Aldworth Company, Inc. and Dunkin' Donuts Mid-Atlantic Distribution Center, Inc., Joint Employers *and* United Food and Commercial Workers Union Local 1360 a/w United Food and Commercial Workers International Union, AFL–CIO *and* William A. McCorry. Cases 4–CA–27274, 4–CA–27603, 4–CA–27629, 4–CA–27725, 4–CA–27866, 4–RC–19492, and 4–CA–27289

September 30, 2002

DECISION AND ORDER

BY MEMBERS LIEBMAN, COWEN, AND BARTLETT

On April 20, 2000, Administrative Law Judge William G. Kocol issued the attached decision. The Respondents, Aldworth Company and Dunkin' Donuts Mid-Atlantic Distribution Center, each filed exceptions and supporting briefs; the General Counsel filed cross-exceptions, a supporting brief, and a brief in partial support of the judge's decision; the Charging Party-Union filed exceptions and a supporting brief; and Respondent Aldworth filed briefs in answer to the General Counsel's and Charging Party's exceptions.

The National Labor Relations Board has considered the decision and the record in light of exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions as modified and to adopt the recommended Order, as modified and set forth in full below.[2]

Background

Respondent Dunkin' Donuts owns a warehouse in Swedesboro, New Jersey, from which food products are transported to retail outlets in a several-state area. It leases truckdrivers, helpers, and warehouse personnel from Respondent Aldworth to carry out these duties. The events of this case began in the spring of 1998[3] when employees began union organizational efforts. As fully set forth in the judge's decision, upon learning of employees' activities, Respondent Aldworth reacted with counter-organizational efforts directed at the entire work force. By July 28, upon reaching a card majority showing of support, the Union requested, and was denied, recognition from Aldworth. The Union filed a representation petition, and subsequently executed a stipulation with Respondent Aldworth for an election among the drivers and warehouse employees. The September 19 election resulted in 45 ballots for, and 48 against, representation by the Union. The Union filed objections, which were considered in this proceeding with the unfair labor practices.

In his decision, the judge rejected Respondent Aldworth's contention that certain complaint allegations were time-barred under Section 10(b) of the Act. He further found that Respondents Aldworth and Dunkin' Donuts are joint employers of the leased employees, and that they engaged in numerous, repeated, and pervasive violations of Section 8(a)(1) and (3) of the Act. The 8(a)(1) violations included soliciting and promising to redress grievances; promising benefits and improved working conditions on one hand while threatening unfair bargaining tactics, job loss, loss of benefits, discipline, and futility of unionization on the other; asking employees to report union "harassment"; instructing employees to remove union pins and T-shirts; interrogating employees; implementing a revised system of communicating workplace complaints; and tying prounion sentiments to discipline.[4] The 8(a)(3) violations included nine discharges and five suspensions. Based on these unfair labor practices and the Union's demonstrated majority support of the unit employees, the judge concluded that a remedial *Gissel*[5] bargaining order was warranted. Accordingly, the judge also found that the Respondents violated Section 8(a)(5) by declining to recognize and bargain with the Union, and thereafter unilaterally implementing changes in terms and conditions of employment.

We are adopting the judge's decision, with modified rationale or expanded analysis on certain issues.[6] As set

[1] The Respondent and the General Counsel have each 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.

[2] We have modified the judge's recommended order and notice in accordance with our decision in *Ferguson Electric*., 335 NLRB 142 (2001), and *Ishikawa Gasket America, Inc*., 337 NLRB 175 (2001). As noted below, we have also substituted separate orders and notices for Respondent Aldworth and Respondent Dunkin' Donuts.

[3] Dates refer to 1998 unless specified otherwise.

[4] No exceptions were filed to a number of 8(a)(1) findings, including: a mid-August threat of job loss by Supervisor Mann to Mitchell; repeated discriminatory enforcement of the dress code so as to bar employees from wearing union T-shirts and pins; during a mandatory preelection meeting, Aldworth Vice President Roy pointing to Meduri's union pin as the reason he would lose his job; Aldworth supervisors threatening Williams that employees would lose their jobs and suffer other unspecified reprisals; Supervisor Mann threatening freezer employees that selecting union representation would result in less favorable and less flexible working conditions; and Supervisor Fisher interrogating Meduri and telling King that his support for the Union could make him ineligible for a long-established boot allowance.

[5] *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).

[6] Contrary to his colleagues, Member Bartlett would not adopt the judge's finding, in sec. IV,B,1,c. of his decision, that the Respondent unlawfully asked employees to report being harassed or bothered by a union organizer. This alleged violation involves a June 16, 1998 memorandum to employees from Aldworth's executive vice president, Roy. The memo stated that Roy had received several phone calls from concerned employees about being contacted at their homes by a union

forth fully below, we differ with the judge's 10(b) analysis, and find that certain complaint allegations are time-barred while others are timely but related to charges other than those cited by the judge. In addition, we address the joint employer issue, modify the threats of plant closure analysis, and revise the rationale as to violations relating to the selection accuracy program. Further, we reverse his recommended order reinstating one unlawfully discharged employee, remand for further hearing his dismissal of allegations relating to four other alleged discriminatees, and restrict the bargaining order to a single Respondent. Finally, we further explain why a bargaining order is the appropriate and necessary remedy for the harm inflicted on employee rights by these unfair labor practices.

Section 10(b)

1. Respondent Aldworth has excepted to the judge's determination that the allegations contained in complaint paragraphs 5(a) and (b) are not time-barred under Section 10(b) of the Act. Those paragraphs allege that the Respondent engaged in certain 8(a)(1)-prohibited conduct, including threats, promises, and solicitation of grievances, during two employee meetings held in early April 1998. The charges underlying these allegations were included in a late-October 1998 amendment to a pending, timely filed charge that principally alleged an 8(a)(3) and (1)-prohibited discharge of a union adherent on June 29.[7] The judge found that because the conduct in the amendment would tend to establish the animus required to support a finding of unlawful discharge, it was closely related to the original charge. Accordingly, applying Board precedent,[8] he found the allegations in paragraphs 5(a) and (b) were not barred by Section 10(b).

While the judge applied the Board's "closely related" standard for determining whether the disputed complaint allegations may be considered timely, we are aware that the courts have not universally embraced this approach.[9] In the circumstances of this case, however, it is unnecessary to reach this matter. Given the breadth and scope of the issues that are undisputedly before the Board for resolution, we find the allegations in complaint paragraphs 5(a) and (b) to be merely cumulative. Even if reflective of unlawful conduct, they would not give rise to additional remedial action. Accordingly, we place no reliance on the judge's decision on this issue and will not consider the substance of the disputed complaint allegations.[10]

2. Respondent Aldworth also asserts that the 8(a)(5) allegation concerning its October implementation of revisions in its warehouse employee performance measurement standard, called the "Selection Accuracy Policy," (SAP) is untimely. Respondent argues that the judge engaged in bootstrapping by finding that the charge raising this matter was related to a pending charge of refusing to recognize the Union. For reasons different from those relied upon by the judge, we find that the allegation in question is supported by a timely charge.

Respondent's unilateral implementation of revisions to the SAP was included in an amendment to a pending charge filed on April 15, 1999, just 3 days beyond the 6-month limit under Section 10(b).[11] The judge found that

organizer; that Aldworth "will not tolerate any harassment of its employees either from outside or inside the operation"; that a roster of employee names and telephone numbers had been stolen and this appeared to be how the union organizer obtained the employees' names; and that Aldworth apologized for this and encouraged employees who felt "harassed or bothered" by a union organizer to contact Roy. Under all the circumstances, including the fact that an employee roster had been taken from the dispatch desk in violation of company policy (see discussion, infra, denying reinstatement to unlawfully discharged employee Mitchell for taking the list), and that Respondent had received complaints from employees about being "harassed" by union organizers at their homes, Member Bartlett would not find Roy's June 16 memo unlawful. Accordingly, he would not rely on this conduct in finding that a remedial *Gissel* bargaining order is appropriate in this case.

In finding that Roy's June 16 memo violated Sec. 8(a)(1), Member Cowen notes that Roy's memo requesting that employees report on the activities of other employees was not limited to circumstances where the employees felt that they were being "harassed" by other employees, but also included circumstances in which the employees felt that they were merely being "bothered" by other employees.

Member Liebman agrees that the Respondent's June 16 memorandum violated Sec. 8(a)(1) as its message would reasonably have a chilling effect on employees' legitimate exercise of union activity. *Greenfield Die & Mfg. Corp.*, 327 NLRB 237 (1998); *Nashville Plastics*, 313 NLRB 462 (1993).

[7] This initial charge, filed in July, also referred to a discriminatory suspension, route change, and advertising for drivers at a time when no apparent vacancies existed.

[8] The judge cited *Office Depot*, 330 NLRB 640 (2000); *Nickles Bakery of Indiana* 296 NLRB 927 (1989); and *Redd-I, Inc.*, 290 NLRB 1115 (1988).

[9] See, e.g., *Ross Stores v. NLRB*, 235 F.3d 669 (D.C. Cir. 2001), denying enf. of 329 NLRB 573 (1999).

[10] Member Liebman would affirm the judge's finding that the allegations in the disputed complaint paragraphs, first alleged in an amendment to a timely filed charge, are closely related to conduct described in the original charge. The amendment to the charge satisfies the Board's three-part test. First, it involves the same legal theory as the pending charge (animus-motivated counter-organizational efforts); second, it arises from the same factual circumstances or sequence of events as the original charge (the Respondent's antiunion campaign); and third, the Respondent would raise similar defenses to both charges. Accordingly, under established Board precedent, Member Liebman would find the allegations in complaint pars. 5(a) and (b) to be properly before the Board for resolution. In any case, Member Liebman would find the substance of the allegations properly considered as background evidence in support of the subsequent unfair labor practices.

[11] We are assuming that the October 12, 1998 implementation date, as stated in the judge's decision, is accurate. The Respondent, however, in its brief in support of exceptions, states repeatedly that the revised Selection Accuracy Policy was implemented on October 17, 1998. If the Respondent's assertion were accepted, it would defeat its own argument that the amendment was untimely, and we could deem

this amendment substantively relates back to a charge filed on October 22, alleging, inter alia, Respondent's refusal to bargain as of the date of the Union's showing of majority status. He concluded therefore that the subsequent allegation of unlawful unilateral action was sufficiently related to the pending 8(a)(5) charges to be timely.

While the April 15, 1999 amendment was the first specifically to allege that the action of unilaterally implementing the revised SAP violated Section 8(a)(5), we find that the legality of the SAP was already the subject of extant charges. In three separate charges, filed in November and December 1998 and February 1999, the terminations of several employees, whose work was covered by the SAP, were alleged as violative of Section 8(a)(3).[12] Those allegations themselves were each amended on April 14, 1999, adding, as an 8(a)(5) basis for attacking those terminations, the Respondent's "unilateral change" in its SAP. Thus, by implicating the circumstances leading to those employees' discharges, the earlier charges placed in issue all relevant factors, including, in this case, the lawfulness of Respondent's revising its Selection Accuracy Policy. Accordingly, we find that the inclusion of the Selection Accuracy Policy within complaint paragraph 23, was timely.[13]

Joint Employer

Based upon a thorough review of the record, the judge determined that Respondents Aldworth and Dunkin' Donuts together share control over the hiring, firing, wages, benefits, discipline, supervision, direction, and oversight of the truckdrivers and warehouse employees and thereby meet the standard for joint employer status. Further, the judge rejected Respondents' procedural contention that by naming only Aldworth (the supplier of the employees) as the Employer on its election petition[14] and on the initial unfair labor practice charges,[15] the Union had waived its right subsequently to allege that Dunkin' Donuts (the user of the employees) is a joint employer in this proceeding. The Respondents except.

First, we find no procedural bar to determining whether Respondents Aldworth and Dunkin' Donuts are joint employers. While the Union's naming only Aldworth as the employer on its election petition affects the parties' bargaining rights and obligations (as discussed infra), the substantive issue of the joint employer status of Respondent Dunkin' Donuts, along with its liability for unlawful conduct, remains for our determination.[16]

Two or more entities are joint employers of a single work force if they "share or co-determine those matters governing the essential terms and conditions of employment."[17] The relevant facts involved in this determination extend to nearly every aspect of employees' terms and conditions of employment and must be given weight commensurate with their significance to employees' work life.

In this case, while we disagree with some parts of the judge's assessment of the evidence, we agree with his ultimate conclusion. Contrary to the judge, we find that actions taken pursuant to government statutes and regulations are not indicative of joint employer status, and therefore we do not rely on those actions in reaching our determination. Specifically, we find that neither Dunkin' Donuts' role in interpreting government rules relating to interstate commerce, nor its inclusion of employees within its 401(k) plan is appropriately counted as an indicia of joint employer status.

For example, Respondent Dunkin' Donuts owns the trucks, trailers, and associated equipment used in the delivery of products to its retail outlets. By virtue of that ownership, Dunkin' Donuts is designated as the carrier. Consistent with that status, Dunkin' Donuts is the entity directly subject to and ultimately responsible for adhering to an array of government requirements regulating the operation of the equipment.[18] Similarly, as the owner of

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the matter conceded. In the interest of ensuring full consideration of the merits of this important procedural matter, however, we will assume that the implementation date was October 12.

[12] These charges alleged that Wallace, Nelson, Mitchell, Sellers, and King had been unlawfully terminated at various dates subsequent to the implementation of the modified SAP.

[13] Member Bartlett agrees that the allegation in par. 23 of the complaint, which alleges that the unilateral implementation of the revised SAP violated Sec. 8(a)(5), is not time-barred under the "closely related" test. However, in so finding, he relies on the fact that the Charging Party had previously filed, not only the timely charges alleging that the revised SAP violated Sec. 8(a)(3), but also a timely charge alleging a general refusal to bargain in violation of Sec. 8(a)(5). He would not find that the prior timely 8(a)(3) charges alone are sufficient to support the allegation in par. 23.

[14] The Union's first petition, filed July 28, was withdrawn. A second petition was filed on August 11.

[15] Two separate unfair labor practice charges were filed in July, a third in October, and a fourth in early November, each naming only Aldworth as Respondent. In late November, amendments were filed to add Dunkin' Donuts as a Respondent to those charges. In December, two more charges were filed against both Aldworth and Dunkin' Donuts. Finally, in February 1999, a seventh charge against Aldworth was amended within 4 days of its filing to add Dunkin' Donuts as Respondent.

[16] We agree with the judge that the absence of a certification and bargaining history distinguishes this case from *Goodyear Tire & Rubber Co.*, 312 NLRB 674 (1993). As Dunkin' Donuts was named as a Respondent in unfair labor practice charges and was included on the consolidated complaint, we find that its due process rights in this proceeding have not been harmed in any way.

[17] This is the long-accepted standard as set forth in *NLRB v. Browning-Ferris Industries*, 691 F.2d 1117 (3d Cir. 1982). See, e.g., *Quantum Resources Corp.*, 305 NLRB 759 (1991).

[18] The judge enumerates a variety of Federal Department of Transportation requirements with which Dunkin' Donuts, as a regulated

the warehouse facility, Dunkin' Donuts must ensure compliance with Federal OSHA standards and other workplace requirements. As with its designation as carrier, Dunkin' Donuts acquired these obligations solely by virtue of its status as owner. Dunkin' Donuts can neither delegate nor otherwise opt out of the responsibilities imposed upon it by these laws. Because Dunkin' Donuts is legally mandated to take these actions, by virtue of its status alone, we find such actions are not reliable indicators of joint employer status.

Equally misplaced is the judge's reliance upon Dunkin' Donuts' "voluntary" inclusion of leased drivers and warehouse employees within its 401(k) plan as evidence of joint employer status. The Federal tax code specifies that if an employer maintains a 401(k) plan for any employees, then that plan must extend to all employees in order for it to qualify for the tax incentives available for such plans. The plan must be available not only to those who are directly employed by the employer but also to those whose services are leased from another employer. In this case, Dunkin' Donuts provided a 401(k) plan to its own, directly employed work force. In order for its plan to be "qualified" for the tax advantages provided to employers offering 401(k) plans, it must also extend the benefit to employees it leases. Failure to include them would deny Dunkin' Donuts the entire tax advantage. Given the significance of the financial penalty, we find that its negative impact effectively acts as a legal obligation. The adverse economic consequences of not including the leased workers operate in the same way as an affirmative government requirement, leaving Dunkin' Donuts without a real choice as to whether to include the Aldworth personnel. In these circumstances, we do not rely on Dunkin' Donuts' inclusion of leased employees within its 401(k) plan in the joint employer calculus.

In sum, in determining the joint employer issue, we will not rely on evidence that Dunkin' Donuts exercised responsibilities derived by virtue of regulation or statute.[19] We find more persuasive, and therefore rely upon instead, those factors that show voluntary involvement in the management process.

The evidence in this case establishes that Respondent Dunkin' Donuts enmeshed itself in the management process in areas wholly apart from what the law might have required. As set forth in detail by the judge, Dunkin' Donuts was, to varying degrees involved in decisions relating to employment tenure, discipline, assignment of work and equipment, recognition and awards, and day-to-day direction of the leased employees.[20] Most significantly, Respondent Dunkin' Donuts played a direct and key role in certain events alleged as unfair labor practices in this proceeding.[21] For these reasons, we find that Dunkin' Donuts is properly named as a joint employer in this proceeding with respect to the 8(a)(1) and (3) allegations alleged in the complaint and that it will be jointly and severally liable, with Respondent Aldworth, for remedying those violations.[22]

With regard to the 8(a)(5) allegations, however, we restrict any and all findings, as well as the imposition of attendant-bargaining obligations, to Respondent Aldworth. Unlike the judge, we are persuaded by the Respondents' arguments that by naming only Aldworth as the Employer on its election petitions, the Union essentially waived

motor carrier, and the drivers must comply. These include record keeping, limitations on hours of work, safety standards, etc.

[19] Member Bartlett also would not rely on Dunkin' Donuts' actions pursuant to its cost plus agreement with Aldworth or Dunkin' Donuts' involvement in assigning work and equipment to employees. In addition, Member Bartlett would not rely on Dunkin' Donuts' involvement in investigating safety violations and accidents and writing up incident reports in response to these and other infractions or store owner complaints, except to the extent the record shows that Dunkin' Donuts' supervisors directly disciplined employees or effectively recommended to Aldworth that employees be disciplined.

Member Cowen finds, for the reasons set forth in the text, that the evidence supports the judge's finding that Dunkin' Donuts and Aldworth are joint employers, and under these circumstances finds it unnecessary to speculate on the probative value of the specific evidentiary items noted by Member Bartlett.

[20] We note particularly the evidence relating to the participation of Dunkin' Donuts' transportation manager, Thomas Knoble, in the hiring process for drivers, as well as his oversight of the day-to-day operations of the enterprise. His purview extended to matters ranging from employees' absences from the workplace (including both requests for earned time off and when disciplinary suspensions would be served) and adjusting schedules, to the assignment of helpers to drivers and drivers to equipment.

In addition, evidence establishes that Respondent Aldworth's operations manager, Fisher, regularly consulted with Dunkin' Donuts' managers both in the hiring and termination of warehouse workers. Moreover, Warehouse Operations Manager Engard personally fired one employee.

The situation involving Daniel Hoffman and his role as Aldworth's field supervisor is especially revealing of Respondent Dunkin' Donuts' role in personnel matters. An Aldworth driver for 13 years, Hoffman was interviewed by Fisher and then by Dunkin' Donuts' managers Knoble and Shive, as well as its then-president, Reeves, for this newly created position. Fisher and Shive together told him he had been selected for the newly created position. After Hoffman served in the job for nearly 2 years, it was Knoble, Shive, and the new Dunkin' Donuts president, Setter, who told Hoffman that the board of directors had abolished that position and that he would be returning to work as a driver. Hoffman returned to his driver duties without any personal consultation with Aldworth managers.

[21] A clear example of Respondent Dunkin' Donuts' direct participation in unfair labor practices is Distribution Center Manager Mike Shive personally conducting an unlawfully motivated route survey of William McCorry. This incident is discussed fully in the judge's decision as well as later in this decision.

[22] Member Liebman agrees with her colleagues that Respondent Dunkin' Donuts is a joint employer of the employees, but does so in reliance upon the judge's findings and analysis.

whatever bargaining rights it might have had with respect to Dunkin' Donuts. At the time it filed its petition, the Union was fully aware of the lease arrangement between Aldworth and Dunkin' Donuts. Nevertheless, the Union did not include Dunkin' Donuts on the petition, nor did it otherwise identify Dunkin' Donuts as an employer during the representation proceeding. In addition, prior to filing the petition, the Union presented its claim of majority support and demand for recognition and bargaining solely to Aldworth. We believe that the Union's actions evidence a conscious and deliberate pursuit of a bargaining relationship limited to Aldworth alone. Consequently, as discussed later in this decision, in adopting the judge's 8(a)(5) findings and his recommended remedial bargaining order, we limit those findings and Order to Respondent Aldworth.[23]

The 8(a)(1) Violations

1. Threat of job loss/disparagement of union adherents

As set forth fully in the judge's decision, Respondent Aldworth held a series of mandatory meetings with groups of employees in response to employees' organizational activity. The complaint alleges, and the judge found, that a number of violations of Section 8(a)(1) occurred at these meetings.[24]

The judge found that at one such meeting on June 27, Respondent Aldworth's executive vice president, Roy[25] addressed a range of workplace issues, including the Company's accident investigation policies, Aldworth's service contract with Dunkin' Donuts, union representatives contacting employees, and the bargaining process. The judge determined that some of Roy's statements violated Section 8(a)(1) by threatening the loss of benefits as a result of unionization and by promising better wages and benefits for not unionizing. We agree with these findings.[26] The General Counsel excepts however, to the judge's dismissal judge's dismissal of allegations that Roy also disparaged and threatened with discharge certain employees who supported the Union. We find merit in the General Counsel's exception.

The judge found that during the course of the June 27 meeting, Roy urged employees not to "grab onto somebody with one foot out the door for lateness and another for stealing company time and sleeping on the job." While their names were not used at the meeting, the evidence shows and the judge found that Roy was referring to drivers Leo and McCorry, two known prounion employees, who were sitting together near the front of the room. Nevertheless, the judge found that describing these employees as having "one foot out the door" was not an unlawful threat of discharge because Roy attributed misconduct—lateness, stealing company time, and sleeping on the job—to these employees for which disciplinary action would be justified. He stated that because Roy did not connect the reason for these employees being "out the door" with their union activities, employees would understand that valid reasons for discipline existed. He further concluded that Roy's comments did not unlawfully disparage Leo and McCorry as union supporters.

We disagree, because the judge failed to consider either the immediate or the broader context in which the remarks were made. The purpose of the meeting was to discuss the conditions and circumstances that gave rise to the organizational effort. The immediate context, therefore, was the union campaign. The Respondent's objective was to deter employees from choosing union representation. By admonishing employees "not to grab onto somebody," Roy was recommending that employees not follow the lead of particular employees, specifically, those who favored the Union. By describing those individuals as having "one foot out the door," Roy was telling them that those prounion employees were about to lose their jobs. The link between supporting the Union and the threat of job loss is clear, and thus we find that Roy's message was an obvious warning to employees that by "grab[bing] onto" those union proponents, they too could be swept out of a job.

Moreover, the purported misconduct for which Leo and McCorry were being disciplined—"lateness," "stealing time," and "sleeping on the job"—was found to be pretext. Contemporaneous with this meeting, the Respondent had subjected both Leo and McCorry to discriminatory treatment. By the day of the meeting, Leo was under indefinite suspension for lateness; 2 days later he was discharged ostensibly for that reason. Both the suspension and the discharge were ultimately found to have been in retaliation for union activities, in violation of Section 8(a)(3) and

[23] For this reason, we have attached separate Orders and notices for Respondent Aldworth and Respondent Dunkin Donuts.

[24] See judge's decision at sec. IV,B,1,a-l.

[25] Discussed at sec. IV,B,1,d. This was the third group meeting Respondent held after learning that employees were engaging in organizational activities. Roy, who traveled to the New Jersey facility from his Boston headquarters office, was the principal speaker at each meeting.

[26] Members Cowen and Bartlett affirm the judge's findings that Roy unlawfully threatened employees with loss of benefits at the June 27, August 29, September 8 and 15 meetings by indicating that bargaining would start from a blank sheet of paper. However, they do so only on the basis that these comments were made in the context of other serious unfair labor practices. See former Member Brame's dissent in *Noah's Bay Area Bagels*, 331 NLRB 188 at 194–195 (2000) (discussing cases).

Members Cowen and Bartlett also agree with the judge's finding that Roy unlawfully threatened employees with the loss of their 401(k) plan at the September 16 meeting. Thus, they find it unnecessary to address whether Roy made similar unlawful threats at the September 15 and 17 meetings.

(1).[27] Similarly, just days before the meeting, McCorry was surreptitiously subjected to a route survey, resulting in a report accusing him of falsifying documents and not working when he was supposed to have been. Two days after the meeting, on the basis of that audit and following a telephone conversation in which Roy made several statements violative of Section 8(a)(1), McCorry was suspended for 5 days. Both the route survey and the suspension are found to have been in retaliation for his union activities in violation of Section 8(a)(3) and (1).[28] Thus, there were no valid reasons underpinning the discipline referenced in Roy's remarks.

Because the discipline imposed against Leo and McCorry was unlawful, we find that Roy's allusion to both their putative misdeeds and the consequences thereof is unlawful on two grounds. First, by falsely accusing union proponents Leo and McCorry of specific and serious misconduct, Respondent held them up to derision before the entire unit. Second, the comments reasonably appear intended to serve, and could reasonably be interpreted by the employees, as a warning to other employees that pursuit of such activities could lead to the same result.[29] We find, therefore, that Roy's comment violates Section 8(a)(1).

2. Plant closure threats

At several of these mandatory meetings, Roy spoke about Aldworth's contractual relationship with Respondent Dunkin' Donuts: how it came about, how the contract could be terminated, and what the effect of a termination might be on employees. The judge found that certain of these statements contained unlawful threats of job loss, while others did not. He dismissed allegations relating to such remarks during the June 27 meeting as merely explanatory of the Respondents' business relationship, but found that similar remarks made on August 29 and September 3 were threats. We agree that the Respondent unlawfully threatened employees that they would lose their jobs if they voted to unionize, but our reasoning differs somewhat from the judge's.

The three meetings were held solely to convince employees not to choose union representation, as part of a consistent and focused antiunion campaign. As we will explain, we see no need to analyze the statements independently. Taken together, in light of their common characteristics and shared context, the statements clearly establish a violation.

At the June 27 meeting, Roy told employees that Dunkin' Donuts could cancel its contract with Aldworth for any reason with 30 days' notice. He also told them that if employees selected the Union and a contract was negotiated that did not allow Aldworth to remain competitive, then Dunkin' Donuts could get rid of Aldworth and turn to a competitor who might not have to recognize the Union.

During the August 29 meeting, Roy informed employees how the relationship between Aldworth and Dunkin' Donuts began. He said that in 1983, an official of Dunkin' Donuts approached him seeking to have Aldworth take over providing Dunkin' Donuts with employees. The official told Roy that its current employee provider had just signed a collective-bargaining agreement with the Teamsters Union and Dunkin' Donuts refused to cover the higher costs associated with that contract. Rather than continue its relationship with the newly unionized work force, Dunkin' Donuts turned to Aldworth instead.

At the meeting on September 3, Roy described a hypothetical scenario in which the Union would be voted in, costs would increase, and Dunkin' Donuts would terminate the contract. He said that in such event, no one would have a job. He also said that Dunkin' Donuts might replace Aldworth with another employee provider, such as Ryder Logistics, and if the new company hired less than half the current work force, there would be no union.

Common to these various statements by Roy is the repeated association between union contracts and the loss of jobs. While the precise content of his statements varied slightly from meeting to meeting, Roy's approach was to address the key topic of job security and convey the notion that organizing a union could jeopardize that security.

During the earliest meetings, Roy's principal purpose was to find out what issues led to the organizing effort and to address those concerns—tactics found to constitute unlawful solicitation of grievances and promises of benefits. As time passed, the Respondent actually (and unlawfully) delivered on some of those promises by implementing a written issue report form, replacing an irksome manager, and creating a new promotional opportunity for unit employees. At the same time, Roy repeatedly cautioned that unionizing was futile and could result in employees losing existing benefits, disparaged union adherents and

[27] Set forth at sec. IV,C,1 of the judge's decision.

[28] In adopting the judge's finding (set forth in his decision at sec. IV,C,2) that the Respondent violated Sec. 8(a)(3) and (1) in this regard, we find it unnecessary to pass on the General Counsel's exception that the judge failed to find these same actions also independently violated Sec. 8(a)(1). While the record indeed establishes that McCorry repeatedly engaged in the protected concerted activity of raising issues relating to conditions affecting drivers' safety and health, this additional finding of violation would be merely cumulative and would not affect our Order or remedy.

[29] At a subsequent meeting on August 29, Roy mentioned what had been discussed on June 27 and told employees that what "came out" of that meeting was one termination and one suspension—referring to Leo and McCorry. The judge found that Roy's August 29 comment connecting disciplinary action with these two union adherents violated Sec. 8(a)(1). Consistent with our findings regarding the June 27 meeting, we adopt the judge's findings regarding the August 29 comments.

warned of the adverse consequences of their stance, and encouraged employees to report uninvited "harassment" by the Union and its advocates. In addition, Roy frequently brought up the tenuous nature of the business and employment world, noting that Aldworth's contract with Dunkin' Donuts was subject to termination and that Dunkin' Donuts' historical response to higher—that is, Union—labor costs, was to cancel those leases.[30] While the wording changed somewhat from one meeting to the next, his consistent aim was to alert employees to the unwelcome and potentially disastrous consequences of unionizing.

Thus, beginning in June, Roy's description of Dunkin' Donuts' lease cancellation rights may be viewed as designed to create uncertainty, if not fear, among the employees as to the adverse consequences of choosing union representation. Roy continued and expanded upon this theme during the next mandatory meeting on August 29. Accompanied by other high-ranking Aldworth management, including its president, Dunn, Roy reiterated many of the same points he had made at the earlier meeting. He asked employees for the opportunity to continue to improve working conditions, told them that negotiations began with a blank sheet of paper, and announced that since the June meeting, one prominent union adherent had been fired and another suspended.[31] Roy also recounted the genesis of the relationship between the Respondents, apprising them that 11 years earlier Dunkin' Donuts had turned to Aldworth to escape from paying higher rates that it was facing with its then, newly unionized provider.[32] Roy told the tale as follows:

> Our association grew because one of our competitors in Massachusetts was doing business with Dunkin' Donuts. At the time, I was talking to the Vice President and General Manager of Dunkin' Donuts' main distribution center. The only distribution center that existed in the country. I got a call from him, after a few meetings, and he wanted me to come see him. I went to see him and he said he had a problem. I said, "What's the problem?" His labor provider had just signed a union contract with the Teamsters. I said, "So, what's the problem?" He said, "Well, they've come to me with increased costs." And, he said, "I am paying off a contract which I negotiated with them earlier at this rate, now they came back and said here's the new rate." He's not going to pay the difference. His Vice President asked me if we wanted to take on the business. I said "Yes. We took on the business, and we've been associated since, again 1983."[33]

At the September 3 meeting Roy replowed familiar ground. However the June and August remarks may be interpreted, by September, the message became explicit and unlawful—if employees unionized, they would cease to have a job.

During an exchange with an employee in which Roy alluded to possible future scenarios, he said, "Let's take a situation. The Union is voted in. My costs go up. My contract is terminated." When the employee asked why his costs would necessarily go up, Roy responded, "Stick with me." He then repeated, "My costs go up. The contract is terminated with Aldworth Company. At that time, no one has a job. Okay?"[34] Roy then enumerated a number of different personnel providers—Aldworth competitors—to whom Dunkin' Donuts could turn for employees.

In his remarks, and by ignoring the employee's question as to why costs would necessarily go up if the Union came in, Roy distorted the reality of the collective-bargaining process: that a union cannot by itself impose contract terms on an employer, but rather an employer and a union together play equal roles in negotiating an agreement on wages and other labor costs. If an employer cannot afford to pay at a certain level, it is free not to accede to that rate. Effectively then, Roy unlawfully equated unionization with prohibitively noncompetitive wage rates, the inevitable termination of the lease, and massive job losses. Coming on the heels of similar remarks just 5 days earlier, and with the June statements as backdrop, Roy's September 3 comments sounded an unmistakable warning to employees that choosing the Union meant elimination of their livelihoods. The message of his earlier statements could no longer be in doubt. Roy did not merely describe the Company's contractual, economic, or competitive position, nor did he outline a range of possibilities resulting from the bargaining process. Instead, he proffered a worst-case scenario and drew a stark connection between unionization and the loss of jobs. Roy's relentless repetition of this theme, culminating in the September 3 exchange, establishes beyond dispute that Respondent intended to threaten employees with the business' demise.

Thus, considering the entire context in which Roy's various statements were made,[35] we find that the Respon-

[30] Lease cancellation is tantamount to a plant closing in a traditional employment situation; that is, if Aldworth's services were no longer required by Dunkin' Donuts, all the employees would cease to have jobs.

[31] These disciplinary references are discussed at greater length elsewhere in this decision.

[32] Roy's remarks on this subject were not delivered in response to a question or otherwise elicited by employee prompting.

[33] GC Exh. 7(a), pp. 11–12, transcript of August 29 meeting.

[34] GC Exh. 7(d), pp. 42–43, transcript of September 3 meeting.

[35] See, e.g., *Southwire Co.*, 277 NLRB 277 (1985); *Yellow Cab Co.*, 229 NLRB 643 (1977). See also *TRW-United Greenfield Division v.*

dent unlawfully threatened that all employees would lose their jobs as a result of their choosing union representation. Assessing the statements collectively, it is clear that Respondent's reiteration of its consistent theme reached a crescendo on September 3 amounting to an irrefutable threat of plant closure.[36]

The 8(a)(3) Violations

1. The selection accuracy policy

The judge found that shortly after the representation election, Respondent Aldworth violated Section 8(a)(3) by implementing new performance standards for warehouse employees, called the Selection Accuracy Policy (SAP). In reaching this conclusion, however, the judge did not rely on the General Counsel's theory that the new SAP imposed stricter standards on employees in retaliation for their efforts to unionize. Instead, based on his view that the new SAP was harsher than the prior policy in some respects and more lenient in others, he concluded that its implementation was the unlawful fulfillment of the Respondent's earlier solicitation of grievances and promise to rectify them. He determined that the Respondent took this step in reaction to employees' expressed dissatisfaction with certain working conditions and in return for their having voted against union representation. We agree that Respondent's implementation of the new SAP violates Section 8(a)(3), but do not adopt the judge's rationale.

As fully set forth in the judge's decision,[37] Respondent Aldworth had an established and detailed system for gauging the accuracy of the work performed by the warehouse employees. For each employee, it measured the number of mistakes against the number of articles pulled, resulting in a percentage designation. That percentage equated with a point value and when a certain level was reached, discipline was imposed. It was a progressive system, whereby every increase in point value resulted in the next disciplinary step. Each of the six disciplinary steps had to be reached and served before moving on to the next higher level, irrespective of how many points may have been accumulated.

On October 12, Respondent implemented a revised system. While it too was based on an error percentage and point system, there were several areas of difference. For example, there were fewer percentage ranges under the new system and suspensions for reaching the third, fourth, and fifth levels of discipline were replaced with written warnings and provisions for additional training at the fourth and fifth steps. In addition, under the new SAP the number of accumulated points correlated directly with the discipline imposed.[38] This meant that, in contrast to the old system, an employee did not have to serve at each step of the disciplinary ladder before moving on to the next. Thus, an employee could face more serious discipline more quickly than under the original SAP. An employee could face discharge in as few as 3 weeks working under the new system, whereas it would have taken at least 6 weeks under the old SAP to face that level of discipline.

Because the judge determined that some aspects of the new SAP were more lax and others more exacting than the previous system, he focused his analysis first on the Respondent's motive in implementing the new policy. Citing testimony from Respondent's witnesses that its purpose in implementing the new SAP was to create a more lenient policy, the judge rejected the General Counsel's argument that the new system was designed to punish employees for having sought to unionize. Nevertheless, the judge reasoned that the absence of a retaliatory motive was not dispositive of the unfair labor practice allegation. Recognizing that the Respondent had engaged in extensive preelection grievance solicitation, he determined that the new SAP was an attempt to rectify a source of employee dissatisfaction and the fulfillment of a promise made in an effort to dissuade employees from the union. He concluded therefore, that even without a punitive motive, by changing a condition of employment in reaction to employees' union activities the Respondent violated Section 8(a)(3).

We adopt the judge's finding that the Respondent violated Section 8(a)(3) by implementing a new warehouse accuracy policy. We disagree with the judge's assessment of Respondent's motivation, however, and place no reliance on his statement that the Respondent "felt that it was creating a more lenient policy for its employees."[39] The

NLRB, 637 F.2d 410 (5th Cir. 1981); *NLRB v. Interstate Engineering*, 583 F.2d 1087 (9th Cir. 1978), for discussion of the appropriateness of such analysis.

[36] Member Bartlett joins in finding this violation, but only because Roy's statements were made in the context of other serious unfair labor practices. Cf. *Savers*, 337 NLRB 1039 (2002); *Pinkerton, Inc.*, 309 NLRB 723 (1992); and *Tri-Cast, Inc.*, 274 NLRB 377 (1985) (finding similar conditional or hypothetical statements lawful or unobjectionable where they were made in a context free of other unfair labor practices or objectionable conduct).

Member Liebman agrees with her colleagues that the Respondent unlawfully threatened employees with the loss of their jobs, but would also find that Roy's remarks at each of the meetings were independently unlawful.

[37] Discussion of this issue is set forth at sec. IV,C,6 of the judge's decision.

[38] The two systems also differed with regard to the manner in which an employee could earn credit against his point accumulation for having performed well.

[39] The judge's findings on this issue contain certain apparent inconsistencies. He first distinguishes between Respondent's motivation in implementing the new SAP and the effect it had on employees' work requirements. In finding that the revised SAP was an attempt to respond to employee complaints about the fairness of the existing warehouse selection standards, he concluded that it was the unlawful ful-

facts support the General Counsel's contention that the revised SAP was, in fact, more onerous than the previous policy. While the revised policy could arguably operate to more lenient effect in some circumstances, the overall impact of the new SAP was quite the opposite.[40]

The stringency of the operation of the new SAP is shown most clearly in the amount of time it could take for an employee to go from having a clear record to being fired for deficient performance. The new SAP cut in half the time in which this might happen. Within only 3 weeks, an employee's failure to meet the new performance standards could mean discharge. This resulted in the terminations of 10 employees during the first 4 months under the new SAP, and another employee 3 months later. By contrast, a total of only seven warehouse employees had been discharged for performance errors in the approximately 22 months just prior to implementation. These statistics starkly demonstrate the negative impact of the new SAP and establish that the new SAP imposed stricter standards upon warehouse employees and operated more harshly than the old system.

The Respondent implemented the new system in reaction to employees' support for the Union. The Respondent was well aware that support for the Union was high among warehouse employees and the record amply establishes Respondent's animus toward unionization. Accordingly, we find that the Respondent violated Section 8(a)(3) by imposing a more onerous performance policy upon warehouse employees in retaliation for their having supported the Union.[41]

2. Terminations under the SAP

The General Counsel alleged that several employees were unlawfully discharged under the operation of the revised SAP. Citing *Great Western Produce*, 299 NLRB 1004 (1990), the judge analyzed the lawfulness of a particular termination by comparing whether the employee being discharged under the new SAP would have been discharged under the old SAP as well. The judge found that seven employees (Mitchell, Sellers, King, Allen, Bostic, Rosenburger, and Wolfer) were unlawfully terminated, but dismissed allegations with regard to four others (Nelson, Everidge, Wallace, and Cramer). We adopt his findings that the discharges of the seven employees violated Section 8(a)(3) and (1) of the Act. However, for the reasons described below, we reverse his dismissal of the allegations involving the four others.

Three of the four employees—Nelson, Everidge, and Wallace—converted into the new system with five points each.[42] Under the revised SAP, at six points an employee would be subject to discharge. Thus, all three began the new system high on the disciplinary ladder.

Within the first week under the new policy, Nelson was assessed two points, bringing his total above six. He became subject to discharge on October 17 and was terminated on October 21. The judge refused to consider the General Counsel's contention that because the Respondent had been lax in enforcing the old SAP, Nelson would not have been discharged at that time had the old SAP still been in effect. He rejected this contention because the lax-enforcement theory was neither pleaded in the complaint nor fully litigated at the trial. He also rejected as speculative the General Counsel's contention that Respondent's long record of tolerating Nelson's poor performance proved that he would have kept his job if the old standard remained in effect.

Like Nelson, Everidge's accuracy percentage also warranted two points during his first week under the new system. He nevertheless continued to work for a few more weeks. During those additional weeks, Everidge's performance was good enough to have earned him credits against his point total if the old system were still in effect. Despite this improvement, however, Everidge was discharged. As for Wallace, he was assessed two points after 3 weeks under the new SAP, and he was discharged shortly thereafter. The judge found that the General Counsel conceded that both Everidge and Wallace would have faced discharge even under the prior system and dismissed allegations relating to both of them.

With regard to the fourth employee (Cramer), the judge concluded that the General Counsel was no longer pursuing his unlawful discharge allegation. The judge reached this conclusion because Cramer's termination was not specifically addressed in the General Counsel's posthear-

fillment of an implied preelection promise. At the same time, however, he completely discredited Respondent's witness Kundrat, who devised both the old and new SAPs, as to the reasons why Respondent created and implemented the new system. Contrary to Kundrat's testimony—which generally described the new policy as more lenient—the judge concluded that the new SAP was harsher in some respects. Because we agree with the General Counsel that the overall impact was adverse to employees, we find it unnecessary to rely on or reconcile every aspect of the judge's findings on this issue.

[40] Although some provisions might on their face appear more employee-friendly than the previous system, e.g., providing training rather than suspension at certain levels of discipline, the record indicates that these opportunities existed more in theory than reality. Further, the record also shows that the old SAP-imposed suspensions were flexibly carried out in order to accommodate both Respondent's fluctuating manpower needs as well as employees' desire for time off.

[41] For the reasons set forth by the judge, the unilateral implementation of the revised SAP violated Sec. 8(a)(5) of the Act as well.

[42] The Respondent issued SAP status letters to employees, which were intended to transfer their production accuracy records under the old SAP into the new one and to place them at the approximate equivalent disciplinary levels.

ing brief. The judge therefore dismissed that 8(a)(3) allegation without making any substantive findings.[43]

The General Counsel argues that Nelson, Everidge, and Wallace would not have been discharged under the old SAP because the Respondent had not diligently and uniformly enforced the old disciplinary system. The General Counsel maintains that the fact that all three employees had problems with their accuracy levels throughout their tenure in the warehouse demonstrates that the Respondent had tolerated their deficiencies in the past. Only with the unlawful implementation of the revised SAP did the Respondent also unlawfully modify its enforcement practices, thereby subjecting these three to discharge.

The General Counsel contends that the judge further erred by concluding that Cramer's discharge is no longer at issue. Cramer's situation differs from the others' only because he had been employed in the warehouse for less than a month when the new SAP was imposed and because, as a probationary employee, Cramer received no SAP status letter upon coming into the new system. Irrespective of Cramer's entering the new system while under probationary status, the General Counsel argues that his termination under the harsher and more strictly enforced revised policy violates the Act.

We find merit in the General Counsel's contentions. We have already determined that, overall, the revised SAP itself imposed stricter standards on employees' performance and was therefore more onerous than the old SAP. In determining the new SAP's impact on individual employees, we must consider the manner in which it was applied, not just its objective terms. Whether the Respondent applied it more strictly than the previous system—or conversely, whether the old SAP was more laxly enforced—is a relevant factor in assessing the impact and effect of the new policy.[44] Accordingly, we find that the judge erred in refusing to consider the General Counsel's arguments and evidence on the relative stringency of enforcement.

In his analysis of Nelson's discharge, the judge declined to consider the General Counsel's contentions in this regard and stated "that legal theory was not pled in the complaint or fully litigated at the trial." On neither point is the judge's ruling supported.

First, the complaint allegations fully comport with the Board's Rules,[45] which require only "a clear and concise description of the acts which are claimed to constitute unfair labor practices, including, where known, the approximate dates and places of such acts." The allegations are sufficient to support the theory. Paragraph 14 of the complaint states that in early October 1998: (1) the Respondent implemented and began enforcing a new SAP; (2) the Respondent discharged certain employees pursuant to the new SAP; and (3) the Respondent took those actions because its employees supported and assisted the Union. These allegations describe precisely the conduct being cited as unlawful and assert a retaliatory motive as the basis for the Respondent's conduct. Proving a retaliatory motive for both the implementation and enforcement of the new SAP (up to and including discharge of employees), logically would entail introducing evidence not only of stricter objective standards, but also evidence of stricter enforcement of those standards. These two aspects of the SAP are inseparable; objective standards must be enforced in some way for the system to function.[46] Thus, we find that the complaint allegations reasonably encompass both of the General Counsel's theories: that the standards themselves were more rigorous and that the enforcement of those standards was more exacting. Accordingly, we find no defect in the pleadings that would prevent the General Counsel from pursuing a violation based upon the Respondent having altered its standards for enforcement.

Second, we reject the judge's rationale that he could not consider the General Counsel's argument because it had not been fully litigated. An examination of the record establishes that the General Counsel attempted repeatedly to elicit evidence concerning the Respondent's varying enforcement practices, but the judge consistently terminated the General Counsel's attempts to pursue the matter. We find that the General Counsel's failure to fully develop the record on this issue was not for lack of trying, but rather was a consequence of the judge's rulings. As we have just explained, those rulings were erroneous.

Finally, we reject the judge's finding that by failing, in the posthearing brief, to include any argument regarding Cramer's discharge, the General Counsel has abandoned the allegation. "As filing of a posthearing brief is permissive in the first instance, the mere omission of the 8(a)(3) argument from his brief at that point hardly, by itself, warrants finding, that the counsel for the General Counsel thereby waived the 8(a)(3) theory explicitly put in issue by

[43] See fn. 131 of the judge's decision.

[44] The terms and the manner in which those terms are applied are but two sides of the same coin. The objective provisions of the SAP are given effect only through the actions taken thereunder. As has been described above, while the language of the old SAP may have prescribed a suspension, the enforcement of that requirement was somewhat flexible. By contrast, the revised SAP's requisites may have been more meticulously enforced, rendering the impact of the program relatively more onerous. Thus, what may appear on its face to be a strict system may operate to a less stringent effect, and terms that appear lax could in fact be less forgiving. Accordingly, an evaluation of the rigorousness of the two SAPs requires consideration of both their objective terms as well as the vigorousness of their enforcement.

[45] See Sec. 102.15 of the Board's Rules and Regulations, which sets forth, inter alia, the required contents of a complaint.

[46] See fn. 37, supra.

the complaint."[47] Moreover, the General Counsel makes clear on exceptions to the judge's decision that the complaint allegation that Cramer's discharge was unlawful has not been abandoned. Thus, we reverse the judge and find the Cramer discharge allegation is still before us.

Accordingly, we will sever and remand to the judge for further hearing the issue of whether employees Nelson, Everidge, Wallace, and Cramer were unlawfully terminated under the new SAP. The sole purpose of the hearing is to take evidence on whether the old SAP had been enforced less rigorously than the revised SAP.[48]

3. Reinstatement of Mitchell

As stated above, the judge determined that Mitchell was unlawfully discharged under the revised SAP. During the course of this proceeding, it was revealed that Mitchell was responsible for taking an employee list from the Respondent's dispatch desk and providing it to the Union for organizational purposes.[49] Citing a provision in its employee handbook addressing the type of conduct in which Mitchell engaged, the Respondent asserted that it would have fired Mitchell had it known about his action when it occurred. The handbook provision is titled "Terminating Offenses," and lists a number of offenses, including in item 13: "Misuse or removal from the premises at any time, without proper authorization, employee lists, Company or client records, or confidential information of any kind." The Respondent argues that Mitchell's misconduct violates this provision and warrants denying him his right to reinstatement.

The judge found that Mitchell engaged in misconduct by taking the list, but nevertheless rejected the Respondent's contention that he should be denied reinstatement. The judge determined that because the information on the list was available to employees upon request, it was not a confidential document. Moreover, absent supporting testimony or documentary evidence indicating how the Respondent normally applies its rules on terminating offenses, he found Respondent's assertion that it would have discharged Mitchell to be merely after-the-fact conjecture. Further, he concluded that what upset the Respondent about Mitchell's action was the purpose for which he used the list—to assist the Union's organizing effort—rather than the taking of the list itself. He thus determined that the Respondent had failed to meet its burden of establishing that it would have terminated any employee who had taken such a list. Accordingly, he ordered Mitchell to be reinstated to his former job with full backpay.

We find merit in the Respondent's exception. The record establishes that when the Respondent discovered that someone had taken an employee list from its office, it considered the action serious and unacceptable. According to testimony from Mitchell himself, Respondent's vice president, Roy, stated at the time he learned that the list had been taken, that he would fire the person who stole the list.[50] The list was not available to employees, but rather was kept on the dispatch desk, in an area where employees ordinarily were not permitted. Mitchell admitted to having reached in through the dispatch window and lifting the list from the desk. The provision cited in the employee handbook appears on its face to apply directly to the type of conduct that Mitchell admitted to having committed, i.e. "removal from the premises . . . without proper authorization, employee lists . . . ." In these circumstances, we find that the Respondent has satisfied its burden of showing that it considered the type of action committed by Mitchell to warrant termination.

Accordingly, we shall not order the Respondent to reinstate Mitchell and we will limit the Respondent's liability for backpay to that period of time prior to the Respondent having discovered Mitchell's misconduct.[51]

Bargaining Order Remedy

1. General issue

The judge determined that the Respondents' unlawful conduct interfered with the election held on September 19 and that the results of the election should not be certified. He further determined, in accordance with the standards set forth in *Gissel Packing*, supra, that the Respondents' repeated and pervasive unfair labor practices so tainted the atmosphere that the likelihood of assuring a fair and coercion-free rerun election is slight. The judge therefore concluded that the expression of employee support for the Union as indicated through signed authorization cards would be better protected by the issuance of a bargaining order rather than by holding a second election. On the basis of the Union's card showing of majority, the judge therefore found that the Respondents violated Section 8(a)(5) and (1) by failing to recognize and bargain with the Union as of its July 28 request and ordered the Respondents to bargain with the Union.

[47] *Louisiana-Pacific Corp.*, 299 NLRB 16, 18 (1990).

[48] As found by the judge, because the revised SAP was a unilateral change in terms and conditions of employment, any terminations effected under it would violate Sec. 8(a)(5) of the Act as well as Sec. 8(a)(3).

[49] While the Respondent was aware during the course of the organizational campaign that someone had taken an employee list from its premises and had given it to the Union, it was at the hearing that the Respondent first learned that Mitchell was responsible.

[50] This testimony is corroborated by at least two other employees who related Roy's reaction to learning that an employee list had been taken from the office.

[51] See *John Cuneo, Inc.*, 298 NLRB 856 (1990); *Marshall Durbin Poultry Co.*, 310 NLRB 68 (1993).

The Respondents except to the issuance of a remedial-l bargaining order.[52] Specifically, Respondent Aldworth[53] asserts that the unfair labor practices were not shown to have caused a decline in employee support for the Union and disputes the judge's finding that the Union had enjoyed majority support. Further, the Respondent argues that whatever violations occurred can adequately be remedied through traditional means. Finally, Respondent contends that employee turnover has substantially dissipated the adverse effects of the unlawful conduct. We find no merit in the Respondent's arguments.[54]

2. Union's majority status

As a preliminary matter, we must consider and resolve the Union's majority status. The judge found that the General Counsel properly authenticated, and entered into the record, signed authorization cards from 58 of 109 unit employees. The Respondent contends that several cards were improperly procured on the basis of misrepresentations. The Respondent challenges the validity of six cards on the grounds that those employees (Wright, Cropper, K. Syman, R. Syman, Wade, and Marcolongo) signed cards after being told that the part-time employees—helpers—would be included in the unit. Because helpers were ultimately excluded from the unit, the Respondent asserts that these cards do not accurately reflect the signers' preference. We find Respondent's argument unpersuasive.

At the time the Union began to organize, the Union aimed for a broad, all-encompassing unit, including part-time helpers along with the full-time drivers and warehouse workers. As the campaign developed, however, the Union narrowed its focus and concentrated its effort on the full-time employees.[55] Each of the six employees whose cards are being challenged on this basis holds a position within the unit sought by the Union. There is no evidence that any of these employees was persuaded to endorse representation on the sole and/or conditional basis that a particular unit composition would be pursued. None of those six employees was called to testify and the record does not otherwise support a finding that the inclusion of part-time employees was of particular significance in securing their support. Accordingly, we find the Respondent's argument on this point without merit.

The Respondent also specifically challenges the inclusion of Allen's card in the Union's showing of majority, arguing that at the time he signed the card, he was employed as a part-time helper, a classification that was eventually excluded from the unit. The record shows that while early in the card-signing campaign Allen was employed as a helper, he soon thereafter became a full-time warehouse employee and therefore within the petitioned-for unit. Allen continued to be a member of the unit at the time of the hearing. There is no evidence that Allen's support for the Union was conditional or limited to the time during which he was employed as a helper. Absent evidence that Allen's card has ceased to be an accurate reflection of his support for union representation, his card is appropriately counted among those included in the Union's showing of majority.

The Respondent makes no other argument concerning the validity of the cards submitted in support of the Union's majority. Accordingly, we find that the judge correctly found that by the time the Union requested recognition and bargaining, it had secured support from a majority of unit employees as evidenced through signed authorization cards.

3. Necessity of a bargaining order

We next examine whether, in this *Gissel* category II case,[56] a bargaining order is necessary to remedy the effects of the Respondent's unlawful conduct. The record shows that almost immediately upon learning of the organizational campaign—and extending well beyond the date of the election—the Respondent engaged in a course of unlawful conduct designed to deter employees from unionizing. The violations include several "hallmark" violations—including the discharge and/or discipline of several union supporters and threats of the loss of its business—as well as numerous other serious and pervasive unfair labor

[52] Respondent Dunkin' Donuts does not except specifically to the imposition of the bargaining order, but rather more broadly to the finding of joint employer status and to the unfair labor practices, remedy and Order that flow therefrom. For the reasons discussed earlier in this decision, we restrict the bargaining order obligation to Respondent Aldworth alone.

[53] Singular references to "the Respondent" in this section are to Aldworth unless designated otherwise.

[54] Member Bartlett concurs in finding a *Gissel* bargaining order appropriate.

[55] The September 19 election proceeded in a stipulated unit consisting of "regular and full-time drivers, warehouse employees, yard jockey(s), maintenance employee(s) and warehouse trainees."

[56] The Supreme Court described two types of cases in which a bargaining order would be appropriate. Category I cases are the most extreme, characterized by "outrageous and pervasive unfair labor practices." Category II cases are "less extraordinary . . . marked by less pervasive practices which still have the tendency to undermine majority strength and impede the election process." *Gissel Packing*, 395 U.S. at 613–614. In fashioning a remedy for category II cases, the Board may take into account the extensiveness of an employer's unfair labor practice violations in determining whether 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 sentiments once expressed through cards would, on balance, be better protected by a bargaining order." *Charlotte Amphitheater Corp. v. NLRB*, 82 F.3d 1074, 1077 (D.C. Cir. 1996) (quoting *Gissel Packing*, 395 U.S. at 613–614). While the judge did not use the term "category II," it is clear that he appropriately applied that standard in analyzing the effect of the unfair labor practices in this case.

practices. Many of these violations directly involved high-level management representatives. As more fully discussed below, we find in agreement with the judge, that the Respondent's unlawful conduct, both before and after the election, clearly demonstrates that "employees' wishes are better gauged by an old-card majority than by a new election."[57]

As described earlier in this decision, at the outset of the organizational effort, Respondent's executive vice president, Roy, embarked on a series of trips from his Boston headquarters office to the facility, located hundreds of miles away, for the purpose of holding mandatory meetings with employees. At these meetings, Roy assiduously solicited grievances and not only promised to rectify employees' complaints, but also implemented a number of changes in an effort to quell the representational effort. To demonstrate its desire to be responsive to employee concerns, the Respondent created a new printed form to allow employees to register complaints in writing. The Respondent also announced that certain duties of a particular troublesome manager would be reassigned to someone more adept at dealing with employee complaints. In addition, Roy announced the creation of a new supervisory position and encouraged employees to apply for the promotional opportunity. During these same meetings, however, Roy demonstrated his plan for dealing with potential bargaining obligations by holding up a blank sheet of paper, suggesting that by starting from scratch, existing working conditions would regress. Through this combination of statements —promising on one hand and threatening on the other—the Respondent conveyed a single clear message: that it holds the greater power in the employment relationship and that it is not averse to wielding that power in a coercive and unlawful manner. That the Respondent chose one of its highest level managers, a corporate level vice president, to deliver this message underscores its significance and impact.

Further, under the guise of concern for employees' right to privacy and to be undisturbed at their homes, the Respondent distributed a written memorandum to all employees, encouraging them to report unsolicited contacts from union representatives, ostensibly to allow the Respondent to intervene and protect them from further intrusions. Stating that it would "not tolerate any harassment of its employees either from outside or from inside the operation" the Respondent extended its proscription against union solicitations beyond union agents to include prounion statements that might be made by fellow employees as well. By asking employees to report these entreaties, the Respondent could not only derive information from employees about their attitudes toward the Union, but also chill employees' freedom to express prounion sentiments to their fellows.

In addition, within weeks of the Union's initial organizing steps, the Respondent heightened its response by retaliating against two drivers who were at the forefront of the union effort. Seizing on purported violations of time and attendance rules, Respondent suspended, and then on June 29 fired, longtime employee Leo. On the same day, Respondent confronted McCorry with the results of an unlawfully motivated and unsubstantiated route survey that had been conducted a few days earlier.[58] Respondent first threatened McCorry with discharge, then told him that Leo had been fired because of his union involvement, and finally, demonstrating its ultimate control, offered to suspend rather than terminate him in exchange for curtailing his union activity and assuring other workers that the discipline was justified. To ensure that other employees were aware of the price of union activism, Roy referred to the disciplinary action taken against Leo and McCorry at employee meetings both before and after the discipline was imposed. Thus, employees were not only subjected to a succession of meetings in which unlawful solicitations were made, promises given, and broad scale predictions of unlawful bargaining tactics threatened, but the dire personal consequences of supporting the Union were broadcast unit wide.[59]

In the weeks leading up to the election, the Respondent continued unabated its campaign of soliciting and promising to redress grievances.[60] In addition, Respondent committed many other serious unfair labor practices. These included threatening individual employees with the loss of their jobs if they selected the Union to represent them, threatening to eliminate the 401(k) plan and other benefits, forbidding employees to wear union pins or T-shirts, threatening to impose less favorable working conditions, and interrogating employees about their union activities.

As discussed earlier in this decision, we find that the Respondent strategically orchestrated its presentations during the course of three employee meetings to convey ultimately the clear message that unionizing could lead to the end of its contract with Dunkin' Donuts, with the

[57] *Charlotte Amphitheater*, supra at 1088.

[58] The route survey was conducted by Distribution Center Manager Shive, Respondent Dunkin' Donuts' highest level management representative at the facility. This was the only occasion on which Shive personally performed a route survey.

[59] See *M. J. Metal Products*, 328 NLRB 1184 (1999), enfd. 267 F.3d 1059 (10th Cir. 2001), where a bargaining order was based on serious violations that began the day the Union requested recognition, affected the entire unit, and involved high-ranking officials.

[60] Unlawful solicitation of grievances/promise of benefits occurred in meetings held in late June, late August, and September 1, 3, 8, 10, 15, and 17.

resultant loss of all their jobs. Because of the nature of the Respondents' contractual arrangement, statements of this type are tantamount to threats of plant closure. Allusions to the potential total loss of its business relationship with Dunkin' Donuts, with obvious ramifications on employees' livelihoods, are the types of threats most likely to have the effect of causing union disaffection. Threats of this kind are not likely to be forgotten by employees whose jobs depend on the stability of that relationship.

Moreover, Respondents continued to retaliate against prounion employees seeking to squelch any remaining support for the Union even after the September election. In mid-October, the Respondent unlawfully suspended three prounion warehouse freezer employees. It then transferred them, along with a fourth union adherent, to less desirable jobs in the dry area of the warehouse, and assigned them to different shifts. A few weeks later, the Respondent imposed a second retaliatory suspension on one of the former freezer employees. In mid-November, the Respondent unlawfully terminated another one of the former freezer workers.

Also in mid-October, the Respondent discriminatorily imposed more onerous performance standards on all warehouse workers. Within only a few months thereafter, Respondent discharged at least seven employees under the revised SAP standards.[61] These unlawfully implemented performance requirements remained in effect at the time of the hearing, thereby continuing to serve as a daily reminder of the consequences of the thwarted organizational effort.

We find that the pernicious effects of the Respondent's preelection unfair labor practices were exacerbated and renewed by independent unlawful postelection conduct.[62] In a period of approximately 6 months, coinciding with the onset of employees' organizational activities and extending well beyond the time of the election, the Respondent unlawfully discharged at least nine employees.[63] The inhibiting impact of these discharges, which included both drivers and warehouse workers, coupled with retaliatory suspensions, work reassignments, and the warehouse-wide imposition of stricter performance standards, would reasonably continue to resonate among those still employed at the facility.

The after-effects of facially less extreme unlawful conduct will further perpetuate the antiunion environment created by the Respondent. For example, the implementation of issue report forms had a coercive and chilling effect both before and after the election. By introducing the written report format prior to the election, the Respondent was telling employees that a union was not necessary to resolve grievances. Now that they are in use, these forms will routinely and repeatedly remind employees of both Respondent's past opposition to the Union and its permanent position of power over their work lives. Similarly, the continued presence of Timothy Kennedy—the new manager who was hired in the midst of the antiunion campaign to demonstrate management's responsiveness to employees' concerns and persuade them that the Union was unnecessary—reinforces on a daily basis Respondent's determination to exclude the Union.[64]

In these circumstances, we find traditional remedies alone insufficient to assure Respondents' employees that they may feel free to exercise their Section 7 rights. The Respondent's immediate, vigorous, and unlawful efforts to thwart employees' organizing efforts and the reaffirmation of its intransigence through continuing retaliatory actions requires imposition of extraordinary relief. Traditional remedies—a cease-and-desist order coupled with affirmative requirements intended to return employees to the terms and conditions that existed prior to these unfair labor practices—would likely be inadequate to repair the damage inflicted by Respondent's egregious misconduct. To ameliorate the harm done to the rights of employees freely to act concertedly and express support for union representation, as well as to deter future misconduct, we find that an affirmative bargaining order is the appropriate course.

In determining that a *Gissel* bargaining order is appropriate, we have fully considered the impact on employees' Section 7 rights to choose or reject union representation. As the Board has recently explained, in approving the bargaining order remedy in category II cases, the Supreme Court in *Gissel* fully took into account and balanced these employees' rights.[65] Nevertheless, we have also considered this factor based on the particular circumstances of this case.[66] Given the extent and severity of the Respon-

[61] The question of whether the discharges of four additional employees under the revised SAP may also have been unlawful is being remanded to the judge. See discussion, supra.

[62] Repeated unfair labor practices affecting a broad segment of the unit, arising within an intensive campaign to defeat the union organizing effort and continuing beyond the date of the election, and including multiple employee group meetings conducted by a high-ranking management official and "hallmark" as well as other serious and pervasive misconduct, strongly support the likelihood that remedies short of a bargaining order will fail to ensure the protection of employees' Sec. 7 rights. See *Parts Depot, Inc.*, 332 NLRB 670 (2000), enfd. by unpublished decision 24 Fed. Appx. 1, 2001 WL 1610068 (D.C. Cir. 2001); *Garvey Marine, Inc.*, 328 NLRB 991 (1999), enfd. 245 F.3d 819 (D.C. Cir. 2001).

[63] See fn. 53, supra.

[64] Roy announced Respondent's intention to hire a new manager in one of the initial meetings in April. Kennedy was installed in his position in September, just 5 days before the election.

[65] *Cogburn Health Care Center, Inc.*, 335 NLRB 1397, 1401 (2001).

[66] See *Douglas Foods Corp.*, 251 F.3d 1056 (D.C. Cir. 2001), remanding 330 NLRB 821 (2000).

dent's unfair labor practices, we find that a bargaining order will provide the proper remedy to effectuate the wishes of the majority who have chosen union representation and whose Section 7 rights have been infringed by the Respondent's unlawful conduct. At the same time, it will do no injustice to the minority who may not support union representation, as the right to file a decertification petition pursuant to Section 9(c)(1) of the Act adequately safeguards their interests.[67]

As indicated above, the Respondent argues that imposing a bargaining order would be inappropriate in light of the passage of time and employee turnover since the events of this case took place. Thus, in its exceptions, the Respondent contends that evidence introduced at the hearing shows 74-percent employee turnover in 1997, 81 percent in 1998, and 27 percent for the first half of 1999. We reject the Respondent's contentions.

The Board traditionally has not considered passage of time and turnover in evaluating the appropriateness of a remedial bargaining order.[68] Some courts have questioned the wisdom of that policy.[69] We need not revisit it in this case because even considering such factors, we find that the effects of the Respondent's unlawful conduct are unlikely to have dissipated sufficiently to ensure a free election. As discussed above, the Respondent's unfair labor practices were serious, widespread, often committed by high-ranking officials, continued for months after the election, and therefore were likely to have a lingering effect.

Both the tone and content of Respondent's counterorganizational campaign contributed to the creation of a lasting impression on the employees. A particularly telling example of its unrestrained tactics took place during three preelection meetings, before the majority of the entire work force. On June 27, at a mandatory employee meeting, Vice President Roy warned employees not to "grab onto somebody with one foot out the door for lateness and another for stealing company time and sleeping on the job." Although not many knew it at that time, Roy's reference was to Leo and McCorry, two leading union advocates.[70] At the next gathering of the work force, on August 29, Roy was accompanied by Company President Dunn, Corporate Director of Operations Kundrat, as well as onsite Operations Manager Fisher. Early in the meeting, Roy referred to the previous session, stating, "We discussed a lot of issues relative to organizing, relative to the Union, relative to runs, relative to mouse feces at stores . . . . What came out of that meeting within a couple of weeks was two events: one termination and one suspension."[71] While not using names, Roy was obviously referring to the fates of Leo and McCorry.[72] Within a few short lines, Roy tied the union campaign to the most serious of employment consequences before the broadest possible audience. The message to assembled employees was clear—if you support the Union, be prepared to face retaliation. It happened to two chief proponents, and it can happen to you. By focusing the attention of the entire work force on the plight of these two men, Roy engaged in what may be likened to a public execution—an event designed to deter others from following their example and unlikely soon to be forgotten.[73]

In case anyone missed the point, Roy raised the specters of Leo and McCorry yet again during another employee meeting on September 10. With the election little more than a week away, Roy commented that employees appeared to be more "quiet" and "concerned" and possibly "afraid to speak" than they had previously. Roy stated, "People that were going gangbusters for the—and I'm calling them—forgive me—two poster boys for the union up here—which originally incited this whole thing—who were going gangbusters for them are now starting to say, "Well, shit, I don't know."[74] Clearly, Roy wanted employees to recall the fates of Leo and McCorry when they decided whether to support the Union.

To further reinforce and clarify its message, Respondent effected a number of unlawful discharges in the months following the election. A new performance standard—found to have been unlawfully imposed on the warehouse workers because of their widespread support for the Union—provided the trigger for at least seven terminations. Clearly, the Respondent's commitment to eradicate prounion sentiment did not end with the election tally.

Thus, we find that the nature and extent of Respondent's antiunion conduct were so pervasive as to have created a corporate culture of lawlessness. The after-effects of this

[67] *Cogburn*, supra.

[68] See *Parts Depot*, supra at 675 (quoting from *Garvey Marine*, 328 NLRB at 995).

[69] See, e.g., *Flamingo Hilton-Laughlin v. NLRB*, 148 F.3d 1166 (D.C. Cir. 1998).

[70] This incident is discussed at length earlier in this decision, in "The 8(a)(1) Violations, 1. Threat of job loss/disparagement of union adherents."

[71] From GC Exh. 7(a), p. 7, transcript of August 29 meeting.

[72] Leo never returned from the suspension he was serving at the time of the June meeting, having been terminated on June 29. McCorry's complaints about the safety and health hazards posed by the presence of mouse droppings at stores were aired at several meetings, including that on June 27.

[73] That this was no ordinary meeting, but rather one intended to leave a lasting impression is demonstrated by the management representatives in attendance. The presence of Company President Dunn not only underscored its relative importance to the Respondent, but also conferred a tacit imprimatur on Roy's words. The presence of Facility Manager Fisher ensured that Roy's message would not be forgotten locally.

[74] From GC Exh. 7(f), p. 35, transcript of September 10 meeting.

rampant unlawful activity created a legacy of hostility that will pervade the atmosphere for some time to come. And while some employees may have voluntarily departed their jobs, those who remain will doubtless share this history with newcomers. The impact of these events will thus live on in the lore of the shop, where stories, often embellished over time, may grow to legendary proportions. In these circumstances, despite the departure of a significant number of employees who were employed at the time of the unlawful conduct, we conclude that those who remain not only will recall those events, but will continue to be affected by them, and will relate their experience to those newly hired.[75] Accordingly, we find that an affirmative bargaining order is necessary to remedy the Respondent's unfair labor practices.

CONCLUSIONS OF LAW

1. Aldworth and Dunkin' Donuts are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

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

3. Aldworth and Dunkin' Donuts are joint employers of the unit employees.

4. Respondents violated Section 8(a)(1) of the Act by:

(a) Soliciting employee grievances and promising to adjust them in an effort to undermine employee support for the Union.

(b) Promising benefits to undermine employees' support for the Union.

(c) Threatening employees that they will start with nothing when bargaining with the Union begins.

(d) Announcing and implementing the use of the issue report form to undermine employee support for the Union.

(e) Adjusting grievances in an effort to undermine support for the Union.

(f) Soliciting employees to report when they were being bothered or harassed by union activity.

(g) Promising to adjust grievances and to improve benefits in order to undermine support for the Union.

(h) Threatening employees with loss of their jobs if they selected the Union to represent them.

(i) Threatening to discipline or discharge employees if they support the Union.

(j) Threatening that it would be futile for employees to select the Union as their bargaining representative.

(k) Promising to create and creating a new operations' manager position and promising to create a new dispatch supervisor position in an effort to undermine support for the Union.

(l) Inviting employees to bid on the newly created operations manager and dispatch supervisor positions in an effort to undermine support for the Union.

(m) Threatening employees with loss of their 401(k) plan if they select the Union as their bargaining representative.

(n) Promising employees that they would no longer have to deal with an unpopular supervisor in an effort to undermine support for the Union.

(o) Instructing employees to remove their union T-shirts and pins.

(p) Threatening to discharge employees for wearing union pins.

(q) Threatening employees with unspecified reprisals if they support the Union.

(r) Threatening that the facility might close as a result of the employees' union activities.

(s) Threatening to impose less favorable working conditions on employees if they engaged in union activity.

(t) Coercively interrogating an employee about his union activity and promising to refrain from discharging an employee if the employee abandons his support for the Union.

(u) Telling an employee that his suspension was a consequence of his union activity.

(v) Disparaging employees for supporting the Union and thereby threatening employees that union activity would result in disciplinary action.

5. The Respondents violated Section 8(a)(3) and (1) of the Act by:

(a) Discharging Leo J. Leo and Robert Moss because they engaged in union activity.

(b) Conducting an audit of a route of William McCorry because he engaged in union activity.

(c) Suspending Douglas King, Robert Moss, Jesse Sellers, and William McCorry for 5 days because they engaged in union activity.

(d) Transferring Kenneth Mitchell, Douglas King, Robert Moss, and Jesse Sellers because they engaged in union activity.

(e) Suspending Jesse Sellers for 1 day because he engaged in union activity.

(f) Implementing a new selection accuracy program in retaliation for warehouse employees' support for the Union.

(g) Discharging Kenneth Mitchell, Douglas King, Jesse Sellers, David Wolfer, Wade Rosenburger, Pierson Bostic, and Gary Allen pursuant to the new selection accuracy policy.

6. Respondent Aldworth violated Section 8(a)(5) and (1) of the Act by:

[75] Cf. *Parts Depot* and *Garvey Marine*, supra (finding bargaining order appropriate notwithstanding passage of time and turnover).

(a) Refusing since July 28, 1998, to recognize and bargain collectively with the Union as the exclusive-bargaining representative of the employees in the unit described above, while engaging in the conduct that undermined the Union's support and preventing a fair rerun election.

(b) Unilaterally implementing a new selection accuracy program and discharging and disciplining employees pursuant to that program.

ORDER

The National Labor Relations Board orders that

A. Respondent Aldworth Company, Inc., Lynfield, Massachusetts, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Soliciting employee grievances and promising to adjust them in an effort to undermine employee support for the Union, promising benefits to undermine employees' support for the Union, threatening employees that they will start with nothing when bargaining with the Union begins, announcing and implementing the use of the issue report form, adjusting grievances in an effort to undermine support for the Union, soliciting employees to report when they were being bothered or harassed by union activity, promising to adjust grievances or to improve benefits in order to undermine support for the Union, threatening employees with loss of their jobs if they select the Union as their bargaining representative, threatening to discipline or discharge employees if they support the Union, threatening employees that it would be futile for them to select the Union as their bargaining representative, promising to create and creating a new operations' manager position and promising to create a new dispatch supervisor position in an effort to undermine support for the Union, inviting employees to bid on the newly created operations' manager and dispatch supervisor positions in an effort to undermine support for the Union, threatening employees that they would lose their 401(k) plan if they select the Union as their bargaining representative, promising their employees that they would no longer have to deal with an unpopular supervisor in an effort to undermine support for the Union, instructing employees to remove their union T-shirts and union pins, threatening to discharge employees for wearing a union pin, threatening employees with unspecified reprisals if they support the Union, threatening that the facility might close if the employees supported the Union, threatening to impose less favorable working conditions if the employees supported the Union, coercively interrogating employees about their union activity, promising to refrain from discharging employees if they abandon their support for the Union, telling employees that their suspensions are a consequence of their union activity, and disparaging employees because of their support for the Union and threatening that supporting the Union would result in disciplinary action.

(b) Discharging, suspending, transferring, conducting route audits, implementing a new selection accuracy program and discharging employees pursuant to that policy, or otherwise discriminating against any employee for supporting the United Food and Commercial Workers Union, Local 1360 a/w United Food and Commercial Workers International Union, AFL–CIO, or any other union.

(c) Failing and refusing to recognize and bargain collectively with the Union as the exclusive-bargaining representative of the employees in the unit described below, unilaterally implementing a new selection accuracy program and discharging and disciplining employees pursuant to that program.

(d) 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) Within 14 days from the date of this Order, offer Leo J. Leo, Douglas King, Robert Moss, Jesse Sellers, David Wolfer, Wade Rosenburger, Pierson Bostic, and Gary Allen full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Jointly and severally with Respondent Dunkin' Donuts, make whole the following employees for any loss of earnings and other benefits suffered as a result of the discrimination against them: Leo J. Leo, William McCorry, Douglas King, Robert Moss, Kenneth Mitchell, Jesse Sellers, David Wolfer, Wade Rosenburger, Peirson Bostic, Gary Allen, and any other employees who may have been unlawfully disciplined under the new selection accuracy program, in the manner set forth in the remedy section of the judge's decision and consistent with this decision.

(c) Rescind the selection accuracy program that was implemented in October 1998 and restore the program that previously existed.

(d) Within 14 days from the date of this Order, remove from the files of affected employees any reference to the unlawful discharges, suspensions, and disciplinary actions taken against them, and within 3 days thereafter notify the employees in writing that this has been done and that the discharges, suspensions, and disciplinary actions will not be used against them in any way.

(e) On request, bargain collectively with the Union as the exclusive representative of employees in the following appropriate unit concerning their terms and conditions of

employment and, if an understanding is reached, embody the understanding in a signed agreement:

> Included: Regular and full-time drivers, warehouse Employees, yard jockey(s), maintenance employee(s) and warehouse trainees.
> Excluded: All other employees, guards and supervisors as defined by the Act.

(f) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under terms of this Order.

(g) Within 14 days after service by the Region, post at the facility in Swedesboro, New Jersey, copies of the attached notices marked "Appendix A." [76] Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representatives, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 11, 1998.

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

B. Respondent Dunkin' Donuts Mid-Atlantic Distribution Center, Inc., Swedesboro, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Soliciting employee grievances and promising to adjust them in an effort to undermine employee support for the Union, promising benefits to undermine employees' support for the Union, threatening employees that they will start with nothing when bargaining with the Union begins, announcing and implementing the use of the issue report form, adjusting grievances in an effort to undermine support for the Union, soliciting employees to report when they were being bothered or harassed by union activity, promising to adjust grievances or to improve benefits in order to undermine support for the Union, threatening employees with loss of their jobs if they select the Union as their bargaining representative, threatening to discipline or discharge employees if they support the Union, threatening employees that it would be futile for them to select the Union as their bargaining representative, promising to create and creating a new operations' manager and promising to create a new dispatch supervisor position in an effort to undermine support for the Union, inviting employees to bid on the newly created operations' manager and dispatch supervisor positions in an effort to undermine support for the Union, threatening employees that they would lose their 401(k) plan if they select the Union as their bargaining representative, promising their employees that they would no longer have to deal with an unpopular supervisor in an effort to undermine support for the Union, instructing employees to remove their union T-shirts and union pins, threatening to discharge employees for wearing a union pin, threatening employees with unspecified reprisals if they support the Union, threatening that the facility might close if the employees supported the Union, threatening to impose less favorable working conditions if the employees supported the Union, coercively interrogating employees about their union activity, promising to refrain from discharging employees if they abandon their support for the Union, telling employees that their suspensions are a consequence of their union activity, and disparaging employees because of their support for the Union and threatening that supporting the Union would result in disciplinary action.

(b) Discharging, suspending, transferring, conducting route audits, implementing a new selection accuracy program and discharging employees pursuant to that policy, or otherwise discriminating against any employee for supporting the United Food and Commercial Workers Union, Local 1360 a/w United Food and Commercial Workers International Union, AFL–CIO, or any other union.

(c) 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) Within 14 days from the date of this Order, offer Leo J. Leo, Douglas King, Robert Moss, Jesse Sellers, David Wolfer, Wade Rosenburger, Pierson Bostic, and Gary Allen full reinstatement to their former jobs or, if those jobs

[76] 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."

no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Jointly and severally with Respondent Aldworth, make whole the following employees for any loss of earnings and other benefits suffered as a result of the discrimination against them: Leo J. Leo, William McCorry, Douglas King, Robert Moss, Kenneth Mitchell, Jesse Sellers, David Wolfer, Wade Rosenburger, Peirson Bostic, Gary Allen, and any other employees who may have been unlawfully disciplined under the new selection accuracy program, in the manner set forth in the remedy section of the judge's decision and consistent with this decision.

(c) Rescind the selection accuracy program that was implemented in October 1998 and restore the program that previously existed.

(d) Within 14 days from the date of this Order, remove from the files of affected employees any reference to the unlawful discharges, suspensions, and disciplinary actions taken against them, and within 3 days thereafter notify the employees in writing that this has been done and that the discharges, suspensions, and disciplinary actions will not be used against them in any way.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under terms of this Order.

(f) Within 14 days after service by the Region, post at the facility in Swedesboro, New Jersey, copies of the attached notices marked "Appendix B."[77] Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representatives, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 11, 1998.

[77] See fn. 76, supra.

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

IT IS FURTHER ORDERED THAT the allegations regarding the discharges of employees Nelson, Everidge, Wallace and Cramer are severed from this proceeding and are remanded to the judge for further hearing regarding whether the Respondents enforced the selection accuracy program that was in effect prior to October 12, 1998, differently from the program that was implemented in October 1998, and to determine thereby whether the discharges of employees Nelson, Everidge, Wallace, and Cramer violate the Act.

IT IS FURTHER ORDERED that the election in Case 4–RC–19492 be set aside.

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

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT solicit employee grievances and promise to adjust them in an effort to undermine employee support for the United Food and Commercial Workers Union Local 1360 a/w United Food and Commercial Workers International Union, AFL–CIO (the Union.)

WE WILL NOT promise benefits to undermine employee support for the Union.

WE WILL NOT threaten employees that they will start with nothing when bargaining with the Union begins.

WE WILL NOT announce and implement the use of the issue report form to undermine employee support for the Union.

WE WILL NOT adjust grievances in an effort to undermine support for the Union.

WE WILL NOT solicit employees to report being bothered or harassed by union activity.

WE WILL NOT promise to adjust grievances or to improve benefits in order to undermine support for the Union.

WE WILL NOT threaten employees with the loss of their jobs if they select the Union as their bargaining representative.

WE WILL NOT threaten to discipline or discharge employees if they support the Union.

WE WILL NOT threaten employees that it will be futile for them to select the Union as their bargaining representative.

WE WILL NOT promise to create and create a new operations manager in an effort to undermine support for the Union.

WE WILL NOT threaten employees with loss of their 401(k) plan if they select the Union as their bargaining representative.

WE WILL NOT invite employees to bid on the newly created operations manager and dispatch supervisor positions in an effort to undermine support for the Union.

WE WILL NOT promise employees that they will no longer have to deal with an unpopular supervisor in an effort to undermine support for the Union.

WE WILL NOT instruct employees to remove their union T-shirts or union pins.

WE WILL NOT threaten to discharge employees for wearing union pins,

WE WILL NOT threaten employees with unspecified reprisals if they support the Union.

WE WILL NOT threaten that the facility might close if employees support the Union.

WE WILL NOT threaten to impose less favorable working conditions if employees support the Union.

WE WILL NOT coercively interrogate employees about their union activity.

WE WILL NOT promise to refrain from discharging employees if they abandon their support for the Union.

WE WILL NOT tell employees that their suspensions are a consequence of their union activity.

WE WILL NOT disparage employees for supporting the Union.

WE WILL NOT discharge, suspend, transfer, conduct route audits, or otherwise discriminate against any of you for supporting the Union, or any other union.

WE WILL NOT implement a new selection accuracy program in order to discourage you from supporting the Union and WE WILL NOT discharge or discipline employees pursuant to that policy.

WE WILL NOT fail and refuse to recognize and bargain with the Union as the bargaining representative of the employees in the unit described below.

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

WE WILL, within 14 days from the date of this Order, offer Leo J. Leo, Douglas King, Robert Moss, Gary Allen, David Wolfer, Wade Rosenburger, Pierson Bostic, and Jesse Sellers full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL, jointly and severally with Respondent Dunkin' Donuts, make whole the following employees for any loss of earnings and other benefits suffered as a result of the discrimination against them: Leo J. Leo, William McCorry, Douglas King, Robert Moss, Kenneth Mitchell, Jesse Sellers, David Wolfer, Wade Rosenburger, Peirson Bostic, Gary Allen, and any other employees who may have been unlawfully disciplined under the new selection accuracy program with interest.

WE WILL rescind the new selection accuracy policy and restore the selection accuracy program that previously existed.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharges of Leo J. Leo, Kenneth Mitchell, Douglas King, Gary Allen, David Wolfer, Wade Rosenburger, Pierson Bostic, Jesse Sellers, Rober Moss and the unlawful suspensions of William McCorry, Douglas King, Robert Moss, and Jesse Sellers and any other employees who may have been unlawfully disciplined under the new selection accuracy program, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discharges and suspensions will not be used in any way against them.

WE WILL, on request, bargain collectively with the Union as the exclusive representative of the employees in the following appropriate unit concerning their terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

> Included: Regular and full-time drivers, warehouse employees, yard jockey(s), maintenance employees and warehouse trainees.
> Excluded: All other employees, guards and supervisors as defined by the Act.

ALDWORTH COMPANY, INC.

APPENDIX B

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

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT solicit employee grievances and promise to adjust them in an effort to undermine employee support for the United Food and Commercial Workers Union Local 1360 a/w United Food and Commercial Workers International Union, AFL–CIO (the Union.)

WE WILL NOT promise benefits to undermine employee support for the Union.

WE WILL NOT threaten employees that they will start with nothing when bargaining with the Union begins.

WE WILL NOT announce and implement the use of the issue report form to undermine employee support for the Union.

WE WILL NOT adjust grievances in an effort to undermine support for the Union.

WE WILL NOT solicit employees to report being bothered or harassed by union activity.

WE WILL NOT promise to adjust grievances or to improve benefits in order to undermine support for the Union.

WE WILL NOT threaten employees with the loss of their jobs if they select the Union as their bargaining representative.

WE WILL NOT threaten to discipline or discharge employees if they support the Union.

WE WILL NOT threaten employees that it will be futile for them to select the Union as their bargaining representative.

WE WILL NOT promise to create and create a new operations manager in an effort to undermine support for the Union.

WE WILL NOT threaten employees with loss of their 401(k) plan if they select the Union as their bargaining representative.

WE WILL NOT invite employees to bid on the newly created operations manager and dispatch supervisor positions in an effort to undermine support for the Union.

WE WILL NOT promise employees that they will no longer have to deal with an unpopular supervisor in an effort to undermine support for the Union.

WE WILL NOT instruct employees to remove their union T-shirts or union pins.

WE WILL NOT threaten to discharge employees for wearing union pins,

WE WILL NOT threaten employees with unspecified reprisals if they support the Union.

WE WILL NOT threaten that the facility might close if employees support the Union.

WE WILL NOT threaten to impose less favorable working conditions if employees support the Union.

WE WILL NOT coercively interrogate employees about their union activity.

WE WILL NOT promise to refrain from discharging employees if they abandon their support for the Union.

WE WILL NOT tell employees that their suspensions are a consequence of their union activity.

WE WILL NOT disparage employees for supporting the Union.

WE WILL NOT discharge, suspend, transfer, conduct route audits, or otherwise discriminate against any of you for supporting the Union, or any other union.

WE WILL NOT implement a new selection accuracy program in order to discourage you from supporting the Union and WE WILL NOT discharge or discipline employees pursuant to that policy.

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

WE WILL, within 14 days from the date of this Order, offer Leo J. Leo, Douglas King, Robert Moss, Gary Allen, David Wolfer, Wade Rosenburger, Pierson Bostic, and Jesse Sellers full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL, jointly and severally with Respondent Aldworth, make whole the following employees for any loss of earnings and other benefits suffered as a result of the discrimination against them: Leo J. Leo, William McCorry, Douglas King, Robert Moss, Kenneth Mitchell, Jesse Sellers, David Wolfer, Wade Rosenburger, Peirson Bostic, Gary Allen, and any other employees who may have been unlawfully disciplined under the new selection accuracy program with interest.

WE WILL rescind the new selection accuracy policy and restore the selection accuracy program that previously existed.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharges of Leo J. Leo, Kenneth Mitchell, Douglas King, Gary Allen, David Wolfer, Wade Rosenburger, Pierson Bostic, Jesse Sellers, Rober Moss and the unlawful sus-

pensions of William McCorry, Douglas King, Robert Moss, and Jesse Sellers and any other employees who may have been unlawfully disciplined under the new selection accuracy program, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discharges and suspensions will not be used in any way against them.

DUNKIN' DONUTS MID-ATLANTIC DISTRIBUTION CENTER, INC.

Margarita Navarro-Rivera and *Deena E. Kobell, Esqs.*, for the General Counsel.

Paul J. Kingston, Esq. (Kingston & Hodnett), of Boston, Massachusetts, for Respondent Aldworth.

Mark Peters and *Keely J. Sullivan, Esqs. (Mahoney, Hawkes & Goldings, L.L.P)*, of Boston, Massachusetts, for Respondent Dunkin' Donuts.

William A. McCorry, for himself.

DECISION

STATEMENT OF THE CASE

WILLIAM G. KOCOL, Administrative Law Judge. This case was tried in Philadelphia, Pennsylvania, on June 21–25, 27–30, July 19–23, and August 16-20, and 23–25, 1999. The charges and amended charges in Cases 4–CA–27274, 4–CA–27603, 4–CA–27629, 4–CA–27707, 4–CA–27725, and 4–CA–27866 were filed by the United Food and Commercial Workers Union Local 1360 a/w United Food and Commercial Workers International Union, AFL–CIO (the Union) beginning July 7, 1998.[1] The charge and amend charge in Case 4–CA–27289 were filed by William A. McCorry, an individual (McCorry), on July 13 and December 18, respectively. The order consolidating cases, consolidated complaint and notice of hearing (the complaint) issued on April 15, 1999. An amendment to the complaint issued on April 22, 1999, and the complaint was further amended at the hearing. The complaint alleges that Aldworth Company, Inc. (Aldworth) and Dunkin' Donuts Mid-Atlantic Distribution Center, Inc. (Dunkin' Donuts) (jointly called the Respondents) are joint employers of drivers and warehouse employees at one of Aldworth's facilities. The complaint further alleges that the Respondents violated Section 8(a)(1) by making numerous unlawful statements; violated Section 8(a)(3) by suspending McCorry, discharging employees Leo J. Leo and Robert Moss, suspending five other employees and changing their working conditions, suspending yet another employee, and implementing a new policy and discharging employees pursuant to that new policy. The complaint seeks an order requiring that the Respondents bargain with the Union. The complaint also alleges that the Respondent violated Section 8(a)(5) by implementing a new selection accuracy policy and refusing to bargain with the Union.

Aldworth filed a timely answer that, as amended at the hearing, admitted the allegations of the complaint concerning filing and service of the charges, commerce and jurisdiction, labor organization status, and supervisory and agency status. It admitted that it was the employer of the employees in question and denied that Dunkin' Donuts was a joint employer of those employees. Aldworth denied the allegations concerning appropriate unit, demand for recognition, and all the substantive allegations. It raised as affirmative defenses that certain allegations were barred by Section 10(b), that the disciplinary action it took was because the employees engaged in misconduct, and that the Regional Office violated Aldworth's due process during the conduct of its investigation of the charges.

Dunkin' Donuts filed a timely answer that denied the substantive allegations of the complaint; it also denied that it was a joint employer of the employees.

Consolidated with the complaint is a notice of hearing on objections to election.[2] This requires the resolution of certain objections filed by the Union to an election conducted on September 19.

Various motions were filed before the hearing commenced. The General Counsel filed a motion to strike portions of Aldworth's answer. This motion pertained to the affirmative defense, described above, concerning the conduct of the Region during the investigation of the charges in this case. I ruled that Aldworth would be precluded from litigating this matter unless it could show that the Region's conduct prejudiced Aldworth's ability to have a fair hearing. Aldworth made no such showing during the trial. Aldworth filed a motion for a bill of particulars; I denied that motion. Aldworth also filed a Motion for Summary Judgment with the Board. That motion asserted that certain allegations were time barred by Section 10(b). The Board denied that motion on the grounds the motion was not timely served on the parties and also because the motion raised genuine issues of material fact which would be better resolved after the hearing. Dunkin' Donuts filed a Motion for Summary Judgment contending that it was not a joint employer of the employees. The Board denied that motion on the ground that it raised genuine issues of material fact that would be better resolved after the hearing.

At the hearing, I permitted the General Counsel to amend the complaint to allege that Aldworth unlawfully interrogated an employee concerning his and another employee's involvement in this unfair labor practice proceeding.

More motions were filed after the hearing closed. On October 21, Aldworth filed a motion to reopen the record. The General Counsel filed an opposition to that motion. On November 8, I issued an order denying Aldworth's motion.[3] On November 29, Dunkin' Donuts filed a request that I not consider the General Counsel's brief. Aldworth filed a position on that motion, and the General Counsel filed an opposition. On December 9, I issued an order denying Aldworth's request except that I ruled that appendix A, attached to the General Counsel's brief, would not be considered.[4] On December 21 Dunkin' Donuts filed a motion to limit the scope of relevant

[1] All dates are in 1998 unless otherwise indicated.

[2] At the hearing, the Union withdrew Objection 1.

[3] Those documents are received into evidence as JD Exhs. 1(a), (b), and (c), respectively.

[4] Those documents are received in evidence as JD Exhs. 2(a), (b), (c), and (d), respectively.

evidence. The General Counsel filed an opposition, and on January 4, 2000, I issued an order denying the motion.[5]

On the entire record,[6] including my observation of the demeanor of the witnesses, and after considering the very helpful briefs filed by the General Counsel, Aldworth, and Dunkin' Donuts, I make the following

FINDINGS OF FACT

I. JURISDICTION

Aldworth, a corporation, has been engaged in the business of leasing personnel to enterprises in the transportation business at various facilities located throughout the United States, where it annually purchased and received goods and services in interstate commerce valued in excess of $50,000. Aldworth admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Dunkin' Donuts, a corporation, has been engaged in the distribution of products for Dunkin' Donuts retail shops from its facility located in Swedesboro, New Jersey (the facility), where it sold and shipped goods and products valued in excess of $50,000 directly to points located outside New Jersey. Dunkin' Donuts admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Aldworth and Dunkin' Donuts admit and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. SECTION 10(b)

As indicated above, Aldworth has maintained that certain allegations in the complaint are untimely under Section 10(b). The Board had denied Aldworth's Motion for Summary Judgment on this issue in part because it raised issues of fact. At the hearing Aldworth renewed its motion after the General Counsel rested his case. I denied the motion. Thereafter, Aldworth filed a request for special permission to appeal my ruling as it pertained to certain paragraphs of the complaint. The Board denied that request.

Specifically, Aldworth argues that the allegations contained in paragraphs 5(a) and (b) are untimely because they allege conduct that occurred "[i]n early April 1998" and on about "April 11, 1998." Aldworth then argues that the "charge" covering these allegations was not filed until October 22. As the General Counsel points out, Aldworth is mistaken. The "charge" that it refers to is really a first amended charge; the charge itself was filed on July 7, well within the 6-month period set forth in Section 10(b). That charge alleges violations of Section 8(a)(1) and (3) by discriminating against employee Leo J. Leo and other employees. The charge also alleges, "The employer has engaged in these actions to threaten, coerce, and intimidate its employees in their exercise of their Section 7 rights." The allegations in the complaint pertain to unlawful threats, promises, and solicitation of grievances. Clearly these allegations, if proven, would help to establish the animus needed as part of the allegations in the complaint concerning Leo's discharge, and thus are closely related to that charge. I conclude that allegations 5(a) and (b) of the complaint are supported by a timely filed charge. *Office Depot*, 330 NLRB 640 (2000); *Nickles Bakery of Indiana*, 296 NLRB 927 (1989); *Redd-I, Inc.*, 290 NLRB 1115 (1988).

Next, Aldworth argues that because certain allegations in the complaint were not made the subject of the objections to the election filed by the Union, those allegations are untimely. I agree with the General Counsel that this "is a nonsensical argument." The allegations in a complaint must be supported by timely filed charges; objections to an election play no part in that process.

Aldworth's next argument concerns the implementation of a new selection accuracy policy in early October. The General Counsel alleges that this conduct violates both Section 8(a)(3) and (5). Aldworth challenges those allegations only as they pertain to the 8(a)(5) allegation. The General Counsel points to a first amended charge filed October 22 as support for that allegation. The amended charge alleges that Aldworth refused to bargain with the Union beginning July 28. I conclude that the allegation concerning the unilateral implementation of the selection accuracy policy without first bargaining with the Union is sufficiently related to the amended charge of a refusal to recognize and bargain with the Union to justify and support the complaint allegations. *Nickles*, supra. It follows that the allegations in the complaint concerning employees discharged pursuant to the selection accuracy policy are also supported by the same timely filed amended charge. In a related argument, Aldworth argues that because the first charge alleging a refusal to bargain was not filed until after it implemented the modified selection accuracy program, it was without notice that the Union was seeking bargaining at that time. This argument misses the point. Section 10(b) requires only that charges be filed and served within 6 months after the alleged unlawful conduct; the Act does not require more than that. Moreover, an employer will not be heard to complain of lack of notice concerning a bargaining obligation if it engages in a pattern of unlawful conduct sufficiently egregious to warrant a bargaining order.

I conclude that Aldworth's contention concerning the absence of timely filed charges to support certain allegations in the complaint is without merit.

III. JOINT EMPLOYER ISSUE

A. The Facts

1. Background

Dunkin' Donuts is a nonprofit purchasing and delivery cooperative that operates for the benefit of the individual owners and franchisees of Dunkin' Donuts' retail stores. The owners of the retail stores pay a fee to use the services provided by Dunkin' Donuts, and the owners of the member retail shops collectively are the owners of Dunkin' Donuts. There are about 970 retail members covering about 1200 to 1400 retail shops. In terms of the scope of operation, Dunkin' Donuts ships between 150,000 and 175,000 cases of product per week for a total of about 4.2 million pounds. Craig Setter is president of Dunkin'

[5] Those documents are received in evidence as JD Exhs. 3(a), (b), and (c), respectively.

[6] The General Counsel's unopposed motion to correct the transcript is granted.

Donuts. Michael Shive is the distribution center manager; he is responsible for the warehousing functions as they relate to facility maintenance, building and grounds maintenance, and slot location. He creates, maintains, and manages the budget covering all warehouse and transportation functions. Reporting to Shive are Thomas Knoble, the transportation manager, and Warren Engard, the warehouse supervisor. Dunkin' Donuts also employs customer service representatives at the facility. These employees take weekly orders from the retail shops and deal with the retail shops to assure that their business needs are satisfied. Cindy Carey, a Dunkin' Donuts' employee, reviews the orders placed by the retail shops and makes necessary adjustments to the delivery routes. For example, an unusually large order may require that the store be placed on another route or that another delivery be made. Once the adjustments are made Carey prints the manifests that are used by the drivers in delivering the merchandise.

Aldworth is in the business of leasing drivers, warehouse employees, and similar employees to businesses in need of such personnel. Kevin Roy, executive vice president, and Wayne Kundrat, director of operations, work out of Aldworth's main office in Lynnfield, Massachusetts. Aldworth employs about 1500 employees in about 24 States; it provides services to about 25 businesses, including Dunkin' Donuts. Dunkin' Donuts, however, is considered the common carrier for purposes of interstate commerce. Aldworth provides these services to Dunkin' Donuts at the Swedesboro facility where it employs about 130–140 employees. These consist of about 63 drivers, 40 to 45 warehouse employees, and 30 to 40 driver helpers. Aldworth employs a number of supervisors at the facility. Frank Fisher was operations manager for Aldworth until about July 1999. Fisher worked at the facility and was the senior Aldworth official there until September 1998 when Timothy Kennedy was hired as regional operations manager. There are also a number of first-line Aldworth supervisors at the facility.

In general, the employees at the facility unload and load trucks, stock and select merchandise, and deliver the merchandise to the individual retail shops. Warehouse employees select merchandise from stock to be delivered to the retail shops. Truckdrivers deliver the merchandise from the facility to the individual Dunkin' Donuts' retail shops where they unload and store the merchandise. They run regularly assigned routes. They are assisted in these tasks by helpers. Helpers work on a part-time basis and they are *not* part of the unit alleged to be appropriate in this case. The helper classification is considered an entry-level position and successful helpers may become full-time warehouse employees. Truckdrivers may occasionally, for various reasons, also work as helpers for other drivers.

Aldworth and Dunkin' Donuts are separate corporate entities. Each has independent management, ownership, and financial control.

Before February 13, the employees worked in a warehouse located in Thorofare, New Jersey. That facility became inadequate due to a continuous expansion in business volume. On February 13, the employees moved to a new facility in Swedesboro, New Jersey. Dunkin' Donuts owns the new facility, which consists of 125,000 square feet. The facility has dry, cooler, and freezer storage areas. Dunkin' Donuts uses the facility to warehouse products that are ordered by and shipped to the individually owned Dunkin' Donuts' retail shops in an eight-state area. It maintains its customer service offices in the front part of the facility. At the rear of the facility near the dispatch office Dunkin' Donuts' managers, Knoble and Engard, and Aldworth supervisors maintain their offices. Dunkin' Donuts owns or leases the trucks and warehouse equipment used by the employees. As such Dunkin' Donuts is responsible for the safety, inspection, and maintenance of that equipment as well as related record keeping. Dunkin' Donuts also owns the goods that are warehoused in the facility and shipped to the retail shops.

Aldworth provides the employees with a uniform that includes a tan long-sleeved shirt with a patch that contains the Dunkin' Donuts' logo and the words "contractor for" appearing in small letters above the log. Employees are also issued T-shirts that are worn during the summer months. The T-shirts simply bear the name "Dunkin' Donuts." The trailers owned by Dunkin' Donuts and used by Aldworth drivers bear the Dunkin' Donuts logo and have pictures of doughnuts and the like. The costs for the uniforms are passed through by Aldworth to Dunkin' Donuts as part of their cost plus contractual arrangement.

2. Lease agreement

Dunkin' Donuts and Aldworth are parties to a lease agreement under which Aldworth provides the personnel to staff the warehouse and deliver the products. Aldworth is compensated on a "cost plus" basis. Under that arrangement Dunkin' Donuts pays Aldworth for the wages and other costs of the employees, plus an additional amount of money to compensate Aldworth for its services. Under the lease agreement Aldworth is responsible for providing a sufficient number of employees to perform the work desired by Dunkin' Donuts. Aldworth is responsible for paying and does pay the wages and benefits of the employees. Aldworth also maintains their workers' compensation insurance, performs payroll withholding functions, and keeps related employment records for the employees. Because Dunkin' Donuts owns the tractors and trailers used by the drivers and the warehouse equipment used by the warehouse employees, the lease agreement provides that it will provide for public liability, property damage, and comprehensive general liability insurance associated with that equipment. Dunkin' Donuts also assumes responsibility for all fines resulting from the operation of the vehicles.

The lease agreement provides that the leased employees working at the facility shall be in control, supervision, and dispatch of Aldworth, and that Aldworth shall act in that regard in conformity with the business requirements of Dunkin' Donuts. Aldworth is required to have on duty at least one supervisor during the entire shift that any leased employees are working. The lease agreement provides:

> At all times and in all respects the right to control [the employees] shall remain with [Aldworth] and shall include, but not be limited to, the right to establish and to pay all wages and fringe benefits thereof, to hire, fire and take all discipli-

nary measures of any kind with respect thereto, and to replace the same at any time.

The lease agreement has an attached "schedule A" that specifies the straight time and overtime wage rates for which Dunkin' Donuts will reimburse Aldworth for specified classifications of employees. In practice, these rates become the actual rates paid by Aldworth to its employees. Schedule A also describes the per diem overnight rate for drivers on overnight runs and the employee benefits, such as paid holidays, sick days, vacation, bereavement pay, paid uniforms, medical insurance, reimbursable expenses such as tolls and motel costs, and a 401(k) pension plan, for which Dunkin' Donuts will reimburse Aldworth.

Changes to the lease agreement are periodically negotiated. On March 10, Craig Setter, then Dunkin' Donuts' vice president and general manager, sent a letter to Roy that summarized negotiations that had taken place concerning modifications to schedule A. The letter indicated that employee wages would be frozen at the current rate and that a specified percentage of total wages would be set aside for a bonus program that had been established the year before. Vacation pay for drivers and warehouse employees was capped at a specified number of hours per week. Employees would begin earning an additional week of vacation after a specified number of years of service with Aldworth. Concerning medical insurance, the letter provided that increased costs would not be automatically passed on to Dunkin' Donuts but instead Dunkin' Donuts retained the option to agree with any increase in whole or part. Dunkin' Donuts expressed its intent not to contribute more for medical insurance for Aldworth employees than it contributes for its own employees. The letter expressed an agreement that Dunkin' Donuts would have no involvement in the hiring and qualifying process of new drivers unless Dunkin' Donuts wished to do so at its own expense. Finally, the letter provided for an increase in the service fee that Dunkin' Donuts paid to Aldworth. As will be seen below, this agreement lead Aldworth to declare a wage freeze that in turn appears to have been the catalyst for the decision of some employees to support an organizing effort.

In 1999, schedule A was again revised. In a document dated February 20,1999, Dunkin' Donuts and Aldworth agreed that drivers and warehouse employees would receive a maximum wage increase of 3 percent, but Dunkin' Donuts would no longer endorse the bonus program. The document indicated that the bonus program had been ineffective and seemed to cause more hard feelings than good. The new hourly wage rates were specified.

In practice, Aldworth provides its employees only the wage rates and benefits that were reimbursable by Dunkin' Donuts. In fact, it would not allow its employees to incur any work-related costs unless Dunkin' Donuts agreed first to agree to reimburse Aldworth. For example, as described below, when driver McCorry was unexpectedly caught in a snowstorm and needed permission to stay at a hotel, Dunkin Donuts made that decision.

3. Government regulation

Dunkin' Donuts is designated as the carrier or employer of the drivers for purposes of compliance with the Department of Transportation (DOT) Bureau of Motor Carrier Safety Regulations. As such Dunkin' Donuts is required to assure that the drivers properly maintain drivers' logs, comply with the limitations imposed on the amount of time drivers may spend on the road, and that the drivers otherwise comply with DOT rules and regulations. Accordingly, Dunkin' Donuts maintains in its offices the drivers' annual reviews, drivers' logs, medical reports, and medical certificates of all drivers, as well as all other reports or forms required by law concerning the drivers. These documents are generated by Aldworth and then provided to Dunkin' Donuts. DOT also requires that the drivers conduct daily inspections of their vehicle when starting and again when completing a delivery run.

Drivers too, of course, are required to abide by Federal regulations covering matters such as how many hours they can drive during a 24-hour period and the number of days that they may work consecutively. Drivers are required to maintain logs that describe their work activity for each day of the year. Dunkin Donuts decides how those regulations are to be interpreted. For example, Daniel Hoffman, an Aldworth supervisor, disagreed with Knoble, a Dunkin' Donuts manager, as to what the regulations required concerning the logs. Hoffman, however, did as Knoble instructed concerning the logs.

During the course of a workday circumstances may develop when a driver no longer is able to complete his deliveries and return to the facility in a manner consistent with DOT regulations. Knoble becomes aware of these situations and discusses the situation directly with the driver to develop a plan to complete the deliveries yet attempt to remain compliant with regulations.

In addition, as owner of the facility Dunkin' Donuts is required to assure that it is operated in accordance with OSHA requirements.

4. Policies and procedures manual

Aldworth prepares and distributes a manual to its employees. The manual covers matters such as seniority, layoff and recall, leave of absence, holidays, days off, absenteeism and tardiness, disciplinary procedure, employee problem solving procedure, payroll, safety, employee conduct, parking, honesty, personal appearance, and incentives and bonuses. Several sections of the manual, such as license requirements, accident procedures, and overloads, are directed specifically to the drivers. The manual also has provisions covering topics such as sexual harassment, workers' compensation program, family and medical leave, safety, and antidiscrimination policy. There is no reference to Dunkin' Donuts in that manual.

5. Hiring and firing

I turn first to the hiring process. Daniel Hoffman has worked for Aldworth for about 13 years. From September 1996 until May 1998 he worked as a field supervisor. Before and after that period of time he worked as a driver. Hoffman was interviewed a number of times for the position of field supervisor. First he met with Fisher, who at the time had recently assumed his position with Aldworth. Next, Hoffman met with Shive and Knoble of Dunkin' Donuts. During this interview Knoble asked Hoffman questions concerning how Hoffman would handle certain situations. Also, Hoffman was interviewed by

Phil Reeves, who at that time was president of Dunkin' Donuts. Reeves asked Hoffman about his family and his hobbies and asked him some hypothetical questions. Later, 1 day after Hoffman had completed his delivery route Shive invited him to the conference room where Fisher was present. Shive and Fisher told Hoffman that he had been selected for the field supervisor position. They told Hoffman to see Reeves who also congratulated Hoffman and asked him not to say anything about his selection until the other applicants had been contacted.[7]

Aldworth creates and places advertisements for driver and warehouse positions at the facility. Applicants apply at the facility; they complete Aldworth application forms and are initially interviewed by Aldworth supervisors. After the initial screening process driver applicants are then given a road test to determine their ability to drive the Dunkin' Donuts equipment. Aldworth personnel generally give these tests, but on occasion Knoble has done so. Records show that for the period December 1996 to the date of the hearing Knoble administered road tests on four occasions. The results of these tests are recorded on a form that is given to Knoble. During the time Hoffman was field supervisor for Aldworth, Fisher and Knoble interviewed the driver applicants. At times Knoble told the applicants that if they passed the drug test they would be hired. At other times Knoble indicated displeasure with an applicant and the applicant was not hired.[8] To give a specific example, Bryon Farnsworth applied for a driver's position in August or September 1996. Fisher first conducted a preliminary interview and then sent Farnsworth to see Knoble. Knoble also interviewed Farnsworth and then took him into the parking lot and had him do a pretrip inspection of a truck. After Farnsworth went on a road test with Hoffman, he went back into Knoble's office where Fisher was also present. After a few more questions, Knoble and Fisher told Farnsworth that he was hired, and later Fisher told him the details concerning when he could start.[9]

Dunkin' Donuts' warehouse supervisor, Warren Engard, plays a role in hiring Aldworth's warehouse employees. Engard had previously worked for Aldworth as a supervisor from August 1989 until January 5, at which time he assumed his current position with Dunkin' Donuts. Engard admitted that Fisher brought warehouse applicants to see him after the applicants had been initially interviewed by Aldworth. Engard then showed the applicant the warehouse area and explained the selection process because Fisher did not know the details of that process. Engard would ask the applicants questions; he also asked them to perform a mock-selection procedure. Engard did this to see if the applicant had a sense of how the selection process worked. Fisher would then ask Engard what he thought of the applicant and Engard would give his opinion. Fisher, however, did not always agree with Engard and occasionally hired an employee over Engard's objection.[10] To give a specific example concerning a warehouse employee, Carl Nelson was hired in May. He responded to an advertisement in the newspaper and called the telephone number listed and spoke to Fisher. Nelson then came to the facility where he spoke to Fisher and Engard. Engard took Nelson to the warehouse area and explained the selecting process to Nelson. Engard wrote a number of items on a sheet of paper and asked Nelson to locate those items for selection. After Nelson did so, Engard indicated that Nelson had an idea of what the job consisted of. Fisher later indicated that he would get back to Nelson. The next day, Fisher told Nelson that he was hired. Nelson served a 90-day probationary period. At the end of that period Nelson had a conversation with Engard in Engard's office. Engard again told Nelson what the job consisted of, and said that Nelson had a problem with selection accuracy. Engard said that he would make an exception and give Nelson a chance and Nelson would be hired as a regular employee.[11]

As noted above, Hoffman was field supervisor for Aldworth until May. At that time Hoffman was summoned to a meeting with Dunkin' Donuts' managers, Knoble, Shive, and Craig Setter, who had replaced Reeves as president. Setter advised Hoffman that the board of directors had voted four to three to abolish his position. Hoffman reminded them that he had been told by Reeves that he would be able to return to his position as a driver if the supervisory position was abolished, and Hoffman subsequently returned to work as a driver. There is no evidence that Hoffman dealt with any Aldworth supervisor concerning his return to the driver's position.

As indicated, under the lease agreement Dunkin' Donuts may request that Aldworth terminate an employee for good cause. Fisher admitted that he consulted with Dunkin' Donuts' managers concerning employee terminations. As he explained, in these matters Dunkin' Donuts was "either aware of it or involved in it." An example of Dunkin Donuts' involvement occurred in 1998 when an employee had a motorcycle accident in the parking lot at the facility. Freezer employee Jesse Sellers asked Engard what happened to the employee. Engard admitted to Sellers that he had fired the employee.[12] Finally, records

[7] These facts are based on the credible and unrefuted testimony of Hoffman.

[8] These facts too are based on Hoffman's testimony. I have considered Knoble's testimony that he did not participate in the interviews of Aldworth drivers. I do not credit that testimony. Knoble's own testimony is not easily reconciled on this point because he later admitted that for a period of time Fisher brought applicants to him, that he discussed the nature of the work and the applicant's past experience, and that he then told Fisher his impressions of the applicant. Apparently, Knoble does not consider that this amounts to an interview. This is the first of several examples that ultimately lead me to conclude that Knoble at times was inclined to give misleading answers.

[9] These facts are based on Farnsworth's credible testimony.

[10] Fisher testified that he was unaware of any occasions when Dunkin' Donuts' supervisors, particularly Engard, assisted in the hiring process. As is obvious from the testimony set forth above, Engard flatly contradicts this. Fisher's testimony here seriously detracts from his overall credibility as a witness.

[11] These facts are based on the credible and uncontradicted testimony of Nelson.

[12] These facts are based on the credible testimony of Sellers. I have considered Engard's testimony that he believes that he told Sellers that if the motorcycle driver was his employee he would fire him. Engard further testified that he told Fisher that he hoped that Fisher was going to fire the motorcyclist. Engard's testimony on this occasion struck me as uncertain and I do not credit it.

show that in April driver Frank Fisher terminated Kenneth O'Brien. Knoble conducted part of the investigation that lead to the discharge and Knoble advised Fisher that he was not comfortable with O'Brien's continued employment.

6. Pay and benefits

Aldworth pays the employees and supervisors and provides their benefits. Aldworth, in turn, is reimbursed for these amounts by Dunkin' Donuts pursuant to their cost-plus contract; Dunkin' Donuts also approves or rejects increases in these salaries or benefits. Dunkin' Donuts' personnel actually generate the payroll records for the Aldworth employees, and Shive or Knoble sign the payroll.

Among the benefits provided to the Aldworth employees is a 401(k) plan. This is the same plan that covers Dunkin' Donuts' employees. The plan itself identifies Dunkin' Donuts as the administrator and describes Dunkin' Donuts as "your employer" to the employees covered by the plan. Some of the forms used by Aldworth employees to make changes to their participation in the plan describe Dunkin' Donuts as the employer. On one such form the name of Aldworth was scratched out and the name of Dunkin' Donuts was added. Questions that Aldworth employees have concerning the plan are directed to and dealt with by Dunkin' Donuts' personnel. New employees are sometimes notified to contact Dunkin' Donuts' personnel directly to participate in the plan. Over the past 10 years the average contribution made on behalf of employees has been 3.68 percent. Employees are also free to contribute to their 401(k) account. The plan has a vesting schedule that ends with 100-percent vesting after 6 years.

Dunkin' Donuts presented the testimony of Jay Pabian, an attorney whose area of expertise is tax law. Pabian assisted Dunkin' Donuts in creating and administering the 401(k) plan. Pabian explained that the plan was a "qualified plan" under the Internal Revenue code. Such a plan results in a tax benefit for the employer and allows employees to defer taxation on earnings until after retirement. Pabian testified that he advised Dunkin' Donuts that because it leased a percentage of employees at the facility those leased employees had to be included in the plan in order for the plan to be considered "qualified." He also clarified that Dunkin' Donuts was not required to offer any employees a 401(k) plan. It could also have developed a retirement plan for its employees only; however had it done so without including the Aldworth employees the plan would not have been "qualified" and thus would have lost the attractive tax consequences that flowed from such a plan.

7. Assignment of work, equipment, and helpers

Aldworth assigns employees and supervisors to work on particular shifts. Dunkin' Donuts establishes the shift times, shift sequences, and delivery routes. As indicated above, Dunkin' Donuts also creates and adjusts the manifests that the Aldworth drivers use to deliver the merchandise to the retail shops. Each route has its own manifest. The manifest lists the order of deliveries, the time the route is to begin and end, and the time that the delivery should be made to each store. The manifest determines how much time the delivery should take and how long it should take to get from one location to another. The manifest also provides for 15 minutes for the drivers to complete the paperwork generated by the deliveries. On overnight routes the manifest indicates the time when the driver is expected to arrive and depart from the hotel. Drivers are expected to indicate their actual arrival and departure times on the manifest.

Dunkin' Donuts' traffic manager, Knoble, admitted that prior to September 1998 he selected and assigned employees to permanent routes. He further admitted that until June he made the daily assignments of Aldworth drivers to routes that did not have a permanent driver.[13] These assignments were passed on to Aldworth's supervisors who then confirmed with the assignment with the drivers. As an example, driver Farnsworth was dissatisfied with the Friday route that he had been assigned. When he learned that driver Leo had been terminated he asked Knoble's assistant whether Leo's route was available. When Farnsworth learned that the route was available he asked Knoble whether he could be assigned to it. Knoble agreed to do so and Farnsworth began working the new route. However, Knoble told Farnsworth that another driver had worked the route in substantially less time than called for by the manifest. Knoble said that if Farnsworth did not work the route as fast as the other driver he would take the route away from Farnsworth because many other drivers were interested in that route. No Aldworth supervisor spoke to Farnsworth about this route reassignment. In addition, during a series of meetings that Aldworth held with its employees before the election employees described many instances of how Knoble had unfairly treated them concerning work assignments. These meetings are more fully described below.

Adjustments to these assignments are regularly made as drivers, for example, call in sick. For example, on one occasion driver Norman Cooper Jr. called in sick at the start of his shift. Knoble called Cooper later that morning and asked him to explain why he did not come in; Knoble said that in the past Cooper had disrupted the schedule. Knoble said that he needed Cooper to work as a jockey to move the trailers around the yard. Cooper said that he was not sure if he could work as a jockey that day. Knoble asked if Cooper was refusing and Cooper finally said that he would come in to work, and he did so. He was paid about $3 per hour less than his normal rate for performing this work. No Aldworth supervisor dealt with Cooper on this occasion.[14] From about 3 p.m. to 6 a.m. Aldworth supervisors made necessary adjustments to the driver assignments. They did so by using a standby list to call drivers to come into work. These adjustments were made about once or twice a week. However, it was Knoble who prepared the list of employees who were on standby list. At times, Knoble directly

[13] Knoble initially testified that he made such assignments until about June. When he was about to be presented with evidence that he continued to make some assignments after June, Knoble explained that he did not testify that he completely stopped making assignments after that time. It is these types of deceptive responses that make me hesitant to credit Knoble's testimony. At one point, Shive testified that Aldworth assigned drivers to particular routes. It is unclear whether he meant before or after autumn 1998. If he meant the former then this testimony is not only contradicted by Knoble's testimony, it is also contrary to records kept by Dunkin' Donuts.

[14] These facts are based on the credible and unrebutted testimony of Cooper.

informed Aldworth drivers that they were on the standby list and that they might expect to be called into work the next day. Knoble also admitted that he had scheduled Aldworth drivers to come in 15 minutes early to view safety videos.

Beginning in June, Aldworth Supervisor Jeff Wade became primarily responsible for making the daily driver assignments. As more fully discussed below, the change was made as part of Aldworth's campaign to persuade the employees that they should not select the Union as their collective-bargaining representative. However, Knoble admitted that even after this change he occasionally prepared the daily schedule and assigned drivers to the schedule. For example, Knoble assigned drivers to routes on the schedules dated June 23–26, July 6–7, 29–31, and August 13 and 24–27. And even after this change Knoble and Dunkin' Donuts continued to create the manifests that determined the times the Aldworth drivers would start their routes and the times they were expected to arrive at the retail shops and finish their workday.

When employees desired to have their routes adjusted, they dealt directly with Knoble. For example, in the summer of 1997 driver McCorry requested that he be relieved of his overnight run to Pittsburgh, Pennsylvania. Knoble arranged for McCorry to be assigned two local routes instead. Thereafter, in about January, when McCorry desired to return to an overnight run he again spoke to Knoble. At that time Knoble was hesitant to give McCorry a particular overnight route, but Knoble finally told McCorry that he would give McCorry the route only if McCorry worked the route at 115 percent of the normal time. To explain what this meant, routes have times assigned to them by which the drivers are expected to finish. If they complete the route on time they are operating at 100 percent. If they complete the route in less time than had been scheduled, they were operating at a rate of greater that 100 percent, the percentage dependent on how quickly the work was completed. Thus, Knoble was telling McCorry that he would have to complete the route in less than the scheduled time. McCorry did not deal with any Aldworth supervisors on these matters.[15] Farnsworth also dealt with Knoble when he wanted to take a different route to get to a retail store.

Similarly, when drivers sought adjustments to the start or delivery times on a route, they saw Knoble who then decided whether or not to make the adjustment. For example, on one occasion driver Leo talked to Knoble in an effort to have the start time on a route changed so that he could avoid traffic congestion. Knoble and Leo discussed the matter and Knoble decided not to make the adjustment.[16] Farnsworth also dealt with Knoble when he wanted to make a change in the time at which he was to deliver to a particular retail store. On one occasion he asked Aldworth Supervisor Michael Houston about a time change on his delivery route, but Houston referred him to Knoble.[17] Issue reports[18] completed by drivers confirm the role Dunkin' Donuts plays in this matter. For example, a driver complained that he needed more time to make a delivery on his route. The response was that the traffic department, which Knoble heads, would conduct an analysis and adjust the time accordingly. Another driver complained that the time allotted to travel to a location was insufficient because of the number of traffic lights. The response was that Cindy Carey, a Dunkin' Donuts' employee, would conduct a study of the travel time and an adjustment to the travel time was made pending the completion of the study. On another occasion a driver requested that certain deliveries from a long route be transferred to another route with a shorter workday. Knoble agreed to make the route changes requested by the driver. On yet another occasion, a driver also requested changes in the manifest times. Knoble agreed to make certain changes. However, he refused to make other changes because other drivers who had worked that route were able to complete the deliveries in less than the time allotted on the manifest. Shive admitted that Aldworth's supervisors pass on these types of issues to Dunkin' Donuts because Aldworth cannot change the routes as described in the manifests. Dunkin' Donuts also revises the manifest to accommodate the retail shops. This too may impact on the drivers' workday.

Even after Wade assumed that task of assigning Aldworth drivers Knoble continued to play a role in that process. For example, on September 16, a shop owner complained that she wanted a regular driver assigned to deliver to her shop. Knoble told Fisher that there was a need for a regular driver to be assigned to that route. Thereafter a regular driver was assigned to that route.

Knoble also assigns the tractors and trailers that the drivers use to make the deliveries. Newer employees were not assigned the same tractor each day. However, as employees gained seniority, they begin using the same tractor each day. On one occasion, Leo spoke to Knoble and requested that he be assigned a tractor. Knoble said he would consider the matter, and later Leo was assigned a tractor. In 1997, Dunkin' Donuts purchased a fleet of new tractors. Knoble assigned the tractors to the drivers.

As previously indicated, sometimes drivers are accompanied by a helper. Leo has asked Knoble to assign him a particular helper if he and the helper worked well together. Knoble usually granted that request.[19]

Knoble also made other work assignments to Aldworth's drivers. For example, manifest records indicate that on about September 29 Knoble assigned a driver the task of moving pallets out of the parking area.[20] On another occasion Knoble

[15] These facts are based on the credible and uncontradicted testimony of McCorry.

[16] These facts are based on the credible and uncontradicted testimony of Leo.

[17] These facts are based on the credible testimony of Farnsworth.

[18] Employees use the issue report forms to identify problems. These forms are then submitted to management; they contain space for a reply. The genesis of these reports is described in more detail below.

[19] The foregoing facts are based on the credible testimony of McCorry and Leo.

[20] I recognize that the notations made on the manifests by the drivers may be considered hearsay. However, under the circumstances here where the documents containing the drivers' notations are submitted to Dunkin' Donuts and there is no evidence that the notations were then corrected or clarified, I regard the notations as reliable evidence for the truth of the matters asserted therein.

assigned an Aldworth driver to work as a jockey in the yard. On other occasions Knoble directed the Aldworth drivers to change the route they normally would take in order to avoid having the vehicle pass through a highway truck scale.[21] On June 28, Knoble assigned yard jockey Edward Eldridge the task of placing new insurance cards in the tractors. When Eldridge failed to do so Knoble completed an incident report[22] describing these facts. Eldridge then received a written warning from Aldworth that stated: "You were given an assignment by supervision to place new insurance cards in the tractors. You were also told if needed to stay late to ensure the assignment was complete. You left that night without doing this assignment." This shows that Aldworth confirmed to an employee that Knoble is to be regarded as his supervisor and that the employee must follow Knoble's instructions or risk discipline.

Knoble also directs Aldworth drivers to make special deliveries to the retail shops and to make deliveries in an order contrary to the order set forth on the manifest. He has directed an Aldworth driver to stop by a truckstop and purchase a map for him and permitted an Aldworth driver to take time and look for another motel to stay at on an overnight route. Knoble has instructed Aldworth drivers to make special stops to pick up Dunkin' Donuts' equipment such as new pallet jacks. He talks directly with the Aldworth drivers as needed. For example, a driver encountered a truck at the delivery door of a retail shop. He spoke with Knoble who directed the driver not to make the delivery.[23] Knoble has provided directions to drivers when they are making nonroutine deliveries. Knoble also meets with individual drivers to discuss matters such as their logbook or equipment; he may leave a note on their timecard to see him.

As described more fully below, Aldworth held a series of meetings with employees prior to the election. At those meetings it became clear that one on the main problems that employees had was with the manner in which Knoble dealt with them on a regular basis. Aldworth recognized the problem that Knoble had created and attempted to rectify it by insulating employees from regular contact with him.

Turning to the warehouse, Engard conceded that after he became a Dunkin' Donuts' manager in January he continued to schedule the warehouse employees. He was uncertain how long he continued to do this, but it could have been up until May. Engard also occasionally deals directly with the Aldworth employees. For example, in June a driver spoke to Engard for 15 minutes by telephone concerning new products that the driver was delivering to a retail shop. On occasion, Shive also directly gives instructions to Aldworth's drivers. For example, in June, Shive directed a driver to keep the frozen merchandise in the freezer on the trailer because the freezer in the retail shop was not functioning. Shive also directed that the driver return to that shop later to deliver the frozen merchandise. On another occasion, a driver spoke to Shive when the driver was unable to fit a large item through the delivery door; ultimately the driver got approval to uncrate the item and then fit it through the door. When the merchandise for the first stop on a route was mistakenly loaded first, Shive permitted the delivery of the other stops first.

8. Time off and timecards

As indicated, many drivers have regular routes with scheduled days off. They also are entitled to use vacation time and personal days. Employees submit requests to use personal days on an Aldworth form. These forms are then passed on to Dunkin' Donuts for their approval or rejection. Shive, Knoble, and Engard admitted that Aldworth's supervisors check with Dunkin' Donuts first before approving time off for Aldworth employees. This is to be sure that Dunkin' Donuts' workload allows the employee to take the time off. As Engard explained, Aldworth supervision is not aware of the projected work volume of Dunkin' Donuts. Many of these forms bear the initials of Knoble and Engard and have a "yes" or "no" circled. Shive also has approved time off for Aldworth employees. For example, on November 2, 1997, he was presented with a written request for 3 days off made by employee Robert Cella. Shive circled "yes" on the form, initialed it, and indicated that it was funeral leave. As Fisher explained, Aldworth also relies on Dunkin' Donuts to keep track of how many personal days the employees have used. Thus, some of the forms contain notations from Knoble concerning whether the employee has sufficient personal days left to take the time off with pay. These forms were then returned to the employees by Aldworth and inform them whether or not their request had been approved. Thus, employees see the notations placed on the forms by Dunkin' Donuts' managers. Until shortly before the election, when employees needed a certain day off and wanted to use a personal day, they often first directly spoke to Dunkin' Donuts Supervisors Knoble and Engard. Knoble and Engard decided whether to allow the employee to have the requested day off. They would either tell the employee directly or advise Aldworth who would then advise the employee. As driver Norman Cooper Jr. described the procedure, the drivers who had worked there a long time understood that when they requested a personal day off, Aldworth would need to get Knoble's agreement, so those drivers began going directly to Knoble to get the day off.[24]

Concerning vacation time, at the beginning of the year Aldworth consults with Dunkin' Donuts to determine how many drivers Dunkin' Donuts will allow off in a given week. Ald-

[21] I have considered Shive's testimony that that these notations on the manifests may indicate that the drivers were simply following a general policy promulgated by Knoble rather than specific instructions. I do not credit that testimony; Knoble did not so testify and no such general policy was described in the record. In any event, in either case it shows the nature of the control exercised by Dunkin' Donuts over the Aldworth drivers.

[22] An incident report form is different from the issue report form described above. The former is a form used by supervisors to document a problem or situation that occurred. This form has been in use long before the Union began its organizing campaign.

[23] I have considered Shive's testimony that Knoble may not speak directly to the drivers when they call in during such situations but that Knoble would speak with an Aldworth supervisor who would then communicate with the driver. I do not credit that testimony. No employee corroborated that Aldworth and Dunkin' Donuts used such a cumbersome method of communicating to the drivers.

[24] These facts are based on the credible testimony of McCorry, Farnsworth, Guillermo Puig, and Cooper.

worth then issued a memorandum to its employees asking them to submit their vacation requests. Vacation requests were then submitted to Aldworth's supervisors. They are generally assigned according to seniority. However, if drivers did not receive the time to which they felt entitled, they spoke to Knoble who would either grant or deny the specific time requested. On other occasions, they would speak to Aldworth Supervisor Fisher, who would tell them that they first had to check with Knoble.[25]

As more fully described below, from time to time Aldworth issued suspensions to warehouse employees because of their failure to adhere to Aldworth's selection accuracy standards. However, these employees did not necessarily immediately serve their suspension time. Instead, they might serve the suspension later, during a time when the warehouse was not busy or on a date mutually agreed upon between the employee and supervisor. In requesting such time off, selector Sellers dealt with both Fisher and Engard. At times Engard would call Sellers at home and tell him to take the day off as a suspension day. On about April 30, Sellers asked Engard whether he could use a suspension day in order to be off on a given day. Engard told Sellers to submit a request and get it to him. Sellers did so.[26] The form submitted by Sellers bears Engards' initials with the word "no" circled. Engard conceded that this meant that the projected work volume of Dunkin' Donuts would not allow Sellers to have that day off.

Aldworth employees use timecards to punch in and out. Knoble occasionally corrected the Aldworth timecards to reflect the actual working hours of a driver. For example, a driver actually started work one day at 6:45 p.m., but his timecard reflected that he had started at 8 a.m. After investigating the matter, Knoble corrected the timecard and initialed the change. On another occasion a timecard showed that a driver had worked 1-1/4 hours when he actually worked 4 hours. Knoble again corrected the timecard and initialed it. The driver was then paid for the 4 hours. On three or four occasions over the past several years Shive has also approved changes to the times recorded on the timecards. Dunkin' Donuts' clerks use the information from the Aldworth timecards to prepare the payroll from which the employees are paid.

9. Safety and accidents

As indicated above, Dunkin' Donuts owns or leases the tractors, trailers, and other equipment used by the employees in warehousing and delivering the Dunkin' Donuts' products. Dunkin' Donuts also carries insurance for the tractors and trailers. As such, it is responsible for the safe condition of its equipment. In the event of a safety accident involving that equipment, Knoble, Dunkin' Donuts' traffic manager, is responsible for conducting an investigation. When employees are on the road and find it necessary to call the facility because an accident, the calls are directed to Knoble. The evidence shows that Knoble deals directly with the Aldworth employee involved in the accident. For example, Knoble once told employee McCorry that a customer had complained that he had damaged a door while making a delivery. McCorry later spoke with the complainant and discovered that it was another driver who had caused the damage. He reported that to Knoble who then apologized for the confusion. On another occasion, McCorry drove his tractor on wet tar and made a tire impression. When McCorry called to the facility to report the incident he first spoke with an Aldworth supervisor. That supervisor told McCorry to see Knoble about the matter when McCorry returned to the facility. McCorry then told Knoble of the matter. Knoble asked him to draw a diagram of what had occurred and asked a number of questions such as whether any police reports were made and if there were any witnesses. On May 11, a car hit the forklift on the vehicle that Cooper had parked at a store. Cooper called the facility and spoke with Timothy Kennedy and Knoble. They told him to see Knoble when got back to the facility. After Cooper arrived, he and Knoble inspected the damage. Cooper drew a diagram of the accident scene and described it to Knoble.

After the investigation is completed, drivers receive written notice from Aldworth concerning whether the accident was found to be preventable or nonpreventable. If the conclusion is the latter, no discipline was taken. However, if the conclusion was that the driver could have prevented the accident they are subject to termination if they have three such incidents within a year. Thus, the decision as to whether an accident was preventable or not is an important one. These decisions were made at discussions attended by officials from both Aldworth and Dunkin' Donuts. Sometimes Fisher or Hoffman would attend for Aldworth; Knoble, Engard, and sometimes Shive would attend for Dunkin' Donuts.[27] Drivers, however, may appeal the initial

[25] This is based on the credible testimony of McCorry, Cooper, and Leo.

[26] These facts are based on the credible testimony of Sellers. I do not credit Engard's testimony that he directed Sellers to talk to Fisher about the matter.

[27] These facts are based on the testimony of Hoffman. I have considered the fact that Hoffman was removed from his supervisory position and later began to support the Union. However, I accept his testimony that the transition back to a driver was not entirely unwelcome and thus would cause little lingering hostility toward Aldworth and Dunkin' Donuts. More importantly, substantial portions of Hoffman's testimony were not refuted and his testimony on this subject seems logically consistent with those unrefuted portions. I have considered Knoble's testimony that he played no role in the determination of whether an accident was preventable. He even claimed that he did not know how Aldworth made that determination. I do not credit that testimony. Knoble admitted that he was responsible for investigating the accidents and there is no credible evidence that Aldworth undertook its own investigation prior to the initial determination. Although Aldworth admitted that it relied on the paperwork generated by Dunkin' Donuts' investigation of the accident, it seems unlikely that the paperwork alone would always resolve the issue of preventability. Thus, it seems that Knoble was the person who had the greatest knowledge necessary to make a determination concerning the preventability of an accident. It seems unlikely, therefore, that he would be excluded from that process. More importantly, even Fisher testified that he and Knoble together determined whether an accident was preventable, and that Shive and Hoffman sometimes participated in the process. In any event, for reasons explained elsewhere in this decision I have concluded that Knoble was generally not credible when his testimony conflicted with other witnesses. For similar reasons, I also do not credit the testimony of Roy and Shive that Dunkin' Donuts does not participate in deciding whether accidents are preventable.

decision. For example, Knoble advised McCorry that he was going to be charged with a preventable accident concerning the wet tar incident described above. He spoke with Aldworth Executive Vice President Rawl Roy about the matter, and the result was changed to a preventable "incident."

On occasion, Knoble's independent monitoring of safety matters leads to discipline. For example, on one occasion Knoble instructed driver Norman Cooper to drop his trailer at a certain location and return to the facility with his tractor. Rather than leave his new handtruck with the trailer, Cooper used rope to attach the handtruck to the outside of the tractor. When Cooper arrived at the facility, Knoble told him that it was an unsafe act to put the handtruck on the outside of the tractor. Knoble said that he would have to "write up" Cooper for the matter. Later, Cooper received a letter from Fisher concerning the matter. However, neither Fisher nor any other Aldworth supervisor talked to Cooper about it. The letter signed by Fisher used the same language to describe the incident that Knoble had used in his discussion with Cooper.[28] In May or June, it came to Knoble's attention that McCorry was not wearing his seatbelt while driving. Knoble called McCorry into his office and told McCorry that he was not going to be working there if he did wear his seatbelt, that it was company policy. On another occasion that occurred about a year before the move to Swedesboro, McCorry had completed his posttrip safety inspection of his vehicle and had filled out the required paperwork indicating that they were no safety problems with the vehicle. Knoble then conducted his own inspection of the vehicle and discovered an oil leak. Knoble told McCorry that he would receive a writeup for the incident. Fisher, an Aldworth supervisor, accompanied Knoble and said that he also thought that the leak was obvious and should have been detected by McCorry. McCorry later inspected his personnel file and saw the writeup that was signed by Knoble.[29] On February 26, Knoble observed driver Marty Porrini speeding in the rear lot at the facility. Knoble directly cautioned Porrini and completed an incident report. Porrini then received a written cautionary warning.

On occasion employees raise safety matters. For example, on June 26 Cooper completed an issue report that complained about a safety problem that he had encountered when pulling his truck away from the dock area. He also told Knoble about the incident. Knoble responded on the issue report that supervision will report these incidents to him and the reports would be forwarded to Aldworth for a job safety review in cooperation with Knoble's department. On at least two occasions a driver complained that the presence of bees at a retail shop had created an unsafe condition. Knoble admitted that he investigated the complaints by going to the shop. Once there he determined that conditions were unsafe. He told the drivers to go into their trucks and close the windows. He then told the shop owner that he was not permitting the employees to enter the shop until the unsafe conditions had been eliminated. A selector filed an incident report complaining that the floor in cooler dock area was unsafe because it was slippery. Shive and Engard investigated the matter and discovered that the door to the warehouse area was being kept open too long resulting in warm air from the warehouse entering the cooler dock area. Shive then instructed that the cooler dock area would no longer be used for loading.

Twice a year Aldworth held safety meetings. These meetings are typically held in about March and September at a nearby hotel. They are held on Saturday and employees are required to attend and are paid, Aldworth supervisors and managers conducted these meetings, but Dunkin' Donuts supervisors, Shive, Knoble, and Engard are also present. At these meetings, Shive has explained to the employees that Dunkin' Donuts would be distributing a new product to the retail stores and that the Aldworth employees would be handling the product. Specifically, at one meeting Shive told employees that they would be handling cheese and orange juice and how these items would be stored in a cooler box. On another occasion, Shive gave a presentation on the new facility that Dunkin' Donuts was then building in Swedesboro. Knoble addresses driving issues at these meetings. For example, he explained to the drivers how they had to shift gears to save fuel when using new computerized engines. At the end of these meetings employees were permitted to ask questions and voice complaints.

10. Supervision and grievance adjustment

Aldworth has four shift supervisors, a transportation supervisor, and two account managers at the facility. In general, it is these supervisors who provide the daily supervision to employees.

As described above, Hoffman was an Aldworth field supervisor from September 1997 to May. At the time he was selected he was told that he would be working with Knoble and in fact Hoffman reported to and worked under the direction of Knoble. Hoffman had only minimal contact with Aldworth Supervisor Fisher. As field supervisor, Hoffman accompanied the drivers to the retail stores that had experienced problems. Each day Knoble told Hoffman which driver he was to accompany. Hoffman then attempted to correct the problems and he reported the results to Knoble. While accompanying the driver, Hoffman also evaluated the driver's performance and made suggestions to the driver as needed. Hoffman also reported this information to Knoble on an almost daily basis. During these discussions, Hoffman described his day with the driver and he and Knoble used a form provided by Knoble to review the

[28] These facts are based on the credible testimony of Cooper. Knoble denied that he told Cooper that he was going to discipline Cooper. Here again, Knoble's testimony conflicts with the testimony of a credible witness. Knoble admitted that he was so angry with Cooper over this incident that he could hardly speak, yet he testified that he ended his confrontation with Cooper by merely saying, "Don't do that again" and never mentioned discipline. Here again Knoble's testimony does not ring true, especially in light of my observation of Knoble's demeanor.

[29] The foregoing events are based McCorry's testimony. I do not credit Knoble's testimony to the extent that it conflicts with McCorry's; his testimony was equivocal in certain important respects. For example, when asked whether he told McCorry that he was sending the report to Aldworth, Knoble answered, "I certainly don't believe I did that." Knoble did admit, however, that he wrote a memorandum to Aldworth concerning this incident after speaking with McCorry directly and determining that McCorry refused to accept responsibility for the matter.

driver's performance on matters such as whether the driver was in uniform, whether he used his seatbelt, how he related to the store owners, etc. Hoffman graded the drivers in these categories on a scale of one to five. Also, when drivers had problems during the time Hoffman was field supervisor the drivers met with Hoffman and Knoble. Hoffman understood that Knoble was in charge of all the drivers.[30]

As indicated above, Dunkin' Donuts is responsible for creating and modifying the manifests. Knoble regularly reviews those documents to determine whether the drivers are making the deliveries in accordance with the time schedules indicated on them. Knoble admitted that it is part of his job to talk directly to an Aldworth driver when the driver is consistently performing the route in more time than the manifest allows. For example, Knoble advised driver Refes Bell that his efficiency level was not acceptable and that he had to improve. Knoble further admitted that he has completed incident reports to notify Aldworth when he feels that drivers are not completing their routes in a timely manner.

There are times when Dunkin' Donuts provides direct supervision to the Aldworth employees. An example occurred during the 1998–1999 winter when McCorry was stranded near Rochester, New York, during a snowstorm. McCorry initially spoke to Aldworth supervisors about his predicament. Knoble then called McCorry and asked a number of questions to assess the situation. Knoble first instructed McCorry that if he was able to get free within a certain period of time he should proceed to his destination because the employees there would wait for him. Later, after McCorry was unable to free his truck from the snow, Knoble again called him and instructed to get to a hotel and spend the night there. The next day, Knoble gave approval for McCorry to continue on to his destination. When McCorry returned to the facility he sought reimbursement for the charges on the cell phone that he had used to communicate with the facility during that incident. After certain expenses were disallowed McCorry spoke with Aldworth Supervisor Kennedy. Kennedy told McCorry that he had nothing to with the matter, that McCorry should see Knoble because Knoble decided which items would be paid and which would not. McCorry then spoke with Knoble and Knoble agreed to reimburse McCorry for an additional $15.[31]

At some point Dunkin' Donuts began supplying frozen bagels for sale at the retail shops. Before that time drivers were not required to store frozen products that they delivered to retail shops. Once the bagel promotion began Dunkin' Donuts instructed the Aldworth drivers that they had to store the frozen product.

On April 7, Shive noticed a Dunkin' Donuts tractor-trailer parked at a local convenience store. Because the tractor-trailer should have been heading in another direction, Shive returned to the convenience store. As he arrived there the tractor-trailer was leaving the parking lot; Shive followed it and recorded its number. As he was following it, Shive encountered a second Dunkin' Donuts tractor-trailer. He changed courses and followed the second tractor-trailer as it too parked at the convenience store. Shive parked across the street to observe how long the Aldworth driver would remain there. He observed driver Leo go into the store where Leo remained about 8 minutes. Later that day, Leo received a call from Shive who told him that he was stealing time from the Company by being off of the route. Shive completed an incident report describing this matter and noting that Leo was 11 minutes late in arriving at his first stop. Shive passed the report on to Aldworth. Later, Fisher issued Leo a cautionary written warning because of this incident. Shive also learned the name of the first driver that he had seen parked at the convenience store. Shive apparently left instructions that he wanted to speak to that driver because Shive noted that the driver failed to call in after his first stop. Shive finally did speak to the driver after the driver called in after his second stop. The driver explained to Shive that he stopped at the convenience store to get cash because he did not have advance-travel money with him. Shive then completed an incident report and passed it on to Aldworth.[32]

As previously noted written incident reports are used by Aldworth and Dunkin' Donuts to document problems or issues that need to be addressed. These reports are not given directly to the employees but they may be placed in an employee's personnel file. The incident reports show that Dunkin' Donuts plays a role in monitoring the performance of Aldworth employees. For example, on July 11, 1997, Knoble completed an incident report wherein he described a situation involving an Aldworth driver who had gone to the wrong location to pick up a backhaul. Knoble reported that this resulted in a serious delay. On the report, Knoble described the incident as "negligence" and indicated that the call about the matter was received by "supervision."[33] The driver received a written cautionary warning from Aldworth, 3 days later. On September 9, 1997, a driver's schedule was changed, but Dunkin' Donuts was unable

[30] These facts are based on the credible and mostly unrefuted testimony of Hoffman.

[31] These facts are based on the credible and mostly unrefuted testimony of McCorry.

[32] These facts are based on a composite of the testimony of Leo and Shive as well as the incident reports. Where the testimony of Leo and Shive conflict, I credit the testimony of Leo. I have also considered Leo's testimony that occasionally extra merchandise is placed on a truck to see if the driver notices it. On one occasion this was done to Leo and he failed to notice the extra merchandise. He testified that when he returned to the facility Engard told him that he had missed the extra merchandise, reminded him that he is to check the merchandise as he is unloading, and cautioned him to be more careful. Engard testified that on this occasion Leo was loudly complaining about the extra merchandise being placed on his truck and Engard simply said that Leo should be more careful how he was delivering the product and he would not have any problems. Based on my observation of the demeanor of the witnesses I conclude that Engard's version of this event is more credible and thus this incident contributes little to the resolution of the joint employer issue.

[33] The document is in Knoble's handwriting. He attempted to explain away the reference to himself as "supervision" by stating, "The only supervisors are Aldworth supervisors. There are no Dunkin Donuts supervisors." If the call was received by Aldworth's supervision, as Knoble would have us believe, why was it necessary for him to document the matter and send it to Aldworth? This is a patent attempt to conform his testimony to the Respondents' legal theory at the expense of the facts. Instances such as this have led me to discredit Knoble's testimony where it is contradicted by more credible evidence.

to contact the driver. After the driver arrived later than the revised schedule called for, Knoble completed an incident report that indicated that the driver was sent home. On October 10, 1997, Knoble completed an incident report that concerned a complaint from a motorist that two Aldworth employees shouted obscenities at him. Knoble wrote on the report that it would be placed in the drivers' personnel files. On September 25, 1997, a motorist complained that an Aldworth driver ran two red lights. Knoble indicated on the incident report that the driver would be interviewed and his safety record reviewed. On November 24, 1997, a shop owner complained about the conduct of a driver. Knoble interviewed the driver directly and conclude that the driver had an arrogant attitude. Knoble told Fisher that the driver was rude and uncooperative, used profanity, and was causing a problem. He asked Fisher to review the driver's file and teach him correct delivery practices.[34] On December 4, 1997, a driver forgot to deliver certain merchandise to a shop. Knoble instructed the driver to return to the shop and deliver the product.[35] In March, a shop owner complained that a driver would get angry if the shop owner's employees did not help the driver unload his truck. Knoble wrote in an incident report that he would talk to the driver and explain that it was the driver's responsibility to unload the truck. In May, a driver called in and spoke with a Dunkin' Donuts' clerk; he asked for directions to his next stop. The clerk consulted with Knoble, who told the clerk to have the driver call back in a few minutes and Knoble would provide the driver with those directions. When the driver failed to call back, Knoble attempted to reach the driver. It turned out that the driver had become lost, was delayed in reaching the next stop, and had failed to report the delay. Knoble completed an incident report describing the matter and gave it to Aldworth. The next day Aldworth issued the driver a written, cautionary warning. Dunkin' Donuts purchased new trucks with modern fuel–saving transmissions. Knoble discovered that driver Leo was not shifting gears on the new truck in a fuel-saving manner. Knoble warned Leo that if he did not improve his performance he would not be able to continue driving the new truck. After Leo's performance showed no improvement he was reassigned to drive an old truck. On July 1, Knoble conducted an audit of drivers' logs and discovered that drivers Henry (Scott) Rollins and Frank Grasso had driven more hours on a particular day than Aldworth's policy and DOT's regulations permitted. Knoble completed incident reports on these matters and passed them on to Aldworth. Thereafter, Rollins and Grasso each received a written-cautionary warning. On December 5, 1997, Knoble completed an incident report indicating that he had received "a long list of employees who have complained about (driver Robert (Bobby) Hawthorne) to Tom Knoble. (Hawthorne) has been warned twice by Knoble that the situation must change! Upon interview with (Hawthorne), he states that he "no longer has a problem." Hawthorne was written up for this incident by Aldworth. As the litigation in this case progressed, the language Knoble used on the written-incident report changed. For example, on March 5, 1999, after a driver reported a minor accident that had occurred earlier in the day, Knoble wrote that "I instructed [the driver] that in the future I'm sure that Aldworth would want him to call from the accident scene so he could show the shop any damage." The effect of Knoble's instructions, of course, remained the same.

Warren Engard plays a similar role concerning warehouse matters. For example, on January 20, Engard reported that he had verbally cautioned driver Bell because Bell had reported that he had been short two items for a delivery when in fact the shop owner acknowledged that he had received those items. Bell was thereafter written up for this incident.

Fisher admitted that when discipline was taken against employees based on an incident report that incident report was placed in the their file. Although the incident reports described above do not necessarily show that Dunkin' Donuts determined the consequent discipline, the reports combined with Aldworth's discipline nonetheless demonstrate that Dunkin' Donuts' monitoring of Aldworth employees often lead to discipline.

Knoble has posted memoranda on a bulletin board outside the dispatch office that dealt with a variety of matters pertaining to the drivers. For example, on June 29, Knoble posted a memo addressed to the drivers that directed them to have a shipping supervisor seal the rear door of the trailer when the drivers were picking up a backhaul. It directed the drivers to report to Dunkin' Donuts those vendors who were reluctant to cooperate. It reminded the drivers that notwithstanding this procedure they were still responsible for counting their freight. The memo indicated that questions should be directed to supervision or Knoble. Another memo addressed to the drivers by Knoble directed them to note on their manifests whenever they were sent to a nearby vendor to pick up a trailer load of product. It also directed the drivers not to use their own heavy-duty chains to lock up Dunkin' Donuts' handtrucks. It advised the drivers to fill out an Aldworth issue report if they had problems with their manifest, and Knoble assured them that they would be notified when the problem was answered. Another memo contained a schematic drawing instructing the drivers how they were to load their trailers when hauling sugar back to the facility. In a memo dated September 2 and addressed to supervisors, drivers, and clerks, Knoble advised that it was his intention to offer shop owners a special delivery of certain items that they had ordered but that had not been delivered. Knoble asked that the employees not lead the shop owners to believe that those items could not be redelivered. Another memo concerned what entrances and exits the drivers should use on the New Jersey Turnpike and what facility the drivers must use to fuel their vehicles. Other memos instructed drivers how to properly use Dunkin' Donuts' equipment. Knoble also posted a memo that described the procedures the drivers were to follow at the new facility. This memo covered topics such as where the drivers were to park, where they were to enter the facility, and the path they must take through the warehouse to get to and from the dispatch office. The memo ended by instructing the

[34] Here again Knoble clearly exaggerated his testimony when he claimed that he merely asked Aldworth "at their discretion'' to look into the matter.

[35] I do not credit Knoble's patently contrived testimony that he advised Aldworth that it would be a good idea if Aldworth sent the driver back to make the delivery.

drivers that they must complete their paperwork and clock out before walking to the employee entrance or entering the Aldworth lunchroom. Drivers spoke directly to Knoble when they had questions or comments about these memoranda.

After the implementation of the issue report forms, more fully described below, drivers began reducing their complaints to writing. Knoble occasionally responded to the complaints. For example, on July 8, a driver complained that he should be notified ahead of time when stops were added to his route. This would permit him to plan for the additional stop by locating it on a map and adjusting his overnight accommodations as needed. Knoble responded that the daily manifests are placed outside the dispatch office 1 day prior to departure to permit drivers to examine them. Knoble also noted that maps are often placed with the route papers to assist the driver in locating the stop. Knoble noted that verbal communication takes place when possible; however, he realized that improvement was needed.

11. Discipline

Fisher admitted that he consulted with Dunkin' Donuts' officials concerning discipline of a "delicate" nature such as a lengthy suspension. He explained that there were communications between the two Companies and that Dunkin' Donuts would make written and verbal recommendations concerning the discipline it thought appropriate for the Aldworth employee. However, Fisher claimed that more often than not, Aldworth followed its own policies and often disagreed with Dunkin' Donuts' recommendations. However, specific examples show that Dunkin' Donuts played a more direct role. In late May, for example, driver Guillermo Puig was called into Knoble's office as a result of complaints from store owners. Fisher was also present. Knoble told Puig that the store owner wanted him to punish Puig severely, and that the store owner had some unexplained influence. Knoble suspended Puig for 3 days. This was despite the fact that under the Aldworth handbook he would have received a lesser penalty because this was his first offense. Fisher merely agreed with Knoble. A few days later, he received a written-suspension letter on Aldworth letterhead and signed by Fisher.[36] Earlier, in December 1997 employee Ronald Matczak Jr. had been wearing shorts while at work throughout the entire year instead of the pants provided by Aldworth. Shive told Matczak that he had to begin wearing the company supplied trousers and that if he did not he could not work there. Matczak refused to agree to wear the trousers, so Shive sent him home. Fisher and Engard were present for this conversation but they did not say anything. After that incident Matczak no longer worked at the facility.[37]

Dunkin' Donuts is also involved in less serious disciplinary matters. On May 28, 1997, a motorist complained that driver McCorry had been tailgating her. Knoble wrote on the incident report that he had cautioned McCorry about the dangers of tailgating and that he did not want any more complaints from motorists on this matter. On November 7, 1997, Knoble completed an incident report concerning a driver who had failed to follow proper loading procedures; this resulted in an $80 ticket because the vehicle was overweight. Knoble indicated on the report that he would advise the driver that the driver had to pay the $80 fine.

During the time that Hoffman was field supervisor he worked closely with Knoble. He heard Knoble say that certain employees were going to be suspended or otherwise disciplined. In February, Hoffman noted that there was trash in the truck driven by Leo. In response, Leo questioned whether Hoffman had anything better to do with his time. Hoffman reported this comment to Knoble, who told Hoffman to write up Leo. Hoffman then completed an incident report on the matter and the report was placed in Leo's file. On another occasion, Hoffman discovered that driver Craig Durgin had falsified his logs. He obtained this information as a result of a conversation with Knoble and Shive. Hoffman then wrote up Durgin for this incident. These were the only two times that Hoffman disciplined employees while he was field supervisor.[38]

In July, Dunkin' Donuts began using a new insurance company. This company required Dunkin' Donuts to place a sticker on the trailers that had an 800 telephone number that motorist could use to report drivers. Reports received under this system were sent to Knoble. These report forms contained a description of the motorist's complaint and provided space for the driver's response. The form also had a section entitled "Manager Action" that contained the following choices: no action taken, verbal counseling, verbal warning, written warning, defensive driving course ordered, public recognition/award/thank you, and other. Knoble admitted that he spoke directly with the Aldworth drivers identified in the report and then determined the level of "manager action" the driver would receive. Fisher, however, testified that he and Knoble first discussed the incident and that they together decided what level of discipline would be administered but that it was Aldworth that decided the discipline. In either case this demonstrates the involvement of Dunkin' Donuts in the discipline of Aldworth employees. Specific examples follow. In October, Knoble received a complaint concerning the driving of Aldworth driver Larry Harber. Knoble interviewed Harbor and decided that Harbor deserved a "verbal counseling." He checked that box on the form. That same month a motorist complained about driver David Lambert. Knoble reviewed the complaint and spoke to Lambert. Knoble wrote on the form that Lambert would be shown safety videotapes and receive

[36] This is based on the credible testimony of Puig. Knoble denied that he ever told Puig that Puig would be disciplined; he denied even being present at a meeting when Fisher suspended Puig. Here again Knoble's testimony conflicts with the testimony of an otherwise credible witness; I do not credit Knoble's testimony.

[37] These facts are based on the credible testimony of Sean Toomey. I have considered Shive's testimony concerning this incident and his testimony that Aldworth, and not Dunkin' Donuts, always decides what discipline to take against the employees. I do not credit that testimony based on my observation of the comparative demeanor of the witnesses and the fact that Shive's testimony is contrary to the weight of otherwise credible testimonial and documentary evidence.

[38] This is based on Hoffman's credible testimony. Knoble testified that he never instructed Aldworth to discipline an employee. He also testified that whatever comments he made concerning the discipline of Aldworth employees resulted from information that Fisher had given him. For reasons previously stated, I do not credit Knoble's testimony.

extensive counseling from Aldworth. He also wrote, under "Manager Comments," the words "final warning" and indicated that Lambert received a verbal counseling, a verbal warning, a written warning, and a suspension. There is no evidence as to whether or not Lambert actually served a suspension for this incident. On another form Knoble indicated that Aldworth would issue a driver a cautionary written warning as a result of the complaint. On another Knoble wrote that the driver would spend the Labor Day holiday weekend "reflecting on his driving habits." Drivers sign the form and thus learn of the discipline that Knoble had written on the same form.[39] It should be kept in mind that the discipline arising out of this procedure was small in comparison to the total level of discipline administered by Aldworth. Fisher estimated that this discipline amounted to from 5 to 10 percent of the total.

All other written discipline is issued on Aldworth stationary and signed by Aldworth supervisors. Again, however, a big picture of the disciplinary practice at the facility is needed for context. Fisher credibly estimated that about 75 percent of all discipline taken at the facility in 1998 before the election occurred with no Dunkin' Donuts involvement whatsoever.

12. Employee evaluations and awards

Aldworth supervisors evaluate the performance of employees. Beginning in 1997, employees received biannual incentive awards from Aldworth. The dollar amount of the award was determined by how the employee was ranked in categories such a professionalism towards retail shop owners and supervisors, tardiness, accidents, and the like. Each of these categories was assigned a certain number of points. Knoble played a significant role in developing these categories and Shive commended Knoble in Knoble's appraisal for his contributions in this matter.[40] During the time that Hoffman served as field supervisor for Aldworth, Knoble initiated the evaluation process by giving Hoffman a form that he was to complete for the drivers covering the matters set forth above. The completion of the forms required that Hoffman use his own observations of the drivers in some categories and check records to determine the driver's ranking in other categories, such as tardiness. When Hoffman completed the forms he returned them to Knoble. At times Knoble questioned Hoffman as to why he had evaluated an employee so high or so low.[41]

The incentive awards were actually distributed to individual employees at meetings with supervisors. Before the election, Dunkin' Donuts' supervisors participated in these meetings along with Aldworth supervisors. For example, in June McCorry received his incentive award at a meeting attended by Aldworth supervisors and Dunkin' Donuts Supervisors Engard and Shive. Shive told McCorry that he had improved his performance since the last meeting and that if it had not been for his lateness he would have been among the top 10 drivers. Likewise, Shive and Engard were present on one occasion when driver Norman Cooper received his incentive award. Shive explained that because Cooper had been absent from work 1 day the amount in his check was reduced but that otherwise Cooper was doing a good job. Shive was present when Anthony Meduri received his incentive award. In that case it was apparent that Aldworth and Dunkin' Donuts had exchanged information concerning Meduri because prior to that meeting Meduri had raised the matter of a "cushion" of time the drivers at one time had but that since had been eliminated. Meduri had raised this matter at a June 27 meeting attended only by Aldworth personnel. At the incentive award meeting, Shive asked Meduri how was his "cushion." Meduri then went on to explain what he meant when he had earlier used that term.[42] Knoble admitted that he also sat in on "quite a few" of these incentive awards meetings.[43] Since the election, only Aldworth supervisors have attended the incentive award meetings.

Aldworth employees also receive awards after having worked at the facility for 5 and 10 years. Dunkin' Donuts awards these employees a $50 and $100 gift certificates respectively. For a time employees were selected as "employee of the quarter" and "employee of the year." These employees were taken to lunch or dinner and awarded a gift certificate by Aldworth.

13. Dealings with store owners

As expected, problems develop between the retail store owners and the drivers. Dunkin' Donuts' supervisors, Shive, Knoble, and Engard, told the drivers that the drivers were not to address these problems directly with the store owners. Instead, the employees were told to bring these problems to the attention of Dunkin' Donuts personnel. In fact, the parties stipulated that Knoble, as a Dunkin' Donuts' manager, had responsibility for the problems that arose at the Dunkin' Donuts retail stores. This impacts the drivers. However, during the early morning hours when no Dunkin' Donuts personnel are on duty drivers bring problems concerning shop owners to the attention of Aldworth supervisors.

Sometimes drivers complain about conditions at the retail shops. For example, on occasion McCorry would attempt to make a delivery but discover that there was garbage in the spot where he was supposed to place the merchandise. He felt that it was the store owners' responsibility to clear that area. He contacted Knoble with the hope that Knoble would resolve the

[39] I reject Knoble's testimony that he completed the disciplinary portions of the form after the driver had signed. I also do not credit his testimony that his markings on the form were designed to placate the insurance company and, therefore, did not constitute action taken against the Aldworth drivers.

[40] In Knoble's pretrial affidavit he stated that he never had anything to do with this incentive program. When given an opportunity to explain the apparent lack of consistency between his trial testimony and his pretrial affidavit Knoble said explained: "When I stated I never had anything to do with the program, what I was referring to is I never liked the idea of the program." This type of transparent dissembling further serves to seriously undermines Knoble's credibility.

[41] This again is based on the credible testimony of Hoffman.

[42] These facts are based on the credible testimony of Meduri. I have considered Shive's testimony that he was unaware of the fact that Meduri had raised the matter earlier with Aldworth. I do not credit that testimony based on the demeanor of the witnesses and the fact that I conclude that Shive was not a credible witness in other areas.

[43] Knoble's testimony that he sat silently throughout each of the meetings until they had concluded, at which time he congratulated the driver, is not credible.

matter. On several occasions McCorry complained to Knoble about what he felt were unsanitary conditions at a retail store. Knoble admitted that on one occasion he asked Aldworth to send out an employee to investigate the complaint. Knoble then spoke to the employee who had investigated McCorry's complaint and Knoble concluded that the complaint was unsubstantiated. No further action was taken on the complaint. Concerning another complaint made by a driver about conditions at a retail shop, Knoble answered that he was aware of the problem but he could do nothing about it because the store owner was on Dunkin' Donuts' board of directors.[44] In this same vein driver Farnsworth complained to Knoble that there was rodent waste at one of the stores he handled. Farnsworth claimed that it was an unhealthy situation. Knoble told him that he did not get involved with the stores on matters such as that and that Farnsworth should just continue to do his job. Another situation developed when Farnsworth found himself delivering to a retail store that he felt was so dirty and disorganized that he was unable to store the products as he normally would have done. On one occasion he left frozen merchandise on the floor outside the freezer because there was no room to store it and he felt that he should not have to clean out the freezer just to store the product. Apparently the merchandise spoiled and the store owner called Dunkin' Donuts. Knoble then talked to Farnsworth, and Farnsworth explained the situation. Knoble, however, told Farnsworth that he had to do whatever was necessary to get the job done and that if he continued to fail to store the product he would be written up. Although Farnsworth was never given a copy, his file contained an incident report dated March 12 and initialed by Knoble that described this incident. Farnsworth began storing the product as best he could.[45] On another occasion a shop owner complained to Dunkin' Donuts that an Aldworth driver insisted that one of the shop owner's employees assist in unloading the truck. Knoble assured the shop owner that he would investigate the matter and explain to the driver that it was the driver's responsibility to unload the truck. Knoble then discussed the matter directly with the Aldworth driver and reminded the driver of his responsibility to unload the truck. Shive recounted an incident where Dunkin' Donuts decided not to require an Aldworth driver to make a delivery to a retail shop because of a backup of sewerage.

The retail store owners also have complaints about the Aldworth drivers. When they do, they contact Dunkin' Donuts. These complaints are recorded on a shop owner complaint form and then forwarded to Knoble. The forms have a place where Knoble records the final resolution of the complaint. Knoble sometimes directly advised the drivers of the nature of the complaint and obtained the driver's version of the situation. In other instances Knoble records what he expects Aldworth to do concerning the matter and sends a copy of the form to Aldworth. For example, on May 21 Knoble wrote that the driver who was the subject of the complaint "will be reviewed [sic] and turned over to Aldworth for instruction concerning correct practices + possible discipline." On September 10 and 11 shop owners complained that drivers had made inappropriate deliveries. In each instance Knoble wrote that he would talk to the driver about correct delivery practices and have Aldworth review the driver's personnel file. On January 14 and February 15, 1999, shop owners complained that Aldworth drivers had been uncooperative. Knoble wrote on the forms that "driver will be interviewed and instructed about correct delivery practices" and that "Driver instructed as to correct delivery practices," respectively. On another occasion Knoble wrote, "Aldworth will review, instruct and discipline driver." After another shop owner complaint about a driver, Knoble wrote on May 17, 1999, that Aldworth would review the driver's file and administer training and discipline as necessary. In November 1997, Knoble received a call from a shop owner complaining that despite the fact that he had signed the delivery invoice he was short of certain merchandise. Knoble talked directly to the Aldworth driver. He decided to drop the matter since the shop owner had signed for the merchandise and the driver remembered delivering it. On another occasion a shop owner complained that a driver drove onto a curb and caused damage. Knoble concluded that due to the snowy weather conditions the accident was unavoidable and he, therefore, did not pass the complaint on to Aldworth. As a consequence, of course, the driver was not disciplined. On January 4, 1999, a shop owner complained that the driver had blocked traffic while making a delivery. Knoble concluded that the driver had parked incorrectly. Knoble indicated that he would place a diagram in the driver's route booklet to show him how to correctly park the truck while making that delivery. On February 25, 1999, a shop owner complained that the handtruck that the driver used to deliver the merchandise was old and was causing scrapes in the stairwell. Knoble rectified the problem by providing the driver with a new handtruck.

Knoble admitted that he forwards copies of the complaint forms to Aldworth with the belief that Aldworth will take the action that he indicated was an appropriate resolution.[46] Fisher, however, testified that he and Knoble talked before the final resolution of the complaint was decided. Fisher explained that at times Knoble would bring the customer complaint to his attention and they would discuss the matter to decide if discipline was warranted and "then at that point we would agree." Knoble would then "sign off" on the final resolution of the complaint. He also explained that for the most part, however, he would tell Knoble what Aldworth would do to resolve the complaint; Knoble would then simply note the resolution. It will be recalled that as part of the Aldworth incentive program described above, drivers are evaluated on the level of service they provide to the shop owners.

Engard also plays a role in dealing with shop owner complaints that pertain to the warehouse. For example, on February 9, 1999, a shop owner complained that she was receiving items

[44] These facts are based on McCorry's credible testimony.

[45] These facts are based on the credible testimony of Farnsworth. I do not credit Knoble's version of this event.

[46] Knoble was asked whether customer complaints can result in discipline for the drivers. He answered: "I don't have any proof to that effect; no." It was only after he was shown his own writing on the customer complaint forms that he recanted. This is another example of the type of testimony that convinces me that Knoble was not attempting to tell the full truth but was rather attempting to construct his testimony, to the extent he could, to suit his Employer's legal theory.

that she had not ordered. Engard reviewed the delivery accuracy of the Aldworth selectors and spoke with Aldworth supervisors about the matter. He assisted them in developing a course of action to deal with the problem. Engard then noted that the matter was resolved because steps had been taken to reduce errors and as a result accuracy had improved dramatically. He also noted that a supervisor had been monitoring the merchandise for delivery to the complainant's store. That same day another shop owner complained that merchandise that was delivered had not been rotated at the facility and thus was not as fresh as it could have been. Engard again spoke with Aldworth supervisors and determined that an employee who worked in the freezer was unfamiliar with proper rotation procedure. Engard noted that as part of the resolution of the complaint that the problem had been identified and corrected. On October 8, a shop owner complained that he was chronically being shorted merchandise that he has ordered. Engard spoke with Aldworth supervisors with the result that they had to increase the number of meetings that were held at the start of the selectors' shift, emphasize accuracy, and refine the selectors' training process.

Shop owners also make a variety of other requests to Dunkin' Donuts that ultimately impact Aldworth drivers. For example, a shop owner requested that deliveries be made to his stores back to back. Knoble reviewed the request and determine to grant the request. Knoble modified the route of the Aldworth driver accordingly. On occasion such modifications of the delivery schedules result in new drivers being assigned to make the delivery.

14. Involvement in this case

Dunkin' Donuts also played a role in the discipline of employees alleged to be discriminatees in this case. Those facts are fully set forth below and will only be summarized here. Knoble and Shive played a role in the events that led to Leo's unlawful termination. It was Shive who decided to observe McCorry's performance and McCorry's unlawful suspension was based on those observations. Shive played a lead role in investigating the incident that led to the unlawful suspension of Moss, Sellers, and King and the unlawful transfer of those employees and Kenneth Mitchell as well. Engard instigated Sellers' unlawful suspension. Engard sent a letter to Aldworth complaining about the quality of work of the former freezer employees; subsequently three of these employees were fired.

B. Analysis

Preliminarily, Dunkin' Donuts argues that the General Counsel and the Union may not now contend that Dunkin' Donuts is a joint employer because the petitions filed by the Union named only Aldworth as the Employer and the stipulation agreement, approved by the Regional Director, likewise identified only Aldworth as the Employer. In support of this argument, Dunkin' Donuts cites *Goodyear Tire & Rubber Co.*, 312 NLRB 674, 688–689 (1993). In that case, the Board determined that the General Counsel had failed to prove allegations that certain employers were joint employers. The history of that case showed that the union there had won a representation election resulting from an election stipulation agreement. The union had not named any employers as joint employers, nor had any additional employers participated in the bargaining that followed the union's certification. It was only when the employer was about to lose its service contract that the union became interested in the additional employers. The Board affirmed the judge's conclusion that the union's conduct "was comparable to a waiver" of its contention that the additional employers were joint employers. The Board likewise affirmed the judge's conclusion that this was a factor to be considered in deciding the joint employer issue.

To be sure, the Union here has been generally aware of the fact that Dunkin' Donuts played a significant role in the employment conditions of the unit employees. However, I conclude that *Goodyear* is inapposite. In that case, the union had prevailed in an election and had begun collective bargaining with the employer. Here, as I describe below, unlawful conduct precluded a fair election and thus prevented the Union from developing a collective-bargaining relationship with Aldworth. In other words, the history of waiver-like conduct that occurred in *Goodyear* is absent in this case. The mere fact that the Union did not include Dunkin' Donuts as a joint employer in the representation proceeding and did not name it in the initial charges is insufficient to establish conduct "comparable to waiver." I conclude that there has been no waiver of the right to contend in this case that Dunkin' Donuts is a joint employer with Aldworth.

The test in determining whether two separate employers are joint employers is whether they exert significant control over the same employees and share or codetermine significant terms and conditions of employment of those employees. *NLRB v. Browning-Ferris Industries of Pennsylvania*, 691 F.2d 1117 (3d Cir. 1982). *TLI, Inc.*, 271 NLRB 798 (1984), enfd. 772 F.2d 894 (3d Cir. 1985). The Board has further held that to establish joint employer status the alleged joint employer must be shown to meaningfully affect matters such as hiring, firing, discipline, supervision, and direction. *Laerco Transportation*, 269 NLRB 324 (1984). I shall now turn to analyze the facts against this standard.

I turn first to examine the leasing agreement between Respondents. Dunkin' Donuts argues that the cost plus arrangement in that agreement is not indicative of joint-employer status, citing *Goodyear Tire*, supra. To be sure, a simple cost plus arrangement whereby one employer agrees to reimburse another employer for certain costs at certain rates is not indicative of a joint-employer relationship. Here, however, the evidence shows that the arrangement went beyond such an arm's-length agreement. For example, Dunkin' Donuts decided whether the Aldworth bonus program was effective or not, and ceased funding the program as a result of its decision. Aldworth permitted Dunkin' Donuts to deal directly with its employees to decide whether the employees had permission to incur unexpected costs. Also, unlike *Goodyear*, where the employer provided additional benefits to its employees beyond those specified in the cost plus arrangement, here the practice is to grant the employees only the specific benefits that Dunkin' Donuts has approved. I conclude that this particular arrangement shows that Dunkin' Donuts plays a significant role in determining the wages and benefits of Aldworth employees and is thus indicative of a joint employer relationship.

I now examine the matter of Government regulation. The fact the Government requires Dunkin' Donuts, as the carrier, and the drivers to abide by certain regulations is not indicative of joint employer status. However, those regulations are not always clear and thus decisions must be made as to how those Government regulations will be interpreted and applied to the employees. Here, the evidence shows that it is Dunkin' Donuts, and not Aldworth, that interprets the regulations and instructs or advises the employees accordingly. I conclude that Dunkin' Donuts' role in this regard is indicative of a joint employer relationship.

The policies and procedures manual gives no indication of the existence of a joint employer relationship. Rather, it confirms the uncontested fact that Aldworth is an employer of the employees.

The facts set forth above show that Dunkin' Donuts, through Knoble, played a significant and important role in deciding which driver applicants were hired. Dunkin' Donuts argues that Farnsworth's testimony, described above, is too remote to be considered useful. It properly cites *Goodyear Tire*, supra, for the proposition that the appropriate timeframe for analyzing the joint employer issue is the period surrounding the alleged unfair labor practices. However, I have concluded that Farnsworth's testimony is generally consistent with the testimony of Hoffman concerning the hiring practice that existed during the time of the alleged unfair labor practices. Thus, Farnsworth's testimony provides specific detail concerning a practice that continued during the relevant period. In any event, I consider the events in August or September 1996 to be events surrounding the unfair labor practices that began in April 1998. I also conclude that Dunkin' Donuts, through Engard, played a significant and important role in determining which warehouse applicants were hired. The evidence also shows that Dunkin' Donuts played a direct role in creating an Aldworth's supervisory position and hiring an individual to fill that position. The creation of a supervisory position and the choice of supervisor in turn affect unit employees. Finally, I conclude that Dunkin' Donuts plays a significant and important role in determining whether employees are terminated. These findings further support a conclusion that Dunkin' Donuts is a joint employer.

I turn now to the Dunkin' Donuts 401(k) plan that is also provided to the Aldworth employees. To the extent that Dunkin' Donuts argues that it was required to include the Aldworth employees in its 401(k) plan, the evidence is to the contrary. It shows only that Dunkin' Donuts voluntarily decided to extend to its employees a qualified plan, and that in order to do so it had to include Aldworth employees. Dunkin' Donuts also argues that that under the Internal Revenue code the fact that the Aldworth employees are included in the plan does not require a finding that those employees are employed by Dunkin' Donuts. That may be the case under tax law, but the joint employer issue in this case is decided by Board law. The fact that Dunkin' Donuts has decided to extend its plan to cover Aldworth employees, and then administered the plan as if it were the employer of those employees is clear evidence tending to show a joint employer relationship.

The evidence set forth above shows that Dunkin' Donuts played a significant role in the development and administration of the incentive plan. Dunkin' Donuts argues that it only gave advice on this matter to Aldworth. I disagree. The totality of the facts show that Dunkin' Donuts' role was more extensive; it participated in developing the specific details of the plan. Dunkin' Donuts argues that its involvement in the service award gifts is not the type of conduct that is indicative of a joint employer relationship. It cites *Osco Drug, Inc.*, 294 NLRB 779, 787–788 (1989). I agree; the amounts of those awards were minimal and thus had little impact. I conclude, however, that the role Dunkin' Donuts played in the incentive plan is some evidence of joint employer status.

The evidence described above also clearly shows that Dunkin' Donuts plays a significant direct and indirect role in assigning work and equipment to the Aldworth employees. Dunkin' Donuts contends that Knoble's role in assigning routes and equipment to the Aldworth drivers is not indicative of a joint employer relationship. It contends that in cases dealing with the use of leased employees in a distribution context the Board permits a certain degree of control concerning assignments, citing *Teamsters Local 776* (*Pennsy Supply*), 313 NLRB 1148 (1994); *Goodyear*, supra at 686; and *Osco Drug*, supra at 782. However, in those cases the alleged joint employer, for the most part, merely distributed the routes to employees. That is far less extensive than the involvement here of Dunkin' Donuts. I further give little weight to the assertion that Knoble's role in these matters has been curtailed. As described below, I conclude that those changes were part of an unlawful course of conduct designed to erode support for the Union. Further, there is no credible evidence that any such changes are permanent in nature and not merely designed to temporarily deal with the issue at hand. I conclude that Dunkin' Donuts plays a significant and substantial role in assigning work and equipment to the Aldworth employees and that is indicative of a joint employer status.

Turning to the matter of timecards and time off, the General Counsel argues that the role Dunkin' Donuts plays in initialing timecards supports its argument. I disagree. This conduct was de minimis and contributes little to the resolution of the joint employer issue. However, the facts described above show that Dunkin' Donuts decides on a day-to-day basis whether Aldworth employees can use personal days or serve suspension days. Dunkin' Donuts cites *TLI*, supra, in support of its argument that its conduct on this matter is not indicative of joint employer status. In that case, however, the alleged joint employer simply notified the employee when the employee was required to work during vacation. Here again, Dunkin' Donuts played a more pervasive role. I conclude that this evidence supports a finding that Dunkin' Donuts is a joint employer.

The facts set forth above show that Dunkin' Donuts monitors the conduct of Aldworth employees concerning certain safety matters. Dunkin' Donuts deals directly with the Aldworth employees on these matters and instructs those employees how they are comport themselves in order to work in a safe manner. Dunkin' Donuts also regularly participates in deciding whether Aldworth employees will be disciplined as a result of safety infractions. Dunkin' Donuts likewise regularly deals directly with Aldworth employees when the employees raise certain classes of safety concerns. Dunkin' Donuts, not Aldworth,

determines whether those concerns are meritorious and if so, what adjustments should be made to deal with the problem. Dunkin' Donuts contends that it did no more than provide information to Aldworth so that Aldworth could take appropriate action. In making this argument, it relies in part on testimony that I have not credited. The facts set forth above show that Dunkin' Donuts did more than merely report facts. Dunkin' Donuts cites *Pennsy Supply*, supra at 1159–1160. That case involved an accident review board composed of managers from the alleged joint employer and employees from both employers. This review board made recommendations concerning discipline to the alleged joint employer. Here, there is no board that includes employees; Dunkin' Donuts itself directly plays a role in these matters. Dunkin' Donuts also relies on *TLI*, supra. However, there the Board found only that mechanical and other problems on the road were reported to the alleged joint employer. Here, Dunkin' Donuts' conduct is more extensive. I conclude that Dunkin' Donuts' involvement in safety matters is further indication that it is a joint employer.

The facts also show that Dunkin' Donuts regularly and significantly monitored the daily conduct and performance of Aldworth employees. It also adjusted certain types of employee grievances. Dunkin' Donuts argues that the incident reports described above do not show that it directly disciplined Aldworth employees. That argument misses the point. Those documents clearly show the role that Dunkin' Donuts in monitoring and supervising the daily work activities of the Aldworth employees. Dunkin' Donuts argues that its role in this matter was a simple exchange of information that is not indicative of a joint employer relationship. It cites *TLI*, supra at 799. In that case, the Board noted that the alleged joint employer sent an "incident report" to the other employer describing employee conduct that it felt was adverse to its interests. Here, the pattern of conduct shows a far more extensive level of monitoring employee conduct. The evidence shows that Dunkin' Donuts went beyond merely reporting conduct that it happened to observe. Dunkin' Donuts also cites *Clinton's Ditch Co-Op Co. v. NLRB*, 778 F.2d 132, 138 (2d Cir. 1985). I am, of course, bound to follow Board law even in the face of contrary circuit law. However, I note that the court in *Clinton's Ditch* concluded that that alleged joint employer's role in monitoring employees conduct had an insignificant effect on the employees' pay and did not amount to day-to-day supervision. Here, I have concluded that Dunkin' Donuts did play a role in the day-to-day monitoring of employees' work. Dunkin' Donuts contends that the memoranda that Knoble issued are not indicative of joint employer status, citing *Osco Drugs*, 294 NLRB at 782; and *TLI*, 271 NLRB at 803. However, it appears that the scope of the memoranda issued by the alleged joint employers in those cases was more restricted than in this case. I conclude that the role Dunkin' Donuts plays in monitoring employee conduct and performance and adjusting employee concerns is indicative of a joint employer status.

I next assess the evidence concerning the discipline of employees. Dunkin' Donuts argues that any role it played in disciplining Aldworth employees was de minimis. I disagree. While it is entirely correct that Aldworth itself solely determined the overwhelming number of disciplinary actions, the role that Dunkin' Donuts played was nonetheless significant. Concerning the insurance report forms described above, Dunkin' Donuts relies on the testimony of Knoble to argue that they, at best, constitute no more that recommendations or at worse, documentary exercises designed to placate the insurance carrier. However, because I have discredited this testimony the argument fails. The role that Dunkin' Donuts played in the disciplinary process of Aldworth employees is further evidence that Dunkin' Donuts is a joint employer of those employees.

The evidence set forth above shows that Dunkin' Donuts almost exclusively monitored the conduct of Aldworth employees in their interactions with retail shops. Dunkin' Donuts regularly and significantly directed the Aldworth employees concerning how they were to comport themselves when dealing with those shops. Dunkin' Donuts contends that the fact that it received and responded to customer complaints about Aldworth drivers does not demonstrate that it is a joint employer. However, Dunkin' Donuts did more than merely prepare a response to those complaints. Dunkin' Donuts' conduct in this regard is a further indication of a joint employer relationship.

Finally, the role that Dunkin' Donuts played in the discipline of the alleged discriminatees in this case is further support for a finding that Dunkin' Donuts is a joint employer. Dunkin' Donuts argues that the freezer incident described below actually supports its contention that it is not a joint employer. It points out that it asked Aldworth to terminate the freezer employees and that it was extremely displeased when Aldworth rejected its suggestion and merely suspended the employees. However, it is not necessary for the General Counsel to show that Aldworth always followed the suggestions made by Dunkin' Donuts. Rather, the test is only that Dunkin' Donuts must be shown to exert significant control over the working conditions of the employees.

In summary, the facts show that Dunkin' Donuts plays a significant role in determining the wages and benefits of Aldworth employees and plays a significant and important role in deciding which applicants are hired and whether Aldworth employees are fired. Dunkin' Donuts plays a significant direct and indirect role in assigning work and equipment to the Aldworth employees. Dunkin' Donuts regularly and significantly monitors the daily conduct and performance of Aldworth employees and adjusts certain types of employee grievances. Dunkin' Donuts plays a significant and important role in disciplining Aldworth employees. It is Dunkin' Donuts, and not Aldworth, that interprets Government regulations and instructs or advises the Aldworth employees accordingly. Dunkin' Donuts also decides on a day-to-day basis whether Aldworth employees can use personal days or serve suspension days. Dunkin' Donuts applies its 401(k) plan to Aldworth employees and played a significant role in the development and administration of the Aldworth incentive plan. Dunkin' Donuts almost exclusively monitors the conduct of Aldworth employees in their interactions with retail shops and regularly and significantly directs the Aldworth employees concerning how they are to comport themselves when dealing with those shops. Dunkin' Donuts monitors the conduct of Aldworth employees concerning certain safety matters, deals directly with the Aldworth employees on these matters and instructs those employees how they are to

work in a safe manner, and regularly participates in deciding whether Aldworth employees will be disciplined as a result of safety infractions. Dunkin' Donuts played a significant role in the discipline of the alleged discriminatees in this case.

Dunkin' Donuts and Aldworth argue that *TLI* and *Osco*, supra, support the conclusion that they are not joint employers. However, as describes above, those cases are factually distinguishable in several important respects. Closer to the mark are *Quantum Resources Corp.*, 305 NLRB 759 (1991), and *W. W. Grainger, Inc.*, 286 NLRB 94 (1987), enf. denied on other grounds 860 F.2d 244 (7th Cir. 1988). Under all the circumstances, I conclude that Dunkin' Donuts is a joint employer with Aldworth of the unit employees.

IV. ALLEGED UNFAIR LABOR PRACTICES

A. Overview

1. Organizing campaign

Rosemary Kelly, organizing director, and Peg Michalowski and Brian Covely, organizers, conducted the Union's organizing campaign. The campaign began in January when Michalowski's nephew Kenneth Mitchell, who worked for Aldworth, called her and indicated a desire to be represented. Mitchell then twice provided Michalowski with a list of names and telephone numbers of employees. The matter remained dormant for several months, but then meetings were held with groups of employees. Individual employees were visited at their homes. The Union distributed three leaflets to the employees. The first described the process of "getting the union in." It included a description of the uses of authorization cards. Specifically, the leaflet indicated that the authorization cards signed by the employees would be used to satisfy the 30-percent showing of interest required by the Board in order to conduct an election. It also indicated that when a majority of employees signed the cards, the Union would use the cards to demand recognition from Aldworth. The leaflet also specified that by signing cards the employees were giving "proof" that they wanted the Union to represent them. The second leaflet set forth employees' rights under the Act, and the third contained a list of unlawful employer conduct. The cards distributed by the Union clearly indicated that the signer was authorizing the Union to be the signer's representative for purposes of collective bargaining. Employees began signing cards in late March. It was about this time that Aldworth announced to employees at a safety meeting that there would be no wage increase for employees that year. The Union also distributed union bumper stickers, T-shirts, and pins to the employees.

As more fully described below, Aldworth held a number of meetings with the employees about the Union starting in April. Aldworth made Dunkin' Donuts aware of the meetings.[47]

By letter dated June 16, the Union formally notified Aldworth of an organizing effort in a unit composed of truckdrivers, helpers, and warehouse employees. The letter also protested alleged unfair labor practices committed by Aldworth. By letter dated June 18, Aldworth responded to the Union by saying that Aldworth respected the legal rights of its employees and has not and does not intend to violate those rights.

2. The election

On July 28, the Union filed a petition for an election seeking a unit that included the classification of helpers. That petition was withdrawn and the Union then filed two new petitions on August 11. One sought to represent the drivers and warehouse employees and the second to represent the helpers.[48] All these petitions named only Aldworth as the Employer.

On August 12, Aldworth and the Union entered into a Stipulated Election Agreement that provided for an election in the following unit of employees:

> Included: Regular and full-time drivers, warehouse employees, yard jockey(s), maintenance employee(s) and ware-house trainees.
> Excluded: All other employees, guards and supervisors as defined by the Act.

As the unit stipulation discloses, the classification of helpers was excluded. This came about as a result of Aldworth's position that the helpers were not properly included in the unit. An election was conducted on September 19, and the Union lost by a vote of 45 to 48 with 1 challenged ballot. The Union filed timely objections to the conduct of the election.

B. The 8(a)(1) Allegations

1. The meetings and related conduct

a. April 9

On Thursday, April 9, Kevin Roy held a meeting with certain warehouse employees in the breakroom at the facility; Frank Fisher was also present. Roy said that he understood that there was a union organizing drive going on. At that time Roy, who believed that the Teamsters were involved, said that he had defeated the Teamsters in an election before and he could beat them again.[49] Roy said that the employees who had supported the Teamsters had been disgruntled employees with disciplinary problems who had been fired because they could not comply with Aldworth's selection accuracy policy. Roy's unrebutted testimony is that these employees were, in fact, fired for disciplinary reasons and no unfair labor practice charges were filed over their terminations.

The foregoing facts are based on a composite of the testimony of Toomey, Mitchell, and Moss. Despite the fact that Roy's testimony was sketchy concerning the content of this meeting, I do not credit the testimony of the General Counsel's witnesses to the extent that it is inconsistent with the facts set forth in the preceding paragraph. For example, I have considered Toomey's testimony that Roy said something about why employees would "hitch their wagon" to someone on their way out the door. I do not credit this testimony. Toomey's testimony was solicited in response to a leading question and he appeared uncertain whether this statement was made at this

[47] I have considered Shive's testimony that he and Roy did not discuss the content of the meetings. I do not credit that testimony.

[48] This petition was later withdrawn.

[49] In 1997, there had been an effort by the Teamsters to organize the warehouse employees. An election was held and Aldworth won that election.

meeting or at a later meeting. I have also considered Moss' testimony that Roy asked why the employees wanted a union and that the employees who were trying to bring in the Union were troublemakers and on their way to losing their jobs. The first part of that statement is not corroborated by any other credible evidence and I do not credit it. The latter portion of the statement was given in response to a leading question and this witness too appeared uncertain about what was said at this meeting. I do not credit this testimony either. I have considered Mitchell's testimony that Roy told employees at this meeting that he would take care of any problems they had. This testimony is not corroborated and I do not credit it. In sum, I conclude that the witnesses presented by the General Counsel concerning this meeting have sufficiently differing versions that I am unwilling to make findings beyond those set forth above.

Analysis

The General Counsel alleges that at this meeting Aldworth threatened employees with job loss if they supported the Union. The General Counsel bases this argument on his contention that Roy said, "That employees who supported the earlier Union drive were not there anymore and that employees who currently were engaged in Union activity were in jeopardy of losing their jobs." However, I have not concluded that Roy made such statements. Instead, Roy told the employees that the supporters of the earlier organizing campaign had been fired because they were unable to comply with Aldworth's policy concerning the accuracy of their selections. The undisputed testimony is that this was a factually accurate statement. I note that Roy did not link the terminations of those employees with their union activity. Instead, as will be seen in more detail below, it was part of an ongoing effort by Roy to identify union supporters as employees who had poor work records and who, therefore, had their own "agenda." Under these circumstances, I conclude that Roy's statement was not sufficiently linked to union activity so as to constitute an unlawful threat of discharge. In support of this allegation the General Counsel cites *Donald E. Hernly, Inc.*, 240 NLRB 840 (1979). However, in that case the threats, in context, where linked to the protected activity of the employees and shop steward. Here, I conclude that there was no such link. Accordingly, I shall dismiss this allegation of the complaint.

The General Counsel alleges that Aldworth solicited employee complaints and grievances in order to discourage the employees from supporting the Union. In support of this allegation, the General Counsel relies on a portion of Mitchell's testimony that I have not credited. I shall dismiss this allegation also.

b. April 11 meeting and May 8 letter

On Saturday, April 11, there was a mandatory meeting for drivers and warehouse employees held at a nearby hotel. Roy conducted the meeting; Fisher and other Aldworth supervisors were present. Roy began the meeting by saying that he had heard rumors that there was a union organizing effort among the employees. He said that he felt that it was due to a communication problem between the supervisors and employees. Roy, who still was under the impression that the Teamsters were involved, spoke of that union's history and financial status. At one point, Roy held up a blank sheet of paper and told the employees that would be where they would start in negotiations with the Union. At some point later during the course of the meeting, Roy also told employees that they could either gain or lose from the collective-bargaining process.

Roy again said that it sounded like a communications problem and that Fisher was at the meeting to take down all the complaints no matter how long that process took. He asked employees to give him their concerns and problems and he would do his best to take care of them. However, Roy said that he could not address pay and benefit matters. Driver McCorry spoke up and described a situation at a retail shop that he felt was unsanitary and how he brought the matter to the attention of Dunkin' Donuts Supervisor Knoble but Knoble's response was that if he did not want to deliver there Knoble would find someone who would. Roy said that this matter would be addressed and Fisher made notes of McCorry's remarks. Other employees also voiced problems they had working with Knoble. The problems included overweight trucks and trailers that Knoble expected them to drive, scheduling problems that were not adjusted by Knoble, discipline imposed by Knoble, logbook violations required by Knoble, and the like. Roy said that he would put an Aldworth manager at the facility to whom the employees could go and have their problems resolved instead of having to deal with Knoble. As employees voiced their concerns Roy checked to be certain that Fisher had written them down. Roy told the employees that he guaranteed that he would get back to them in writing within 30 days. During the course of the meeting freezer employee Doug King complained that he felt the freezer area was unsafe due to overcrowding. He also complained that the certain equipment in the freezer was broken. In the May 8 letter described below, Aldworth sets forth some of the specific complaints made by employees at this meeting. The meeting lasted several hours.

These facts are based on a composite of the testimony of McCorry, Leo, Moss, Toomey, Farnsworth, Meduri, and Puig. Roy's testimony confirms some of this testimony. Roy admitted that the first part of the meeting concerned the Union and during the second part he wanted to know what concerns the employees had. As he put it, "I asked if there were any issues other than wages and benefits that I could discuss because it had come to my attention that the Union had been around." He discovered that the employees complained that they had presented problems to Fisher but those problems were never resolved, so he instructed Fisher to write down the employees' concerns and promised the employees that he would address them within 30 days. Roy also admitted that the employees complained of the treatment that they had received from Knoble. He further acknowledged that he referred to a blank sheet of paper and told the employees that collective bargaining starts there. Roy also testified that he told the employees that Aldworth was bringing in a regional operations manager with the result that Knoble would have less involvement with the drivers. This testimony is generally consistent with the facts set forth above. To the extent, however, that Roy's testimony is inconsistent with the facts set forth in the preceding paragraphs I do not credit it. In other parts of this decision I cite specific examples of where I felt Roy's testimony was not believable.

Based on my observation of the demeanor of the witnesses, the degree to which they attempted to give full and factual answers, and the inherent probabilities based on the entire record in this case, I conclude the testimony of the employees, to the degree set forth above, is more credible than Roy's testimony. Fisher's testimony also confirms parts of the employees' testimony. Fisher admitted that he took extensive notes at this meeting because Roy wanted to make sure that he could give a written response to all the concerns raised by the employees. He further admitted that this was prompted by the fact that Aldworth had begun to hear about the union activity of the employees, although at that point they believed that the Teamsters were involved. As he put it "The [u]nion concern aspect was a big key." Fisher admitted that Roy referred to a blank sheet of paper and told the employees that negotiations would start with nothing and then whatever then resulted from bargaining would be what the employees ended up with. However, I do not credit Fisher's testimony to the extent that it is inconsistent with the facts set forth above. In making my credibility resolutions I have considered the testimony of John Kanady, Carl Troilo Jr., and Ronald Butrymowicz, all employees called as witnesses by Aldworth. Kanady impressed me a credible witness in certain respects. He had a clear recollection of the fact that a "safety meeting" occurred earlier, separate and apart from the meeting of April 11; Aldworth initially argued that the April 11 meeting was nothing more than a regularly held safety meeting. Although Kanady did not testify in detail concerning this meeting he did state Roy said as follows:

> He addressed any concerns, any issues, to try to get focused on what might be the reasons why people were upset, dissatisfied. I guess to try to get to the center of everything.

Butrymowicz testified, in response to questions that I asked, that Roy said that the employees were going to start from scratch in the bargaining process. Troilo likewise testified that Roy held up a blank sheet of paper and said the bargaining started there. I conclude from this testimony that Roy in fact told employees words to the effect they would start bargaining from scratch and that he solicited employees complaints in an effort to address them and, therefore, eliminate the need for the Union. The facts concerning the complaints in the freezer are based on the credible and unrebutted testimony of King.

About a month after the April 11 meeting described above, McCorry went to see Frank Fisher in his office. McCorry asked whether the employees would be receiving responses to the concerns they had raised at the meeting. Fisher asked what the hurry was. McCorry explained that the Union was still organizing and employees were trying to make up their minds concerning whom to support. Fisher said that Roy had "pretty much squashed that" and that "it's a done deal," referring to the union organizing effort. McCorry disagreed. Fisher then asked McCorry what he thought the Union would do for him. McCorry explained how he received a great wage rate and benefits, but he described how the conditions were at the retail shops. Fisher finally replied that the answers were coming.

Meanwhile, after the April 11 meeting Roy returned to his home office in Massachusetts and considered the employees' concerns. On May 8, he distributed a six-page letter to employees. The first page of the letter read:

> As you know, there were several issues and concerns brought up at our meeting on April 11, 1998.
>
> To summarize some of the concerns, they were in the area of productivity, manifest time, load configuration, hours of compensation, favoritism, concern over incentive pay, lack of respect and understanding and issues not being responded to. These issues seemed to be the theme of the comments made at this meeting.
>
> Please be advised that due to this meeting, we have created an Issue Report Form that will guarantee you a response in writing to any and all of your concerns. It has and will continue to be Aldworth's objective to listen and react to any and all comments regarding changes to any part of our operation and absolutely our policy to respond to you when these issues arise.
>
> At the meeting, we discussed the possibility of forming a committee to bring employees' concerns forward. We are not going to create or form a committee because we feel that you as an individual will always have the opportunity to bring any concerns or issues you have directly to Management on an individual basis.
>
> It is our feeling that this meeting was very helpful and perhaps overdue. A positive result of this meeting is the Issue Report Form that will absolutely close the loop regarding communication and addressing any of your future concerns.
>
> As always, if you have any comments or questions regarding this memo or leftover comments from the meeting, please contact me at your earliest convenience.

There followed 21 comments made at the meeting and Aldworth's response to the comment. For example, one comment described in letter concerned a complaint that pallets should not be loaded too heavily when they are to be pulled up an incline. Aldworth's response was that it would build lighter pallets. Another comment was that a driver felt that Dunkin' Donuts did not value him as an employee. He had asked to be removed from a run because Dunkin' Donuts did not keep a commitment to him, and he requested that he be returned to his old route. Aldworth responded that the driver is considered a valuable employee but that he was not made the promises as he had contended but that he would be considered next in line for assignment to the route. Another comment was that new drivers were not storing merchandise and that a particular retail store should be moved from an overnight route to a local route because of unloading problems the driver experienced there. Aldworth responded that the new drivers' performance was being watched and that it was considering placing the store on a local route as the driver had suggested. A comment from a driver was that certain routes had difficult stores to service and that for this reason he was unable to run his route at 100-percent efficiency. This in turn lowered his incentive awards. Aldworth responded that the driver's run and his efficiencies would be adjusted. In response to another comment made by a driver, Aldworth said that Dunkin' Donuts had given the driver more hours so that could improve the driver's efficiency. An-

other driver had complained that an extra store was added to his route but he was not given any extra time to perform the work. Aldworth answered that the driver's comments were legitimate and would be corrected. Another comment was that issues were not being resolved. Aldworth responded that Dunkin' Donuts feels that it is addressing the drivers' issues and that the newly implemented issues report form would guarantee that the issues were addressed.

The letter concluded by assuring employees that Aldworth and Dunkin' Donuts would work together to open up better communications by involving the supervisors' resources to greater extent and that those supervisors would listen to issues and be able to find answers.

The issue report form alluded to in the letter identifies the employee, has a space for a description of the issue or recommendation and the supervisor's response. Aldworth had never before used this form at the facility. Fisher and Kundrat admitted that the issue report was created in response to complaints from employees that management had not addresses their concerns.[50] They also explained that the form served the purpose of documenting the fact that management had responded to the concerns of the employees.[51]

Analysis

The General Counsel alleges that at the meeting Aldworth solicited employees' complaints and grievances thereby promising them improved working conditions in order to discourage their support for the Union. As set for the above, Roy did ask employees what their complaints were. In the context of the meeting it is clear that he was referring to the complaints they had that led them to contact the Union. The fact that he had Fisher write the complaints as they were given heightened the coercive effect of the solicitation. Indeed, Roy explicitly promised the employees that they would receive a response to their complaints and, as the May 8 letter shows, he was true to his word. The Board has long held that the solicitation of employee grievances and promises to adjust the grievances, when this is an effort to stifle employees' union activity, is unlawful. *Hospital Shared Services,* 330 NLRB 317 (1999); *Reliance Electric Co.*, 191 NLRB 44, 46 (1971), enfd. 457 F.2d 503 (6th Cir. 1972). Indeed, this matter is devoid of more troublesome difficulties that frequently accompany the resolution of allegations of this type. Here, there was an express statement that employees would receive a response to their complaints and the May 8 letter shows that some concerns were remedied. Also, the evidence shows that the solicitation of grievances was directly tied to the Union's organizing effort. The fact that Roy refrained from soliciting pay and benefit complaints does not detract from the fact that the complaints he otherwise solicited concerned the working conditions of the employees.

Aldworth argues that it has a practice of addressing employee concerns that long predates the union activity. Indeed it is accurate that Aldworth has a practice of holding biannual safety meetings with employees. At these meetings safety matters are addressed. Occasionally, guest speakers would attend. Sometimes Dunkin' Donuts' officials would attend and address the employees on matters such as the how well the business was doing and new developments. Near the end of these meetings employees are allowed to ask questions and present their concerns to Aldworth management. This typically lasted about 10–15 minutes.[52] There is no specific, credible, evidence that Aldworth adjusted the concerns that the employees raised. Roy also admitted that the April 11 meeting was not a regularly scheduled safety meeting. Indeed, he admitted that it was at the safety meeting held earlier in March that he had announced a wage freeze for employees.

I conclude, however, that the April 11 meeting was not a continuation of the practice that developed at the end of the safety meetings. First, the April 11 meeting was not a safety meeting. It was a specially called meeting, and it was held to specifically deal with the subject of the union organizing effort. The April 11 meeting lasted several hours compared to the minutes devoted to employee complaints at the safety meetings. Next, at the April 11 meeting Roy directly tied the solicitation of grievances with the union organizing effort. Moreover, unlike at the safety meetings, Roy had Fisher write down the employees' complaints. Finally, at the April 11 meeting Roy explicitly told the employees that he would have a response to each of their complaints within 30 days. Aldworth cites *American Freightways,* 327 NLRB 832 (1999). However, that case supports my conclusion here. There, the Board concluded that the employer improperly solicited grievances. It rejected the employer's contention that the solicitation was merely a continuation of an existing practice of solicitation of employee concerns. In doing so, the Board noted that the meetings that occurred during the critical period were different from the single meeting held outside the critical period. I too conclude that the solicitation of employee grievances that occurred after the arrival of the Union was substantially different from the practice that occurred before the Union's arrival. This case is also distinguishable from the dissent in *American Freightways,* supra. The dissent concluded that the meetings held during the critical period were a followup to a meeting held before the critical period and dealt with subjects initially raised at the earlier meeting. In the case at hand, there is no connection between the solicitation of grievances that occurred after the Union began organizing with the prior safety meetings at which employees were permitted to ask questions and voice complaints. In sum, the April 11 meeting was quite different from the earlier safety meetings.

[50] Thus, Roy's statement that he "never gave the union a second thought" when he developed the issue report form is an example of testimony so incredible that it serves to undermine Roy's overall credibility.

[51] Kundrat testified that the implementation of the use of issue reports was merely the formalizing of a process already in place. However, he gave no specific examples of how that alleged informal process work. I do not credit that testimony.

[52] Aldworth's employee handbook has an employee problem solving procedure. The stated purpose of the procedure is to assure that employees receive a fair and reasonable response to their problems. Under this procedure an employee may initially bring a problem to the attention of the operations' manager, then to the director of operations, the executive vice president, and finally to the president. There is no contention that the April 11 meeting was part of the procedure.

Aldworth also cited *NLRB v. K & K Gourmet Meats,* 640 F.2d 460 (3d Cir. 1981). There the court concluded that the employer did not violate the Act when it solicited grievances and expressed its hope that it would settle them. The court found that such statements were insufficient to sustain a conclusion that the employer promised to adjust the grievances. In this case, there is no such ambiguity. As pointed out above, I have concluded that Roy told the employees at the April meeting that he would respond to their grievances and then did so. Under these circumstances, I conclude that by soliciting employee grievances and promising to adjust them in an effort to undermine the organizing campaign underway, Aldworth violated Section 8(a)(1).

The General Counsel alleges that at this meeting Aldworth promised employees that it would hire a new manager in order to discourage their union support. I have concluded above that Roy in fact told employees at this meeting that he would hire a new Aldworth manager to work at the facility. This statement was made in the context of many employee complaints concerning Knoble and Fisher. This was the first time that employees were told that Aldworth might hire a new manager at the facility.

Aldworth contends that it began the process of hiring a new manager prior to the start of the union activity. In fact, Aldworth did place a blind advertisement in the Philadelphia Inquirer in mid-March. The advertisement sought a human resources manager who was highly motivated. Someone with a BS or BA degree in management or human resources and experience with workers' compensation and state laws was preferred. Computer and organizational skills were required. Another advertisement placed at about the same time was for an operations/human resources manager. This advertisement sought someone with supervisory experience in the field of distribution and employee recruiting. A BS or BA degree was required. However, Aldworth did not hire anyone through the advertisements. As explained more fully below, effective September 14, 5 days before the election, Aldworth did hire Timothy Kennedy as the new manager and introduced him to employees at the meetings that Aldworth held that week. Roy and Kundrat interviewed him in late August. He applied for the position after a friend told him that the position was available. Kundrat testified that Kennedy was the type of person that Aldworth had been seeking in the advertisements that Aldworth had placed in mid-March. In this regard, Roy testified that he felt that Fisher had been a weak manager so he decided in 1997 to hire a regional operations manager to whom Fisher would report. When presented with the fact that neither of the advertisements Aldworth placed in March sought a regional operations manager, Roy testified that the positions were identical, only the titles were different. Roy admitted that Kennedy was hired in part so that Kennedy could directly respond to employee complaints "without [Fisher's] famous words 'I'll get back to you.' That was not appropriate, nor was it going to be tolerated any more." I conclude that the announcement Roy made at the April 11 meeting that he would hire a new manager was not merely a continuation of preexisting efforts by Aldworth to fill such a position. The advertisements clearly sought someone for a human resources position. The manager that Roy described to the employees was someone with operational experience. In fact, I conclude that announcement was made to quell the complaints that the employees had voiced that they never received responses to the problems that they raised. I do not credit the testimony of Roy and Kundrat to the extent that it is contrary to this finding. This was a promise of a benefit made to undermine the employees' support for the Union. As such it violated Section 8(a)(1). *NLRB v. Exchange Parts Co.*, 375 U.S. 405 (1964).

Next, the General Counsel alleges that Aldworth threatened employees with loss of benefits if they selected a union by saying that the employees would commence the bargaining process with nothing. I have concluded above that Roy held up a blank sheet and paper and told employees that that was where they would start in negotiations with the Union. In determining whether such statements violate the Act, the context in which they are made is especially important. *BI-LO,* 303 NLRB 749 (1991); *Wagner Industrial Products,* 170 NLRB 1413 (1968). If the context of the statement indicates to employees that the bargaining process has its risks and employees may even lose benefits in the process, then the statement is a lawful explanation of the realities of bargaining. *Somerset Welding & Steel,* 314 NLRB 829 (1994). If, however, the statement may be reasonably understood by employees that the employer would begin the bargaining process by proposing that the employees start with no benefits and require the union to attempt to regain existing wages and benefits, then the statement is unlawful. *Belcher Towing Co.*, 265 NLRB 1258 (1982). In assessing the context in which the statement was made, I consider the fact that at some point during the meeting Roy did tell employees that they could gain or lose in the bargaining process. However, such general statements about the bargaining process do not necessarily cure other unlawful statements. *Noah's New York Bagels,* 324 NLRB 266 (1997). Here, Roy's general statements about the bargaining process were not sufficiently connected with his "bargaining from scratch" statement to lend additional meaning to the latter statement. The two statements were separated by time and by other topics. Under these circumstances employees would reasonably understand that Roy was telling them that they would start the bargaining process with nothing and the Union would have to gain back existing benefits.

Aldworth also argues that Roy's comments were protected under *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969), and Section 8(c) of the Act. However, comments are protected only when they do not contain threats of reprisal or promise of benefit. Here, I have concluded that Roy's statements did contain a threat of reprisal. Accordingly, I conclude that Aldworth violated Section 8(a)(1) by threatening employees that they would start bargaining with the Union with nothing.

Concerning the May 8 letter, the General Counsel alleges that Aldworth unlawfully solicited employees' complaints and grievances. As indicated above Roy wrote that it had been and would continue to be Aldworth's objective to listen and react to any and all comments regarding changes to its operations and was its policy to respond to the employees when issues arose. In context this was an indication to employees that the solicitation of grievances that occurred at the April 11 meeting was

being extended. Moreover, I have already concluded that the solicitation that occurred at that meeting was not a mere continuation of a prior practice but rather was an unlawful effort to undermine support for the Union. Here too, the solicitation implied that the grievances would be adjusted because in the very same letter Aldworth adjusted some of the earlier grievances. Under these circumstances, I conclude that Aldworth again violated Section 8(a)(1) by soliciting grievances and promising to adjust them in an effort to undermine support for the Union.

The General Counsel also alleges that in the letter Aldworth announced the creation of an "issue report" form to solicit employee grievances in order to discourage their union support. As described above, I have concluded that the issue report form was a new form that was created as a response to employee complaints that their grievances in the past had not received a response. The form itself permits employees to document their complaints and provides a space for management's response. I conclude that the issue report form was both an adjustment of the grievance that the employees had voiced and an effort to systemize the solicitation of grievances in order to discourage support for the Union. Accordingly, by announcing and implementing the use of issue report form system Aldworth violated Section 8(a)(1).

Finally, the General Counsel alleges that the letter unlawfully announced that certain grievances raised at the earlier meeting had been adjusted. As set forth above, Roy announced in the May 8 letter that certain grievances voiced by employees at the April 11 meeting had been adjusted in a manner favorable to the employees. Inasmuch as the adjustment of these grievances was part of Aldworth's unlawful solicitation of grievances, I conclude that Aldworth violated Section 8(a)(1) by adjusting those grievances in an effort to undermine support for the Union.

c. June 16 letter

The union representatives visited driver John Kanady at his home at about 6:30 or 7 p.m. Kanady invited them into his home and spoke with them for about 45 minutes. Despite this Kanady complained to Roy about the fact that the union representatives had visited his home uninvited. He conveyed to Roy that he and his wife were upset because they have two small children and Kanady frequently works at night. For that reason Kanady did not want his address to be given to others. Kanady's wife called Roy directly and voiced similar concerns to him. Fisher testified that he had received complaints from employees that they were being "harassed" at home. He said that the complaints concerned being called at "odd" times of the night, being visited on the weekends, and people knocking on their doors.

On June 16 Roy distributed a memorandum to all employees on the subject of unsolicited telephone calls. The memorandum read in pertinent part:

> Recently, I have received several phone calls from concerned employees regarding their being contacted at their homes by a union organizer.
>
> I want to be perfectly clear that Aldworth Company, Inc., will not tolerate any harassment of its employees either from outside or from inside the operation. It appears that a roster listing employees' names and telephone numbers has been stolen from our supervisors.[53] This is how this individual has gotten your names. We apologize for this and encourage everyone who feels that they are being harassed or bothered by this individual to please contact me at their earliest convenience.

The memo later again invited employees to contact Roy if they felt that they were being harassed or bothered, and it provided a toll free number for use in contacting him.

Analysis

The General Counsel argues that by requesting employees to report if they felt they were being bothered or harassed by the employees or the Union, Aldworth violated the Act. I agree. In a recent case the Board upheld a judge's finding that it was unlawful for an employer to ask an employee if the union organizer was "bothering" him and thereafter directing the union organizer not to "bother" the employee. *Mr. Z's Food Mart*, 325 NLRB 871, 891 (1998). The Board has also held that requests by an employer that employees report when they are being "bothered" or "harassed" by union supporters violate Section 8(a)(1). *Greenfield Die & Mfg. Corp.*, 327 NLRB 237 (1998). This is so because such requests cover protected union activity and an employer may not inquire into such activity. The facts in this confirm this pattern. The testimony set forth above concerning the reports of employees that prompted the letter was vague and general and did not show that the employees were reporting improper, much less unlawful, conduct by the Union. To the contrary, it shows that the Union was engaging customary and fully protected conduct by soliciting employees' support. The fact that certain employees may not have welcomed the solicitation can not serve to deprive the Union of the opportunity to try. I conclude that nothing in these reports could serve as a legal justification for Aldworth's conduct on this matter. The fact that Aldworth was responding to employee complaints or that the Union had visited the employees as a result of a list that had been taken from Aldworth's facility does not justify Aldworth's solicitation that employees report the union activity of other employees to it. Accordingly, by soliciting employees to report when they were being bothered or harassed by union activity, Aldworth violated Section 8(a)(1).

The General Counsel also alleges that Aldworth created the impression of surveillance among employees by stating in the letter that it knew that union representatives had been visiting them at their homes. However, the letter made clear that the source of Aldworth's knowledge were reports from employees. Thus, in context, it was clear to employees that Aldworth's knowledge of these events did not come as a result of surveillance. I shall dismiss this allegation of the complaint.

Next, the General Counsel alleges that Aldworth solicited employees' complaints and grievances in the letter in order to

[53] Aldworth contends that alleged discriminatee Mitchell is not entitled to reinstatement because he admitted that he was the person who took the list from the office area. This matter is described in detail below.

discourage their support for the Union. However, the context of Roy's solicitation makes clear that he was requesting that employees report instances of harassment and the like and that he was not soliciting general employee complaints. I shall, therefore, also dismiss this allegation.

d. June 27 meeting

Another mandatory meeting was held on June 27; all employees, including helpers, attended. By this time the Union had notified Aldworth that an organizing campaign was underway. Again Roy was Aldworth's spokesman at the meeting. He invited anyone with a tape recorder to bring it near the front of the room so that he would not be misquoted. Although apparently no one recorded the comments at this meeting, subsequent meetings were recorded. Roy then again held up a blank sheet of paper and said that that is where the employees would start during the bargaining process if the Union were selected.

McCorry voiced his concerns about the need for an accident investigation policy. He also described a situation at one of the retail shops that he serviced. He explained that the storage area was covered with rodent excrement; water was dripping in the area and it became slippery. McCorry recounted how he had told Knoble of the problem and how Knoble responded that he was aware of the situation but there was nothing he could do about it because the store owner was on Dunkin' Donuts' board of directors. Roy responded to McCorry's comments by loudly asking why McCorry was putting on a show. McCorry in turn, pointed out what he thought were the health hazards that could flow from the situation. After another employee joined McCorry in pointing out the health hazards involved Roy began to take McCorry's comments more seriously. Other employees also made comments at this meeting.

Roy also told the employees that Dunkin' Donuts could terminate its contract with Aldworth with 30 days' notice. He said Dunkin' Donuts could say, "It's over" and then bring in a new contractor. He said that Ryder Logistics, an Aldworth competitor, could underbid Aldworth for its contract with Dunkin' Donuts and that Ryder could retain 49 percent of the work force and then would not have to deal with the Union; the remaining employees would be out of work. Roy discussed how Aldworth's future otherwise looked bright. Roy turned to the bargaining process and said that he had to bargain in good faith. Toward the end of the meeting Roy urged the employees not to grab onto somebody with one foot out the door for lateness and another for stealing company time and sleeping on the job. The remarks concerning lateness referred to driver Leo J. Leo, who at that time had been suspended.[54] The employees were unable to connect the remarks Roy made concerning stealing company time and sleeping on the job to any particular employee at that time. Later, however, it became apparent that the comments pertained to McCorry.[55] Leo and McCorry were sitting side by side almost in the front row at the time Roy made these comments.

Roy apologized because someone had given the Union a list of the names and telephone numbers of the employees and the Union had used the list to contact the employees. Roy said that he would fire the employee who had given the Union the list when he discovered who that employee was. Roy said the employees did not have to meet with union officials and had the right to ask them to leave. One of the employees said that he had been harassed at his home by the union officials, and Roy replied that Aldworth would not tolerate union officials harassing employees. Roy said that if they felt they were being harassed or bothered by the Union they should let him know.

One of the helpers said that he had heard from a driver that the helpers were getting a raise, uniforms, and benefits. Roy said that he could not make any commitments but he could say that he was looking into the possibility of doing so. Roy then showed the videotape "Little Card, Big Trouble."

I turn now to explain how I arrived at the findings set forth above in the preceding paragraphs. Those findings are based on a composite of the testimony of McCorry, Leo, William Chalmers, Guillermo Puig, Gary Blevins, Frederick Williams, and Bryon Farnsworth. I note that Chalmers, Blevins, Williams, and Farnsworth are not alleged as discriminatees in this case and they were still employed by Aldworth at the time they testified. However, I do not credit their testimony to the extent that it is inconsistent with the facts set forth above. For example, Puig testified that Roy explicitly said, "Everything you have now, you will lose. Let's remember who the boss is. I am the one who has to sign this. All I have to do is show up at the bargaining table." McCorry also testified that Roy said that all he had to do is show up at the bargaining table. Other employees do not corroborate this testimony. Based on my examination of all the testimony concerning this meeting and my assessment of the relative credibility of the witnesses, I conclude that Roy did not directly make those statements. McCorry testified that Roy talked about specific opportunities to gain new customers and then asked whether the employees were willing to throw that all away by bringing in a union. This testimony is uncorroborated and for reasons indicated above I do not credit it. In the same vein, Williams testified that Roy said that just because the Union was selected did not mean that Aldworth had to bargain with it; I, likewise, do not credit this testimony.

Roy testified that at this meeting he told employees that Dunkin' Donuts could cancel its contract with Aldworth for any reason with 30 days' notice. Roy also admitted that he said that if the employees selected the Union and a contract was negotiated that did not allow Aldworth to remain competitive then Dunkin' Donuts could get rid of Aldworth and use a competitor. That competitor, said Roy, might only hire a minority of the former Aldworth employees in which case it would not even have to recognize the Union. Roy also admitted that he may have used a blank sheet of paper and told the employees that that was where bargaining began. Roy further testified that he said that if employees felt that they were being harassed or bothered by the Union they should let him know. Roy admitted that he advised the employees to beware of the personal agendas of some employees and not hook their wagons to employees who had one foot out the door for lateness, or falsification,

[54] The General Counsel alleges that Leo's subsequent discharge violated the Act. This matter is more fully described below.

[55] The General Counsel alleges that McCorry's subsequent suspension violated the Act. This matter is more fully described below.

or stealing time. Roy confirmed that McCorry raised the topic of rodent waste at one of the stores. This testimony is generally consistent with the facts described above. I have also considered Fisher's testimony. He stated that Roy told the employees at this meeting that if the Union won the election and Dunkin' Donuts did not continue its contract with Aldworth then "they" only had to hire half of the employees to maintain the union contract and the other half of the employees would lose their jobs. I conclude that the facts set forth in the preceding paragraphs more accurately describe what Roy said on this subject. I also reject Fisher's and Roy's testimony that Roy told the employees that Roy could not discuss increased benefits for the helpers because of the union campaign. I have also considered Kundrat's testimony concerning this meeting. His testimony was unimpressive; it seemed designed to put Roy's remarks in a most favorable light rather than be a factual recitation of what Roy actually said. I, therefore, do not credit that testimony to the extent that it conflicts with the facts set forth above.

Analysis

The General Counsel alleges that during this meeting Aldworth threatened employees with loss of existing benefits by telling them that they would start with a blank sheet of paper if they selected the Union. I have concluded above that Roy again made such a statement. As previously described this statement violates Section 8(a)(1).

The General Counsel alleges that Aldworth created the impression that the employees' union activities were under surveillance when it told them that "Union people" were visiting their homes. As described above, I have found that Roy apologized to the employees for the fact that someone had given their names and telephone numbers to the Union and the Union had been using that information to contact them. Shortly before the meeting, the employees had received the June 16 letter that explained the basis of Aldworth's knowledge of the fact that the Union had been contacting employees at their homes. Under these circumstances I do not find that Roy's statement at the meeting would reasonably lead employees to believe that Aldworth was engaging in surveillance of their union activity. Rather, in context, employees would reasonably understand that Aldworth was simply explaining to employees how the Union was able to reach them at their homes. Accordingly, I shall dismiss this allegation of the complaint.

The General Counsel argues that Roy's statements concerning harassment also violated the Act. Although I have concluded that Roy made such statements, the General Counsel did not allege that at this meeting such statements were unlawful, or did he move to amend the complaint after this testimony was elicited at the trial. Under these circumstances, I find it unnecessary to make additional conclusions concerning these unalleged statements because I have already concluded above that Aldworth made similar statements and any additional findings would not alter the remedy in any respect.

Next, the General Counsel alleges that Aldworth interrogated employees concerning their union activities. In support of this allegation the General Counsel asserts that Roy demanded to know which employees provided the Union with the list of the names and telephone numbers. However, I have not concluded that Roy made such a statement. Accordingly, I shall dismiss this allegation of the complaint.

The General Counsel alleges that Aldworth threatened employees that another employee who supported the Union would be fired, and disparaged the employee. In this regard, the General Counsel relies on Roy's "one foot out the door" statement and claims that the statement amounted to a threat of discharge. I disagree. Roy did not connect the reason those employees had one foot out the door with their union support. Instead, he clearly indicated the reasons were lateness, sleeping on the job, and stealing time. Under these circumstances, employees would not understand Roy's remarks to mean that these employees were being terminated because of their union activity. The General Counsel cites *Carry Cos. of Illinois*, 311 NLRB 1058 (1973), enfd. 30 F.3d 922 (7th Cir. 1994), and *Cannon Industries*, 291 NLRB 632, 635 (1988). However, in those cases there was a clear connection between the threats and union activity. Such a connection is absent here. The General Counsel also contends that Roy's remarks constituted an unlawful disparagement of union supporters. The General Counsel relies on *F.W.I.L. Lundy Bros. Restaurant*, 248 NLRB 415, 422–423 (1980). However, in that case the employer required certain union adherents to remain standing for about 45 minutes in front of about 50 to 60 employees. The employer told those employees to "shut up" when they attempted to speak, and called them "jokers" and "clowns." No such outrageous conduct was directed at union adherents in this case. Accordingly, I shall dismiss this allegation of the complaint.

The General Counsel also alleges that Aldworth threatened employees with job loss if they selected the Union. The Supreme Court has described the test to be applied in this situation as follows:

> [A]n employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union . . . . He may even make a prediction as to the precise effects he believes unionization will have on his company. In such a 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 . . . . If there is any implication that an employer may or may not take action solely on his own initiative for reasons unrelated to economic necessities and known only to him, the statement is no longer a reasonable prediction based on available facts but a threat of retaliation based on misrepresentation and coercion [*NLRB v.Gissel Packing Co.*, 395 U.S. 575, 618 (1969)].

In support of this allegation, the General Counsel claims that Roy told the employees that Dunkin' Donuts would cancel its contract with Aldworth if the employees chose the Union. However, I have not found that Roy made such a statement. Instead, Roy simply informed employees of the fact that their jobs were not guaranteed because Dunkin' Donuts could cancel its contract with Aldworth and obtain services elsewhere. There was no explicit or implicit connection that this would or might occur only if the employees selected the Union. I recognize that this statement was made in a meeting where Aldworth communicated its antiunion message. But this fact alone is

insufficient to transform the otherwise factual statement into a veiled threat. This is especially true because the specific context of this statement shows that Roy was addressing Aldworth's business relationship with Dunkin' Donuts and the prospects for additional expansion in the future. This was not a prediction of the consequences of unionization. *Reeves Bros.*, 320 NLRB 1082 (1996), is distinguishable. There, the employer told employees that its customers would stop doing business with it if the employees unionized. Roy made no such statement in this case. For similar reasons *Dlubak Corp.*, 307 NLRB 1138, 1143–1152 (1992); *Feldkamp Enterprises*, 323 NLRB 1193 (1997); and *Metalite Corp.*, 308 NLRB 266, 272 (1992), are inapposite. In sum, I conclude Roy's statement approached, but did not cross, the line into the territory of unlawful threats. Lastly, I note that the General Counsel does not argue that Roy's statement concerning the possibility that if a successor employer hired only 49 percent of Aldworth's work force it would be under no obligation to recognize the Union was an unlawful threat.

Finally, the General Counsel alleges that at this meeting Aldworth unlawfully promised employees wage increases, new work attire, and an improved benefit package in order to discourage union activity. I have found that Roy told the employees that while he could not make any commitments concerning improving the benefits of the helpers, he was looking into the possibility of doing so. There is no credible evidence that in fact Aldworth had been in the process of examining the helpers' level of benefits prior to the start of the organizing effort. In the context of this and earlier meetings, where Aldworth was attempting to ascertain what problems led the employees to seek the assistance of a union, I conclude that employees would reasonably understand Roy's comment as a general promise that he would examine the level of helpers' benefits in order to stifle their desire for union representation. By doing so, Aldworth violated Section 8(a)(1). *NLRB v. Exchange Parts*, 375 U.S. 405 (1964). The fact that Roy prefaces his remarks by saying that he could not make any commitments does not negate its unlawful nature. "It is immaterial that an employer professes that he cannot make any promises, if in fact he expressly or impliedly indicates that specific benefits will be granted." *Michigan Products*, 236 NLRB 1143, 1146 (1978).

The General Counsel also contends that Roy made other unlawful statements at this meeting that violated the Act. However, I have not credited the testimony that the General Counsel relies on to support those contentions.

e. August 29

Present for this meeting were Dunn, Aldworth's president, as well as Roy, Kundrat, and Fisher.[56] Roy began the meeting by introducing himself and the others to the employees. He stressed the importance of employees being informed before they cast a vote in the impending election. He said that the law required that everything he said during the campaign be factual information whereas the Union could say anything it wanted, whether it was true or not. Dunn then addressed the employees. He distributed a letter to the employees that was also distributed to employees with their paychecks. Dunn reiterated the content of the letter by assuring the employees that they would not be fired or lose benefits whether or not they supported the Union. He said that this statement was made to counteract a scare tactic often used by the Union that an employer would "clean house" if the Union lost the election. Dunn said, "So, please pay attention to everything we have to offer you, and feel free to express your opinions. We'll work on them, and we'll stay here as long as you want."

At that point, Roy invited anyone with a recording device to bring it forward, and McCorry did so. Roy then explained why Aldworth had sought to exclude the helpers from the unit of eligible voters. Roy referred to the last meeting where many issues were discussed, including matters such as problems with the routes and rodent waste at retail stores. He said, "What came out of the meeting within a couple of weeks was two events, one termination and one suspension."[57] He said that he was not going to mention names but he would talk about the matter. He explained that Aldworth had rules concerning tardiness and that at some point he had to enforce those rules out of concern for other employees who showed up on time every day. He said that individual, in obvious reference to Leo, created his own problem. Roy then turned to "Individual # 2." He stated that if an employee is found falsifying the manifest and found stealing time because of that, the employee can be terminated, but that individual, in obvious reference to McCorry, was not terminated. Roy said that he talked on the telephone with this individual and told him that he had worked for the Employer for 6 years and had made a mistake. He said that he told the individual that it was not a union issue and that it had nothing to do with that process. Roy claimed that the individual thanked him after the employee admitted wrongdoing. At that point, McCorry spoke up and said, "That's a lie." McCorry asserted that he did not admit anything and that he did not falsify his log or manifest, and he did not steal any time from Aldworth. McCorry said that he forgot to write the time on his manifest, but that was not falsification. He said that there were a lot of other employees in that room who had done what he was accused of but who were not suspended.

Roy said that Aldworth had been associated with Dunkin' Donuts since 1983. He described how their association began in Massachusetts after he talked with the vice president and general manager for Dunkin' Donuts. That official told Roy that Dunkin' Donuts' labor provider, who then was a competitor of Aldworth's, had signed a contract with the Teamsters and that this was a problem because the provider had come to Dunkin' Donuts with increased costs. Roy said that the Dunkin' Donuts' official indicated that Dunkin' Donuts refused to pay the higher costs and then asked Aldworth to take on the business.[58] Roy agreed to do so.

[56] The facts in this section are derived from a transcript of a tape recording made at this meeting.

[57] As described more fully below, on about July 1 Aldworth discharged employee Leo ostensibly because of excessive tardiness; he had earlier been suspended. On June 29, Aldworth suspended McCorry. The General Counsel alleges that both of these matters were unlawful.

[58] Roy testified that he actually told the employees that the labor provider canceled its contract with Dunkin' Donuts. I do not credit that

Roy explained that now Aldworth had over 1600 employees in 29 States and that Aldworth was probably going to exceed $60 million in sales that year. Roy then said:

> Do we have improvements to make? No question . . . Here, at this Center . . . they need to be addressed . . . . One is communication. The other has to do with respect . . . I'm not going to make excuses for Tom Knoble, for Mike Shive, for Frank Fisher, for Wayne or myself. Two of those people happen to be our clients. One of them is not a people person to say the least. One of them should not be talking to people. I don't feel bad about this conversation because I had it with him yesterday. My intention is to bring in a dispatch supervisor to fill the void . . . . A void, because there's nobody to talk to. You guys fill out issue reports now. You're not talking to anybody . . . . You're talking to warehouse supervisors who are trying their best to help you from time to time. But nobody consistently—nobody consistently. So, this Sunday I'm running an ad for a dispatch supervisor. I'm posting the job also if you like to apply . . . . I am also hiring, as of September 14th, a regional operations manager, who will be Frank [Fisher's] immediate boss, located right there at the Center, who will be empowered to make decisions, who will be empowered to authorize requests without going anywhere, without talking to anybody . . . . Tom Knoble, I can't discuss Tom Knoble. I don't know what's going on there, alright. And, I say that with a heavy heart, because it shouldn't get to this process . . . . Nobody should be told, "If you don't like it, I'll give it to somebody else . . . . And I'm going to prevent that from happening.

Roy then made a presentation about unions using a question and answer format. He also explained the benefits the employees had enjoyed working for Aldworth. Later, Roy continued with the theme he had given earlier. He said:

> Do we have things to discuss? Yeah, yeah. Can we improve communications? I've already told you my two endeavors. I've already got one in the process. It's been in process a long while okay. A long while. The dispatch supervisor is going to prove to be very, very important as well, and it's going to help you folks go out, because it going to allow the warehouse supervisors to focus more on you. . . . Do we structure our bid packages properly? Probably not. Do we have a method? No. No. Some people in this room are upset about that, and rightfully so. Can we create one? Yeah, it's damn well time we do. But, it's not going to the most senior person. Maybe a combination of the senior person and how they fared on their incentive program. Because you don't want us giving it just by seniority. Because that would bring the company down.

At other points during the meeting, Roy again discussed the new regional operations manager and dispatch supervisor positions that he would be filling. He invited the employees to bid on the dispatch supervisor position when it was posted. Employees asked questions concerning the two positions.

Later during the meeting, a new employee asked a question concerning how his lunch period is shown on the manifests. The discussion turned to the fact that some employees were concerned that they did not have enough time to take lunch and still complete the deliveries on time. Roy then went on to say that Aldworth did not want employees performing their work at better that 100 percent of the allotted time for a run. A driver told how it seemed to him that Knoble wanted drivers to perform at greater that 100 percent.[59] Roy said, "From this day forward . . . all you have to do is run at 100 percent." He assured the employees that when the new supervisors come in, that they would evaluate employees accordingly.

McCorry then complained that Knoble had asked him to falsify his logbook. Roy asked how many drivers had been asked to do so also and 20 to 30 drivers raised their hands.[60] The discussion then turned to McCorry's recent suspension. Roy said that he had problems when a driver arrives at a hotel at 7 o'clock and yet does not call in until 8 o'clock to indicate that he was at the hotel. He said those employees were trying to beat the system and that when it happened again and again the drivers would be suspended. This again is in obvious reference to McCorry's suspension. McCorry interjected and explained that after he checks in a hotel he then does his paperwork and takes his lunch period, all of which is paid time.

Driver Byron Farnsworth noted that during the last meeting Roy had held up a blank sheet of paper and said that if the Union gets in, they were going to start from scratch; he asked if the Union gets in would Roy take away the drivers' rate of $17.95 per hour and the warehouse rate of $13.80 per hour. Roy answered:

> And when we're involved in this process . . . . I can't tell you what I can do and what I can't do. What I can tell you is what the collective bargaining process means . . . . That is a process. So a process, when you negotiate a contract, this is where you start. That's the starting point. So you're asking me a question I can't answer.

The discussion then turned to personal days. An employee complained that last year he lost the personal days that he had not used and that he did not get paid for them. Roy answered that the intent of the program is for the employees to take the time off and rest, but that if it was a program that could not be used, it was useless. He ended: "So, let me look into that."

The discussion moved to the timeclock. An employee suggested that they be permitted to punch in anytime between 7 minutes before and 7 minutes after the scheduled starting time. Roy answered that he would rather permit employees to punch in 15 minutes prior to their scheduled starting time, but they would not get paid for that extra time. The employee said he thought that was a good idea. Roy said: "I'm saying that's a

testimony. The content of this statement appears to be complete and Roy did not indicate exactly the point at which he allegedly made this remark. Generally, I do not credit Roy's testimony concerning the content of the taped meetings. It appeared that he was simply attempting to lessen the effect of his statements.

[59] A driver at this meeting told of how he had spoken to Knoble about getting an early run. Roy did not indicate any surprise by this disclosure, nor did he direct the driver to bring these matters to Aldworth supervisors instead of to Dunkin' Donuts.

[60] This amplification of the transcript is based on McCorry's testimony.

possibility." Others spoke up and said that employees were not allowed to punch in that early without getting paid for the time. Roy then went on to describe a system that they had "in place" but that they had not yet implemented. He described a swipe card system that employees would use to clock in. Roy then said: "We obviously need to regulate the clock and figure out what makes sense in relation to punching in early. I don't think your question is as much for punching in late."

Later, in response to a question, Roy said that the issue reports would go to him. He said, "And those issues are being discussed, then resolved and sent back to you."

An employee then commented that they had been discussing the same problems for years and nothing had changed. He asked if the changes that they were talking about would occur before the election; he wondered if it would be too late to wait until after the election. Roy said: "I hear what you're saying." Roy explained that all the problems would not be resolved in a matter of weeks. He reminded the employees of how, in the past, they had complained about a certain manager and that person was removed. Roy acknowledged that the union effort was a "wake-up call" and that "it's time for action, no question." Roy continued: "But what I'm telling you is changes are going to be made. Changes are going to be made." He told the employees that he can make changes happen and said: "What I talked about—am I foolish enough not to deliver?" Then Roy referred to the meeting he had held earlier that year with the employees. He said that they had discussed issues then. He asked if the issues had "gone away" and he answered the question by saying that they had not, but the issues got responses and that was a start. He said that they "kick-started" using the issue report form then because employees were not getting answers to the problems they raised with management. Roy said that he gets a copy of every issue report form, and he reads them and they are making progress. He indirectly referred to the Union and said that it could not do any more for the employees than he could do; he continued: "Not a god-damn thing—unless I say so." He said that he saw in the spring (referring to the April meeting) what was going on and that he didn't just hire somebody yesterday (referring to the new manager). He continued: "Things are going to change. I have a commitment from the top level, that these practices are not tolerable. He again said that no one can force change on him without his agreement. Roy said:

> I'm telling you the changes are coming. Are you going to see something visible by the 14th or the 19th? I sure hope so. I hope you will see something that gives you a ray of hope that you know what it wasn't BS at the meeting.

Later, Roy alluded to McCorry when he said he would be "damned" if he fired someone that had been working there for 6 years. He said that he could have done so but he did not. Again referring to McCorry he said a mistake was made but otherwise his record was clean.

Roy then said:

> Reality is simple. Nobody can do anything until I sign it off. If I tell you I'm going to make a change, I'd have to be pretty stupid not to make a change . . . . You know why? Because when they do lose the election on the 19th they have one year. They can come back. So, if you haven't seen things change in a year's time, I've done something drastically wrong here, and I deserve whatever I get. If that means having to deal with a third party if in fact that is what happens . . . .

During the course of this meeting Roy read questions and answers from a prepared text. These questions dealt with topics such as how Aldworth felt about the upcoming election, whether employees who signed union cards could still vote against the Union, the collective-bargaining process, and strikes.

Analysis

The General Counsel contends that at this meeting Aldworth violated the Act by soliciting employees' complaints and grievances, thereby promising improved working conditions, in order to discourage the employees from engaging in union activities. I have concluded above that early in the meeting Dunn, Aldworth's president, invited employees to listen to what Aldworth had to offer, to voice their opinions and Aldworth would "work on them." Roy later spoke of how Aldworth had to make improvements, and he specified the areas of communications and respect. He also mentioned the need to restructure the bidding process, noting that some employees were rightfully upset by the current system. He repeated this theme several times during the meeting. Roy asked that the employees give him the opportunity to make things happen. As employees voiced their complaints, Roy answered that perhaps Aldworth needed to adjust a matter, or look into a concern, or said that an employee's suggestion was a possibility. He specifically told employees that from that day forward they would not be required to complete their routes in greater than 100-percent efficiency. He also told employees that he would rather "adjust the timeclock" to address a particular problem. Roy tied this all to the Union by saying that the union effort was a "jump-start" and that changes were going to be made. He repeatedly emphasized this. This occurred during extraordinary set of mandatory meetings designed to persuade employees to reject the Union. Aldworth relies on *National Micronets, Inc.*, 277 NLRB 993 (1985), and *Noah's New York Bagels*, 324 NLRB 266, 267 (1997). However, Roy's remarks at this meeting went well beyond the generalized expressions that employers may lawfully make. Under these circumstances, I conclude that Aldworth violated Section 8(a)(1) when it solicited employees' problems and promised to adjust them in order to dissuade the employees from supporting the Union.

Next, the General Counsel argues that Aldworth violated the Act by threatening the employees with loss of benefits if they selected a union by saying that the employees would begin the bargaining process with the benefits listed on a blank sheet of paper. As more fully described above, at this meeting a driver alluded to the earlier meeting where Roy had held up a blank sheet of paper and said that that was where the employees would start. The employee asked whether the drivers and warehouse employees would have their current wage rates "take[n] away." Roy replied that he could not answer that question, but confirmed that the blank sheet of paper was the starting point of the collective-bargaining process. Roy went on to indicate that wage rates were part of the collective bargaining process, but

gaining process, but reaffirmed that the process started with a blank sheet of paper and refused to assure the employee that wage rates would not be cut at the *start* of that process. This is quite different from explaining to employees that at the *end* of the process of collective bargaining, which includes the obligation to bargain in good faith, wage rates could go up or down. By again telling employees that they would start the bargaining process with nothing, Aldworth again violated Section 8(a)(1).

The General Counsel alleges that at this meeting Aldworth threatened employees with loss of their jobs if they supported the Union. In support of this allegation the General Counsel points to Roy's story of how Aldworth originally obtained the contract with Dunkin' Donuts. In that story he described how the employees of the former contractor with Dunkin' Donuts had been unionized and how Dunkin' Donuts then terminated the services of that contractor because it was unwilling to pay the increased costs resulting from the contract between the contractor and the Teamsters. I have concluded above that Aldworth and Dunkin' Donuts are joint employers. In *CPP Pinkerton,* 309 NLRB 723 (1992), the Board found unobjectionable a statement by an employer that another business possibly could take its work away from the employer. In this case, however, I have concluded that Dunkin' Donuts and Aldworth are joint employers. This case therefore does not involve references to possible third-party conduct. Rather, Roy's statement implied that Dunkin' Donuts itself would terminate its relationship with Aldworth as a result of its unwillingness to bear increased costs resulting from bargaining. Under *Gissel* such statements must be supported by objective evidence of demonstrably probable consequences beyond its control. Because the Respondents have failed to produce such evidence, Roy's statements amounted to a threat to the employees that the same fate may await them if the selected the Union. This threat of job loss violated Section 8(a)(1). *Overnite Transportation Co.*, 296 NLRB 669, 670 (1989). This statement is different from the one described above, when Roy said only that Dunkin' Donuts could terminate its contract with Aldworth with only 30 days' notice. Here, Roy's statement was specifically tied to a consequence of unionization.

The General Counsel next contends that Aldworth violated the Act by informing employees that it has suspended one employee and discharged another employee because they supported the Union. As more fully described above, Roy referred to an earlier meeting where they had discussed a number of issues concerning the Union and other matters such as rodent waste creating a safety hazard at the retail shops. This obviously referred to the statement that McCorry had made at the June 27 meeting. Roy said that the result of that meeting was one suspension, obviously referring to McCorry's 5-day suspension, and one termination, this time referring to Leo's discharge. Employees were aware of these events and understood what Roy was saying despite the fact that he did not mention specific names. It should be recalled that at the earlier meeting Roy had also linked Leo and McCorry as leading union adherents. By connecting McCorry's suspension and Leo's discharge to their visible support for the Union at the earlier meeting, Roy lead the employees to believe that union support may lead to discipline or termination. Aldworth argues that Roy was merely explaining the circumstances that lead to the discharge and suspension in an effort to dispel any concern that they were motivated by union activity. To be sure, Roy did go on to explain Aldworth's position concerning why the suspension and discharge occurred. If this were all that Roy had done, his statements might well have been lawful. Here, however, Roy specifically indicated that the discharge and suspension "came out" of the earlier meeting where Leo and McCorry had been identified as the leading union supporters. In this context, Roy's statement constitutes a threat to discipline or discharge employees if they engage in union activity, and it violates Section 8(a)(1). *Aero Metal Forms*, 310 NLRB 397, 399–400 (1993).

The General Counsel alleges that Aldworth unlawfully indicated to employees that their support for the Union would be futile. As noted above, Roy said that the Union could not do more for the employees than Roy himself could do. He emphasized the point by saying," Not a god-damn thing—unless I say so." These statements must be viewed in context. They were unaccompanied by any expression that Roy would bargain in good faith with the Union in an effort to reach agreement. Instead, Roy was on the one hand telling the employees that he was going to change conditions for the better without a union but on the other hand saying that with a union he would be very reluctant to agree to any changes. This statement may reasonably be understood by employees as indicating that their union activity would be futile. Aldworth argues that Roy's statement was merely an accurate statement of the law because Section 8(d) does not compel any party to make concessions. However, this is only a partial statement of the law. Aldworth is also required to bargain in good faith in an effort to reach an agreement with the Union. Aldworth also argues that Roy's statement merely expressed his belief that the Union could not make Aldworth a better company. However, Roy did not express this belief to the employees. Instead, he made the remarks described above. I conclude that Aldworth violated Section 8(a)(1) by indicating to employees that their support for the Union would be futile. *Airtex*, 308 NLRB 1135 fn. 2 (1992).

Continuing, the General Counsel argues that Aldworth promised to create new supervisory positions and promotion opportunities for employees and promised to remove an unpopular supervisor in order to discourage the employees from supporting the Union. I have already concluded above that Aldworth unlawfully promised to hire a new manager at the April 11 meeting. The evidence shows that at the August 29 meeting Roy announced that he would actually be filling that position effective September 14. He made that announcement in the context of demonstrating to employees the tangible steps he had taken to deal with the employees' complaints voiced at earlier meetings concerning Fisher and Knoble. Roy also promised at the August 29 meeting that he would hire a new dispatch supervisor. He stated that the reason he was hiring the new supervisor was to "fill the void" caused by the perception that the employees had no one that they could bring complaints to. This too was in response to employee complaints. Roy also invited employees to bid on the new supervisory position that he was posting. This amounted to the creation of a new promotion opportunity for employees. Aldworth's argument that it

historically permitted employees to bid on supervisory positions misses the point. This position was created in an effort to stifle union activities and the invitation to employees to bid on it was part of that effort. Roy also indicated to employees that he recognized that Knoble had not been effective in dealing with them and that he was henceforth going to limit the contact that they had with him. This was as a result of the complaints the employees had expressed when Roy had earlier unlawfully solicited the reasons why the employees had sought the Union. I conclude that by hiring a new operations manager Aldworth fulfilled its earlier unlawful promise, thereby violating Section 8(a)(1). By announcing that it would hire a new dispatch supervisor, Aldworth promised to create a new supervisory position in an effort to undermine employee support for a union in violation of Section 8(a)(1). By inviting employees to bid on the new dispatch supervisory position, Aldworth promised employees a new promotional opportunity in an effort to undermine their support for a union in violation of Section 8(a)(1). Finally, by telling employees that they would no longer have to deal directly with an unpopular supervisor in an effort to undermine union support, Aldworth again violated Section 8(a)(1). *Research Federal Credit Union*, 310 NLRB 56 (1993), remanded 25 F.3d 1115 (D.C. Cir. 1994).

Finally, the General Counsel also alleges that at this meeting Aldworth threatened an employee with discharge because he engaged in union activity. However, the General Counsel does not address this allegation in his brief, and I find no evidence to support this argument. I shall dismiss this allegation.

In his brief, the General Counsel argues that Aldworth made unlawful statements during the taped meetings in addition to those alleged in the complaint. At the hearing, I advised the General Counsel that I expected that all allegations of unlawful statements stemming from the meetings be alleged in the complaint. I stated that it would be unfair to expect Aldworth to have to examine hundreds of pages of transcripts from those meetings and guess what additional violations the General Counsel might later argue were unlawful. This compares with the minor burden placed on the General Counsel of seeking to amend the complaint to put Aldworth on specific notice. I also note that the General Counsel has had the transcript of these meetings and thus had ample opportunity to examine them carefully and include all allegations in the complaint. I, therefore, will confine my conclusions to the allegations made in the complaint.

f. September 1

Roy began this meeting by again stating that Federal law required that everything that Aldworth said be factual, but that this did not apply to the Union. Roy then gave examples of reports of union corruption and employees voiced their experiences with unions. Roy discussed the Union's pension plan and compared it to the one provided by Aldworth.

An employee commented that if the Union was not trying to obtain something from Aldworth why would Roy be down at the facility trying to fix things the way he was doing, and walking around shaking hands with the employees and asking them what was wrong. The employee said that it seemed "kinda funny" that Roy was at the facility "all of a sudden trying to make things right." Roy responded:

> I have been working on this issue since February of this year, long before you guys decided to use the word union. In terms of a regional manager, in terms of politicking behind the scenes for a dispatch supervisor . . . Timing, yeah, looks rather suspicious. I mean all off a sudden I'm here and I want to fix things and make it right . . . Timing is everything and if I had those things in motion, I'm not going to stop them just because of the way it might appear. I won't do that, number one. And number two . . . every company in America needs a little wake-up call now and then . . . Now I said Saturday (the August 29 meeting described above) I'm gonna resolve these issues. I'm gonna put people in place that have the power to resolve issues. I'll put processes and procedures in place that are meant to resolve issues.

Roy later told the employees that it was not a game, it was big business. He said that people do lose their jobs and wages do get cut or frozen. He said he never claimed that Aldworth was the "best choice" as a place to work, but no person outside the room (referring to the Union) was going to help him make things better. He said that he would learn from the employees, but that he was not going to learn from the union representatives. He said that the Union was telling employees that it would eliminate random drug testing. He said some employee recently signed a union card believing that promise, and that was sad.

Roy then told the employees how it was necessary to maintain and enforce rules and how that makes a company a good organization. He said:

> How the hell do you think we got to the money we are paying now? Where do you think we came from? What did you make at your last job? These are the questions you need to ask yourself. I'm not promoting answers here. Ask yourself where you came from. Ask yourself where you can go when we don't have this anymore. Good question. Good question. Because unions put so much pressure on employers, employers say hey, screw it. I don't need this.

Later an employee said that he knew store owners in upstate New York, locations that Aldworth drivers serviced, who had said that if the Union were selected they would take their business away from the facility and go somewhere else. He said that if Aldworth lost upstate New York that meant the loss of 10 drivers plus some warehouse employees. A driver asked if that was legal. Roy answered by saying: "Let me explain." Roy then proceeded to explain how the Dunkin' Donuts distribution center was owned by the franchisees and was different from Dunkin' Donuts. Roy said that there was another distribution center in the northeast that serves New York. He explained that the upstate New York stores that the drivers serviced were so close to the boundary that they could just move their business to the other distribution center. "That's what they can do. That's all. It's pretty easy. That's how it works."

Roy then discussed the topic of strikes, and employees shared their experiences with unions. A new employee ex-

pressed how pleased he was with the salary he received from Aldworth. Roy responded:

> Money isn't everything and I said to the guys on Saturday and I'm gonna say it for the next three weeks until I make it right, that there are still some issues that we need to resolve, okay. And those issues are being resolved in personnel changes. All I'm asking for is an opportunity to show people that those changes will come through. . . . I stand on my word that I have to deliver and I will deliver and some people are gonna like that changes and you know what. Some aren't. I'm sorry. Some aren't. But, I think the majority of people will absolutely like the change.

Roy also made a slide presentation covering various topics related to the organizing effort. This slide presentation was also made at the next two meetings described below.

Analysis

The General Counsel alleges that at this meeting Aldworth solicited employees' complaints and grievances and promised to adjust them, and announced that favorable changes were being made in order to discourage union activity. The facts noted above show that Roy repeated the message that he gave at earlier meetings that in response to the complaints of the employees concerning their current supervisors he was going to hire new supervisors. Although he claimed that he had been in the process of doing so before the Union came on the scene, the employees were not advised of any such plans until after their union organizing efforts became apparent. Roy, himself, admitted that the timing of these announcements made it appear that the promised changes were in response to the employees' union activity. He further admitted to the employees that the union effort had been a wake up call that yielded the changes. For reasons noted above, I conclude that Aldworth again violated Section 8(a)(1) by soliciting grievances and promising to adjust them and by announcing that favorable changes had been made in order to discourage the employees from supporting the Union.

The General Counsel also alleges that at this meeting Roy indicated the union activity of the employees would be futile. The General Counsel relies on Roy's statement that there wasn't one person outside the door (referring to the Union) that would help him make things better. He stated that he would learn from the employees but he would not learn from the union representatives. In context, Roy was again telling employees that he had an open mind concerning making things better at Aldworth when he was dealing directly with employees but he would not have that same attitude if he had to deal with the Union. This was a threat that the union activity would be futile, and it violates Section 8(a)(1).[61]

Lastly, the General Counsel contends that Aldworth unlawfully gave employees the impression that their union activity was under surveillance. In doing so the General Counsel points to Roy's statement, noted above, that an employee had relied on a union promise to eliminate random drug testing as an inducement to sign an authorization card. Roy gave no specifics concerning how he came to know of the employee who supposedly signed the card for that reason. However, considering the context of the statement I am unable to conclude that it gave the employees the impression that their union activities were under surveillance. Rather, it would seem equally plausible to employees that Roy's knowledge of this matter came from discussions with employees. The General Counsel relies on *Piccadilly Cafeterias, Inc.*, 231 NLRB 1302, 1308 (1977). However, in that case, unlike here, the circumstances reasonably gave to an employee the impression that his union activity had been under surveillance. I shall dismiss this allegation.

g. September 3

Roy again was the main speaker at this meeting. He answered questions from the employees concerning matters such as Aldworth's health insurance plan. Employees complained, among other things, that they had problems finding doctors under the plan. Roy responded that Aldworth reviews the policy every year and that they record each time an employee complains about the plan. He said that there were five complaints in 1996, two in 1997, and three in 1998. He said that he was hearing that there were not enough doctors in the program "so obviously we've got to look at changing what we have." Later, on the same issue, Roy said:

> If you tell me that that's the issue, I'll address it. How many in this room, when you guys have issues, have I addressed them or not? Or do I just ignore them? If you bring them up, we can work on them, we can take care of them.

An employee then presented a recent example of how he felt he was getting billed unfairly by the health care provider. Roy asked if the employee wanted him to deal with the problem, and the employee indicated that he did. Roy then said: "Give me a shot at it. Give me the paperwork."

The subject then turned to work performance as a driver asked why his performance on a route should be based on how other employees performed on that route. Roy referred to the earlier meeting and said that that was not the case. The driver persisted, explaining that if he ran a route at 130 percent he would receive a bonus. Roy answered: "Listen to me. You're going to get a bonus by doing 100 percent. Period." The driver then expressed his view that labor and management should be able to get along, and when Roy said that they do get along, the driver asked why they were there. The driver explained that he was a new employee. Roy answered:

> Then you need to ask everybody else. I did not sign a union card. Alright. That's part of the reason why I'm here. Okay.

[61] The complaint also contains another allegation that Aldworth indicated to employees that it would be futile for them to select the Union. However, the complaint alleges that this occurred at one of the meetings "the specific date of which is presently unknown to the General Counsel." The General Counsel provided no explanation as how he would not know the date when he possessed transcripts of all but two of the meetings. In any event, the General Counsel alleges in the complaint that Aldworth violated the Act in this regard by telling employees that it "would not deal with the Union" and would "show up at negotiations but did not have to agree to anything." I have not found those remarks in the transcripts nor have I credited any testimony to that effect. I shall dismiss this allegation.

> The other part is obviously there must be some major issues brewing, okay. Which I am still trying to find out. Because people are telling me it's not money. People want to say it's health and welfare. Well, guess what? You're learning something tonight. It may not be health and welfare. Then, what the hell is it? That's what I don't know.

Another employee then made a veiled complaint about Knoble. Roy said that the matter has been eliminated, and that the process for eliminating the problem had been in place since February and that it was unrelated to the union organizing effort. The topic then turned to an alleged uneven enforcement of work rules. An employee explained how he had gone to see Shive, Dunkin Donuts' top official at the facility, on a number of occasions and asked Shive to tell him what Shive wanted him to do; he told Shive that he would do whatever Shive wanted to get the job done to Shive's satisfaction. The driver said that despite this attitude he still felt that he was not being treated fairly on some things. Roy said the employee should not worry about Shive. Roy went on to talk about consistency, and repeated that working a route at more than 100 percent was not acceptable. He also reiterated that there was a possibility that routes could be rebid, although he did not know how that would work. He said that maybe he would let the employees decide that matter. Roy said that if "new packages" are created they would need to be distributed in a fair and equitable manner and that this was not the way it had been done in the past.

Another employee asked what had changed over the years as the authority in the facility shifted towards Dunkin' Donuts. Roy explained that an earlier Aldworth supervisor had left and was replaced with Fisher and as business increased no one was paying attention to what was happening. Roy continued:

> I admit that. I told you that on Saturday. . . . Did that make it right? No. Can I make it right today? If I put myself out, and you know me by now, if I put myself out and tell you I can do something, I do it. I think you know that. Okay. So, that's what changed. And here we are, back full circle. If there's some needed changes, come forward.

Warehouse employees then complained that work was not being assigned fairly. Roy said that that could be improved and that maybe they needed a new program where senior employees could serve as trainers. He repeated that there were ways to resolve the matter. An employee then questioned whether the quantity that employees were expected to pick was sustainable night after night. Roy answered that a lot of things could be evaluated. A warehouse employee complained that he had to work through lunch and breaks to pick the number of pieces expected. When Supervisor Scott Henderschott replied that it was the employee's job, Roy told Henderschott to listen to him, that no one should work through breaks and lunch in order to make a piece count. He continued: "I'm here to learn just like you. Okay? I'm here to learn. But that's not right. It's not right and that will change. Okay? That will change." An employee then said that piece count had to be lowered. Roy replied: "I'm not saying that the piece count is not going to be lowered, but you will get a break and you will get lunch. You will take breaks. That's wrong. That part is wrong." Later Roy said that it was the first time he had heard that employees were working through lunch and breaktime and that "that won't continue." Roy later made similar comments.

Later, Roy said that he was told of an incident by someone who delivered in upstate New York to stores that are right on the border between the Dunkin' Donuts distribution center involved in this proceeding and another facility that services the New England area. Roy said that this person was talking to a store owner in that border area and the owner asked what was going on at the facility. The person told of the union organizing efforts that were occurring. The store owner said that if anything happened to his operation he would no longer use the mid-Atlantic distribution center but would instead use the New England facility. Roy told the employees that it was perfectly legal for the store owner to do so. Roy said he was not making a veiled threat but was just telling the employees that the remarks were made. Later, Roy said that the store owners owned the distribution center and they could do whatever they wanted and if they did transfer the work there would be less runs and less drivers. He said: "That happens. That's business. I don't expect it to happen."

Roy then moved on to another topic. He claimed that someone told him that the Union wanted to make sure that whatever company provided service to Dunkin' Donuts at the facility, that company would be union. He asserted that the Union could not make such a claim, and he described a scenario where the Union was voted in and his costs increased and the contract with Dunkin' Donuts was terminated. He said that then no one would have a job. Dunkin' Donuts would seek another service provider such as Ryder Logistics or other companies. He explained that if the new company decided to hire less than 50 percent of the employees then by law there would be no union at the facility. Roy described what would happen if the new company decided to hire all the existing employees. He said at that point the new company would be obligated to recognize and bargain with the Union but they had to negotiate a new contract. He said the likelihood would be that the new employer would seek reduced labor costs because it already had claimed that it could provide the service for less than Aldworth had. He asked the employees how $15 per hour sounded as opposed to the $17.95 rate they were then receiving. He said: "That can really happen. Will it happen? I don't want it to happen. Hopefully, it won't happen." Roy then gave an example of how the Union's pension fund might increase his costs. An employee asked if Dunkin' Donuts terminates its contract with Aldworth how would Dunkin' Donuts service its stores. The employee referred to a "gap" between the termination of the contract with Aldworth and the signing of a new contract with the next employer. Roy explained that what would happen was that the contract could be terminated on a Friday and the new company would begin providing service the following Monday.

He then commented that perhaps the newer employees were listening to employees who had their own personal agendas. Those employees could feel insecure in their positions and might seek out the Union to get job security. Roy explained that even if the Union was selected, under a typical management-rights clause the authority to run the business would re-

main with him. He explained that the Union would not be running the business even if it wins the election.

Roy asked if anyone had any rumors that they would like to raise and an employee asked what was happening to Knoble. Roy said that Knoble was not being fired and he did not mean to infer that earlier at the Saturday meeting. The employee asked if Knoble would remain in his current position after the election. Roy said that Knoble was becoming a traffic manager and was getting out of the fleet business. Roy added that he was still interviewing for the dispatch supervisor position and he welcomed anyone who was interested to apply. He said that they still had the new regional operations manager starting September 14. At this and the next two meetings Roy made another slide presentation. This presentation described the obligations to bargain in good faith and other topics.

Analysis

The General Counsel contends that at this meeting Aldworth again unlawfully solicited employees' grievances. By now it is clear that this meeting, like the others described above, was a continuation of Roy's effort to solicit from the employees the problems and grievances that had led them to seek union representation. Indeed, Roy said just that ("If there's some needed changes, come forward" and "The other part is obviously there must be some major issues brewing, okay. Which I am still trying to find out."). Among other things, Roy promised to address the complaints concerning the lack of available doctors and other problems under Aldworth's health plan; he again promised employees that they would no longer have to run a route in greater than 100 percent of the manifest time; and that they no longer would have to work through lunch and breaktime in order to pick the number of pieces required. The fact that Aldworth might have addressed some of these concerns if employees had raised them in the normal course of events does not detract from the fact that at this meeting Roy was soliciting grievances specifically to determine why the employees had gone to the Union. I again conclude that by soliciting grievances and indicating that the grievances would be remedied in order to discourage the union organizing effort, Aldworth violated Section 8(a)(1).

Next, the General Counsel alleges that at this meeting Aldworth unlawfully announced that it had responded favorably to employees' complaints and grievances in order to discourage support for the Union. In this regard, it will be recalled that employees had consistently complained of the treatment they received by Knoble. At this meeting Roy announced that this problem had been eliminated and that while Knoble was not being fired in the future he would have limited interaction with the employees. Roy again announced that he would be filling the dispatch supervisor and regional operation's manager positions, each designed to satisfy employees, complaints previously voiced. Under these circumstances, I conclude that Aldworth again violated Section 8(a)(1) by telling employees that it had taken action on their complaints, and that this was an effort to stifle the union activity of the employees.

The General Counsel next alleges that Aldworth threatened employees with job loss if they selected the Union. He points to several statements Roy made during the meeting. As more fully described above, Roy told of a store owner who warned that if the operation of his store was disrupted as a result of the unionization effort at the facility, he would stop using the services of Aldworth and Dunkin' Donuts at the facility but would instead use the services of another Dunkin' Donuts' distribution center. Roy added that his statement was not intended to be a threat and that he did not expect it to happen, but if it did occur, routes and therefore jobs would be lost. It is important to remember that a driver at an earlier meeting raised this matter; the driver claimed that a store owner had made the statements to him. Here, Roy told employees of a demonstrably probable consequence of unionization that was beyond his control: store owners *may* decide to take their business elsewhere and that would result in a decrease in the number of routes and employees. It will be recalled that the stores are individually owned. Moreover, Roy based his comments on "objective" fact: apparently a store owner had told an employee that the store owner might do just that. There is no indication that the story was fabricated or that Aldworth had any involvement in it. Under these circumstances, I conclude that this statement did constitute an unlawful threat of job loss and I shall dismiss that allegation.

The General Counsel also points to Roy's remarks that employees would lose their jobs if Aldworth lost its contract with Dunkin' Donuts as a result of being under bid because Aldworth's labor costs had increased as a result of unionization. The General Counsel argues that this statement was an unlawful threat. I have concluded above that Aldworth and Dunkin' Donuts are joint employers of the unit employees. I have noted above why similar statements were unlawful. For those reasons, I conclude that this statement too is a threat of job loss in violation of Section 8(a)(1).

The General Counsel also argues that Roy's description of the successorship obligations was an unlawful threat. There is no contention that Roy's description of the successorship obligations was inaccurate. It is important to note that Roy explained that he was raising the subject as a response to the Union's contention that any company that replaced Aldworth in providing services to Dunkin' Donuts would be union. Under these circumstances, Aldworth was free to counter the Union's campaign material by demonstrating that the Union might not be able to control the matter of whether any successor employer was union. I perceive no threat of job loss in this statement, and I shall dismiss this allegation.

Finally, the General Counsel contends that Roy's answer to a question that a replacement company for Aldworth would be able to immediately begin servicing Dunkin' Donuts was also an unlawful threat. I disagree. In context, Roy was merely responding to a question from an employee concerning how Dunkin' Donuts would be able to service its retail stores if Aldworth no longer performed that service. The employee had referred to a "gap" in providing that service. Roy simply responded that the old employer would be released on Friday and the new employer would be ready to perform its services on Monday. I again perceive no threat of job loss in this statement, and I shall dismiss this allegation.

h. September 8

At this meeting, Roy told employees that it was okay that some of them had spoken out in favor of the Union, that it was their right to do so. Roy then discussed Aldworth's health plan and pointed out that employees might not have been using the plan correctly. He described how since he had "been in town" he had been able to help some employees correct problems that they had with the health care plan.

An employee told of a route that he was given where the former driver that had that route ran it at 100 percent. The employee explained that he had found a different way to get to the first stop that resulted in less time than set forth on the manifest to make the delivery. The employee further explained that despite this decrease in time he was told by Knoble that another driver had earlier run the route in even less time than he did and Knoble said that if he did not reduce the time even more Knoble would take the route away from him. The employee said that conversation with Knoble occurred about 4 weeks prior to the meeting. The employee then explained that in order to run the route in the time desired by Knoble he found it necessary to exceed the speed limits. Roy responded that they had discussed the matter already and the conversation with Knoble did not apply anymore. Roy told the employee to slow down and obey the speed limit. He said that the manifest times were "screwed up" and that the employee needed to write up the problem and "[w]e'll discuss it and we'll take care of it." Later in the meeting, Roy repeated from an earlier meeting how a new employee had asked what the issues were that lead to the organizing effort. Roy said he replied to the employee by saying: "Tell me, I wish I knew."

Roy then turned to Aldworth's duty to bargain in good faith under the Act; he pointed out that the law did not require Aldworth to agree to any specific proposal made by the Union. He also described how the Board permits employers to tell employees that the result of negotiations may be less benefits for them. An employee then asked how that could happen. In particular, the employee asked how their wage rate could be reduced. Roy answered that perhaps he could propose that employees be paid a certain amount per mile and per stop instead of a hourly wage rate. Roy then repeated that if he were forced to bargain in good faith with the Union "we start with a blank sheet of paper." He continued: "It in no way implies that there is any guarantee that the benefits that you have today or the wages you have today, it in no way implies that that's a starting point. Everybody is under the false impression that that is a starting point. We can't go backwards." The employee then asked what he meant by a starting point. Roy said: "Negotiations. The blank screen. Everybody remember I held up the blank piece of paper last week and said this is where it starts . . . . It's not from where you are today. It's not from where you are today. That's where everybody is under the impression and it's not." The employee then asked whether it would be good-faith bargaining if Aldworth offered less than existing benefits in bargaining with the Union. Roy answered that it was, pointing out that there was no obligation to continue all existing benefits. Roy said: "That's still bargaining? I'm still showing up, you know?" He referred to a case that stated that just as surely as an employer may increase benefits in bargaining, it may take them away.

Later, Roy raised the subject of what would happen if Aldworth lost its contract with Dunkin' Donuts. Citing *NLRB v. Burns Security Services*, 406 U.S. 272 (1972), he described how if the new employer hired a majority of the employees it would have to recognize the union but it would not be bound by any contract. He told the employees that if the new employer did not hire a majority of the employees it would not have to deal with the union. Roy later returned to this subject when he described how he had heard that the Union was telling employees that if Aldworth lost its contract with Dunkin' Donuts the Union would "stay with the building" and the new company would have to deal with the Union. Roy addressed the situation of what if Aldworth lost its contract with Dunkin' Donuts for any reason, "not just because we have a union but for any reason." He posed a scenario where the Union wins the election and as a result of bargaining his costs increase and as a result of increased costs Aldworth is underbid by a competitor and loses the contract. He again pointed out that if the competitor hired less that a majority of the employees it would not have to deal with the Union. He also pointed out again that even if the competitor hired a majority of the employees it would not be bound by the contract and the Union would have to start the bargaining process again. Roy said: "So where do you start all over again from? Right here. You can't get any plainer than this plain paper. You start all over again."

Roy then described how contracts typically have management-rights clauses that allow management to operate the business. He read the employees one such clause. He said he was making that point because he feared that the employees were being misled concerning the degree of control the Union would have over the operation of the business. Roy continued:

> Because that doesn't change. I am stressing to each and every one of you what the union gets if they win the election, simply the right to represent you for the purposes of collective bargaining. It has nothing to do with manifests. It has nothing to do with 210 pieces. It has nothing to do with your present job of the way it's set up right now. Nothing. We won't do away with random drug testing.

Analysis

The General Counsel alleges that at this meeting Aldworth again unlawfully solicited employees' grievances. Here again this meeting was a continuation of Aldworth's effort to discover the problems that lead to the union organizing effort in order to address those problems and stifle the union activity. In this meeting Roy repeated that he wanted to know what issues lead the employees to seek union representation. He again specifically told the employees that they should not be operating their routes at more than 100 percent of the manifest time. He specifically told an employee that he should write up his problem in this regard and it would be taken care of. I conclude that Aldworth again violated Section 8(a)(1) by unlawfully soliciting employees' grievances.

The General Counsel contends that at this meeting Roy again used the blank sheet of paper to threaten employees with loss of

benefits. On this occasion, Roy more closely linked Aldworth's bargaining obligation with the blank sheet of paper. As indicated above, the key in resolving this issue is whether, in context, Roy threatened that the Union during bargaining would have to attempt to regain existing benefits. The context shows that Roy lawfully explained that the Act does not require that an employer agree to any specific proposal made by the Union during bargaining. He further lawfully explained that bargaining could result in lower benefits for the employees, and, in response to a question, he lawfully gave an example of how this could happen. He further lawfully explained that the wages and benefits currently enjoyed by the employees is not necessarily the starting point of bargaining. But Roy then again referred to the blank sheet of paper and indicated that bargaining starts there. This statement goes beyond telling employees that the bargaining process could start with Aldworth proposing less benefits and wages for the employees; rather it again told employees that the Union would have to regain all the benefits that the employees currently had. This constitutes a threat of loss of benefits resulting from unionization. Roy's reference to the blank sheet of paper later in the meeting while discussing the successorship process again was unlawful. As before, I conclude that these statements violated Section 8(a)(1).

Next, the General Counsel alleges that Aldworth again threatened employees with job loss if they supported the Union. In this regard Roy told employees that if Aldworth were to lose the contract for any reason, including as a result of increased costs from bargaining, then the *Burns* rules determined whether the new company had to recognize the Union. I see nothing unlawful from this accurate description of the law. In context, Roy's comments do not rise to the level of an independent violation of Section 8(a)(1).

i. September 10

At this meeting, Roy repeated many of the things he had said at the September 8 meeting. As he was discussing the *Burns* decision an employee asked a question and stated that what Roy was saying was not true. This employee was on workers' compensation and had not been actively working. The employee insisted that when one company bought another the new company had to take everything that the old company had. The employee said to Roy: "I'm standing up to you. You're so small I can't even see you." Roy invited the employee to come up after the meeting and they would discuss the matter, but the employee declined. Roy said: "If you want to just yell things out like you did last week and disrupt the meeting" The employee claimed that Aldworth wanted to intimidate him, but Roy insisted that no one was intimidating the employee. The employee said that he weighed 240 pounds and could not be intimidated. Roy said that there was no need to intimidate the employee. The employee persisted: "I'm just letting you know. Everybody's here—but you can't intimidate (me)—I'm just letting you know that." Roy replied, "Good, who do you work for?" The employee answered that he was not worried about working for Aldworth, that he could not be threatened with that. Roy said: "Okay. I'll tell you what. I don't need to pay you to sit here once a week." After a further exchange of words the employee left the room. Roy then explained to the employees that he was trying to describe what the law was and he was not trying to give the employee a hard time but he was not listening. He then repeated the holding of *Burns.* At the hearing in this case, Roy admitted that he ejected the employee from the meeting; however the employee was still paid for attending the meeting.

Later an employee asked how Dunkin' Donuts would be able to service the retail stores with "half the workforce." Roy initially said that he did not know, but he then said: "We can bring in . . . temporaries. We can bring in people from all over the country. Okay. So, you know, the only answer is in that building—I think you might be misjudging them." This was in reference to Dunkin' Donuts. Someone pointed out that the New England distribution center could service the New York routes done by Aldworth, and Roy agreed. An employee asked if after the Union wins the election would they still have vacations or would they lose it. Roy asked the employee who said that; he said that he was not saying that employees would lose their vacations if the Union won the election and he said: "Don't, please don't spread that."

Roy encouraged the employees to avoid making an emotional decision and to think of the long term. He said:

> You may still be here. Half these people that voted "yes" may not be here. Okay? Half the people today, in 4 years, may not be here. Because their agenda is not necessarily to retire with Aldworth and Dunkin'. Their agenda is somewhere hidden—somewhere. Okay? Because they think they're here six months, they're here 2 years, They're here 3 years or 4 years, they become lawyers overnight. They become smarter than everybody in this room and they know what's right for everybody. Most of them don't have families. Many of them don't have children and wives at home that they're supporting, that are dependent on them. Many of them still live at home. So what's the risk? What's the gamble?

Later an employee asked when negotiations would take place if the Union won the election. Roy responded: "Well, I don't know. I don't live in this area, so—it could take a while. They may have to fly to Boston. Sorry." Roy then explained that he had never negotiated a contract so he did not know the answers to those questions.

Roy told the employees: "I've already told you that changes that are going to be put in place. I'm also telling you the things I'm going to look at. . . . And I'm also trying to demonstrate to you that you can talk to me, you can talk to Wayne (Kundrat), you can talk to anyone associated with Aldworth about any matter whatsoever and get an answer. You, yourself. Not a pre-selected shop steward." Later Roy said: "I've already told you what I want to do—I already told you what I want to do." Roy assured the employees that he would not disappear after the election, that they had things to do after the election. He stated those things would happen and he would keep his word.

Roy described a situation where a group of union-represented employees fought for dependent medical coverage and almost went on strike, but they were unsuccessful. Implicit in the point Roy was making was that the Aldworth employees already received dependent medical coverage. Roy said: "I told

everybody in the room last night. You guys all want individual coverage—I'll pay for it all day long—I'll pay for it all day long." But Roy went on to explain that he wanted family people to be able to bring up their children and send them to college. He wanted the employees to be able to retire from the Company.

Roy emphasized how the Company had assisted employees over the years when they had problems. In this context he described how they had recently saved an employee a considerable amount of money on his medical payments. Roy said: "He gonna get his benefits because he spoke up about it. He's going to make sure he gets it. That's a good thing. . . . Nobody should pay a dime more than they have to. . . . You got an issue you can talk about. . . . If you don't want to talk about it, I can't force you to talk." On this same topic Roy later said that employees who had problems with Aldworth's medical insurance would get help, but they needed to communicate those problems to him rather than just complain about poor coverage.

Near the end of the meeting Roy told employees that they needed a training program to assist employees in meeting their selection quotas. He said that the training program would be implemented when they became fully staffed. He discussed how Aldworth promoted from within in that part-time helpers become warehouse employees, warehouse employees become drivers and supervisors, and that a driver might be promoted to the new dispatch supervisor position.

Roy assured the employees that they could display union bumper stickers and speak in favor of the Union, that no matter how they felt about the Union no one would get hurt. He repeated these assurances again later. He referred to the "two poster boys for the union" who "originally incited this whole thing." This was in obvious reference to Leo and McCorry. Roy later referred to a new employee who Roy said "needs to hear the truth—not from somebody that's got one foot out the door already, that doesn't really give a shit about their job—or from somebody that became an attorney over the weekend with a law school on the back of a match book."

Analysis

The General Counsel contends that at this meeting Aldworth again unlawfully solicited employee grievances. Roy repeated the commitment to change things that had been identified earlier as problems. He told employees they could raise problems at anytime and get an answer. This meeting was a continuation of Aldworth's effort to find out what issues triggered the organizing campaign and resolve them. Accordingly, Aldworth again solicited grievances in violation of Section 8(a)(1).

The General Counsel contends that Aldworth unlawfully threatened employees with loss of their jobs at this meeting. First, the General Counsel points to Roy's answer to a question about how Dunkin' Donuts could service the retail shops with "half the workforce." Roy answered that "we" could bring in temporary employees from around the country. He then described how the employees might be misjudging Dunkin' Donuts. Roy's statement here was merely an answer as to how Dunkin' Donuts might continue operations with only "half the workforce." I conclude that this did not threaten employees with loss of their jobs. Next, the General Counsel points to Roy's statement that half the employees who vote yes would not be working for Aldworth in the future. That statement must be understood in its context. I conclude that Roy sufficiently explained that a number of employees who would vote for the Union would not be working at Aldworth in the future because they had "agendas" other than working for Aldworth until retirement. Accordingly, the loss of jobs was not connected to the support for the Union. Under these circumstances I conclude that the comments are too ambiguous to constitute threats of job loss related to union activity.

The General Counsel also alleges that Aldworth announced that it had responded favorably to complaints and grievances of the employees in order to discourage support for the Union. As described above, Roy told employees of how an employee had presented a medical coverage problem to him and how he had resolved the problem by saving that employee some money. It will be recalled that at an earlier meeting the employee had presented the problem to Roy and Roy said that he would look into it. I have concluded above that this earlier incident was part of Aldworth's unlawful pattern of grievance solicitation. In this context it is clear that Roy was announcing an instance where he was able to favorably resolve the grievance. By doing so in an effort to stifle the employees' support for the Union, Aldworth violated Section 8(a)(1).

Next, the General Counsel alleges that at this meeting Aldworth threatened to discharge an employee, disparaged the employee, and ejected the employee from the meeting all because the employee spoke in favor of the Union at the meeting. This allegation stems from the confrontation between Roy and an employee, described above, which lead to the employee's ejection from the meeting. Concerning the alleged threat of discharge, the General Counsel relies on Roy's response, "Good. Who do you work for, okay?" after the employee said that he would not be intimidated by Roy. Roy was obviously attempting to deal with an unruly employee intent on disrupting the meeting. In support of this argument the General Counsel cites C*annon Industries*, 291 NLRB 632, 635 (1988). In that case, the employer told a union activist that he was on the employer's "hit list." There is no such explicit threat in this instance. Under all the circumstances I conclude that the question posed by Roy is too ambiguous to either constitute a threat of discharge or be sufficiently linked to union support to constitute a violation of the Act. The General Counsel argues that the employee was ejected from the meeting because he questioned Roy's statements about the Union. I disagree. The transcripts of the meetings show that Roy tolerated a wide range of comments. In this instance, I conclude that the employee was intent on disrupting the meeting. Because the employees were on paid time Aldworth had the right to control the meeting, at least to the extent that the meeting achieved its general purpose. Finally, the General Counsel alleges that Roy unlawfully disparaged the employee. Again, context is the key. The employee was attempting to disrupt the meeting and Roy's remarks were appropriate under the circumstances. Accordingly, I shall dismiss this allegation of the complaint.

The General Counsel alleges that Aldworth unlawfully promised to create new supervisory positions and promotion opportunities for employees and promised to remove an un-

popular supervisor. In this regard, Roy reminded the employees of the new dispatch supervisor position that Aldworth was creating. He again invited employees to bid on that position by telling them that the new supervisor might be promoted from within the ranks. I have already concluded above that this conduct violates Section 8(a)(1) of the Act.

Last, the General Counsel alleges that Aldworth promised to improve medical insurance benefits in order to discourage employees from selecting the Union to represent them. In support of this allegation the General Counsel points to the same comments that I have relied on in concluding that Aldworth unlawfully announced that it had redressed certain employee complaints. I conclude that this incident is best addressed in that manner and I conclude that these same comments do not constitute an announcement of improved benefits. I shall dismiss this allegation.

j. September 15

At this meeting, Roy introduced Timothy Kennedy as the new regional operations manager that he had earlier told the employees would be hired. Kennedy assumed that position on September 14. Kennedy talked to the employees about his experience and management style. He invited employees to bring questions and problems to him and he promised to give them answers. Roy then played a videotape. After the tape, Roy addressed the guarantees that the Union had made in a leaflet. One of the guarantees was that no member of the Union had ever paid for their health benefits. Aldworth employees, however, paid a portion of their medical costs. In response to the Union's assertion, Roy again described the situation where the employees of another employer represented by the Union were about to strike to obtain, among other things, dependent medical care coverage. Ultimately a strike was avoided but the employees failed to gain that coverage. Roy then told the employees that if the employee contribution to Aldworth's medical insurance was a big issue for them, he would agree to provide individual coverage only and pay 100 percent of the costs. Roy then said: "But what about your family?"

Roy then compared the Union's pension plan to the 401(k) plan that the employees were currently receiving. Roy pointed out the benefits of the current plan, including the fact that if employees left the Company they would be able to roll over the money they had accumulated. He made a slide presentation on this same topic. This same slide presentation was made at the next two meetings. Roy then urged employees to look down the road concerning the possible impact of the Union's pension plan. He said:

> Let's follow through a bit more. A union gets voted in here. Somehow we continued to still work. Alright. Somehow we lose the deal.[62] Somehow you guys are looking for new jobs. But we're a year or two into this, okay . . . . You want to continue a pension now. If that's what you've decided. With whom? UFCW? Go find a job with UFCW so that you can continue with the pension. Or everything gets disrupted, you lose again. See the difference. Over 60 percent of the employers today offer what? 401(k)s. Why? Because they float with you. I want you to take my money with you when you decide to go. I want you to take your money with you when you decide to go. I want you to roll it over . . . . I want you to roll it over into your new employer's plan. So you don't lose. So you don't pay taxes on it . . . . But if you don't find another UFCW job that offers that pension, what have you done . . . . Pre-tax employees contributions are not allowed to remain in two pension plans. They're fixed defined benefit programs. It's not a 401k . . . . Less the opportunity for significant tax deferrals, the pre-tax accumulation is available only if the employee participates in both a pension and a 401k. Well, you're 401ks gone. You can't do that anymore. So this is all you got. Pension.

Roy explained the time limitations involved with the filing of a decertification petition if the employees selected the Union and then changed their minds. Roy then referred to the September 10 meeting when he told an employee to leave the meeting. Specifically, Roy said:

> Sure everyone knows that I ejected a gentleman from this very room. Okay. Didn't intimidate him. Asked him to leave 'cause he was just bothering the shit out of me. Okay. Bottom line. Asking questions and questions and just calling me a liar, blah, blah, blah, blah. It escalated too far. Didn't intimidate anyone. Alright. But I asked him to go.

Roy then expressed his commitment to continue to make the business grow. He continued:

> So everybody in this room that has a better answer, everybody in this room that has no responsibilities. Know what? Raise your hand. I don't care I'd vote it in. What do I got to lose? I'm not here for no career. I'm passing through. I'm going to college next year. I've already applied for another job . . . . This is big business. This is real. If you're just passing by, keep on going. Please. Okay. 'Cause there's a lot of good people in these rooms that want to stay here . . . . You gotta vote. Do I want you to vote no? You'd better believe it. Do I wanna risk anything we have today? No. No. Go home. Look at yourself in the mirror. Ask yourself, what am I doing? What am I fighting for? Does it [the Company] really suck? Do I really think these people [the Union] can make a change? Am I coming in [after the election] to kick down that freakin' front door? Say, hey, hey, hey, hey, I'm here man. I'm changing it all. I'm changing it all, my way. I don't wanna do 216 [selection pieces] anymore. Freezer's too, too crowded. The warehouse is too crowded. Manifests aren't clear. I don't wanna work this hard . . . . And if these people are responding to those promises that you have and those issues, I got news for ya. They're blowin' smoke. Because nothing changes. Work rules are work rules.

Later in the meeting Roy told the employees:

> Can we do better here? We can do it better. Tim Kennedy guaranteed he is gonna do it better. . . . He'll see to an answer, get you a response. That's what you need. That's the respect that you're looking for? That's what it is right here. That's been in the making since February.

[62] This refers to the service that Aldworth provides to Dunkin' Donuts.

> Not because someone said we big bad Union [sic]. Okay. Since February. Want to see the ads for the job? I'll be happy to show them.
>
> . . . .
>
> I'm trying to improve things. Okay. I'm trying my best. Not scramblin'. Not running away from anything or anybody. Okay. The reinforcements have arrived. Knoble's out of the picture. A lot of things are gonna be nice. A lot of things are gonna change. Alright. But guess what? You're all not gonna like 'em.

Later (Roy) returned to the subject of the election and told employees, "Think about what ya got. Think about what you got. We talked about collective bargaining last week. Think about where we have to start. Okay. I never lied to ya. I'm not gonna start today."

Analysis

The General Counsel alleges that at this meeting Aldworth again solicited employee grievances. The General Counsel points to Roy's statement that he was trying to improve things for the employees, that reinforcements were on their way and Knoble was out of the picture, and that many things were going to be nice and many things were going to change. This statement was clearly part of Aldworth's pattern of soliciting the grievances to discover what lead employees to contact the Union and then redressing some of those grievances, all in an effort to remove the grounds for which the employees felt they needed a union. However, Roy's comments on this occasion were not so much a solicitation of grievances as a promise that those grievances were in the process of being resolved. By promising to adjust employee grievances in an effort to undermine support for the Union, Aldworth violated Section 8(a)(1).

The General Counsel alleges that Aldworth again referred to the blank sheet of paper, relying on Roy's comments near the end of the meeting that reminded employees of the discussion of collective bargaining at earlier meetings and "where we have to start." I conclude that this comment reminded employees of Roy's earlier statements that bargaining started with a blank sheet of paper, and Aldworth again violated Section 8(a)(1).

The General Counsel alleges that Aldworth threatened employees with job loss if they selected the Union. In support of this allegation he points to the following statement: "A union gets voted in here. Somehow we continued to still work. Alright. Somehow we lose the deal. Somehow you guys are looking for new jobs." But Roy continued, "But we're a year or two into this, okay. . . . You want to continue a pension now. If that's what you've decided. With whom? UFCW? Go find a job with UFCW so that you can continue with the pension. Or everything gets disrupted, you lose again. See the difference. Over 60 percent of the employers today offer what? 401(k)s. Why? Because they float with you. I want you to take my money with you when you decide to go. I want you to take your money with you when you decide to go. I want you to roll it over." In context, then, I conclude that Roy was not threatening employees with job loss because of their union activity. Rather, he was explaining to employees the situation they would experience if for any reason they lost their jobs after the Union was selected and after they became covered solely by the Union's pension plan. I shall dismiss this allegation.

The next allegation is that Aldworth unlawfully promised to improve medical insurance benefits for employees. The General Counsel points to Roy's statement that Aldworth would be willing to pay 100 percent of the employees' medical insurance costs. However, here too, Roy's statement must be viewed in context. Under Aldworth's plan employees pay part of the costs, but dependents are covered. Roy was responding to the Union's claim that employees would not have to pay any part of the cost of medical insurance. Roy then gave an example of a union-represented employer that did not have dependent coverage. Roy's rhetorical remarks were simply making a point that if the employees did not have dependent coverage, like that employer, then Aldworth would be able to afford to pay 100 percent of the costs too. This is not an unlawful promise of improved medical benefits, and I shall dismiss this allegation.

The General Counsel alleges that Aldworth threatened employees with loss of their 401(k) benefits if they selected the Union. During this meeting Roy explained the benefits, from Aldworth's point of view, of its 401(k) plan when compare to the Union's pension plan. However, he also said that the employees could not end up with both Aldworth's retirement plan *and* the Union's pension plan. He did not carefully phrase the loss of the 401(k) as a possible consequence of good-faith bargaining. Rather, he made it appear as if the loss of the plan would be an automatic result of unionization. By threatening employees with loss of their 401(k) benefits Aldworth violated Section 8(a)(1). *Crown Cork & Seal Co.*, 308 NLRB 445 (1992), order vacated 36 F.3d 1130 (D.C. Cir. 1994).

Finally, the General Counsel alleges that at this meeting Aldworth informed employees that it had ejected an employee from an earlier meeting because the employee had voiced support for the Union. I have concluded above that this conduct was not unlawful. Here Roy simply described how that employee had been disruptive to explain why the employee had rejected. I shall dismiss this allegation.

k. September 16

At this meeting Aldworth showed a videotape about labor organizations. Roy then talked about some of the good points of working for Aldworth. He said:

> Pretty neat job we have. We've got a pretty good thing going. Okay. There isn't one person in this room—we don't hire choir boys, none of you are choirboys. If I look in everybody's file, I could find a ton of things, or I could find just one or two things. Alright. Either you're late or you don't do a manifest well, you don't work in the warehouse very well, whatever. A lot of people have told me you should—yeah, you should have fired so and so a long time ago, right. Or, geez, I can't believe you put up with this guy for this long.

Roy then went on to say that contrary to the Union's campaign literature that the employees would be receiving in the mail, Aldworth had never terminated an employee other than for cause.

Roy later said that employees were free to support the Union. He continued:

> If that's your way, that's terrific. What I'm saying is, do we need it. Nobody's pointed out that it is a need, you know. Nobody's pointed out that they're going to change things in the warehouse, that your manifests are going to change.

Roy then again discussed Aldworth's 401(k) and medical insurance plan and compared them to the Union's plans. He then said: "Now let's—hypothetical here. We have a union. Okay. Now do you still have a 401(k)? No, no—you have a pension plan. Forget a 401(k)." Roy explained the options the employees would have concerning the money they had saved in the plan. An employee then asked if Roy was saying that if the Union came in they could not have both a 401(k) plan and a pension plan. Roy responded as follows: "Look, I, you know, before we . . . closes, the 401(k) closes. The 401(k) closes. It does, it does." He then again explained the advantages of Aldworth's plan. Roy continued:

> But it's your money. UFCW plan—Aldworth 5 years from now loses the contract—you don't have a job—where do you go? You have to go to another company within that plan. Okay? I know Shop-Rite is in that plan. I don't think any of you guys would look good in an apron. But, that's what you gotta do. To keep it growing. To keep your pension growing.

Later in the meeting Roy turned his attention to addressing the claims made by the Union in its campaign literature. One of the items he read from that literature was an assertion that no member of the Union had ever paid for the health benefits and pension that they contractually enjoyed. Roy's response to that assertion is as follows:

> Great. It sounds good. Doesn't it? I like that. Question. 8700 people are members of (the Union). That's a lie, 8736 I think is the number. Alright? 1700 of them work at Shop-Rite. Remember the Shop-Rite strike or threat of the strike not too long ago, right down in the woods here? Yes? What was it over. It was over wage increases and it was over dependent health care. Okay. Guess what? They settled. They didn't go out on strike. They got a wage increase. Still no dependent health care. So, let me tell you something right now. I will commit to paying 100 percent of your individual medical coverage. Right? Starting October 1st or today. Right? Because I don't have to pay for dependent coverage. I'll commit to that. That sounds cool doesn't it? That sounds pretty good. That sounds good. Think of the wording. Okay. Yeah, employees don't have to pay anything toward their pension. You know why? Because it isn't as good as what we have. That's why.

Roy then introduced Kennedy to the employees as the new regional manager. Roy continued:

> He guaranteed me that he's going to take care of some situations. I personally took Tom Knoble out of the picture—not because you complained about him—I did. That Saturday meeting—some of your chins bounced off the floor when I said that. It's becoming reality. I want a dispatch supervisor in there to work with you guys. I want to evaluate the warehouse for the 210.[63] I want to evaluate the over-crowding. Look at it. If we can do something, we'll do something. If we can't, then you know what—we'll come back and say we can't. Is Rose Kelly going to force those issues on me? Is she going to say—"Oh, these guys gotta do 200 now?" Bull shit. They don't make the rules.

Later in the meeting, Roy again emphasized that he was asking drivers to only do their runs at 100 percent of the manifest time. He said:

> Anybody have a problem with that? We've been beating the shit out of you lately over the manifest? No. You're running basically what you want to run? Yeah. Anybody come in and question you tonight when you came in and say, hey, you're 32 minutes over—what happens? Anybody said anything to anybody in this room? Ever? Thank you.

Roy returned to the topic raised by the Union that a "yes" vote indicated that the employees wanted job security. Roy then said: "Anyone feel insecure in the room, or is that a bad question to ask? You had told me before nobody did." He then dealt with the Union's argument that a "yes" vote meant that the employee wanted a voice on his or her job so that the employee will be treated fairly. Roy replied:

> Anyone in that much trouble where they can't speak up? Maybe some of you 'cause you're shy. Maybe some of you because you feel intimidated. Maybe some of you just want to bitch in the parking lot and never to a manager. . . . Anyone not receive a fair treatment since you walked in the door? Everybody says "No, things have been cool."

Later, on the same subject Roy asked: "Anyone feel like they don't have a voice?"

Addressing the Union's argument that the employees needed a grievance procedure to resolve problems Roy said: "You have issue reports." Later he said, "We haven't treated you that badly until now. And if you have input, have we listened?"

Roy addressed the Union's contention that the employees needed job security. Roy said that only employees who are not performing their jobs are in need of job security; that employees who are doing their jobs have no such concern. He continued:

> Don't forget that guys. Be careful who you're following out that door, and who you're listening to. Alright. Plenty of people, since you guys are not choir boys—I've looked in your files. Your asses have been on the line plenty of times. You can't look me in the eye and tell me differently. But you're here—you're here. Do you feel secure?

Roy again addressed the importance of Aldworth's contract with Dunkin' Donuts. He said:

> Gentlemen, we have a contract . . . with Dunkin' Donuts that is renewable every single year, automatically. The bottom line to this contract is—if we continue to do a good job, we're here. Okay. There isn't a contract in the world that can't be

[63] This is in obvious reference to the number of pieces per hour that warehouse employees had been expected to pick.

> broken. Somebody said, you know—why don't you do whatever—a 5-year contract. Well that doesn't matter. Because of a clause, it can be broken—or for any reason—it can be broken. There hasn't been a reason. There hasn't been a reason. Okay. And why? Because you, believe it or not, do a damn good job. That's why. That's job security; doing a good job is job security.

Later Roy continued:

> We got work rules. There are people here that could care less about what I've said for the last 3 weeks—totally. I look into their eyes and they're gone. They're history. And there's a lot of young guys here that may not have families, live at home, they get 3 squares, their laundry is done. They don't really give a shit. They're passing through. No offense to anybody. Okay. But there are a lot of people here that do care about what they have and who do believe in a retirement system that we have set up for them—do believe in their benefits—do believe in the process that they've been treated fairly since they came in the door. Alright. There are a lot of people here that believe that. But for those of you who don't, there's the door. Don't ruin it for the core group of guys here. I believe a big core of guys here that really, really believe in what they're doing. This isn't a game. I don't want anything to happen to what we have. Okay. I'm not saying we're the best. I never have. If you can find a better company, please go—please go.

Roy urged employees to consider whether Aldworth really was as bad a company to work for as the union supporters claimed. He told the employees not to assume that the vote would be a landslide in favor of the Union because there were a number of private no votes among the group publicly supporting the Union. He continued:

> A lot of guys say, you know, 'What do I wanna risk; what do I wanna risk? Weigh it up. What are you gonna risk? You know what you have today. What about the unknown? What do you want to give up? What do you want to risk? That's the question, not a threat, not intimidation—it's a question. Okay. Status quo with the opportunity to get better? Yeah. The opportunity to do Baskin work? The opportunity to [do] Togos? Alright. These are opportunities that are on the table today. Will this affect that? It could. Am I absolutely saying it will? No. Don't, don't misquote me. Well, you can't misquote me. It can affect you. Talking hypothetically, things can happen. Things that we don't want to happen, or things you haven't thought all the way through on.

Roy then turned to the issue of strikes and referred to earlier statements he had made at the meetings. He continued:

> So, the power a union has—yes—is to strike. If you think it has any more that that, you're wrong. You're absolutely wrong. The power to strike. Who wins a strike? I can show you reams of strikes that people will never make up what they lost in wages —ever—for a lifetime.

Roy then gave the employees a specific example of what he felt was such a strike.

After explaining the election procedures, Roy took questions. An employee asked what Kennedy's title was, and Roy said that he was the regional operations manager. He explained that Frank Fisher had been the operation's manager but now would report to Kennedy. Kundrat then said that there would be a dispatch supervisory position that would be filled as well. He told the employees that Aldworth was recruiting to fill that position and had conducted an interview the previous week.

Analysis

The General Counsel again alleges that Aldworth made the blank sheet of paper threat. However, I have found no reference to a blank sheet of paper in the transcript of this meeting, and the General Counsel does not direct me to any in his brief. I shall dismiss this allegation.

The General Counsel alleges that Aldworth again threatened employees with loss of their jobs if they selected the Union. In support of this allegation the General Counsel points to the instance when Roy asked employees what they wanted to risk and what benefits they wanted to lose. In context, however, Roy was simply pointing out that the collective-bargaining process does not guarantee improvements but instead has risks. He coupled those remarks with an explicit statement that he was merely asking a question and not making a threat. I conclude that Roy's remarks are too general to support the allegation in the complaint; I shall dismiss it.

Next, the General Counsel alleges that Aldworth promised to improve medical insurance benefits in order to discourage support for the Union. At this meeting Roy generally made the same remarks about medical care costs as he did during the October 15 meeting. For reasons set forth above, I shall dismiss this allegation too.

The General Counsel then alleges that Aldworth threatened employees with loss of their 401(k) plan if they selected the Union. Here again, Roy generally repeated the remarks he made at the October 15 meeting. By threatening employees with loss of their 401(k) plan if they select the Union, Aldworth again violated Section 8(a)(1).

Finally, the General Counsel alleges that Aldworth threatened employees with discipline and other unspecified reprisals in order to discourage support for the Union. The General Counsel points to two sets of comments to support this allegation. First, Roy made comments about not hiring choirboys, that he had examined the personnel files and none of the employees had perfect work records. The General Counsel also relies on Roy's comments warning employees about who they have been listening to, that he had examined the personnel files and the employees all had blemished work records and their jobs had been on the line many times. He ended the comments by asking the employees whether they felt secure. But in context Roy was dealing with the issue of job security and explaining that despite the fact that the employees were not perfect they had not been fired and retained their jobs. In fact, Roy went on to explain how other employees had commented why Aldworth had not fired some employees. I conclude that these remarks did not threaten employees with discipline if they supported the Union, and I shall dismiss this allegation.

l. September 17

The last meeting was held on September 17. Roy began the meeting by showing a videotape concerning the United Food and Commercial Workers Union. After the video Roy again compared the Union's pension plan to Aldworth's 401(k) plan. He posed the question of what would happen to the money invested in the 401(k) plan if the employees were covered by the Union's pension plan. Roy said:

> Well, what do you do with that 401(k) when that happens? What happens to that? Do you get both? I think not. Do you still have accessibility to that 401(k)? No. Do you have to find somebody that's pretty sharp in finance to pull that money out, avoid a tax penalty . . . to put it somewhere in safekeeping? Yes. That's what you gotta do real fast.

An employee said that he was told that they could keep the 401(k) and have the Union's pension plan as well. Roy answered that the 401(k) plan provided that if the employee was not part of the plan anymore "at any given time you can be bumped out." He explained that employees could roll over the money from the 401(k) into an IRA account.

Roy turned to a letter with "guarantees" that the Union had sent to employees. He explained that he had covered this subject with some of the employees during the previous week but that he wanted to go over it again because some of the employees at the meeting did not hear his response. Roy said that he did not get the Union's letter of "guarantees" until mid-week, and that "[m]y sources are a day behind." In the letter the Union guaranteed that no member had ever paid for health or pension benefits. In response to this Roy again pointed out that a substantial number of the Union's members were employed by Shop-Rite. He told of how the employees there threatened to strike to gain a wage increase and dependent medical coverage. Roy said that the result of these efforts was that the employees did get a raise but they did not get dependent medical coverage. Aldworth employees paid part of their medical coverage, but this included dependents. Roy said, as he had before, that he would be happy to pay 100 percent of the employee's individual medical coverage if the employees paid for the dependent coverage portion of the costs.

Roy then talked about the previous election campaign involving the Teamsters. He said that in that election the Teamsters received five votes. Roy continued:

> We had to have these types of meetings with the warehouse guys. They remember. Alright. Not one of them could tell you what the issue was—that are still working here—I doubt. But not one of them can tell you that those five "yes" votes are working here today, because they were just passing through. They were just passing through. They were disciplinary problems and they were passing through—they wanted to make it miserable for everybody, because they were miserable themselves. They did not want to be here. They weren't grateful. They didn't give a shit . . . That was the Teamsters—two years ago. Okay? In two years what's changed? How many drivers do we have? Apparently we got a whole new crew of warehouse people that aren't happy. We got one kid working in the freezer who had taken me on at a lot of the meetings . . . Think. Think gentlemen. You guys new on board—think. Okay? Because when he takes a shot at me, if you've got 3 months on the job, you're gonna say to yourself, "ooh, how long has he been here? Oh, hey, he's been here a year—he must know what he's talking about. That Roy guy, he's a real freakin' asshole. Right? Don't listen to him, listen to him. He lives at home. He has 3 squares and has his laundry done. How many of you get that? Okay. He's got to make up his mind and go his way, and take you down with him, and he doesn't care. He doesn't care.[64] You guys have families to support. You guys have responsibilities. You guys want to retire.

Roy again returned to the subject of Aldworth's business relationship with Dunkin' Donuts. He said:

> We don't need a contract that goes 10 years. We just need a contract that says we're gonna do what we do the best we can. Okay? We do it on our own merits. We don't need a lock. There's no such thing as a locked contract. Okay? Contracts are made to be broken. Period. Whether it's a union or whether it's us and Dunkin. People are cocky as hell, coming up to me—"We can't be replaced, I don't care what you say, because Rose [Kelly] told me." You know what? Good, buy that. Believe it. Okay? Because everyone is that good here, because nobody could hire a hundred people? There isn't one trucking company out there that's a dedicated carrier that would want to do what you do in a second? You don't think they walk in the door once in a while and say "Hey, we can do it better, hey, we can do it cheaper?" I told you how they do it cheaper . . . Cut your God damn wages, cut the wages, period. Cut the wages. Trucks are trucks are trucks. Warehouse equipment is warehouse equipment is warehouse equipment. Guys, think. Think, please. I'm asking you to think about what you're doing. How bad is it?

Roy then introduced Kennedy as the new regional operations manager.

Roy later revisited the issue of the improvements he had made. He said:

> I've already mentioned the improvements I want to put in place. I've already mentioned Tim Kennedy. We're interviewing right now, right from your own group for dispatch supervisors, and from the outside. The decision on that will be made in a couple of weeks. I have taken Mr. Knoble out of the equation. Nobody said "take him out." I took him out. I came to you that Saturday and said, "he's out," you know, much to your surprise. Your chins bounced off the floor, etc., etc. I took him out. Okay. Because I knew that that was not right. Are we perfect? No. Do we have the best place to work at? It's not bad, but not the best. Can we get better? Yeah. We want to run it 100 percent. Yeah. We want to run it 100 percent. Maybe 95 percent to 100 percent is the right number. I don't know. Okay? Somewhere in the middle there is the right number for our runs. Okay? Nobody has to beat themselves up to beat the clock. Period. You guys in the

[64] Roy admitted that he was referring to freezer employee Jesse Sellers, who is alleged to be a discriminatee.

> warehouse, is 210 the right number? Maybe not. Give us a shot to look at it. If it is, we're gonna get back to you and tell you it is. If you don't like that, I'm sorry. We pay the best in the area. . . . We do this because you work your tails off, okay? . . . This is not an easy job. We don't proclaim it to be. That's why we pay more for the job.

Later, Roy addressed the issue of whether Aldworth was a caring employer. He told how they built the new facility and purchased new equipment for the drivers. He pointed out that the new equipment was purchased with the input of the employees. He continued:

> I guess that makes us a bad company to ask for your input—what you think, when should we order the equipment, what should we get? Does that make us bad? Or does that make us a caring organization. If you got comments about your run, you should write them up. Do they get addressed? They damn well better. I see all of those things. Okay? Do we give you more time when it's necessary that you get more time? Should you come back if you finish early?

At that point and employee answered, "Yes." Roy continued:

> Thank you. Only one point I wanted to make. Okay? Because the next week when you're ½ hour behind do you get paid?

An employee again answered "Yes."

Roy returned the topic of the statements the Union had made in its campaign literature and said:

> Your reading stuff that comes in the mail. Alright? I was a little more upset about it when I looked at it yesterday than I am today. Okay? A "yes" vote tells Aldworth Company, "I want job security." I asked last night, "Does anybody in the room feel insecure?" Nobody raised their hand. Maybe that's not a fair question to ask in front of the boss, I don't know. But I doubt very much if anybody sits there and really thinks about it. I doubt very much anybody in this room says "gee, I worry everyday I go to work." You do? Okay. Sorry you do. I really am. Do you want better health insurance—Blue Cross/Blue Shield with no deductibles? Is an HMO better?

Roy then described a situation where an HMO denied a patient a medical test and then the patient died.

Roy began reading from the union literature. He read, "I want a voice on my job so that I will be treated fairly." He responded by asking whether anyone was unable to speak up in the Company. He added that over the previous 4 weeks, 99 percent of the employees had spoken up either in the meetings or to him personally. He read, "We need a system in place with grievance procedures to solve our problems." Roy answered, "You need to tell me what problems there are so we can solve them." Roy read, "If you say 'No'—I don't want any voice in how I'm treated by Aldworth." Roy's response was:

> I've got news for you. Anybody that's felt mistreated believe me has come forward to me, on the phone or in person, and said "Hey, I don't like this." Okay? "I want this resolved." "I got an issue with pay. I got an issue with benefits, I got an issue with Tom Knoble. I got an issue with this one or that one." Come forward. You guys aren't shy. Don't tell me you are now. "Don't start to become shy, please."

After explaining the election procedures and encouraging employees to vote in the election Roy said:

> All I know is I'm asking you to vote "No." I'm asking you to continue on. The risks are on the other side of this. Okay? The risks are definitely on the other side of this. The unknown. The unknown. Okay? We have a contract. We're under a contract. We're going well. We've been going well for 15 plus years. That should say something to you.

Analysis

The General Counsel alleges that Aldworth again unlawfully solicited employee' grievances. At this meeting Roy again asked employees to tell him what their concerns were. He combines these remarks with a description of how he had redressed some of the grievances that the employees had earlier voiced. I again conclude that these remarks violated Section 8(a)(1).

The General Counsel also alleges that Aldworth again unlawfully threatened employees with job loss. The General Counsel relies on Roy's comments that contracts can be broken, referring to both the contract with Dunkin' Donuts and a contract with the Union. However, Roy made those remarks as part of an explanation that the best job security is to continue to provide good service at competitive prices. The Union raised the issue of job security in its campaign literature and Roy was responding. Under these circumstances I conclude that these remarks did not constitute an unlawful threat. The General Counsel also relies on Roy's statement claiming that there are risks involved if the employees select the Union, and that the risks were "the unknown." I find that these comments are too general to constitute an unlawful threat of job loss. I shall dismiss this allegation.

The General Counsel claims that Aldworth again unlawfully promised to create new supervisory positions and promotion opportunities and unlawfully promised to remove an unpopular supervisor. Roy told the employees of the appointment of Kennedy to fill the new managerial position. He reminded employees that he was in the process of filling the new supervisory position. I have already concluded that this constituted unlawful conduct. Roy also proclaimed that he had taken Knoble "out of the equation." It is clear that Roy reduced the contact that Knoble had with the employees because they had complained about the manner in which Knoble had treated them. In other words Roy was again rectifying an employee complaint in an effort to undermine support for the Union. By again referring to the new managerial and supervisory positions and by announcing that he had adjusted the duties of an unpopular supervisor, all in an effort to thwart employee support for the Union, Aldworth violated Section 8(a)(1).

The General Counsel alleges that Aldworth again unlawfully promised to improve medical benefits insurance. Roy's comments here were similar to those he made at earlier meetings. I shall dismiss this allegation.

Finally, the General Counsel alleges that Aldworth unlawfully threatened employees with the loss of their 401(k) plan.

Again, Roy's comments were similar to those made earlier. I conclude that Aldworth again violated Section 8(a)(1).

2. Surveillance

On the Friday before the September 19 election Kelly, Michalowski, Covely, and other union representatives visited the facility during the early morning hours. They remained there for about 2 hours and distributed leaflets to employees as they were arriving at and leaving the facility. Shortly after they began, Mark Kearney, Aldworth's dispatch supervisor, and Keith Cybulski, Aldworth's warehouse supervisor, approached them and asked them to move off of Dunkin' Donuts' property. They indicated where the property line ended. The union representatives moved back a few steps and remained there for the remainder of the time without further objection. Kearney and Cybulski returned inside the facility where Cybulski was given a walkie-talkie. Cybulski then went back outside the facility and stood by the employee entrance for about 15 to 20 minutes monitoring the situation. Meanwhile, Kearney called Kundrat, who was staying at a nearby hotel, and advised him that there was union informational activity near the employee entrance to the facility. Kearney reported that the handbillers were not on the property. Kundrat then came to the facility and Kearney again reported that the handbilling was proceeding uneventfully. Kundrat then proceeded to the general area where the handbillers were and he remained there for "quite a while" observing them and answering questions that the employees had concerning the handbilling. Kundrat admitted that he had no concerns that the handbillers had been trespassing; he indicated he came to the facility to assure that the workflow continued safely and was not interrupted.

These facts are based on a composite of the credible portions of the testimony of Kearney and Kundrat. The union representatives testified that Shive approached them on this occasion. However they did not know Shive at the time. They testified that an employee identified Shive to them. Shive and others denied that he was present at the facility at that time on that occasion. I noted on the record that the appearances of Kearney and Shive are similar. Under these circumstances, I find the testimony of Shive, Kearney, and Kundrat to be more convincing than then hearsay description of the unidentified employee; I conclude that Shive was not present for this incident. The General Counsel's witnesses also testified that "Shive" and Kundrat remained observing them for about 2 hours. In light of my conclusion that Shive was not present at the facility on that occasion, I do not credit the testimony of those witnesses to the extent that it is inconsistent with the facts set forth above.

Analysis

The general rule is that employees and union representatives who choose to engage openly in union activities at an employer's premises have no cause to complain that management observes them. *Porta Systems Corp.*, 238 NLRB 192 (1978). In support of the allegation that Aldworth unlawfully engaged in surveillance of the union activity of its employees the General Counsel cites *Carry Cos. of Illinois*, 311 NLRB 1058 (1993), enfd. 30 F.3d 922 (7th Cir. 1994). That case is factually distinguishable. There, the supervisor stood within 2 to 3 feet of the union handbillers and remained there for at least 3 hours. The General Counsel also relies on *Hoschton Garment Co.*, 279 NLRB 565 (1986). However, in that case the Board pointed out that the supervisor did not merely observe the open handbilling, but rather he attempted to prohibit the distribution of handbills to employees on public property and he "stood very close to" the handbiller for the duration of the handbilling. Id. at 566. Here, the credited testimony fails to show that Kundrat stood sufficiently close to the handbillers so as to constitute coercive surveillance. Rather, the facts show that he merely engaged in surveillance of open union activity at the facility. Under these circumstances I shall dismiss this allegation. *Emenee Accessories, Inc.*, 267 NLRB 1344 (1983).

3. Individual conversations

a. June

In June, driver Leo[65] and Aldworth Supervisor Fisher were outside the entrance to the warehouse smoking a cigarette. Fisher was shaking his head and Leo asked what was the matter. Fisher replied that the union business was getting to be too much, that it was unnecessary, and that it could be avoided. Fisher said that they did not need a union and that "[w]e need to talk this out." Leo said: "That's your opinion." Leo then complained that employees were not getting respect from management and the conversation ended.[66]

Analysis

The General Counsel alleges that Fisher's remarks during this conversation amounted to an unlawful solicitation of grievances in order to discourage union representation. I conclude, however, that Fisher's comment that they needed to "talk this out" is too ambiguous to constitute an unlawful solicitation of grievances, even in the context of his remarks that a union was unnecessary and could be avoided. The General Counsel cites *Columbian Rope Co.*, 299 NLRB 1198, 1204 (1990). However, in that case the employer specifically asked what the problems were and advised employees that it would look into those problems. I shall, therefore, dismiss this allegation of the complaint.

b. Late July or early August

The General Counsel alleges that in late July or early August Aldworth Supervisors Cybulski and Donahue interrogated an employee concerning the employee's union sympathies. In support of this allegation, Moss testified in a conclusory fashion concerning certain remarks allegedly made by Aldworth Supervisors Donahue and Cybulski. I sustained an objection to that testimony and indicated that I would not consider those conclusory statements. The General Counsel chose not to attempt to elicit more specific testimony from the witness. However, Moss did confirm that there was an incident involving employee Sellers and those supervisors in the breakroom. The General Counsel apparently attempted to elicit testimony from Sellers on this incident; his testimony was directed to a time period of about 1 month prior to the September 19 election.

[65] The General Counsel alleges that Leo was unlawfully discharged. This issue is discussed below.

[66] These facts are based on the credible and uncontradicted testimony of Leo.

During a conversation at that time Cybulski or Donahue said that the employees did not need a union and that the Union would not change the selection accuracy program.[67] The employees gave their views of why they felt a union was needed. After Moss left the room the encounter ended when Cybulski said, "Then vote yes, baby" as he, Sellers, and Donahue left the room.

Analysis

Taking into account Moss' conclusory testimony and Sellers' uncertain and hesitant testimony concerning important parts of this incident, I am unable to make factual conclusions beyond those set forth above. I conclude that the General Counsel has failed to present credible evidence to support the allegation that any coercive interrogation took place; I shall dismiss this allegation.

c. Mid-August

The General Counsel alleges that in mid-August Aldworth Supervisor David Mann threatened employees with job loss if they selected the Union as their collective-bargaining representative. In support of this allegation, the General Counsel presented the testimony of Kenneth Mitchell, a former warehouse employee and an alleged discriminatee in this case. Mitchell testified that a few days after the date scheduled for the representation hearing he had a conversation with Mann. Mann said that he should not be telling Mitchell this, but that if for any reason Dunkin' Donuts canceled the contract with Aldworth, Dunkin' Donuts was ready to bring in people who could take over the operation of the facility and avoid a shutdown. Mitchell had attended the conference on August 12 conducted at the Board's Regional Office; he attended as a potential witness in support of the Union.[68]

Analysis

In assessing whether this statement is unlawful, I am guided by *Gissel Packing.* First, I consider the context. The statement was made a few days after the parties met on August 12 and at which Mitchell was a visible supporter of the Union. Mann referred to the canceling of the contract between Aldworth and Dunkin' Donuts and mentioned that Dunkin' Donuts had personnel ready to take over the operations and avoid a shutdown. In the absence of any other explanation, a reasonable employee would understand that Mann was referring to the union situation. Mann's statement that he should not be talking to Mitchell about the subject strengthens the conclusion that the matter was union related. I conclude that Mann was, therefore, threatening that Dunkin' Donuts might cancel its contract with Aldworth if the employees supported the Union, and that the employees would thereby lose their jobs. The statement was not accompanied by any explanation of demonstrably probable consequences beyond Aldworth's control, and in any event I have concluded that Aldworth and Dunkin' Donuts are joint employers. By threatening employees with job loss Aldworth violated Section 8(a)(1).

d. Union T-shirts

As indicated above, warehouse employees are provided long-sleeved shirts that are worn during the colder weather and T-shirts that are worn during the summer months. These shirts bear the name of Dunkin' Donuts. However, occasionally warehouse employees and supervisors wear other types of shirts while working such as regular white T-shirts or T-shirts bearing the name of sports teams or other matters. The employees were not required to remove or cover these T-shirts nor were they disciplined for wearing them.[69]

In late August or early September, employee Dave Shipman wore a union T-shirt while at work. The T-shirt said, "UCFW Union Yes." He wore the T-shirt under his freezer suit, but the T-shirt became visible when he opened his freezer suit while he was on break outside the freezer. Mann and Fisher told him to either take the T-shirt off or turn it inside out. Shipman then turned the T-shirt inside out and then put on his freezer suit.[70]

About 3 weeks before the election, Fisher told Williams, who was wearing a union T-shirt under his opened Dunkin' Donuts' shirt, that he could not wear that shirt. At the same time, Fisher asked Williams whether he had changed his mind yet concerning the election. Williams replied that he had not. Williams removed the union T-shirt and replaced it with another T-shirt.[71]

At some point in late October or early November, employee Robert Moss wore a union T-shirt under his uniform shirt. The day was very warm and Moss removed the outer shirt exposing the union T-shirt. Supervisor Henderschott told Moss that he was going to write up Moss because Moss was not in proper uniform. Moss argued that he was in proper uniform and pointed to where his uniform shirt was hanging. Henderschott said that the uniform shirt had to be on his person. Moss then took his uniform shirt and tied it around his waist and pronounced that he was then in uniform because the shirt was now on his person. The next day, Moss asked Henderschott if he had been written up. Henderschott replied that he had not because Henderschott's own supervisors (meaning those beneath

[67] The selection accuracy program is used by Aldworth to measure the selection accuracy of the warehouse employees. Employees are disciplined for breaches of the standards set forth in that program. This matter is discussed more fully below as it ties into allegations concerning the unlawful discharge of employees.

[68] These facts are based on the credible testimony of Mitchell. Mann's general denial was unconvincing.

[69] These facts are based on the credible testimony of Mitchell, Moss, Williams, and Sellers. Mann admitted that employees were permitted to wear various types of T-shirts while working. Aldworth and Dunkin' Donuts did not contradict this testimony. Although Blevins testified that employees do not wear T-shirts other than the uniform T-shirt, I do not credit this testimony since it is uncorroborated and against the clear weight of other evidence.

[70] These facts are based on a composite of the credible testimony of Mitchell and Moss. Fisher essentially admitted these facts; Mann testified that he did not recall this incident but denied that he ever told employees that they could not wear a certain type of T-shirt. Roy admitted that he received a report concerning this incident from Fisher but that he instructed Fisher to allow the employee to wear the union T-shirt under his freezer suit.

[71] These facts are based on the credible and uncontradicted testimony of Williams. However, this incident is not alleged in the complaint and the General Counsel did not offer this testimony to establish an independent violation of the Act.

him in Aldworth's supervisory hierarchy) did not wear their uniforms.[72]

A few days before the election, employee Aaron Lewis was wearing a "Union no" T-shirt at work. Henderschott told Lewis that he could not wear that T-shirt, but Lewis laughed and continued to wear it.[73] There is no evidence that Lewis was disciplined for refusing to remove the shirt.

Roy admitted that he received reports from supervisors that they had restricted the wearing of union pins, buttons, and T-shirts. Roy instructed those supervisors that the restrictions that they imposed were contrary to company policy and that the supervisors should "let it go."

Analysis

The Board had long held that absent special circumstances, Section 7 extends to employees the right to wear union T-shirts while at work. *DeVilbiss Co.*, 102 NLRB 1317 (1953). Aldworth argues that its instructions to employees to remove their union T-shirts were lawful because they were made "in accordance with a consistently enforced dress code." However, I have concluded above that Aldworth had no consistently enforced dress code policy. To the contrary, Aldworth permitted employees to wear a wide variety of T-shirts other than Dunkin' Donuts' T-shirts. Aldworth may not selectively enforce the dress code policy against union supporters. *Ideal Macaroni Co.*, 301 NLRB 507 (1991). It is for this reason that *Research Management Corp.*, 302 NLRB 627 (1991), and other cases cited by Aldworth are distinguishable. In any event, even if Aldworth had uniformly maintained a dress code it could not use that code to prohibit the wearing of union T-shirts. This is so because Aldworth has failed to establish any "special circumstances" that would justify the prohibition. I note that Aldworth has made no argument that its dress code is required for safety reasons. I also note that the employees involved work in the warehouse area and thus do not regularly come into contact with customers. *Meijer, Inc.*, 318 NLRB 50 (1995), enfd. 130 F.3d 1209 (6th Cir. 1997). I therefore conclude that Aldworth has failed to show the existence of special circumstances sufficient to justify a ban on wearing union T-shirts by employees working in the warehouse. By instructing employees to remove their union T-shirts, Aldworth violated Section 8(a)(1).

e. August 29

On August 29 after the mandatory meeting described above, employee Meduri approached Roy to ask him a question. At the time Meduri was wearing a union pin. Roy pointed to the pin and said, "That's one of the reasons why you will not be working here." Meduri then went to the back of the room to have a sandwich when Fisher approached him. Fisher told Meduri, "Why don't you take the pin off? You'll make me happy." Meduri replied that if it would make Fisher happy he would remove the pin.[74]

Analysis

The General Counsel alleges that Roy threatened Meduri with discharge because he engaged in union activity. It is well settled that, absent special circumstances, employees have a Section 7 right to wear union pins while working. *Republic Aviation Corp.*, 324 U.S. 793 (1945). I note that on this occasion, while employees were being paid to attend the meeting, they were not engaged in normal work and instead were attending a meeting designed to give them Aldworth's antiunion message. Thus, there were no special circumstances that would justify a refusal to permit employees to wear union pins while attending the meeting. Under these circumstances, I conclude that Aldworth violated Section 8(a)(1) when Roy threatened Meduri with discharge for wearing a union pin.[75]

f. Early September

In early September Supervisors Henderschott and Cybulski and employee Williams were talking about the Union while Williams was working in the warehouse. Henderschott said that he did not know why the employees needed a union. He said that if the Union came in it would strike and that they had a team in Massachusetts waiting to come down and take over the jobs of the strikers.[76]

Analysis

The General Counsel alleges that Aldworth unlawfully threatened employees with job loss if they selected the Union. Henderschott's statement above amounted to a threat that employees would lose their jobs as a result of a strike. Henderschott gave no indication that he was referring to the right of employers to hire permanent replacements for economic strikers. Even then, however, strikers do not immediately lose their employee status when they are permanently replaced. Under these circumstances, I conclude that Aldworth violated Section 8(a)(1) by threatening employees with job loss if the Union was selected.

g. Living hell comments

In early September while Aldworth was conducting the meetings described above, driver Farnsworth complained to Fisher that the amount of time it took him to drive to the facility to attend the meetings was disruptive. Fisher said: "If you think that is bad for you . . . you're making my life a living hell right now, too." This was in obvious reference to the stress stemming from the union campaign. On another occasion, Fisher made similar comments.[77]

Analysis

The General Counsel alleges that Fisher's statements amounted to an accusation of disloyalty and therefore violated Section 8(a)(1). I disagree. In support of this allegation the

[72] These facts are based on the credible testimony of Moss.

[73] These facts are based on the credible and uncontradicted testimony of Williams.

[74] These facts are based on Meduri's credible testimony.

[75] The General Counsel has not alleged that Fisher's remarks to Meduri violated the Act, and the General Counsel did not move to amend the complaint after Meduri testified. Also, I note that any findings concerning this incident would not affect the remedy in this case. Under these circumstances, I find it unnecessary to resolve that matter.

[76] These facts are based on the credible testimony of Williams.

[77] These facts are based on the credible testimony of Farnsworth and Moss. Fisher testified that he could not recall making such comments.

General Counsel cites *Wometco Coca-Cola Bottling Co.*, 255 NLRB 431, 443 (1981); *Paul Distributing Co.*, 264 NLRB 1378, 1382 (1982); and *Belding Hausman Fabrics*, 299 NLRB 239, 241 (1990), enfd. 953 F.2d 641 (4th Cir. 1992). However, those cases involved clear expressions by the employer that union activists had been disloyal. Fisher's statement indicated only that he was undergoing a great amount of stress and pressure as a result of the union campaign and, inferentially, the complaints the drivers had made concerning his performance as a supervisor. Those remarks were neither threatening nor coercive, nor did they have tendency to interfere with employees' Section 7 rights. *Oklahoma Installation Co.*, 309 NLRB 776 (1992). Accordingly, I shall dismiss that allegation of the complaint.

h. September 13

On about September 13, Aldworth Supervisor Donahue encountered Williams in the cooler box. Donahue said that he felt sorry for the employees because they were going to screw themselves if the Union got in.[78]

Analysis

The General Counsel alleges that Aldworth threatened employees with unspecified reprisals if they selected the Union. I agree. The Board has held that similar comments have been unlawful. *K & M Electronics* , 283 NLRB 279 fn. 1 (1987). By threatening unspecified reprisals against employees because they engaged in union activity Aldworth violated Section 8(a)(1).

i. Union pin

As more fully described above, drivers regularly deliver to the retail shops and have regular contact with the shop owners and their employees. They are required to wear the uniform described above, including a shirt bearing the logo of Dunkin' Donuts. There is no evidence that the uniform policy has not been uniformly enforced concerning the truckdrivers.

In September before the election, driver Meduri wore a union pin on his shirt while at the facility. Meduri approached Shive to ask him a question. Shive appeared angry and told Meduri that he was out of uniform and would he please take off the pin. Meduri did so.

These facts are based on the credible testimony of Meduri. I have considered Shive's testimony that he told Meduri that he could not ask Meduri to remove the pin, but because Meduri was wearing the pin on the Dunkin' Donuts' logo, he asked Meduri to remove the pin from the logo area of the shirt and Meduri merely relocated the pin to another part of his shirt. Shive claimed that he asked Meduri to remove the pin because the message on the pin and the message on the logo were overlapping. However, in Shive's pretrial affidavit he gave a somewhat different explanation; he stated that the union pin that Meduri was wearing made the Dunkin' Donuts' logo "not visible." I conclude that Shive's explanations are not credible. I base this conclusion not only on the comparative demeanor of the witnesses but also on the fact that, as clearly shown by the General Counsel, the pin was tiny when compared to the size of the Dunkin' Donuts' emblem. Shive's clearly contrived testimony on this matter serves to undermine his overall credibility.

Analysis

Employees have a right under the Act to wear union pins and buttons while at work. *Republic Aviation*, supra. Dunkin' Donuts argues that it was lawful for Shive to instruct Meduri to remove the union pin because special circumstances exist in this case that justify its action. In support of that argument it cites *Eastern Omni Constructors v. NLRB*, 170 F.3d 418, 426 (4th Cir. 1999). However, that case concerned the placement of union insignia on hardhats worn by employees for their safety. No such safety concerns are involved in this case. Moreover, the court there pointed out that employees were free to wear union insignia on other parts of their clothing. Here, Shive instructed Meduri to remove the union pin altogether. Dunkin' Donuts also cites *United Parcel Service v. NLRB*, 41 F.3d 1068, 1073 (6th Cir. 1994). In that case, however, the union had agreed to contractual language giving the employer the right to establish and maintain reasonable standards concerning the wearing of uniforms and accessories. No such agreed-upon provisions are present in this case. Dunkin' Donuts also relies on *Burger King Corp. v. NLRB*, 725 F.2d 1053, 1055 (6th Cir. 1984). That case too is inapposite. There, the employees seeking to wear the union insignia worked in the retail portion of the operation with direct contact with the public at large. Here, the drivers do not regularly come in contact with the public at large while working; instead they interface with other employees. Deliveries, for the most part, are made in the rear of the stores away from consumers. In any event, the drivers do not interact with the customers of the retail shops. In fact, neither Dunkin' Donuts nor Aldworth have made a showing of a need to ban the display of union pins when the drivers are interacting with employees of the retail shops. I conclude that Shive's instruction to Meduri to remove the union pin violated Section 8(a)(1). *Meijer, Inc.*, supra.

j. September 10

On about September 10, McCorry and Dunkin' Donuts Supervisor Warren Engard had a conversation. Engard was about to leave on vacation and the election was set for September 19. McCorry wished Engard an enjoyable vacation and Engard said, "Don't let the doors be locked when I come back." McCorry asked what he was talking about and Engard indicated that he was referring to the Union. McCorry, who may have laughed at this remark, said that matter was out of his control.[79]

Analysis

The General Counsel contends that Engard's statement unlawfully threatened that plant closure could result from the union campaign. I agree. Engard's remarks clearly linked the possibility of plant closure with the union activities then being

[78] These facts are based on the credible and uncontradicted testimony of Williams. Donahue did not testify at the trial.

[79] These facts are again based on McCorry's testimony. Engard's testimony does not substantially differ from McCorry's. Engard admitted that he told McCorry to do the right thing concerning the election and that he did not want to return from vacation to a locked building. Engard characterized these remarks as "a stupid comment" that he meant to be lighthearted.

conducted by the employees. *Precision Graphics, Inc.*, 256 NLRB 381 (1981), enfd. 681 F.2d 807 (3d Cir. 1982). Aldworth argues that Engard intended the comment to be a joke. However, the test is whether the comment could reasonably be understood to be a threat. *Caterpillar, Inc.*, 322 NLRB 674, 675 (1996). Thus, the fact that Engard may have intended the remark to be lighthearted does not detract from its coercive nature. Also, the fact that McCorry may have laughed at the comment does not show that the comment was anything other than a threat. Under these circumstances, I conclude that Dunkin' Donuts violated Section 8(a)(1) by threatening that the facility might close as a result of the employees' union activities.

k. September 17

On September 17, 2 days before the election, freezer employees Jesse Sellers and Ken Mitchell were in the breakroom with Aldworth Supervisor Fisher. Sellers told Fisher that he needed a particular day off. Fisher replied that they had always worked with the employees concerning their need for a day off, but that depending on what happened that Saturday (the day of the election), they might not be able to do that.[80]

Analysis

The General Counsel alleges that Fisher's comments amounted to an unlawful threat to consider employee requests for time off less favorably if the employees selected the Union. I agree. Fisher's comments implied that if the employees selected the Union he would be less flexible in allowing employees to take their desired day off. His statement was unaccompanied by any reference to demonstrably probable consequences beyond Aldworth's control. *Schaumburg Hyundai, Inc.*, 318 NLRB 449 (1995). By threatening to impose less favorable working conditions on employees if they engaged in union activity Aldworth violated Section 8(a)(1).

Later on September 17, another conversation occurred, this time between Aldworth Supervisor Mann and freezer employees Sellers, Moss, and Shipman. Mann told these freezer employees that if the Union was selected they would be unable to start work early and thereby leave early on their Sunday shift, that they would be required to select a full load and not the lesser amount that freezer employees were permitted to select, that the lowest seniority freezer employee would have to pick in the dry goods area of the warehouse if there was not enough product to select in the freezer, and that the freezer employees would have to take their breaks as scheduled instead of working through them and then taking the time at the end of the day.[81] Mitchell then walked into the area and asked what was going on. Mann said that he had just told Shipman that if the Union was selected the employees would not be able to continue practices such as coming in early on Sundays and taking their breaks when they wanted. Mann also said that he had told Shipman that the employees would have to pick a full load and that Shipman would have to pick whatever work remained because he had the least seniority and that if that work did not amount to a full load Shipman would be assigned to work as a jockey in the yard.[82]

Analysis

The General Counsel alleges that Aldworth threatened employees with more onerous working conditions if they selected the Union. Aldworth argues that Mann was merely expressing his opinion that if the Union were involved there would be a more structured workplace. However, Mann statements were not made in the context of stated probable consequences beyond Aldworth's control. *Schaumburg Hyundai*, supra. By threatening to impose less favorable working conditions on employees if they supported the Union, Aldworth violated Section 8(a)(1).

l. Early October

Aldworth requires that its freezer employees wear boots while working in the freezer and it provides them with a $40-boot allowance. In early October, Fisher and freezer employee King had a conversation in the breakroom. King asked whether the boot allowance was given once or twice a year. Fisher replied, "With your standing in the company." At that point Fisher chuckled and then said, "I don't know."[83]

At the time King had been a visible supporter of the Union. He had worn a union T-shirt and had attended the scheduled representation hearing as witness for the Union. The statement occurred after the Union had lost the September 19 election.

Analysis

The General Counsel alleges that Aldworth threatened to withhold the boot allowance because King supported the Union. First, I conclude that under the circumstances Fisher's comment about King's "standing with the company" referred to King's support of the Union and the position King was in after the Union had lost the election. I further conclude, based upon my observation of King's demeanor and my listening to the manner in which he testified, that Fisher's comment, "I don't know" did not convey the message that he was unsure of the answer to King's question. Rather, I conclude that the comment was made in a manner and context to convey that King's entitlement to any boot allowance was in jeopardy. Connecting the two remarks, I find that Aldworth violated Section 8(a)(1) by threatening to withhold boot allowance money from an employee because he supported the Union.

[80] These facts are based on the credible testimony of Mitchell and Sellers. I do not credit Fisher's general denial.

[81] These facts are based on the credible testimony of Moss and Sellers.

[82] These facts are based on Mitchell's credible testimony. Mann admitted that he spoke about the Union with these employees. He testified that in response to questions from the employees he explained that if the Union came in he was fearful that his supervisory discretion would be eliminated in areas such as permitting employees to start work early and to take breaks together. In many respects Mann's testimony corroborates the testimony of the General Counsel's witnesses. However, based on my observation of the demeanor of the witnesses I do not credit Mann's testimony to the extent that it is inconsistent with the facts set forth above.

[83] These facts are based on King's credible testimony. I do not credit Fisher's hesitant, unconvincing testimony on this issue.

m. April 1999

In April 1999, driver Meduri apparently had applied for work at another employer. At that time Meduri had a conversation with Fisher in Fisher's office. Fisher asked Meduri whether he had heard anything. Meduri, believing that Fisher was referring to his employment search, said no and that he thought Fisher would hear first when the prospective employer called him. Fisher then explained that he was asking if Meduri heard anything about the Union. Meduri finally answered that he had not heard anything recently about the Union.[84]

Analysis

In determining whether questioning of employees concerning union activities is unlawful, the Board examines the totality of circumstances to determine whether the questioning is coercive. *Rossmore House*, 269 NLRB 1176 (1984), enfd. sub nom. *Hotel & Restaurant Employees Local 11*, 760 F.2d 1006 (9th Cir. 1985); *Sunnyvale Medical Clinic*, 277 NLRB 1217 (1985). Here, the questioning of Meduri was initiated by a high-level supervisor in his office. Although the questioning was short in duration, the general nature of the questioning tends to heighten its coercive nature. *Sundance Construction Management*, 325 NLRB 1013 (1998). Moreover, there is no evidence that Meduri was an open supporter of the Union. Finally, this interrogation occurred in the context of prior unremedied unfair labor practices. Under all the circumstances, I conclude that this questioning was sufficiently coercive to violate Section 8(a)(1).

n. Mid-June 1999

In mid-June 1999, Hoffman received a subpoena issued on behalf of the General Counsel to appear at this proceeding. At around that time Aldworth Supervisor Houston approached Hoffman as Hoffman was coming off his truck at work. Houston said that some of the employees had received their subpoenas. He asked Hoffman if he had received one. Hoffman said no, not yet.[85]

Analysis

The General Counsel alleges that this conversation violated Section 8(a)(1) inasmuch as it amounted to an unlawful interrogation of Hoffman's involvement in this proceeding. In resolving that allegation, I consider the totality of circumstances to determine whether there was a tendency to interfere with Section 7 rights. *Rossmore House*, supra. First, I note that Houston was a relatively low-ranking supervisor who was not otherwise directly involved in any of the unfair labor practices found in this case. Moreover, the conversation occurred in an informal setting at the worksite. Most importantly, the questioning was brief and did not probe into unrelated topics. Under these circumstances, I conclude that this conversation did not rise to the level of an unfair labor practice, and I shall dismiss that allegation of the complaint.

[84] These facts are based on the credible testimony of Meduri.

[85] These facts are based on Hoffman's credible testimony. Houston did not testify at the trial.

o. Johnnie's Poultry

At the hearing I denied the General Counsel's motion to amend the complaint to include an allegation that Aldworth Attorney James Pender violated Section 8(a)(1). This was premised on the assertion that Pender had failed to give an employee the assurances set forth in *Johnnie's Poultry*, 146 NLRB 770 (1964), enf. denied on other grounds 344 F.2d 617 (8th Cir. 1965). In his brief the General Counsel argues that I erred.

The facts show that Pender consistently gave employees the proper assurances in writing, and he did so again in Bell's case. However, Bell testified that Pender asked him if he had signed an authorization card and asked why Bell had signed it. The record does not show what response, if any, Bell made. Because the General Counsel was seeking a bargaining order based on a card majority, Pender was entitled to ask Bell whether he signed an authorization card. Pender was also entitled to ask the circumstances under which Bell signed the card. Although I recognize that Pender could have procured that information from Bell by asking a more specific question, I concluded based on Bell's testimony that this isolated remark, in context, was insufficient to establish a coercive interrogation. Rather than prolong the hearing by requiring Aldworth to present testimony to deal with this allegation, I simply denied the motion to amend the complaint. I adhere to my ruling.

C. The 8(a)(3) Allegations

1. Leo J. Leo

The General Counsel alleges that Leo was unlawfully terminated. Leo began working at the facility as a driver in January 1994. He also occasionally worked as a helper. On March 25 union organizer Kelly visited Leo at his home at which time Leo signed an authorization card. Thereafter, Leo talked to about 25–30 employees about the Union and solicited them to sign authorization cards; he obtained about 9–10 signatures. In June, Leo also wore a union pin at work for 2 days, and Aldworth Supervisor Kearney saw Leo wearing the union pin.

In June, Leo had a conversation with Fisher outside the warehouse where, as more fully described above, Fisher indicated that he thought a union was unnecessary and could be avoided and Leo responded that that was Fisher's opinion and that the employees were not treated with respect by management.

On June 21, Leo was scheduled to start at 4:45 a.m. as a helper. A driver on another route called off his route that day so at 3:20 a.m. Knoble called Leo and asked him to report to work as soon as possible. Leo said that he would cleanup and come in. Leo did not arrive at work until 4:51 a.m., thereby not only failing to arrive early to take over the driver's route, but actually arriving 6 minutes late for his original start time. Knoble prepared an incident report concerning this event.

What happened next is difficult to ascertain. Fisher testified that Knoble came to him and angrily described the incident; Knoble did not confirm this testimony. Moreover, Kundrat testified that Fisher was out of the facility on the road when this incident happened and that it was he who commenced the investigation that led to Leo's termination. Knoble gave testimony concerning a memorandum that he sent to Aldworth con-

cerning Leo's tardiness. However, although the General Counsel subpoenaed the document it was not produced, nor was a credible explanation given for the failure to produce it.[86] Shive testified that for about a year[87] he noticed that Leo was late in leaving the facility and that this was due to Leo's tardiness, but his testimony is unclear what role, if any, he played in Leo's subsequent discharge. I conclude little from this tangled testimony and missing document except that Dunkin' Donuts played a role in Leo's discharge and Aldworth and Dunkin' Donuts were unable to credibly explain how the decision was made to terminate Leo.

In any event, on June 24 Leo reported to work and discovered that he was not on the dispatch list. He was directed to see Kundrat. Kundrat showed Leo a letter with a list of Leo's tardinesses over the past year and said that they have an issue that needs to be resolved. Leo asked whether this had to do with what happened the past week, but Kundrat did not respond. Leo said that many of the latenesses were for 1 minute and that there were other more important issues that needed to be addressed. Kundrat then told Leo that he was suspended until further review.[88]

On June 26, Leo called Fisher and asked if he could attend the June 27 meeting concerning the Union, described above. Fisher later called him back and granted him permission to attend the meeting. It should be recalled that during this meeting Roy told the employees that they should not be led in the union effort by someone who had one foot out the door for lateness, referring to Leo.

The following Monday Leo spoke with Kundrat by telephone. Kundrat said that Leo's services were no longer needed and he was terminated. On July 1, Kundrat sent Leo a letter confirming his termination due to a "continual pattern of attendance related failures as detailed below." The letter indicated that during 1997, there were "13 documented incidents" including four written warnings, two 1-day suspensions, and one 3-day suspension. The letter indicated the following for 1998:

2–04–98	Called out
4–17–98	Late. Issued final written warning.
4–22–98	Called out
5–19–98	Late. Issued one (1) one (day) suspension and informed that future violations would subject you to employment termination.
6–22–98	Late

The letter indicated that Leo's termination was effective June 29.

As indicated on the face of the termination letter, some of the occurrences relied on by Aldworth were "callouts." A callout occurs when an employee calls in and advises Aldworth that he or she will not appear for work that day. Records reveal that when Leo called out on February 4 and April 2 he advised Aldworth that he was sick. Records show that on April 27 Leo was 34 minutes late in reporting to work; he received a "Final Written Warning." On May 19 Leo was again late, this time for 28 minutes; he received a 1-day suspension.

Leo's tardiness record for 1997 reveals that on January 15 he was 27 minutes late, on February 24 he was 11 minutes late, on March 27 he was 33 minutes late, and on March 28 he was 25 minutes late. On March 31, 1997, Leo received a written warning for the last three incidents. On April 9, 1997, Leo was 25 minutes late; he received a 1-day suspension for this lateness on April 12, 1997. On May 2, 1997, Leo was late 30 minutes; this time Leo was suspended for 3 days. On May 19, 1997, Leo was 1 minute late, on May 20 he was 22 minutes late; he was given a final warning and was advised that any further lateness would result in his termination. On August 13, 1997, Leo was 1 minute late, on August 28 he was 27 minutes late. Leo received a written warning and was advised that if that pattern continued he would receive more severe discipline, up to and including suspension time. On September 30, 1997, Leo was 28 minutes late; he received a 1-day suspension. Finally, on December 4, 1997, Leo was 37 minutes late; he received a written warning and was advised that further incidents would result in more severe discipline including suspension or termination.

Leo's tardiness record for 1996 shows that on April 26, 1996, he was 30 minutes late, on July 11 he was again 30 minutes late, on July 22 he was 14 minutes late, on August 13 he was late for an unspecified period of time, on August 14 he was 18 minutes late, on October 14 he was 6 minutes late and the next day he was 55 minutes late. On October 16, 1996, Leo received a letter confirming a conversation that took place concerning the last two incidents wherein Leo was advised that any further lateness would result in further discipline up to and including suspension. On December 30, 1996, Leo was 11 minutes late.

It should be noted that Leo was terminated for arriving late at the facility and not for arriving late at his first delivery site. In fact, Leo made on time deliveries whether or not he arrived late at the facility. Knoble explained that the main reason that an employee's repetitive lateness concerns Dunkin' Donuts is that Dunkin' Donuts pays Aldworth to supply qualified labor for specific assignments and Dunkin' Donuts expects them to arrive on time. He further explained that if a tractor and trailer are kept at a dock later than expected it may cause delays for incoming trucks that need to use the dock to be unloaded. He explained that the equipment-leasing company agreed to keep a maintenance employee at the facility until the last tractor-trailer departs. Thus, late departures delay the maintenance employee's departure from the facility to the consternation of the equipment-leasing company. Next, Knoble pointed out that in his experience drivers who arrive late may try and make up the time during the course of the day by taking shortcuts such as

[86] Because the document was apparently unavailable, I allowed oral testimony concerning its content. Having considered that testimony I give it little weight, especially the testimony that the memo was submitted to Aldworth between April and June.

[87] Earlier, Shive testified that his awareness began in about April; on redirect examination he clarified this testimony.

[88] I do not credit Fisher's testimony that he told Leo that Leo was suspended pending an investigation. I have considered Kundrat's version of this conversation. I am uncertain whether Kundrat confined himself to the substance of the conversation or interspersed his testimony with what he had hoped or meant to say. I, therefore, credit Leo's testimony concerning this conversation.

skipping a pretrip inspection. Last, Knoble described how the freezer unit on the vehicle is unattended while the vehicle awaits its driver. Kundrat gave a similar explanation for Aldworth. There is no evidence however, that any of these consequences actually occurred as a result of Leo's lateness.

Aldworth's old employee handbook contains a progressive discipline procedure that provides for a four-step process beginning with a verbal warning and ending with termination. The handbook also contains a specific tardiness provision that provided for increasing levels of discipline for each instance of tardiness up to six occurrences during a 12-month period. The discipline began with a verbal warning for the first occurrence and then increases to a cautionary letter, written warning, minimum 1-day suspension, 3-day suspension, and then with the sixth occurrence the employee was "Subject to termination." Another provision of the handbook deals with absenteeism and states, in pertinent part, that repeated absenteeism and tardiness will not be accepted.[89] Yet another provision deals with conduct that is subject to disciplinary action. Among the items listed is "Failure to report for duty at specified times after having received adequate notification" and "Report for work more that fifteen (15) minutes late." However, as Kundrat testified, Aldworth does not have a policy that requires termination after a given number of absences or tardinesses. Instead, he testified that Aldworth looks at the entire picture to determine the appropriate response to the problem.

The General Counsel contends that Aldworth disparately applied it tardiness and attendance rules. He points to the tardiness and absence record of a number of employees, including warehouse employee Jeffrey Wade. On December 19, 1997, Wade received a written warning for tardiness; he had been late and/or called out 10 times that year. The warning advised Wade that future attendance problems would result in more severe discipline. On April 27, 1998, Wade received another written warning as a result of being 6 minutes late on April 15. Wade had also called out twice in January and once in March. After the second written warning Wade was late on four other occasions during 1998 for time periods ranging from 5 minutes to 1 hour and 31 minutes. He also called out on five more occasions during that year. As of May 1999, Wade was late twice more, for 2 and 21 minutes. He also called out on three more occasions. Wade received no discipline since the second written warning.

Driver Richard Neff was late and/or called out 6 times in 1997, 11 times in 1998, and 8 more times through June 1999. Warehouse employee Craig Cropper was late and/or called out 17 times in 1998, 10 times prior to July and 5 times thereafter. During that year he received a written warning and a 1-day suspension. In 1997, he was late and/or called out on 24 occasions. This pattern continued in 1999 when he was late and/or out four more times. Cropper continues to work for Aldworth. Warehouse employee Mark Detrempe was late and/or called out nine times in 1997 and five times through June 1998; he was not fired. Martin Porrini started working for Aldworth on March 20, 1997. For the remainder of the year he was late and/or called out eight times. In 1998 he was late on six occasions; by May 1999 he was late five more times. Porrini was not fired. Warehouse employee Christopher Mingin was late and/or called out 18 times in 1997, 6 times in 1998, and 8 times through April 1999. Mingin was not fired. Selector Jerome Pickney was late and/or called out 12 times in 1997, 8 times in 1998, and 5 times through May 1999. Pickney was not fired. Driver Richard Anderson was late and/or called out eight times in 1997 and six more times through September 1998; he too was not fired. Warehouse employee Gary Blevins was late and/or called out 12 times in 1998 and 7 more times through June 1999. He was not fired. Fisher gave Blevins a written warning in 1998 and told him that he had to arrive to work on time. Blevins was late several times thereafter and he received a 3-day suspension. Kennedy told Blevins that if he could get to work on time Kennedy would talk to Kundrat about "wiping the slate clean." Thereafter Blevins did not actually serve the suspension.[90] Other employees with serious tardiness and attendance problems who were not fired are Henry Sledge, driver Charles Stires, and David Kloiber.

Aldworth points to the record of selector Russell Williams Sr. Williams applied for employment on November 27, 1996. On December 11, 1997, Williams called in late and was told to take the day off. The next day he was fired. His record, however, is not comparable to Leo's. It shows that for the last 2 weeks of his employment Williams virtually stopped appearing for work. Aldworth also points to the record of William White. For the last 12 months of his employment White had a series of latenesses and tardinesses. More to the point, on December 16, 1996, White requested a leave of absence due to personal problems; he was advised that it would be granted only so long as it fell under Aldworth's family medical leave policy. On January 9, 1997, White was cleared to return to work however, he failed to establish that he had been qualified for the leave of absence because his doctor refused to justify his claims. He was advised that his absence was considered unauthorized. When he returned he was assigned to work as a helper. On February 7 and 18, 1997, called out. He was fired February 21. This too is unlike Leo's situation because it is apparent that White had personal problems that had not been resolved despite the extensive periods of absence.

At the hearing Kundrat testified that Leo's cavalier attitude as demonstrated by his refusal to shift the gears in the new tractors in a fuel-efficient manner contributed to his decision to terminate Leo. This claim was not mentioned in Leo's termination letter nor was ever mentioned to Leo in any of the conversations he had with supervisors concerning his discharge. When the gear-shifting incident occurred earlier Aldworth and Dunkin' Donuts acquiesced in Leo's refusal to operate the truck in the new manner by assigning him an old vehicle. Under

[89] The new handbook states that repeated absenteeism and being absent without notifying Aldworth in a timely manner is not acceptable and will be grounds for disciplinary action or termination.

[90] These facts are based on the credible and uncontradicted testimony of Blevins.

these circumstances, Kundrat's testimony amounted to giving shifting reasons for Leo's termination.[91]

Finally, it should be noted that on June 29, as more fully described below, Roy told McCorry in effect that Leo had been fired because of his union activity.

Analysis

The analysis set forth in *Wright Line*[92] governs the determination of whether the Respondents violated Section 8(a)(1) of the Act by discharging Leo. The Board has restated that analysis as follows:

> Under *Wright Line*, the General Counsel must make a prima facie showing that the employee's protected union activity was a motivating factor in the decision to discharge him. Once this is established, the burden shifts to the employer to demonstrate that it would have taken the same action even in absence of the protected union activity.[7] An employer cannot simply present a legitimate reason for its actions but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected conduct.[8] Furthermore, if an employer does not assert any business reason, other than one found to be pretextual by the judge, then the employer has not shown that it would have fired the employee for a lawful, nondiscriminatory reason.[9]

[7] *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 400 (1983).

[8] See *GSX Corp. v. NLRB*, 918 F.2d 1351, 1357 (8th Cir. 1990) ("By asserting a legitimate reason for its decision and showing by a preponderance of the evidence that the legitimate reason would have brought about the same result even without the illegal motivation, an employer can establish an affirmative defense to the discrimination charge.")

[9] See *Aero Metal Forms*, 310 NLRB 397, 399 fn. 14 (1993).

T&J Trucking Co., 316 NLRB 771 (1995). This was further clarified in *Manno Electric*, 321 NLRB 278 (1996).

Turning to the General Counsel's case, Leo engaged in union activities. He not only signed an authorization card but also solicited others to sign cards. He wore a union pin at work and contradicted Fisher when Fisher attempted to persuade him that the employees did not need a union.

Turning to the element of knowledge, I have concluded that an Aldworth's supervisor saw Leo wearing the union pin. Leo's conversation with Fisher likewise would tend to show that Leo supported the Union. Most significant, however, are Roy's remarks at the June 27 meeting about the Union where he identified Leo as a union leader. This occurred only a few days before Leo's termination, and there is no evidence that Roy gained this knowledge only after Leo's earlier suspension. Based on the record as a whole I conclude that Aldworth was aware of Leo's support for the Union.

Next, the evidence shows that Aldworth had animus towards union activity. This is shown by the numerous violations of the Act described above. Also, the timing of Leo's discharge supports the General Counsel's case; Leo's discharge occurred in the midst of the organizing campaign just as Aldworth was launching its campaign against the Union.

Furthermore, the General Counsel has proven that Aldworth disparately applied its attendance and tardiness rules against Leo. As more fully described above, other employees had records as bad as, or worse than, Leo's record, but they were not fired. The two examples relied on by Aldworth are so unlike Leo's situation that they actually tend to support the General Counsel's argument that terminations for attendance and tardiness were rare. Also, the General Counsel has shown that Aldworth gave shifting reasons for Leo's discharge when Kundrat brought up the "gearing-shifting" incident in an effort to further explain why Leo was terminated. The use of shifting reasons for termination strengthens the General Counsel's case. Finally, the statements Roy made at the mandatory meetings and to McCorry on June 29, described below, directly linked Leo's termination with his union activity.

Under these circumstances, I conclude that the General Counsel has met his initial burden under *Wright Line*.

I turn now to determine whether Aldworth has shown that it would have terminated Leo even in the absence of his union activity. Aldworth argues that it did not disparately enforce its tardiness and attendance rules. First, it argues that many of the employees with poor records were warehouse employees and Aldworth was more tolerant of their tardinesses and absence because the degree of impact on operations was different. I reject that argument for several reasons. First, none of the documents submitted in this case show that there was a policy of stricter enforcement for drivers. Next, this explanation was never given verbally to Leo, was not mentioned in his discharge letter, and was never articulated in any way prior to the hearing in this case. Also, common sense would indicate that if a selector is late or absent this may result in a delay in loading the trucks. This in turn would result in many of the same problems that result from a driver being late. Under these circumstances, I conclude that this argument was created after the fact to attempt to justify Aldworth's treatment of Leo.

Aldworth next attempts to explain Leo's discharge by arguing that he was unrepentant when confronted with past attendance records. But here again there is no documentation that the degree of contrition is a critical factor in Aldworth's enforcement of its rules, and for reasons previously stated I am unable to conclude that Kundrat's oral testimony is sufficiently credible to establish this fact.

Thus, my finding that Aldworth disparately applied its tardiness and attendance rules against Leo compels the conclusion that Aldworth has failed to meet its burden under *Wright Line*. In any event, even in absence of disparate enforcement Aldworth has failed to meet its burden. It should be recalled that this burden entails more than merely showing that Leo engaged in misconduct; it requires Aldworth to persuade by a preponderance of the evidence that it would have discharged Leo for that misconduct. I conclude that Aldworth has failed to do so. I, therefore, find that Aldworth violated Section 8(a)(3) and (1) by suspending Leo on June 24 and then terminating him effective June 29.

[91] There is no credible evidence that Kundrat was even aware of the gear-shifting incident before Leo's termination; he was, after all, stationed in Massachusetts and came to the facility only occasionally.

[92] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

2. William McCorry

The General Counsel alleges that Aldworth unlawfully conducted a route survey of McCorry's route and then unlawfully suspended him for 5 days. McCorry has worked as a truckdriver at the facility for about 6 years. One of his routes typically began at the facility at 4:30 a.m. and concluded in the Genessee, New York area. He would stay overnight there and then continue to Rochester, New York. There he would pick up a back haul and then return to the facility.

McCorry learned of the Union's organizing campaign from employees Leo and Cooper in the spring. McCorry agreed to assist them in the effort and he signed an authorization card. Later, on June 6 Union Representative Kelly visited McCorry at his home. McCorry signed another card because he was uncertain that the Union had received the card that he had signed earlier. McCorry displayed a union bumper sticker on his personal vehicle that he drove to work and he also occasionally wore a union pin and distributed pins to other employees. McCorry also attended union meetings and solicited other employees to attend those meetings.

About a month after the April 11 meeting described above, McCorry went to see Frank Fisher in his office. It was at the April 11 meeting that Roy told employees that he would respond to their complaints in writing within 30 days. McCorry asked whether the employees would be receiving responses to the concerns they had raised. Fisher asked what was the hurry? McCorry explained that the Union was still organizing and employees were trying to make up their minds concerning whom to support. Fisher said that Roy had "pretty much squashed that" and that "it's a done deal," referring to the union organizing effort. McCorry disagreed. Fisher then asked McCorry what he thought the Union would do for him. McCorry explained how he received a great wage rate and benefits, but he complained about conditions at the retail shops. Fisher finally replied that the answers were coming.[93] As more fully described above, on May 8 Aldworth issued a letter to the employees providing responses to the matters raised at the April 11 meeting.

During the June 27 meeting fully described above, McCorry made the comments concerning the unsanitary conditions he felt existed at a retail shop. Roy in turn cautioned employees about following the lead of an employee who was stealing time and sleeping on the job. This comment later was understood to refer to McCorry. The explanation now follows.

On June 29, after McCorry completed his work assignments for the day he was directed to see Fisher. Fisher told McCorry that they had some very serious charges against him. Fisher explained that the charges against McCorry were manifest falsification, log falsification, and stealing company time. McCorry responded that Fisher had to be kidding. Fisher then showed McCorry his manifest for June 23.[94] On that day, helper Kenneth Burnett had assisted McCorry. Fisher said that he had a witness that saw McCorry complete a delivery at 1:30 p.m. at a particular Rockville, Maryland store and then go to sleep in the truck for an hour. McCorry asked to see the witness so that he could call the witness a liar; Fisher refused. McCorry then requested to see Roy, but Fisher explained that Roy was unaware of the matter and that Fisher was still conducting an investigation of the charges. Fisher said that once the investigation was completed they would decide what discipline would be taken. They then looked at McCorry's manifest. McCorry pointed out that the actual arrival and departure times were left blank. He asked how that could be falsification when he just forgot to write the actual arrival and departure times. McCorry also said that he had called to the facility in accordance with policy when he had arrived at the retail stores. McCorry also explained that the notations he had made in his logbook matched the times that he had called in to the facility.[95] McCorry asked what was wrong with the log. Fisher said that after McCorry made the delivery to the back of the retail store he pull the trailer to the front of store in a mall area and failed to record that second event on his log. McCorry countered that the regulations did not require such detail. Fisher finally announced that McCorry was suspended until further notice. Neither Aldworth nor Dunkin' Donuts spoke with McCorry's helper that day to ascertain his version of the days events.[96]

After McCorry left Fisher's office he called Roy at Roy's office in Massachusetts. McCorry began to explain to Roy what had occurred, mentioning that Fisher had told him that Roy did not know what was happening. Roy answered that he knew what was going on and he was glad that McCorry had decided not to fight the discipline. McCorry, taken by surprise by these remarks, exclaimed: "Not fighting this?" Roy continued, saying that he guessed McCorry had already seen what happens when you fight these things. McCorry answered by observing that Leo had been fired and Roy said yes. McCorry became nervous and started talking, but Roy interrupted him and asked to talk to McCorry for a few minutes. Roy said that he wanted McCorry to take into account what he was going through. He asked how McCorry thought it felt sitting at a meeting with the people who work for his Company wearing union buttons on their shirts. Roy continued talking until McCorry interrupted and said that he could not afford to lose his job. Roy replied that he was not going to fire McCorry but instead would suspend him for 5 days. McCorry said that if he was suspended the employees would think it was because of his union activity. Roy told McCorry that it was McCorry's job to convince the employees otherwise. Roy also said that he wanted McCorry to take complete responsibility for the suspension and that if any-

[93] This incident has also been set forth above following the recitation of the facts concerning the April 11 meeting..

[94] The manifest used by Aldworth's drivers is prepared by Dunkin' Donuts and shows the time the driver is expected to depart from the facility, the expected arrival and departure time at the retail shops, and the expected arrival time back at the facility. On occasions when the driver is on an overnight run and will not be returning to the facility that day the manifest shows the expected arrival time at a hotel. Drivers are expected to write in their actual arrival and departure times on the manifest.

[95] Drivers are required by U.S. Department of Transportation to maintain a log of their daily activities. A driver records the time he is off duty, driving, in a sleeper berth, and on duty but not driving.

[96] These facts are based on the credible testimony of McCorry. Fisher's version of this conversation did not differ from McCorry's in any significant way.

one asked McCorry should admit he was wrong and got caught. Roy explained, "We don't need a Union here . . . we got good benefits here, I've gone out of my way to make sure you guys had the best benefits, I tried to deal with you the best I can." He told McCorry that he needed McCorry to explain that to the other employees. The conversation ended with McCorry explaining that when he was able to get 15 or 20 minutes ahead of schedule he would use that time to catch his breath or prepare for the drive back to the facility. Roy said that the time was company time and McCorry was not allowed to take that time.

The facts concerning this telephone conversation are based on McCorry's testimony. Roy testified that McCorry did call him that day and McCorry said that he had just spoken with Fisher about the incident and was very upset and did not want to lose his job. Roy testified that he did not want McCorry to worry about being fired so he told McCorry that McCorry would receive a 5-day suspension. McCorry then raised the specter that employees might think that the suspension was related to his union activities. Roy testified that this was the first time that he had heard that McCorry was involved in union activity. Roy testified that he then said to McCorry:

> It's your job to convince them otherwise. For you to explain to employees why in fact you had been disciplined. It has nothing to do with any union activity, or organizing attempt whatsoever. And, I said, I will be very disturbed if it comes back to me that in fact I have taken this action and you are going out and perhaps telling people that that's the reason. And, we were very clear on that issue. Very, very clear. And, he said that he would do that and he appreciated the five-day suspension and not being terminated.

As can be seen, some of the testimony of Roy and McCorry is mutually corroborative. However, Roy's assertion that this was the first time he learned of McCorry's support for the Union is so unbelievable that it undermines his overall credibility. In fact, Roy had alluded to McCorry's support for the Union at the June 27 meeting. I conclude that McCorry's version of this conversation is likely the more accurate one, and I credit his testimony as set forth above.

After the telephone call McCorry gathered his union pin, union pamphlets, and the other union material that he had. He went to Fisher's office and gave the material to Fisher. McCorry told Fisher that he was done supporting the Union and that he supposed that was what Aldworth wanted.[97]

McCorry served the 5-day suspension. When he returned he was given a memorandum that stated:

> This letter is to confirm and document the warning and suspension in regards to your performance on 6/23/98. On that date it had been confirmed and acknowledged that your delivery manifest and required DOT driver logs were intentionally falsified. This is a violation of written company policy as well as federal safety regulations and is not acceptable.
>
> Any further falsifications or misrepresentations of DOT logs or manifests will subject you to employment termination. This letter is to serve as a Five Day Suspension.

It turns out that Shive was the unnamed witness who allegedly observed McCorry's misconduct. Shive testified that he made those observations after he decided to go into the field and observe McCorry. I turn now to assess Shive's testimony. Shive testified that the decision to observe McCorry came after Cindy Carey, Knoble's logistics assistant, reported to him and Knoble that she had attempted to reach McCorry one day at a retail shop but the shop owner told her that McCorry had already left. She reported that she continued to call the shops until she reached McCorry who was well ahead of the delivery time indicated on the manifest. Shive then raised this matter with Knoble who said that McCorry had been asking for more time to make his deliveries. Shive testified that he found it strange that McCorry was running ahead of his manifest times yet he was asking for more time. However, typically when drivers run their routes ahead of the manifest time a route survey may be performed to determine whether the manifest times are too generous. No such route survey was done on McCorry's route. Instead, Shive testified that he asked Fisher to match McCorry's timecards with his motel receipts.[98] Fisher did so and reported that the motel receipts showed that McCorry would arrive at the motel at about 6:30 or 7 p.m., yet his timecards showed that he called off duty at around 8 p.m. In other words, in Shive's view the records showed that McCorry was working less hours than he was being paid for. Shive claims he expressed his disappointment to Fisher that Dunkin' Donuts was being billed for time that McCorry apparently was not working.[99] No action was taken against McCorry at this time; indeed, this matter was not even raised with McCorry until *after* his subsequent suspension. Rather, Shive decided weeks later to do his own audit. Instead of auditing the route that had the overnight motel stay, Shive selected a more local route. When asked to explain why he decided to conduct this audit when, according to him, the records already showed McCorry's misconduct, Shive said, "I just wanted to get—do an audit myself." Shive further admitted that his audit of McCorry's route was the only one he had done at the facility; he said otherwise: "I was too busy to do that."

I do not credit Shive's testimony set forth above. First, turning to Shive's testimony about the report from Carey, she was not called as a witness to corroborate Shive's testimony. Knoble did not corroborate Shive's testimony that Carey made the report to them or that Shive discussed the matter with him. To the contrary, Knoble seemed to contradict Shive's testimony as Knoble testified that he was unaware that McCorry had been running ahead of the manifest times. Also inconsistent with the notion that Dunkin' Donuts suspected that McCorry was running ahead of his manifest time is the fact that later McCorry's time was adjusted to give him *more* time to run this route. Moreover, McCorry also credibly testified that the only time

[97] McCorry and Fisher gave similar testimony concerning this event.

[98] I reject Roy's testimony that he was the person who instructed Fisher to check McCorry's hotel receipts. This testimony is uncorroborated by Fisher and contradicted by Shive.

[99] This testimony was not received for the truth of the matter asserted.

Carey called him on this route was on June 24, at which time he was about 1-1/2 to 2 hours ahead of schedule. As will be seen later, this was 1 day *after* Shive conducted his audit of McCorry's route. Concerning McCorry's hotel arrival time, evidence shows that it was at least possible that McCorry could have been on duty for a substantial portion of the time after he arrived at the hotel. Thus, employees are permitted to take their 30-minute lunchbreak at the conclusion of the workday. They are also permitted 15 minutes at the conclusion of the day to conduct a posttrip inspection of the vehicle, and they are also permitted to take brief "rest" breaks. McCorry credibly explained that on this run he would typically skip his breaks and lunchtime and would frequently arrive at the motel prior to the scheduled end of the workday. He would then check in at the motel and receive instructions as to where he should park his truck. He then rearranged the remaining stock on his truck to make it easier to deliver it the next day. He would also take the lunchtime that he had skipped during the earlier part of the workday. In fact, Knoble encouraged employees to take their lunchbreak at the end of the day.[100] Most significant is the fact that Shive claims that he uncovered facts pointing to McCorry's "stealing time" yet he did nothing at that time, not even to direct that an investigation be conducted. Shive's explanation as to how these alleged reports lead him to conduct an audit also does not withstand scrutiny. As noted, Shive did *not* audit the route that included the overnight stay at a hotel. Instead, he audited another route. Shive's explanation as to why he decided to conduct the audit personally rather then send someone else to do it also is entirely unpersuasive. Shive was the highest-ranking official at the facility; he is a very busy person with a good deal of responsibility. This was the first and only occasion that he personally conducted such an audit at the facility. I conclude Shive's testimony was largely created after the fact in an effort to explain why he decided to conduct an audit of McCorry's route. In the absence of a credible explanation of the reasons that lead to that decision, I must infer that there was another, unstated reason.

Continuing with Shive's testimony, he explained that he left from home on June 23 with a copy of McCorry's manifest and arrived at McCorry's penultimate stop in Rockville, Maryland. He discovered that McCorry was already leaving the stop at a time that he should have been arriving there. Shive testified that he followed McCorry to his last stop in a strip mall, also located in Rockville. Shive parked his car across the road and was able to see McCorry's truck through the green slats of the fence that surrounded the parking area. Shive testified that he saw McCorry and his helper complete the delivery about 1-1/2 hours ahead of the manifest time. McCorry then moved his truck away from the delivery area and proceeded to the front of the mall area; Shive followed. Shive initially testified that once there he saw McCorry slouch over in the front seat of the tractor as if he were sleeping. On cross-examination, however, Shive admitted that he could not see McCorry well enough to determine whether he was sleeping or doing paperwork in his tractor. Shive claimed that McCorry remained there for about 1-1/2 hours. When McCorry finally left the strip mall Shive attempted to follow him but was unable to do so. Shive testified that he waited for about 45 minutes on the road hoping to encounter McCorry, but he was unsuccessful. When he returned to the facility McCorry was just pulling in. Thus, in Shive's eyes there was another 45 minutes that were not accounted for. Shive says that he reported the matter to Fisher and expressed his disappointment that Dunkin' Donuts was being charged for services that were not rendered. Shive explained that when drivers complete their routes before the times allotted on the manifests he expects them to return to the facility since drivers are paid by the hour. Shive admitted that McCorry's manifest for the day did not show a lunchtime and that many drivers wait until after completing their last delivery before taking their lunchbreak. Shive further admitted that it was proper for drivers to do their paperwork during the course of the day.

I turn now to assess the credibility of Shive's testimony concerning his observations on June 23. I first conclude that Shive exaggerated his testimony when he stated that he saw McCorry parked in front of the retail store for 1-1/2 hours. I have noted above that Fisher initially told McCorry that the then unidentified witness had seen him in front of the store sleeping for an hour. Kundrat testified that he understood Shive to be claiming that McCorry was parked there for 1 hour and 5 minutes. These differences in the amount of time are significant because McCorry credibly testified that after he made the delivery to the back of the retail shop in question, he typically moved his truck to the front of the store where he would remain for 30 to 50 minutes. During this time he waited for the store owners to rotate their stock and verify the delivery. The time he spent parked in the front of the store depended on whether there were any problems with the delivery. Thus, if McCorry remained parked in front of the store for about an hour it would not be anything terribly unusual. I also do not credit Shive's testimony that he saw McCorry appear to be sleeping. At trial he admitted that he could not specifically see what McCorry was doing because of the distance that he was from McCorry. Even more damaging to Shive's testimony is the fact that Fisher and Kundrat testified that Shive provided a written report to them of his observations of McCorry on the day in question. Kundrat testified that he did not retain the written description that Shive provided because he was not aware that he had to preserve an evidence trail. This explanation is patently incredible; Kundrat surely knows the need to retain documentation to support disciplinary action. His testimony is even more incredible in this case because Aldworth and Dunkin' Donuts have produced volumes of paperwork documenting all sorts of offenses. Instead, I infer under the circumstances that the reason Kundrat did not retain Shive's summary was because it would not have been entirely supportive of Aldworth's and Dunkin' Donuts' position at the hearing.

McCorry testified that on June 23 he pulled his truck to the front of the mall area where he completed his paperwork. He

[100] After McCorry was suspended, this pattern of checking in at the hotel and then calling off duty at some later time ceased. Instead, McCorry began calling off duty within minutes of checking in at the hotel. McCorry explained that for a period of time after the suspension he altered his practice and took his lunchbreak prior to checking in at the hotel.

then went into the Dunkin' Donuts' shop and talked with the shop employee concerning the load that he had just delivered. He then returned to his truck where he ate a sandwich and completed his paperwork. He denied that he slept or rested in the truck. I conclude that this testimony, on balance, is more credible than Shive's testimony.

Sometime in August, Roy had a conversation with Hoffman concerning McCorry. At this time Hoffman no longer was field supervisor and had returned to his position as a driver. After Roy asked Hoffman how he was doing in the transition from supervisor to driver, Roy said some employees were trying to bring in a union and there were a couple troublemakers who were just passing through. Roy said that he had suspended McCorry because he did not want to fire him as McCorry had worked there for 6 years. Hoffman and Roy then discussed whether the timing of the suspension made it appear that it was related to the Union. Roy then said that he gave McCorry his job back and then McCorry "shoved it" to him. During this discussion Roy said that he would be conducting meetings to discuss the Union. Hoffman answered that he has already made up his mind on how he was going to vote and that Roy would not be able to change his mind.[101]

As set forth above, McCorry's suspension letter indicates that one of the reasons that he was suspended was because he intentionally falsified his logs. Although the letter makes no reference to sleeping or otherwise taking too many breaks, Kundrat testified that McCorry was suspended for log falsification in relation to concealing an unauthorized break. Specifically, he testified that McCorry's log for that day showed that he arrived at the first Rockville shop at 11:45 a.m., left there at 12:30 p.m., and arrived at the second Rockville shop at 12:45 p.m. Shive reported that McCorry had already left the first Rockville store at 11:45 a.m. and arrived at the second shop at 11:55 a.m. Because log entries are made in 15-minute increments, this resulted in a 45-minute discrepancy. McCorry's log entry indicated that he left that shop at 2:30 p.m. while Shive reported that McCorry completed the delivery at 1:15 p.m. and did not leave that shop 2:20 p.m. This would result in a 15-minute discrepancy. However, if Shive or McCorry's watches were off by 3 minutes, there would have been no discrepancy. Finally, Kundrat testified that based on Shive's report that McCorry and his helper sat in front of the mall area for 1 hour and 5 minutes after making the delivery to the second Rockville shop, McCorry's log should have indicated that he was "off duty" taking breaktime whereas his log indicated that he took his lunchtime at 4:15 to 4:45 p.m. Yet Fisher further admitted that McCorry was not suspended for "stealing time" but instead for log falsification. Indeed, as Kundrat testified, Aldworth differentiates log falsification issues from payroll fraud matters. Thus, Kundrat's testimony that McCorry was suspended in part due to "payroll fraud" seems to be something contrived after the fact. If this element entered into the picture, there is no explanation as to why it was not specified in the suspension letter. Kundrat, like Fisher, claimed to have no knowledge of McCorry's union activities at the time. This testimony further undermines their credibility. Kundrat added that it appeared that McCorry was completing that route in less time than the manifest allowed, but instead of returning to the facility early and allowing the manifested time to be reduced to reflect the actual time needed to perform the route McCorry took unauthorized breaks and thus got paid for more time than was needed. However, as indicated below, after this incident Aldworth did *not* reduce the manifest time on the route but instead actually increased it. I do not credit Kundrat's testimony.

The second and last reason given in McCorry's suspension letter was intentional falsification of his manifest. As previously indicated, employees are required to note their actual arrival and departure times on their manifests. McCorry's manifest for June 23 shows that he indicated no actual arrival or departure times. He testified that he merely forgot to do so. However, Kundrat testified that McCorry's manifest was "very loudly quiet." The General Counsel argues that McCorry was treated disparately concerning his failure to properly complete his manifest on June 23. Hoffman credibly testified that while he was an Aldworth field supervisor he regularly reviewed the drivers' manifests. He noted that there were times that the manifests were not complete in that the drivers failed to enter items such as their ending miles, their start time, or the time they arrived at and departed from a retail store. When this occurred, Hoffman would make the drivers complete the manifest entries. There is no indication that these drivers were disciplined in any way. On August 19, Knoble reported that driver Refes Bell had reported that he arrived at a retail shop at 1 p.m. when at 1:45 p.m. the retail shop owner was complaining that Bell had not yet arrived. Records show that Bell also failed to complete his manifest for that day. Thereafter, Aldworth issued Bell a written cautionary warning for "improperly" completing his manifest. A review on McCorry's manifests for the period of time from January 1 to July 22 indicates that McCorry regularly completed the manifest in the proper manner. However, on approximately six occasions he failed to do so. There is no evidence that he was disciplined on those occasions. By the same token other drivers occasionally failed to properly complete their manifests by not indicating the actual arrival and departure times at the retail shops. There is no evidence that these employees were disciplined either. Indeed, Kundrat admitted that drivers have failed to complete their manifest entries and have not been disciplined.

As indicated, McCorry worked with a helper on the day in question. The helper was not disciplined, nor was he even interviewed by either Aldworth or Dunkin' Donuts. Fisher explained that as the driver McCorry had primary responsibility for the route, but he conceded that the fact that the helper also apparently took an extended break should have been of some concern to Aldworth. Fisher admitted that the helper's conduct was not what they were focusing on.

Aldworth's handbook contains a section entitled "Log Falsification Policy/Hour of Service Violations." This section sets up a point system for assessing discipline for intentional falsification of logs. A first offense is assessed five points and a minimum 2-day suspension. A second offense is assessed another five points and leaves the employee subject to termina-

[101] These facts are based on Hoffman's testimony. Hoffman gave somewhat different versions of this conversation. I credit that testimony only to the extent set forth above.

tion. Other provisions of the handbook require drivers to abide by appropriate governmental regulations and properly complete all required forms. Theft and dishonesty and falsification of records subject an employee to termination.

The General Counsel argues that even if McCorry was guilty of log falsification, Aldworth did not discipline other employees when they engaged in similar conduct. On February 27, Knoble reported a driver for "abuse of time." The driver had logged that he had worked 10.25 hours and had not taken a lunchbreak. However, Knoble wrote that he had seen the driver parked at a meat market next to a hotel for at least 45 minutes. There is no evidence that this driver was disciplined or that the matter was even investigated further. In September 1997, a state trooper found that a driver had completed his logbook entries 2 days in advance. As a result, the trooper ordered the driver to park his truck on the side of the road. The trooper barred the driver from driving again until he had completed 8 hours off duty. The driver apparently remained parked for 8 hours when he was then able to drive to a hotel. This driver was suspended for 3 days for log falsification. Knoble admitted that for gross and severe infractions of this nature Dunkin' Donuts could be fined or even shut down by DOT. This incident was more disruptive of Dunkin' Donuts' business operations than the conduct Shive alleges McCorry committed. On August 12, 1997, Aldworth concluded that driver Refes Bell had earlier worked more hours and took less rest time than DOT regulations allowed. He also falsified his log to cover up these matters. Bell, who was newly hired and presumably still on probation, was suspended for 1 day.

The General Counsel also contends that McCorry was required to falsify his logs in the past. The credible evidence shows that at times McCorry appeared for work 15 or 20 minutes early. He would do a pretrip inspection of the vehicle and complete his paperwork during that time. At his scheduled start time he would clock in and commence driving. McCorry did this so he could get a head start on his work. However, on his log he would indicate that he spent the first 15 minutes performing his pretrip duties. This, of course, amounted to a falsification of the log. Knoble knew about this practice but took no action to stop it. On other occasions, Knoble told McCorry that he could indicate on his log that he was off duty when in fact McCorry was still on duty performing work. This was done in order to make it appear that McCorry had sufficient time under the DOT regulations to drive the truck back to the facility when he completed his deliveries. On the occasions when McCorry had to work on his normal off day due to a holiday, Knoble asked him to adjust his log entries so as to permit him to work a full schedule the following week. Knoble himself admitted that drivers have called him and advised him that they did not have enough hours left under DOT regulations to complete a delivery or drive home. Knoble testified that he told those drivers that they could then either quit working for the day and drive to a hotel for an overnight stay or log off duty, let the helper complete the delivery, and then log back on duty and drive home. The rationale for the latter choice was based on an assumption that the Dunkin' Donuts' shop could be regarded as the equivalent of the main facility for DOT purposes.

Analysis

I first address the allegations in the complaint concerning the June 29 telephone conversation between McCorry and Roy. The General Counsel argues that Roy told McCorry that another employee, namely Leo, was terminated because of his union activities. As noted above, during that conversation Roy, referring to Leo's termination, said that was what happens when employees "fight these things." I conclude that this, in context, was a veiled reference to Leo's continued union activity in the face of Aldworth's antiunion campaign. As such it amounts to both a statement that Leo had been fired for his union activity and a threat of discharge to McCorry if he persisted in engaging in union activity. Both violate Section 8(a)(1). *Aero Metal Forms*, 310 NLRB 397, 400 (1993).

The General Counsel also argues that during this conversation Roy solicited McCorry to campaign against the Union and tell employees that his suspension was unrelated to his union activity. In context, Roy was telling McCorry that he would only be suspended and not fired, but that he was expected to cooperate with Aldworth by telling employees that he admitted wrongdoing and deserved the suspension. Implicit in this message was the notion that McCorry was to abandon his activities on behalf of the Union. That McCorry understood this message is shown by the fact that immediately following this conversation he gathered his union paraphernalia and turned it over to Fisher with a proclamation that he was abandoning his union activity. This is an example of the carrot and stick approach. By soliciting McCorry to abandon his efforts on behalf of the Union as the implicit quid pro quo for not being fired, Aldworth violated Section 8(a)(1). *Permanent Label Corp.*, 248 NLRB 118, 132 (1980).

I now turn to the allegation in the complaint concerning the conversation between Roy and Hoffman in August. The General Counsel alleges that during that conversation Roy interrogated Hoffman concerning his union activity and the union activity of other employees. However, as more fully set forth above, I have not concluded that Roy questioned or interrogated Hoffman in any manner. Accordingly, I shall dismiss this allegation of the complaint.

The General Counsel also alleges that Dunkin' Donuts unlawfully conducted a survey of McCorry's route on June 23 and then Aldworth unlawfully suspended McCorry for 5 days on June 29. In resolving this issue I again apply the *Wright Line* analysis.

The credited evidence shows that McCorry engaged in union activity and Aldworth knew this. Roy had identified McCorry as a union leader at the June 27 meeting. Roy and McCorry discussed the possibility that McCorry's suspension would be viewed as related to his union support. I recognize that there is no specific evidence that Dunkin' Donuts had knowledge of McCorry's union activity, but I have concluded above that Aldworth and Dunkin' Donuts are joint employers of the employees and that Dunkin' Donuts plays a direct role in the day-to-day affairs of the employees. Also, the evidence shows that Aldworth and Dunkin' Donuts worked in a cooperative effort in performing the investigation of McCorry. I infer from the circumstances that Dunkin' Donuts had knowledge that McCorry was a union supporter. Aldworth's animus is amply demon-

strated by the violations of the Act that I have described above. That conduct included unlawful statements directed at McCorry himself. Dunkin' Donuts also has been found to violate the Act by its own conduct. Moreover, McCorry's discipline came at a time when Aldworth was just beginning its intense antiunion campaign. The General Counsel having established the elements of union activity, employer knowledge, union animus, and timing, I conclude that he has met his initial burden under *Wright Line*.

I now address the issue of whether Dunkin' Donuts has shown that it would have conducted an audit of McCorry's route on June 23 even in the absence of union activity. Shive testified that a factor that led him to monitor McCorry was the incident involving Carey's difficulty reaching McCorry. However, I have not credited that testimony. Even if it were true Shive conducted the survey weeks later, and there is no credible explanation as to what triggered his renewed interest in the matter. Shive also testified that he relied on the results of the audit of McCorry's hotel arrival times that he had ordered. However, this explanation also falls short because Shive's testimony indicates that he had evidence of wrongdoing by McCorry but took not action to discipline him for such misconduct. I conclude that this explanation was created after the fact. Moreover, there is no credible explanation as to why Shive would take time from his busy schedule to conduct the audit himself. As pointed out above, in the absence of any credible explanation I infer that the reason Shive conducted the survey was another unstated reason, namely that McCorry had been supporting the Union. Under these circumstances, I conclude that Dunkin' Donuts violated Section 8(a)(3) and (1) when it conducted an audit of McCorry's route because he had supported the Union.

I turn now to the matter of McCorry's 5-day suspension and determine whether Aldworth would have suspended McCorry for 5 days even if he had not engaged in union activity. First, it seems obvious that if the unlawful route survey had not been conducted there would have been no basis for suspending McCorry. Thus, the suspension was a result of other unlawful conduct and, thus, is itself unlawful. However, the circumstances of the suspension only serve to strengthen the General Counsel's case. Aldworth's reliance on any "falsification" of McCorry's manifest falls of its weight. McCorry's failure to complete his manifest hardly qualifies as an intentional falsification. Moreover, McCorry and others had done this in the past and did not receive discipline. Aldworth's reliance on log falsification to support McCorry's suspension fails because I have concluded that McCorry did not in fact falsely report that he was on duty while he was in parked in front of the retail shop on June 23. Moreover, other employees have committed similar or worse falsifications and they did not receive such severe discipline.

Aldworth's brief describes McCorry's log falsification as follows:

> Shive observed taking McCorry [sic] an authorized break from 1:15 to 2:20 p.m., when he was scheduled to be at certain stops, and a lunch later in the day. However, McCorry's log did not reflect the hour-long break. His log closely reflected his manifest instead of his actual hours. Thus, McCorry intentionally falsified his driver's log, which violates Aldworth's written personnel policies as well as DOT safety regulations.

This is the sole instance of "log falsification" relied on by Aldworth in its brief. However, as indicated above, I have credited McCorry's testimony that he did not take a break for that period of time. Rather, I conclude that Shive seized upon the incident as a means to discipline McCorry.

Aldworth cites *Goodyear Tire & Rubber*, 312 NLRB 674, 694–698 (1993). However, in that case the Board affirmed the judge's conclusion that the alleged discriminatee has actually falsified her logs. I have not concluded that McCorry falsified his logs. Aldworth also argues that even if Shive's report was not accurate Aldworth was entitled to rely on it citing *GHR Energy Corp.*, 294 NLRB 1011 (1989). In that case the Board concluded that the employer had shown that it had a reasonable basis for believing that the alleged discriminatee had engaged in misconduct. Here, I make no such conclusion. This is not a case where there was an arms'-length report from an unbiased party. Both Aldworth and Dunkin' Donuts, individually and as joint employers, were involved in the unlawful course of conduct set forth in this decision. I conclude that Aldworth has not met its burden of showing that it would have suspended McCorry even if he had not supported the Union. I find that by suspending McCorry because he supported the Union Aldworth violated Section 8(a)(3) and (1).

3. The handbook

Aldworth maintains a handbook for all its employees, including those employed at the facility. The General Counsel alleges that on or about July 18 Aldworth issued a handbook to employees that described modified policies concerning tardiness, absenteeism, and log falsification. There is no question that in 1998 Aldworth began issuing a revised handbook to new employees that differed from the earlier version in several respects. Undisputed testimony shows that the new handbook was put into effect for all employees of Aldworth and not just those employed at the facility. A key issue is when Aldworth began distributing the handbook. With one exception, employees began receiving the new handbook in July, well after Aldworth was aware of the union organizing campaign. The one exception is employee Edward Eldridge, who signed an acknowledgement for the new handbook on April 7, the same day that he filled out an employment application. Eldridge did not actually start work until April 16.

Kundrat testified that he completed preparation of the new handbook in the fourth quarter 1997 and then submitted it to legal counsel. He testified that the review of the new handbook was completed in 1997 and the handbook was then sent to the local facilities for copying and distribution. Specifically, he testified that the new handbook was sent to the facility in January. Fisher testified that he first received the new handbooks in about February, well before the start of the union activities. He explained that because he had some of the old handbooks left he continued to use them first but that the majority of employees did not receive the new handbook until July. He did not

explain why he waited until July to begin distributing the new handbook to current employees.

Analysis

As indicated above, there is evidence that one employee signed for the new handbook on April 7. The General Counsel implies that I should not credit that evidence because it stands in stark contrast to the general pattern of distribution beginning in July. However, I find that argument unpersuasive. I conclude that at least one employee acknowledged the new handbook prior to its knowledge of the union activities. Although I have often not credited the testimony of Kundrat and Fisher, on this issue they have given at least plausible explanations as to why the handbook was not distributed to all employees earlier than July. It follows from this finding that Aldworth prepared the handbook prior to April 7 and prior to its knowledge of the union organizing effort and thus its preparation was unrelated to that event. Buttressing this finding is the uncontested testimony that the new handbook was distributed to all Aldworth employees at its facilities throughout the United States. It seems unlikely that Aldworth would have attempted to punish its entire work force in an effort to mask its desire to punish the employees working at the facility.

I further conclude that the evidence shows that Aldworth fully intended to distribute the handbook even in the absence of union activity. I note that the General Counsel does *not* contend that Aldworth began enforcing the new handbook in any discriminatory fashion. Specifically, he does not argue, and there is no evidence, that the enforcement of the provisions of the new handbook was tied to the organizing effort. Also, although the summary of documents in evidence tends to show that a high number of union activists received their handbooks in July, I note that the General Counsel does not argue that Aldworth distributed the handbook to certain employees in a discriminatory manner. In any event, neither of these two matters were fully litigated and thus I decline to pass on them in the absence of providing Aldworth with a full opportunity to meet them.

On balance, I conclude that the General Counsel has failed to sustain his burden of persuasion on this matter. The fact that Aldworth had animus towards the organizing effort of its employees is insufficient to conclude that its conduct in formulating and distributing the handbook was tainted by that animus. Accordingly, I shall dismiss this allegation of the complaint.

4. 5-day suspensions and change of work shifts and assignments

On October 14 warehouse employees Douglas King, Rob Moss, David Shipman, and Jesse Sellers were suspended for 5 days purportedly as result of events that occurred the day before. The General Counsel contends that the suspensions occurred because these employees supported the Union. King, Moss, Shipman, and Sellers along with Kenneth Mitchell worked in the freezer section of the warehouse at the facility. They worked together on the same shift and were the only freezer selectors on that shift.

Turning to the union activity of the freezer employees, in January or February Mitchell and union organizer, Michalowski, who is Mitchell's aunt, discussed the possibility of beginning an organizing effort at the facility. A month or so later they again discussed the matter. In the meantime, Mitchell obtained a list of employees and their telephone numbers. He obtained this list from the desk in the dispatch office at the old facility in Thorofare and he gave it to Michalowski at their second meeting. Later, at the new facility in Swedesboro, Mitchell again obtained a list of the employees and their telephone numbers. Mitchell had never been advised that the list was confidential. The Union used this list to contact employees.[102] Mitchell signed an authorization card and he also solicited other employees to sign cards. He attended the scheduled representation hearing at the Regional Office of the NLRB on behalf of the Union; this was when the parties agreed to a stipulated election. Mitchell also openly taped recorded several of the employee meetings described above, and gave the tapes to the Union. On the day of the election, September 19, Mitchell along with many other employees, wore a union T-shirt to the election. Roy observed Mitchell wearing the T-shirt.[103] Douglas King asked fellow freezer employee Jesse Sellers to sign an authorization card. On June 16, Sellers signed a card in his home and gave it to Michalowski. On the day of the election, Sellers carried the union T-shirt in his hand and after the election he began to wear the union T-shirt. On about June 16, King also approached fellow freezer employees Moss and Shipman on breaktime on the parking lot at the facility and obtained their signatures on authorization cards. About 2 weeks after Moss signed the card he began wearing a union T-shirt to work. He wore it from two to three times a week, and he continued to do so even after the election. Aldworth Supervisors Kennedy, Fisher, Henderschott, Rivera, and Cybulski all saw Moss wearing the union T-shirt. Shipman also wore a union T-shirt to work. Moss also displayed a union hat on the dashboard of his car; Fisher noticed the union hat and commented unfavorably about it. King also wore a union T-shirt on one occasion. He wore it to one of the meetings described above. King also obtained the signatures of employees Wallace and Pinckney on authorization cards, and he distributed cards to other employees. It should be recalled that at the April 11 meeting concerning the Union, King complained about certain conditions in the warehouse. Thereafter, Roy and Aldworth President Craig Setter examined conditions in the freezer. At that time King reminded them that he had been the employee who complained about the freezer. Later, King openly taped two of the September meetings with employees and gave the tapes to Kelly. Finally, about 2 days before the election Fisher asked King what he thought about "all of this." King answered in such a way as to indicate his continued support for the Union.[104]

[102] This is the list Roy referred to in various meetings with employees and in his memo to employees dated June 16, described above.

[103] These facts are based on the credible testimony of Mitchell.

[104] These facts are based on a composite of the credible testimony of King, Sellers, and Moss. I have considered the fact that in Moss' pretrial affidavit he stated that he wore the union T-shirt to work only seven or eight times, but based on his demeanor, I conclude that his testimony at trial is more accurate than his pretrial affidavit on this point.

Roy conceded that he was referring to Sellers when he commented at the September 17 meeting that an employee in the room who had been consistently taking "potshots" at him. Roy and Kennedy also admitted that by October 13 they knew that all the freezer employees were union supporters. Roy recounted an incident when he was driving to the facility and Shipman and Mitchell recognized him and, as they were laughing, passed his car and slowed down in front of it. As they approached a local restaurant that Union Agent Kelly frequently used as a base of operations, Shipman purposefully slowed his car to clearly indicate to Roy that they were going to the restaurant to see Kelly. Shive likewise conceded that he was aware that Shipman supported the Union.

Some background is necessary to understand the events that led to the terminations. The temperature in the freezer is maintained at between -1 and -10 degrees. Because of this extremely cold environment the freezer employees are provided special suits to wear. However, it appears that employees generally felt that working in the freezer was preferable to working in the general warehouse area because there were fewer pieces to select and the pieces were lighter in weight. The freezer employees receive two 30-minute breaks and a 30-minute lunch period. However, unlike selectors in the dry goods area of the warehouse, freezer employees are not required to punch out for breaks and lunch. Instead, that time is automatically deducted from their hours.

Aldworth found that it was preferable to load freezer items first on the trucks followed by the dry goods. In order to assure that this happens, the freezer employees occasionally worked through some of their scheduled breaks until the freezer items were selected. When the work of the day was completed the freezer employees "hung out" in the locker room where they watched television and read until the end of his shift. Mann was aware of this practice but so long as they did their selection work quickly so it could be loaded first, Mann left them alone.[105]

At one end of the freezer area is a small room separated from the main freezer area by a door. This room has a heater strip and the temperature there is about 60 degrees; some employees and managers refer to this room as the "warm room." There is an exit sign outside the door leading to the warm room. Inside the room there is another door that opens into the parking lot. That door is on an alarm system that is activated when that door is opened.

Continuing with the background facts, in September or October Aldworth Supervisors Kearney and Engard were conducting a daily inspection of the facility when they discovered cases of orange and grapefruit juice in the warm room. Juice is kept in the freezer and shipped frozen to the retail stores. The juice in the warm room had thawed and a few of the individual cartons were missing. They reported the matter to Fisher who apparently reported it to Shive.[106] About that same time period Mann conducted an inspection of the facility with Engard in Kearney's absence. They noticed that there was an opened case of juice in the warm room and decided to leave the juice there.[107] Shive admitted that Kearney told him that orange juice had been discovered in the warm room and that he decided to leave the orange juice in the room to see what would happen. On about October 12, the day before the incident described below that lead to the suspensions, Cybulski and Mann discussed the presence of the juice in the warm room. Mann told Cybulski that he suspected that the freezer employees were drinking the juice. Cybulski testified that freezer employees are supposed to be more responsible than other employees and for that reason supervisors did not make it a practice to closely supervisor them. But on this occasion, Mann asked Cybulski to "pop in and out" of the freezer a few times to make sure everything was as it was supposed be. Mann told Cybulski that if he saw anyone missing he should check the warm room to see if anyone was there drinking orange juice. Cybulski and Mann knew exactly how many containers were missing out of the case.[108] Sellers and Williams also testified that they had seen an open case of orange juice in the warm room.

On October 13 as the freezer employees completed the work for the day, they went to the locker room to "hang out." Moss came in the locker room and said that Mann had told him that the freezer employees should go into the warm room to hang out until it was time to leave because Shive and Kennedy were still at the facility. Shive and Kennedy were not usually in the warehouse at that late time. By this time, because they had actually stopped working in the freezer, they had removed their freezer suits and were dressed in their street clothes. Mitchell, however, was not present because he left the facility. While the four remaining freezer employees were there, Mann approached them and said that Shive and Kennedy were still in the building and that it would be best if they went back into the freezer area and remained there.[109]

The employees went to the freezer area and proceeded to go into the "warm room" described above. Shipman went in the room first, and then Sellers, Moss, and King came in the room at about the same time. The employees remained talking in the warm room for about 20–30 minutes. In the room was a box of small containers of orange juice. The box was ripped open and two empty small cartons of orange juice were located nearby. Shipman later admitted that at some point he drank the orange juice. However, the other freezer employees did not see him do so. Because there was no way to open the door from inside the

[105] These facts are based primarily on the testimony of King, who I found to be a credible witness, as corroborated by the other freezer employees. King's testimony differs from the other freezer employees in that he testified that they generally took their breaks whereas the other employees testified that they generally worked through their breaks and took that time at the end of the day. All testified that Mann was aware that they stopped working and went on a prolonged break when the work was done. I also do not credit Mann's testimony to the extent that it is inconsistent with the facts set forth above. Specifically, I do not credit his denial that he permitted the freezer employees to stop working once the work for that day had been completed.

[106] These facts are based on Kearney's credible testimony.

[107] This is based on Mann's testimony.

[108] This is based on Cybulski's credible testimony.

[109] These facts are based on the credible testimony of King, Moss, Sellers, and Williams. Mann testified that he saw the employees in their street clothes and told them to go back into the freezer. Apparently he was not surprised that they were out of their freezer uniforms before the end of the shift.

warm room to regain access to the freezer area, the employees kept the door propped open. At some point, the four employees engaged in horseplay with the result that the door opening from the warm room to the freezer closed shut. Unable to get back into the freezer area, and after pondering their dilemma, the employees decided that Sellers would exit the room through the door opening into the parking lot even though this meant that the alarm would be set off.[110]

Sellers opened the door and ran around parking lot and back into the building in an effort to open the door to the warm room and permit his coworkers to leave through that door. While he was doing so, he encountered Cybulski. Cybulski had earlier heard the alarm and had gone to investigate the matter. Cybulski asked Sellers where he was going, and Sellers replied that he was looking for Moss, who normally gave him a ride home. Cybulski said that the freezer alarm had been set off, and Sellers said that he would go with Cybulski to the freezer area. Together Sellers and Cybulski went to the warm room and Cybulski opened the door and discovered the three remaining employees. Cybulski then reported the matter to Mann and Shive who then went to the warm room and noticed the open orange juice containers. Later, the four employees were told that Shive wanted to talk to them individually.[111]

King encountered Shive outside the locker room. Shive held up an orange juice carton and asked if King knew anything about it. King answered that he did not. Shive asked if King knew who drank the orange juice. King again answered that he did not. King then punched out and left.[112] Moss then met with Shive. Shive said that he wanted to know who drank the orange juice and that he regarded it as stealing from the Company. Shive said that he would have the empty orange juice cartons finger printed if necessary. Moss said that he did not drink the orange juice and did not know who did. Shive did not raise the issue of the employees' presence in the warm room. Shive gestured towards the door and Moss left.[113] Sellers also met with Shive on that day. Shive asked who drank the orange juice. Sellers denied that he had done so and said that he did not know who did. Shive again asserted that he would fingerprint the empty cartons, and Sellers answered that Shive should do so because Sellers' fingerprints were not on the carton.[114] Next Shive spoke with Shipman. Shive said that they were considering calling the police. Shipman then admitted that he drank the orange juice.[115]

As Moss and Sellers were in the parking lot afterward, they met Shipman. Shipman told them that he had taken and drunk the orange juice.

That night Shive called Kennedy and reported what had occurred and expressed his anger over it. He later spoke with Roy and again expressed his anger. He said that he understood that it could constitute a terminating offense and he asked what Roy was going to do about it.

The next day Moss and Sellers arrived for work together and were brought into a meeting with Fisher and Kennedy. They gave their version of what had transpired the day before. Kennedy told them that they were suspended for "theft by association and stealing company time and being in an unauthorized place." Sellers denied that the warm room was an unauthorized area or that he drank or stole the orange juice. Kennedy said that the matter was in the hands of the officials at Aldworth headquarters in Massachusetts.[116]

That day King too was summoned to see Fisher and Kennedy. Kennedy asked what happened the night before. Kennedy admitted that King told him that the employees had removed their freezer uniforms and were in the break area "killing time" when "word" reached them that he and Shive were still in the building. Kennedy further admitted that King explained that they had been in the warm room several times before. King explained how the door had locked and Sellers had opened the alarmed door and ran around the facility to let them out. Kennedy indicated that it was a bad situation and Dunkin' Donuts was angry. Kennedy said that the employees had been stealing time, and King replied that Kennedy could call it whatever he liked. King asked if he was fired and Kennedy said that he was not, but that he was suspended until further notice. Fisher added that he spent a lot of overtime in the warehouse working on the union campaign and that King was a big union supporter. King credibly denied that he ever told Kennedy that he had seen Shipman drink the orange juice.[117] Kennedy and Fisher also interviewed Shipman. Shipman admitted that he drank the orange juice.[118]

When Mitchell arrived for work, Kennedy and Fisher told him not to clock in, that they wanted to talk to him first. It will be recalled that Mitchell was not involved in the freezer incident because he had already left work. Fisher and Kennedy

[110] These facts are based on a composite of the credible testimony of Moss, Sellers, and King. Shipman did not testify at the hearing.

[111] All witnesses agree that this generally was the sequence of events.

[112] These facts are based on the credible testimony of King.

[113] These facts are based on the credible testimony of Moss.

[114] These facts are based on the credible testimony of Sellers.

[115] These facts are based on the uncontradicted portions of the testimony of Shive and Mann that I conclude are credible. I do not credit the remainder of this testimony concerning their conversation with Shipman.

[116] These facts are based on the credible testimony of Moss and Sellers.

[117] These facts are based on a composite of King's credible testimony and certain portions of Kennedy's credible testimony. Based on my observation of the demeanor of the witnesses and the inherent probabilities of the entire record, I conclude that King's testimony is the most credible among the various witnesses concerning the events October 13 and thereafter. I consequently do not credit Kennedy's testimony that King and the others told him that days before the incident Mitchell had brought orange juice into the room, that Shipman had consumed the orange juice on the day in question, and that they admitted that they knew the warm room was an unauthorized area. I note that Fisher, who was present for this interview, did not corroborate Kennedy's testimony in this regard. I likewise do not credit Fisher's general, unconvincing, denial that he ever told an employee that the employee had been suspended for his union activity.

[118] This is based on Kennedy's testimony; as indicated above Moss and Sellers testified that Shipman admitted to them that he had drunk the orange juice. Again, Shipman did not testify at the trial. I do not credit Kennedy's testimony to the extent that he indicated that Shipman implicated Mitchell's involvement in orange juice matter.

asked Mitchell what time he had left work the day before and whether he knew anything about what had transpired that day. Mitchell answered that he did not. Fisher and Kennedy then explained that the other four freezer employees had locked themselves in the warm room and asserted they had been drinking orange juice. Fisher and Kennedy asked Mitchell whether he knew anything about who had been drinking orange juice. Mitchell said that he did not. Kennedy and Fisher said that the other four employees asserted that Mitchell was the "mastermind;" that he had put the orange juice in the warm room. Mitchell denied those assertions and claimed that the others would not have made such claims against him. Kennedy and Fisher then asked whether Mitchell was sure that there was nothing else that Mitchell could tell them about those events, and Mitchell said no. They said that they had to see Shive and report what had happened the day before. They then told Mitchell to clock in. At the hearing Mitchell denied that he put the orange juice in the warm room.[119]

On October 16, Sellers and Moss went to the facility and to pick up their paychecks. They again met with Kennedy and Fisher who told them that the matter was then in the hands of Dunkin' Donuts and that Dunkin' Donuts was thinking of pressing criminal charges because of the alleged theft of the orange juice. On this day, Moss told Kennedy that Mann had told the freezer employees on October 13 to kill some time in the freezer because there were management officials still at the facility.[120]

The following Tuesday Kennedy called the employees and told them that were suspended for 5 days and they were being reassigned from the freezer area to the dry goods section of the warehouse to work on the 7 a.m. to 3:30 p.m. shift.[121]

On October 20, Mitchell received a letter from Kennedy. The letter indicated that effective the next day Mitchell was being reassigned to work as a selector in the dry freight portion of the warehouse on the shift beginning 7 a.m. The reasons given for the reassignment were:

> 1. You were identified in our most recent investigation regarding the use of the unauthorized room off the freezer. This identification came from all 4 individuals who were involved in this most recent incident.
>
> 2. It was discovered through our most recent quarterly inventory that the freezer had significant shortages in a variety of products representing in excess of $10,000 in shortages, which brings us to the conclusion that the entire freezer crew has not been handling the inventory as well as should be expected.

When Mitchell received the letter, he called Kennedy and told him that he had talked to the four other employees and they denied telling Kennedy that Mitchell was the mastermind of the events in the warm room. Kennedy told Mitchell that he should call Roy if he had problems. At some point during the same day, Mitchell requested to take vacation the next week so that he could look for a new job. Later, Mitchell called Roy. Roy asked if the call was being recorded and then asked whether Mitchell had received the letter. Mitchell said that he did, but that the other four employees denied saying that he had put the orange juice in the warm room. Roy claimed that other employees had made that assertion. Mitchell asked to confront his accusers but Roy said that that was not possible. Roy then told Mitchell that vacation request had been approved. Mitchell then claimed that he was being harassed because of what happened on election day, but Roy said that he could not talk about that right then.[122]

On October 21 Moss, Sellers, Shipman, and King received identical letters from Kennedy that read in pertinent part:

> This letter is to confirm and document the verbal conversation we had regarding the very serious incident that took place on 10/13/989.
>
> On that date, you were found by supervision taking an unauthorized break in an unauthorized area; you were actually changed into your street clothes waiting for at least 45 minutes to 1 hour so that you could punch out from your shift. You were also found in a room with product that had been stolen from inventory and partially consumed.
>
> The severity of this incident is also paramount because it could have endangered all of you who were locked in this room if the emergency door had failed to open.

The letter then set forth the 5-day suspension, the change in shift times, and the reassignment to the dry goods area of the warehouse.

In the meantime, Kundrat had advised Setter, Shive, and Engard that Aldworth had decided to suspend the employees for 5 days. The Dunkin' Donuts officials expressed their anger at the decision because they felt that the discipline was not severe enough. Shive became so upset that he walked out of the discussion.[123]

Concerning the prior use of the "warm room," Mitchell credibly testified that he would go there to take a brief break and warm up and that he saw a number of other employees use that room, including Keith Cybulski before Cybulski became a supervisor. Mitchell was never told that the room was not authorized for employee use. Moss credibly testified that during the summer he was in the warm room with Cybulski while they were taking inventory. Cybulski admitted to Moss that when Cybulski was working as a freezer employee he used to go into the warm room to warm up.[124] Sellers credibly testified that he had seen employees in that room several times and that he was told by the selector who trained him that he could use the warm room to do his paperwork and warm up. Frederick Williams

[119] These facts are based on the credible testimony of Mitchell.

[120] These facts are based on the credible testimony of Moss and Sellers.

[121] I do not credit Kennedy's testimony that Sellers replied that he would "like to just bomb out on the selection accuracy process so he could just go collect unemployment" or that Moss replied that he also "wanted to bomb out of the selection accuracy program because he wanted to go back to school in January and he just wants to go collect unemployment."

[122] These facts are based on Mitchell's credible testimony.

[123] These facts are based on the credible testimony of Engard.

[124] Cybulski admitted that he was aware of the warm room shortly after the move to the facility in February.

credibly testified that while the new facility was in the process of being constructed Engard took some employees on a walk through the facility. Engard pointed out the warm room and told the employees that the freezer employees could use that room to warm up.[125] Williams also testified that Mann too told employees that they could use the warm room to warm up.[126]

When products are damaged Aldworth attempts to salvage them. If they can not be salvaged and repackaged then Aldworth supervisors may place the food product in the breakroom for consumption by the employees. Employees are not permitted to consume damaged food products without permission.

Turning to the matter of the alleged $10,000 shortage mentioned in Mitchell's letter, Aldworth offered no documentation to further describe the nature of this alleged shortage. Thus, I am unable to conclude whether or not the freezer employees were linked to the problem. I conclude that if the documentation had supported linking the freezer employees to the shortage, the documentation would have been produced. Moreover, Kennedy admitted, contrary to the letter, that the suspensions and transfers were *not* based in part because Aldworth thought the freezer employees were responsible for the shortage.

Analysis

Turning first to a preliminary allegation, the General Counsel alleges that Aldworth unlawfully told an employee that his suspension was related to his union activity. The General Counsel relies on the evidence that during King's suspension interview that Fisher commented to King that he spent a lot of overtime in the warehouse working on the union campaign and that King was a big union supporter.

This comment appeared to have no other purpose than to link King's suspension with his union activity. By telling that employee that his suspension was a consequence of his union activity Aldworth violated Section 8(a)(1). *Aero Metal Forms*, supra.

Turning now to the allegations that Aldworth unlawfully suspended the four employees and unlawfully transferred all five of them, I again apply the *Wright Line* analysis. I have already set out above my findings concerning the extensive union activity of the freezer employees. I have concluded above that Aldworth was well aware that the freezer employees supported the Union. In fact, it became clear that the freezer employees as a group were visible supporters of the Union and that they remained so even after the Union lost the election.

It should be recalled that I have concluded above that in mid-August Mann unlawfully threatened Mitchell with job loss; that in late August or early September Fisher and Mann unlawfully instructed Shipman not to wear his union T-shirt; that on September 17 Fisher threatened Sellers and Mitchell with imposing less favorable working conditions; that in early October Fisher unlawfully threatened to withhold King's boot allowance, that in late October or early November Henderschott unlawfully instructed Moss to remove his union T-shirt; and that on October 15 Fisher unlawful told King that his suspension was related to his union activity. This unlawful conduct was directed specifically at the freezer employees. I have also concluded above that Aldworth additionally violated Section 8(a)(1) and (3). This demonstrates Aldworth's animus towards the union activity of its employees. Aldworth argues that the record does not demonstrate animus because Aldworth's president, Ernest Dunn, assured employees at the June 27 meeting and in writing that there would be no reprisals taken against the employees because employees support the Union. The answer to that argument is that I have concluded that this commitment was not kept. *Warren Manor Nursing Home*, 329 NLRB 3 (1999). Aldworth also points to testimony by Roy that he told Moss and Sellers that after the election he wanted to "put this matter behind us." However, neither the Union nor the freezer employees agreed to do so.

Finally, the suspensions and reassignments occurred about 1 month after the election during the time when the Union was seeking to overturn the election results. Thus, timing supports the General Counsel's case. Having established the elements of union activity, employer knowledge, union animus, and timing, I conclude that the General Counsel has met his initial burden under *Wright Line.*

I turn now to determine whether Aldworth has established that it would have suspended the employees even if they had not engaged in union activity. I first address Shipman's suspension and transfer. In that regard, I have concluded that Aldworth discovered that Shipman had consumed orange juice. Contrary to the General Counsel's contention in his brief, I have also concluded that Aldworth's policy did not permit employees to consume food without first having permission to do so. Shipman had no such permission. His conduct amounted to petty theft; it certainly warranted discipline. There is no credible evidence that Aldworth or Dunkin' Donuts permitted other employees to engage in this conduct. I recognize that Aldworth did not specifically indicate that Shipman was being suspended and transferred for consuming the juice. I further recognize that Shipman's discipline was part of a package of conduct, the remainder of which I conclude below was unlawful. Nevertheless, the fact remains that unlike the other freezer employees Shipman engaged in misconduct and that misconduct was generally related to the reasons for his discipline. Under these circumstances, I conclude that Aldworth has met its burden of establishing that it would have suspended and transferred Shipman in any event. I shall dismiss those allegations.[127]

Turning now to the suspensions of King, Moss, and Sellers, I have concluded that they did not consume any juice and Aldworth had no credible evidence that they did. I have further concluded that they did not see Shipman drink the juice and played no part in that matter, and that Aldworth had no credible evidence that they had done so.

In the suspension letters Aldworth asserted three reasons to justify the discipline. First, Aldworth asserted that the employees were found taking an unauthorized break. However, I have concluded above that Mann had condoned the practice of the

[125] I have considered Engard's denial that he ever told Aldworth employees that they could use the room to warm themselves. I conclude that Williams' testimony is more credible.

[126] I therefore do not credit Mann's claim that the first time that he saw the warm room was about 2 weeks prior to the incident.

[127] Shipman's file indicates that he resigned his employment with Aldworth on January 4, 1999.

freezer employees taking an extended break at the end of the shift after the work for the day had been completed. Thus, the break was authorized. I recognize that the freezer employees initially sought to shield this practice from Mann's superiors, but it quickly became apparent to Kennedy and Fisher that the employees were claiming that they were acting in accordance with a practice condoned by their supervisor. Yet, Aldworth made no investigation to ascertain the truth of the assertion. Instead, it simply concluded that the break had been unauthorized. Next, the letters assert that the freezer employees were in an unauthorized area. However, I have found that Aldworth supervisors permitted the employees to use the room to warm themselves. Thus, the warm room was not an unauthorized area. Last, the letters assert that the freezer employees were found in a room with stolen product that had been partially consumed. This assertion falls of its own weight. There is no evidence that Aldworth would discipline employees merely for being in the presence of stolen goods under circumstances where there was no evidence that the employees were involved in the theft or consumption. In the letters, Aldworth pointed out that the freezer employees had placed themselves in danger if they had been unable to open the emergency door. However, it was Aldworth who permitted the employees to use the room and placed a heater there to make the room more comfortable. I note that Aldworth does not assert that the horseplay that the employees engaged in played a part in the discipline.

Aldworth argues that it is not enough to declare that the reasons for discipline were pretextual. Instead, Aldworth argues that it must be demonstrated why the good motive was not the sole reason for discharge, citing *NLRB v. Instrument Corp. of America*, 714 F.2d 327 (4th Cir. 1983). However, that case was decided before the Supreme Courts decision in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), and thus no longer has precedential value. Aldworth cites *Chicago Tribune Co. v. NLRB*, 962 F.2d 712, 718 (7th Cir. 1992), for the proposition that the General Counsel may not proceed:

> to construct a self-rising house of cards, garnering support for his subsequent findings that each succeeding disciplinary action was unlawful from his previous determinations that the preceding one or ones had been unlawful.

I find no reason in law or otherwise to dispute that admonition, and I have attempted to comply with it in this case. I recognize that not all discipline taken during the course of an election campaign is unlawful simply because an employer has exhibited union animus. Instead, I have examined each allegation on its own merits and, as shown above, I have dismissed several allegations of unlawful conduct made by the General Counsel.

Under these circumstances, I conclude that Aldworth has not established that it would have disciplined the employees even in the absence of their union activities. It follows that by suspending King, Sellers, and Moss, Aldworth violated Section 8(a)(3) and (1).

I now address the allegation that Aldworth unlawfully transferred the freezer employees to the dry goods area of the warehouse. As noted above, employees generally preferred to work in the freezer area because there were fewer items to select and the items there are lighter in weight. Also, the freezer employees worked under less supervision and were granted greater leeway on matters such as breaks. Thus, the transfer of the freezer employees to the dry goods warehouse area on another shift was an unfavorable action. The evidence described above has shown that the General Counsel has met its initial burden of showing that the transfers were unlawful. Moreover, the transfers were part and parcel of the 5-day suspension that I have concluded was unlawful. Aldworth relies on the same reasons to support the transfer, and I have already rejected those justifications. Aldworth directs me to *McDonald Land & Mining Co.*, 301 NLRB 463 (1991), for the proposition that an employer may lawfully transfer an employee who has been "goofing off." In that case the Board affirmed the judge's finding that the employer believed that the alleged discriminatee was found "goofing off when he should have been working." Id. at 463 fn. 2. Here I have concluded that the freezer employees were acting in accordance with a practice that allowed them to stop working when their scheduled tasks were completed. I conclude that the transfers were part of an effort by Aldworth to punish the freezer employees as a group.

Aldworth's decision to transfer Mitchell powerfully supports this conclusion. Mitchell left work on October 13 before the later events occurred. There is no credible evidence that he was involved in any way with the incident in the warm room. Aldworth had no lawful basis for transferring Mitchell. Aldworth's reliance on the $10,000 inventory shortage to justify Mitchell's transfer only serves to undermine its case. Again, there is no evidence, credible or otherwise, to connect Mitchell with the inventory shortage. Thus, that shortage could have been the result of any number of other causes. Next, if Aldworth felt that Mitchell or the other employees were somehow the cause of such a large shortage it has provided no explanation as to why it would consider the transfer as an appropriate punishment.

In summary, by transferring Moss, Sellers, Mitchell, and King Aldworth violated Section 8(a)(3) and (1).

5. 1-day suspension

On November 11, about 3 weeks after Sellers had been transferred to the dry goods section of the warehouse, he was present at a regular nightly meeting that was held with warehouse employees at the start of their shift. At this meeting Supervisor Mann said that employees had been taking cases of pens out of stock and using them. He said that if employees needed a pen they should ask a supervisor who would then get the employee a pen. Mann said that if employees were caught taking pens out of stock it would be considered theft. Sellers retorted, "Well, if I get caught stealing pens, do I get sent back into the freezer?" Dunkin' Donuts Supervisor Engard was present for this meeting. The following day Engard had a conversation with Roy and he discussed Sellers' comment. Roy asked what the supervisor had done about it and Engard reported that the matter had not been addressed. Roy said that he would take care of the matter.[128]

[128] These facts are based on the credible portions of the testimony of Engard and Sellers. I have considered Kennedy's testimony that Mann reported the incident to him; Kennedy's testimony makes no mention of any involvement from either Engard or Roy. Mann did not corroborate

The next day Kennedy informed Sellers that he did not appreciate Sellers' remarks, that he considered it insubordination, and that Sellers was suspended indefinitely. Sellers then received a letter from Kennedy that read:

> This letter is to confirm and document your serving of a one day suspension on 11/12/98, due to your insubordination and poor attitude towards supervision. On 11/11/98 during a shift meeting you had made comments that were unacceptable towards supervision. Insubordination and a poor attitude will not be tolerated by the company.
>
> Future incidents of this nature will result in further discipline, up to and including employment termination.

At another nightly meeting about a week before Sellers was suspended, employee Aaron Lewis was angry with some supervisors. He called them a couple of punks and said, "I can't believe this messed-up shit. This is bullshit. I don't respect any supervisors besides Dave Mann." Supervisors Cybulski, Juan Rivera, Henderschott, and Mann were present. Lewis was not disciplined for this outburst.[129] Other instances of similar conduct are set forth below in detail in the section of this decision dealing with Moss' termination, although those instances did not occur at a nightly start-up meeting.

Analysis

I again apply the *Wright Line* analysis. Sellers' union activity and Aldworth's knowledge of that activity have been described above. Moreover, Sellers had been identified as part of the prounion freezer group. The record further shows that Sellers himself had been subjected to unlawful treatment and that this was part of a broader picture of unlawful conduct. Moreover, Sellers' suspension came during the time that the Union was seeking to overturn the results of the election and on the heels of Aldworth's unlawful suspension and transfer of the freezer employees. The General Counsel has established the elements of union activity, knowledge, animus, and timing. I conclude that he has met his initial burden.

The evidence also shows that Sellers' remarks at the meeting were inappropriate. The resolution of this matter thus turns on whether Aldworth tolerated such conduct from others who were not identified with the Union or whether Aldworth was simply applying a uniform policy against tolerating such comments. Aldworth had supplied no evidence to show that it has in the past disciplined employees for such conduct. Aldworth points to language in its employee handbook that provides that employees may be disciplined for insubordination or discourtesy towards supervisors. However, the Aaron Lewis incident shows conduct that could be characterized as insubordination and discourtesy towards supervision, yet Lewis was not disciplined. It should be pointed out again that Lewis' conduct, like Sellers', occurred at a nightly start-up meeting. Additionally, as described below, there were numerous other instances where Aldworth tolerated insubordination and verbal abuse from its employees. As Roy himself had noted at the meetings he held, the employees were not "choir boys." Aldworth argues that in Sellers' case he was "making light of theft of client product shortly after the freezer incident where the theft and consuming of orange juice was the focus point of his discipline." The problem with that argument is that I have concluded that the earlier discipline against Sellers was unlawful. I conclude that Aldworth has failed to meet its burden. By suspending Sellers, Aldworth violated Section 8(a)(3) and (1).

6. Selection accuracy program

The General Counsel alleges that Aldworth implemented a new selection accuracy policy in violation of Section 8(a)(3).[130] Aldworth maintains a selection accuracy policy that measures the accuracy of the product picked by the warehouse employees for shipment to the retail stores. Under the policy that existed before October 12 the numbers of selection errors made during a calendar week were tabulated as a percentage of the total units picked during that week. The percentage was then assigned a number of points and when a certain number of points were accumulated progressively higher discipline was imposed. Specifically, under the old policy the percentages and points assessed were:

Percent Range	*Points*
.000–015	-2
.016–030	-1
.031–046	0
.047–061	+1
.062–076	+2
.077–091	+3
.092–106	+4
.107–121	+5
.122–and above	+6

As can be discerned from this system, when selection errors were low the number of accumulated points were reduced and thus employees had the opportunity to avoid ever-escalating discipline. However, the point total was not permitted to go below 0 or above 12.

The policy provided that each *increase* in point value would result in the next higher step in the following disciplinary progression:

> cautionary letter
> written warning
> 1-day suspension without pay
> 3-day suspension without pay
> 3-day suspension without pay and final written warning if improvement is not immediate employment termination

Unless the selector reduced his point level to zero and maintained it there for 4 weeks each increase in points would result in the next step in the disciplinary progression. It is important

Kennedy and, as indicated above, Engard reported that Mann did not react to Sellers' comments. Under these circumstances, I do not credit Kennedy's testimony on this matter. Rather, I conclude that Kennedy's participation came as a result of contact from Roy.

[129] These facts are based on the credible and uncontradicted testimony of Williams and Sellers.

[130] The General Counsel also alleges that the implementation of the new policy violated Sec. 8(a)(5). This argument is dealt with later in this decision.

to note that under this system the selector continued up the disciplinary ladder regardless of the number of points accumulated. This policy also provided that a selector who received four cautionary letters in a 12-week period would receive a 1-day suspension.

On October 12, Aldworth implemented a revised selection accuracy standard. The new policy was again based on the number of selection errors as measured by a percentage of total units selected during a calendar week. However, the percentages were compressed and the points reduced as follows:

Percent Range	*Points*
.000–.015	-2
.016–.030	-1
.031–.046	0
.047–.091	+1
.092–and above	+2

Under the new policy points were capped at six but now the selector could accumulate up to six negative points to be used as credits against future point accumulations. Also, employees who performed at the zero level for 6 consecutive weeks received one negative point. Under the new policy the number of accumulated points correlated directly with the discipline received in the following manner:

1 point	cautionary warning
2 points	cautionary warning
3 points	written warning
4 points	2d level written warning, as signed additional training
5 points	3d level written warning, as signed additional training
6 points	subject to termination

The policy also provided that a selector who received four written warnings within a 12-week period would receive additional training and evaluation.

Thus, the new selection accuracy policy differed from the old one in several respects. First, it reduced from six to two the number of points that could be accumulated in a 1-week period. This was an improvement from the employees' perspective. It also permitted employees to build up to 6 credit points and capped the total points at 6 instead of 12. It also eliminated the suspensions under the old policy and substituted them with warnings and training. These changes also were beneficial to the employees. However, under the old policy it would take at least 6 weeks for an employee to be fired because the employee had to go through each of the disciplinary levels. Under the new policy, an employee could be subject to termination in 3 weeks if, for example, the employee accumulated two points for 3 consecutive weeks.

As part of the conversion to the new program each selector received a memorandum from Kennedy indicating the number of points the employee would carryover from the old system to the new system and the stage of discipline those points placed the employee. Warehouse employee Toomey credibly testified that Kennedy told him of the new selection accuracy policy. Kennedy indicated that he felt that the employees would like the new plan and that it would be harder for them to lose their jobs.

Kundrat devised both the old and new selection accuracy policies. He gave the reasons why Aldworth made the changes. He explained that after the move to the new facility he discovered that the old policy could be improved upon in several ways, including "communication levels." Kundrat testified that he felt that under the old policy some employees felt that they were digging a hole so deep that they never would recover and thus they gave up trying. Kundrat provided no specific instances to support his perception. He also testified that the old policy had to be modified after the move because of the different layout and square footage of the new facility. He did not explain in further detail how these factors caused the old policy to become defective, nor did he describe how the new policy remedied those problems. Most importantly, he presented no specific instances under the old policy in which those concerns lead to the improper discipline of an employee. Kundrat pointed to aspects of the new policy to support Aldworth's argument that, in general, the new policy was more lenient to employees than the old one had been.

Analysis

The General Counsel alleges that the implementation of the new policy was an unlawful response to the employees' union activities. As a preliminary matter, the General Counsel argues that the new policy was harsher and thus designed to punish the employees. In fact, however, the new policy was harsher in some respects and more lenient in others. In support of his argument, the General Counsel points to documents that he contends show that the new policy resulted in an increase in the number of discharges compared to the old policy. Under the circumstances of this case, that argument misses the point. The test is not what new selection accuracy policy resulted in, but what Aldworth's motive was in implementing the new policy. Based on Kundrat's testimony as corroborated by Kennedy's comments to Toomey, I conclude that at the time of the implementation of the new policy Aldworth felt that it was creating a more lenient policy for its employees. However, this finding is not dispositive of the allegation.

Aldworth concedes, as it must, that by time of the implementation of the new policy it knew that its employees had engaged in activities in support of the Union. In addition, I have concluded above that Aldworth had reacted to that activity in a number of unlawful ways. Specifically, at the series of meetings held before the election Roy unlawfully solicited employee grievances and promised to resolve them. Among the grievances that Roy discovered at those meetings was that the warehouse employees felt that the selection system in the warehouse was unfair. Warehouse employees complained that it was too difficult to select the number of pieces that they were expected to pick. They complained that they had to work through break and lunchtimes in order to do so. Roy promised to look into these complaints and asked the employees to trust him to keep his word and give him a chance to deal with these complaints. The announcement of the new selection accuracy policy came about 3 weeks after the election. Although that policy did not deal with the number of items employees were expected to

select, it was an attempt by Aldworth to address the concerns of the warehouse employees. As Aldworth states in its brief, it devised the new policy in part because it "wanted to address the frustration of employees" with the old policy. The evidence thus shows that Aldworth implemented the new selection accuracy in fulfillment of its earlier unlawful solicitation of grievances and promise to rectify them, all in an effort to undermine support for the Union.

I have set forth above Kundrat's testimony containing Aldworth's explanation of why it decided to create and implement the new policy. I conclude that Kundrat's explanation is unpersuasive and I do not credit it. Kundrat's testimony, as previously explained, was lacking in specificity. The explanation had no logical connection to the changes made in the policy. It was unsupported by any documentary evidence. Kundrat's testimony was not otherwise generally credible. I conclude that by implementing the new selection accuracy program Aldworth violated Section 8(a)(3) and (1).

7. Terminations pursuant to selection accuracy program

a. Background

The General Counsel alleges that employees Mitchell, Sellers, King, Carl Nelson, and other similarly situated employees were fired pursuant to the unlawful new selection accuracy program. At the hearing the General Counsel specifically identified James Everidge, David Wolfer, Stanley Wallace, Wade Rosenburger, Gary Allen, and Pierson Bostic as the other employees[131] who were similarly situated and who were unlawfully terminated.[132]

As indicated above, the five freezer employees, including Mitchell, Sellers, and King, were reassigned to work in the dry goods area of the warehouse. They were given a 4-week period to adjust to working in that area; during that time their selection errors were not assessed against them. By letter dated November 18 Kennedy advised each of the former freezer employees the following:

> This letter is to confirm and document discussions held with you regarding your return to dry selecting activities since 10/21/98. Since that date (Aldworth) has extended a re-training period that has just recently ended. This period was to provide for a period of product recognition.
>
> If selection errors occur in the future as described under the company's accuracy policy, additional training and/or corrective action will be given in accordance to the described levels. (Aldworth) will provide whatever reasonable assistance it can to assist you in your assigned duties.

The 4-week adjustment period for these employees ended November 14.[133]

On November 27 Engard sent a letter to Roy complaining about how Aldworth had handled the five former freezer selectors. The letter indicated that during the 4-week training period those employees accounted for 116 shortages to the shops, and that their performance actually deteriorated during the course of the 4-week period. Engard complained that Aldworth did not implement a "managed retraining period" in that Aldworth did not process any warning letters to advise the selectors what discipline they would have received if their mistakes had been held against them. Engard also complained that Aldworth did not provide any counseling to the selectors and did not otherwise take any steps to reduce the number of errors made by them. Engard also indicated that due to a lack of communication the Aldworth supervisors felt that they had to handle those employees with "kid gloves." Engard ended the letter by stating that Dunkin' Donuts could not meet its committed service levels to the retail shops with this type of service from Aldworth.

b. Nelson's termination

Nelson worked at the facility from May to October as a selector in the dry goods area of the warehouse. On October 10, Nelson converted to the new system with five points at the third/final written warning level of the new program. This was the equivalent of the fifth step of the old policy. That is, under the old policy if Nelson was assessed any more points without first reducing his point total, he could be fired. For the week ending October 17 Nelson made additional selection inaccuracies sufficient to add two points to his accumulated total. Under the new program, as set forth above, this point total makes an employee subject to discharge. However, Nelson was allowed to work until October 21.

On October 19, Nelson spoke to Aldworth Supervisors Rivera, Henderschott, and Cybulski. Nelson was seeking to transfer to a freezer selector position and these supervisors told him that the position had to be filled by seniority but apparently someone with less seniority than Nelson had been selected to fill that position. The next day Nelson spoke with Aldworth Supervisor Mann and expressed his concern that he had not been selected to for the freezer position. Mann replied that they felt that Nelson had a problem with the accuracy of his selections. Nelson then asked to speak with Mann's supervisor, Kennedy. Mann took Nelson to see Kennedy. Also present in Kennedy's office were Dunkin' Donuts Supervisors Engard and Shive. Nelson again asked why the freezer position had not been filled by seniority and given to him. Kennedy replied that

[131] The General Counsel also alleged that Martin Cramer was unlawfully discharged under the new policy. However, the General Counsel does not make that contention in his brief. At the trial it appeared that Cramer was discharged during his probationary period. I conclude that the General Counsel is no longer contending that Cramer was unlawfully discharged.

[132] The General Counsel also identified nine other employees who unlawfully received discipline under the new policy. Because that issue only remotely affects the need for the bargaining order sought in this case, I shall leave that matter for final resolution in the compliance stage of this proceeding.

[133] The General Counsel contends that the November 18 letter shows that the adjustment period actually ended the following week. He uses this argument as a predicate to contend that Aldworth therefore, improperly relied on the selection errors made by these employees in the week ending November 14. I reject the General Counsel's argument. The facts clearly show that the employees were given a 4-week adjustment period; based thereon that period ended November 14.

the reason Nelson did not receive the position was because he had problems with selection accuracy. Kennedy said that he did not think Nelson was cut out for the job. Nelson asked if he was being fired and Kennedy said yes. Engard added that Nelson had been written up several times for selection inaccuracies and that the job was not cut out for him. Nelson protested that he had a good attendance record. He explained that the reason he wanted to transfer to the freezer was because he had heard that the position would be a little easier than his current position. He turned to Shive and asked whether anything could be done to work the matter out. Shive replied that there was nothing that could be done. The meeting then ended.[134]

Analysis

In *Great Western Produce,* 299 NLRB 1004 (1990), the Board held that the discharge or discipline of employees pursuant to an unlawfully implemented work rule are likewise unlawful. However, an employer is free to show that the discharge or discipline would have occurred even absent the unlawfully implemented work rule. *Consec Security,* 328 NLRB 1201 (1999). Here, because of the need to assess the impact that the unlawfully implemented new selection accuracy program had on the need for a bargaining order, I required that the parties litigate that matter now as opposed to leaving it for resolution in a compliance proceeding.

Aldworth argues that Nelson would have been terminated in any event under the old selection accuracy policy. As indicated above, Nelson was converted from the old system at a level just short of termination and he thereafter was assessed two more points due to selection inaccuracies. Thus, even under the old system Nelson would have been fired. The General Counsel argues that Nelson would not have been terminated under the old policy. His argument is that Nelson's conversion at five points did not accurately reflect the true level that Nelson was at under the old system. Thus, the General Counsel argues that the records in Nelson's file show that he actually stood at the fourth level, and not the fifth level, of the disciplinary ladder. However, I am unable to conclude whether it was the conversion that was inaccurate or whether Nelson's file simply does not fully document the level that he had actually attained. In any event, it is clear that Aldworth treated Nelson as being at the fifth level and the General Counsel does not contend that was unlawful. Once Aldworth regarded Nelson as being at the fifth level, even if by mistake, then even under the old system he would have been fired the next week when he was assessed additional points.

The General Counsel contends in his brief that Aldworth was lax in its enforcement of the old policy and that it more strictly applied the new policy. However, that legal theory was not pled in the complaint or fully litigated at the trial. Aldworth has not been given a fair opportunity to present evidence to meet this contention. I, therefore, will not consider that argument. The General Counsel also argues specifically that because Nelson had a history of selection errors under the old policy Aldworth would not have discharged him even if he reached the level calling for termination. This argument is entirely speculative and unsupported by the record. I shall dismiss this allegation.

c. Mitchell's termination

Mitchell began working under the new system without carrying over any points from the previous system. On November 21, Mitchell earned two points as a result of his selection errors. The next week he earned two more points and the following week yet two more points for a total of six points.

On December 8, Mitchell had a conversation with Aldworth Supervisor Henderschott. Henderschott gave Mitchell a letter concerning his inadequate selection accuracy. As Henderschott began to tell Mitchell that he could do a better job, Mitchell interrupted and said that management was out to get him. Henderschott asked what Mitchell meant by that remark, and Mitchell replied that Henderschott knew what he meant. Mitchell signed the letter and then left. The letter indicated that Mitchell had been assessed four points previously and for the week ending December 5 Mitchell was assessed two points for a total of six points and that accordingly Mitchell's employment was terminated. However, despite the letter Mitchell continued to work until December 14 when he received a call at home from Fisher and Kennedy. They told him that they had reviewed his selection accuracy records and he had reached the termination level and that his employment was terminated.

Analysis

Although Aldworth argues that Mitchell would have been terminated in any event, the record is clear that Mitchell would not have been terminated under the old policy. This is so because he was terminated after 3 weeks on the disciplinary ladder and under the old policy he would have received only a 1-day suspension for the same pattern of selection inaccuracies. Aldworth concedes as much in its brief. It argues, however, that in assessing whether Mitchell would have been fired under the old policy the selection inaccuracies that he made during the 4-week training period that he and the other former freezer employees were given should be counted against him. I reject that argument. The fact of the matter is that Aldworth decided to give Mitchell a 4-week period during which their inaccuracies would not be counted; it cannot now, after the fact, attempt to change the rules. In any event, Aldworth in fact did not rely on the inaccuracies during that period in deciding to terminate Mitchell. By terminating Mitchell pursuant to the unlawfully revised selection accuracy program Aldworth violated Section 8(a)(3) and (1).

d. Mitchell's reinstatement

Aldworth asserts that Mitchell is not entitled to reinstatement because he took the lists of the names and telephone numbers and gave them to the Union. These lists are regularly computer generated and are used by Aldworth to contact employees as

[134] These facts are based on the credible testimony of Nelson as well as the documents contained in his personnel file. I have considered Shive's testimony that he told Nelson that it was not his decision to make concerning whether Nelson should be fired. Here again Shive's testimony conflicts with an otherwise credible witness; I do not credit that testimony. I have also considered Engard's testimony that he did not participate in the conversation that occurred between Nelson and Kennedy; I conclude, however, that Nelson's recollection is fuller and more credible.

needed during the course of the day. At times drivers would call and obtain the telephone number of another driver, and Aldworth did not always determine the purpose of seeking the telephone number. The lists are thrown away when new lists are generated. The lists are not marked as confidential.[135]

As previously indicated, Mitchell took the list on two occasions. The first occurred while the employees were still located in the Thorofare facility and the second at the new facility in Swedesboro. On each of these occasions, Mitchell reached his hand through a window into the dispatch office area and removed the list from a desk. He did not enter the dispatch office area; however, he did not have permission from Aldworth to remove the list.

Fisher explained that it was not a "general practice" for employees to come into the dispatch office and take documents that are on the desks. He explained that employees were permitted to come in that office only if specifically authorized to do so. Roy credibly testified that employees are not free to remove Aldworth's working papers from the dispatch office. Roy also testified that after learning of Mitchell's conduct during the course of this trial he concluded that Mitchell should be terminated.

Aldworth points to the provision in its handbook that provides that the following is a terminating offense:

> Misuse or removal from the premises at any time, without proper authorization, employee lists, [sic] Company or client records, or confidential information of any kind.

Analysis

Aldworth argues that Mitchell is not entitled to reinstatement because it has shown that Mitchell would have been terminated for taking the lists. It contends that its backpay liability ends on the date that it acquired knowledge of the offensive conduct, citing *Marshall Durbin Poultry Co.*, 310 NLRB 68 (1993). The General Counsel's argues that Mitchell should not be denied reinstatement because Mitchell did not engage in misconduct and Aldworth has failed to show that it would have fired Mitchell for taking the lists. I note that the General Counsel does *not* argue that Mitchell's conduct was activity protected by the Act. This presents a close issue.

First, I dispose of some preliminary arguments to more narrowly focus the issue. Aldworth's argument that employees are not allowed to enter the dispatch office without permission is beside the point. Mitchell obtained the lists by reaching his hand through the dispatch window. The record is clear that the dispatch window is a location where employees are permitted to be and they regularly transact business *through* the window. Thus, Mitchell's location at the time he took the lists does support Aldworth's argument. The General Counsel argues that employees had requested telephone numbers from the list and they were given the numbers with no questions asked. This too is beside the point. That evidence shows that those employees *requested* the information; they did not simply take it. Had Mitchell requested and received the telephone numbers pursuant to that procedure the issue here would be a good deal simpler.

Aldworth argues that the lists were confidential. However, employees were never told this and the lists were not marked as such. On the other hand, it is not at all unreasonable to expect employees to understand that they are not free to help themselves to their employer's business related documents, even if those documents are not marked as confidential. I, therefore, conclude that Mitchell did engage in misconduct when he took the lists from the dispatch office.

Of course, it is well settled that an employer may not simply point out misconduct committed by an alleged discriminatee. Instead, an employer must establish not only that its has learned of the misconduct, but that it would have terminated the employee for the misconduct. This burden is not satisfied by after-the-fact conjecture. The fact that Aldworth has a rule that covers this matter is also insufficient to make Aldworth's case. Aldworth has not provided testimony that it applies its rules generally, or this rule in particular, in a manner that inevitably results in termination whenever an employee commits misconduct subject to termination. Had it done so, the General Counsel would have then have had the opportunity to challenge that testimony and I would then make appropriate findings in that regard. Nor has Aldworth submitted documentary evidence to support such a proposition. Under these circumstances, I am unwilling to make inferences to fill the evidentiary gap. I next consider Roy's testimony that Aldworth would have fired Mitchell for taking the lists. However, Roy did not testify that he would have fired any employee who had taken those lists, even if they were not used to support the organizing effort. That is to say, there is no testimony that Aldworth would have fired an employee who took the list to organize, say, a super bowl party or a baseball outing. To the contrary, I infer that it was the use of the lists to support the organizing effort that so upset Aldworth. Under these circumstances, I reject Roy's testimony.

Aldworth argues that requiring Mitchell's reinstatement would be construed as an invitation to employees to continue such misconduct and send a message to union activists that they could remove confidential information with impunity. No such invitations or messages should be culled from this decision. Mitchell's reinstatement is based on the facts of this case; it should not be read to shield other employees from lawful discipline.

I conclude that Aldworth has failed to meet its burden of showing that it would have terminated Mitchell for taking the lists.

e. Sellers' termination

Under the old selection accuracy program Sellers received a wide range of discipline from cautionary warnings to a 3-day suspension/final warning. However, he was always able to reduce his points to zero and avoid the final step—termination. Sellers converted to the new system with one point assessed against him.

For the week ending November 21, Sellers was assessed two points and received a cautionary warning. The next week Sellers was given two additional points. He was given a third writ-

[135] These facts are based on the credible testimony of McCorry, Leo, and Scott Tufts.

ten warning. Henderschott gave Sellers this warning. Sellers looked at the letter and said that he guessed that it meant that he was fired. Henderschott asked why and Sellers explained that the letter was backdated and he had shortages since that time. Henderschott said that it would not mean that Sellers would be automatically fired, that Sellers' file would be reviewed. Sellers asserted that he would be fired because Aldworth did not like any of the former freezer employees because they supported the Union. Henderschott replied that they were not worried about the union effort, that it was all over and done with. Sellers brought up the matter of his 1-day suspension, described above, and how Lewis had made similar remarks and was not disciplined.

A few hours later Kennedy called Sellers and told him that he was fired because he was in violation of the Company's selection accuracy program. Thereafter, Sellers received a letter indicating that for the week ending December 5 he was assessed two additional points for a total of seven points and that he was terminated.[136]

Analysis

Aldworth's argument that Sellers would have been terminated under the old policy is without merit. Sellers' pattern of selection inaccuracies would not have resulted in his termination under the old selection accuracy policy. Under the old policy, because he was at the fourth level on the disciplinary ladder, he would have received only a 3-day suspension. I conclude that by terminating Sellers pursuant to the unlawful new selection accuracy program, Aldworth violated Section 8(a)(3) and (1).

f. King's termination

King began working under the new system with no points carried over from the old program. For the week ending November 21 King was assessed a point for his selection inaccuracies and received a cautionary warning. The following week King was assessed two more points, for an accumulated total of three points. He received a written warning. At that point King told Henderschott that he wanted to see the paperwork that actually documented the inaccuracies because King did not believe that he had made that number of mistakes. A few days later, Henderschott showed King some paperwork concerning the inaccuracies. King examined the paperwork and concluded that it did not support the contention that he had committed the large number of inaccuracies that had been assesses against him. He pointed this out to Henderschott, but Henderschott merely shrugged his shoulders. King asked to see additional forms that set out the actual shortages, but Henderschott said that the paperwork that he had given to King was the only paperwork that he, Henderchott, had been given. King refused to sign the letter advising him of the written warning. The next week, the week ending December 5, King was assessed an additional point for a total of four points. He received a second-written warning. From that time until the week ending January 30, 1999, King did not receive any more letters indicating that he was assessed additional points. His point total remained at four. For the week ending January 30, King was assesses two more points for a total of six points. On January 29, 1999, Kennedy called King at home and told King that he had made significant shortages and that it was grounds for termination. King asked if he was fired, and Kennedy said yes.[137]

Analysis

The facts set forth above show that King was terminated under the new policy after 5 weeks in which points were assessed against him. Under the old policy this would have resulted only in a 3-day suspension. Thus, King would not have been fired under the old policy. By terminating King pursuant to the unlawfully revised selection accuracy program Aldworth violated Section 8(a)(3) and (1).

In his brief, the General Counsel argues that I erred in denying his motion to amend that complaint to allege that Aldworth terminated King, Mitchell, and Sellers in retaliation for their union activity. This motion was made on the last day of a trial that had lasted for weeks and was spread over months. Moreover, that matter had not been fully litigated in that Aldworth had not been given an opportunity to respond to that particular allegation. I denied the motion, and I reaffirm my ruling. In any event, I have concluded that all three employees were unlawfully discharged under existing allegations in the complaint. Under these circumstances, I also find it unnecessary to address the General Counsel's additional argument that the former freezer employees did not receive the training called for under the new policy.

g. Allen's termination

Allen converted into the new system with two points; this is at the cautionary warning level.[138] The next week he accumulated two more points and received a first-written warning. The following week he was assessed one more point, for a total of five; he received a second-written warning. Allen then received two additional points the next week and under the new policy he should have been terminated. For some unexplained reason Allen instead received a third-level written warning. The next week Allen was assessed two more points and a termination letter was prepared. However, he continued to work for several additional weeks before he was actually terminated. During those 3 weeks, Allen continued to accumulate additional points. Aldworth explains that because of temporary labor shortages it sometimes continued to employ employees destined for discharge until it found a replacement.

Analysis

Allen reached the termination level under the new policy after 3 weeks in which he was assessed points. Because he was converted at the equivalent of the first level under the old system, he had one more level to pass through before he could be terminated under that system. His record shows that he would have only reached 3-day suspension level under the old policy.

[136] These facts are based on Sellers' credible testimony. I again do not credit Kennedy's testimony that Sellers had again stated that he wanted to do poorly so he could collect unemployment compensation.

[137] These facts are based on King's credible testimony.

[138] The General Counsel again argues that Allen was improperly converted. For reasons previously stated I reject that argument.

Aldworth argues that because Allen was not terminated when he initially reached the termination level under the new policy, but instead was allowed to continue to work, that his additional work record should be used to show that under the old policy he would have been later terminated. I reject that argument. Allen was certainly aware of the new program and must have realized that his discharge was simply a matter of time after he reached the termination level. He was certainly working with a cloud over his head. It is unfair to assume that his abilities would not have been affected by these circumstances. More importantly, it is clear that Aldworth itself did not rely on the subsequent weeks. That is, even if the employees improved their record after reaching the termination level, Aldworth ignored this fact and terminated the employee anyway. I shall apply the standard that Aldworth itself applied. By terminating Allen pursuant to the unlawfully revised selection accuracy program Aldworth violated Section 8(a)(3) and (1).

h. Bostic's termination

Bostic was hired after the new policy was in effect. Records show that for the week ending March 13, 1999, he was assessed two points, but that point total was later canceled by a two-point credit. Bostic then was assessed one point for the week ending April 3, 1999, two more points the following week, and one more the next week, for a total of four points. He remained at that level until the week ending May 8, 1999, at which time he was assessed two additional points and was thus subject to termination. However, Bostic continued to work for a period of time and during that time he continued to accumulate points.

Analysis

At the point Bostic reached the termination level under the new policy he had received five levels of discipline. Under the old policy that would have resulted in a 3-day suspension/final warning for Bostic. Aldworth again argues that because Bostic was permitted to work after he reached the termination point, his subsequent work record should be used to establish that he would have been terminated in any event 1 week later under the old policy. For reasons previously stated I reject that contention. By terminating Bostic pursuant the unlawfully revised selection accuracy program Aldworth violated Section 8(a)(3) and (1).

i. Rosenburger's termination

Rosenburger converted into the new system with three points; this placed him at the written-warning level. The next week he accumulated another point and received a second-written warning. The following week he earned two more points but instead of being fired he received a third-final written warning. The next week he again was assessed two more points and a termination letter was prepared. Rosenburger continued to work for 2 additional weeks before he was actually terminated. During that time he continued to make selection inaccuracies that would have resulted in the assessment of additional points.

Analysis

Applying the same analysis, under the old policy Rosenburger would not have been fired at the point he reached the termination level under the new policy. This is so because he would not have completed each of the earlier levels of discipline needed before termination. Aldworth violated Section 8(a)(3) and (1) by terminating Rosenburger pursuant to the unlawfully revised selection accuracy program.

j. Wolfer's termination

Wolfer started the new program with three points at the written warning level. The following week he was assigned another point and received a second written warning. He thereafter was given two additional points, for a total of six. Under the new policy as written, Wolfer should have been terminated but he instead received a third final warning letter. The following week he was assessed two more points. He realized that he was going to be fired and told Aldworth that he would not be coming in to work. Aldworth treated that as a resignation.

Analysis

Wolfer too would not have been fired under the old policy. He had not gone through the requisite levels of discipline to warrant termination under that policy. The fact that he resigned in the face of imminent termination does not alter this result. By accepting Wolfer's resignation in lieu of termination pursuant to the unlawfully revised selection accuracy program Aldworth violated Section 8(a)(3) and (1).

k. The terminations of Everidge and Wallace

Everidge started the new system with five points; this placed him at the final-written warning stage. He accumulated two more points for the next week. As the General Counsel concedes, had he remained under the old system he would have been terminated. Interestingly, Everidge too continued to work, but unlike the others who did so his subsequent selection accuracy, if counted, would have resulted in a decrease of points such that could have permitted him to escape discipline. Everidge was terminated nonetheless. In this instance, Aldworth does *not* argue that I should consider this fact in determining whether Everidge would have been fired under the old policy.

Wallace started the new system with five points. Three weeks later, he was assessed two more points for a total of seven points. After continuing to work a period of time he was fired. Again, the General Counsel concedes that Wallace would have been terminated even under the old system. I shall dismiss the allegations pertaining to Everidge and Wallace.

8. Termination of Moss

Robert Moss worked for Aldworth as a helper and then as a selector first in the dry goods area and then, as described above, in the freezer area of the warehouse. He worked from March 1997 until his termination on November 19. On November 18, Moss was angry because he had not been selected to work overtime the next day. He raised the matter with Cybulski near the dispatch area, but Cybulski was indifferent. Moss said that the decision was "pretty f— up" and that the warehouse was also "pretty f— up." Cybulski then turned around and pointed to-

ward the timeclock. Moss asked if Cybulski was saying that he should clock out, and Cybulski said yes. Moss clocked out and left. The next day Moss received a telephone call from Kennedy who advised him that he was terminated for insubordination and using foul language. Moss protested that how could he be insubordinate when he was told to clock out and then did so. He also said that foul language was used every day in the warehouse.[139]

There is a memorandum from Kennedy addressed to Moss that reads:

> This letter is to confirm and document the verbal abuse conversation we had in regards to the incident that occurred on 11/19/98. On that date you were verbally abusive and insubordinate to supervisor Keith Cybulski and requested to be sent home after arguing with him. All of this was admitted by you on Friday 11/20/98. This type of conduct and behavior is unacceptable.

The memorandum went on to confirm Moss' termination. However, Moss credibly testified that he never received the letter and there is no credible evidence that the letter was ever sent. Although the memorandum claims that Moss requested to be sent home during the incident, no witness testified that Moss actually did so.

The new employee handbook provides: "Personal language will also reflect a professional and neutral work environment. The use of profanity is strictly prohibited at all times." Despite this employees regularly use profanity in their conversations with each other and with supervisors. Turning specifically to instances of profanity directed at supervisors, in May 1999 driver Farnsworth bought tickets to attend a Sunday concert the following month. At that time he requested to have the Monday following the concert as a day off because his Monday route began at 2:30 a.m. Aldworth Supervisor Houston agreed to the request. However, a few days before the concert Houston told Farnsworth that he would have to work that Monday. Farnsworth said it was bullshit and called Houston an asshole. Fisher was standing nearby when Farnsworth made these comments.[140] Farnsworth was not disciplined. Another incident involved Leo. Engard described how Leo was upset with a certain policy and told Engard that the policy was f— up. Leo was not disciplined. Engard conceded that it was not unusual for warehouse employees to say that things were f— up in the warehouse.

In about November, employee Aaron Lewis was unhappy with the work that he had been assigned. Lewis repeatedly told Supervisor Henderschott that "this fuckin' sucks" and "this is shit." Employee Mark Collins occasionally called Supervisors Juan Rivera and Keith Cybulski "assholes" when he did not like what they had said to him. On occasions Collins would also "get in the face" of a supervisor and angrily say that the job f— sucks, that the warehouse employees f— suck and were a bunch of pussies, and that he was not going to pick their pieces. On another occasion a supervisor told Collins to pick up cups that Collins had knocked over. Collins said that he was not going to pick up the f— cups, and he refused to do so. Instead, Sellers had to pick up the cups. On another occasion, Collins told Cybulski, "F— you, pussy" and that he would see Cybulski at the shopping mall where he would beat Cybulski's ass.[141] Collins was not disciplined for such outbursts. Supervisors also directed profanities to the employees.[142]

Aldworth argues that it tightened its policy concerning use of profanity prior to Moss' discharge. Sometime in November, Dunkin' Donuts hired a female checker to work in the warehouse area. At a startup meeting of warehouse employees that occurred around Thanksgiving Shive said that cursing would not be tolerated because they had hired the female checker and she would be working in the warehouse area. However, this meeting occurred after Moss was fired.[143]

In any event, use of profanity continued even after the female checker was hired. On about April 1, 1999, Supervisor Rivera asked employee Delvin Street why he had so many shortages. Street told Rivera, "Get the f— away from me, I don't need you to tell me what I did wrong, I know I did it wrong, go on, bother somebody else." Street was not disciplined for these remarks.[144] In April 1999, Farnsworth became frustrated because of delays caused by loading problems on his

[139] These facts are based on the credible testimony of Moss. I have considered the testimony of Cybulski that Moss said "f— Tim Kennedy, f— you, f— Dunkin' Donuts, f— Aldworth, f— everybody." I conclude that this testimony is exaggerated. I have also considered Kennedy's testimony that he received a report from Cybulski that Cybulski had a confrontation with Moss and that Cybulski feared for the safety of female employees in the office area. Kennedy said that Cybulski told him that Moss "went off on a rampage" using the, "f—" word repeatedly in front of "the girls in the office." However, there is no corroboration that office employees were present for this incident or that any safety issues were involved. I conclude that Kennedy too is exaggerating. I have also considered the testimony of Kennedy concerning the conversation he had with Moss. I conclude that Moss' version is more credible.

[140] These facts are based on the credible and unrebutted testimony of Farnsworth.

[141] These facts are based on the credible and uncontradicted testimony of Williams.

[142] These facts are based on the credible and unrefuted testimony of Sellers.

[143] Sellers credibly testified that this meeting occurred after Moss was fired. Likewise, although Williams initially testified that this meeting occurred before Moss was fired, in response to my questions, he clarified that it occurred between Thanksgiving and Christmas, which was after Moss was fired. Shive testified that sometime in the fall he spoke at a startup meeting and asked the employees to curb their profanity because he had hired a female checker. He was unable to specify more precisely when this meeting took place. Likewise, Engard and Kennedy were unable to state more precisely when this meeting occurred. Mann was also unable to specify when this meeting occurred. They claimed, however that Moss attended the meeting. It seems that Aldworth certainly had documents that would show when this checker was hired and that if those documents supported its argument that this meeting occurred before Moss was fired it would have produced them. I, therefore, infer that those documents do not support its position. Under these circumstances, and based on my observation of the demeanor of the witnesses and the character of their testimony, I conclude that this meeting occurred after Moss was terminated.

[144] These facts are based on the credible and uncontradicted testimony of Williams.

truck. He called the facility and spoke to Fisher. Farnsworth said it was a good thing that he had a wife and family because if he didn't he would come back to the facility and "shove this truck right up your fucking ass." Fisher told him to calm down and not to worry about the delay and return safely to the facility.[145]

Records show similar incidents. In December, an employee was instructed by a supervisor to perform certain work. The employee responded that "what the f— do you want from me." Later the employee told the supervisor, "I should take you outside and kick your f— ass." The employee was sent home for the day. This incident too occurred after Shive made his presentation to the employees concerning the need to reduce the use of foul language. There is no evidence that the employee received any further discipline. That same month an employee threw his paperwork through the dispatch office window. It landed on the floor and nearly hit a supervisor. When the supervisor asked what the problem was, the employee responded, "If you want to make something of this we could go outside." The employee was sent home and told not to come in the next day. There is no evidence that the employee received any further discipline.

Aldworth points to an incident involving maintenance employee Thomas Rich. In 1996 or 1997, Kearney criticized the manner in which Rich had painted the locker room. Rich then told Kearney, "F— you, you're a motherf—. I don't have time for this. Get off my ass." Rich made these comments in front of about six employees. Kearney sent Rich home and completed an incident report and forwarded it to Fisher. Rich was terminated for his remarks.[146] Aldworth also points to the case of selector Leonard Hoover. On August 20, Aldworth discovered that Hoover, instead of picking his own product, used product that another selector had already picked. Hoover received a written-cautionary warning. On September 24, Cybulski instructed Hoover to unload a truck. Hoover refused and so Cybulski unloaded the truck. During this conversation Cybulski called Hoover a "baby." Later that same day, Cybulski discovered that Hoover again had used product that another selector had already picked. He directed Hoover to select his own product and replenish the product that he had taken from the other selector. Hoover refused. Cybulski reiterated his instructions; he told Hoover to do as instructed or go home. Hoover again refused. Cybulski left to consult with another supervisor and then returned and again told Hoover to do as he had directed. Hoover then selected some, but not all, of the merchandise Cybulski had ordered him to select. Cybulski then instructed Hoover that either he complete the selection or go home. Hoover merely moved to another aisle and continued working. Cybulski again repeated his directions and took Hoover's paperwork so that he could not continue to work. Hoover told Cybulski to give him back his "f— paperwork." Cybulski said he would not do so until Hoover completed the selection. Finally, Hoover started to leave. As he did so he called Cybulski a "f— bitch" several times. Hoover finally completed the selection of product, and Cybulski returned the paperwork. As Cybulski left the area Hoover called him names, including "bitch." Cybulski then told Hoover to leave. Hoover answered that since Cybulski had called him a baby, he was calling Cybulski names in return. Several employees heard this exchange. Hoover finally left. He was terminated the next day for insubordination and using verbally abusive language towards a supervisor.

Analysis

I now examine the evidence to determine whether the General Counsel has met his initial burden under *Wright Line*. I have already described above Moss' union activity and Aldworth's knowledge of it. I have also set forth Aldworth's unlawful conduct directed at other employees and to Moss himself. Moss' termination occurred about 1 month after had been unlawfully suspended and transferred and during the time period when the Union was seeking to overturn the results of the election. Aldworth argues that the General Counsel has failed to meet its initial burden in that "Moss' union activity is questionable." Aldworth also implies that the General Counsel has failed to show that Aldworth knew of Moss' union activity. I disagree. Roy himself admitted that he was aware of the fact that Moss, as well as all of the other former-freezer employees, supported the Union, and that his knowledge of this fact preceded the discipline. I conclude that the General Counsel has met his initial burden.

I now examine whether Aldworth had shown that it would have discharged Moss even if he had not supported the Union. The language that Moss used in his conversation with Cybulski was clearly vulgar and disrespectful. But as Aldworth acknowledges in its brief, it must show more than the fact that it had a legitimate reason for disciplining Moss. Rather, it must show that it would have taken the same action in the absence of union activity, citing *Monroe Mfg.*, 323 NLRB 24 (1997). The key here again is whether Aldworth has shown that had terminated other employees under similar circumstances. The clear weight of the evidence shows that Aldworth has failed to do so. The many incidents described above show that it has tolerated a wide range of vulgar and disrespectful comments from employees directed at supervisors. In support of its case, Aldworth points to only two instances. The first occurred in 1996 or 1997. However, this incident occurred a year or two before Moss' termination and it was followed by many instances where similar conduct that did not lead to termination. Moreover, the testimony in support of this incident is lacking in sufficient detail to determine whether the circumstances were truly similar to Moss'. Aldworth also relies on the Hoover incident described above. That incident, however, actually tends to support the General Counsel's case. It shows how much insubordination and abuse Aldworth was willing to tolerate from its employees before it finally took disciplinary action. Aldworth also argues that Moss has a poor work record that included two written warnings and three prior suspensions. However, to the extent Aldworth is now arguing that it relied on Moss' prior record, it is actually undermining its own case because I have concluded that Moss' most recent suspension was unlawful. It

[145] These facts are based on the credible and unrebutted testimony of Farnsworth.

[146] These facts are based on the credible and uncontradicted testimony of Kearney.

follows that any later discipline that relied on the unlawful discipline is also unlawful. I conclude that Aldworth has failed to show that it would have fired Moss absent his union activity.

In summary, I find that by discharging Moss Aldworth violated Section 8(a)(3) and (1).

D. The 8(a)(5) Allegations

1. Bargaining order

a. Unit

As set forth above, on August 12 Aldworth and the Union stipulated to the appropriateness of a unit identical to the one described in the complaint. It was at Aldworth's insistence at the representation proceeding that the classification of helpers was excluded from the unit. It took the position helpers were casual or temporary employees. Although Aldworth originally admitted the unit allegation of the complaint, at the hearing I permitted Aldworth to amend its answer and deny that allegation. However, Aldworth is now estopped from asserting that the unit is inappropriate. *Red Coats, Inc.*, 328 NLRB 205 (1999). Moreover, Aldworth presented no evidence to show that the stipulated unit became inappropriate. I conclude, based on Aldworth's stipulation in the representation case and on the entire record in this case, that the unit alleged in the complaint is an appropriate unit as defined by Section 9(b) of the Act.

b. Majority status

On December 11, Aldworth sent the regional office the names of employees in the classifications of drivers, warehouse employees, yardmen, and helpers it employed as of July 28. That document listed the names of 59 drivers and 50 warehouse employees and jockeys, for a total of 109 unit employees.

At the hearing the General Counsel authenticated the authorization cards of 58 employees.[147] Aldworth challenged some of those cards on the ground that the solicitors improperly told the signers that the cards were for the purpose of securing an election. The test for this matter is clear and well settled. A card signer is generally held to the language on the card unless he was told that the sole purpose of the card was to obtain an election. *Jeffrey Mfg. Division.*, 248 NLRB 33 (1980). Here, as described above, the literature distributed by the Union clearly indicated that the cards would be used to obtain an election and to demand recognition based on majority support. Such representations accurately state the lawful purposes for which the cards could be used and in no way serve to cancel the clear language of the card. The language used by the union solicitors in obtaining the cards mirrored the language in the literature[148] and likewise is insufficient to invalidate the cards. No other card solicitor used language that would cause the card signer to ignore the clear language on the card.

At the hearing, Aldworth also challenged the cards on the grounds that at the time that they were solicited the Union told the employees that it was organizing in a unit that included helpers, yet the unit for which the bargaining order is now sought does not include that classification. Aldworth apparently felt that the employees might not have signed cards if they knew that the helpers would be excluded from the unit. I conclude this argument is entirely speculative and without merit; Aldworth does not renew this argument in its brief.

Aldworth also challenges some individual cards. At the time Gary Allen signed his card he worked as a helper, a nonunit position. At that time, however, the Union was seeking to represent the helpers as part of the overall unit. By the time the Union demanded recognition in June, Allen had become a warehouse employee. Aldworth argued that because he signed the card in the context of the campaign that included helpers, he might not have signed the card if he knew that helpers would later be excluded. I do not find this argument to be persuasive. As indicated above, the card unambiguously granted the Union the authority to represent him. There is no evidence that such a grant of authority was conditional and there is no evidence that the Union, by statements or conduct, canceled the clear language on the card. Accordingly, I conclude that Allen's card has been properly authenticated.

I conclude that on July 28 the Union had majority support among unit employees.

c. Demand for recognition

By letter dated June 28, the Union advised Aldworth that it represented a majority of employees in a unit of regular full-time and regular part-time truckdrivers, truckdriver helpers, warehouse employees, and receivers. The Union requested recognition. Aldworth replied by letter dated June 30; it declined to recognize the Union until after a Board-conducted election established its majority status.

d. Need for a bargaining order

In *Gissel*, 395 U.S. 575 (1969), the Supreme Court held that a bargaining order may be imposed when an employer commits unfair labor practices that tend to undermine a union's majority support and impede the Board's election processes. The Supreme Court indicated that if the Board determined that there was only a slight possibility of erasing the effects of those unfair labor practices and of ensuring a fair election through resort of the Board's traditional remedies, then a bargaining order is appropriate. The Supreme Court further indicated that in making this determination the Board may take into account the extensiveness of the employer's unfair labor practices in terms of their past effect on the election and on the likelihood of their recurrence in the future.

I have concluded that Respondents repeatedly violated the Act before and after the election. The Respondents responded to the organizational effort by an intensive, sustained, and unlawful effort to discover the grievances that lead the employees to seek out the Union and promise to adjust those grievances. The Respondents actually adjusted some of the grievances before the election and promised to adjust others after the election. The Respondents kept their word by thereafter unlawfully implementing a new selection accuracy program. The Respondents kept their word by hiring an operations manager, whose continued presence at the facility is a daily reminder to

[147] The names of those employees and the dates they signed the cards are attached as App. A.

[148] This is based on the credible testimony of Michalowski and Covely.

the employees of the Respondents' unlawful conduct. This entire course of conduct certainly would have a lasting effect in the minds of employees; traditional remedies would have only slight hope of erasing these effects. The Respondents' course of unlawful conduct included a wide and sustained range of other serious violations, including threats of discharge, plant closure, stricter working conditions, and loss of benefits. The effect of these threats on any future election is not likely to be erased by traditional remedies. The Respondents' violations also initially included the discharge of Leo and the suspension of McCorry. After the election the Respondents unlawful transferred and suspended the freezer employees. It then unlawfully implemented the new selection accuracy program and discharged seven employees pursuant to that program. This pattern of unlawful discharges, suspensions, and transfers will certainly linger in the minds of employees in any future election.

It should be noted that many of the unfair labor practices were committed by high-ranking officials, particularly Roy. This demonstrates to employees the depth of the Respondents' willingness to engage in unlawful conduct. Moreover, some of Respondents' unlawful conducted was repeatedly directed at the entire unit of employees. The cumulative effect of the Respondents' entire course of unlawful conduct only serves to heighten the probability that traditional remedies will not be sufficient to assure employees that they may, in the near future, openly assert the rights assured them under the Act.

Nor have the Respondents given any indication that they would not engage in such conduct in the future. I have already noted that the unlawful pattern of conduct continued even after the election. Many of those involved in the unlawful conduct, including Roy, Shive, and Kundrat, are still employed by the Respondents and are an everyday reminder of that conduct.

Aldworth makes a number of arguments concerning why a bargaining order is not appropriate in this case. First, Aldworth argues that turnover among its employees lessens the need for a bargaining order. The Board does not generally consider turnover in determining whether to issue a bargaining order. Rather, the Board assesses the need for such an order at the time the unfair labor practices were committed. *Salvation Army Residence*, 293 NLRB 944, 945 (1989), enfd. mem. 923 F.2d 846 (2d Cir. 1990). To do otherwise would permit an employer to benefit from the effects of its own unlawful conduct and result in the perverse effect of encouraging such conduct. *Overnite Transportation Co.*, 329 NLRB 990, 991 (1999). In any event, I conclude that employee turnover will not serve to sufficiently erase the lingering effects of the unlawful conduct to permit a fair rerun election. In that regard, while the Respondents do experience a high degree of turnover, it also employs a core of steady employees with whom the experience of the Respondents' unlawful conduct will remain. This experience will likely be shared with new employees. Indeed, during the Respondents' speeches to employees before the election Roy encouraged new employees to talk to the more senior employees concerning the election that had been conducted years earlier.

I conclude that the likelihood of assuring a free-rerun election in the near future is slight and that, on balance, the employee sentiment expresses through the authorization cards is better protected by the issuance of a bargaining order. By failing and refusing to recognize and bargain with the Union beginning July 28, Respondent violated Section 8(a)(5) and (1).

It follows that the Respondents also violated Section 8(a)(5) and (1) when it unilaterally implemented the new selection accuracy program and thereafter disciplined and discharged employees pursuant to that plan.

V. THE OBJECTIONS

As indicated above, the Union filed objections to the election held on September19. Those objections include assertions that Aldworth interfered with the election by the remarks Roy made at the various meetings held with employees described above. The objections also cover the discharge of Leo and the suspension of McCorry. It follows that those objections are meritorious and the election must be set aside.

CONCLUSIONS OF LAW

1. Aldworth and Dunkin' Donuts each is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. Aldworth and Dunkin' Donuts are joint employers of the unit employees.
4. Respondents violated Section 8(a)(1) of the Act by:

(a) Soliciting employee grievances and promising to adjust them in an effort to undermine employee support for the Union.

(b) Promising benefits to undermine the employees' support for the Union.

(c) Threatening employees that they will start with nothing when bargaining with the Union begins.

(d) Announcing and implementing the use of the issue report form to undermine employee support for the Union.

(e) Adjusting grievances in an effort to undermine support for the Union.

(f) Soliciting employees to report when they were being bothered or harassed by union activity.

(g) Promising to adjust grievances and t improve benefits in order to undermine support for the Union.

(h) Threatening employees with loss of their jobs if they selected the Union to represent them.

(i) Threatening to discipline or discharge employees if they support the Union.

(j) Threatening that it would be futile for employees to select the Union as their bargaining representative.

(k) Promising to create and creating a new operations' manager and promising to create a new dispatch supervisor position in an effort to undermine support for the Union.

(l) Inviting employees to bid on the newly created operations manager and dispatch supervisor positions in an effort to undermine support for the Union.

(m) Threatening employees with loss of their 401(k) plan if they select the Union as their bargaining representative.

(n) Promising employees that they would no longer have to deal with an unpopular supervisor in an effort to undermine

support for the Union. Instructing employees to remove their union T-shirts and union pins.

(o) Threatening to discharge employees for wearing a union pin. Threatening employees with unspecified reprisals if they support the Union.

(p) Threatening that the facility might close as a result of the employees' union activities.

(q) Threatening to impose less favorable working conditions on employees if they engaged in union activity.

(r) Coercively interrogating an employee about his union activity. Promising to refrain from discharging an employee if the employee abandons his support for the Union.

(s) Telling an employee that his suspension was a consequence of his union activity.

5. The Respondents violated Section 8(a)(3) and (1) of the Act by:

(a) Discharging Leo J. Leo and Robert Moss because they engaged in union activity.

(b) Conducting an audit of a route of William McCorry because he engaged in union activity.

(c) Suspending Doug King, Rob Moss, Jesse Sellers, and McCorry for 5 days because they engaged in union activity.

(d) Transferring Kenneth Mitchell, King, Moss, and Sellers because they engaged in union activity.

(e) Suspending Sellers for 1 day because he engaged in union activity. Implementing a new selection accuracy program in an effort to undermine support for the Union and by discharging Mitchell, Sellers, King, David Wolfer, Wade Rosenburger, Pierson Bostic, and Gary Allen pursuant to that policy.

6. The Respondents violated Section 8(a)(5) and (1) of the Act by:

(a) By refusing since July 28, 1998, to recognize and bargain collectively with the Union as the exclusive bargaining representative of the employees in the unit described above, while engaging in conduct that undermined the Union's support and prevented a fair rerun election.

(b) Unilaterally implementing a new selection accuracy program and discharging and disciplining employees pursuant to that program.

REMEDY

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

I have concluded above that Aldworth and Dunkin' Donuts are joint employers of the unit employees. As such they are generally jointly liable for any unfair labor practices. *Whitewood Maintenance Co.*, 292 NLRB 1159, 1163 (1989), enfg. sub nom. *World Service Co.*, 928 F.2d 1426 (5th Cir. 1991). In *Capitol EMI Music*, 311 NLRB 997 (1993), enf. 23 F.3d 399 (4th Cir. 1994), the Board crafted an exception to that general rule. The Board held that in situations where one employer merely supplies employees to another employer and otherwise takes no part in daily direction of the employees, does not participate in their oversight and has no representatives at the worksite, joint liability would not be automatically applied. Instead, in such a situation joint liability would be found only where the record permitted an inference that the nonacting employer knew or should have known that the other employer acted unlawfully and that the nonacting employer acquiesced in the unlawful conduct. Although the Board focused its decision on the 8(a)(3) aspects of the case, it applied its holding to the 8(a)(1) violations also. The question becomes whether the *Capitol* test is applicable to this case. I conclude that it is not. I have described above how Dunkin' Donuts maintains its supervisors at facility and how those supervised are involved in the day-to-day monitoring of Aldworth employees. Indeed, Dunkin' Donuts was intimately involved in the discipline found to be unlawful in this case and it contributed to the unlawful pattern of conduct by committing its own unfair labor practices. These facts preclude a finding that Dunkin' Donuts was uninformed, innocent bystander in these events. Under these circumstances, I conclude that Dunkin' Donuts and Aldworth are jointly liable for the unfair labor practices in this case.

The Respondents having discriminatorily discharged employees, they must offer them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

The Respondents having unlawfully suspended employees they must make them whole for any loss of earnings and other benefits, plus interest as computed in *New Horizons for the Retarded*, supra.

The Respondents having unlawfully transferred employees they must return those employees to the positions and shifts that they previously occupied.

The Respondents having unlawfully implemented a new selection accuracy program, they must rescind that policy and restore the selection accuracy program that previously existed. I have concluded that in some respects that new policy was harsher than the old policy. Accordingly, the Respondents must rescind the discipline of all employees who were disciplined under the new policy but who would not have been disciplined under the old selection accuracy policy. It must make those employees whole for any loss of earnings and other benefits, plus interest as computed in *New Horizons for the Retarded*, supra.

Because of the serious nature of the violations demonstrating a general disregard for the employees' fundamental rights, I find it necessary to issue a broad Order requiring the Respondents to cease and desist from infringing in any other manner on rights guaranteed employees by Section 7 of the Act. *Hickmott Foods*, 242 NLRB 1357 (1979).

[Recommended Order omitted from publication.]