

Westchester Lace, Inc. and Local 2052, NY–NJ Regional Joint Board, Unite and All-Lace Corporation, Party in Interest. Case 22–CA–21032

September 30, 1998

DECISION AND ORDER

BY MEMBERS FOX, HURTGEN, AND BRAME

On November 25, 1997, Administrative Law Judge Robert T. Snyder issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel and the Charging Party each filed a brief in opposition. The Respondent filed briefs in reply.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions² and to adopt the recommended Order as modified.³

In adopting the judge's conclusion that the Respondent violated Section 8(a)(3) and (1) of the Act when it subcontracted the work at its West New York, New Jersey facility and laid off the employees who worked at that site, we agree with the judge's finding that the General Counsel made a prima facie showing sufficient to support the inference that protected conduct was a motivating factor in the Respondent's decision. Accordingly, the burden then shifted to the Respondent to demonstrate that the same action would have taken place even in the absence of the protected conduct. *Wright Line*, 251 NLRB 1083 (1980), modified 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); *Manno Electric*, 321 NLRB 278 (1996). In order to rebut the General Counsel's prima facie case, the Respondent cannot simply present a legitimate reason for its action but must

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

The Respondent has moved to supplement the record with material purporting to show that its president, Leonard Edelson, and Key Gaetano, of M. Silverman Laces, Inc. (Silverman Laces), had approached counsel in the summer of 1995 in connection with a contract that was executed more than 1 year later. We deny the Respondent's motion because it does not involve newly discovered and previously unavailable evidence and because, even if the proffered material were admitted as evidence, it would not change our disposition of the case.

² We find it unnecessary to pass on whether the Respondent violated Sec. 8(a)(5) and (1) of the Act by failing and refusing to bargain with the Union about the effects of the closure of its West New York, New Jersey facility. The relief that would flow from finding such a violation would be cumulative.

³ We shall modify the judge's recommended Order in accordance with our decisions in *Indian Hills Care Center*, 321 NLRB 144 (1996), and *Excel Container, Inc.*, 325 NLRB 17 (1997). Since we are not adopting the judge's alternative effects bargaining remedy, we shall delete the last sentence of par. 2(a) of the judge's recommended Order.

show that the same action would have taken place even in the absence of the protected conduct. *Roure Bertrand Dupont, Inc.*, 271 NLRB 443 (1984).

The Respondent argues, attacking the General Counsel's prima facie case, that the judge incorrectly concluded that antiunion animus was a motive for the closure. We reject this argument, especially in light of the judge's finding, not excepted to by the Respondent, that the Respondent violated Section 8(a)(1) of the Act by threatening its employees with closure of its plant and its business if they continued to engage in protected concerted activity, namely, filing grievances and refusing to agree to modification of the existing contract regarding introduction of piece-rate compensation.

The Respondent further contends that the closure would have occurred irrespective of union activity because of the arrangement worked out between the Respondent and Silverman Laces referred to above. However, the judge pointed out that the arrangement was not formally settled at the time of the closure and that, in any event, Edelson had stated that he was prepared to close even if the Silverman Laces arrangement fell through, on the assumption that he would be able to find another subcontractor. This statement lends support to the view that the Respondent's reliance on the arrangement with Silverman Laces is pretextual.

Further, testimony at the hearing indicated that the Respondent was considering closing West New York in the first place because of production and scheduling problems that it believed were aggravated by some of the unit employees' contractual benefits. If this were the case, however, the Respondent could have turned to the Union for relief. Its failure to do so suggests that this was not the reason for the closure or at least that the Respondent was not interested in trying to avoid the problem by dealing with the Union. In sum, we find that the Respondent has not come forward with evidence sufficient to rebut the General Counsel's prima facie case.

In agreeing with the judge's conclusion that the Respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing to bargain with the Union about the closure, we note the Respondent's defense that the closure was a core entrepreneurial decision motivated solely by economic reasons and hence not bargainable. This defense is untenable in light of our finding that the closure was motivated by union animus and thus violated Section 8(a)(3) and (1) of the Act. *Joy Recovery Technology Corp.*, 320 NLRB 356 fn. 3 (1995), enfd. 134 F.3d 1307 (7th Cir. 1998) (an employer's subcontracting decision cannot be a legitimate entrepreneurial decision exempt from bargaining if antiunion considerations are at the heart of the alleged fundamental change in the direction of the corporate enterprise).⁴

⁴ See *Strawsine Mfg. Co.*, 280 NLRB 553 (1986); *Delta Carbonate*, 307 NLRB 118 (1992).

ORDER

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

1. Delete the last sentence of paragraph 2(a) and substitute the following for paragraph 2(d).

“(d) Within 14 days after service by the Region, post at its facilities in North Bergen and West New York, New Jersey, copies of the attached notice marked “Appendix.”² Copies of the notice, on forms provided by the Regional Director for Region 22, after being signed by the Respondent’s authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the respondent to ensure that the notices are not altered, defaced, or covered by any other material. 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 October 20, 1995.”

2. Add the following as paragraph 2(f).

“(f) Within 14 days from the date of this Order, remove from its files any reference to the unlawful layoffs, and within 3 days thereafter notify the employees in writing that this has been done and that the layoffs will not be used against them in any way.”

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

MEMBER HURTGEN, concurring and dissenting in part.

I agree with my colleagues that the Respondent’s closure of its West New York, New Jersey facility violated Section 8(a)(3) and (1) of the Act. I find it unnecessary to pass on whether the decision to close violated Section 8(a)(5). In particular, I am not necessarily persuaded that the decision was a mandatory subject of bargaining. In my view, the fact that a closure decision is discriminatorily motivated does not per se place the decision into the mandatory subject area. In any event, I do not pass on this 8(a)(5) issue because the remedy for the 8(a)(3) violation (reopen, reinstate employees and make them whole) provides an adequate substantive remedy for any 8(a)(5) violation that might exist.

Finally, I agree with my colleagues that we need not reach the question whether the Respondent unlawfully failed and refused to bargain with the Union over the effects of the closure. If it were necessary to reach that issue, I would not rely on the judge’s analysis of it.

APPENDIX

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

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

Section 7 of the Act gives employees these rights.

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

WE WILL NOT threaten our employees with closing our business and our plant if they continue to engage in protected concerted activity.

WE WILL NOT discriminate in regard to hire, tenure, and terms and conditions of employment to discourage membership in the Union by terminating our scallop cutting department and all of its operations at our West New York facility, subcontracting those operations and laying off the employees who were employed at that facility.

WE WILL NOT fail and refuse to bargain in good faith with Local 2052, New York-New Jersey Regional Joint Board, UNITE, the exclusive bargaining agent of our employees in the appropriate bargaining unit described below, by terminating our scallop cutting department and all of its operations and laying off the employees who were employed at that facility, without affording the Union an opportunity to bargain and without bargaining with respect to this conduct and the effects of this conduct on the employees in the bargaining unit.

In our Separating, Winding, Scalloping, Cutting and Dyeing Department—all employees in the plant excepting general office help, salaried Foremen, salesmen and heads of departments. The aforementioned exceptions do not include receiving or shipping clerks.

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

WE WILL reestablish and resume our separating, winding, scalloping, cutting and dyeing department and all of its operations as it existed prior to October 27, 1997, at our West New York facility and WE WILL offer immediate and full reinstatement to our unlawfully laid off and terminated employees previously employed at that facility to their former jobs, or in the event their former jobs no longer exist, to substantially equivalent jobs, without prejudice to their seniority or other rights and privileges,

and make them whole for any loss of earnings they may have suffered by reason of our unlawful conduct, with interest.

WE WILL, on request, bargain in good faith with the Union as the exclusive bargaining agent of our employees in the above-described unit, as to our decision to close the West New York facility and subcontract the scallop cutting department and all of its operations performed there and as to the effects on employees of subcontracting that work and, if an understanding is reached, embody such understanding in a signed agreement.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful layoffs and WE WILL, within 3 days thereafter, notify all of the unlawfully laid-off employees in writing that this has been done and that the layoffs will not be used against them in any way.

WESTCHESTER LACE, INC.

William E. Milks, Esq., for the General Counsel.

Larry M. Cole, Esq. (Cole & Cole, Esqs.), for the Respondent.

Larry Magarik, Esq. (Kennedy, Schwartz & Cure, P.C.), for the Charging Party.

DECISION

STATEMENT OF THE CASE

ROBERT T. SNYDER, Administrative Law Judge. This case was tried before me on December 2, 4, and 5, 1996, in Newark, New Jersey. The complaint alleges that Westchester Lace, Inc. (Westchester Lace or Respondent) threatened its employees with closing of its business if they continued to engage in protected concerted activity in violation of Section 8(a)(1) of the Act, and closed its West New York plant, laying off the employees employed there who were primarily in the scallop cutting department and contracted out the work performed by these employees without affording Local 2052, NY-NJ Regional Joint Board, UNITE (the Union), which the Union represented its rank-and-file plant employees under a collective-bargaining agreement then in effect, an opportunity to bargain with it with respect to its decision to close and contract out the work and the effects of this conduct, in violation of Section 8(a)(1) and (5) of the Act. This conduct of laying off the employees in its scallop cutting operation is also alleged as discriminatory conduct in violation of Section 8(a)(1) and (3) of the Act.

Respondent filed timely answer denying the acts alleged as unfair labor practices. It also denied the Government's entitlement to the relief sought in the complaint that it be required to reinstate its scallop cutting operation as it existed prior to the closing and contracting out.

The parties were provided full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. Although provided with formal notice of the proceeding, Party in Interest All Lace Corporation did not appear or participate in the proceeding. Posttrial briefs have been filed by counsel for the General Counsel, Respondent, and the Union and they have been carefully considered. On the entire record in the case, including my

observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACTS

I. JURISDICTION AND LABOR ORGANIZATION STATUS

Respondent, a corporation, with offices and places of business in North Bergen and West New York, New Jersey (Respondent's facilities), has been engaged in the business of manufacturing lace. During the 12-month preceding issuance of the complaint herein, on April 20, 1996, the Respondent, in conducting its business operations described, sold, and shipped from its New Jersey facilities goods valued in excess of \$50,000 directly to points outside the State of New Jersey. Respondent admits, and I find, that at all material times, it has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Respondent admits, and I also find, that the Union has been a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background

Respondent is a manufacturer of lace. For many years it has operated in North Bergen, New Jersey. These facilities include a main plant at 3901 Liberty Avenue and a second facility at 3200 Liberty Avenue, also known as the Hill. From 1973 to 1994 it operated a knitting facility in Puerto Rico. Since 1959, the Union has been the collective-bargaining representative of its rank-and-file production employees at its facilities in New Jersey. The Puerto Rican plant was not unionized.

Sometime early in 1993 Respondent opened a third New Jersey facility in West New York, New Jersey. Money was invested in preparing the building and setting up machinery to produce a form of lace known as narrow band with scalloping.

On and effective November 1, 1993, the Respondent and the Union entered two separate collective-bargaining agreements, running to October 31, 1996. One covered all of the production employees in the North Bergen facilities who worked in Respondent's knitting department. The other covered all of the production employees who worked in Respondent's West New York facility where they worked in Respondent's separating, winding, scalloping, cutting, and dyeing departments (The West New York agreement). Both agreements provide for Respondent's right to discipline or discharge for just cause and the Union's right to submit such discharge to final and binding arbitration, with authority in the arbitrator to determine the question and extent of retroactive wages or backpay and the right of the Union to strike or sue to enforce an arbitrator's award which Westchester Lace has failed to carry out within 5 days from the date of notice of the award. Workload disputes are also subject to arbitration, and changes in present workload shall be made either by mutual agreement or by an arbitration award (sec. 2.4(b)).

The agreements also provided for equal distribution of work among workers in each classification, layoff, and recall on the basis of seniority in each department with replacements done by departmental seniority, provided the worker is capable of performing the job. The regular workweek consists of 8 hours per day, 5 days, Monday to Friday, with time and one-half paid above 8 hours, and work on Saturday, and double time for Sunday.

Also, under the West New York agreement, employees ordered to report to work shall be guaranteed 4-hour pay and no employee shall be paid for less than 4 hours when working. Also, foremen, dyers, or employers shall not be permitted to do any work at any time in the plant to deprive a worker of any work hours. The agreements also provided for shift premium pay for employees assigned to second or third shifts.

The minimum rates of pay provided for in the West New York agreement ranged from a low of \$7.015 per hour for shipping and packing and lace separating, through \$7.415 to \$7.965 for dye house employees and \$7.415 for employees in the finish room, and from \$6.95 for scallop cutting department, straight cutting machine operators, to a high of \$8.70 for scallop cutting machine operators. This compares to a range running from a low of \$7.865 to a high of \$11 for employees under the North Bergen agreement.

Both agreements also provide for 13 paid holidays, paid vacations running from 1 week to more than 2 depending on years of service, hospitalization, and life insurance plan maintained substantially at Respondent's sole cost and participation in the Union's dental plan. The parties also agreed under the West New York agreement that effective November 1, 1992, Respondent would start a pension plan or Keogh Plan with a contribution of 5 cents per hour, per member.

Since the West New York facility opened in 1993, Respondent had subcontracted some of the scallop cutting work but had never subcontracted all of the work, or closed the facility. While employing about 200 bargaining unit personnel in its North Bergen facilities, by October 1995, Respondent employed 23 employees in its West New York facility.

B. The Facts and Circumstances Surrounding Respondent's Contracting Out of its Scallop Cutting Department and Termination of its Operations at the West New York Facility

Edgar de Jesus, assistant manager and organizing director of the Union, who was responsible for overseeing the collective-bargaining agreements with Respondent, received a letter late in the evening of October 18, 1995, directed to him from Leonard Edelson, president of Respondent. In the letter, dated October 16, Edelson informed de Jesus that, "[t]he Company has made a determination to permanently discontinue the scallop cutting department effective at the close of business on October 27, 1995. This will mean a permanent lay off for the employees in that department." In a separate paragraph, Edelson informed de Jesus, "If you wish to discuss this decision, I would be please [sic] to meet with you at any time you request."

De Jesus testified that neither he nor the Union had received any prior notice of the closing of the operation at West New York and that this letter came as a complete surprise. In fact, on the very same date, October 18, that de Jesus received the Company's notice he had prepared and forwarded a letter to Edelson requesting a formal labor-management meeting regarding two issues. The first concerned a continuing problem of "car theft at the main (North Bergen) facility. The second issue involved a concern that the employees at the West New York facility have regarding their job security and the appearance that there is an increase in jobbing out work. De Jesus stated, "[T]he Union would like to know if there is any new business plans in effect that may affect the job security of our members." De Jesus listed the names of five stewards he requested be present at a meeting which he requested be held on November 8 in North Bergen.

The following morning after receiving the letter, Thursday, October 19, de Jesus telephoned the Company and got Edelson on the line. De Jesus said he had in his possession this letter, and could Edelson explain it. De Jesus said the Union was protesting this letter and how is it that he is closing the factory with no discussion and with no notice while the Company and the Union were involved in negotiations on an incentive piece-rate system at the Company. De Jesus explained at the hearing that these negotiations were over a proposal the Company had made for an incentive program covering the work performed at the West New York facility.

According to de Jesus, Edelson responded that the Company just made a decision to close the West New York facility. That it was a done deal. When de Jesus protested he couldn't do it like this Edelson said, "[W]ell, it's done." He said that the work force at West New York had given him too many headaches. There were too many grievances filed. The people were not accepting the piece rate proposal that they put forth. At this point he just had to make a decision to close. That it was not cost effective and it was too many headaches.

De Jesus protested that the way he was proceeding was absolutely wrong. He also told Edelson about the letter he had sent him requesting a meeting because of layoffs and now Edelson was closing the whole factory down. De Jesus said he needed to meet right away. They agreed to meet the next morning, October 20, at the company offices.

At this meeting, representing the Union were de Jesus, Judy Cortez, president of Local 2052 and chief steward at the West New York facility, Dionisio Melo, vice president of the Local and a member of the steward's committee at Respondent, and Carlos Bernard, chief steward of all of Westchester Lace. Both Melo and Bernard worked at North Bergen. Respondent was represented by Edelson and a woman assistant, Dale Polace.

The union delegation announced its protest of the decision to close, but requested an explanation. Why was he doing this and what was happening. Edelson proceeded to explain that they've had it with the problem at West New York. They've had it with grievances. They've had it with the fact that workers would not agree to an incentive piece-rate proposal they had made, and the work would be done cheaper elsewhere. With this comment the record reflects that Edelson, who was present, in an outburst showing a lapse of discipline and judicial decorum, spoke up to say, "I never said that." (Tr. 33.) De Jesus went on to report that Edelson commented that the workers were a headache, they've closed the factory before in Puerto Rico and brought the operation here and they are ready to close it here and they're doing it now, and they wanted the Union to stop being a headache.

When De Jesus asked what grievances are you talking about, Edelson could not identify any of them. De Jesus noted that the parties had spent the past 7, 8 months negotiating an incentive program and had engineers going to the factory and now all of a sudden he is closing the factory with no notice. De Jesus commented that with the closing scheduled for the 27th, this was only 5 workdays' notice. At this point de Jesus said that Federal law generally respects a 60- to 90-day notification of the work force if your going to intend to close a place, and that the Company was not doing this. De Jesus also said that Edelson is committing an act that hurts not only West New York, but it sends a chilling message to the entire factory. De Jesus asked, "[A]re you saying you could do this whenever you feel

like it?" Edelson said, "[Y]es, if I have to close down the whole building, I'll close down the whole facility."

When de Jesus asked why they couldn't have enough time to discuss this, because we've been discussing other issues anyway, Edelson noted that if he had given advance notice it would have allowed for workers to sabotage production. De Jesus, incredulous, replied, "[S]abotage production, what are you talking about?" Edelson now made an accusation that workers at the factory the previous day stole a copy machine. To de Jesus' knowledge, no employees were ever accused and no police report was ever filed.

De Jesus remonstrated that if closing was an option it was his obligation to have been discussing it with the Union. It was never discussed. Edelson repeated the closing was a done deal. There is no more discussion. Under no circumstances was he going to reopen this factory. He also revealed that he was subcontracting to a company called All-Lace. Edelson did not disclose the nature of any agreement with All-Lace or its owner or the fact that under a proposed understanding which would be executed some 6 or 7 months later, he, Edelson, would become a 50-percent owner of Silverman Lace, whose co-owner also owned All-Lace.

De Jesus voiced his view that his actions were going to be viewed as an attack on the entire work force, because he is sending a message that he could close the factory whenever he felt like it. Edelson affirmed that he could close the factory whenever he feels like it and the Union is not going to stop him from doing that and that if de Jesus and the stewards persisted in being a headache he was going to close the factory, the entire operation. Edelson asked the union delegation to be cooperative. De Jesus took this to mean that he was asking the Union to accept whatever decisions the Company made.

As the meeting closed de Jesus again protested the closing of the factory and urged it to remain open, especially given the fact that the same work was still being done but now with a nonunion facility. It was not that the work doesn't exist. The work existed, but it's just that our members are not doing it because we're a headache. We file too many grievances. We oppose his incentive program the way he proposed it because we were negotiating.

Before closing the meeting, de Jesus mentioned issues which would have to be discussed and negotiated, such as severance if the closing went ahead in spite of the Union's protest. Edelson told the union delegates, flat out, there's no severance. There is no recall. This is a done deal, it's not going to be turned back. de Jesus said that was not acceptable but the delegates would have to meet with their membership and pursue what's going to happen to these workers who were going to be without benefits. Edelson mentioned that he would be willing to retain the present employees on the medical plan. What this meant was that the Respondent actually continued coverage of the medical plan for 1 month after the closing so that employees could file for continued coverage on their own under COBRA.

The parties met again, pursuant to agreement on Wednesday, November 8. This was the date de Jesus had originally requested for a meeting to discuss lay off matters at West New York before he received notice of the closing.

On November 8 the same participants for each side met, but in addition Ted Hoffman, Respondent's director of manufacturing, attended a part of the meeting, and on the Union's side, Melo was absent. By this date, the West New York facility had

been closed a week and a half, and all of the 23 employees had been terminated.

The Union's position, expressed at this meeting, was that Edelson should immediately recall everybody and that operations should be resumed. It was wrong that Edelson sent the work to All-Lace and it was wrong that this group of workers who were presently involved in a discussion on an incentive program should be thrown into the streets. Edelson responded it was completely out of the question. It's a done deal. There is no discussion on this. Edelson repeated what he said previously, that this grouping of workers are a headache. They file too many grievances. They would not agree to the piece rate. And he could get this work done cheaper somewhere else. He said times are rough, competition is hard and he cannot continue to run his operation and he demanded that the Union cooperate with him.

De Jesus protested that the Union had been cooperating. He mentioned he actually pushed these workers—this whole building—to accept even the concept of an incentive program and piece rate, that was a struggle for him to convince the workers to do that. De Jesus went on, the grievances you talk about, in fact in that whole period there were probably no more than two or three official grievances ever filed.

Edelson now got upset and said, "[L]ook, if the Union continues to be a headache I'll just close the whole facility down." De Jesus accused Edelson of threatening them with closing the whole factory down because we are trying to protect people's jobs.

It became obvious to de Jesus at this meeting that he was not going to reverse the decision to contract out the work to All-Lace. Edelson disclosed that he had some form of relationship with the Company Silverman and All-Lace, which could be that of partial owner and that there had always been subcontracting to All-Lace. But, as de Jesus pointed out, the Westchester Lace employees were not doing the work and All-Lace is. De Jesus now stated that if he refused to recall the people then we would have to enter into discussions of severance pay and for him, de Jesus, to get back to the workers. Edelson said forget it. No discussion on severance. The issue at West New York was closed. He was not going to consider that at all. The only thing he would do was make sure that whatever he was obligated to do under the contract up until that moment he would comply with. He was not going to do anything outside of that and there was no discussion for it.

Following the Union's filing of its initial charge in this proceeding on November 17, 1995, a few weeks later in early December shortly after Edelson received a copy of the charge on November 29, Edelson left a phone message for de Jesus. The following Monday, when de Jesus returned the call, Edelson asked him, "Eddy, what are you doing, have you talked to the Union lawyers?" De Jesus said he had. Edelson asked, "[H]ow come your doing this, why are you filing this charge, what is it you're trying to do?" De Jesus said, "[W]ell, Mr. Edelson, you forced us into a corner. You don't want to discuss anything with us. You don't agree that it was wrong. The impact it has on the whole factory." Edelson then said, "[Y]ou know, the Union won, the Union always wins." When de Jesus asked what he meant, Edelson replied, "[Y]ou know what I mean." When de Jesus asked, does that mean you're going to call people back or negotiate severance, Edelson didn't respond, but kept repeating, the Union won.

In a second phone call Edelson made to de Jesus that day, Edelson told him I have my original position, there is no discussion, our position stands and I'm giving you notice right now that by next October, if the Union continues to give me this headache, the factory will be closed.

By the time of the hearing in December 1996, the North Bergen facilities remained open, but the scallop-cutting work was still being done by All-Lace.

Further examination of de Jesus by union counsel disclosed that the West New York facility had previously employed close to 40 employees. Of the 23 employees who were laid off on October 27, seniority with the Company ranged from 18 to 10 years to 3 years. On the topic of recall rights which de Jesus had raised, particularly at the second meeting, Edelson said even if he did recall any employees, it would not be in accordance with seniority. It will be recalled that the collective-bargaining agreement in effect at the time required laid-off employees be recalled in each department on a strictly seniority basis.

Note has been taken of the Respondent's efforts to establish piece rates at the West New York facility, the Union's refusal to the date of closing to agree to the Respondent's proposal and de Jesus attributing to Edelson references to the Union adamancy on this issue when explaining to de Jesus why Respondent made the decision to close the facility and contract out the work.

The Respondent's piece rate proposal had its genesis in an arbitration proceeding under the contract in which hearing was conducted in July 27 and October 11, 1994, and an opinion and award was issued by Arbitrator Robert Light on November 27, 1994. In his award Light recounts facts showing that after opening the new operation Director of Operations Hoffman told the employees he expected increased work performance and their performance would be measured against all those in their department performing the same job. Two employees, scallop cutter Moses Morales and straight cutter Aida Rentes, were then terminated on November 4, 1993, for poor performance based on a series of evaluations.

At the arbitration, these dismissed employees were represented by de Jesus and Cortez. The arbitrator deemed persuasive the argument made by the Union's representative that the Employer had unilaterally increased the work quotas against which these workers were being measured without the agreement of the Union and without going to its own arbitration in violation of section 2.4(b) of the collective-bargaining agreement which, as I earlier noted, prohibits changes in present workload or workload assignment unless by mutual agreement or by an arbitration award. Accordingly, he concluded that these employees were not properly discharged. He ordered them reinstated, but without backpay, and further, directed the parties to meet pursuant to section 2.4 of the contract for the purpose of establishing mutually satisfactory production schedules.

It was pursuant to this award that Respondent prepared an incentive program for West New York which de Jesus testified was received by the Union in October to November 1994, but which I find was prepared and received by it after the award, probably in December.

The document comprising the program consisted of a first page describing it as experimental and explaining how it would be applied to machine operations with the incentive payments based on making a specific production per hour for 8 hours per

day. It also contained a second page setting forth the specific production goals per hour for each category of worker, including splitter, scallop cut, straight cut, hand winder, machine pile winder, and machine traverse and the incentive payment for each inch or yard of work performed above the goal or quota. Either in December 1994 or later, Hoffman also forwarded to de Jesus a handwritten proposal detailing a progressive disciplinary system leading to termination for employees who fail to meet the acceptable minimum production standards.

During his cross-examination, de Jesus described the Union's response. He informed the Company the Union had no objection to commencing the process even though it had to be discussed. De Jesus met with the bargaining unit employees at West New York and they selected a negotiating committee. As the next step, de Jesus solicited an engineer from the Union to review the Respondent's proposals and to do a timestudy of the operations, in question. That timestudy commenced in January or February and proceeded into the summer of 1995. There was some delay in completing the timestudy because some of the Company's machines were not in full operation at the time the engineer was available. There was also a problem in coordinating a time when the engineer, who traveled extensively for the Union, could be present with respondent managers. Although progress had been made in reaching agreement on some production quotas for certain operations, others were still in dispute by mid-October 1995 when Respondent announced the closing.

Thus, by May 11, 1995, the Union's timestudy engineer had provided a summary report to de Jesus covering timestudies made over the past several months. In all cases in which the machine were available, the engineer's recommendation was to lower the production per hour which had to be achieved in order to start to receive incentive pay for production in excess of those figures. On one operation, pile winder, the operation was unavailable for study. Then by a document dated June 15, 1995, de Jesus forwarded to Hoffman the Union's response. It consisted of two parts, the first were a series of comments on the Company's "language policy" on incentives, which had made up the first page of the Company's December 1994 submission. Here, the Union disputed company proposals on notice of discontinuance of the program, requested clarification as to calculation of overtime and incentives and made a counterproposal to soften the Company's proposed policy of forfeiture of 30 percent of incentive pay for absences in excess of 5 days in a 6-month period, including disputing any forfeiture at all as a double penalty for the absent employee, and opposing another Company proposal requiring 98 percent of production to be first quality to avoid a day's forfeiture of incentive pay, but providing counter proposals of its own on this subject. The Union made other suggestions, to establish a joint incentive committee to meet weekly, to monitor or settle issues such as equitable distribution of good and "bad" materials, disputes which may arise regarding bonuses, timestudies or rates due to changes in style, materials, improvement, or changes in equipment, etc., and whether a grievance may exist requiring work to be reviewed by an engineer.

In the second part of the Union's response, de Jesus set forth minimum production to qualify for incentive, with two columns, one at 100-percent production and the other for the minimum expected prior to discipline, providing only a tentative proposal as to the machine pile winder pending final recommendation by the Union's engineer.

On this submission, de Jesus noted the Union had not yet made a counterproposal on the incentive payment amounts, and would prefer a mutual discussion. De Jesus apparently also forwarded the Union timestudy engineer's summary report.

De Jesus visited the West New York facility at least once a month. It had only one shift and performed scalloping and winding operations and shipping and receiving work in a warehouse section. He also described conversations with Judy Cortez, the Union's chief steward which led him to write his October 18 letter to Respondent. She told him that in September there had been an employee layoff of an unusual nature. When she questioned the plant manager, Kenton Metz, she was told there was nothing to be concerned about, and the layoff was not unusual. However, the September layoffs, unlike prior ones, were made without informing the employees involved of a date for recall. In September, de Jesus was still discussing the proposed incentive program with the Company.

De Jesus also noted that after receiving his own letter from Respondent informing the Union of the shutdown, he learned from a message left on his home telephone late Wednesday evening, October 18, from Steward Cortez, that Respondent had also informed the West New York employees of the closing. This notice to employers was probably made orally. Not until October 20, the day of the first union/respondent meeting, did Westchester Lace provide a formal notice in writing to its affected work force. In it the employees were informed of a permanent lay off effective at close of business on October 27, and, also, that medical coverage, however, would be continued through November 30, 1995, at which time they would be eligible to be covered under COBRA. Respondent accompanied the notice with forms and rates to be completed and returned by November 30 for continued medical coverage under the COBRA program.

Under cross-examination, while de Jesus acknowledged that Respondent had a practice of subcontracting some scalloping work in the past, it had never resulted in the replacement of union workers. It was always supplemental. This meant that when the full complement of workers was not sufficient to get the work done, some work was then subcontracted. But there was never a substitution of the unit work force and in this instance by a nonunion subcontractor. Prior lay offs had occurred when the scalloping work was slow and those instances had not been brought to his attention by the stewards until the unusual September layoffs.

De Jesus clarified that at the point when Edelson spoke of having the work done cheaper somewhere else, he had not yet mentioned All Lace and de Jesus assumed that when All-Lace was ultimately mentioned, Respondent was getting the work done cheaper there.

While de Jesus acknowledged that Edelson, in their meetings, referred to work being slow, he was not informed then or at any earlier time of any change in product mix between all-oversee (wide band lace) and narrow band lace, which included the scallop lace produced at West New York.

De Jesus confirmed on cross-examination that at the meetings with Edelson he had raised the issues of, recall of the laid-off employees into existing operations at the North Bergen facilities and severance pay, both of which Edelson summarily denied and refused to discuss, and when the stewards raised questions of existing contractual benefits like vacation and holiday pay, Edelson agreed to do whatever Respondent was obligated to provide under the collective-bargaining agreement.

When pressed about union proposals made at the meetings, de Jesus mentioned that at the second meeting on November 8, in connection with his plea to reopen the facility, after recalling the employees and putting everybody back into operation he would sit down and discuss the gravity of the problems facing the Company and mentioned the use of engineers and consultants in factories represented by the Union and worker participation with management as aids in solving production problems. But at this point, aside from having referred to the contracting out of the scallop cutting work and thus closing down the West New York operation and the competitive problems faced by the Company in general terms, Edelson had not disclosed any changes in the nature of the production mix or any other production problems which may have caused him to close the facility. Thus, the Union was not in the position to make concrete suggestions, or offers or concessions to influence Respondent's decision, since Edelson had not disclosed any grounds for his decision, other than his concern with continual union complaints and grievances and its failure to have agreed to Respondent's proposal for a piece rate system in the facility.

During a union reexamination conducted of de Jesus, de Jesus referred to a letter he had sent to the Respondent prior to receiving notice of the contracting out, seeking a meeting to finalize discussions on the incentive program. That letter was not produced or offered. It clearly was not the letter dated October 18, 1995, in which de Jesus sought assurances to assuage employee anxiety regarding their job security. But de Jesus confirmed again that by October the parties had reached agreement on standards and rates governing most of the machines and operations studied under the incentive program, and that with respect to only two operations, unspecified, did the Union dispute the Company's proposed rates as being tight, i.e. requiring production levels that were too high in order for employees to qualify for incentive pay. And even as to these two operations, the Union was willing to present to its membership what the Company had presented in support of its position in setting these production standard and rates. In September, de Jesus had informed Respondent West New York Manager Kenton Metz at a meeting concerning the incentive proposal that he just needed to meet with those workers assigned to the two operations on which differences still remained to arrive at a final recommendation which very well could have led to a closure on the incentive plan and final agreement with Respondent. In de Jesus' view, the Company was well aware in October 1995 of the Union's position of basic agreement to introduction of an incentive pay system at West New York and that the parties were close to final agreement on its terms.

In a later re-cross examination, de Jesus explained that he and the Union took the Respondent's proposal on an incentive system very seriously because it included provision for discharge of workers who failed to meet minimum production goals. As a consequence, it became a complicated matter to reach agreement with the Company on rates which, if not achieved or achievable, could result in termination.

Dionisio Melo, the union vice president and assistant steward at West New York, testified about the October 20 meeting which he attended as a member of the union delegation. He corroborated de Jesus' testimony in which Edelson attributed the closing to problems he was having with the workers, and their failure to accept the Company's piece rate plan. When de Jesus sought to persuade Edelson not to close the plant he further corroborated de Jesus' testimony that Edelson responded

by saying that if the Union kept giving him a hard time he would have to close the rest of the plant.

According to Melo, in describing the problems Edelson spoke about four employees having fights and giving a hard time to the supervisor, and the many grievances filed against the Company. Consistent with de Jesus, Melo ascribed to Edelson the comment that it was cheaper to send the work out than retain it at West New York.

During his cross-examination, Melo acknowledged that he had not mentioned in his pretrial affidavit given to the Board anything said by Edelson about grievances at the October 20 meeting. Melo also agreed that among other things, Edelson complained about worker productivity at this meeting.

Melo described changes in the product mix in the lace industry over 18 years of his employment. When Melo started in the industry production was almost all of narrow band, with and without scallop cutting. The market started changing 5 to 6 years ago, and by November 1995, 45 percent of production was of all over, wide band lace, 35 percent was of scallop cut narrow band lace, and the balance was narrow band thread pulled lace.

Ted Hoffman, Respondent's director of manufacturing, described in detail as a Respondent witness the nature of the changes in Respondent's lace production. In the manufacturing process, yarn is purchased, transformed into knitted forms at the North Bergen facilities, and dyed and finished there as well. Respondent produces three types of band lace, scallop cut, thread drawn, and all over lace. Five years ago all lace was produced at the North Bergen facilities and in Puerto Rico. In 1993, because of space requirements and in order to make the operation more efficient, the scallop cutting operation was relocated to the West New York facility. The wide band lace is a wide piece of goods measuring anywhere from 48 to 110 inches in width. This lace is either cut or thread drawn to reduce its width to very narrow bands. The scallop (and straight) cutting reducing the width to as little as 1 or 1/2 inches has been performed at West New York since 1993, while the thread pulling or drawing operation to narrow the lace is performed at North Bergen. The wide bands were shipped by Respondent's own trucks to West New York where the cutting was performed, and then shipped back to North Bergen for preparation and shipping to customers.

In 1991, the Company was mainly producing narrow band lace. Ninety-four percent was narrow band and 4 percent was over all. Until 1993 when West New York opened, between 25 and 40 percent of the scallop cutting work was contracted to outside firms who performed all of the work later assigned to West New York, including cutting, and breaking down the wide spools of lace, putting it on narrow spools, packaging it and returning it to North Bergen ready for shipping to customers. The scallop shapes were always made on the knitting machines maintained and operated at North Bergen.

West New York always operated one shift only. When the decision was made to open West New York in mid-1992, Respondent purchased some additional and different type of equipment for installation there. Beginning in 1993 Respondent started training some workers who were then on lay off from the second shift at North Bergen. They were recalled all during 1993 and assigned to West New York.

As early as 1994, Hoffman spotted a trend developing, based on customer orders, away from narrow band lace and toward an increase in orders for all over lace. He started tracking the

production mix based on orders in 1995. By March 1995 the mix was 60.7-percent webs—the unit of production—of all overs, 22.7-percent scallop cut and 16.6-percent thread drawn. When he started with Respondent in 1991, 94 percent of its production had been narrow band and only 6 percent had been all overs. In early 1993, Respondent wanted to modernize and spend a lot of money because scallop cutting was still a significant part of its business. The change in mix was gradual over 1994 into 1995.

Hoffman disclosed that the most labor intensive work occurs in scallop cutting, with thread drawing being less intensive and all over (wide band) cutting being the least labor intensive. Hoffman also described the variations in the size of the work force at West New York, running from 29 at its start in January 1993, to 34 at the end of 1993, to a highest complement of 48 at the end of 1994, and shrinking to 23 at time of closing in October 1995. As to the analysis Hoffman started making in March, 1995 of the dramatic changes occurring in the mix of production styles, he admitted that neither he nor anyone else from the Company provided the Union with any of the results of the analysis.

Hoffman explained that what made scallop cutting highly labor intensive were the series of steps required to be done by workers from the time the spools of dyed yarn first arrive. They first have to be split down into sections to make them workable. Then these sections are scallop cut, straight cut, and then wound around narrow spools. Other workers were also required to move the yarn from one work station to another.

Significantly, since the complete contracting out of the scallop cutting work in October 1995 to one subcontractor, All Lace, the same procedure is followed as took place with respect to the prior partial subcontracting to All-Lace and other firms. Company owned trucks from North Brunswick continue to deliver the prepared and dyed yarn to All-Lace, and the completed cutting work is returned by All Lace in its own truck to North Brunswick, or, in the case of an emergency, Respondent will pick the work up with its own truck. The invoice from All-Lace does not break out separately the shipping costs. They are just a part of the overall service which All-Lace provides. So, the basic process continues as before the closing of the West New York facility. Westchester Lace still prepares the material, knits the yarn, dyes it and then sends it to All-Lace to be cut and returned for shipping out to customers by Westchester Lace. These customers are the same ones which Respondent supplied with finished product prior to the shut down.

Interestingly, when the Puerto Rican facility owned by Respondent was closed in 1994, it was closed because the demand for the yarn it knitted there decreased as the demand for scallop cut and band lace lessened. Some of its machinery was moved to the two North Brunswick locations and some of it was junked because it was obsolete.

Hoffman also acknowledged that during 1995, as the scallop cutting work lessened, the remaining 23 workers at West New York did not all work full time. As a consequence complaints were filed about some full-time workers now working part time.

When Kenton Metz began as manager of the West New York facility in January 1994, he was able to plan a weekly production schedule. He confirmed that by November 1994, the facility started to receive less yarn for scalloping. In order to compensate, after consultation with Hoffman, Respondent shipped additional material into West New York to cut into

very narrow webs or "skinnies" which provided more work for the scallop cutters and increased the yardage count on an hourly basis. These skinnies are narrow bands which are scallop cut and also have a straight-edge side. Previously, the bulk of this particular cutting work had been contracted out. The introduction of this work resulted in a problem, described by Metz, of cutters having difficulty in maintaining a straight cut on the scallop cutting machine and in overall production declining a bit. As a result of these problems, Metz consulted with the Union Steward Judy Cortez, but the problems were not resolved.

By March 1995, Metz also experienced difficulty in scheduling production on a weekly basis because the particular very narrow band materials which he had been receiving and had arranged to cut, started to fall off and the mix of goods shipped to West New York began to change. Since the work of the various departments, including splitting, then scallop cutting, then straight cutting and finally winding and then packing, are closely interrelated in that each department in turn feeds the next with the material it has processed, in planning work for successive days, a continuous flow of work required a certain overflow balance in order to feed work into the next department for work for the following day.

Metz started planning and scheduling work on a daily basis as he worked from a rush list requiring priority completion of the work. As a result, particularly because he didn't want to run out of work for the following day, Metz started sending employees home from different departments. For example, at times he didn't have enough webs for the employees in the winding department to work 8 hours the next day, so he sent the whole department home after 2 hours, but had to pay them for 4 hours under the contractual guarantee. This happened once or twice a week starting in June or July. But this caused problems with the Union. The union steward complained that a winder sent home had greater seniority than a straight cutter and also had experience in that work. Similarly, a scallop cutter scheduled for layoff who could straight cut and had seniority was retained over another employee. Metz then had to select straight cutters to leave work.

By June 1995, Metz testified his planning went from day to day to hourly, as the daily production required varied greatly both in volume and styles and widths within the narrow band category. He informed Hoffman and laid off two employees first in the scallop cutting and then later, employees in straight cutting. Metz attributed part of the fall off in production to a periodic "slow down," i.e., what he considered a reduction in daily production of finished webs of material by, e.g., the straight cutters compared to their "normal" production. Yet, Metz also spoke of a fall off in orders accompanied by an increase in rush orders he received from the customer service department and the problems the employees were raising with the union steward over his selections of employees for layoff as he tried to build up a backlog of work for the next department. Furthermore, Metz was not asked nor was he able to point to any evidence of a deliberate slowdown in production by particular employees. But Metz did conclude that he perceived the "slowdown" as a form of retaliation against him for his daily layoffs and disputed selections of employees for layoffs. Metz did not consider it a serious enough matter to inform the Union that pay would be docked for those employees participating. Nor was it a reason for the ultimate closedown and contracting out of all the cutting work. He did speak to Steward Cortez

about the matter, and, at times the pace of production increased only to go back down again. In some cases Metz disciplined with writeups those employees he believed were responsible and the Union countered with formal grievances claiming Metz was making unnecessary quotas. All of these complaints were reported daily to Hoffman.

Metz also had some problems finding enough employees to work overtime, which was voluntary under the parties' agreement and/or practice. At the very same time he was seeking to have some employees work overtime, others were being sent home. Following the raising of complaints by Cortez on behalf of unit employees, Metz had incidents of apparent vandalism arise, including stopping up a toilet bowl with paper towels in June and August 1995 and changing a pulley on a scallop cutting machine causing its motor to burn out, also in June. After the announcement of the plant closedown in October 1995, a compressor which operated all of the machinery ceased functioning requiring the attention of an engineer. Metz was unable to determine who was responsible for these acts or whether they were, indeed, in reaction to the layoffs. The toilet stopping had begun well before the summer of 1995, and Metz had locked the men's bathroom and made a key available to the employees. According to Metz, it was not a reason for the plant closing. Also, a pulley had been changed and a motor burned out before his tenure as manager. Only the disconnection of the compressor took place for the first time in 1995, and that happened only after the closing was announced. Metz also mentioned the theft of a photocopying machine at the time of the closing but did not report it to the police.

Metz also began sending "skinnies" out to contractors to cut so he could meet customer time demands for finished product.

In sum, the West New York facility was receiving both fewer work orders in general and the orders which were received were more unpredictable than they had been in the past. And among the contractual obligations which Respondent had to meet in this situation were salary payments made a few times to employees who had no work, 4 hours of pay to employees who were brought in and whose work ran out well before the 4 hours were up, and paying overtime to some employees while others were sent home early.

As to the incentive plan, Metz testified under cross-examination that he had participated in the development of Respondent's proposal to institute an incentive plan. The motive for the plan was to reward employees who were doing well and to encourage other employees who were borderline productive to increase their productivity by providing them with an incentive to work harder.

Under further cross-examination by union counsel, Metz agreed that he had received a lot of flack from the Union Steward Cortez on the shop floor in 1995 and he reported a lot of it to his superiors in the Company. On one occasion he let Leonard Edelson know directly in a personal discussion about the protests and complaints he was receiving from the Union on the shop floor. Metz also acknowledged that in the instances where the Company was paying for 4 hours of work when employees were being sent home short of working that time, this was adding to the Company's labor costs. Yet, the Union, to his knowledge, was never asked to modify the contract language which mandated these payments. Also, some occasions arose where Respondent was required by its contract to pay time and a half overtime pay to one or more employees called in to work overtime during 1995. Yet, again Metz did not seek to modify

the clause in the labor contract requiring overtime pay for work beyond 8 hours in a day. Neither did he bring this matter to his superior, Hoffman. According to Metz, it wasn't a serious enough problem.

In explaining that prior to October 27, 1995, the work which was contracted out was rush work which the customer service department at North Brunswick told him was needed the next day and, based on production in process, Metz knew he couldn't complete timely, Metz also acknowledged that the contracted out work prior to closing West New York was work over and above what the 20-odd employees could really produce when working at capacity.

Metz also agreed that with respect to his claim of an intentional slowdown in effort, there were contractual provisions, specifically sections 2.3 and 2.4(a) in which the Union agreed that its members shall perform their work in a workmanlike manner, in accordance with the instructions of the Employer, and that every employee shall perform a full day's work and that the setting of arbitrary production schedules by workers is contrary to this principle and the Union agrees to eliminate any such condition. Another contractual provision, section 23.1, prohibits slowdowns or strikes over workloads, among other prohibitions. Yet, even with these contractual safeguards, Metz did not file a grievance claiming breach of any of these sections. Nor did he complain to de Jesus or the steward to stop the alleged improper practice. Metz did issue written disciplinary warnings to one or more employees for poor production, which led to the Union's filing of a grievance which may have resulted in the arbitration award previously discussed.

Company records disclose that while de Jesus spoke of September layoffs there weren't any in September, but there had been 10 layoffs in April, with only 2 recalled, one each in May and July, and 3 layoffs in August, none of whom were recalled before the closing of the facility on October 27.

Hoffman resumed his testimony for Respondent by outlining the history of the origin of the incentive plan, the Respondent's November 1994 submission and the Union's response some nine months later in June 1995. After receiving its response Hoffman now testified, "[he] informed de Jesus that [he] couldn't agree with it and that we had no interest in pursuing the matter, and I think it was dropped there. We did have some discussions, but we couldn't come to a conclusion, and I indicated that at this point I wasn't interested in pursuing it." (Tr. 357.) According to Hoffman, this decision didn't necessarily have to do with the union engineer's report or the merits of the Union's objections to the plan, but it was primarily based on internal considerations and discussions about the feasibility of continuing the West New York operation as it was structured. Since Respondent was already looking into discontinuing that operation, it would have been moot to try to conclude anything on the incentive plan after the Union's June response.

Hoffman's recollection of his communication with de Jesus, either by phone or in person, was not acknowledged by de Jesus who believed that, based on further discussions with the Company after June, the parties were close to agreement and only apart on two operations. Based in part on de Jesus' genuine surprise and dismay at the time of his belated receipt of Edelson's notice of plant closing, as well as the general credibility of his testimony, I do not credit Hoffman that he made de Jesus aware of his thinking and lack of interest in reaching agreement on incentives. Indeed, in testimony almost immediately following his quoted remarks, Hoffman could not recall

having any further discussions with de Jesus between their alleged June discussion and October 20, 1995. Hoffman, when pressed, could not recall de Jesus' reaction to his refusal, following receipt of the Union's engineer's analysis and the Union's modifications to the procedural language accompanying the incentive plan, to engage in further discussions and his disinterest in now adopting the plan. Surely, de Jesus' reaction would have been memorable after the Union's review and detailed study of the Company's proposal was now to become so much wasted effort.

It should also be noted that Hoffman's testimony here does not preclude a certain resentment over what he perceived as an inordinate delay in responding to the Company's proposal and the detailed criticisms of both the incentive standards themselves as well as the procedural provisions which accompanied them. Hoffman frankly admitted being upset over the length of time it took the Union to come up with its response, during which time the business was deteriorating in terms of the mix of product. He also described the incentive program as a "relatively simple undertaking." (Tr. 360.) I am prepared to conclude based on the full import of de Jesus' and Hoffman's testimony that Respondent, indeed, made its decision to close, at least in part, on the basis of its perceived unwillingness of the Union to embrace its incentive proposal in toto and permit it to increase production and productivity on its own terms following the Union's thwarting of its earlier attempt, made unilaterally, to terminate employees who did not meet its perceived production standards.

Hoffman, from March 1995 on, continued to see a continually changing mix, and an up and down daily amount of work being put in for production at West New York. The mix changed, in that Respondent was receiving fewer orders for scallop cutting done on goods 1-1/4-inch wide and wider. Although Respondent started cutting more skinnies in house, it stopped doing this and started sending them out again in March because although an extra winding machine had been added for this work, according to Hoffman, West New York did not have the right mix of equipment to produce the amount of skinnies needed to satisfy orders of customers, some of whom were also ordering scallop cut lace.

The investment on additional machinery and equipment that was purchased for West New York in the startup there totaled \$200,000.

In addition to the suddenly changing nature of customer orders, Hoffman referred to the more prevalent use of color and the fact that customers wanted to approve the color before their order was produced. Previously most production was in white, black and beige. This lengthened the production process and helped create the "spikes," i.e., the daily variations in production. These problems, coupled with an inability to plan production overtime, because of a lack of backlog and lessened demand, led Hoffman to conclude, according to his testimony, notably in the summer, August or September 1995, that the West New York operation wasn't viable from a customer service standpoint.

When Hoffman reached his decision regarding West New York he discussed it with Edelson, informing him of the difficulty they had in servicing customers, that the work was too sporadic and they couldn't plan their workflow properly. With too many spikes, the unpredictable mix, they were unable to service customers and get the goods out in an expeditious fashion. By the end of September, early October, Edelson informed

him of his decision to close the facility. They both determined then not to announce it and keep it very quiet because Edelson was afraid that it could impact the business until they closed, there could be sabotage and “things” could happen that could impair their ability to service their customers. Hoffman concurred and recommended providing a 10-day notice of the closing to the Union and work force. Hoffman was involved in drafting the letter to the Union and a day or two later notice was given to the employee complement.

Since the closing, all of the scallop portion of Respondent’s business is being done by All-Lace, as an outside cutter. The spikes and change in the mix have continued. The basic machinery and equipment used at West New York is still at that location, in storage, disassembled, with some auxiliary equipment moved to other warehouses. While it is for sale, it has not been advertised, and there is no market for it.

On cross-examination, Hoffman testified that the problems he had described were industrywide, that competition in the industry, domestic and foreign, was intense, and some of Respondent’s competitors were nonunion. Admittedly, unit cost of production was an important factor in that competition. Hoffman also viewed the proposed incentive system as both lowering per unit cost as well as providing the customer with faster and better service. The latter result expected from the proposed incentive system, which Hoffman himself brought forward in response to counsel for the General Counsel’s inquiry (see Tr. 382), would seem to have been a very important benefit of the proposal for some one like Hoffman, who continually emphasized on the record the Respondent’s leadership in the industry in providing the highest quality and most efficient customer service and a fear that the West New York facility was not providing such service.

When the Union raised its objections and modifications to the Company’s incentive scheme, after a lengthy delay which upset him, he decided not to seek to resolve those differences or to enter an agreement. Hoffman had also heard of employee complaints about being sent home early and questioning selection for layoffs. But when Metz sought to discipline, writeup, employees for poor production, Hoffman let him know that the arbitration award forbid raising issues about minimum production or quantity but he could warn for damaging goods. Hoffman was also aware, through Metz, about employee unhappiness about not getting steady work at the time.

Hoffman went so far as to concede that one of the reasons for the decision to contract out all the West New York work was the Union’s lack of cooperation with and opposition to his incentive/bonus plan. Furthermore, to the extent that early union agreement to the Company’s November 1994 proposal would likely have significantly improved customer service, by increasing production and shortening the time to complete cutting work, it is probable that this improvement would have undercut Hoffman’s other stated reason for closing, that the West New York operation was unable to service its customers, properly. Yet, the scheduling problem as Hoffman explained it, would have required additional capital investment in equipment in order to meet an immediate upsurge in rush orders, while also requiring additional overtime as well as continuing to require that certain departments receive less than full work until they were able to build up a backlog. In a declining market, generally, Hoffman was unwilling to recommend making that investment. However, the unwillingness of enough employees to work overtime was a problem which could conceivably have

been rectified by seeking modification of what Hoffman conceived of as a voluntary overtime practice between the parties and by making a full disclosure and seeking union cooperation for its scheduling problems, neither of which did Respondent seek to do. Clearly, Respondent did not take the Union into its confidence at any time, neither before the announcement of the closing nor afterward during Edelson’s two meetings with the Union committee. Neither did Respondent ever seek to modify contract terms or understandings which could have reduced costs or ameliorated scheduling problems in the production process. Neither did the Company apparently consider transferring the scalloping equipment and operation to North Bergen, although it did move the compressor, which supplied power for the cutting equipment, to North Bergen after the closing.

Hoffman also agreed during his cross-examination that there had been no prior history of any closing of either North Bergen plant or the West New York facility which could have provided the Company with some basis to conclude that sabotage would or would not be a problem if the Union was provided with advance notice beyond the 10 days that he and Edelson agreed upon. In essence the claimed fear of sabotage was speculation.

In Hoffman’s view, the production and scheduling problems that West New York had experienced abated after the contracting out. All-Lace, because it was supplying cutting work to other manufacturers in addition to Westchester Lace and because of its different equipment, was better able to plan ahead and avoid the “spikes” that Westchester Lace had experienced. Yet, Hoffman did not know how many employees All-Lace had, and if they had the same number or fewer employees than West New York, how they could do the work quicker than West New York. Hoffman also claimed that in terms of costs the contracting out resulted in a wash, i.e., there was no saving as a result of contracting and no additional cost.

On the subject of the Respondent’s incentive proposal, Hoffman felt the Union’s response to what he described as “a simple engineering study” was too long. He also found that response basically unacceptable. Hoffman also could not deny, although he could not recall, that he may have met with de Jesus over the summer of 1995, following receipt of the Union’s June counterproposal on production minimums and standards for imposing discipline for failing to meet them. Hoffman now also acknowledged that although he felt further negotiations on the plan were moot because a decision was being made to close the facility, “[he] never informed [de Jesus] that we were considering closing the shop.” (Tr. 414.)

Hoffman also related that sometime in 1993 or 1994, the Union had refused a request he had made to stagger the contractual work hours at North Bergen. Staggering work hours would have been a boon for Respondent in scheduling and planning work at West New York when the problems there intensified in 1995. There is no evidence that Respondent made such a request of the Union in 1995 regarding West New York work hours.

In withholding notice of the closing to the Union, Hoffman was unaware of any legal obligation on the Company’s part to provide timely notice to permit bargaining about either the decision or its effects. He had asked company counsel about a possible requirement of a 60-day notice (probably under the WARN Act) but had not investigated any possible duty or the desirability of bargaining with the Union about the subject once the decision had been made.

During his cross-examination of Hoffman, union counsel suggested that the parties' collective-bargaining agreement did not prohibit a strike over a plant closing, or a full contracting out of unit work on bargaining over these issues and this knowledge, in addition to a desire to avoid bargaining over its decision to close and its consequences, contributed to the Company's strategic decision to withhold notice.

While Respondent lacked the space in either North Bergen facility, it could resume scallop lace cutting at West New York if required to do so. Also, according to Hoffman, other space could be rented in the same geographic area, to perform the work previously done at West New York.

During his redirect examination, Hoffman stated the view that nothing the Union could have proposed to modify or change under its contract relating to increasing overtime work hours, changing the hourly wage rate, or starting times of employees, or any other subject would have caused Respondent to continue to operate its West New York facility. The causes for the closing, not amenable to labor negotiations, resided in business conditions, the change in the type of goods being demanded in the industry and the resulting changes in the production mix. It was not a labor cost issue. And, in spite of an attempt by union counsel to have Hoffman acknowledge that a change to a two-shift scallop cutting operation at West New York or at 3901 Liberty Avenue, North Bergen would have permitted the work to be continued to be performed in house, Hoffman rejected the two-shift concept as being able to solve the spikes in customer demands which would have left Respondent with unused plant capacity at certain times and not enough capacity at others.

Leonard Edelson testified that he was the sole owner of Respondent, and that he owned, as well, the real estate that comprised the West New York facility. At the present time it is empty, had been for sale and was now under contract of sale, and awaiting the contract buyer's obtaining a commitment for a mortgage, which was a condition of the sale.

As a consequence of changes in the industry, Respondent has had to switch from previously producing narrow band lace, a hallmark of its part success, to making all-over lace, which is a much more competitive item and not as profitable. Respondent has had to face foreign competition now, not only in the production of the garment, but in the making of the lace overseas as more companies in the far east, in particular, have purchased lace machines and become more expert in their use. Respondent's advantage in producing all-oversee as against foreign competitors is that the market demand is for quick production and delivery within 2 to 3 weeks of an order.

Since the changes described, over the last 3 years, Respondent's sales have decreased about 10 percent a year and it has not turned a profit. In 1996, for the first time, the Company provided the Union with financial information as negotiations were coming up for a successor agreement to the one expiring on October 31.

Edelson testified he made the decision to close the West New York facility at the end of September or beginning of October 1995, for the following reasons which he described.

Sometime in 1994, when Edelson saw that the nature of his business was changing, he learned that Silverman Lace was for sale. Edelson was aware that Silverman Lace has sold only all-overs for 40 years, and had an expertise and market share in that segment of that market. They did not manufacture, but bought from his competitors, essentially acting as a jobber.

Edelson contacted Silverman Lace to arrange to acquire that business. The acquisition would provide Westchester Lace with an additional manufacturing base, whereby Silverman Lace would buy same product from Westchester Lace and Westchester Lace would do the knitting and dying for Silverman Lace's customers, and Silverman Lace's sales people would become integrated into Westchester Lace and thus handle both Silverman Lace's preexisting and Westchester Lace's current product lines, and a competitor would thereby be eliminated.

Silverman Lace informed him they would be interested in doing the deal but wanted Westchester's scallop cutting work. The person Edelson was dealing with was Key Gaetano who was by this time the owner or majority shareholder and president of Silverman Lace, as a result of purchase from Morris Silverman, its long-time owner, as well as the president and sole owner of All-Lace since its inception.

Since Edelson saw the future of the Company as well as the industry, in producing all-oversee versus band lace, he likewise saw the deal with Silverman Lace, including providing all his scallop cutting work to All-Lace, as being in his best interests - for the future.

When Edelson made his decision to discontinue and contract out his scallop cutting operation he did not consider having conversations with the Union over the elements of that decision. Whatever concessions the Union could have made, even saving 10 percent of payroll costs, it would have comprised such a small percentage of the total at a time when he was interested in obtaining additional business to enhance the Company's future, they would not have made a difference. Nonetheless, in his letter to the Union, Edelson expressed his willingness to meet and discuss anything they wanted to.

At the meeting on October 20, de Jesus told him that he, Edelson, couldn't close, he was going to meet with the people who would not be happy if he closed, and if they have to do anything to prevent this from happening they would do it. He was very angry. Edelson, in turn got angry. He readily acknowledged, without prompting that although, quite frankly, he didn't remember it, it is possible he said, well, if you do that, I'm going to close the plant. Since Edelson had already informed the Union of the West New York closing, he could only have been referring here to a closing of the remaining facilities in North Brunswick.

According to Edelson the meeting proceeded with de Jesus asking about severance, benefits for the people, paying for their medical leaves, and recall rights for the people being displaced. Edelson's response was that we have a contract. Whatever is legal under the contract we will do and we will live up to that contract. If we can find a slot for these people we'll be glad to take them back. Although seniority was discussed, Edelson could recall nothing about it.

As to the demand for severance, Edelson said, if it was 5 years ago, we would have no problem discussing severance. But right now we are in a very bad situation. We just can't do it.

As to the decision to close, de Jesus pressed him as to why he was doing it and told him he couldn't do it. He also said the Company had to give a 60- to 90-day notice. Edelson admitted he became very angry and responded that he had a right to do this, i.e., to close the facility and let the people go in less than 10 days. Edelson explained that since he had discussed his decision with counsel, de Jesus was misleading him and caus-

ing the employee delegates present to get angry about something that didn't exist and it was upsetting him. The meeting ended with de Jesus stating he was going to meet with the people and get back to him.

The next meeting, as earlier noted, was held on November 8. Although Edelson could not initially recall how it was set up, he subsequently recalled de Jesus calling him to set the date. As earlier described, and as found here, November 8 was the date de Jesus had originally sought in his letter of October 18 to Edelson to discuss the troubling layoffs which had come to his attention from Cortez, and this date was retained by the parties and apparently confirmed for their next meeting following de Jesus' meeting with the employees.

Edelson testified that the second meeting was a duplication of the first. De Jesus kept asking about reopening the West New York facility and taking the people back. He also brought up severance, medical benefits, recall rights. Although Edelson volunteered now that at the first meeting "we had negotiated to give him the medical benefits for one month," other evidence which I credit, including the Company's memorandum to all West New York employees dated October 20, which nowhere refer to the Company's decision to continue medical coverage for 1 month as having been negotiated with the Union, as well as legal requirements of sufficient notice of discontinuation of medical benefits strongly suggest that Respondent's decision was dictated by COBRA legal requirements, and not made as a counter offer to the Union's demand for benefits following the employees' separation.

Edelson claimed, but offered no corroborative proof, that he had offered seven of the West New York employees an opportunity to work for a week or two in North Bergen and they all refused. One employee in that unit had been offered and accepted full-time work at North Bergen in packing and shipping. In this regard, it was Edelson's view, that although he had separate contracts with the Union covering West New York, and North Bergen, he was prepared to, and did consider, the West New York employees as being eligible for employment at North Bergen, provided they were qualified. Whether this position covered all openings at North Bergen, and whether it was of finite or of indefinite duration is unclear, and, clearly, Edelson never offered to state this position in writing, and thereby make clear these recall rights included provision for notice to the Union of any offers made, the availability of any openings, the application of contract seniority provisions and agreeing that the Union could grieve a failure to make an offer or a failure to employ a West New York applicant who responded to such a recall offer.

As to the Government's claim to restoration of the scalloping cutting work and recall of the dismissed employees, Edelson argued that it was not possible. By reopening the scallop facility he would be breaching his deal with Silverman Lace to provide all his scallop cutting work to All-Lace, thereby losing the dying, knitting work and expanded sales derived from Silverman's all-over business. This loss in turn would probably result in layoffs in various departments. Aside from the loss of the Silverman deal, any restored scallop cutting operation would still face the problem of not being able to provide the proper kinds of services his customers required and it would cost a lot of money. In estimating the cost of setting up the necessary machinery and equipment which the Company still retained in a disassembled state, Edelson guessed the cost at \$100,000 to \$200,000.

Edelson confirmed that the contract of sale of the West New York property was subject to a 60-day mortgage contingency from date of contract, but he was not otherwise familiar with its terms.

Under cross-examination by counsel for the General Counsel, Edelson agreed that his decision to close West New York was firm and had already been made when he sent the letter to the Union. He had also decided to delay informing the Union about the decision from late September for a certain period of time, which Hoffman had testified, without conflict, was to be until 10 days before closing. Edelson continues to receive orders for scalloping work from his customers, and to fill these orders, shipping to these customers, on receipt of the scalloping work from All-Lace, after first having knitted and dyed the goods and produced a finished product ready for cutting. The only difference in this process before and after the closing is that All-Lace's employees perform the scallop cutting work instead of Westchester Lace's employees.

Edelson was also aware of the Company's incentive plan proposal and the Union's delay in responding and he could not understand why the employees would not accept it, particularly since the Company had incentives in other portions of its operations. He was also made aware by Metz of employee unhappiness about insufficient work hours and inequitable selections for being dismissed early. And he was also aware of the Union's successful challenge to the Company's attempt to impose discipline for poor production. Edelson also acknowledged his expressions of anger at the October 20 meeting, in response to the union representative disputing his right to close, going so far as to acknowledge that he may have said he would close the entire plant if the Union kept pushing "these things." Nonetheless, Edelson incredibly denied that he viewed the Union's delay and objections to its incentive plan as being uncooperative conduct, and his denial is not credited. Neither is Edelson's later denial, credited, made during his cross-examination by union counsel, that he did not refer to the Union's lack of cooperation, grievances, complaints, and problems with the work force and their gripes as reasons for the decision to close West New York. De Jesus' straightforward account and detailed account of their October 20 and November 8 meetings is credited.

Edelson further acknowledged that the benefits provided to the unit employees at West New York, such as the 4-hour work minimum, the requirement of overtime pay after 8 hours, the 12 or 13 paid holidays, made the contract a very good one for the employees, but also expensive for the Company, per unit of production, and "[t]hat's why we're having a hard time." (Tr. 508.) Yet Edelson also disputed that he switched to All-Lace because it costs less to contract out. Edelson asserted that it cost him as much to pay All-Lace as it cost him when Westchester Lace manufactured the lace. Edelson surmised that perhaps All-Lace's profit margin, whatever that may be, possibly equaled Westchester Lace's inefficiency and higher wages when it performed the scallop cutting.

Significantly, on initial direct-examination Edelson was not asked, and, consequently, did not deny that he informed de Jesus and the employee union officers that the work could be done cheaper elsewhere. (Although he did deny making this statement in a courtroom outburst while not under oath.) I do not credit Edelson's extemporaneous denial.

Edelson further agreed that he never informed the Union of scheduling problems at West New York, or that this was the

reason he had to contract out. Neither did he tell the Union about the deal he had with All-Lace or Silverman Lace. Edelson explained that at the time, the deal had not been consummated, and the union people who might lose jobs, could do something that could sabotage the discussions. Edelman clarified that what he meant by sabotage were the actions the union has since taken to get Respondent to resume the operation and therefore cancel out the deal with Silverman Lace like instituting the instant proceeding.

At the time of the closing, the deal with Silverman Lace was not wrapped up and they were in the process of having conversation. Edelson was nonetheless prepared to close the facility and take the risk because "there are many contractors out there that we could have given the work to." (Tr. 514.) Surprisingly, the deal with Silverman Lace was not executed until May 17, 1996, 7 months after the closing and his notice to the Union, with some aspects of it made retroactive to January 1, 1996. Respondent never explained this delay.

At the present time, neither the facility at 3901 Liberty Avenue nor the one at 3200 Liberty Avenue (the Hill) have sufficient available space to perform the subcontracted scallop cutting work. Respondent could rent space. The space required runs from 10,000 to 20,000 square feet. Space which would otherwise be available at 3901 Liberty Avenue is used for storage of inventory of merchandise, both raw materials as well as finished goods. Some parts of machines Respondent purchased for dismantling for spare parts are presently stored at the Hill.

Edelson testified that the Respondent does approximately \$23 to 25 million worth of business annually. The total labor cost is around \$9 million, while the portion attributable to the 23 employees at West New York was roughly \$400,000.

As for Respondent's October 20 notice of closing to employees informing them of continued medical coverage through November 30, Edelson could not explain who prepared the memorandum or when it was prepared or what led to its issuance. In a second, undated typed memorandum directed to employees on Westchester Lace letterhead, dealing exclusively with medical coverage, employees are now finally advised that their "group insurance benefits will terminate as of 11-30-95, which is 30 days after the end of the month of you [sic] last day of employment (six months after your last day of employment if you are currently disabled). Under federal law (Cobra), you may continue health and/or dental benefits for yourself and your covered dependents for a period of 18 months. You will be required to pay the full cost of the coverage's you continue, plus an additional 2% allowed by law." The letter goes on to list monthly premiums, described procedures on claims and referred to an enclosed enrollment form and deadline for its return. It is apparent this letter was prepared with assistance from Respondent's insurance carrier, and that Federal law dictated the 30-day continued medical coverage, and not Respondent's willingness to provide continued medical coverage in negotiation with the Union as a counter to de Jesus' demand for continued benefits. Edelson could not recall when he discussed this 30-day continued coverage with Hoffman. He did recollect that he announced it at the October 20 meeting. His final recollection that as the meeting broke de Jesus asked him to do this for the people is not credited. Not only did de Jesus deny that this minimal benefit was the product of negotiation, but all of the surrounding facts convince me that the decision was a matter of Federal law, given the requirement that some advance notice be provided the plan administrator so that the timely

COBRA notice can be given to employees thereby providing them the opportunity to purchase continued medical coverage.

Edelson agreed that at no time, from his written notice to the Union dated October 18, through de Jesus' telephone call, their meetings of October 20 and November 8, did he inform de Jesus or the Union about the Silverman Lace deal or problems involving scheduling of hours of work, customer service or turnaround time which factors were reasons for the decision to close West New York or so that the Union could offer some relief. Yet, Edelson was compelled to agree that in 1994 when the New York State Labor Department raised questions about the compliance of Respondent's long-term North Brunswick knitting department bonus plan with overtime pay requirements, he had sought and obtained union assistance in satisfactorily resolving the dispute. In 1995, at no time did Edelson ever approach the Union to discuss employee scheduling of hours of work or adjusting the collective-bargaining agreement including overtime or seniority or any other provisions. Edelson did not know if Hoffman or Metz had done so. The testimony of each manager precludes an such notice or discussion. Neither did Edelson contradict nor respond to de Jesus' testimony describing two telephone calls he made to de Jesus in early December, 1995 following receipt of the Union's charge, in which he exclaimed you won and threatened to close the factory by next October if the Union continues its pressure to reverse the closing. De Jesus' accounts of those telephone calls are credited.

Edelson also could not recall losing any scalloping customers in 1995 before contracting out all the work, and no scalloping work customers canceled their orders in 1994 because turnaround time was not satisfactory.

Edelson also agreed that when he provided financial information to the Union in 1996, in connection with upcoming negotiations, it was done at the request of the Union.

As to the sale of the West New York facility, the contract price for the building and the land on which it sets is \$500,000. Edelson testified that he, personally had provided over \$2 million of bank loans as operating capital for Westchester Lace. The proceeds of the prospective sale would provide a way for Edelson to repay a portion of these loans.

The record was filled out with copies of the various agreements covering the deal Edelson entered with Silverman Lace. In one agreement, entered May 17, 1996, Gaetano and one Bloom, the son of a nephew of Silverman, the original owner, agree to sell and transfer to Edelson one half of their respective shares of stock held in M. Silverman Lace, Inc., 50 and 16-2/3 shares, respectively, for the purchase price of \$50,000, \$37,000 to Goetano and \$12,500 to Bloom. In addition to becoming an one half holder of its stock as well as a director, a designee of Edelson shall be a first vice president. In another agreement, also made May 17, 1996, Silverman Laces, Inc., by its president, Gaetano, agrees to retain Westchester Lace, Inc., by its president, Edelson, as a general advisor and consultant beginning January 1, 1998, for an annual fee of \$75,000, plus actual expenses, the agreement to cease if Edelson or any family member cease to own a controlling interest in Westchester Lace. In another agreement made May 17, 1996, Silverman Lace agrees to employ and compensate Gaetano and Bloom as president/chief operating officer and second vice president/secretary and treasurer, Gaetano to manage its day-to-day business and affairs, and Bloom to be in charge of production and sales. In addition to the principal parties, Edelson also

signed for Westchester Lace. Edelson is also indemnified in a separate agreement, entered with Gaetano and Bloom, as an inducement to becoming an officer and director of Silverman Laces, against any losses or claim arising out of or based on all assets of Silverman which do not exceed all of its liabilities on its audited financial statement as of December 31, 1995, with Gaetano and Bloom agreeing to make up any losses by Silverman Laces within 60 days after the deficiency has been determined.

Two separate requirements agreements, were each executed on May 17, 1996 (with the execution date in each case substituted by hand for the original preparation date of January 1). In one, Westchester Lace first agrees to give to All-Lace all of Westchester's business relating to lace cutting, provided the prices charged by All-Lace are competitive with other cutters, and All-Lace agrees to accept the work and perform or have the work performed in accordance with the usual industry standards, with either party having the right of termination in the event Gaetano ceases to own the controlling interest in All-Lace or Edelson ceases to be a stockholder in Silverman Laces. In the other, signed by Gaetano and Edelson, respectively, Silverman Laces agrees to give to Westchester Lace all of Silverman's business relating to lace knitting and dying, provided the prices charged by Westchester to Silverman are competitive with other knitters and dyers, and Westchester agrees to accept the work in accordance with recognized industry standards. This agreement is also subject to termination if Edelson ceases to be a stockholder of Silverman or to own the controlling interest in Westchester.

In connection with Respondent's claim that its postcomplaint conduct satisfied whatever obligation it may have had to bargain about the effects of its decision to contract out its scallop cutting work and close its West New York facility, I permitted the record to contain some limited history of the parties' negotiations. In this respect the parties (the Union and the Company) stipulated and counsel for the General Counsel did not dispute certain limited facts, with both counsel for the General Counsel and counsel for the Union reserving their position that these facts should not have been admissible under Federal Rule of Evidence 408 prohibiting the introduction of conduct or statements made in compromise negotiations. Union counsel added a further ground for exclusion that the discussions comprising the stipulated facts were subject to an understanding they were to be off the record. Counsel for the General Counsel added two additional grounds for inadmissibility; that bargaining negotiations occurring after the unfair labor practice cannot serve as a remedy about compliance with certain Board mandated remedial requirements, and, both the Union and the General Counsel assert, that, in any event, consideration of the evidence offered belongs in the compliance stage of this proceeding and not in the initial underlying hearing as to Respondent's liability.

Those facts are that between May 14 and October 1996, the representatives of the Employer and the Union had a series of meetings and discussions about resolution of the dispute between them, which led to a tentative agreement subject to ratification with union recommendation and was rejected by the workers. The proposal was monetary with extension of recall rights and a payout schedule. Ratification of the agreement would have resulted in withdrawal of the National Labor Relations Board charge. The National Labor Relations Board set-

tlement coordinator (in Region 22), Margo Greenfield, was involved in one discussion.

Union Counsel Larry Magarik represented that at the first postcomplaint meeting between the parties they agreed that the ongoing discussions of the settlement of the unfair labor practice charge was an off-the-record process and that this understanding was reiterated at every discussion in which he personally participated, including the meeting with the National Labor Relations Board representative present. Respondent's counsel noted that the parties conducted all aspects of their settlement discussions, except for the one at which the Board's settlement coordinator was present, including the one at which they arrived at their final tentative agreement, in direct contact with each other. While Respondent counsel admits that there was agreement at the first meeting with full committees and both counsel present to conduct it off the record, such a condition was not later renewed, and, in any event, as the subject of the meetings were the issues normally encompassed inappropriate effects bargaining, and discussed at a time when Respondent was faced with a complaint proceeding alleging its failure to bargain about both the decision and its effects, its conduct in this regard should satisfy its bargaining obligations about the impact of its decision on unit employees.

Analysis and Conclusions

I turn first to the allegations that about October 20 and November 8, 1995, Respondent threatened its employees with closing of its business if they continued to engage in protected concerted activity. Those were the dates of the meetings held between Edelson and de Jesus and union stewards, including two who were employees in the North Bergen facilities. I have previously concluded, based on admissions made by Edelson himself, as well the crediting of de Jesus' testimony, as corroborated by Dionisio Melo, vice president of the Union and employee at North Bergen, as to Edelson's statements made on October 20 only, Melo not having attended the November 8 meeting, that Edelson, in response to union protests to his action in closing West New York, exclaimed that if de Jesus and the stewards persisted in being a headache, giving him a hard time, he was going to close the factory, the entire operation. On November 8, 1995, Edelson again became upset in the midst of union protests to claims they weren't cooperating with him and again exclaimed that if the Union continues to be a headache he would just close the whole facility down.

It is clear that the "headache" and hard time the Union was giving to Westchester Lace was its past conduct in objecting to and seeking to modify Respondent's incentive pay proposal, its complaints to layoffs and layoff selections, and its current effort at the meetings to get Edelson to reverse his decision to close the facility. Each of these actions constitute a form of protected concerted activity. The owner's threat to close facilities in North Bergen was thus a reaction to and retaliation for the employees' exercise of their Section 7 rights and violative of Section 8(a)(1) of the Act. See, e.g., *General Stencils, Inc.*, 195 NLRB 1109 (1972).

The next issue I consider is whether Respondent discriminatorily terminated the West New York facility employees when it contracted out all of the work performed there. I have already found that Edelson threatened to close all of Respondent's facilities if the Union continued to press him to continue the West New York operation. Having also credited de Jesus' version of their various interchanges, I have also found that

Edelson expressed irritation and hostility toward union efforts, undertaken with some success, to reign in Respondent's attempts to unilaterally determine production standards and to make personnel decisions involving allocation of overtime work hours, selection for short workdays, and the like without union consultation or compliance with seniority provisions. The expression by Edelson of his hostility were made responsively during meetings at which the Union was seeking to abort his decision to close the West New York facility. The evident inference arising from these facts is that Respondent was motivated in significant part by the Union's and employee's concerted activities in making its decision to close the facility and contract out its work. In dwelling on his litany of complaints with the Union and the work force the credited testimony of Edelson's own remarks goes a long way to establishing unlawful motivation. In offering up the lame excuse of fear of sabotage to explain his delay in disclosing his intent to de Jesus, Edelson also reveals his true motive. The minor acts of vandalism were never attributed to employees, most had taken place, for the first time well before the current spate of layoffs and short hours, there is conflict among Respondent's managers as to whether they contributed at all to Respondent's decision to close, they did not lead to serious adverse discipline and the most serious item, conduct disabling the compressors took place after Respondent had announced the closing. Respondent probably considered more serious, the so-called slowdowns which Metz reported to Hoffman and which Respondent considered another form of negative informal response to its personnel decisions.

Not only did Edelson express his hostility to the Union's noncooperative conduct, but Hoffman was particularly aggravated by the Union's delay and opposition to his plan to increase productivity.

Based on the credited evidence I conclude that the General Counsel has made a prima facie showing that the Union's protected concerted activity was a motivating factor in its decision to contract out all of the work produced at West New York.

Respondent nonetheless argues that the production problems discussed and itemized by Hoffman establish that it would have taken the action of contracting out even absent the Union and employees' Section 7 conduct, *Wright Line*, 251 NLRB 1082 (1980), enf'd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). I reject this defense and find it lacking in merit. Respondent never sought to test its claim that disclosure and open engagement of the Union would not have ameliorated or sufficiently reduced its alleged failure to provide fair service to its customers. Since early in 1995, Respondent had been utilizing subcontractors, principally All-Lace, in scallop cutting its rush orders involving very narrow band lace, "skinnies," and West New York had been supplying all other scallop cutting without customer complaints. Hoffman was frank in noting that its failure to put the incentive program in place contributed in part to Respondent's decision to contract out all the work. It is likely, or at least possible, that the incentive plan could have aided in solving the current production and scheduling problems, along with modifications of the contractual benefits enjoyed by the unit employees, which Respondent never sought. Finally, while Respondent, Edelson in particular, appears to rely on his deal with Silverman Lace as supporting a decision free of unlawful motivation, the timing of the contractual agreements show that at the time Edelson made his decision

and then belatedly announced it to the Union, this deal was not consummated and the parties were just in a talking stage. Even Edelson announced that he was prepared to close without that deal and use another subcontractor.

I now turn to the allegation that Respondent failed to bargain about its decision in violation of its bargaining obligation under the Act. In analyzing the issue one has to take into account the two lines of cases, represented, respectively, by *Fiberboard Corp. v. NLRB*, 379 U.S. 203 (1964), and *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981). In *Fiberboard*, the Court held that subcontracting issues are mandatory subjects of bargaining if all that is involved is the replacement or substitution of one group of employees for another to perform the same work under similar conditions of employment. In *First National Maintenance* the Court held that an employer decision to shut down part of its business, which involves a change in the scope and direction of the enterprise is outside the scope of bargaining.

In *Torrington Industries*, 307 NLRB 809, 810 (1989), the Board reaffirmed its application of the principles set forth in *Fiberboard*, supra. Thus, where there is the kind of subcontracting described, "there is no need to apply any further tests in order to determine whether the decision is subject to the statutory duty to bargain. The Supreme Court has already determined that it is." 307 NLRB at 810. As a consequence, the Board's burden shifting test utilized in *Dublinque Packing Co.*, 303 NLRB 386 (1991), to determine whether particular management decisions affecting employees, other than pure subcontracting, are mandatory subjects of bargaining, is inapplicable. Nonetheless, the Board noted in *Torrington Industries*, supra, that there may be cases where the nonlabor cost reasons for subcontracting may provide a basis for concluding that the decision to subcontract is not a mandatory subject of bargaining. In these cases, the employer's proffered reason for subcontracting involves some change in scope and direction of its business and is thus outside the scope of bargaining under *First National Maintenance*, supra.

In determining that Respondent's decision here is governed by *Fiberboard* and *Torrington*, rather than *First National Maintenance* and *Dubuque Packing* I note the following:

Although Edelson claimed that the cost of contracting out to All-Lace did not result in any savings, and Hoffman denied that any Union modifications of its contract would have convinced Respondent to continue the West New York Operation, I conclude that labor costs played a role in Westchester Lace's decision. I have previously credited the two General Counsel witnesses who attributed statements to Edelson at the October 20 meeting claiming that he could get the scallop cutting work done cheaper elsewhere and that it was cheaper to send the work out. Thus, Edelson was clearly thinking about unit costs when he made the decision to contract out all the work. In also equating All Lace's profit margin with Westchester Lace's higher wages and its inefficiencies of operation, Edelson was impliedly acknowledging that its incentive plan if implemented plus changes in its Union contract could have resulted in cost savings sufficient to warrant continuing the scallop cutting operation. By admitting that the Union's delay and criticism of its incentive plan was a factor in his recommendation to close, Hoffman was acknowledging the role that efficiencies of operation, lowering unit costs, could play in evaluating the continued viability of

West New York. Further, until Respondent was prepared to disclose its production problems to the Union, it is decidedly unclear, in spite of Hoffman's confident assertion to the contrary, that negotiations could not have permitted an increased ability to service customers properly, even with continued judicious use of sub-contracting.

Even assuming labor costs were not a major factor in Respondent's decision, nonetheless, there is a lack of probative evidence that its decision was based on a basic operational change in the scope or direction of the enterprise. While Hoffman spoke of the necessity of making an additional capital investment, presumably of machinery and equipment, in order to provide customer needs for large volumes of rush orders, it is far from clear that Respondent would have even been required to make that investment were the Union to have been amenable to major revision of its contractual work schedule and benefit provisions, and had Respondent concluded an incentive plan with the Union instead of withdrawing from final negotiations. It is noteworthy also that Hoffman never sought to support his bare assertion with any documentation or statistics showing the need for additional machinery. Special customer needs could still have been met by some continued subcontracting. De Jesus even offered to supply union efficiency consultants to aid in the process.

The important point here is that Respondent has continued in the same narrow band cutting business supplying the same customers, but by substituting another group of employees for its own. In doing so, Respondent has been unable to demonstrate that it has changed the basic nature of its business. See *Dorsey Trailers, Inc.*, 321 NLRB 616 (1996). Neither *Furniture Rentors*, 318 NLRB 602 (1995), on remand from *Furniture Rentors of America v. NLRB*, 36 F.3d 1240 (3d Cir. 1994), denying enforcement in relevant part 311 NLRB 749 (1993), nor *Oklahoma Fixture Co.*, 314 NLRB 958 (1994), relied on by Respondent for the conclusions that its decision here was of a core entrepreneurial type outside the range of bargaining, are applicable. Although the Board accepted the remand as the law of the case, its position still appears to be that productivity factors are amenable to bargaining. Furthermore, as I have concluded, neither the alleged slowdown nor minor acts of vandalism played a role in Respondent's decision to close, and the other factors involved in *Furniture Rentors*, damage to products and customer complaints, are not present here. And the question of legal liability present in *Oklahoma Fixture Co.* is also not present here. Finally, as the employer's decision was grounded on antiunion considerations, it cannot be a legitimate entrepreneurial decision exempt from bargaining. See *Mid-South Bottling Co. v. NLRB*, 876 F.2d 458 (5th Cir. 1989).

While Respondent argues that its agreement with Silverman Lace was basic to its decision to contract out, the facts do not support such a conclusion. That agreement was not in place until many months after the decision to close was made and Edelson was willing to arrange to contract out without the ultimate benefits of the deal it has received for the other, knitting and dying segments of its business. The dichotomy which exists between Edelson's explanation for the closing, based exclusively on his Silverman Lace deal, and Hoffman's efficiency driven and customer and service based explanation, omitting entirely the Silverman Lace and All-Lace Requirement Agreements, show an internal conflict in Respondent's reasoning which must serve to undercut its claim of having made a man-

agement decision on a subject not amenable to resolution through the bargaining process.

Inasmuch as Respondent evidenced a closed mind and unwillingness to bargain about its decision to contract out all of the work for its west New York facility, even delaying timely notice to the Union in order to avoid real bargaining, about a subject which I conclude relates to a traditional subject—subcontracting—as to which the Board, with Supreme Court approval has continued to require bargaining, and under circumstances which has adversely affected the tenure of the West New York work force, I conclude that Respondent has violated the Act by refusing and failing to bargain about its decision to close the West New York facility.

Respondent has likewise failed and refused to bargain with the Union with respect to the effects of that decision on its work force. First, while Respondent did provide 10 days (5 to 7 workdays) advance notice of its decision to close the West New York facility, the evidence I have credited portray an owner unwilling to engage in any meaningful bargaining prior to the closing. The Union's attempts to raise issues of severance, recall, and extension of benefits were met informally with summary rejection. Edelson's offer to comply strictly with the terms of the existing agreement—until closing—and his announcement extending medical coverage for 30 days beyond closing fail to meet minimal requirements to bargain about the effects on employees whose position were being permanently eliminated. As I have also earlier explained, Edelson's apparently off hand offer of jobs on future openings in North Bergen, without agreeing to bargain in detail about the parameters and specifics of its application, including the application of seniority rights as they presently applied to West New York employees, hardly comports with an obligation to bargain in a meaningful manner as required by the Act. *First National Maintenance*, supra at 682. *Nathan Yorke, Trustee*, 259 NLRB 819, 826 (1981), *enfd.* as modified 709 F.2d 1138, 1143 (7th Cir. 1983). Thus, not only was the time remaining to closing of extremely short duration, when the Union raised issues it felt required serious consideration, even while it continued to press Respondent to keep the facility open to provide adequate time to bargain about the underlying decision, Respondent's negative responses made clear its unwillingness to deal with the adverse impacts on employees, some with many years of loyal service.

Respondent's summary rejection of effects bargaining, contrary to Respondent's contention, relieved the Union of any obligation to continue to meet on the successive days leading to the closing. Such meetings would have proved futile. Furthermore, the Union was entitled, as de Jesus sought, to consult with the workers to obtain their input.

By the time the parties next met, on November 8, 1995, the facility was closed and the Union had lost whatever bargaining power it could be said to have enjoyed while the facility remained open. See *Walter Pape, Inc.*, 205 NLRB 719, 720 (1973). Still, on that date, Respondent, by Edelson, continued to stone wall de Jesus and the Union, refusing to consider any benefits which might have ameliorated the hardships directly flowing from the employees' loss of employment. Thus, even if the decision was nonbargainable, Respondent has failed in its continuing duty to bargain about the decision's impact. *First National Maintenance*, supra. See also, e.g., *Otis Elevator Co.*, 283 NLRB 223 (1987); *Vroman Foods*, 309 NLRB 209 (1992). Just as in *Compact Video Service*, 319 NLRB 131 (1995), *enfd.*

121 F.3d 478 (9th Cir. 1997), the Respondent did not meet its burden of demonstrating “particularly unusual or emergency circumstances” that would have relieved it of the obligation to provide the Union with effective preimplementation notice.

As to this issue of effects bargaining, Respondent nonetheless maintains that its subsequent negotiations, following issuance of the complaint here, satisfied its bargaining obligations in this regard. The parties’ stipulation shows that the negotiations which commenced after complaint issued dealt with the effects of Respondent’s decision to close the West New York facility. At one of their sessions the Board’s settlement coordinator for Region 22 participated. The successful completion of the negotiations contemplated a withdrawal of the charge. No agreement was reached as the unit employees rejected a tentative agreement in a ratification vote to which a final agreement was made subject.

There is no doubt that Federal Rule of Evidence 408 prohibits these after-complaint negotiations from being admissible. As noted by the Court in *Vulcan Hart Corp. v. NLRB*, 718 F.2d 268 at 277 (8th Cir. 1983), enfg. in relevant part 262 NLRB 167 (1982), “Rule 408 excludes evidence of settlement offers only if such evidence is offered to prove liability for or invalidity of the claim under negotiation. To the extent that the evidence is offered for another purpose, and to the extent either party makes an independent admission of fact, the evidence is admissible.” See also *Cirker’s Moving Co.*, 313 NLRB 1318, 1326 (1994).

Contrary to Respondent’s contention appearing at page 19 of its brief, it offered the evidence of postcomplaint negotiations solely to support its argument that the Governments’ claim that it breached its duty to bargain about the effects of its decision is invalid because it was satisfied by these negotiations, and not for any other purpose. Thus, the offer of the stipulation of facts fly’s in the face of the Rule 408 prohibition. See in this connection, *Contee Sand & Gravel Co.*, 274 LRB 574 at fn.1 (1985). It is noteworthy that in *Barney’s Club*, 288 NLRB 803 (1988), while the central issue in the case was whether Respondent made an offer to bargain through a Board agent during the investigation about the effects on employees of the closing of Respondent’s entire operation in violation of Section 8(a)(5) and (1) of the Act, a closing like the one in the instant proceeding, the Board noted that insofar as the statements at issue were made in the course of settlement negotiations, they would be inadmissible, in any event, citing *East Wind Enterprises*, 250 NLRB 685 fn. 2 (1980), enfd. 664 F.2d 754 (9th Cir. 1981), and the Federal Rule 408.

Apart from the foregoing, inasmuch as Respondent admits that the first meeting between the parties was governed by an off the record understanding, there is some reason to believe that that understanding may have applied to all later discussions which followed, even though not expressly so stated, and even though union counsel was not in attendance at some of them. It is likely that counsel wished to preserve that understanding for all future negotiations which he may have expected he would be unable to attend.

Finally, without regard to Rule 408 and a probable privacy understanding, these negotiations took place after the facility had closed, and thus without the conditions required by the Board to be in place to assure meaningful bargaining and to effectuate the purposes of the Act. In this case I have concluded that the Respondent, inter alia, by withholding information from the Union of its decision to close and subcontract

until close to the effective date of closing, deterred the Union from effective bargaining over the effects of the closing. Had the notice been given sufficiently in advance of the closing before the collective-bargaining strength of the employees and their Union had been dissipated, the notice would have provided a proper basis for effects bargaining. See *Transmission Navigation Corp.*, 170 NLRB 389 (1968). By starting to meet after the employees had been terminated, at a time when the Union and employees’ bargaining strength had been significantly dissipated the negotiations could not be found to satisfy Respondent’s bargaining obligation.

Respondent’s effort to equate union bargaining strength derived from continued employment free from immediate termination, with the presence of an outstanding complaint as both creating similar economic consequences for the employer, is rejected. Respondent is attempting to construct a false relationship. The Board has recognized in *Transmission Navigation Corp.*, id., that only by requiring a limited backpay remedy can it provide in a practicable manner a situation in which the parties’ bargaining position has some economic consequences. It is entirely unclear whether in ultimately complying with its bargaining obligation as to the effects of its closing, that Respondent will suffer by virtue of a Board Order here any adverse economic consequences, apart from its *Transmission Navigation* backpay obligation.

CONCLUSIONS OF LAW

1. The Respondent, Westchester Lace, Inc., is, and has been, at all times material, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. Local 2052, NY-NJ Regional Joint Board, UNITE, is, and has been at all times material, a labor organization within the meaning of Section 2(5) of the Act.
3. The following employees of Respondent constitutes a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

In the Respondent’s Separating, Winding, Scalping, Cutting and Dyeing Department—all employees in the plant excepting general office help, salaried Foremen, salesmen and heads of departments. The aforementioned exceptions do not include receiving or shipping clerks.

4. The Union described in paragraph 2, above, is now, and at all times material herein has been, the exclusive representative of all the employees in the above-described appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By threatening its employees with closing of its plant and its business if they continued to engage in protected, concerted activity, Respondent has been interfering with, restraining, and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act in violation of Section 8(a)(1) of the Act.

6. By terminating its scallop cutting department and all of its operations at its West New York, New Jersey facility, subcontracting those operations and laying off the employees who worked at that site, effective October 27, 1995, because those employees joined and assisted the Union and engaged in concerted activities, and to discourage its employees from engaging in these activities, Respondent has been discriminating in regard to the hire and tenure and terms and conditions of em-

ployment of its employees, in violation of Section 8(a)(1) and (3) of the Act.

7. By engaging in the conduct described in paragraph 6, above, without affording the Union an opportunity to bargain and without bargaining with respect to this conduct and the effects of this conduct on the employees in the bargaining unit described in paragraph 3, above, Respondent has been failing and refusing to bargain collectively and in good faith with the exclusive collective-bargaining representative of its employees in violation of Section 8(a)(1) and (5) of the Act.

8. The unfair labor practices of Respondent described above affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondent has violated Section 8(a)(1), (3), and (5) of the Act, I shall recommend that it be ordered to cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Since I have concluded that Respondent discriminately terminated the work force employed at its West New York facility when it closed the facility and contracted out the work performed at that facility, I shall recommend that Respondent be ordered to restore the operation at the West New York facility, which at the close of hearing was still owned by Leonard Edelson, its owner, unless it is shown at the compliance stage of this proceeding by previously unavailable evidence, see *Compu-Net Communications*, 315 NLRB 216 fn. 3 (1994), that the reinstatement of those operations is unduly burdensome. *Lear Siegler, Inc.*, 295 NLRB 857 (1989). The reason for requiring the resumption of former operations is to reestablish the status quo ante to the extent necessary to provide jobs for the employees who desire reinstatement and employment and to avoid rewarding the Respondent for its unlawful actions and thereby achieve basic remedial objectives under the Act. It is further recommended that Respondent be ordered to offer immediate and full reinstatement to its unlawfully discharged West New York facility unit employees to their former jobs, or, in the event their former jobs no longer exist, to substantially equivalent jobs, without prejudice to their seniority or other rights and privileges, and make whole the employees for any loss of earnings they may have sustained by reason of Respondent's unlawful conduct, by making payment to them of a sum of money equal to that which they normally would have earned from the date of Respondent's unlawful action to the date of its offers of reinstatement, less net earnings during such period, with backpay to be computed as provided in *F.W. Woolworth Co.*, 90 NLRB 289 (1950), and interest as provided in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

In recommending that the Board order the restoration of Respondent's West New York scallop cutting operation, I have concluded that Respondent has failed to meet its burden, see *Coronet Foods v. NLRB*, 981 F.2d 1284 (D.C. Cir. 1993), to establish that restoration is unduly economically burdensome. Respondent still owned at close of hearing all equipment and machinery, including the compressor, necessary to reestablish its scallop cutting operation, most in a disassembled state, and the cost of reassembling and start up of the operation was estimated by owner Edelson at \$100,000 to \$200,000, a sum which he did not claim was exorbitant or unreasonably costly. Furthermore, Edelson also noted that even if the West New York facility was sold, another location could probably be rented in

the area of North Bergen. As the sale agreement was entered at a time when Edelson was on notice from the complaint that closing was unlawful and General Counsel would seek its restoration, Respondent should not be able to knowingly benefit from its unlawful conduct. The same reasoning should apply to the requirement agreements executed in May 1966, which have permitted Respondent to increase its volume of business devoted to knitting and dying operations out of North Bergen at the expense of the jobs and livelihoods of its West New York work force. Furthermore, just as was noted by the Board in *Jay Recovery Technology Corp.*, 320 NLRB 356 at fn. 4 (1995), it would not be inconsistent with the Respondent's burden to remedy the unfair labor practices found in this case for it to bear the cost of any hardship resulting from the restoration of the status quo ante, as long as the hardship is not unduly burdensome to resume its scallop cutting operation. See also *Monongahela Steel Co.*, 265 NLRB 262 (1981). I also conclude as did the Board in *Jay Recovery Technology, Corp.*, a case like the instant one in which an employer's subcontracting decision was based on antiunion considerations, id. at fn. 3, that, based on the facts presented of record, it would not be unduly burdensome for the Respondent to resume its scallop cutting operation, *Mid-South Bottling Co. v. NLRB*, 876 F.2d 458, 460-464 (5th Cir. 1989); *Teamsters Local 171 v. NLRB*, 863 F.2d 946, 957-958 (D.C. Cir. 1988). See also *Masland Industries*, 311 NLRB 184 (1993).

The same restoration and make-whole provision shall be recommended to remedy Respondent's refusal to bargain about its decision to close West New York and contract out all its work. *Jay Recovery Technology Corp.*, supra. In the event that the Board ultimately determines that Respondent's only refusal to bargain was its refusal to bargain about the effects of its decision, I shall recommend the payment of limited backpay. *Garwood-Detroit Truck Equipment*, 274 NLRB 113, 116 (1985); *Transmarine Navigation Corp.*, 170 NLRB 389 (1968). That remedy requires Respondent to pay backpay to its adversely affected employees at the rate of their normal wages when last in Respondent's employ from 5 days after the date of this Decision and Order until the occurrence of the earliest of the following conditions: (1) the date the Respondent bargains to agreement with the Union on those subjects pertaining to the effects of the subcontracting on its employees; (2) a bona fide impasse in bargaining; (3) the failure of the Union to request bargaining within 5 days of this decision, or to commence negotiations within 5 days of the Respondent's notice of its desire to bargain with the Union, or (4) the subsequent failure of the Union to bargain in good faith; but in no event shall the sum paid to any of these employees exceed the amount that employees would have earned as wages from October 27, 1995, the date on which Respondent subcontracted the work, to the time the employee secured equivalent employment elsewhere, or the date on which the Respondent shall have offered to bargain, whichever occurs sooner; provided, however, in no event shall this sum be less than these employees would have earned for a 2-week period at the rate of their normal wages when last in the Respondent's employ. I shall further recommend that Respondent be ordered to, on request, bargain in good faith with the Union as the exclusive bargaining agent for its unit employees as to the decision to close the West New York facility and subcontract the scallop cutting department and all of its operations performed at that facility and with regard to the effect on em-

ployees of subcontracting that work, and, if an understanding is reached, embody such understanding in a signed agreement.

On these findings of fact and conclusions of law, and on the above record, I issue the following recommended¹

ORDER

The Respondent, Westchester Lace, Inc., North Bergen and West New York, New Jersey, its officers, agents, successors, and assigns, jointly and severally, shall

1. Cease and desist from

(a) Threatening its employees with closing of its business and its plant if they continued to engage in protected, concerted activity.

(b) Terminating its scallop cutting department and all of its operations at its West New York facility, subcontracting those operations and laying off the employees who were employed at that facility, thereby discriminating in regard to hire, tenure, and terms and conditions of employment to discourage membership in the Union.

(c) Failing and refusing to bargain in good faith with Local 2052, New York-New Jersey Regional Joint Board, UNITE, the exclusive bargaining agent of its employees in the appropriate bargaining unit described below, by terminating its scallop cutting department and all of its operations at its West New York facility, subcontracting those operations and laying off the employees who were employed at that facility, without affording the Union an opportunity to bargain and without bargaining with respect to this conduct and the effects of this conduct on the employees in the bargaining unit:

In the Respondent's Separating, Winding, Scalloping, Cutting and Dying Department—all employees in the plant excepting general office help, salaried Foremen, salesmen and heads of departments. The aforementioned exceptions do not include receiving or shipping clerks.

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

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

(a) Reestablish and resume its separating, winding, scalloping, cutting, and dyeing department and all of its operations as it existed prior to October 27, 1995, at its West New York facility, offer immediate and full reinstatement to its unlawfully laid

off and terminated employees previously employed at that facility to their former jobs or, in the event their former jobs no longer exist, to substantially equivalent jobs, without prejudice to their seniority or other rights and privileges, and make whole these employees for any loss of earnings they may have suffered by reason of Respondent's unlawful conduct, in the manner set forth in the remedy section of this decision. If this order only requires effects bargaining, make whole the employees as provided, alternatively, in the remedy section of this decision.

(b) On request, bargain in good faith with the Union as the exclusive bargaining agent of its employees in the above-described unit, as to the decision to close the West New York facility and subcontract the scallop cutting department and all of its operations performed there and as to the effects on employees of subcontracting that work and, if an understanding is reached, embody such understanding in a signed agreement.

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

(d) Within 14 days after service by the Region, post at its facilities in North Bergen and West New York, New Jersey, copies of the attached notice marked "Appendix."² Copies of the notice, on forms provided by the Regional Director for Region 22, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive 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.

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

² If this Order is enforced by a Judgment of the 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."

¹ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.