held on August 3, 1989, among the Employer's truckdrivers, mechanics, parts employees, and welders. It derived from a petition filed by the Union on May 11, 1989, and a stipulated consent election agreement approved by the Regional Director on June 8. The tally was 13 votes for the Union and 23 against, with 2 challenged ballots.

On August 10, the Union filed 14 objections to the Employer's preelection conduct, seven of which it later withdrew.

On October 27, the Regional Director issued his report on objections, order directing hearing, and order of consolidation, in which he concluded that the remaining objections ''raise substantial and material issues of fact which can best be resolved after the conduct of a hearing''; observed that the investigation of the objections revealed evidence of objectionable conduct in addition to that raised by the objections, which also ''raise substantial a nd material issues of fact . . . [requiring] . . . the conduct of a hearing''; and, noting that the allegedly objectionable conduct corresponds with certain of the allegations of misconduct set forth in the complaint herein, directed that these matters be consolidated for purposes of hearing before and decision and report on objections by an administrative law judge.

I. JURISDICTION/LABOR ORGANIZATION

The Employer, located in West Jordan, Utah, is engaged in waste pickup and disposal in greater Salt Lake City. The complaint alleges, the answer admits, and I find that it is an employer engaged in and affecting commerce within Section 2(2), (6), and (7) of the Act.

The parties also agree and I find that the Union is a labor organization within Section 2(5) of the Act.

II. THE EMPLOYER'S 10(B) DEFENSE

A. *The Employer's Position*

The Employer asserts in its answer, as affirmative defenses:

> The allegations of violations of 8(a)(5) of the . . . Complaint which are based on the Respondent's alleged refusal to recognize and to bargain with the Union . . . from May 8, 1989, to the present are barred by the six month statute of limitations contained in Section 10(b) of the Act.
>
> The allegations of violations of 8(a)(2) and 8(a)(3) of the . . . . Complaint which are based on Respondent's

[1] May 22–25 and 30–31; June 1; and August 13 and 14.

[2] The complaint bases the Employer's bargaining obligation on *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969), and its progeny.

> alleged forming and dominating employee committees since on or about July 7, 1989, and the allegation that Respondent promised, implemented and withheld benefits through such committees, on or about July 25, 1988, are barred by the six month statute of limitations contained in Section 10(b) of the Act.

The Employer moved at the outset of the trial that I dismiss the subject 8(a)(2), (3), and (5) allegations on 10(b) grounds, and placed in evidence a written supporting argument. I reserved ruling. The Employer adheres to that position in its posttrial brief.

B. *Facts*

The Union filed its original charge in Case 27–CA–10940 on June 14, 1989. It alleged that the Employer violated Section 8(a)(1) and (3) as follows:

> On or about May 11, 1989, two Labor Relation individuals, Tom Tucker and Ron Keith, from corporate, held meetings with all drivers at the West Jordan facility and did make statements to the employees that if they voted the union in . . . they would lose their benefits.
>
> Rick Peters from Corp., when trying to explain the incentive program to the employees, did make the statement that, if the union was voted in, employees would have to work for $3.35 until a contract would be negotiated. Chuck Elmers, Operations Manager, on May 25, 1989, also made the same statement.

This charge, and the others in question, also contained this preprinted language:

> By the above and other acts, the above-named employer has interfered with, restrained, and coerced employees in the exercise of the rights guaranteed in Section 7 of the Act.

The Regional Director issued a complaint in Case 27–CA–10940 on July 28, 1989. It alleged that the Employer violated Section 8(a)(1) by specified verbal acts on May 11, 25, and 28, 1989.

The Union filed an amended charge in Case 27–CA–10940 on October 18, 1989. It alleged that the Employer violated Section 8(a)(1) and (3), elaborating:

> Since on or about May 11, 1989, the Respondent has threatened, questioned, interrogated and coerced employees regarding their union activities and employees' wages and benefits.

The Regional Director issued an amended complaint in Case 27–CA–10940 on October 19, 1989. It repeated the earlier allegations, and alleged that the Employer further violated Section 8(a)(1) by certain verbal acts on July 6, 28, and 30, and August 1 and 2, 1989.

On October 27, 1989, as earlier noted, the Regional Director issued his report on objections, order directing hearing, and Order of Consolidation. The hearing was set for November 28.

The Union filed the charge in Case 27–CA–11130 on November 17, 1989. It alleged that the Employer violated Section 8(a)(1) and (5), adding:

> Regarding Cases 27–CA–6962 & 27–CA–10940 which have been consolidated and ordered to hearing on November 28, 1989, the Teamsters union requests that the hearing be set aside and a bargaining order be issued on the Employer due to the fact that a fair and equitable election cannot be conducted for the employees due to the violations of unfair labor practices that the Employer committe[d] before the last election and is committing since. High management officials are telling employees that under no circumstances are they willing to abide by the results of the NLRB hearing . . . . That they will appeal any and all decisions for the next 3 years to keep the employees without representation.
>
> With the track record of this employer, and the unfair labor practices already committed, it would virtually be impossible for the employees to feel that they could get a fair election.

The Regional Director thereupon issued an order, dated November 20, postponing indefinitely the consolidated hearing set for November 28 in Cases 27–CA–10940 and 27–CA–6962.

The Union filed the charge in Case 27–CA–11141 on November 27, 1989. It alleged that the Employer violated Section 8(a)(1) and (3) by discharging Jim Jacketta on November 20.

The Union filed a second amended charge in Case 27–CA–10940 on March 1, 1990. It alleged that the Employer violated Section 8(a)(1) and (2) and, in addition to repeating the language of the first amended charge, stated that the Employer ''has solicited employee grievances, promised benefits, and then withheld benefits based on the employees' union activities.''

The second amended charge in Case 27–CA–10940 also asserted:

> Since on or about July 7, 1989, the employer has formed and dominated employee committees. The employer has bargained with such committees regarding wages, hours, and working conditions, promised benefits through such committee[s] and then withheld benefits negotiated with the committees based on the Union having filed objections to the conduct of the election.

On March 2, 1990, the Regional Director issued an order consolidating Cases 27–CA–11130 and 27–CA–11141 with Case 27–CA–10940, together with an amended consolidated complaint. This complaint incorporated the 8(a)(1) allegations set forth in the amended complaint in Case 27–CA–10940, and alleged that Respondent committed violated Section 8(a)(1) in sundry other respects in July and September 1989. The new complaint also alleged that the Employer:

(a) Violated Section 8(a)(2) and (1) on about July 6, 1989, by forming and inviting employee participation in various committees, and later in July by negotiating and offering changes in terms and conditions of employment in and as a result of the committee meetings that ensued.

(b) Violated Section 8(a)(3) and (1) on about November 20, 1989, by discharging Jim Jacketta.

(c) Violated Section 8(a)(5) and (1) since about May 8, 1989, by failing to recognize and bargain with the Union.

The Union filed a third amended charge in Case 27–CA–10940 on April 25, 1990, alleging that the Employer violated Section 8(a)(1), (2), and (3). It enlarged on the second amended charge by stating that the Employer not only had promised and withheld, but had ''implemented,'' benefits; and requested that ''all benefits and working conditions negotiated through the committees be implemented.''

Also on April 25, the Union filed a second amended charge in Case 27–CA–11141. It alleged that the Employer violated Section 8(a)(1) and (3) not only by discharging Jacketta, but by issuing a warning to Ron McQuiston on about January 11, 1990.

On April 26, 1990, the acting Regional Director issued a second amended consolidated complaint, which was operative at the onset of the trial. It expanded on its antecedent by alleging that the Employer violated Section 8(a)(3) and (1) in these additional respects:

(a) On about August 3, 1989, by implementing benefits formulated by the committees, and on about September 15, 1989, by withdrawing said benefits.

(b) On about August 28, 1989, by warning Jacketta, and on about November 21, 1989, by reclassifying as ''chargeable'' certain ''incidents'' involving him.

(c) On about January 11, 1990, by reprimanding McQuiston, and on about January 13, 1990, by finding McQuiston chargeable for a January 9 accident.

C. *Conclusion*

1. Section 8(a)(5)

To summarize, the first charge alleging a violation of Section 8(a)(5) was filed on November 17, 1989; and the complaint alleges that the Employer violated that section by failing to recognize and bargain with the Union since the preceding May 8—the date of the Union's demand letter.

Thus, as the Employer contends, the charge indeed was filed more than 6 months before the alleged onset of the misconduct in question. I conclude, even so, that the allegation is not time-barred. As the complaint states, the theory of violation derives from *NLRB v. Gissel Packing Co.*[3]—that is, it presupposes that the Employer's overall course of conduct rendered unlikely a fair second election. All but one instance comprising that allegedly unlawful course of conduct occurred within 6 months of November 17.

Gissel aside, the Employer never acknowledged the May 8 demand letter. The Union consequently did not know the Employer's position concerning the demand until well within the 10(b) period, when the Employer revealed where it stood not by unequivocal statement, but by its conduct generally. The 10(b) period ''commences only when a party has clear and unequivocal notice of a violation of the Act,'' and ''the burden of showing that the charging party was on clear and unequivocal notice of the violation rests on the respondent.''[4]

2. Section 8(a)(2) and (3)

Again summarizing, the subject conduct—the allegedly unlawful formation and domination of employee committees and the changes—occurred in July and August 1989. The first charge alleging 8(a)(2) misconduct was filed more than 6 months later—on March 1, 1990; and the first charge alleging that certain of the same conduct violated 8(a)(3) was not filed until April 25, 1990.[5] However, the charge filed on November 17, 1989, alleging an 8(a)(5) violation and calling for a bargaining order, referred nonspecifically to the Employer's unlawful ''track record'' both before and after the election.

I conclude that the allegations in question are not time-barred. They arose from the same circumstance as the conduct alleged to be unlawful in the November 17 and earlier charges; namely, the organizing drive and the Employer's efforts to resist it. Moreover, although the November 17 charge alleged neither 8(a)(2) nor (3) violation, it called for a bargaining order based on the sum total of the Employer's antiunion behavior—of which the conduct underlying the challenged allegations was an integral part. Those allegations thus satisfy the Board's ''closely related'' test.[6]

III. THE ORGANIZATIONAL ONSET

In November 1988, the parent organization installed Bob Martin as the general manager of its Salt Lake Division—that is, the Employer. Martin testified that ''improv[ing] the profitability of the Division'' was ''foremost on [his] mind.'' To that end, he effected ''benefit reductions'' as of January 1, 1989—imposing a less generous formula for calculating vacation pay and replacing the sick-leave program with an attendance-bonus arrangement. Martin testified that ''the Division was in quite a bit of turmoil due to management turnover,'' as well, one result being that only one of four operations supervisors had any experience; another being that Chuck Elmer, whose style aggravated the employees, became operations manager. Employee morale consequently was ''very poor,'' as Martin put it.

The alleged discriminatees herein, Jim Jacketta and Ron McQuiston, began discussing the desirability of union representation on about May 1, 1989. On May 6, McQuiston hosted a backyard barbecue attended by a number of employees, during which Al Longoria, an organizer for the Union, described the steps leading to recognition and the employees signed union authorization cards. Card solicitation continued after the meeting; and, by letter dated May 8, Longoria advised the Employer that ''a majority of [the] employees . . . have approved the Union as their representative'' and requested recognition.[7]

On May 11, as earlier noted, the Union filed for an election.

From about May 16 to 22, approximately 30 employees signed petitions stating in part that they ''hereby voluntarily signed up for the inplant committee . . . so that [they] can

[3] Cited above in fn. 2.

[4] *A & L Underground*, 302 NLRB 467 (1991).

[5] The first charge alleging a violation of Sec. 8(a)(3) was filed on October 18, 1989. The text of that charge, however, described nothing fitting the allegation.

[6] See generally *Well-Bred Loaf*, 303 NLRB 1016 fn. 1 (1991); *Columbia Portland Cement Co.*, 303 NLRB 880 (1991); *Long Island Day Care Services*, 303 NLRB 112, 113 (1991); *Southwest Distributing Co.*, 301 NLRB 954, 955 (1991); *Nickles Bakery of Indiana*, 296 NLRB 927, 928 (1989); *Overnite Transportation Co.*, 296 NLRB 669 (1989); *Redd-I, Inc.*, 290 NLRB 1115, 1116–1118 (1988). See also *NLRB v. Fant Milling Co.* 360 U.S. 301, 307–309 (1959); *NLRB v. Braswell Motor Freight Lines*, 486 F.2d 743, 746 (7th Cir. 1973).

[7] The Employer did not respond to Longoria's letter.

assist the Union to organize.'' By letter dated June 7, Longoria supplied the Employer with an integrated composite of the petitions, and proposed that it be posted at the terminal so ''there will be no question which employees are assisting the Union.''[8]

IV. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Alleged Misconduct by Tom Tucker on about May 11, 1989*

1. The allegation

Paragraph 5(a) of the complaint alleges that, on about May 11, 1989, Tom Tucker, director of employee relations for the Western States, ''questioned groups of employees regarding what their grievances were, asked the employees why they had not first come to the employee relations office with their grievances, and promised that, if given a chance, Respondent would make things right.'' Paragraph 15 alleges that the Employer thereby violated Section 8(a)(1).

2. The evidence

Tom Tucker, then director of employee relations for the Western States,[9] made a rare visit to the Salt Lake facility on May 10–11, 1989.[10] He conducted meetings with three employee groups—at 4, 5, and 6 a.m.—on May 11. The meetings had a ''twofold'' purpose, he testified—to ''express the company's point of view'' that unions are ''unnecessary'' and to forestall ''any future card signing.''[11] He said ''approximately the same thing'' in each of the meetings, he testified, and the meetings in general ''were pretty much carbon copies'' of one another. He did not use a script.

Tucker testified that he began the meetings by saying he served in an ''employee-relations capacity,'' with one of his ''functions'' being ''problem resolution''; and that his various ensuing remarks included these:

(a) That ''unions are not a necessary ingredient within our corporation.''

(b) That a union ''needed to get employees' signatures'' to organize; and that, ''if card signing or petition signing had been started or was to be started in the future,'' the employees should ''think twice before putting down their signatures, because that can get us going down a path that could lead to an election setup.'' He accordingly ''asked that they just please hold off until we had an opportunity to find out how far things had progressed . . . .''

(c) That, because the Employer had been ''in an unfavorable economic position in Salt Lake,'' the new management team had made ''several changes . . . to try to turn the economic picture to the brighter side,'' and ''many employees were quite upset'' as a result.

This last ''triggered sort of a barrage of employee comments,'' Tucker recalled—''everybody was really upset.'' The employees complained about ''excessive hours'' (''that was probably the main topic of discussion''), about recent ''supervisory demotions back to drivers,'' about ''recent disciplinary action,'' and about ''a lot of different things . . . besides that''—such as changes in sick-leave and vacation-pay policies.

Although admittedly ''a little sympathetic'' toward the complaints,[12] Tucker testified that he ''did not express that anything would be done one way or the other about them.'' He added that, while he could not ''remember precisely'' how he responded to the complaints, his usual approach when dealing with employee complaints is to ''say that . . . [he] would look into it and get back to them, and that would be the extent of a commitment.'' ''Here,'' he averred, ''since we were in a union campaign, my guess is that I was more reserved than that, even.''

Tucker went on:

> I said something to the effect that, depending on whether we were in a union-campaign situation or not, it would have an impact on the company's ability to deal or not to deal with the problems. Knowing that if we were at or close to a petition stage, our hands would be pretty much tied in terms of being able to come in and do unusual sorts of changes, and that if we were in an organizing campaign at all, we would have some limitations put on us, too. And I remember talking with a group and telling them: ''We don't know where we're at, so, therefore, we don't know what, if anything, can be done about these things at the present time. We're just going to have to wait and see what happens.''

In addition to stating at the outset that one of his functions was problem resolution, Tucker summarized the means available to the employees to air their grievances.[13] Even so, he testified, he was ''not positive'' if he invited the complaints or if they were ''spontaneous.'' Later, reading from the complaint, the Employer's counsel asked Tucker if he ''question[ed] groups of employees about what their grievances were.'' Tucker answered:

> I really don't think so. . . . Their comments, their complaints, were pretty much spontaneous. I don't believe I had to ask any question at all. It just kind of flowed forth without any prompting at all.

Yet later, asked a similar question by counsel for the General Counsel, Tucker replied: ''I don't think I did. . . . I think they just let it unload.''

Again tracking the complaint, the Employer's counsel asked Tucker if he promised that the company ''would make things right'' if given a chance. Tucker replied: ''No. Definitely did not do that.'' He presently enlarged:

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[8] The Employer did not post the document.

[9] Subsequently named vice president of human resources for the Western States.

[10] Tucker last visited the facility in December 1987. His office was and is in Palm Desert, California.

[11] Tucker testified: ''I had no information that any cards had been signed at that point.''

[12] Tucker was sympathetic, he explained, ''because a lot of things had happened in a negative sense in a very short period of time''—''that was probably as dramatic [a] picture as I've seen in awhile in terms of the number of changes that have taken place.''

[13] Tucker testified: ''I would have said . . . that we have the ability . . . through our Employee Relations group . . . to help solve problems or morale issues,'' which ''makes a union unnecessary so long as benefits and wages are competitive.'' He also said, he testified, that procedures to deal with employee discontent had ''been in place for a long time''; and that he ''referred to the 800 number'' for employee complaints, to ''opinion surveys,'' and to an existing ''grievance procedure.''

> I don't have a precise recollection of what I said. But I do know that I did not say that the problems would be taken care of. . . . I would have said something to the effect that we have the ability, typically, through our Employee Relations group, and one of its missions being to help solve problems or morale issues.

Several employees testified about one or the other of the meetings. Their accounts matched Tucker's in most respects, the significant difference being the explicitness with which he invited complaints and spoke of solutions. Thus:

(a) Jim Jacketta testified that Tucker asked what the ''problems'' were, and responded to the resulting deluge that the employees ''had some legitimate complaints and . . . they would be addressed.''[14]

(b) Jeff Jones, called by the Employer, testified that Tucker said ''something about they'd try to take care of things if there wasn't too many cards signed.''

(c) Ron McQuiston testified that Tucker ''wanted to know what the problem was,'' and asked the employees to give the Employer ''a chance . . . to fix what is wrong.''

(d) Curtis Smith testified that Tucker ''wanted to know what our problems were and why we were trying to organize a union,'' and appealed to the employees to ''please hold off on signing any more union cards until we get things straightened out.''

(e) Jeffery Woolsey testified that Tucker ''asked us what our problems was and what our bitches was''; then said the Employer would ''straighten everything out'' if the employees would ''give [it] a chance first.''

3. Conclusion

I find that Tucker expressly invited the employees to voice their grievances. He equivocated when asked about it, and the overwhelming weight of evidence otherwise—the employees' testimony and the fact that he listened sympathetically to the complaints—leaves scant doubt that he did.

I find, as well, that Tucker held out the ''carrot'' of relief, at least by implication, if the organizational ferment were to subside. He not only invited the complaints, but he told the employees his position entailed ''problem resolution'' and described the available mechanisms ''to help solve problems or morale issues,'' he asked the employees to ''hold off'' signing cards so the Employer could ''find out how far things had progressed,'' and he said the Employer's ''ability to deal or not to deal with the problems'' would depend on ''whether we were in a union-campaign situation or not.'' Further, when asked if he promised solutions, he again equivocated, professing lack of ''precise recollection,''[15] whereas the employee witnesses testified convincingly that he did.

I conclude that the Employer, through Tucker, violated Section 8(a)(1) substantially as alleged by promising to remedy the employees' complaints if they rejected the Union.[16]

B. *The Alleged Misconduct by Chuck Elmer on about May 25, 1989*

1. The allegation

Paragraph 5(b) of the complaint alleges that, on about May 25, 1989, Chuck Elmer, operations manager, ''questioned an employee about what he was going to do if the Union got in, and threatened the employee with a reduction in wages and benefits until everything was negotiated, if the Union were to get in.'' Paragraph 15 alleges that the Employer thereby violated Section 8(a)(1).

2. The evidence

On about May 25, 1989, Chuck Elmer, operations manager at the time, called Curtis Smith to the office, ostensibly to propose Smith's reassignment. Smith said he opposed the change because it would mean less money.

With that, Smith testified, Elmer ''started going on about the Union.'' Smith elaborated:

> He [Elmer] says he knows a little about the Union. He was involved in a union. He told me I was only guaranteed 3.35 an hour. I would have no benefits until everything was negotiated if the Union was voted in.

The federally mandated minimum hourly wage was then $3.35.

Elmer went on, according to Smith, that, if the Employer ''had to close their doors,'' management personnel would still have jobs, ''but us drivers won't''; that ''basically [unions] were no good''; that a union ''broke them down'' when Elmer worked for another firm (Laidlaw); that ''unions do that to companies, force them to close down''; that ''all of [the Employer's] drivers would be out of a job if Waste Management was going to close the doors''; and that ''we could take a loss of wages or we could get more wages'' with a union, but employees ''usually have to give up something for something.''

Smith's recital continued:

> He [Elmer] told me, he says, what are you going to do if the Union is voted in? You are only guaranteed 3.35 an hour and you lose everything. No benefits or nothing until everything is negotiated. He just said you have nothing until everything is negotiated.

Smith testified that the conversation progressively ''heated up,'' and that Elmer knew that he was ''a union supporter.''[17]

Elmer, led by the Employer's counsel, denied telling Smith ''that, if the Union got in . . . his wages would be reduced,'' that ''his wages would go back to minimum wage

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[14] Jacketta testified that one of the complaints concerned the imposition on the employees of a uniform-rental fee, that the Employer shortly provided new uniforms, and that the employees ''never heard any more about uniform rental.''

[15] Even Tucker's self-serving postulates—that he commonly said, in answer to employee complaints, that he ''would look into it and get back to'' the employee, and that he ''would have said . . . we have the ability . . . to help solve problems or morale issues''—suggest that he promised relief.

[16] E.g., *Pennsy Supply*, 295 NLRB 324, 325 (1989); *Massachusetts Coastal Seafoods*, 293 NLRB 496, 514 (1989); *L. M. Berry & Co.*, 266 NLRB 47, 54 (1983); *Borg-Warner*, 229 NLRB 1149, 1152–1153 (1977); *Uarco Inc.*, 216 NLRB 1, 1–2 (1974).

[17] Smith wore a union hat and buttons at work. He testified that his wife also was active—''very much so''—in support of the Union.

if the Union were to win the election,'' or that ''he would lose benefits if the Union were to win the election.''

3. Conclusions

Smith's account was convincingly detailed, and he impressed me as a sincere and competent witness. Elmer's perfunctory, lawyer-led denials were hollow by comparison. I therefore credit Smith that the exchange transpired much as he described it.

I conclude that the Employer, through Elmer, violated Section 8(a)(1) as alleged by saying in effect that the employees would lose existing wages and benefits, with restoration dependent upon negotiation, should the Union win the election.[18]

I also conclude that Elmer's remarks about closure and job loss, although not specifically alleged to be unlawful, additionally violated Section 8(a)(1).[19] Extracting from *NLRB v. Gissel Packing Co.*,[20] an employer properly can

> make a prediction as to the precise effect 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 . . . .

Elmer's remarks fell well short of that standard.[21]

C. *The Alleged Misconduct by Rick Peters on about May 28, 1989*

1. The allegation

Paragraph 5(c) of the complaint alleges that, on about May 28, 1989, Rick Peters, regional productivity compensation manager, ''questioned various drivers about why they wanted a union, and threatened the employees with a reduction in wages and a loss of benefits if the Union were to get in.'' Paragraph 15 alleges that the Employer thereby violated Section 8(a)(1).

2. The evidence

Rick Peters, regional productivity compensation manager, visited the Salt Lake facility ''seven, ten times'' in the spring and summer of 1989. His office is in Denver, Colorado. He described himself as ''an internal consultant,'' his role being to ''figure out ways to improve the operations, routing, anything that . . . is going to improve the productivity of the division.'' ''The first thing I do when I go to a location,'' he testified, ''is get on the routes and get some input from employees, what they see as problems.''

Jim Jacketta testified that he and Peters had a conversation in the drivers' room in ''the latter part of May'' in which he asked Peters how the wages and benefits at the parent organization's unionized operations compared with those at Salt Lake City. Peters presently remarked, per Jacketta, that those matters ''are all put on the table'' in collective bargaining, and that:

> [I]f you get the Union in, all you are guaranteed is minimum wage and all you are going to get. You could lose all your benefits until they're negotiated for.

Jacketta's account continued:

> I didn't understand whether I heard him correctly, so I asked him to repeat it, which he did. . . . He said, ''You know, if you get the Union in, the only thing you have got is minimum wage. You are going to lose all your benefits until they're negotiated for.''

Jacketta later specified that Peters said ''wages would be 3.35 during negotiations.''

Jacketta testified that, within a month following this exchange, as Peters rode with him, Peters said that another division of the parent organization had defeated—''kicked their butts''—the home local of Teamsters President Jackie Presser, and that the Employer ''would risk unfair labor charges to keep the Union out.''

Peters testified that he could not ''recall any specific conversation'' with Jacketta in the drivers' room, much less one ''relative to the Union.'' He added that, while he ''had a lot of discussions . . . in the drivers room,'' they generally concerned ''how did things go that day.'' Moreover, he averred, he would not have made the drivers' room remarks attributed to him by Jacketta ''because I wouldn't say anything I know is not true.'' He explained that, based on his ''pretty good knowledge of . . . what goes on during a negotiations process,'' he knows that, ''even if we were to have been unionized, things remain as they are until the outcome of those negotiations.''

Peters acknowledged that he ''might have'' ridden with Jacketta twice. He did not speak, however, to Jacketta's assertion that he said the Employer ''would risk unfair labor charges to keep the Union out,'' and he could not remember telling Jacketta that an affiliate had defeated Jackie Presser's ''home local.'' ''I know that in fact did happen,'' he testified, ''but if I had that discussion with Jacketta, I don't remember.''

Jeffery Woolsey testified that Peters asked, while riding with him ''on about May 26th,'' ''how come I thought we needed a union.'' Woolsey replied, as he recalled, that the employees ''needed somebody to speak for [them] because management didn't.'' Woolsey testified, ''I don't think anybody knew at that time that I was for the Union.''

Asked if he ever discussed the union situation when riding with Woolsey, Peters testified:

> I would think probably not, because then most of the type of discussions I had with employees were centering around getting their input as to ways we can improve the operation, and, again, my purpose wasn't there for the campaign. I really couldn't recall unless he brought something up. I would probably think we didn't discuss it at all.

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[18] *Kenrich Petrochemicals*, 294 NLRB 519, 530 (1989); *Plastronics, Inc*., 233 NLRB 155, 156 (1977).

[19] The legality of unalleged conduct can be considered if it is ''related to other allegations in the complaint, fully and fairly litigated, and not prejudicial to respondent.'' *Northern Wire Corp*., 291 NLRB 727, fn. 3 (1988). This situation meets those criteria.

[20] At 395 U.S. 618 (1969).

[21] E.g., *Long-Airdox Co.*, 277 NLRB 1157, 1157–1158 (1985); *Thriftway Supermarket*, 276 NLRB 1450, 1452 (1985); *Scotch & Sirloin Restaurant*, 269 NLRB 436, 440 (1984); *Four Winds Industries*, 228 NLRB 1124, 1124 (1977).

Peters enlarged that he could not recall *ever* engaging Woolsey in discussion ''with regard to the Union.''

Peters denied generally that he ever said ''wages would be reduced to 3.35 an hour'' if the Union got in, or that benefits ''would be taken away until further benefits were bargained for.''

3. Conclusions

Jacketta. Jacketta's rendition of the drivers' room conversation not only contained persuasive detail, but was delivered with conviction. That Peters so spoke gains probability, moreover, from the similarity of the comments attributed to him to those Chuck Elmer made to Smith, just discussed. On the other hand, Peters' professed inability to recall conversing with Jacketta in the drivers' room, together with his purported surmise that he would not have made such comments ''because I wouldn't say anything I know is not true,'' struck me as disingenuous. Jacketta's account of the incident in his truck, not specifically denied by Peters, was eminently believable, as well. I therefore credit Jacketta regarding both conversations.

I conclude that the Employer, through Peters, violated Section 8(a)(1) as alleged by saying in substance that the employees would lose existing wages and benefits ''until they're negotiated for'' should the Union get in.[22]

I conclude, as well, that Peters' statement to Jacketta that the Employer ''would risk unfair labor practices to keep the Union out,'' while not alleged to be improper, conveyed that the organizational effort was a futility, thereby further violating Section 8(a)(1).[23]

Woolsey. Woolsey impressed me as a conscientious and reasonably capable witness. Further, Peters did not explicitly contest his testimony, instead resorting to transparent equivocation (''I really couldn't recall'') and postulation (''I would think probably not'') when asked if he ever discussed the union situation with Woolsey.

I therefore credit Woolsey that Peters asked why he thought the employees needed a union, and conclude that the Employer thereby violated Section 8(a)(1) as alleged.[24]

D. *The Allegedly Unlawful Formation of and Participation in the Committees on and After July 6*

1. The allegations

Paragraphs 5(e), (h), and (k) of the complaint allege that, on about July 6, 1989, Bob Martin, General Manager, formed the Benefits, Safety, and Productivity and Routing Committees and ''solicited employee participation in the formulation of revised terms and conditions of employment.'' Paragraph 8(a) makes substantially the same allegation.

Paragraphs 5(f), (i), and (l) allege that, from July 6 through 25, ''members of management'' participated with each of the three committees ''to formulate revised terms and conditions of employment.'' Paragraph 8(b) contains much the same allegation.

Paragraphs 15 and 16 allege that the Employer in each instance violated Section 8(a)(1) and (2).

2. The evidence

On July 6, 1989, Martin presided over six employee meetings to ''solicit their participation'' in one of three ''employee committees'' he was forming. The committees were to be called Routing and Productivity, Safety, and Benefits. Their purpose, he explained, was to get employee ''input'' so the Employer could correct some past mistakes.[25] Martin asked the employees to indicate their committee preferences on signup sheets.[26]

Martin decided the makeup of the committees, from among those signing up, following the July 6 meetings. By letter to each volunteer dated July 10, he identified those chosen and announced the times and places of the first meetings. The letter thanked everyone for ''volunteering to participate,'' and stated:

> Your thoughts and ideas are important to me and necessary for us to improve our operation so that we may all grow and prosper together.

The safety committee, comprised of 11 employees, first met on July 12. The benefits committee, 11-strong as well, first met on the 13th.

On July 17, Martin provided members of the benefits committee with a summary of the July 13 meeting. Martin testified that it embodied ''the ideas . . . that [he] thought were the best things from the meeting.'' The summary indicates that the meeting dealt with ''proposed programs'' regarding attendance bonuses and vacations, and that two other programs—concerning new-account bonuses and performance recognition—were ''pending for discussion.''

A letter from Martin to the members accompanied the summary. Beyond setting forth the time and place of the next meeting, it ''encourage[d]'' those on the committee ''to dis-

[22] See cases cited above in fn. 18.

[23] Cf., *American Furniture Co.*, 293 NLRB 408, 408 fn. 2 (1989); *Bay Area Mack*, 293 NLRB 125, 133 (1989). As noted above in fn. 19, illegality can attach to unalleged conduct in certain circumstances. I find that those circumstances obtain in this instance.

[24] The test is ''whether under all the circumstances the interrogation reasonably tends to restrain, coerce, or interfere with rights guaranteed by the Act.'' *United Artists Communications*, 280 NLRB 1056, 1056 (1986), citing *Rossmore House*, 269 NLRB 1176, 1177, 1178 fn. 20 (1984). This interrogative incident plainly had that tendency inasmuch as Woolsey was not then an open union proponent (he had signed one of the petitions to be on the in-plant organizing committee, but Longoria had yet to supply the Employer with the integrated composite). Peters gave no assurances against reprisal, and the question served no legitimate business purpose. See generally *Benjamin Coal Co.*, 294 NLRB 572, 572 fn. 2 (1989); *Establishment Industries*, 284 NLRB 121, 123–124 (1987); *Cardivan Co.*, 271 NLRB 563, 567 (1984).

[25] Martin testified that the ''benefit reductions'' instituted as of January 1, ''to put it mildly, didn't go over too well with the employees,'' and he ''wanted to get their input to see . . . what we could do . . . to get morale turned back around.''

[26] Many of the employees signed for more than one committee, necessitating followup meetings at which Martin urged them to pick just one.

cuss'' the summary ''with other employees so that we may also benefit from their thoughts and ideas.'' The letter also stated:

> Your contribution, like those of your fellow employees, are [sic] invaluable to the continued success of our division. The more I work with people like you, the better I feel about our ability to beat our competition and prosper—together—in the future.

On July 17, as well, Martin presented those on the Safety Committee with a summary of that committee's July 12 meeting. Martin testified, ''There were a lot of employee thoughts and ideas that were discussed . . . but these are the ones I felt were good.'' The summary reveals that the meeting concerned the establishment of an Accident/Injury Review Committee—the selection and terms of its members—and the procedures for reviewing accidents and injuries; and stated that the next meeting would address ''Safety Bonus Program & final review of Accident/Injury Review Committee.'' A letter from Martin, nearly identical to that just described to the Benefits Committee, accompanied each summary.

The safety committee next met on July 19. Martin provided the members with a summary and a letter on July 24. The summary indicates that the committee worked out ''modifications'' affecting the accident/injury review committee and formulated a ''proposed safety bonus program,'' and that a ''safety training program'' was ''pending for discussion.'' The letter again ''encourage[d]'' the members ''to discuss'' the summary ''with other employees so that we may also benefit from their thoughts and ideas.'' It further stated:

> We already made tremendous progress in our first two meetings and we are ready to write two final policies. They are concerning the accident and injury review committee and the safety bonus program.

Martin met with the benefits committee a second time on July 20. By letter to the committee members dated July 25, he stated:

> We have made tremendous progress in our first two meetings and we are ready to write two final policies. They are concerning Vacations and the Attendance Bonus Program.
>
> Due to the time it will take me to write the final policies they won't be ready until the end of this week. . . . I will send the policies to you as soon as they're completed.

Meanwhile, Martin apparently divided the Routing and Productivity Committee in two—one for front-load or commercial drivers, one for roll-off or residential drivers. He first met with these groups on about July 20. In letters dated July 25 to the members of both, Martin opened:

> I would like to thank you all for participating in our productivity/routing committee last week. The feedback I received in the meeting has been invaluable and we are in the process of utilizing the information.

The letter to the front-load group added that ''we are in the process of correcting some of the identifiable problems''; and that to the roll-off group also stated:

> I have met with both your supervisor and the dispatcher to discuss the immediate problems and we should have improvement with our routing process.

On July 27, Martin presented all employees with a two-page document entitled ''Proposed Attendance Bonus Program Initiated by: Benefits Committee'' and a five-page document entitled ''Proposed Vacation and Holiday Policy Initiated by: Benefits Committee.'' Martin attached an addendum to each stating, ''This proposed policy if adopted will be started in August 1989 . . . .'' In an accompanying letter to the committee members, Martin noted that the proposals ''are based on everything agreed on by the benefit committee,'' and stated:

> Copies of these policies and addendums will be sent to every employee in the company so they can have a chance to give any final input before we finalize the programs. I encourage you to discuss it with other employees so that we may also benefit from their thoughts and ideas.

And, in a companion letter to the employees at large, Martin stated:

> As you are aware the company has established a benefits committee to review, update and improve some of our current programs. It is the desire of the committee to keep everyone informed as to our progress so that we can benefit from your thoughts and ideas. Attached for your review are the proposed vacation and holiday policy and the attendance policy.
>
> The benefits committee is scheduled to meet again on August 3, 1989, to finalize these two programs. Once again we welcome your input either to me or anyone on the committee so please let us know your thoughts before we meet again.

On July 27, as well, Martin provided all employees with a two-page document entitled ''Proposed Safety Bonus Program Initiated by: Safety Committee,'' and a two-page document outlining the establishment of and guidelines for an accident/injury review committee.[27] As with the proposals of the Benefits Committee, these included addenda stating that the proposals ''if adopted will be started in August 1989.'' Martin's companion letter to the employees was similar to that accompanying the benefits committee's proposals.

The election, as earlier stated, was on August 3.

The benefits committee next met on August 3, after the election. Martin announced during the meeting that the committee's proposals were in effect. The new vacation and holiday policy was implemented as of August 1. The record is unclear whether that was the precise implementation date for the new attendance-bonus policy.

By letter dated August 10, Martin informed the employees that the safety committee and the benefits committee had

[27] Martin testified that the incumbent accident-review committee ''was not effective''; that the one now proposed ''was very different in its form and function.''

''elected to adopt all but one policy as previously issued.'' That not adopted, the letter stated, had to do with ''the Safety Committee policy and it concerns the board members and the election process.'' The letter closed:

> I want to thank you for your input into these new and improved policies. Your contribution, like that of your fellow employees are [sic] invaluable to the continuing success of our division.

Martin dissolved the routing and productivity committee sometime after the election. He explained that the Employer had been cited for ''DOT violations,''[28] that he formed the committee to facilitate compliance with DOT regulations, that he ''adjusted'' the routes aided by the committee's ''thoughts, ideas, and input,'' and that he consequently had ''met [his] objectives in that area.''

The benefits and safety committees continue to function, although Martin reduced their size from 11 to 5 in late October 1989.[29]

Martin denied that he ''negotiate[d] with'' the committees ''as to what changes would be made.'' He amplified:

> There was one-hundred percent my decision. . . . I got input from . . . employees, management, supervisors, everybody. But it was my decision and only my decision.

3. Conclusions

Martin engineered the formation of the committees to get employee ''input'' so the Employer could correct past mistakes—and as part of a transparent effort to undermine employee support of the Union. He dictated committee size and membership, he set meeting times, he presided over the meetings, he decided which of the ideas merited inclusion in the summaries, he alone determined which resulting changes to make, and he dissolved one of the committees when he decided that it had no further use.

I conclude that each of the three committees was a labor organization within Section 2(5) of the Act,[30] and that the summary just stated establishes a classic case of domination and interference violating Section 8(a)(2) and, derivatively, 8(a)(1).[31]

I also conclude that, by avowedly seeking employee ''input'' to correct past mistakes through the committees, the Employer additionally violated Section 8(a)(1) by promising to remedy the employees' complaints to discourage their support of the Union.[32]

Finally, based on my conclusion below that the Employer became obligated to bargain with the Union in May, I conclude that it violated Section 8(a)(5) by forming and dealing with the committees.[33]

E. *The Alleged Misconduct by Bob Martin on about July 6, 1989*

1. The allegation

Paragraph 5(d) of the complaint alleges that, on about July 6, 1989, Martin ''stated that anyone who did not want to participate on the Benefits Committee ought not to be working there because, if they did not want to support the Company, there was no use in working there.'' Paragraph 15 alleges that the Employer thereby violated Section 8(a)(1).

2. The evidence

Ken McQuiston, a roll-off driver at the time, attended one of the July 6 meetings at which Martin solicited volunteers for the three committees. He testified that, when he passed the signup sheet to the next person without signing it, Martin ''looked right at'' him and declared, ''Anybody that don't want to participate in these might not even be working here,'' or words to that effect. McQuiston stated that he signed for two committees as a result.

McQuiston first testified that this meeting occurred about 4 a.m.—that it was ''pretty early and I'm still half asleep.'' He later opined that it was in the afternoon ''because all the drivers was there.''

Martin testified in substance that McQuiston misconstrued what he had said. He elaborated:

> I was talking about my management style, and I said to the employees, I said, ''Any manager or supervisor in this company that does not agree or will work with the same management style that I have doesn't have [a] place here.'' That message was directed to my management staff, not the hourly employees.

3. Conclusion

I find that, although McQuiston had doubts whether the meeting was morning or afternoon, he accurately conveyed the gist of Martin's remarks. The ''spin'' Martin would impart is unduly clever and makes no sense in the context of an employee meeting.

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[28] DOT being the Utah Department of Transportation. The Employer had been cited by it on June 20, 1989, for ''requiring or permitting driver to drive after having been on duty 12 hours'' and ''more than 60 hours in 7 consecutive days.''

[29] Martin's memoranda to the members announcing the makeup of the committees as reduced attributed the change to ''DOT maximum hour requirements.''

[30] E.g., *NLRB v. Cabot Carbon Co.*, 360 U.S. 203 (1959). Sec. 2(5) of the Act defines ''labor organization'' to include ''any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning . . . wages, rates of pay, hours of employment, or conditions of work.'' As the Court points out in *Cabot Carbon Co.*, the term ''dealing with'' in this definition is less limited than ''bargaining with.'' Id. at 210–211. Martin's denial that he ''negotiated with'' the committees thus is of no moment.

[31] *Camvac International*, 288 NLRB 816, 816 fn. 3 (1988); *Jet Spray Corp.*, 271 NLRB 127, 129 (1984); *Predicasts, Inc.*, 270 NLRB 1117, 1121–1122 (1984); *Kurz-Kasch, Inc.*, 239 NLRB 1044, 1045 (1978); *Rennsalaer Polytechnic Institute*, 219 NLRB 712, 712 (1975).

[32] See cases cited above in fn. 16. The Board may find a violation on a theory other than that specifically alleged. *Gordonsville Industries*, 252 NLRB 563, 564 fn. 7 (1980).

[33] E.g., *U.S. Marine Corp.*, 293 NLRB 669, 669 (1989). See also, *Pembrook Management*, 296 NLRB 1226, 1229 (1989); *Camvac International*, 288 NLRB 816, 822 fn. 18 (1988); *Trading Port*, 219 NLRB 298, 302 (1975). Although the complaint does not allege an 8(a)(5) violation in this context, the circumstances justify a finding of violation. See fn. 19, above.

By suggesting a link between committee participation and job security, Martin necessarily pressured McQuiston and all others within earshot to abet an activity that not only violated the Act, as I have concluded, but was designed to defeat the organizational effort. I accordingly conclude that Martin abridged the employees' unquestioned right to refrain from antiunion activities, and that the Employer consequently violated Section 8(a)(1) as alleged.[34]

F. *The Alleged Misconduct by Ken Baylor and Jim Jones on about July 19, 1989*

1. The allegation

Paragraph 5(n) of the complaint alleges that, on about July 19, 1989, Ken Baylor, human resource manager, and Jim Jones, business development manager, ''solicited the grievances of employees and promised to remedy those grievances.'' Paragraph 15 alleges that the Employer thereby violated Section 8(a)(1).

2. The evidence

On the night of July 20, 1989, Ken Baylor, human resource manager, presided over a dinner meeting of 13 or so employee wives at a restaurant in Glendale, near Salt Lake City. Jim Jones, business development manager for the Employer and formerly general manager, accompanied Baylor. Several of the employees—Jim Jacketta, Ron McQuiston, Curtis Smith, and Dale Bullock—had sold Baylor on the idea, reasoning that less would be ''lost in translation'' if management were to explain its position on the several issues of employee concern directly to the wives. The wives made the arrangements, and Baylor and Jones ''just showed up'' at the designated place and time. Baylor ''pick[ed] up the tab.''

The meeting lasted about 3 hours—the first devoted to dining, the rest to substantive matters. By all accounts, Christine (Mrs. Jim) Jacketta and Sandra (Mrs. Ron) McQuiston were the most vocal of the wives. Baylor recalled that Lisa (Mrs. Curtis) Smith was ''somewhat vocal,'' as well. Several of the others also spoke from time to time.

The substantive portion of the meeting began with introductions all around, after which Baylor asked the wives what their ''problems'' were.[35] Mrs. Jacketta redirected the question, asking him, ''Why do you think we're here?'' Baylor replied, ''We understand you have some concerns about your husbands' supervisors and their long hours, and you don't understand the incentive pay, and I guess your insurance claims aren't getting paid or something.''[36] Mrs. Jacketta replied that he had ''missed the point altogether,'' and had ''put his foot in his mouth.'' She enlarged:

> That's not why were here. We're not here about petty things, about supervisors and insurance claims. . . . We're worried about our husbands' well-being and their health and their state of mind.

Mrs. Jacketta went on that the wives were upset by

> a combination of the long hours, the unsafe equipment, the pressure that [their husbands] were feeling, the mind-games that were being played with them.

Baylor replied: ''We're concerned about your husbands, too. What can we do to make it right? . . . Does anyone else have any concerns?'' With that, various of the wives spoke up.[37]

These were foremost among the wives' complaints:

(a) That the ''trucks were poorly maintained and . . . unsafe.'' Carmen (Mrs. Lynn) Cook said her husband, a mechanic, did not have proper repair parts, so was forced to use ''wire and bubblegum''; and that she was ''bothered'' that trucks ''fixed like that'' were given ''the guys to drive.'' Baylor replied that the Employer ''always wanted to maintain the safety of [its] trucks, and that they are regularly maintained according to a maintenance schedule.''

(b) That the employees were required to work excessive hours under the new incentive pay arrangement. Rita (Mrs. Juan) Martinez complained that her children ''didn't know their dad anymore'' because he ''left for work when the kids were in bed, and he came home from work after the kids had been in bed.'' Baylor answered that ''this is the type of business which just requires long hours''; that ''everyone in the company works long hours, it's simply not drivers and mechanics.'' He added that he is ''away from home a lot''; indeed, that this was his wife's birthday and he would have to send her flowers. Mrs. Jacketta, echoed by Mrs. McQuiston, responded: ''Well, then pack your bags and go home. We didn't ask you to come here.''

(c) That, with the advent of an answering machine, the wives could not ''get ahold of'' their husbands before office hours. Baylor said he had had no idea this was a problem, and Mrs. McQuiston disclosed that she had ''some secret internal number that she could call and get through.''[38] Respondent posted a direct-line number the next morning.

(d) That the processing of health insurance claims was too slow. Lisa Smith complained that bill collectors were after her because of the delayed payment of a pending claim. Baylor said he would ''look into'' her claim ''and see exactly where it is.''[39] Baylor then stated, more generally, that the employees could give their claims to him if they were having trouble and he would ''make sure'' they received prompt handling.[40]

(e) That the incentive pay arrangement was confusing and demoralizing. One of the wives complained that she could not ''figure it out'' and so could not budget; another, that

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[34] *Midland Transportation Co.*, 304 NLRB 4 (1991); *A-1 Schmedlin Plumbing Co.*, 284 NLRB 1506, 1506 (1987); *Reeves Rubber*, 252 NLRB 134, 142 (1980).

[35] I credit Mrs. McQuiston that Baylor inquired about ''problems.'' This testimony was not refuted, and fits plausibly with surrounding developments.

[36] Mrs. Jacketta and Mrs. McQuiston both testified that Baylor cited specific problem areas. He testified that he did not. I credit the two wives, who came across as witnesses of utmost sincerity and competence.

[37] The foregoing derives largely from Mrs. Jacketta's detailed and convincing account. Except as noted in the preceding footnote, it corresponds in substance with that of Baylor and Mrs. McQuiston.

[38] Respondent apparently had informed the employees of this number some months earlier.

[39] Baylor justified, ''That's part of my responsibilities.''

[40] Mrs. Jacketta and Mrs. McQuiston testified convincingly and without contradiction that Baylor made this offer.

it was hard on ''the men's mental state'' because they were ''trying to meet a time quota and they're being told at the end of the week by their paycheck that they weren't productive.'' Baylor said Respondent was ''working on the incentive program . . . to make it better.''

(f) That the Employer no longer gave the employees fresh Thanksgiving turkeys or Christmas hams. Baylor promised in reply that Respondent would get the employees ''some turkeys and hams.''[41]

(g) That the husbands apparently could not wear their own, rather than official company, T-shirts as part of their summer uniform. Mrs. Smith commented that her husband had been ''chewed out'' for wearing an unofficial T-shirt, and asked if he could wear a his own gray shirt the next day, that being the color of the official uniform. Baylor replied that he ''was sure that would be okay''; that ''there wouldn't be a problem.''

(h) That the wives had no place at the terminal to wait for their husbands. Marty (Mrs. Jim) Nunnally complained that she had to wait in the car, whereas, ''at the old building,'' the wives could wait in the breakroom. Baylor responded:

> I don't think that will be a problem. You come on up and we'll have a coffee cup for you and you can have a cup of coffee while you're waiting for Jim.

At some point in the meeting, Jones offered to be a ''go-between'' carrying employee complaints to management for resolution. His testimony:

> I said . . . that if they felt they needed someone like that, that I would do it if they felt maybe the supervisors weren't answering their questions as good as they should or something. I would help out in that way.

Jones further stated, as Mrs. Jacketta credibly recalled:

> I know all your husbands. I can personally relate to them. Let them come to me. Let me take their concerns to management, because . . . you can't get anywhere with the Union. It builds walls.

As the meeting wound down, Baylor said that the Employer ''would bargain hard'' should the Union get in, and asked what the wives would do if their husbands ''had to go on strike.'' Mrs. McQuiston replied that she would ''pack up [her] kids and go out and picket with [her] husband.'' Some of the wives declared that their husbands ''would not continue working . . . unless they had a collective-bargaining agreement,'' and that they ''would go on strike . . . if they didn't get exactly what they wanted in that . . . agreement.'' Mrs. Jacketta then asked Baylor, ''And what would you do then?'' He answered, ''We would continue to service our customers, regardless of whether or not there was a strike''; and Mrs. Jacketta came back, ''Do you mean to tell me that you would starve our families by bringing in people to do their jobs?'' Baylor rejoined, ''Well, my intent certainly isn't to starve your families, but I certainly intend to service the customers.''

At meeting's end, Baylor asked: ''Have I taken care of all your concerns? Have I heard everything? Have we taken care of some things tonight?'' Mrs. McQuiston answered: ''No. The Union's not in yet. It's not been resolved. It's not been taken care of.''[42]

Baylor denied—''absolutely not''—that he promised to remedy grievances the wives had raised. He admittedly had a notepad, but, apart from jotting the wives' names, assertedly ''did not take notes during the meeting.'' He brought the note-pad, he explained, because he ''didn't want to appear cavalier.''[43]

Jones likewise denied that he or Baylor ''promise[d] to fix anything.'' His more particular testimony suggested otherwise, however, and contradicted Baylor's claim that the notepad was only a prop. Thus, beyond admittedly offering himself as a go-between, Jones testified:

> Probably the biggest comment . . . that was used was that we would look into the concerns and try to find answers, was more or less the way we approached it. . . . A lot of the questions were directed at Ken and he did make some notes of things that he would look into, and I don't recall what they were. . . . When the question was asked that maybe he [Baylor] didn't have the answer for, he would make a note of some sort to remind himself to look into that particular situation.[44]

Sherry Lynn (Mrs. Dale) Bullock, called by the Employer, testified that, ''the wives were upset'' in the parking lot after the meeting, ''because . . . they felt like it was a waste of time, nothing had been promised, nothing had been accomplished.''[45]

By letter to wives dated July 21, Baylor thanked them for meeting with him and Jones ''to discuss our mutual concerns,'' and added:

> While it was most disappointing to hear about the difficulties you have experienced in the past, I am confident of our ability to work together to resolve these matters and restore Salt Lake to the type of Company in which you and your families may once again be proud.

The letter closed:

> Please do not hesitate to contact me if you have any other questions, or if I may be of further assistance to you.

3. Conclusion

The overwhelming weight of evidence eliminates all doubt that Baylor—and Jones to a lesser extent—invited the wives' complaints and held out the prospect of relief, the purpose being to engender good-will in anticipation of the election. Thus:

[41] True to Baylor's word, each employee received a fresh turkey the following Thanksgiving and a certificate for a ham at Christmas.

[42] Crediting Mrs. Jacketta's convincing testimony, which was corroborated in substance by Mrs. McQuiston.

[43] Baylor was sensitive to appearances, he testified, because Jeffery Woolsey recently had faulted the seeming indifference of a supervisor who jotted an employee complaint on a paper towel.

[44] Addressing Jones' testimony that he had taken notes, Baylor testified that Jones was ''not in a position . . . to see what I was writing, . . . nor did I ever expose them to him.''

[45] Dale Bullock signed a union card, but later opposed the Union.

(a) Baylor began the substantive portion of the meeting by asking what the problems were and what the Employer could do ''to make it right,'' after which he and Jones listened solicitously as the wives besieged them with grievances.

(b) Baylor responded to the complaint about insurance claims by proposing that the employees give their claims to him and he would ''make sure'' they received prompt handling; to the complaint about the incentive-pay arrangement, that the Employer was ''working on the incentive program . . . to make it better''; to the complaint about holiday turkeys and hams, that the employees would get ''some turkeys and hams''; to the T-shirt complaint, that it ''would be okay'' if Curtis Smith wore his own; and, to the complaint that the wives had no place to wait for their husbands, that they could wait in the terminal and ''we'll have a coffee cup for you.''

(c) Jones offered to be a ''go-between'' carrying employee complaints to management for resolution, adding in that context: ''[Y]ou can't get anywhere with the Union. It builds walls.''

(d) By Jones' admission, Baylor responded to the complaints by saying ''we would look into the concerns and try to find answers.''

(e) Baylor made entries on his note-pad during the meeting, creating the appearance, at least, that he was recording the wives' complaints.[46]

(f) At meeting's end, Baylor asked: ''Have I taken care of all your concerns? Have I heard everything? Have we taken care of some things tonight?''

(g) In his next-day letter to the wives, Baylor expressed confidence in ''our ability to work together to resolve these matters,'' and urged them ''to contact'' him if they had ''other questions'' or if he could be ''of further assistance.''

I conclude that the Employer, through Baylor and Jones, violated Section 8(a)(1) as alleged by promising to remedy the wives'—and by implication their husbands'—complaints in the hope of blunting their support of the Union.[47]

G. *The Alleged Misconduct by Bob Martin on about July 28, 1989*

1. The allegation

Paragraph 5(o) of the complaint alleges that, on about July 28, 1989, Martin ''questioned an employee regarding his union activities and/or sympathies.'' Paragraph 15 alleges that the Employer thereby violated Section 8(a)(1).

2. The evidence

The Friday before the election, riding together, Martin and Dave Snow, an operations supervisor, spoke with some of the residential drivers on their routes. Martin's ''main objective'' admittedly was to campaign in anticipation of the election. He and Snow never before had done this.

One of the drivers, Patrick Gonsalves, testified that Martin and Snow ''pulled up behind'' him as he was ''picking up garbage,'' whereupon Martin asked him, ''With this union deal, we got your support?'' Gonsalves replied, as he recalled, ''Yes, you got my support.''

Martin testified that he and Snow ''got out and talked to'' Gonsalves''; that Snow asked Gonsalves ''how the route was going and normal, typical questions a supervisor should ask his driver''; and that he, Martin, said to Gonsalves, ''I'd like to have your support in the election.'' Martin added, ''I think he said that I would have it.'' Martin testified that his words with Gonsalves were ''very brief''; that Snow ''took up most of the minutes.''[48]

Martin testified that he had like encounters with drivers Mark Mierra and Doug Gerber, asking them ''for their support on the union issue.'' He denied asking anyone ''how they were going to vote.''

3. Conclusion

I credit Gonsalves that Martin asked if the Employer had his support, and that he replied, ''Yes, you got my support''; rather than Martin that he simply asked for Gonsalves' support. Gonsalves, although casual in manner, came across as a witness of sincerity and cognition, while Martin seemed disposed once again to impart a self-serving ''spin.''

I conclude that, by questioning Gonsalves in this fashion, Martin violated Section 8(a)(1) as alleged. Although Gonsalves was a known union adherent, the surrounding circumstances—Martin's never before having sought him out on his route, Martin's failure to accompany the question with assurances against reprisal, and the absence of a valid business purpose for the question—imparted a coercive taint.[49]

H. *The Alleged Misconduct by Dave Snow on about July 28, 1989*

1. The allegation

Paragraph 5(p) of the complaint alleges that, on about July 28, 1989, Dave Snow, operations supervisor, ''interrogated an employee regarding his union activities and/or sympathies.'' Paragraph 15 alleges that the Employer thereby violated Section 8(a)(1).

2. The evidence

Patrick Gonsalves testified that, ''probably about [an] hour and a half'' after the Martin incident just described, Snow ''cornered [him] on the route,'' leading to this:

> He says if I vote no, he is the supervisor, and he will take care of me. He says . . . he will put his job on the line. He says the Company can do good for me. He

[46] I credit Jones—and the probabilities inherent in the situation—over Baylor's denial that he took notes. Baylor in this and some other instances came across as a witness of expedience rather than probity. But, even if he had not taken notes, only nurturing that illusion to avoid seeming ''cavalier,'' the wives' perception would have been the same.

[47] See citations above in fn. 16.

[48] Snow's testimony conflicted with Martin's in certain fundamental respects. Thus, he testified that he could not recall Martin's getting out of the car, that Martin said nothing to Gonsalves, and that his and Martin's purpose was ''just to check on the guys . . . and see how the guys were doing.''

[49] See, in addition to the comments and citations above in fn. 24, *Establishment Industries*, 284 NLRB 121, 123–124 (1987); *Pony Express Courier Corp.*, 283 NLRB 868, 868 (1987); *Bates Nitewear Co.*, 283 NLRB 1128, 1128 (1987); *Fimco Co.*, 282 NLRB 653, 654 (1987); *Sunnyvale Medical Clinic*, 277 NLRB 1217, 1217–1218 (1985).

> says, if I go, he can put his job on the line and he can go. So I said okay. He says, all I want you to do is vote no. So I tell him I'll vote no.

Gonsalves testified that Snow did not ask him if he was going to vote no.

Snow, while recalling that he and Martin saw Gonsalves on his route, professedly could not remember talking to Gonsalves later that day. He denied—''I don't believe so, no''—discussing the pending election with Gonsalves, and denied telling Gonsalves later that day or anytime that ''good things could happen to him'' if he voted for Respondent.

3. Conclusion

Gonsalves, as I have noted, ''came across as a witness of sincerity and cognition.'' Snow, on the other hand, was singularly unconvincing.[50] I therefore credit Gonsalves' account, and conclude that the Employer, through Snow, violated Section 8(a)(1) by promising him unspecified benefits for voting against the Union.[51]

I. *The Alleged Misconduct by Ken Baylor on about July 30 and August 2, 1989*

1. The allegation

Paragraph 5(q) of the complaint alleges that, on about July 30 and August 2, 1989, Baylor ''interrogated an employee regarding his union activities and/or sympathies.'' Paragraph 15 alleges that the Employer thereby violated Section 8(a)(1).

2. The evidence

The employees had a picnic in a public park the Saturday before the election. During the picnic, someone called for a show of hands of those voting for Union. Patrick Gonsalves was among those raising their hands.

At work soon after, according to Gonsalves, Baylor asked why he had raised his hand when he previously had said he would vote no, and he answered:

> I say, well . . . that Saturday I had a bike race, and it was a long race. I was pretty hammered, and I had a few beers after the race, and I was pretty well polluted. So I raised my hand to anything.

Baylor denied—''absolutely not''—that he interrogated any employee about his union activities or sympathies as alleged. More specifically, he denied asking Gonsalves about the show of hands at the picnic. He expanded that ''the results'' of that poll ''were well advertised'' and much discussed at work,[52] that ''you didn't have to ask anybody how they voted,'' that he knew how Gonsalves had voted, and that he had known ''for weeks'' that Gonsalves was prounion and was not surprised that he would raise his hand.

Gonsalves testified that he had another conversation with Baylor ''a day or two'' later, shortly ''before the vote.'' His testimony:

> He asked me how I liked the Company, you know. . . . I said, ''Well, the Company is okay.'' . . . I says the only thing I don't like, I say they recognize Gerber as a—he got the driver-of-the-month award. I says . . . I had no wrecks, no nothing. I says . . . I think I should get it. And he said, ''Well, we'll see what we can do.''

Baylor testified that, ''towards the end of the campaign,'' incidental to a conversation with Gonsalves about his car-restoration hobby, he said he would ''be glad when'' the union campaign ''is over'' and asked Gonsalves ''if he had any questions about anything that we had been discussing in the meetings that we had been holding with employees.'' Gonsalves said he ''did not have any questions about those things,'' Baylor recalled, but then complained about being ''overlooked for the employee of the month.'' Baylor did not describe his response to this complaint.

Gonsalves was named August driver of the month.

3. Conclusions

As I have indicated, Gonsalves impressed me as a forthright and competent witness, whereas Baylor seemed more intent on gaining an advantage than promoting the truth when it served the Employer's purpose. I therefore credit Gonsalves' version of the first of the above encounters.

So doing, I conclude that Baylor violated Section 8(a)(1) as alleged by confronting Gonsalves about raising his hand when previously he had said he would vote no.[53] The combination of Baylor's failure to include an assurance against reprisal, his accusatory tenor (that Gonsalves had broken his word), the underlying implication that Gonsalves had been under surveillance, and the lack of a valid business purpose gave the question an impermissibly coercive thrust.[54]

Regarding the second encounter, I do not see unlawful interrogation as alleged. An amalgamation of the two accounts warrants the inference, however, that Baylor invited Gonsalves to express whatever complaints he had; that, when Gonsalves complained of being bypassed as driver-of-the-month, Baylor promised and shortly effected redress; and that Baylor's purpose in doing this was to lure Gonsalves away from the Union. I conclude that the Employer, by this conduct, violated Section 8(a)(1).[55]

J. *The Alleged Misconduct by Jack Cassari about August 1, 1989*

1. The allegations

Paragraphs 5(r), (s), and (x) of the complaint allege that, on about August 1, 1989, Jack Cassari, director of human resources, told employees that ''the Company would have an

[50] Because of both Snow's demeanor and the conflicts between his and Martin's testimony noted above in footnote 48, which betray Snow's see-no-evil tendencies.

[51] While the complaint alleges unlawful interrogation rather than a promise of benefit, a finding of violation on the latter basis is warranted. See fn. 19, above.

[52] The outcome of the picnic vote, Baylor testified, was ''the talk of the town.''

[53] Baylor presumably was alluding to the incidents just described in which Martin and then Snow elicited from Gonsalves on his route that he would vote for the Employer.

[54] See generally the comments and citations in fns. 24 and 49, above.

[55] See citations above in fn. 16. This conduct warrants a finding despite the absence of a specific allegation. See fn. 19, above.

incentive program with or without a union''; that ''the incentive program would go on as it currently exists'' even if the Union won the election and the employees ''could go out the door . . . if they did not like it''; that ''sick leave would not be negotiable . . . if the Union got in''; and that the Employer ''would shut the doors . . . if the Union got in.'' Paragraph 15 alleges that the Employer in each instance violated Section 8(a)(1).

2. The evidence

The Employer's director of human resources, Jack Cassari, visited the Salt Lake City facility in late July and again on August 1 ''in connection with'' the union campaign. His office is in Oakbrook, Illinois. His duties include being the Employer's chief collective-bargaining negotiator. He testified that he spoke to four groups of employees during the first visit, and that, while he attended employee meetings during the second, he said nothing.

Ron McQuiston tape-recorded Cassari's remarks at the meeting of commercial drivers. A transcript of that tape, in evidence, reads:[56]

> I guess there's some critical issues you guys should be aware of. Number one is that this division will have an incentive program. We'll have an incentive program with or without a union. That is the bottom line. We will have an incentive program. Under the current situation, we're making some progress. We're working with you on it. Hopefully some adjustments will be made, but after Thursday if we have a union in here we'll be bargaining in the incentive program and [it will][57] go in as it currently exists without much thought or discussion to any more flexibility.
>
> Seniority, in all our contracts basically, what seniority will mean, the only time seniority's going to come into play is when skill and ability and experience are equal. . . . We will have a managements-rights clause in the contract that will cover everything. We will have in that contract everything we need to run this division as efficiently and productively as we possibly can. . . . [T]here's been a lot of progress made, these committee meetings and the committee sessions are making a lot of progress. . . . I suggest you give them the opportunity to conclude and get it back on track, back as to where it was.
>
> I can assure you that I've[58] not put any sick leave in any contract that I've been negotiating. That's number one. Number two, as far as vacation pay is concerned, as far as our contracts are concerned, you're looking for vacation pay of 40 hours. I know those are issues that brought this whole thing to light. . . . [B]ut when we get to sit down with the Union, all those are cost measures that we're gonna to take into consideration before we sign any type of an agreement. You're making progress, you've caught our attention, as I said to you earlier last week, take advantage of it and make sure we work this thing out before they make any serious mistakes till next Thursday.
>
> So I'm saying, you've got our attention, you've made a lot of good progress, you're about ready to put the Humpty-Dumpty back together again. Don't let him fall off. . . . [Y]ou can rest assured that . . . we're never gonna let these things happen again. That's a commitment we made . . . . I can assure you . . . that things fell apart here a few months ago. We made commitments . . . that those things won't happen again. Okay?

Douglas Gerber, who attended one of the meetings not taped,[59] testified that Cassari said to his group, among other things:

> He said, ''If the Union came in, . . . we don't need this business in Salt Lake City. . . . [W]e just close the doors. If you don't like it, don't let it kick you in the butt on the way out.'' He said, ''We'd just stay with Portalet and Modular.''[60]

Cassari did not deny this.[61]

3. Conclusions

By the totality of his remarks in the taped meeting[62]—that the Employer would ''have an incentive program with or without a union''; that the incentive program would ''go in as it currently exists''; that any contract would have a management-rights clause ''that will cover everything''; and that, while he realized that unhappiness over the sick-leave and vacation-pay takeaways triggered the organizational ferment, he had never ''put any sick leave in any contract'' and the calculation of vacation pay would stay put—Cassari conveyed the unmistakable impression that union representation would be a futility. I conclude that the Employer consequently violated Section 8(a)(1) substantially as alleged in this regard.[63]

Further, by repeatedly citing progress made by the committees and beseeching the employees to continue building on that progress, Cassari tacitly promised to remedy complaints if the employees rejected the Union. I conclude that this also violated Section 8(a)(1).[64]

Finally, crediting Gerber's uncontroverted testimony, I conclude that Cassari violated Section 8(a)(1) much as al-

[56] The General Counsel and the Employer both introduced transcripts. With one duly noted exception, I adopt the Employer's, which generally is the cleaner of the two.

[57] The Employer's transcript reads ''then we'll''; the General Counsel's, ''it will.'' Given the surrounding context, I agree with the General Counsel that Cassari more likely said ''it will.''

[58] The General Counsel contends, based on his transcript, that Cassari said ''I'll'' rather than ''I've.'' Either is compatible with the surrounding context. I therefore will adhere to the Employer's transcript in this regard.

[59] The meeting of commercial drivers, taped by McQuiston, preceded that for residential drivers, attended by Gerber.

[60] Apart from its primary function, collecting waste, the Employer's Salt Lake operation provides portable toilets in the name of Portalet and rents and sells modular trailers under the style of Modular of Salt Lake. Portalet and Modular employ about eight people.

[61] Cassari, called by counsel for the General Counsel as an adverse witness, testified before Gerber and was not recalled.

[62] And presumably in the other meetings, as well.

[63] *American Furniture Co.*, 293 NLRB 408, 408 fn. 2 (1989); *Bay Area Mack*, 293 NLRB 125, 133 (1989); *Camvac International*, 288 NLRB 816, 820 (1989).

[64] See citations above in fn. 16. Although not specifically alleged, this conduct warrants a finding. See fn. 19, above.

leged by raising the prospect of closure and job loss should the employees bring in the Union.[65]

K. *The Allegedly Unlawful Announcement on about July 25 and Institution on about August 3 of New Terms and Conditions of Employment*

1. The allegations

Paragraphs 5(g), (j), and (m) of the complaint allege that, on about July 25, the Employer ''announced that'' each of the three committees ''had formulated new terms and conditions of employment which would be implemented after the scheduled August 3, 1989, election.'' Paragraph 8(c) makes substantially the same allegation. Paragraphs 15 and 16 allege that the Employer in each instance violated Section 8(a)(1) and (2).

Paragraph 5(t) of the complaint alleges that, on about August 3, 1989, Bob Martin ''told employees that the benefits formulated by the Benefits Committee, Safety Committee, and Productivity and Routing Committee had been put into effect.'' Paragraph 15 alleges that the Employer thereby violated Section 8(a)(1).

Paragraph 6(d) alleges that, on about August 3, the Employer ''implemented the benefit plans formulated through'' the three committees. Paragraph 13(b) alleges that the Employer did this ''without notice to or bargaining with the Union.'' Paragraphs 17 and 18 allege that the Employer thereby violated Section 8(a)(1), (3), and (5).

2. The evidence

To summarize:

On July 27, Martin presented the employees with documents entitled ''Proposed Attendance Bonus Program Initiated by: Benefits Committee'' and ''Proposed Vacation and Holiday Policy Initiated by: Benefits Committee''; and attached an addendum to each stating, ''This proposed policy if adopted will be started in August 1989 . . . .'' In a companion letter to the employees, Martin stated that ''the benefits committee is scheduled to meet again on August 3, 1989, to finalize these two programs.''

On July 27, as well, Martin provided the employees with a document entitled ''Proposed Safety Bonus Program Initiated by: Safety Committee'' and one outlining the establishment of and guidelines for an Accident/Injury Review Committee. These likewise included addenda stating that the proposals ''if adopted will be started in August 1989.'' Martin's companion letter to the employees was similar to that accompanying the Benefits Committee's proposals.

On August 3, following the election, Martin announced to the Benefits Committee that its proposals were in effect; and he informed all the employees by letter dated August 10—the very date the Union filed its objections concerning the election—that the Safety Committee and the Benefits Committee had ''elected to adopt all but one policy as previously issued.''

About the same time, Martin adjusted the drivers' routes after conferring with the two groups comprising the Routing and Productivity Committee.

Needless to say, the Employer made these several changes without first notifying or conferring with the Union.

3. Conclusion

The conduct just described contained promises and grants of benefit, and flowed from that regarding the committees that I already have concluded violated Section 8(a)(1), (2), and (5). I conclude that this conduct, like that from which it emanated, perforce also violated 8(a)(1), (2), and (5).

I find, in addition, that the Employer implemented the changes because of and to dampen the employees' union ardor, and therefore conclude that said implementation violated Section 8(a)(3), as well.

L. *The Allegedly Unlawful Withdrawal of Benefits on about September 15*

1. The allegations

Paragraph 6(e) of the complaint alleges that, on about September 15, 1989, the Employer ''withdrew the benefits'' it had unlawfully instituted on about August 3. Paragraph 13(b) alleges that it did this ''without notice to or bargaining with the Union.'' Paragraphs 17 and 18 allege that the Employer thereby violated Section 8(a)(1), (3), and (5).

2. The evidence

After the Union filed its objections, the Employer aborted the recently-instituted changes arising out of the safety and benefits committees—a development that Martin announced to the employees on August 25.[66] It did this because of the objections, on the advice of counsel.

Again, the Employer did this without first notifying or conferring with the Union.

3. Conclusions

I conclude that the Employer, by retracting the changes because objections had been filed, necessarily violated Section 8(a)(3) and (1). I also conclude, based on the Employer's outstanding obligation to bargain with the Union, that it violated 8(a)(5) by taking this action without first giving the Union a chance to bargain.

M. *The Alleged Misconduct by Bob Martin on about August 25, 1989*

1. The Allegations

Paragraphs 5(u)–(w) of the complaint allege that, on about August 25, 1989, Martin ''announced to employees that the policies formulated by the benefits committee, safety committee, and productivity and routing committee could not be put into effect because the Union had filed objections to the election''; ''polled employees concerning their awareness of the Union's objections to the election''; and ''solicited employees to have the Union withdraw its election objections

[65] Even had Cassari refuted Gerber, I would be disinclined to believe him. His contempt for the oath is revealed by comparing his testimony with the transcript of the tape, which did not surface until later in the trial. Cassari testified, in stark conflict with the tape: ''I never mentioned the word 'committee' once in my meetings. . . . I knew absolutely nothing about what the committees were discussing. . . . I knew nothing about the committees. . . . I mentioned nothing about committees during my meetings with these employees.''

[66] Of which more later.

so the benefits formulated by the benefits committee, safety committee, and productivity and routing committee could be implemented.''

Paragraph 15 alleges that the Employer in each instance violated Section 8(a)(1).

2. The evidence

As previously noted, the Union filed its objections on August 10. On August 25, Martin held a series of employee meetings, during which he:

(a) Announced that, because of the objections, ''the benefits discussed in the committees couldn't be put into effect.''[67]

(b) Asked which of the employees knew about the objections, prompting Jim Jacketta, Ron McQuiston, and Kevin Love to raise their hands.[68]

(c) Stated: ''If you have any pull with the Union, I suggest that you go down and see if you can get these objections dropped, so I can put these benefits in.''

Martin testified with regard to the objections:

> It was kind of an emotional issue with me because we'd worked so hard and we had things going, and I had to stop everything and take away people's pay . . . .

3. Conclusions

Martin's announcement that the benefits ''couldn't be put into effect'' because of the objections and his urging that those with ''pull'' try to get the objections ''dropped'' so he could ''put these benefits in'' unavoidably restrained the employees in the exercise of their statutory right to a fair election through the objections process. I conclude, therefore, that the Employer violated Section 8(a)(1) by each of these statements.[69]

Martin's call for a show of hands or similar indication regarding knowledge of the objections was not directed solely to known union adherents, was sandwiched between the two unlawful remarks just discussed, was not accompanied by assurances against reprisal, and had no imaginable legitimacy. In view of these circumstances, I conclude that the Employer, by this incident of interrogation, again violated Section 8(a)(1).[70]

N. *The Alleged Discrimination Against Jim Jacketta in August and November 1989 and Against Ron McQuiston in January 1990*

1. The allegations

Paragraph 6(a) of the complaint alleges that, on about August 28, 1989, the Employer ''issued a written warning and suspension to its employee Jim Jacketta.'' Paragraph 6(b) alleges that, on about November 20, 1989, the Employer discharged Jacketta and since has refused to reinstate him. Paragraph 6(c) alleges that, on about November 21, 1989, the Employer ''classified incidents which had involved Jim Jacketta on May 15, 1989, August 23, 1989, and November 17, 1989, as chargeable.''

Paragraph 6(f) of the complaint alleges that, on about January 11, 1990, the Employer ''issued its employee Ron McQuiston a written reprimand for insubordination.'' Paragraph 6(g) alleges that, on about January 13, 1990, the Employer ''found Ron McQuiston chargeable for a January 9, 1990, accident.''

Paragraph 17 alleges that the Employer in each instance violated Section 8(a)(3) and (1).

2. Background evidence

Jacketta was employed by the Employer from November 1986 until discharged on November 20, 1989. He was a commercial driver except for a 3-month period—from December 1988 to March 1989—when he was a supervisor.[71] He previously had his own trash-hauling business, which he sold to the Employer.

McQuiston has been a front-load driver for the Employer since 1978.

Jacketta and McQuiston were the most conspicuously prounion of the employees. Dave Peck, operations manager since October 1989 and maintenance manager before that, perceived them to be the ''instigators'' of the organizational drive. They had ''several conversations'' concerning the need for representation in late April and early May. That led to the May 6 barbecue at McQuiston's, during which the Union's Longoria explained the organizational process and they and a number of their coworkers signed authorization cards. They thereafter solicited the signatures of other coworkers on both cards and petitions, and distributed prounion handbills in the Employer's parking lot

Gary Goff, an operations supervisor, recalled Jacketta's telling him, in May or June, that he should

> let Bob Martin and everybody else know that he was the Number One man, that if they pointed any fingers, to point them at Jim Jacketta, because he was the man that was doing all the organizing, and he was the man that wanted the Union in.

Following the July 20 meeting of the benefits committee, on which Jacketta served, Martin asked him if he ''was ready to join his team.'' Jacketta answered that he thought Martin ''was going in the right direction.'' At about that same time, Jacketta testified, he and McQuiston were ''getting a lot of pressure'' from coworkers to ''back off the

[67] Martin elaborated: ''I told them that . . . the filing of the objections . . . put us right back in the same mode as we were prior to the vote and, legally, we were not able to put [the changes] in at this time. We just had to wait until it was resolved.''

[68] Ron McQuiston testified that Martin called for a show of hands. Martin denied this. Regardless, Martin plainly was seeking a response of that sort. Thus, he testified that one of his purposes was ''so other employees would know who was aware of'' the objections, another being that he ''wanted to just get an impression of what was going on out there.'' He also testified that he ''probably didn't'' ask this of the mechanics because he ''knew nobody would raise their hand in that group.''

[69] E.g., *Josten Concrete Products Co.*, 295 NLRB 1029 (1989).

[70] See generally the comments and citations in fns. 24 and 49, above.

[71] Jacketta reverted to driving at the Employer's request.

Union'' because the Employer ''was giving them what they wanted.'' Jacketta and McQuiston consequently considered dropping the campaign, but ''decided that [they] had to continue.'' Jacketta reported this to Martin ''the next week at the fuel island.'' Jacketta's account:

> Mr. Martin walked up to me and asked me, he said, ''I thought you was ready to join the team,'' and I says, ''I'd like to believe you, Bob, but I can't.'' His statement from that was, ''What's the matter, don't you think I'm for real?'' I said, ''No, Bob, I don't.'' He looked at me and said, ''Too bad,'' turned around and walked back into the building.

After the next meeting of the benefits committee, on August 3 following the election, Martin told Jacketta and Robert O'Neal that he knew ''pretty much which way [they] voted''; that he wanted them to know he was ''for real'' and the things he had been working on with the committees ''would be put into effect''; and that he ''hoped to work with [them], not against [them], in the future.''

In the election's aftermath, Jacketta and McQuiston discussed with Longoria whether the Union should file objections, deciding it should. On August 25, as previously set forth, Martin held employee meetings in which he asked which of the employees knew about the objections, prompting Jacketta, McQuiston, and Kevin Love to raise their hands; then appealed to those having ''pull'' with the Union to ''see if you can get these objections dropped'' so the ''benefits'' worked out by the committees could be reinstituted. This, as Martin put it, was ''kind of an emotional issue with'' him.

Within a month after the election, Goff told Craig Taul, a mechanic and a personal friend, that Martin had said supervision ''would be watching the people they knew were for the Union''; that accidents ''that was chargeable would be charged''; and that ''they would be 'down the road.'''[72]

Hal Lafeen, another operations supervisor, asked Jacketta in January 1989 if he had ''heard of any union activity.'' Jacketta, then a supervisor, said he had not. That night, Ross Hoefling, then operations manager, asked Jacketta if he ''knew anybody had went to the Union,'' and Jacketta again said no. Later that night, Lafeen told Jacketta he had ''found out it was Juan Martinez that had went to the Union,'' and directed him ''to find any way possible and legal to get rid of Juan Martinez, to fire him.''[73]

Seeking to allay any notion that the Employer might discriminate against employees because of their union sympathies, Martin listed certain ''special favors'' it had extended to known union supporters:

(a) Loaning money to Jeffery Woolsey to pay for his father's burial, which Martin thought was after the election.

(b) Providing $500 to sponsor Robert O'Neal's son as a bicycle racer, which happened ''right during the campaign,'' according to Martin.

(c) Accommodating O'Neal's postelection request for transfer to another city.[74]

(d) Acceding to Mrs. Jacketta's postelection request for sponsorship of a charity volleyball tournament.

(e) Assigning new trucks to Mark Mierra and Douglas Gerber, which ''was certainly [after] we were notified of the union activity,'' Martin testified, although he could not recall if it was ''pre- or post-election.''

(f) Deferring the discharge of Curtis Smith, in early 1990, from the time he was arrested for driving-under-the-influence until his driver's license was suspended about a month later.

(g) Promoting Juan Martinez to a better paying job. Martin testified that he ''believe[d]'' Martinez's promotion ''was post-election''; Jacketta, less tentatively, that it happened in July or August 1989.

3. Jacketta's August 28 warning

a. *The evidence*

On August 23, 1989, as Jacketta backed his truck from an alley, the right extremity of the front bumper hooked a fire hydrant at the alley outlet. This moved the hydrant ''slightly,'' according to Jacketta, but ''there was no water leakage or anything like that.'' The bumper ''was pulled out approximately a foot,'' he estimated. That interfered with the truck's ability to lift the container at the next stop, so he forced the bumper into some semblance of alignment with his feet, enabling function. Jacketta recalled that the bumper was already ''full of dings and nicks,'' but never had been bent in a ''major'' way.[75]

The alley is about 120 feet long,[76] and is flanked on both sides by buildings, which left little clearance for Jacketta's truck.[77] Because of a recent route change, this was only his ''second or third time'' there.

Jacketta submitted an accident report the same day. In it, he described the accident as ''backing up between two buildings right front bumper caught fire hydrant,'' and attributed causation to ''bad suspension; dog tracks to the left bad.''[78]

The next day, August 24, Goff prepared a Supervisor's Accident/Injury Summary which stated:

> Driver was backing up between two building[s]. He caught the right front bumper of the truck on a fire hy-

[72] Taul, avowedly ''never for the Union'' although he had signed a card, described this incident grudgingly and only after being faced with his affidavit. Goff testified that he ''vaguely'' remembered telling Taul that the Employer had ''tightened its enforcement of the accident policy,'' but he denied (in answer to a leading question from the Employer's counsel) indicating ''that the Company was going to watch union supporters more closely with regard to vehicle accidents.'' Goff added: ''I don't remember exactly how it went. . . . I don't remember the specifics on it. . . . I don't recall anything other than that.'' In the circumstances, I have no trouble crediting Taul's affidavit-prompted account.

[73] I credit Jacketta's convincing and uncontroverted testimony that this sequence of events happened as described.

[74] The Employer has not granted O'Neal's subsequent request to return to Salt Lake City

[75] Jacketta testified that Craig Taul eventually—''a good two weeks after the incident''—straightened the bumper by ''back[ing] the service truck into it.''

[76] Goff, who investigated the accident, gave the alley's length as 120 feet. Jacketta, in his testimony, reckoned it to be ''sixty to a hundred feet.''

[77] Jacketta estimated that he had perhaps 6 inches of clearance on either side.

[78] One of the witnesses, Donald Snow, defined dog-tracking as ''where your truck don't go down the road straight. . . . The plane of the front wheel would be . . . removed from the plane of the rear wheel.''

> drant and knoted [sic] it loose. He also hit a cement pole about 3 feet high before he hit the hydrant.
>
> The driver claims that because the truck dog tracks to the left that was the major cause of this accident. But the driver was fully aware of the problem before the accident happen [sic]. The driver should have compensated knowing of the problem with the truck. It wasn't that he was not aware of the problem. We do have spare truck and if the driver was uncomfortable with Truck #200 he should have taken a spare.

Goff's summary stated, in a space captioned ''Actions Taken to Reduce Likelihood of Recurrence'':

> Talk with driver about backing when truck is dog walking like Truck #200 was doing. If he chooses to drive a truck with this problem to be very careful when backing—Disciplinary action taken will be 3 days off without pay. This is the second chargeable accident of a twelve month period. Next chargeable accident will be termination with W.M. of S.L.

On August 28, 1989, Jacketta received a written reprimand signed by Goff and Lafeen. It stated:

> On 8/23/89 you were involved in a backing accident at 3675 S. 300 W. in which you hit a pole and a fire hydrant causing damage to both. The pole and the fire hydrant are approximately 3 feet apart which means you struck the pole first then the hydrant. Also truck #200 received damage to the right front bumper. The accident we feel was preventable. You stated on the accident report that the truck was dog tracking to the left. You were fully aware of this problem before the accident happened. We are confident in your abilities as a professional driver. Taking into consideration all of the above information we feel that the dog tracking condition of your truck should not have and quite likely did not contribute to the accident.
>
> Therefore, it is our conclusion that this accident is chargeable against your safety record. This is your second chargeable accident in a twelve month period and requires disciplinary action of a Final written warning and a 3 day suspension to be given at the companies [sic] discretion. This letter should be considered your final written warning and any further accident will result in termination of your employment with Waste Management of Salt Lake. We recommend that you take any and all precautions to avoid any further problems that would require disciplinary action as stated above.
>
> Again we are confident in your professional abilities and appreciate your didication [sic] to service as an employee of Waste Management of Salt Lake.

Goff testified that, although this accident made Jacketta subject to suspension, the Employer withheld that action because it would not have been ''convenient.''

Jacketta testified that he reported the accident to Goff, by truck radio, ''at the time it happened''; that Goff asked if the hydrant was damaged; and that he said no, ''it wasn't leaking or anything.'' Jacketta recounted that he asked Goff what to do about the bumper, and Goff said to finish the route ''if it's workable'' and that he would ''look at the hydrant'' later.

Concerning the so-called dog-tracking, Jacketta testified that the ''the suspension on the truck had a serious problem''; that it caused the wheels to be ''a good four to six inches'' out of alignment''; and that this ''does not allow you to back up straight—it gives you the impression that you are straight, but you are not.'' Jacketta testified that the truck ''had been in that condition for months,'' and that he had talked to shop personnel about the condition and mentioned it in vehicle condition reports as far back as March or April.

The shop had installed walking beams on the truck ''within a month'' before the hydrant accident in an unsuccessful effort to solve the dog-tracking problem. Jacketta testified that he continued to report the problem ''on the daily VCR reports'' thereafter, that he also told Goff about it, and that Goff said he would ''let the shop know about it.''[79] The condition finally was corrected sometime after the accident, when a worn out bushing rendered the truck inoperable.

Goff investigated the accident in question. He testified that it warranted a reprimand because of ''both'' the damage to the hydrant and the damage to the truck. The Employer's accident file contains no indication, however, of monetary damage to either.

Goff asserted that the hydrant ''had been broken loose,'' then qualified that ''the ground around it'' had been loosened and ''it appeared somewhat'' that a connecting pipe had been broken. He testified that he mentioned the matter to a county official, who said he would send someone ''to check it''; and that he ''never heard back.'' Another driver, Jim Nunnally, caused $576.10 damage to a hydrant in December 1989, yet apparently received no reprimand.

Regarding the bumper, Goff testified that, while he had ''no idea'' how it was straightened or the cost, he is ''sure'' it entailed some expense. Goff could cite no other instance when he issued a written reprimand for bumper damage.

Although Goff denied that ''the majority of trucks . . . have bumper damage,'' the weight of evidence[80] compels the inference that bumper damage is commonplace. Lafeen, Goff's co-signator on the subject reprimand, admitted that it sometimes happens, and that he could not recall ever issuing a reprimand for it. Donald Snow, a supervisor for about 10 years until December 1988, testified that his drivers reported a number of instances—''a dozen, a couple of dozen''—of bent bumpers during that period, and that only one warning resulted—to a recurrent offender.[81] The ''biggest culprit,'' Snow added, ''is probably fire hydrants and fence posts.'' Jeffery Woolsey testified that he bent a bumper in 1988, that Snow told him to ''just bend it back,'' and that the bumper eventually ''just broke in half'' from ''continually being bent

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[79] Jacketta used a ''spare'' truck while his was in the shop. He then reclaimed his regular truck, although aware that the dog-tracking persisted. He preferred it because ''the hydraulics was a lot better.''

[80] Not to mention common sense.

[81] Asked how the bent bumpers were fixed, Snow testified: ''Generally, we just ran them up against a steel post or a telephone pole, something that could push the bumper back into place.'' Snow reverted voluntarily from supervisor to driver. He was discharged in December 1989 after an ice-abetted skid into a carport, causing damages estimated at $8,750. Snow described himself as a ''very open and obvious'' union proponent.

and straightened.'' Jacketta testified that most of the trucks have ''some damage to the bumpers.''

Goff acknowledged that Jacketta's truck had a dog-tracking problem. He would have it, however, that it was ''a few inches'' out of line—''probably two inches at the most''—rather the ''four to six'' estimated by Jacketta. Goff conceded, as well, that Jacketta mentioned the problem in his daily reports.

b. *Conclusions*

Applying the analytical approach prescribed in *Wright Line*,[82] I conclude that the General Counsel has made the requisite prima facie showing that Jacketta's union sympathies and activities were a motivating factor in the Employer's issuing the August 28 warning. I base this conclusion on these considerations:

(a) Jacketta probably was the most actively prounion of the employees, and was so regarded by management. Peck perceived him and McQuiston to be the ''instigators,'' beyond which Jacketta told Goff in May or June that he was ''the Number One man'' and he raised his hand on August 25 when Martin asked who knew about the objections.

(b) The Employer is virulently antiunion. This is disclosed not only by the manifold instances of misconduct chronicled elsewhere herein, but by Lafeen's directing then-supervisor Jacketta in January 1989 to ''find any way possible and legal to get rid of'' Juan Martinez because Martinez reportedly had gone to the Union, and by Goff's postelection disclosure to Taul that supervision ''would be watching the people they knew were for the Union''—that accidents ''that was chargeable would be charged'' and ''they would be down the road.'''

(c) The warning issued the first business day after the meetings in which Martin asked who knew about the objections, then appealed to those having ''pull'' with the Union to try to ''get these objections dropped.''[83]

(d) The objections frustrated Martin greatly; he conceded that the attendant retraction of the newly instituted benefits was ''an emotional issue'' with him. That frustration doubtless was compounded when, despite his pointed appeal to those with ''pull,'' the objections were not ''dropped.''[84]

(e) The underlying accident was of a sort that was not unusual and rarely prompted disciplinary action,[85] indicating that the Employer singled Jacketta out for adverse treatment.

I further conclude that Respondent has not overcome the General Counsel's considerable prima facie showing. The accident was minor, apparently entailing no monetary loss. Jacketta's culpability was mitigated, moreover, by the length and narrowness of the alley, by its newness to his route, and by the dog-tracking problem, which he dutifully had reported time and again.

In addition, Goff's credibility suffered from his effort to hold Jacketta responsible for using an impaired truck, although management was well aware of that situation; by his exaggeration, initially, that the hydrant ''had been broken loose''; by his unsupported and unconvincing claim that the bumper damage entailed some expense; and by his insistence, contradicted by the weight of evidence, that ''the majority of trucks'' did not have bumper damage.

In summary, I conclude that the Employer violated Section 8(a)(3) and (1) as alleged by its August 28 warning of Jacketta and by its attendant determination that Jacketta's August 24 hydrant accident was chargeable.[86]

4. Jacketta's discharge and the alleged classification of incidents as chargeable

a. *The evidence*

About noon on November 17, 1989, as Jacketta attempted to pick up a trash container at a Pic 'N Pac store, one of the forks on his truck poked a hole in the cinder-block wall behind the container. Jacketta described the hole as ''about the size of a silver dollar'' and, ''at the most,'' an inch deep.

Jacketta testified that he immediately called the dispatcher, asking for Goff; that the dispatcher said he did not know Goff's whereabouts; and that he told the dispatcher to make a note that he had called. Jacketta then completed his route; and, upon returning to the terminal about 4:30, told Goff what had happened. Goff said he would ''have a look at it'' over the weekend.

In his accident report, dated November 17, Jacketta stated: ''Container was on a angle against the block wall. I was watching the left fork and the right fork poked through the wall.''

The next Monday, November 20, Goff and Dave Peck, operations manager, spoke with Jacketta in Peck's office. Peck said, as Jacketta recalled, that the Employer would ''have to replace three blocks in that wall,''[87] that this would ''cost the company a hundred fifty dollars,'' that that was ''too much,'' and that he therefore held Jacketta ''chargeable.'' Peck went on, according to Jacketta, that this was Jacketta's third chargeable accident in a year, ''actually four, counting the windshield,'' and that he consequently would ''have to let [Jacketta] go.''

The Employer's published Disciplinary Policy dictates ''termination'' for three ''chargeable'' incidents ''within 12 months.'' Jacketta's previous chargeable accidents, so far as he had been informed, were when he turned into another ve-

[82] In *Wright Line*, 251 NLRB 1083 (1980), the Board stated at 1089:

> [W]e shall henceforth employ the following causation test in all cases alleging violation of Section 8(a)(3) or violations of Section 8(a)(1) turning on employer motivation. First, we shall require that the General Counsel make a *prima facie* showing sufficient to support the inference that protected conduct was a ''motivating factor'' in the employer's decision. Once this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct.

This formulation received Supreme Court approval in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

[83] August 25, the date of the meetings, was a Friday; August 28, the date of the warning, a Monday.

[84] Jacketta also had frustrated Martin in late July when he defied Martin's entreaties that he ''join the team.''

[85] Even when, as in the case of Jim Nunnally, the damages were over $500.

[86] That the Employer bestowed ''special favors'' on union supporters does not weaken this conclusion. Those bestowed before the election might well have been calculated to affect the outcome; those after, to engender goodwill on behalf of the effort to get the objections withdrawn and in the event of an election rerun.

[87] A photograph, in evidence, reveals that the poke was at the junction of three blocks, inflicting some damage on all.

hicle on March 15,[88] and when he hooked the hydrant on August 23.

Jacketta heatedly accused Peck and Goff of being ''out to get'' him. Peck, taking that as an allusion to Jacketta's union activities, angrily rejoined, ''That's not the situation at all.'' Peck presently asked, ''What are you going to do, file charges?'' Jacketta answered, ''You're damn right I'm going to file charges,'' and walked out.

Goff's Accident/Injury Summary, dated November 20, noted that ''driver poked hole in wall with forks,'' and contained this entry: ''Disciplinary Action: Found Chargeable. Employee Terminated.''

On November 21, Peck prepared this memorandum:

> On November 20, 1989 Jim Jacketta was terminated from Waste Management of Salt Lake in accordance with safety policies.
>
> On Friday November 17, 1989 Jim was involved in an accident at Cottonwood Bowl, 5600 South 900 East where he poked a hole through the wall with the forks of his truck while attempting to pull into the container. Additionally, the employee failed to report this accident to his supervisor immediately after it happened, as is required by the rules and regulations of Waste Management of Salt Lake. This was Jim's fifth preventable accident in less than 12 months.
>
> Due to Jim's past and present accident record with Waste Management of Salt Lake he has left us with no alternative but to terminate his employment.

The reporting requirement Peck referred to appears in the Employer's Rules and Regulations. It states:

> Employees shall report all accidents, including damages to customer property or other property, and all personal injuries immediately. Failure to report an accident or damage shall result in termination of employment.

On Jacketta's termination notice, dated November 21 and signed by Goff, two boxes were checked: ''Unacceptable Work Performance'' and ''Rules Violation.'' The notice further stated that Jacketta was ineligible for rehire because of ''to [sic] many accidents,'' and concluded: ''Jim did a good job on his route servicing customers. Only problem to [sic] many accidents.''

The next day, at the terminal to return his uniforms and get his final check, Jacketta asked Peck why the ineligible-for-rehire box had been checked on his termination notice. Peck answered that it was Martin's ''policy that anybody terminated for too many accidents is not eligible for rehire.''

Goff testified that he was not aware that Jacketta left a message with the dispatcher—''Not to my knowledge, no''—but that ''it seems like'' Jacketta said he had called in. Goff also testified that the cost to repair the wall was ''150 to 200 dollars.'' An invoice from Ed Conrad Masonry reveals that it in fact was $53.

Curtis Smith, who as a relief driver was familiar with many routes, testified that wall damage near the garbage bins is common. Smith further testified that, when he poked a hole at Sophie Garcia's in October 1989, Goff responded: ''We won't worry about it unless something is brought up. There are several other holes in the wall.'' Goff conceded that the Employer's ''practice'' is to make repairs only if a customer complains.[89] Yet, he admittedly ''chose to let'' Pic 'N Pac ''know about'' Jacketta's poke.[90]

Smith to the contrary, Goff denied that wall-pokes are ''fairly common''—''it happens, yes, but frequently, no.'' Goff also denied that a driver reported to him poking a hole at Sophie Garcia's, or that he told the driver ''to just forget about it.''

Apart from Jacketta, Goff could not recall citing anyone for a wall poke. Donald Snow, identified earlier as a supervisor from 1978 to 1988, testified that the drivers under him reported ''a dozen or so'' wall pokes in that time, and that this occasioned neither an accident report nor a reprimand.[91] Peck testified, on the other hand, that the Employer has found some wall-pokes to be chargeable. He amplified that Ken McQuiston was charged ''about a month ago,'' but only after damaging a wall a second time within a brief period; and that Donald Snow was charged in December 1989, but for pushing a container into a wall, not damaging it with a fork.[92]

Peck's November 20 remark that Jacketta had ''actually four'' chargeable accidents ''counting the windshield'' referred to an incident on August 22. Jacketta testified that, as he picked up a container and ''leveled the container out, a big, round piece of metal came rolling out and struck the right windshield, breaking it.'' Jacketta reported this to Goff at the landfill, Jacketta recalled, and Goff said, ''Duly noted, you did report it to me.''

When Jacketta finished his route the day of the windshield incident, Goff had him sign a memorandum stating:

> On Tues 8–22–89 you had a part of a transmission roll off a container you were servicing. That broke the right windshield of your truck #200. You brought it to my attention out at the Salt Lake County landfill at about 11:00 A.M. This information will be filed. No further action will be taken unless a similar incident like this occurs again.

Goff said nothing about chargeability.

Jacketta testified that windshield breakage is ''very common'' with front-loader trucks. Lafeen testified that he could recall ''possibly a dozen'' such incidents and that the Employer generally does not impose chargeability in a driver's

[88] He was informed by memorandum dated March 28 from Chuck Elmer, then operations manager.

[89] A photo of Sophie Garcia's pocked wall is in evidence. Goff granted that it has ''several'' unrepaired holes and has been in that condition ''for years,'' the reason being that Sophie Garcia's has never complained.

[90] Goff did not explain why he departed from the practice in this instance.

[91] Echoing Goff, Snow testified that generally, ''until the customer contacted us, no, we wouldn't repair it.'' He qualified, however, that if a poke ''was in an obvious place,'' he sometimes would repair it without contacting the customer. ''We'd buy a little three-pound box of wall patch,'' he recalled, ''and just mix it up and patch it.''

[92] Lafeen, too, cited the writeups of Ken McQuiston and Snow. Lafeen testified that he also wrote up Robin Clontz for a wall-poke, in 1989, later amending that he could not recall if Clontz was found chargeable.

first instance; and neither he nor Goff could recall ever issuing a reprimand for such an occurrence.

The statement in Peck's November 21 memorandum that the November 17 wall-poke was Jacketta's ''fifth preventable accident in less than 12 months'' apparently also contemplated an incident at the landfill the previous May 18. The box on Monty Young's truck ''jumped the hooks'' and became stuck when Young began to unload it. As Jacketta tried to help him restore the box to its proper place, it ''tipped over and off the truck and hit another truck.'' Jacketta later told Goff about this, and asked if he should fill out an accident report. Goff said that was ''not necessary,'' and that seemingly was the end of the matter as concerns Jacketta.[93]

Even so, Goff put a memorandum in Jacketta's personnel file concerning the incident. Dated May 23, it stated, after describing what happened:

> I felt that Jim played a major role in this accident. Since he was in control and operating the heavy equipment that caused the box to tip off. He should have called management and let us handle the situation. Although Monty was found chargeable for this I felt that Jim was also very much at fault in this accident.

Goff did not tell Jacketta about this memorandum. Its purpose, he testified, was to make ''everyone aware that Jim Jacketta was involved in an incident.''

Martin testified that the ''only reason'' for Jacketta's discharge ''was the number of chargeable accidents''; that his performance otherwise was ''satisfactory.'' Martin testified that, upon becoming general manager in late 1988, he ''could tell that [previous management] were very lax . . . about chargeability on accidents,'' and that ''there is no question that [he] enforced the policy more stringent than previous.''[94]

Ron McQuiston told Peck and Lafeen, after Jacketta's discharge, that he thought it ''was not fair.'' Peck responded, ''I hope that you don't think Jim was terminated for union activities,'' and McQuiston said he did. Peck came back that ''it was never [his] intent to let Jim go for union activities''; that it was for ''too many accidents.'' Peck added: ''You don't need to worry, you know, we're not looking to get rid of you. You're one of our better employees.''[95]

Its stated policy notwithstanding, the Employer does not always effect discharge upon a third chargeable accident within a year. It did not discharge Douglas Gerber or Bob Wiechert until their fourth chargeables; and, in a written warning to Ron McQuiston, dated January 12, 1990,[96] stated:

> [I]t is our hope that this will help prevent a third chargeable incident which will, *depending on the severity*, result in termination . . . .[97]

Peck rationalized regarding Gerber that one of the accidents involved ''a very minute injury and we . . . gave Doug a break on that.'' Peck testified that Gerber ''probably'' would not have been discharged even on his fourth, had it not related to ''a very serious accident.'' ''It all depends on the circumstances,'' he observed. As for Wiechert, the Employer states in its brief that his was ''a special circumstance and not in line with Martin's strict-enforcement policy.''

Nor is the Employer's accident-review procedure unfailingly consistent. When Donald Snow lost a turn signal, Goff told him ''not to worry about it''; and, when Curtis Smith tipped a container onto and damaged a nearby vehicle, Goff did not require that he file an accident report. Martin testified that he first learned about these incidents during the present trial, and that they ''should have been reported on accident forms and gone up the chain of command for proper review.''[98]

The Employer is less than consistent, moreover, concerning the eligibility for rehire of those discharged for too many accidents. Whereas Jacketta's termination notice stated that he was not eligible for rehire, Donald Snow's was blank in that regard and Peck admittedly ''sure wanted to try'' to effect Snow's rehire. Similarly, Peck told Gerber that he ''wanted to do what [he] could for him.''

b. *Conclusions*

Again heeding the *Wright Line* approach,[99] I conclude that the General Counsel has made a prima facie demonstration that Jacketta's discharge was improperly motivated. My reasons are these:

(a) Apart from other considerations, the Employer's would-be justification for the discharge—that the November 17 wall-poke was Jacketta's third chargeable accident—presupposes the validity of its holding him chargeable for the hydrant incident. But, as I have concluded, the Employer violated the Act in that instance. The taint necessarily transfers.

(b) The Employer mightily resented Jacketta's union sympathies and activities—as shown by its unlawful discrimination against him in August and, more generally, by Goff's postelection disclosure to Taul that supervision ''would be watching the people they knew were for the Union''; that accidents ''that was chargeable would be charged'' and ''they would be 'down the road.'''

(c) Jacketta's wall-poke, like his August hydrant accident, was of a sort not particularly uncommon and seldom prompting disciplinary action.[100] Indeed, when Curtis Smith re-

[93] Young, however, received a written reprimand.

[94] Martin qualified that he did not impose the greater stringency immediately—''it was a two- to three-month period before my style was firmly in place with the division.'' Jeffery Woolsey testified that he and his fellow drivers complained to Tom Tucker, at one of the May 11 meetings previously described, that ''every little accident that we would have they would charge us for . . . and we didn't think it was fair.''

[95] McQuiston testified that he was ''not really sure'' why Peck said this. Peck testified, ''Ron's a good man. I'd hate to lose him.''

[96] Which warning allegedly was unlawful. That issue is treated later.

[97] Emphasis added.

[98] The Employer states in its brief: ''The essence of the Smith and Snow incidents is the fact that Martin's supervisors did not perfectly carry out his policy of reporting all damages of property and accidents.''

[99] See fn. 82, above.

[100] The two instances cited by Peck in which employees were disciplined for wall damage are distinguishable either in degree (Ken McQuiston) or kind (Snow) from the present. Also, McQuiston's writeup occurred ''about a month'' before Peck testified, raising the

ported a wall-poke to Goff in October 1989, Goff said not to ''worry about it unless something is brought up.''[101] This indicates that the Employer again singled Jacketta out for adverse treatment.

(d) Contrary to the Employer's practice of repairing wall damage only if a customer complains, Goff ''chose to let'' Pic 'N Pac ''know about'' Jacketta's poke. This, too, bespeaks a singling out; that the Employer was building a case against Jacketta.

(e) Goff's determination that Jacketta is ineligible for rehire, when others discharged for too many accidents have been eligible, suggests that Jacketta's accidents are a smokescreen concealing another true reason.

(f) The Employer commonly ignores its policy dictating termination for three chargeable incidents, and its operative criteria for determining what is chargeable (or even reportable) plainly are fraught with subjectivity, as well. Thus, its strict application of the rules against Jacketta also indicates pretext.

I conclude, as well, that the Employer has not surmounted the General Counsel's prima facie case. My thinking:

(a) The accident caused only $53 in damage.

(b) Peck's November 20 remark that Jacketta had ''actually four'' chargeable accidents and his depiction of the wall-poke, in his November 21 memorandum, as Jacketta's ''fifth preventable accident,'' when Jacketta had been charged only twice before (once lawfully), betray a need to inflate Jacketta's transgressions to give the discharge ostensible legitimacy.

(c) The statement in Peck's November 21 memorandum that Jacketta had ''failed to report this accident . . . as is required by the rules and regulations,'' when Jacketta had attempted to reach Goff through the dispatcher, and later told Goff he had, further reveal a need to overstate Jacketta's sins.[102]

(d) As before, Goff hurt his credibility, exaggerating the cost of repair severalfold, self-servingly downplaying the incidence of wall-pokes, and disputing Curtis Smith's credited testimony that he told Smith not to ''worry about it'' when Smith reported a wall-poke. I have commented elsewhere about Martin's poor credibility. His testimony concerning Jacketta's discharge was similarly wanting.[103]

I conclude, in sum, that Jacketta's termination violated Section 8(a)(3) and (1) as alleged. I conclude that the Employer also violated Section 8(a)(3) and (1), as alleged, by treating Jacketta's November 17 wall-poke as chargeable, and by according prejudicial weight to the May 18 landfill and August 22 windshield incidents to bulwark the discharge.

5. McQuiston's warning on about January 11 and the chargeability finding about January 13

a. *The evidence*

On January 9, 1990, about 8:40 a.m., McQuiston's truck hit a car in the parking lot of a 7-Eleven store. His testimony:

> I turned into the 7-Eleven off of 8th South, turned north into their parking lot, went around the fuel island, started turning around it, then the truck just started sliding straight. It wouldn't turn. . . . It slid on ice. . . . I stepped on the brakes, I couldn't stop, and slid into the car.''

McQuiston testified that he was ''about 20 feet'' from the car when he attempted to turn, was going ''about six, seven miles an hour,'' and that he could not see the ice from his vantage point in the cab. The record does not disclose the cost, if any, of the resulting damages.

McQuiston reported the accident by radio, and Goff arrived at the scene about 30 minutes later. McQuiston told him that ice had caused the accident, and Goff remarked: ''Where's the ice? I can't see no ice.'' McQuiston said it had melted ''where the sun has hit,'' he testified, and pointed to ice in the shadows, but Goff ''just insisted that there was no ice.'' At length, ''upset'' by Goff's seeming skepticism, McQuiston exclaimed, ''You had better come down off your high horse.'' Goff rejoined, ''You'll think, 'come down off my high horse','' and McQuiston shot back, ''Don't be cocky with me.''

With that, Goff summoned Lafeen by radio, and McQuiston meanwhile made some entries about the incident in his notebook. Goff, seeing this, asked what he was doing and if he took notes often. McQuiston replied, ''Yeah, I take 'em all the time, every day.'' Goff countered, ''Well, two can play at that game, you know.''

McQuiston calmed down while awaiting Lafeen's arrival, saying to Goff, ''I'm sorry, but you shouldn't come across like that.'' McQuiston could not recall if Goff responded.[104] Also, McQuiston asked Goff, ''Does this mean that it's the end of my job?'' Goff answered, ''No comment.''

When Lafeen arrived, he examined the point of impact on the two vehicles, and McQuiston showed him the remaining ice ''where the sun hadn't quite hit.'' McQuiston recalled that Lafeen ''didn't say much,'' and that he shortly resumed his route.

McQuiston testified that he ''believe[d]'' he mentioned to both Goff and Lafeen that two people had witnessed the accident—''two Mountain Fuel guys''—who by then had left.

The next day, January 10, Goff and Lafeen called McQuiston to the office. He asked if he could bring his brother, Ken, along. They refused, and he ''kind of argued the point,'' saying he had that ''right'' and asking if they had ''something to hide.'' Lafeen replied, ''[M]aybe in a union company you can have a witness, but you can't now.'' That over, Goff or Lafeen read to him and asked that he sign a memorandum captioned: ''Written warning for insubordination at the seen [sic] of an accident.''

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suspicion that it was imposed to give colorable legitimacy to Jacketta's treatment.

[101] I credit Smith, rather than Goff's denial, that Goff said this. Goff had more incentive to lie than did Smith, and in general was not an impressive witness when his interests did not correspond with the truth.

[102] I credit Jacketta's unchallenged testimony that he called in. Goff conceded that ''it seems like'' Jacketta said he called in.

[103] Peck's testimony on the subject was limited, not requiring a credibility assessment.

[104] McQuiston testified that, although he apologized, he did not think his conduct ''out of line.'' Asked by the Employer's counsel why he did it, then, he answered, ''I'm a nice guy.''

Prepared by Goff, the memorandum stated:

> On Tuesday January 9, 1990 I received a radio call from you requesting a supervisor to come to 7–11 at 800 South 900 West at 8:40 AM. You then stated over the radio that you had slid on some ice and hit a car. On arrival I walked around the entire truck on both sides to see where the ice was and could not find any. You were on the phone at this time. When you walked over I asked you where the ice was, at that point you walked toward me in a threatening manor [sic], raised your voice and said don't get arrogant and cocky with me and to come down off my cloud. I said you haven't seen me on a cloud yet. Then I walked away because I could see a confrontation starting to happen. I then called Hal Lafeen to also come out to the accident location because of the situation. While waiting for Hal we were talking and you said you were sorry for the accident and for getting upset.
>
> Ron, this type of behavior cannot be tolerated and if an infraction of this type ever happens again it could result in serious disciplinary action.

McQuiston refused to sign, exclaiming that it ''isn't true,'' that it was ''all in Gary's favor,'' and that the ''only part'' he agreed with ''is that [he] did call [Goff] on the radio to come and investigate the accident when he slid across the ice.'' Goff suggested that he get his ''little notebook out and compare.'' McQuiston refused. Goff called him ''a goddamn liar,'' declaring, ''You did tell me to come down out of the clouds or something.'' McQuiston replied that he ''didn't say nothing about clouds.''

On January 11, in Peck's office, Peck and Goff told McQuiston the accident had been found chargeable. McQuiston protested that ''there was ice there,'' and that he ''had witnesses''—the ''two Mountain Fuel guys,'' whose names he did not then know.

On January 12, Goff presented a memorandum to McQuiston stating that the ''accident has been found to be chargeable against your safety record.'' The document added:

> This accident is your second chargeable accident in a twelve month period and will be treated as such.[105] Therefore, according to the Safety policies of Waste Management of Salt Lake it is required that you receive a final written warning in lieu if disciplinary layoff. . . . We strongly urge you to make every effort to increase your safety awareness. In doing so, it is our hope that this will help prevent a third chargeable incident which will, depending on the severity, result in termination of your employment with Waste Management of Salt Lake.

Lafeen told McQuiston at the time, ''We believe that this [the accident] may have happened because you have a lot on your mind.'' McQuiston took this as an allusion to his union involvement, although Lafeen did not specifically so state.

McQuiston eventually learned the names of the two witnesses, co-partners in Mountain Fuel Company, telling Peck ''about a month'' after the accident. Peck spoke with one of them, Ken Minear, ''probably three to four weeks'' later.[106] Minear said that McQuiston ''was driving very slow and did not seem to be careless.'' Peck prepared this memorandum of his conversation with Minear:

> Parking lot was icy. He said Ron was not speeding just did not allow enough distance as he was turning for the conditions. He also said Ron was driving very slow and did not seem to be careless. It was just one of those things.

Peck did not bother to speak with the other witness—''I accepted the first one and pretty much stayed with the decision that was made.''

Peck testified that the Employer found McQuiston chargeable because ''he did not allow enough time to clear that vehicle. He started sliding and didn't allow himself enough room to recorrect.'' Peck admitted that ''ice was the big problem.'' Asked why that did not exonerate McQuiston, he stated:

> I just felt that the driver was in control of the vehicle. He was the only one in there. He was traveling too fast for existing conditions and not allowing himself enough room to recorrect the situation he was in.

Goff likewise testified that the presence or absence of ice made ''no difference in terms of chargeability.''

In January 1989, the Employer exempted Harold Sucese from chargeability because of ''the icy conditions.'' Peck explained:

> Harold was sitting completely still, just got done dumping a container, and his truck just slid right off the side of the at pavement and hit into a building or something of that nature, it seems. . . . Basically he was sitting still. He wasn't in control of the vehicle at all. . . . [T]he truck just slid right off of where it was sitting.

Sucese's report of the accident reflects that his truck ''slid sideways and into the wall'' as he *began to move forward.*

The Employer held another driver, Donald Snow, chargeable for an ice-related accident—when he slid into a carport in December 1989, causing damages estimated at $8750.[107]

b. *Conclusions*

Once more applying the *Wright Line* analysis, I conclude that the General Counsel has achieved a prima facie case with regard to both the January 10 reprimand and the January 12 finding of chargeability. My reasoning:

(a) With the possible exception of Jacketta, McQuiston was the most ardently prounion of the employees, and was perceived by Peck to be one of the two ''instigators.''

(b) As revealed by its unlawful conduct toward Jacketta, culminating in discharge, the Employer will go to extremes to punish those behind an organizational drive.

[105] McQuiston had been charged in connection with an accident in April 1989. As he described it, he ''was dumping . . . a garbage can and a pallet had went over the top . . . and fell off and . . . hit a car.''

[106] Peck testified that he finally reached Minear ''after several attempts, probably 15 to 20 different times.''

[107] Mentioned above in fn. 81.

(c) By adamantly refusing to entertain McQuiston's claim that the accident was ice-caused, and admitting that ice made ''no difference in terms of chargeability,'' Goff displayed a resolve not only to make a case for chargeability regardless of the realities of the situation, but to goad McQuiston into ostensible ''insubordination.''

(d) By issuing the January 10 reprimand in disregard of McQuiston's intervening apology, Goff again revealed a vindictive resolve.

(e) Peck, by joining in the chargeability determination although acknowledging that ''ice was the big problem,'' and by adhering to that finding despite hearing from a disinterested witness that McQuiston ''was driving very slow and did not seem to be careless,'' likewise exhibited a hostile bias.

(f) The Employer had excused Harold Sucese from chargeability in January, citing similar ''icy conditions.''

I also conclude that the Employer has not overridden the prima facie showing. Regarding the January 10 reprimand, McQuiston's postaccident conduct toward Goff did not amount to insubordination by any objective standard; and, concerning the finding of chargeability, driver-negligence played no discernible part in the accident, the damage apparently was minimal, Peck's attempt to distinguish the Sucese situation from McQuiston's came across as hyper-technical and palpably dishonest, and Goff's credibility, as I have indicated, was singularly unimpressive.

The Employer accordingly violated Section 8(a)(3) and (1) on January 10 by reprimanding McQuiston for supposed insubordination, and on January 12 by finding him chargeable for the ice-related accident.

O. *The Appropriateness of a Bargaining Order Remedy and the Allegedly Unlawful Refusal to Recognize and Bargain*

1. The allegations

Paragraph 13(a) of the complaint alleges that, since about May 8, 1989, the Employer ''has failed and refused to recognize and bargain collectively with the Union as the exclusive collective-bargaining representative'' of certain of its employees. Paragraph 14 alleges that the Employer's several unfair labor practices were

> so serious and substantial in character that the possibility of . . . conducting a fair election by the use of traditional remedies is slight and the employees' sentiments regarding representation, having been expressed through authorization cards, would . . . be protected better by . . . a bargaining order . . . .

Paragraph 18 alleges that the failure to recognize and bargain therefore violated Section 8(a)(5) and (1).

2. The sufficiency of the violations herein to support a bargaining order

Before addressing the other issues in which a bargaining order remedy or an unlawful refusal to recognize and bargain rely, I think it appropriate first to determine if Respondent's misconduct is sufficient, assuming the presence of the other requisites, to support a bargaining order.

The applicable guidelines appear in *NLRB v. Gissel Packing Co.*[108] The Supreme Court in *Gissel* set forth two situations in which bargaining orders are indicated: ''exceptional'' cases fraught with ''outrageous'' and ''pervasive'' unfair labor practices, and certain ''less extraordinary'' cases attended by misconduct that is ''less pervasive'' but nevertheless has a ''tendency to undermine [the Union's] majority strength and impede the [Board's] election processes.''[109] The Court elaborated that the Board, in deciding whether misconduct comes within the latter category, may consider

> the extensiveness of an employer's unfair practices in terms of their past effect on election conditions and the likelihood of their recurrence in the future. If the Board finds that the possibility of erasing the effects of past practices and of ensuring a fair election . . . 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, then such order should issue.[110]

Weighing the appropriateness of a bargaining order remedy under *Gissel*, the Board characterizes unlawful threats of discharge (not to mention discharges themselves) and closure as ''hallmark violations,''[111] with the former ''more likely to destroy election conditions for a lengthier period of time than other unfair labor practices,''[112] and the latter being ''one of the most coercive actions . . . a company can take . . . to influence an election.''[113] The Board also takes the position that an employer's unlawfully promising to redress grievances, forming and dealing with employee committees, and announcing or granting improved terms or conditions comprise a ''course of action'' having ''a strong coercive effect on the employees' freedom of choice . . . eliminat[ing], by unlawful means and tactics, the very reasons for a union's existence.''[114]

The Board has further observed that the ''swiftness and timing'' of an employer's unlawful response after the onset of union activity reduce ''the possibility of erasing the lingering effects of'' that misconduct,[115] and that act also is magnified if the conduct is perpetrated by high officials and ''envelopes a significant number of employees.''[116]

The Employer in the case at hand committed several violations of the hallmark variety. Its course of conduct included sundry other violations, as well, which although of lesser severity, certainly were not inconsequential in their aggregate effect or in combination with the hallmark violations. The violations began the day the Union filed its petition and continued with increasing intensity until the election, some even occurring thereafter; they were perpetrated by the ranking locally based official, Martin, and by high-level officials who

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[108] 395 U.S. 575 (1969).

[109] Id. at 613–614.

[110] Id. at 614–615.

[111] *International Door*, 303 NLRB 582, 584 (1991).

[112] Id. at 583, quoting from *Koons Ford of Annapolis*, 283 NLRB 506, 508 (1986).

[113] *Long-Airdox Co.*, 277 NLRB 1157, 1160 (1985).

[114] *Camvac International*, 288 NLRB 816, 822 (1988).

[115] *Long-Airdox Co.*, supra at 277 NLRB 1160.

[116] *Massachusetts Coastal Seafoods*, 293 NLRB 496, 499 fn. 7 (1989).

had come from afar for the purpose; and they were pervasive in scope.

I conclude, based on the totality of the circumstances, that the possibility of erasing the effects of the Employer's misconduct and conducting a fair election by application of traditional remedies is slight to nonexistent, and that a bargaining order remedy therefore is warranted, assuming the presence of the other requisites to such a remedy.

3. The other requisites

a. *Unit appropriateness*

The Union's demand letter, dated May 8, 1989, requested that the Employer recognize it ''as the bargaining agent . . . for all your employees employed at your Waste Management Facility.'' The Union's election petition, filed May 11, described the unit as ''all drivers, mechanics, welders,'' excluding ''all salesmen, office, clerical, management, guards and supervisors as defined in the Act.'' The Stipulated Election Agreement executed by the parties on June 5 and approved by the Regional Director on June 8, contained this description:

> Included: All refuse drivers, mechanics, parts employees and welders employed by the Employer . . . .
> Excluded: All management employees, salesmen, office clerical employees, guards and supervisors as defined in the Act, and all other employees.

I conclude that, despite the imprecision of its demand letter, the Union's organizational efforts at all times were directed toward the employees in the unit ultimately agreed upon, and that that is an appropriate unit for purposes of the Act.[117]

b. *Majority*[118]

(1) The numbers

The appropriate unit consisted of 42 employees on May 1. The number rose to 43 the week of May 7, then dropped to 42 the week of May 20, to 40 the week of May 28, and to 37 the week of June 4. The *Excelsior* list of unit employees, supplied by the Employer in mid-June, contained 38 names. Some hirings and one termination thereafter occurred, raising the number to about 49 by the end of July.

The General Counsel introduced 37 signed authorization cards. Each is captioned ''Application Blank,'' and states that the signer ''hereby make[s] application for admission to membership and hereby designate[s] the [Union] as my bargaining agency for collective bargaining regarding conditions of employment . . . .'' The signatures on 35 of the cards were duly authenticated by either the signer or the solicitor. The General Counsel has asked me to pass on the authenticity of the other two—ostensibly signed by Randy Jolley and Kenneth Sheets—by comparing the signatures on the cards with their undoubted signatures on W-4 forms. Having done that, I find the card signatures to be authentic.[119]

Twenty-three of the cards are dated May 6. Another, Todd Forman's, was signed on May 6 although erroneously dated May 16. Of the remaining cards, one each is dated May 10, 15, 16, 19, and 21 and July 7; four are dated May 17; and three are dated July 10. Longoria credibly testified that he received 13 signed cards during the May 6 barbecue at McQuiston's; that Sandra (Mrs. Ron) McQuiston delivered another eight to him the following Monday, May 8; and that he had 32 in his custody about June 19, when he compared those signing against the names on the *Excelsior* list.

Some of the cards were dated by Longoria's secretary, who approximated the date of signing, rather than by the signer. Not all of the dates, therefore, reflect the exact date of signing. The record affords no basis for supposing, however, that any date is materially off.[120]

I am satisfied and find that a comfortable majority of the unit employees had signed cards by about May 11, when the Union filed its petition; and that the majority thereafter grew despite the onset of employer misconduct.

(2) Cards specifically challenged by the Employer

(a) *Arguments and evidence*

The Employer, in its brief, specifically challenges the validity of 17 cards. It challenges two, those of Randy Jolley and Kenneth Sheets—for want of signature authentication. As I have just found, they did sign.

The Employer attacks the validity of the remaining 15 cards as follows:

(a) That Dale Bullock was told, before signing, that the purpose was to get ''on a mailing list to receive more information.''

Bullock testified that Jacketta and Ron McQuiston told him that signing ''would just put [him] on a mailing list to receive more information''; that he read a card at that time and said he wanted to talk to his father-in-law about ''the benefits of union membership'' before signing; that he later signed a card, after again reading it, at the union hall; and that he signed because he supported the Union. His support was such that he once hosted an organizing party at his house.

Bullock switched allegiance a ''couple weeks'' before the election, and asked the Union to return his card on election eve.

(b) That Randy Childs was told he would not have to pay a $25 membership fee if he signed.

Called by the Employer, Childs testified that Ron McQuiston told him, when soliciting his signature, that

> if we did go union and I didn't sign it, I would have to pay an initiation fee, but if I'd already signed and it goes to the Union, I'd automatically be in, something to that effect.

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[117] A demand, for that matter, ''is not a necessary predicate to the granting of a bargaining order.'' *Yolo Transport*, 286 NLRB 1087, 1096 fn. 47 (1987). And, should a demand be made, the inappropriateness of the unit description therein renders the demand invalid only if—which is not so in the present case—the description presents a ''substantial deviation'' from that which is appropriate. *Soil Engineering Co*., 269 NLRB 55, 79 (1984).

[118] ''[N]onmajority bargaining orders cannot be considered a remedial option.'' *Gourmet Foods*, 270 NLRB 578, 587 (1984).

[119] The Board accepts authentication by comparison of signatures. E.g., *Lott's Electric Co*., 293 NLRB 297, 312 (1989); *Sarah Neuman Nursing Home*, 270 NLRB 663, 682–683 (1984).

[120] ''[D]ates that appear on authorization cards are presumed valid.'' *Zero Corp.*, 262 NLRB 495, 499 (1982).

Childs testified that McQuiston said the purpose of the card was ''to get a vote in, to see if we could have the Union in there.''

(c) That Richard Cook ''was not told the purpose of the card,'' and did not date it.

Cook testified that Sandra McQuiston took the card to him at his home, that he ''looked it over before [he] signed it,'' and that he could not remember what Mrs. McQuiston said the ''card was for.'' Mrs. McQuiston testified that Cook had asked her to bring a card over, that he signed in her presence on May 8, and that she ''didn't explain the card to him.''

(d) That Todd Forman's card bears a date after the Union's demand, and his reasons for signing contain ''inherent ambiguities.''

Forman testified that he signed May 6 at the McQuiston barbecue; that he, Jacketta, and McQuiston solicited signatures at the homes of coworkers later the same day, their purpose being ''so that we could petition the company to go union''; and that they told those they solicited that the cards were ''to help bring the Union in and that.''

(e) That Leonard Gilley signed ''only to get an election.''

Gilley testified that he signed a card tendered by Jacketta and Ron McQuiston after they had said ''that signing the card was to have the Union represent [him].''

(f) That Patrick Gonsalves did not read his card, and said in a statement obtained by Ken Baylor that Kevin Love had told him, when soliciting his signature, ''that the sole purpose of the card was to get an election.''

Gonsalves testified that he read and signed the card the night of May 6, and that Juan Martinez, accompanied by Love, told him the purpose was ''to be represented by the Union.''

Baylor obtained a statement from Gonsalves in April 1990 which says:

> I did not read the card before I signed it. I understood the card to be only for us to have an election, nothing else. I believe that Kevin Love gave me the union card. He told me that the sole purpose of the card was to get an election.''

Gonsalves testified that, while the statement was accurate ''to a certain extent,'' he ''didn't really take time to read it and consider it and all that good stuff''; that he ''was late'' for a bicycle time-trial that night and was ''in a hurry''; that he ''just wanted to get out of there.''

The Employer offered the statement for impeachment only, and I received it on that basis.

(g) That James Hensley's name was not on the *Excelsior* list, and ''the testimony about the purpose of [his] card is ambiguous.''

Hensley testified that he signed May 6 at the barbecue; that Longoria previously had said that, ''if the majority of the people signed . . . the Union would bargain''; and that Longoria also said he would ''set up the time for us to vote on it . . . if we got enough signatures.'' Hensley received a transfer to Modular of Salt Lake—that is, out of the unit—on about May 22.

(h) That Earl Holt did not date his card, that the record contains no testimony ''with respect to the purpose of the card,'' and that his name was not on the *Excelsior* list.

The Employer hired Holt the week of June 18. He left after about 6 months, but later rejoined the payroll. He testified that he signed his card after reading it ''real carefully,'' then gave it to Mark Mierra on July 7.

(i) That Troy Justet's card bears a date after the demand, and that he was not eligible to vote.

The Employer hired Justet the week of June 11. Mark Mierra testified that Justet returned his signed and dated card to him. It is dated July 10.

(j) That Juan Martinez ''did not read'' his card before signing it, and said, in a statement procured by Ken Baylor, that he ''signed it only to get more information and have an election.''

Martinez testified that he signed at the May 6 barbecue; and that, while he did not read the card, he ''signed it because we wanted to have a union representation.'' Martinez added that he thereafter solicited signatures from others, telling them that

> the card was for the purpose of having legal representation, and for the purpose to see how many people were interested in it, and to see if they come up with enough signatures to have election.

Baylor obtained a statement from Martinez in April 1990 which says:

> I did not read the card. I believed the card was only to get a union election at our company. I have no idea what the card read. I got the card from Al Longoria, the union agent. He said the card was to get more information, too. So, I signed it only to get more information and have an election.

Martinez testified that the statement is inaccurate; that he told Baylor the cards were ''to have an election to have union representation, to see how many people are interested in having union representation.''

I received the statement for impeachment purposes only.

(k) That Mike McNally neither read nor dated his card and signed because of ''peer pressure.''

McNally testified that he signed, but did not date, his card during a Sunday meeting at the union hall, possibly on May 21; that he did not read it; that coworkers previously had solicited him ''three times'' at his home; and that he signed because of ''peer pressure.''

(l) That Ken McQuiston's card was invalidated ''by ambiguities regarding the date it was signed'' and because the record contains no testimony that he read the card.

Longoria testified that Ken McQuiston's was among the 13 cards he obtained at the barbecue.

(m) That Lewis Peck's card is invalid because Longoria told him ''signing was not putting him in the Union, it was just to show support of a vote''; and because someone else dated it.

Peck testified that he signed at the union hall in the ''first part'' of May, after first reading the card and after Longoria had said ''the card was not putting you in the Union, it was just to show support of a vote.'' Peck testified that Longoria said this to a group of ''probably 50 guys,'' not to him personally.

Longoria denied on rebuttal that he ever said the cards ''were solely for the purpose of getting an election.''

(n) That Craig Taul neither read nor dated his card; and that Ron McQuiston said, when soliciting Taul's signature,

that ''it was for no other purpose [than] to get on a mailing list for the Union.''

Taul testified that he signed the card, without reading it, about 4 a.m. on May 8. He enlarged: ''[I]t was dark enough not to read without a light.'' Taul also testified at one point that McQuiston had said the purpose of the cards was ''to see how many people wanted the Union in,'' and at another that the purpose ''was to get on a mailing list and to see how much support there was.''

(o) That Blaine Wallgren ''was never told the purpose of the card and he did not read it.''

Wallgren testified that he signed at his home ''when they first started pushing it''; that he did not read ''all of it''; and that the solicitors—Jacketta, Ron McQuiston, and Curtis Smith—said ''it was just to get enough signatures to have the Union represent [him].''

b. *Conclusions*

The Supreme Court stated in *Gissel*:

> [E]mployees should be bound by the clear language of what they sign unless that language is deliberately and clearly canceled by a union adherent with words calculated to direct the signer to disregard and forget the language above his signature. There is nothing inconsistent in handing an employee a card that says the signer authorizes the union to represent him and then telling him that the card will probably be used first to get an election.[121]

The Board consequently holds that a card is not tainted by a solicitor's saying it would ''let the union come for a vote'' or that it would help get an election.[122] It also deems a solicitor's misrepresentation of no moment if the signer did not rely on it.[123]

Moreover, a card need not be accurately dated—or dated at all—to be valid, provided the approximate signing date can be established by other means;[124] the signer need not have read the card;[125] that the signer may have been induced by peer pressure ''is irrelevant'';[126] and, a demand not being ''a necessary predicate'' to a bargaining order,[127] the date of signing relative to a demand likewise is irrelevant. Finally, that a signer entered the unit after the cutoff date for election eligibility or was omitted from the *Excelsior* list does not negate his/her card.

I conclude, based on the evidence concerning 14 of the 15 cards in question and the operative legal principles, that the Employer has not met its burden of showing invalidating circumstances.[128] Concerning the remaining card, Randy Childs testified that McQuiston raised the prospect that his initiation fee would be waived if he signed. That perhaps invalidated Childs' card under the doctrine of *Savair Mfg. Co.*,[129] although I see no need to pass on that since the one card would not affect the Union's majority.

(3) Conclusion regarding majority

Having found that a majority of the employees had signed cards by about May 11 and that at least 14 of the 15 cards challenged by the Employer are valid, I conclude that the Union on that date had a valid majority, which it thereafter retained.[130]

4. Conclusions regarding a bargaining remedy and the refusal to recognize and bargain

The Union having achieved a valid card majority in an appropriate unit by May 11, and the Employer having embarked upon its course of unlawful conduct that same day, I conclude that a bargaining order remedy is warranted, effective May 11.

I also conclude that the Employer's subsequent disregard of the Union's May 8 demand for recognition and bargaining violated Section 8(a)(5) and (1) as alleged.[131]

CONCLUSIONS OF LAW

1. The Employer's manifold violations of the Act, in combination with the Union's card majority, warrant a bargaining order remedy.

2. The Employer violated Section 8(a)(5) and (1) by failing and refusing to recognize and bargain with the Union after May 11, 1989.

3. The Employer violated Section 8(a)(5), (2), and (1) as follows:

(a) On and after July 6, 1989, by establishing and dealing with the routing and productivity, safety, and benefits committees concerning terms and conditions of employment.

(b) On July 27, 1989, by promulgating and announcing the likely adoption in August of new programs ''initiated by'' the benefits and safety committees.

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[121] 395 U.S. at 606–607. The Court also observed at 608:

> [E]mployees are more likely than not, many months after a card drive . . . to give testimony damaging to the union, particularly where company officials have previously threatened reprisals . . . in violation of Section 8(a)(1). We therefore reject any rule that requires a probe of an employee's subjective motivation as involving an endless and unreliable inquiry.

[122] *299 Lincoln Street*, 292 NLRB 172, 184 (1988); *Horizon Air Services*, 272 NLRB 243, 257–258 (1984); *Gordonsville Industries*, 252 NLRB 563, 565 (1980).

[123] *Photo Drive Up*, 267 NLRB 329, 364 (1983).

[124] *Tall Pines Inn*, 268 NLRB 1392, 1405–1406 (1984); *Atlas Microfilming*, 267 NLRB 682, 693 (1983).

[125] *Hicks Oils*, 293 NLRB 84, 87 (1989).

[126] *Ideal Elevator Corp.*, 295 NLRB 347, 348 (1989).

[127] See fn. 117, above.

[128] ''It is the Respondent who must show clear and convincing evidence of material misrepresentations to invalidate otherwise unambiguous authorization cards . . . .'' *Photo Drive Up*, supra, at 267 NLRB 364. As noted, I received the statements Baylor obtained from Gonsalves and Martinez for impeachment purposes only. Having serious reservations about the procedure Baylor followed to obtain them, I accord them scant impeachment value; and, if they did constitute substantive evidence, I would give them no credence vis-a-vis the two employees' testimony.

[129] *NLRB v. Savair Mfg. Co.*, 414 U.S. 270 (1973).

[130] Three employees—Dale Bullock, Craig Taul, and Blaine Wallgren—sought the return of their cards either shortly before the election or after Martin appealed to the employees to try to get the objections dropped. The Board regards an attempted revocation ''after the onset of the coercive conduct'' to be a result of that conduct and thus ''ineffective.'' *Lott's Electric Co.*, 293 NLRB 297, 312 (1989).

[131] *Yolo Transport*, 286 NLRB 1087, 1097 (1987); *Grandee Beer Distributors*, 247 NLRB 1280, 1280 fn. 5 (1980); *Freehold AMC-Jeep Corp.*, 230 NLRB 903, 903 (1977).

(c) On August 3 and 10, by announcing that the several new programs ''initiated by'' the benefits and safety committees were in effect.

4. The Employer violated Section 8(a)(5), (3), (2), and (1) in early August 1989 by instituting the several new programs ''initiated by'' the benefits and safety committees and by adjusting the drivers' routes after conferring with the routing and productivity committee.

5. The Employer violated Section 8(a)(5), (3), and (1) on about August 25, 1989, by retracting the newly instituted programs ''initiated by'' the benefits and safety committees because the Union filed objections to the election.

6. The Employer violated Section 8(a)(3) and (1) in these respects:

(a) On August 28, 1989, by issuing a written warning to Jim Jacketta, and concomitantly deeming Jacketta's August 24 hydrant accident chargeable, because of his union sympathies and activities.

(b) On November 21, 1989, by discharging Jim Jacketta, and concomitantly treating Jacketta's November 17 wallpoke as chargeable and according prejudicial weight to his May 18 landfill and August 22 windshield incidents, because of his union sympathies and activities.

(c) On January 10, 1990, by issuing a written reprimand to Ron McQuiston, supposedly for insubordination, because of his union sympathies and activities.

(d) On January 12, 1990, by deciding that Ron McQuiston's ice-related accident on January 9 was chargeable because of his union sympathies and activities.

7. The Employer violated Section 8(a)(1) as follows:

(a) On May 11, 1989, when Tom Tucker, director of employee relations for the Western States, promised employees that the Employer would remedy their complaints if they rejected the Union.

(b) On about May 25, 1989, when Chuck Elmer, operations manager, told Curtis Smith he would lose existing wages and benefits, with restoration dependent upon negotiation, should the Union be voted in; and implied to Smith that the Employer would close its doors, costing the employees their jobs, if the Union got in.

(c) In late May 1989, when Rick Peters, regional productivity compensation manager, told Jim Jacketta that the employees would lose existing wages and benefits ''until they're negotiated for'' should the Union get in; and said the Employer ''would risk unfair labor practices to keep the Union out,'' thereby indicating that the organizational effort was a futility.

(d) On about May 26, 1989, when Rick Peters questioned Jeffery Woolsey why he thought the employees needed a union.

(e) On July 6, 1989, when Bob Martin, general manager, impliedly threatened the job security of employees not wishing to participate on the committees then being formed.

(f) On and after July 6, 1989, by promising through the three committees to remedy employee complaints to discourage their support of the Union.

(g) On July 20, 1989, when Ken Baylor, human resource manager, and Jim Jones, Business Development Manager, promised to remedy the complaints of employee wives—and by implication their husbands—to discourage support of the Union.

(h) On about July 28, 1989, when Bob Martin questioned Patrick Gonsalves whether the Employer had his support in the election.

(i) On about July 28, 1989, when Dave Snow, Operations Supervisor, promised Patrick Gonsalves unspecified benefits if he voted against the Union.

(j) On about July 30, when Ken Baylor questioned Patrick Gonsalves why he had raised his hand at a picnic to indicate his support of the Union.

(k) On August 1, 1989, when Jack Cassari, director of human resources, told employees, in substance, that union representation would be a futility; promised that their complaints would be remedied if they rejected the Union; and raised the prospect of closure and job loss if they brought the Union in.

(l) On about August 2, 1989, when Ken Baylor promised to remedy a complaint raised by Patrick Gonsalves to discourage Gonsalves' support of the Union.

(m) On August 25, 1989, when Bob Martin announced that the newly instituted programs emanating from the benefits and safety committees ''couldn't be put into effect'' because the Union had filed objections to the election; asked those with knowledge of the objections to show themselves; and urged those with ''pull'' to try to get the objections ''dropped'' so he could ''put these benefits in.''

REPORT ON OBJECTIONS

The Employer's misconduct warranting a bargaining order remedy, the election of August 3, 1989, in Case 27–CA–6962, should be set aside and the underlying petition dismissed.

REMEDY

The Employer having engaged in sundry unfair labor practices, I will recommend that it cease and desist therefrom and take certain affirmative action to effectuate the policies of the Act.

More particularly, as I have indicated, my recommended Order will direct the Employer to recognize and bargain with the Union, that obligation to be retroactive to May 11, 1989.[132] My recommended Order also will require the Employer to disband the benefits and safety committees; if requested by the Union, to reinstate any or all of the programs growing out of the bnefits and safety committees which were instituted in August 1989, then retracted because of the objections to the election,[133] and, as concerns those programs reinstated, to make the employees whole, with interest, for the monetary equivalent of any loss occasioned by those retractions;[134] if requested by the Union, to restore the routes as they existed before the adjustments made in August 1989; to offer Jim Jacketta reinstatement, and make him whole,

[132] The Employer will begin to satisfy its obligation only when it starts to bargain in good faith with the Union. *Bentson Contracting Co.*, 298 NLRB 199, 201 (1990).

[133] ''It is not the Board's policy to require that unlawfully granted benefits be rescinded . . . .'' *Pembrook Management*, 296 NLRB 1226, 1228 (1989).

[134] The employees' entitlements, if any, are to be calculated in accordance with *Ogle Protection Service*, 183 NLRB 682, 683 (1970). Interest, wherever called for herein, shall be figured in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

with interest, for the loss of earnings and benefits he suffered because of his unlawful discharge;[135] and to rescind the other unlawfully discriminatory actions against Jacketta and Ron McQuiston.

Finally, because of the pervasive and serious nature of the Employer's misconduct, I will include broad remedial language.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[136]

ORDER

The Respondent, Salt Lake Division, a Division of Waste Management, Inc., West Jordan, Utah, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to recognize and bargain with Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO, Local 222 (Union) as the exclusive collective-bargaining representative of its employees in this appropriate unit:

> All refuse drivers, mechanics, parts employees and welders employed by the Employer at its West Jordan, Utah, location, excluding all management employees, salesmen, office clerical employees, guards and supervisors as defined in the Act, and all other employees.

(b) Dominating or interfering with the formation or administration of any employee committee or group constituting a labor organization.

(c) Dealing with any employee committee or group concerning terms and conditions of employment in violation of its obligation to recognize and bargain with the Union.

(d) Announcing and/or effecting changes in terms or conditions of employment without first giving the Union a chance to bargain over them, to discourage employee support of the Union, or because objections to an election have been filed.

(e) Discharging, issuing warnings to, or otherwise discriminating against employees because of their union sympathies or activities.

(f) Promising employees and employee wives that it will remedy their complaints to discourage their support of the Union.

(g) Threatening employees that they will lose existing wages and benefits, with restoration dependent upon negotiations, should the Union be voted in.

(h) Threatening employees that it will close and they will lose jobs if the Union gets in.

(i) Indicating to employees that their efforts to gain union representation are a futility by telling them it will risk unfair labor practices to keep the Union out and that its posture in bargaining would be unyielding on the issues that prompted those efforts.

(j) Coercively interrogating employees regarding their union sympathies.

(k) Threatening the job security of employees not wishing to participate in activities designed to defeat the Union.

(l) Promising unspecified benefits to employees for voting against the Union.

(m) Urging employees with ''pull'' to try to get objections to the election ''dropped'' so that certain benefits can be instituted.

(n) In any other 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) Recognize and, on request, bargain collectively in good faith with the Union as the exclusive bargaining representative of the employees in the above-described unit, said recognition to be retroactive to May 11, 1989; and embody any resulting agreement in a signed document.

(b) Offer Jim Jacketta immediate and full reinstatement to his former job, or if that job no longer exists, to a substantially equivalent job, without prejudice to his seniority or any other rights or privileges; and make him whole as prescribed above in the remedy section for any loss of earnings and benefits suffered as a result of his unlawful discharge.

(c) Disband the benefits and safety committees created in July 1989.

(d) If requested by the Union, reinstate any or all of the programs growing out of the benefits and safety committees which it instituted in August 1989, then retracted because of the objections to the election; and, as concerns those programs reinstated, make the employees whole as prescribed above in the remedy section for any loss occasioned by the retractions.

(e) If requested by the Union, restore the routes as they existed before it adjusted them in August 1989.

(f) Rescind its written warning of August 28, 1989, to Jim Jacketta, as well as its determinations that Jacketta's August 24, 1989, hydrant accident and his November 17, 1989, wallpoke were chargeable, and its treatment of his landfill and windshield incidents on May 18 and August 22, 1989, respectively, as added justification for his discharge.

(g) Rescind its written reprimand of January 10, 1990, to Ron McQuiston, and its January 12, 1990, determination that McQuiston's ice-related accident on January 9 was chargeable.

(h) Remove from its files and destroy any and all writings comprising, documenting, or referring to the several acts of unlawful discrimination against Jim Jacketta and Ron McQuiston; and notify them in writing that this has been done and that those unlawful actions will in no way serve as a ground for future personnel or disciplinary action against them.

(i) Post copies of the attached notice marked ''Appendix.''[137] Copies of the notice, on forms provided by the Regional Director for Region 27, after being signed by the Employer's authorized representative, shall be posted by it im-

[135] Jacketta's entitlement shall be computed as prescribed in *F. W. Woolworth Co*., 90 NLRB 189 (1950).

[136] Any outstanding motions inconsistent with this Order are denied. If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and 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.

[137] 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.''

mediately upon receipt and maintained for 60 consecutive days, in conspicuous places, including all places where notices to employees customarily are posted. The Employer shall take reasonable steps to ensure that the notices are not altered, defaced, or covered by any other material.

(j) 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 election of August 3, 1989, in Case 27–CA–6962 be set aside, and that that case be remanded to the Regional Director for dismissal.

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 representative 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 fail and refuse to recognize and bargain with Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO, Local 222 (Union) as the exclusive collective-bargaining representative of our employees in this appropriate unit:

> All refuse drivers, mechanics, parts employees and welders employed by us at our West Jordan, Utah, location, excluding all management employees, salesmen, office clerical employees, guards and supervisors as defined in the Act, and all other employees.

WE WILL NOT dominate or interfere with the formation or administration of any employee committee or group constituting a labor organization.

WE WILL NOT deal with any employee committee or group concerning terms and conditions of employment in violation of our obligation to recognize and bargain with the Union.

WE WILL NOT announce and/or effect changes in terms or conditions of employment without first giving the Union a chance to bargain over them, to discourage employee support of the Union, or because objections to an election have been filed.

WE WILL NOT discharge, issue warnings to, or otherwise discriminate against employees because of their union sympathies or activities.

WE WILL NOT promise employees or employee wives that we will remedy their complaints to discourage their support of the Union.

WE WILL NOT threaten employees that they will lose existing wages and benefits, with restoration dependent upon negotiations, should the Union be voted in.

WE WILL NOT threaten employees that we will close and they will lose jobs if the Union gets in.

WE WILL NOT indicate to employees that their efforts to gain union representation are a futility by telling them we will risk unfair labor practices to keep the Union out and that our posture in bargaining would be unyielding on the issues that prompted those efforts.

WE WILL NOT coercively interrogate employees regarding their union sympathies.

WE WILL NOT threaten the job security of employees not wishing to participate in activities designed to defeat the Union.

WE WILL NOT promise unspecified benefits to employees for voting against the Union.

WE WILL NOT urge employees with ''pull'' to try to get objections to the election ''dropped'' so that certain benefits can be instituted.

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

WE WILL recognize and, on request, bargain collectively in good faith with the Union as the exclusive bargaining representative of the employees in the above-described unit, said recognition to be retroactive to May 11, 1989; and WE WILL embody any resulting agreement in a signed document.

WE WILL offer Jim Jacketta immediate and full reinstatement to his former job, or, if that job no longer exists, to a substantially equivalent job, without prejudice to his seniority or any other rights or privileges; and WE WILL make him whole for any loss of earnings and benefits suffered as a result of his unlawful discharge.

WE WILL disband the benefits and safety committees created in July 1989.

WE WILL, if requested by the Union, reinstate any or all of the programs growing out of the benefits and safety committees which we instituted in August 1989, then retracted because of the objections to the election; and, as concerns those programs reinstated, WE WILL make the employees whole for any loss occasioned by the retractions.

WE WILL, if requested by the Union, restore the routes as they existed before we adjusted them in August 1989.

WE WILL rescind the written warning of August 28, 1989, to Jim Jacketta, as well as our determinations that Jacketta's August 24, 1989, hydrant accident and his November 17, 1989, wall-poke were chargeable, and our treatment of his landfill and windshield incidents on May 18 and August 22, 1989, respectively, as added justification for his discharge.

WE WILL rescind the written reprimand of January 10, 1990, to Ron McQuiston, and our January 12, 1990, determination that McQuiston's ice-related accident on January 9 was chargeable.

WE WILL remove from our files and destroy any and all writings comprising, documenting, or referring to the several acts of unlawful discrimination against Jim Jacketta and Ron McQuiston; and WE WILL notify them in writing that this has been done and that those unlawful actions will in no way serve as a ground for future personnel or disciplinary action against them.

SALT LAKE DIVISION, A DIVISION OF WASTE MANAGEMENT, INC.