

**The Earthgrains Company and Bakery, Confectionery & Tobacco Workers International Union, Local 343, AFL-CIO.** Cases 11-CA-18006-1, 11-CA-18202, 11-CA-18223, 11-CA-18230, and 11-CA-18376

September 29, 2007

DECISION AND ORDER

BY MEMBERS LIEBMAN, SCHAUMBER, AND KIRSANOW

On May 1, 2000, Administrative Law Judge Benjamin Schlesinger issued the attached decision. The Respondent filed exceptions and a supporting brief.

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

The Board has considered the decision and the record in light of the exceptions and brief<sup>1</sup> and has decided to affirm the judge's rulings, findings,<sup>2</sup> and conclusions as modified below and to adopt the recommended Order as modified and set forth in full below.<sup>3</sup>

<sup>1</sup> The Respondent filed a 278-page exceptions document containing 1171 exceptions, many of which are identical to other exceptions or otherwise redundant, and many of which are merely bare exceptions unsupported by argument in the Respondent's brief. As to the latter, we find, in accordance with Sec. 102.46(b)(2) of the Board's Rules and Regulations, that the exceptions should be disregarded. See *New Concept Solutions, LLC*, 349 NLRB 1136, 1136 fn. 2 (2007). Moreover, as detailed below, the Respondent's supporting brief makes representations that are, at best, misleading.

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

In addition, the Respondent asserts that the judge's rulings, findings, and conclusions demonstrate bias and prejudice. On careful examination of the judge's decision and the entire record, we are satisfied that the Respondent's contentions are without merit.

The Respondent also contends that the charges were filed in the wrong Regional Office. However, where a charge should be filed is essentially a venue matter, and improper venue is not fatally defective. *Allied Products Corp.*, 220 NLRB 732, 733 (1975). The Respondent was served with all charges and had a full opportunity to defend against the charged allegations on the merits. Thus, we find no prejudice to the Respondent. See *id.*

<sup>3</sup> We shall modify the judge's recommended Order to conform to the violations found, in accordance with our decision in *Ferguson Electric Co.*, 335 NLRB 142 (2001), and to remove the limiting, location-specific language from the cease-and-desist provisions in the recommended Order. See, e.g., *Beverly Health & Rehabilitation Services*, 346 NLRB 1319 (2006) (wording cease-and-desist provisions generally where corresponding violations occurred at various facilities). For the reasons explained below in the section entitled "notices to employees," we find the judge's recommended common notice inappropriate, and we shall order the Respondent to post separate notices at its Johnson City, Tennessee, and Bristol, Virginia facilities, and a shared notice at its Jenkins, Kentucky, and Norton, Virginia facilities.

The judge found that the Respondent committed numerous violations of Section 8(a)(1) of the Act. We affirm all but one of those findings.<sup>4</sup> The Respondent does not except to the legal or factual merits of any of the judge's 8(a)(1) findings. It argues for reversal of some of them on due process, Section 10(b), or other procedural grounds; we address those arguments below.<sup>5</sup> The judge also found that the Respondent violated Section 8(a)(3) and (1) of the Act by discharging employee Tommy Duncan and transferring employee Barry Mullins.<sup>6</sup> For the reasons stated by the judge, as supplemented below, we affirm those findings.

I. RESPONDENT'S 10(b) DEFENSE CONCERNING ALLEGATIONS OF THREATS MADE TO EMPLOYEE MULLINS

The Respondent contends that certain allegations of threats made to Mullins are time barred.

A charge filed on July 8, 1998, alleged that, about June 29, 1998, the Respondent discriminated against garage mechanic Barry Mullins, who worked at the Respondent's Jenkins, Kentucky garage, by transferring his job (and therefore Mullins) to Johnson City, Tennessee, because of his union activities. An amended charge filed

In adopting the judge's recommended Order, we adopt the provision of the recommended Order that refers alleged misconduct by Respondent's attorney, Joan Canny, to the investigating officer pursuant to Sec. 102.117(e) of the Board's Rules and Regulations. We disavow, however, the passage in the attorney misconduct section of the judge's decision in which he granted the General Counsel's request to recommend that the Board sanction Canny. Allegations of misconduct are not to be submitted to the Board in the first instance. See *McAllister Towing & Transportation Co.*, 341 NLRB 394, 398 fn. 7 (2004) (alleged attorney misconduct), enf. mem. 156 Fed.Appx. 386 (2d Cir. 2005); *675 West End Owners Corp.*, 345 NLRB 324, 325-326 (2005) (alleged party misconduct). They are to be submitted to the investigating officer under Sec. 102.177(e), as reflected in the judge's recommended Order. We note, however, that, rather than making the submission a part of the Order, the better practice is to submit misconduct allegations directly to the investigating officer. *McAllister Towing*, supra (stating that the judge "should have filed her recommendation" with the investigating officer).

<sup>4</sup> We find merit in the Respondent's exception to the judge's finding that the Respondent, by Route Supervisor Clayton Caudill, violated Sec. 8(a)(1) by threatening stricter enforcement of the Respondent's rules and policies. This conduct was not alleged in the complaint, and the General Counsel did not move to amend the complaint to add such an allegation. Accordingly, we reverse the judge's finding of this unalleged violation. We note, however, that the judge did not include any provision in his recommended Order corresponding to this finding.

<sup>5</sup> Accordingly, we need not address the Respondent's contention that the judge erred in omitting from his decision his reasons for rejecting some of the Respondent's procedural and due process arguments, or that the judge's omission in this regard requires either that the judge's decision be set aside or that we remand the proceeding to the judge.

<sup>6</sup> The judge dismissed allegations that the Respondent discriminated against employee Tim Harvey in violation of Sec. 8(a)(3) and (4). Thus, we need not address the Respondent's assertion that it lacked sufficient information concerning those allegations to enable it to prepare a defense.

on December 28, 1998, alleged that the following incidents occurred between June 23 and 26, 1998: Sales Manager Heath Chandler threatened Mullins with unspecified reprisals if he engaged in union activities; and Johnson City Fleet Superintendent Dave Farmer threatened Mullins with closure of the Jenkins work facility, and with transfer or termination, in retaliation for his having engaged in union activities. Thus, these incidents were alleged to have occurred more than 6 months before the date the amended charge was filed. The judge found, however, that the 8(a)(1) allegations contained in the amended charge were not time barred by Section 10(b) because they were closely related to the timely-alleged 8(a)(3) allegation regarding Mullins' transfer. We agree.

In determining whether an otherwise untimely allegation is sufficiently related to a timely allegation to allow it to be added to the complaint, the Board applies the three-prong test set forth in *Redd-I, Inc.*, 290 NLRB 1115 (1988). Under that test, the Board (1) considers whether the timely and the untimely allegations involve the same legal theory; (2) considers whether the otherwise untimely allegations arise from the same factual situation or sequence of events as the allegations in the timely charge; and (3) "may look" at whether a respondent would raise the same or similar defenses to both the timely and untimely allegations. *Carney Hospital*, 350 NLRB 627, 628 (2007); *Nickles Bakery of Indiana*, 296 NLRB 927, 928 (1989).<sup>7</sup> The untimely allegations in issue here meet the *Redd-I* test.

First, the timely and untimely allegations involve the same legal theory. To prove the 8(a)(3) allegation in the timely charge, that the transfer was retaliatory, the General Counsel had to show that Mullins' union activity was a motivating factor in his transfer. The untimely-alleged 8(a)(1) threats directed at Mullins serve to establish an unlawful motive for Mullins' transfer. Indeed, the threats themselves portend a transfer as a reprisal for engaging in union activities.

Second, the timely and untimely allegations plainly arise from the same factual situation or sequence of events. The untimely-alleged threats and the announcement of the timely-alleged discriminatory decision to close the Jenkins garage and transfer Mullins all occurred within a few days. Moreover, the transfer made good on Farmer's preceding threat to transfer or discharge Mullins.

<sup>7</sup> The General Counsel does not here contend that the mere occurrence of the alleged violations during or in response to the same organizing campaign is sufficient to establish the close factual relationship required by Sec. 10(b). Thus, this case does not present the issue the Board recently addressed in *Carney Hospital*, supra.

Finally, the Respondent raised similar defenses to the timely and untimely allegations, at least with respect to the alleged threats by Farmer.<sup>8</sup> Thus, Farmer testified that he did not threaten Mullins but rather chastised him for talking instead of working. In defending against the timely 8(a)(3) allegation, the Respondent claimed that the Jenkins garage was closed and Mullins transferred because of Mullins' poor work performance, as well as for business reasons. Thus, as to both Farmer's threats and Mullins' transfer, the Respondent's defense was based on Mullins' purported performance. In sum, we find that the untimely allegations of threats made to Mullins in relation to his union activity are closely related to the timely 8(a)(3) allegation that Mullins was transferred due to his union activity and thus are not time barred under Section 10(b).

## II. ISSUES RELATED TO ALLEGATION THAT RESPONDENT ENGAGED IN COERCION TO IMPEDE A BOARD INVESTIGATION

At hearing, the judge allowed the General Counsel, over the Respondent's objections, to amend the complaint to include an allegation that the Respondent "coerced its employees to sign false statements to impede a Board investigation."<sup>9</sup> Excepting to the judge's ruling, the Respondent advances two principal arguments: that it was denied due process, and that the allegation is time barred. For the following reasons, we reject the Respondent's exceptions.

### A. The Judge's Decision

The judge found that on March 2, 1999,<sup>10</sup> the route supervisor for the Norton, Virginia facility, Clayton Caudill, spoke to employee Donald (Eric) Rogers in Caudill's office. The judge credited Rogers' testimony about this conversation, including Rogers' assertion that the telephone in Caudill's office was off the hook during the conversation. After reminding Rogers of writeups he had previously received, Caudill told Rogers that he had done Rogers a favor by not firing him, and that Rogers could do Caudill a favor by signing a paper saying that anything that Caudill had said to Rogers about the Union

<sup>8</sup> We find the untimely-alleged threat by Chandler closely related to the timely-alleged 8(a)(3) Mullins transfer, even assuming the Respondent would not raise similar defenses to those allegations. See *Carney Hospital*, supra, slip op. at 2 fn. 8 (stating that the third prong of the *Redd-I* test is nonmandatory).

<sup>9</sup> At hearing the General Counsel gave two explanations for his delay in so amending the complaint. First, he had not been aware that the statements had been coerced until Thursday of the week before the hearing. Second, once he became aware, he was then concerned that, if the Respondent were to learn of the allegation, its employees could be subject to further coercion.

<sup>10</sup> All dates hereafter are 1999, unless otherwise stated.

had been said in a joking or friendly manner. Caudill then put Rogers on the telephone. According to Rogers, the Respondent's attorney, Joan Canny, was on the line. After their telephone conversation, Canny faxed a statement to Rogers, which Rogers signed and faxed back to Canny. That statement, quoted verbatim in the judge's decision, essentially represented that anything Caudill and Sales Manager Heath Chandler had said to Rogers regarding the Union was "between friends" and not "intended to be a bribe or a threat." The judge credited Rogers' testimony that he did not tell Canny what to write in the statement and that the statement was inaccurate.<sup>11</sup> The judge found that Caudill's statements to Rogers constituted a threat to his employment if he did not sign the statement and thus interfered with Rogers' Section 7 rights.

The judge also found that the Respondent violated Section 8(a)(1) by "coercing its employees to sign false statements to impede a Board investigation." As more fully discussed below, the Respondent used the statement signed by Rogers in support of a Motion for Partial Summary Judgment, in which it argued that employees who were the targets of alleged unlawful statements "have denied that such statements were made and have further asserted that allegations of threats were the results of a misunderstanding." The judge noted that the General Counsel had amended the complaint at hearing to allege this unfair labor practice, and he rejected the Respondent's arguments that the allegation was time barred and that the Respondent had been deprived of due process. The Respondent renews those arguments here.

<sup>11</sup> As noted above, the judge ordered that allegations of misconduct by Attorney Canny be referred to the investigating officer, and also recommended that the Board sanction Canny for her conduct in preparing Rogers' statement. The Respondent contends that the judge's finding that Canny engaged in misconduct was improper and interfered with the Respondent's right to counsel. We have disavowed the judge's finding in this regard, as that determination is to be made in the first instance by the investigating officer. However, the judge was required to make credibility rulings regarding Rogers' and employee Shane Jessee's testimony that they had not told Canny what to write in their statements. (Jessee signed a statement similar to Rogers'.) Thus, Canny's role in preparing those statements necessarily came into play. However, we find it unnecessary to rely on the judge's inference that Canny overheard the conversation in which Caudill coerced Rogers.

The Respondent also claims that it was denied the right to make a record by the "poor state of the transcript." Although the Respondent contends that the transcript was marred by numerous gaps and omissions, it claims only one specific omission (i.e., that Canny's assertion to the judge that she had not overheard Caudill's and Rogers' discussion on March 2 is missing from the transcript), and it does not claim that it requested a correction of any error. In any event, the Respondent's contention is mooted by our finding it unnecessary to rely on the judge's inference that Canny overheard the Caudill/Rogers conversation.

## B. The Respondent's Contentions

### 1. Due process

The fundamental elements of procedural due process are notice and an opportunity to be heard.<sup>12</sup> The Respondent contends that the judge denied it due process by granting the amendment without affording it an opportunity to prepare a defense.<sup>13</sup>

In *Paramount Farms*, 334 NLRB 810 (2001), the Board found no merit in the respondent's contention that it had been denied due process. There, the judge, in allowing a complaint amendment, gave the respondent an opportunity to request time to prepare a defense to the new allegation, and the respondent did not dispute the judge's observation that it did not avail itself of the additional time. *Id.* at 810 fn. 1.

Here, the Respondent claims that it made an off-the-record request for a recess to prepare a defense, which the judge denied. The Respondent additionally claims that its off-the-record request was accompanied by an objection to going off the record. Obviously, without a record, it is difficult to review such claims. But even assuming their truth, the Respondent's due process defense fails. The Respondent acknowledges that, although denying the request for an immediate recess, the judge stated that he would receive testimony relevant to the complaint amendment subject to a motion to strike. Moreover, on the record, the judge made clear that he had not foreclosed the Respondent from renewing its

<sup>12</sup> See *Lamar Advertising of Hartford*, 343 NLRB 261, 265 (2004). "The precise procedural protections of due process vary, depending upon the circumstances, because due process is a flexible concept unrestricted by any bright-line rules." *Steinert v. Winn Group, Inc.*, 440 F.3d 1214, 1222 (10th Cir. 2006).

<sup>13</sup> The Respondent also contends that the Regional Office was biased against it because it had complained about conduct of Regional Office employees, and because of this bias the Region did not investigate statements such as Rogers' (which the Respondent attached to its position statement to the Region as well as to its Motion for Partial Summary Judgment).

There is no support for the Respondent's claim that the Region failed to investigate the employees' statements. In a letter to Canny dated March 3, Field Examiner Norman Reese confirmed that the Regional Office had received the Respondent's position statement and attachments. In a letter dated March 8 to Union Agent William Boyd, Reese stated that he had had difficulty contacting the Union's witnesses and that he had conflicting information from some of them. Reese then requested to meet with specified employees, including those who had provided statements to the Respondent, "this Wednesday." Shortly thereafter, in a letter to the regional director and the regional attorney dated March 16, the Respondent asserted that the Union and Reese were harassing employees by attempting to contact them at work and home. Clearly, this alleged "harassment" was precisely the Region's effort to contact employees for the purpose of investigating their statements. We therefore find no merit in the Respondent's contention that the Regional Office did not investigate the statements due to bias against the Respondent.

request for time to prepare a defense. In denying the Respondent's additional motions to strike the amendment and for a recess to enable the Respondent to take a special appeal, the judge stated: "You will see whether you need additional time with Mr. Caudill to . . . prepare your defense[.]" Thereafter, the Respondent never renewed its request for a recess to prepare a defense. In other words, the judge merely denied the Respondent's request for an *immediate* recess, without prejudice to its right to renew that request should that prove necessary and to move to strike testimony relevant to the amendment if it uncovered a basis for doing so. Such a ruling is not a denial of due process. It is simply a routine exercise of a judge's prerogative to avoid unnecessary hearing delays. Thus, we find no merit to the Respondent's assertion that it was denied time to prepare a defense to the new allegation, and therefore find no merit to its contention that the addition of the new complaint allegation at hearing was a denial of due process.<sup>14</sup>

<sup>14</sup> Although, as stated above, the judge denied the Respondent's motion for a recess to take a special appeal, the judge delayed the start of the hearing the next day to give the Respondent time to prepare and file a special appeal. When the hearing opened the next day, Canny stated that the Respondent was in the process of filing the appeal, but she had not been allowed sufficient time to prepare it. On brief, the Respondent contends that at that point, the judge refused to allow it to make offers of proof that (1) the judge had not provided it with a sufficient recess to prepare a special appeal; and (2) off the record, the judge had denied its request for a recess to prepare a defense. The Respondent also contends that during this exchange, Canny stated that "there is prejudice to me and I need an opportunity to—prepare a defense." The hearing transcript demonstrates otherwise. According to the transcript, Canny stated, "There is prejudice to me and I need an opportunity to"—at which point the judge interjected. Given the context, the likely unspoken conclusion of Canny's statement would have referred to the special appeal.

In any event, Canny's request to take the special appeal and the judge's response were already in the record, making an "offer of proof" on that issue unnecessary; and the Respondent did not establish that it was denied the opportunity to make such an offer regarding any previous request for time to prepare a defense to the new allegation. Moreover, as to the latter, we have accepted the Respondent's assertions concerning its off-the-record request and found on the merits that the denial of that request for an immediate recess did not deprive the Respondent of due process. We therefore find no merit in these contentions.

However, in explaining why he did not grant the Respondent's motion for an immediate recess to file a special appeal, the judge included statements suggesting that the Respondent's attorney had misrepresented the availability of an employee to testify. As any conversation regarding the employee's availability occurred off the record, we place no reliance on the judge's remarks in this regard.

During the above exchange, the judge stated that he did not want to hear reargument. Canny continued to speak, and the judge responded that Canny could make her point to the Board. Canny still continued to speak, and the judge responded by paraphrasing Sec. 102.35(a)(6) of the Board's Rules and Regulations, which states in relevant part that the administrative law judge shall have authority "[t]o regulate the course of the hearing and, if appropriate or necessary, to exclude persons or

## 2. Section 10(b)

The Respondent contends that the judge erred in granting, at hearing, the General Counsel's motion to amend the complaint on the additional ground that the amendment was time barred and did not meet the *Redd-I* "closely related" test. For the reasons discussed below, we disagree.

At hearing, Rogers testified in support of the timely-alleged complaint allegations that the Respondent had violated Section 8(a)(1) by (1) interrogating employees regarding their and their coworkers' union activities; (2) promising that employees would receive a pay increase if they voted against the Union; (3) threatening the inevitability of strikes; and (4) telling employees that a wage increase was being frozen because of the Union.<sup>15</sup> In its Motion for Partial Summary Judgment, the Respondent noted that the complaint alleged that Caudill and Chandler interrogated and threatened employees and made other statements in violation of Section 8(a)(1).<sup>16</sup> The Respondent also stated that Region 11 had averred that those allegations pertained to employees Shane Jessee, Eric Rogers, Mark Mullins, and Charlie Baker. The signed statements of those four employees, including the statement of Rogers that is in issue, were attached to the motion.<sup>17</sup> In the motion, the Respondent argued that

[a]s the employees that are the target of the purported unlawful statements have denied that such statements were made and have further asserted that allegations of threats were the results of a misunderstanding, there is no competent evidence of these allegations and they are otherwise unsupported.

Applying the *Redd-I* factors, we find that the amendment alleging that the Respondent coerced employees to sign false statements to impede a Board investigation was closely related to the timely allegations in support of

counsel from the hearing for contemptuous conduct[.]” The judge then stated that Canny had an automatic exception to any of his rulings, but that he would “not tolerate continued discussion on matters that I have ruled upon and a continuation of your conduct,” warning her that he would “have [her] colleague take over this case if [she] ma[d]e that necessary.” The Respondent contends that the judge's threat to exclude the Respondent's counsel from the hearing had a chilling effect on counsel's effective representation of the Respondent. We find no merit in the contention.

<sup>15</sup> Rogers' testimony pertained to pars. 7(d), (p), (q), and (s) of the second consolidated complaint.

<sup>16</sup> The motion specifically references complaint par. 7(a) as it pertains to the Norton facility, and pars. 7(d)–(l), (o)–(t), and (v). At the time the motion was made, the complaint in issue was the consolidated complaint. However, the relevant complaint paragraphs in both the consolidated complaint and the second consolidated complaint are identical.

<sup>17</sup> In his decision, the judge inadvertently stated that Jessee's statement was signed February 2. The correct date was February 27.

which Rogers later testified. First, the timely claims alleged specific instances of interference with employees' Section 7 rights; the amendment alleged coercive efforts to obtain false statements to support a motion to dismiss those claims. Second, the amendment and the timely allegations arise from the same factual scenario or sequence of events, in that the alleged coerced statement concerned the very conduct that gave rise to the timely 8(a)(1) allegations that the Respondent attempted to have dismissed by using the statement. Finally, even assuming that the Respondent would raise dissimilar defenses to the timely allegations (i.e., that there was "no competent evidence" to support them) and the untimely amendment (i.e., that it was time barred and that Respondent's due process rights were impaired), we find the foregoing sufficient to satisfy the *Redd-I* "closely related" test.<sup>18</sup> To find otherwise would be to endorse the unlikely proposition that an attempted cover-up of unlawful conduct is not closely related to the unlawful conduct sought to be covered up. Thus, the untimely allegation is not barred by Section 10(b).

### III. OTHER 8(A)(1) ALLEGATIONS

#### A. Maintenance of No-Union-Talk Rule

The judge granted the General Counsel's request, in his posthearing brief, to amend the complaint to allege that the Respondent violated Section 8(a)(1) by maintaining a rule prohibiting employees from speaking about the Union on company property. The Respondent excepts.

In the course of questioning Chandler concerning his alleged threat to Mullins of an unspecified reprisal, the Respondent elicited testimony that Chandler had told Mullins that Mullins could not talk about the Union on company time. Chandler then amplified the point, testifying that he did not know what Mullins was allowed to talk about, but he knew that Mullins could not talk about the Union on company property. On cross-examination, Chandler testified that he and other supervisors were told that the employees could not talk about the Union on company property, and that he communicated this rule to Mullins when Mullins was talking to other employees. Based on Chandler's testimony, the General Counsel sought, in his posthearing brief, to amend the complaint as stated above; and the judge allowed the amendment and found the violation.

Section 102.17 of the Board's Rules and Regulations provides, in relevant part, that a complaint "may be amended upon such terms as may be deemed just . . . at the hearing and until the case has been transferred to the Board." By analogy to the standard for determining the

adjudicability of unfair labor practice violations that have not been alleged at all, we find the terms of this amendment just. Under that standard, the Board may find an unalleged violation "if the issue is closely connected to the subject matter of the complaint and has been fully litigated." *Pergament United Sales*, 296 NLRB 333, 334 (1989), enf'd. 920 F.2d 130 (2d Cir. 1990). We find both prongs met here.

As to the "closely connected" prong, the Respondent sought to squelch its employees' union activities in multiple unlawful ways, including threats of unspecified reprisals, facility closure, transfer or termination, more onerous work assignments, reduced commissions, and loss of wages and benefits; promises of more favorable treatment if employees reject the Union; coercive interrogation; creating the impression of surveillance; and statements to employees that it had gotten rid of a union ringleader, that supporting the Union was futile, and that a wage increase was being frozen because of the Union. We find that maintaining a rule prohibiting employees from speaking about the Union on company property was closely connected to the subject matter of the complaint because it was part and parcel of the Respondent's broad campaign of unlawful conduct aimed at interfering with, restraining, and coercing its employees in the exercise of their Section 7 rights. We also find that it was fully litigated because it was based on the testimony of the Respondent's own witness and flowed from testimony elicited by the Respondent itself. See *Pergament United Sales*, supra (stating that closely connected/fully litigated rule "has been applied with particular force where the finding of a violation is established by the testimonial admissions of the Respondent's own witnesses"). Thus, we find no merit in the Respondent's exception and adopt the judge's finding of a violation.

#### B. Futility Threat

The judge found that Chandler made a statement in September 1998 to employee Shane Jessee that, if the employees obtained union representation, the Respondent would not give the employees the "Golden 80" retirement plan, which the Union had negotiated for the Respondent's employees at Johnson City. The judge found that the statement supported the complaint allegation that the Respondent, by Chandler, had violated Section 8(a)(1) by telling employees that support for the Union would be futile. The General Counsel, on brief, requested to withdraw that allegation. The Respondent contends that it lacked sufficient information about the nature of the allegation of futility to prepare a defense, and implies that its on-the-record request for clarification of the allegation was denied by the judge. The Respondent therefore argues that the General Counsel's request

<sup>18</sup> Again, the third prong of the *Redd-I* test is not mandatory. *Carney Hospital*, 350 NLRB 627, 628 fn. 8 (2007).

to withdraw the allegation should have been granted. However, when the Respondent's attorney asked for the specific testimony that went to the futility allegation, the judge directed her to testimony about threats of reducing pay and no "golden [80]," and the General Counsel agreed. We therefore find no merit in the Respondent's implied claim that it did not receive clarification about what evidence pertained to the allegation, and we reject its related claim that the judge erred by failing to grant the request to withdraw it.<sup>19</sup>

#### C. *Interrogation of William Harvey*

The Respondent contends that the judge erred in finding an 8(a)(1) violation by Chandler on November 13, 1998, because there is no complaint allegation pertaining to that date. In support of the complaint allegation that Chandler coercively interrogated employees on August 20, 1998, employee William Harvey testified on direct examination that, on August 20, 1998, Chandler asked him if he was the "ringleader" of the Union. However, on cross-examination, Harvey was confronted with his personal notes, which placed the date of the interrogation as November 13, 1998. Harvey stated that the later date was more likely to be accurate. In his posthearing brief, the General Counsel acknowledged Harvey's "confusion" and asked that if the judge found that the incident occurred on November 13, "the pleading be conformed to the proof." The judge found that the conversation occurred on November 13 and found the violation, thus implicitly granting the General Counsel's request. We adopt the judge's finding of a violation supported by an appropriate complaint allegation.

#### D. *The Respondent's Contention that It Lacked Sufficient Information Regarding the 8(a)(1) Allegations*

The Respondent contends that it was denied sufficient information to adequately prepare a defense regarding the 8(a)(1) allegations. The allegations set forth in the complaint comport with the Board's Rules and Regulations Section 102.15 and Casehandling Manual (Part One) Unfair Labor Practice Proceedings, Section 10264.2.<sup>20</sup> We therefore find no merit in this exception.

<sup>19</sup> It is well settled that after relevant evidence has been adduced, the General Counsel no longer has absolute control over the complaint. Rather, whether to grant a motion to dismiss any portion of the complaint is within the judge's discretionary authority. See *Sheet Metal Workers Local 28 (American Elgen)*, 306 NLRB 981, 982 (1992), and cases cited therein.

<sup>20</sup> Moreover, letters from the Regional Office to the Respondent, sent to the Respondent before issuance of the complaint, provided additional details about various allegations in the charges. We also note the Respondent's Motion for Partial Summary Judgment, discussed above, in which the Respondent specified certain paragraphs of the complaint

#### IV. THE 8(a)(3) ALLEGATIONS

##### A. *Discharge of Tommy Duncan*

As stated above, we affirm, for the reasons stated by the judge, the judge's finding that the Respondent violated Section 8(a)(3) in discharging employee Duncan. In so finding, the judge relied in part on evidence that the Respondent told another employee that Duncan was a union "ringleader." There was no direct evidence that Duncan engaged in union activity, and the Respondent contends that this is fatal to the General Counsel's case. Section 8(a)(3) is violated, however, where an employer discriminates against an employee because it *believes* that the employee has engaged in union activity, even if the employee has not done so. *Krystal Enterprises*, 345 NLRB 227, 230 fn. 15 (2005). Thus, we reject the Respondent's contention.<sup>21</sup>

##### B. *Transfer of Barry Mullins*

Also as stated above, we affirm, for the reasons stated by the judge, the judge's finding that the Respondent violated Section 8(a)(3) in transferring employee Mullins. In so finding, the judge discredited the testimony of Johnson City Fleet Superintendent Dave Farmer that he transferred Mullins because of poor performance, relying in part on a lack of documentation to support that claim. The Respondent contends that the judge erred in drawing an "adverse inference" based on the Respondent's failure to produce documentation supporting Farmer's testimony.

Preliminarily, the judge did not say that he was drawing an adverse inference; rather, absent documentation corroborating Farmer's testimony, he credited Mullins' contrary testimony. As stated above, we find no basis for reversing the judge's credibility determinations. Assuming, however, that he did draw an adverse inference, we also find that such an inference was warranted. When a party has relevant evidence within its control that is not produced, that failure may support an inference that the evidence would be unfavorable to the party. See, e.g., *Wal-Mart Stores*, 350 NLRB 879, 893 (2007). There was evidence here that the Respondent possessed relevant, unproduced evidence. Farmer testified that one of the ways that he kept track of how a mechanic (such as Mullins) was doing his job was by examining the mechanic's "preventive maintenance reports," which the mechanic turned in to the Respondent. No such reports were produced. Farmer also testified that the Respondent had a progressive discipline policy (a "three writeup

and acknowledged that the Region had named specific employees to which those allegations pertained.

<sup>21</sup> In adopting the finding that Duncan's discharge was unlawful, we find it unnecessary to rely on the testimony of employee Donald Hoss.

deal”), and that he sometimes made a note of even verbal warnings. Farmer’s testimony establishes the likelihood that, if Mullins’ work performance was as poor as Farmer portrayed it to be, the Respondent would have had documentation of that fact. Thus, the absence of such documentation supports the judge’s finding that “there was nothing wrong with [Mullins’] work.” Moreover, in contrast to the lack of documentation concerning Mullins’ alleged poor performance, the Respondent possessed ample documentation of Duncan’s purported performance deficiencies: (1) a counseling form; (2) a “Conference With Employee Record”; (3) a first written warning; (4) a verbal warning and a written warning dated April 6, 1995; and (5) a “disciplinary layoff” dated April 28, 1997.

#### V. CONDUCT OF REGION 11 EMPLOYEES AND THE JUDGE’S RULING CONCERNING SUBPOENAS TO REGIONAL EMPLOYEES

Claiming that communications from its employees gave it reason to believe that Regional Office employees had improperly solicited charges, the Respondent requested, by letter dated November 23, the consent of the General Counsel for the production of documents responsive to the Respondent’s November 23 subpoenas duces tecum and subpoenas ad testificandum to specific Regional Office employees. The General Counsel denied the Respondent’s request.<sup>22</sup> The Respondent raised the issue again at hearing and now contends that the judge erred in refusing to order production, by the agency, of witnesses and documents to demonstrate that the Region had improperly solicited charges. We disagree.

<sup>22</sup> Sec. 102.118(a)(1) of the Board’s Rules and Regulations provides, in pertinent part, as follows:

No present or former . . . employee of the Agency shall produce or present any files, documents, reports, memoranda, or records of the Board or of the General Counsel, whether in response to a subpoena duces tecum or otherwise, without the written consent of the . . . General Counsel if the document is in a Regional Office of the Agency or is in Washington, D.C., and in the control of the General Counsel. Nor shall any such person testify in behalf of any party to any cause pending in any court or before the Board . . . with respect to any information, facts, or other matter coming to that person’s knowledge in his or her official capacity or with respect to the contents of any files, documents, reports, memoranda, or records of the Board or of the General Counsel, whether in answer to a subpoena or otherwise, without the written consent of the . . . General Counsel if the person is in a Regional Office of the Agency or is in Washington, D.C., and subject to the supervision or control of the General Counsel. . . . A request that such consent be granted shall be in writing and shall identify the documents to be produced, or the person whose testimony is desired, the nature of the pending proceeding, and the purpose to be served by the production of the document or the testimony of the official.

In *Sunol Valley Golf Co.*,<sup>23</sup> the Board refused to allow a Board agent to testify, as his testimony was sought by a party based on “mere speculation” regarding the Board agent’s conduct. *Sunol Valley Golf* is on point here. The Respondent did not present any evidence that Regional Office employees had solicited charges.<sup>24</sup> Rather, there is nothing but “mere speculation” that the Region’s employees did anything other than fulfill their duties to take proper measures to prosecute unfair labor practices revealed by an investigation.<sup>25</sup> Therefore, the judge appropriately refused to order the Board to produce either the witnesses or documents sought by the Respondent.

We therefore find no merit in the Respondent’s contentions that Regional Office employees engaged in misconduct, and that the judge erred by refusing to order production of witnesses and documents.<sup>26</sup>

#### VI. NOTICES TO EMPLOYEES

The judge recommended that a common notice be posted by the Respondent at each of the facilities involved in this case: Johnson City, Tennessee; Norton and Bristol, Virginia, and Jenkins, Kentucky. For the reasons discussed below, we find a common notice for each facility to be inappropriate, and that separate notices are to be posted at the Respondent’s Johnson City, Tennessee, and Bristol, Virginia facilities. However, we find that a common notice is warranted at the Jenkins, Kentucky, and Norton, Virginia facilities.<sup>27</sup>

<sup>23</sup> 305 NLRB 493, 494 (1991).

<sup>24</sup> Contrary to the Respondent’s contention in its brief, the judge allowed the Respondent limited questioning of Union Agent Boyd regarding the circumstances under which he signed certain charges. Boyd testified that normally, a field examiner would call him before faxing proposed amended charges, would state that facts had been discovered during the investigation, and would ask Boyd to review the amended charges. If Boyd agreed with them, he would sign and return the charges. With reference to the charge pertaining to Tim Harvey, Boyd stated that he did not remember whether he had talked to anybody at “the Board” before the charge was faxed to him.

<sup>25</sup> See *Petersen Construction Corp.*, 128 NLRB 969 (1960). In *Petersen*, the Board found that a Board agent acted properly, after investigation of the initial charge uncovered conduct that could constitute additional violations, in furnishing the charging party with appropriately drawn charges and instructions to sign them if he wished to do so. See also NLRB Casehandling Manual (Part One) Unfair Labor Practice Proceedings, Sec. 10062.5, which provides that, where the investigation of a charge reveals evidence of unfair labor practices not specified in the charge, and the charge does not support complaint allegations covering those newly revealed potential unfair labor practices, “the charging party or its representative should be apprised of the potential deficiency . . . and given the opportunity to file an amended charge.”

<sup>26</sup> We also find, contrary to the Respondent’s contention, that the judge’s failure to address these issues in his decision does not demonstrate bias.

<sup>27</sup> There were no exceptions to the judge’s notice posting recommendations. It is well established, however, that the Board may exercise its broad discretionary authority under Sec. 10(c) to fashion appro-

Where a respondent has committed different unfair labor practices at various locations within the same geographic area, “the Board orders a common notice when it finds ‘considerable similarity in the nature of the unfair labor practices’ committed at the different locations.” *Wal-Mart Stores*, 350 NLRB 879, 885 (2007) (quoting *Albertson’s, Inc.*, 307 NLRB 787, 788 (1992), enf. denied mem. 8 F.3d 20 (5th Cir. 1993)). In determining that a common notice is warranted, the Board may also consider other factors that, taken together, create “reasonable cause for concern that the employees of one [location] would become aware of the [r]espondent’s similar conduct at the other[s].” *Albertson’s*, supra at 789. Where, however, there is only one unfair labor practice common across different locations, the Board orders separate notices. *Wal-Mart Stores*, supra (citing *F. W. Woolworth Co.*, 173 NLRB 1146, 1146–1147 (1968)).

Here, we find that a common notice across all four facilities is unwarranted. At most, only one unfair labor practice—maintenance of a rule prohibiting union talk on company property—was committed at all four locations.<sup>28</sup> Only one additional violation—a statement that selecting the Union would be futile—was found to have occurred at the Bristol facility. And no other violations were found to have been committed at the Johnson City location.<sup>29</sup> Thus, we will order that separate notices be posted at Bristol and Johnson City.

The Jenkins, Kentucky, and Norton, Virginia facilities present a different situation. First, the Respondent made multiple 8(a)(1) threats to employees at both locations. Second, the Jenkins and Norton facilities were both involved in a contemporaneous organizing campaign by the Union. Third, Chandler was the area sales manager for the geographic area that included both facilities, and

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appropriate remedies even in the absence of exceptions. See, e.g., *Indian Hills Care Center*, 321 NLRB 144, 144 fn. 3 (1996).

<sup>28</sup> We cannot even be certain that the unlawful rule was maintained at each location, as the events giving rise to this 8(a)(1) violation finding transpired at the Jenkins facility. However, Area Sales Manager Chandler testified that he and “other supervisors” were informed that employees could not talk about the Union on company property, and Chandler did not specify that by “other supervisors,” he meant only other supervisors at Jenkins. Moreover, Chandler, himself, exercised authority over employees at more than one facility. Thus, we will include a provision pertinent to this violation in each separate notice.

<sup>29</sup> As set forth above, however, we have found that the Respondent unlawfully threatened and transferred employee Mullins, and Mullins was transferred to Johnson City. Moreover, some of the threats were made by Johnson City Fleet Superintendent Dave Farmer, and Mullins began working at Johnson City within a few weeks of the unlawful threats. Under these circumstances, we find reasonable cause for concern that employees at Johnson City would have become aware of Respondent’s unlawful conduct toward Mullins at Jenkins. Accordingly, we will include provisions pertinent to the Respondent’s threats toward and transfer of Mullins in the Johnson City notice.

Chandler directly participated in unfair labor practices at both locations. Moreover, Chandler informed Shane Jessee, an employee at the Norton facility, that the Respondent had gotten rid of the union “ringleader,” Tommy Duncan, at the Jenkins facility. Also, Mullins testified that he attended a union meeting at Norton while working at Jenkins. Under all of these circumstances, we find a common notice for the Jenkins and Norton facilities to be appropriate. See *Albertson’s*, supra at 788–789 (ordering common notice where stores were in same corporate district, employees in both stores were involved in a contemporaneous union organizing drive, and respondent committed substantially similar violations at each store).

#### ORDER

The National Labor Relations Board orders that the Respondent, The Earthgrains Company, Johnson City, Tennessee, Norton and Bristol, Virginia, and Jenkins, Kentucky, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening its employees with unspecified reprisals for engaging in activities on behalf of Bakery, Confectionery & Tobacco Workers International Union, Local 343, AFL–CIO (the Union).

(b) Threatening its employees with closure of their work facility if they engage in activities on behalf of the Union.

(c) Threatening its employees with transfer or termination in retaliation for their having engaged in activities on behalf of the Union.

(d) Interrogating its employees concerning their and their coworkers’ union activities, support, and sympathies or their protected concerted activities.

(e) Giving its employees the impression that their or their coworkers’ union activities were under surveillance.

(f) Making disparaging remarks about its employees who supported the Union.

(g) Threatening its employees with more onerous work assignments in order to discourage union activity.

(h) Threatening its employees that it would reduce the commission paid to its employees if the Union were voted in as their collective-bargaining representative.

(i) Threatening its employees that it would replace them if they went on strike.

(j) Informing its employees that it had gotten rid of the union ringleader.

(k) Informing its employees that support for and selection of the Union would be futile.

(l) Informing its employees that they would receive more favorable treatment if they opposed the Union in the upcoming election.

(m) Threatening its employees with the inevitability of strikes.

(n) Informing its employees that a wage increase was being frozen because of the Union.

(o) Threatening its employees with loss of wages and benefits if the Union was selected as their collective-bargaining representative.

(p) Maintaining a rule prohibiting its employees from speaking about the Union on company property.

(q) Coercing its employees to sign false statements to impede a Board investigation.

(r) Discharging, transferring, or otherwise discriminating against any employee for supporting the Union, or any other union.

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

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

(a) Within 14 days from the date of this Order, offer Tommy Duncan full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Tommy Duncan whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, and Tommy Duncan and Barry Mullins whole for any expenses suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the judge's decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge of Tommy Duncan and the unlawful transfer of Barry Mullins, and within 3 days thereafter, notify Tommy Duncan and Barry Mullins in writing that this has been done and that the discharge and transfer, respectively, will not be used against them in any way.

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

(e) Within 14 days after service by the Region, post at its facilities in Johnson City, Tennessee, Norton and Bristol, Virginia, and Jenkins, Kentucky, copies of the attached notices: the notice marked "Appendix A" at the Norton, Virginia, and Jenkins, Kentucky facilities; the notice marked "Appendix B" at the Johnson City, Ten-

nessee facility; and the notice marked "Appendix C" at the Bristol, Virginia facility.<sup>30</sup> Copies of the notices, on forms provided by the Regional Director for Region 11, after being signed by the Respondent's authorized representative, shall be posted by Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed any of the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notices to all current employees and former employees employed by Respondent at the closed facility or facilities at any time since June 23, 1998.

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

IT IS FURTHER ORDERED that the alleged misconduct by Respondent's counsel, Joan M. Canny, as set forth in the credibility and attorney misconduct sections of the judge's decision, is referred to the investigating officer, the Associate General Counsel, Division of Operations-Management, pursuant to Section 102.117(e) of the Board's Rules and Regulations.

IT IS FURTHER ORDERED that the remaining allegations of the complaint, not withdrawn by the General Counsel at the hearing or in his brief, are dismissed insofar as they allege violations of the Act not specifically found.

#### APPENDIX A

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

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

#### FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union  
Choose representatives to bargain with us on  
your behalf

<sup>30</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT threaten our employees with unspecified reprisals for engaging in activities on behalf of Bakery, Confectionery & Tobacco Workers International Union, Local 343, AFL-CIO (the Union).

WE WILL NOT threaten our employees with closure of their work facility if they engage in activities on behalf of the Union.

WE WILL NOT threaten our employees with transfer or termination in retaliation for their having engaged in activities on behalf of the Union.

WE WILL NOT interrogate our employees concerning their and their coworkers' union activities, support, and sympathies or their protected concerted activities.

WE WILL NOT give our employees the impression that their or their coworkers' union activities were under surveillance.

WE WILL NOT make disparaging remarks about our employees who supported the Union.

WE WILL NOT threaten our employees with more onerous work assignments in order to discourage union activity.

WE WILL NOT threaten our employees that we would reduce the commission paid to our employees if the Union were voted in as their collective-bargaining representative.

WE WILL NOT threaten our employees that we would replace them if they went on strike.

WE WILL NOT inform our employees that we had gotten rid of the union ringleader.

WE WILL NOT inform our employees that support for and selection of the Union would be futile.

WE WILL NOT inform our employees that they would receive more favorable treatment if they opposed the Union in the upcoming election.

WE WILL NOT threaten our employees with the inevitability of strikes.

WE WILL NOT inform our employees that a wage increase is being frozen because of the Union.

WE WILL NOT threaten our employees with loss of wages and benefits if the Union is selected as their collective-bargaining representative.

WE WILL NOT maintain a rule prohibiting our employees from speaking about the Union on company property.

WE WILL NOT coerce our employees to sign false statements to impede a Board investigation.

WE WILL NOT discharge, transfer, or otherwise discriminate against any employee for supporting the Union, or any other union.

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

WE WILL, within 14 days from the date of the Board's Order, offer Tommy Duncan full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Tommy Duncan whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, and make Tommy Duncan and Barry Mullins whole for any expenses suffered as a result of the discrimination against them, with interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Tommy Duncan and the unlawful transfer of Barry Mullins, and WE WILL, within 3 days thereafter, notify Tommy Duncan and Barry Mullins in writing that this has been done and that the discharge and transfer, respectively, will not be used against them in any way.

THE EARTHGRAINS COMPANY

APPENDIX B

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT threaten our employees with unspecified reprisals for engaging in activities on behalf of Bakery, Confectionery & Tobacco Workers International Union, Local 343, AFL-CIO (the Union).

WE WILL NOT threaten our employees with closure of their work facility if they engage in activities on behalf of the Union.

WE WILL NOT threaten our employees with transfer or termination in retaliation for their having engaged in activities on behalf of the Union.

WE WILL NOT maintain a rule prohibiting our employees from speaking about the Union on company property.

WE WILL NOT transfer or otherwise discriminate against any employee for supporting the Union, or any other union.

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

WE WILL make Barry Mullins whole for any expenses suffered as a result of the discrimination against him, with interest.

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

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT inform our employees that support for and selection of the Union would be futile.

WE WILL NOT maintain a rule prohibiting our employees from speaking about the Union on company property.

THE EARTHGRAINS COMPANY

*Don Gattalaro, Esq.*, for the General Counsel.

*Joan M. Canny, Esq., Michael L. Fantaci, Esq., and E. Frederick Preis Jr. (McGlinchey Stafford)*, of New Orleans, Louisiana, for the Respondent.

*William Boyd, Business Agent*, of Jonesborough, Tennessee, for the Union.

DECISION

FINDINGS OF FACT AND CONCLUSIONS OF LAW

BENJAMIN SCHLESINGER, Administrative Law Judge. The complaint<sup>1</sup> alleges that Respondent, The Earthgrains Company, committed numerous unfair labor practices—a discharge, a transfer, imposition of more onerous working conditions, interrogations, threats, among others—in an attempt to thwart the organizing efforts of the Charging Party, Bakery, Confectionery & Tobacco Workers International Union, Local 343, AFL-CIO (the Union). Respondent denies that it violated the National Labor Relations Act (the Act), in any way.

I. JURISDICTION

Respondent is a Delaware corporation, with its principal offices in St. Louis, Missouri, and other facilities nationwide, including those involved in this proceeding in Johnson City, Tennessee; Norton and Bristol, Virginia; and Jenkins, Kentucky, where it engages in the production, distribution, and nonretail sale of bakery products to grocery stores, restaurants, convenience stores, and schools. During the year ending August 11, 1999, a representative period, Respondent sold and shipped from each of these facilities products valued in excess of \$50,000 directly to points outside Virginia, Tennessee, and Kentucky. I conclude, as Respondent admits, that it is an employer within the meaning of Section 2(2), (6), and (7) of the Act. I also conclude that the Union, which has a collective-bargaining agreement with Respondent for employees at the Johnson City facility, is a labor organization within the meaning of Section 2(5) of the Act.

II. CREDIBILITY

On March 2, 1999, Clayton Caudill, Respondent's Norton sales supervisor, called truck loader Donald Rogers into his office. The telephone was lying on his desk, off the hook. Caudill mentioned the writeups that Rogers had been given and said that he could have already been out of a job and that Caudill had done Rogers a favor by not firing him. Now, Rogers could do Caudill a favor, by signing a paper that anything that he had said to Rogers was in a joking or friendly manner. Rogers agreed to talk to Caudill's lawyer, Joan Canny,

<sup>1</sup> The relevant docket entries are as follows: The charge in Case 11-CA-18006-1 was filed on July 8, 1998, and amended on December 28, 1998. The charge in Case 11-CA-18202 was filed on December 18, 1998, and amended on February 3 and April 26, 1999. The charge in Case 11-CA-18223 was filed on January 12 and amended on February 3 and April 26, 1999. The charge in Case 11-CA-18230 was filed on January 20 and amended on February 3, March 18, and April 26, 1999. The charge in Case 11-CA-18376 was filed on June 16, 1999. The second consolidated complaint, at issue herein, was issued on August 11, 1999. The hearing was held in Bristol, Tennessee, on December 6-9, 1999.

and she was already on the telephone. She explained what he was being asked to sign, and she said that (despite what Caudill had told him) Rogers was under no pressure to sign and that it was his decision to sign. She explained that he did not have to speak with her if he did not want to; that he would not be asked any questions about how he felt about the Union, or how other people felt about the Union; that, if he did not want to speak to her, nobody was out to do anything to him; that he would be faxed a statement and that he should read it over and make any corrections; and that he should not sign it if he did not think it was true. Rogers read and signed the following document that was then faxed by Canny:

STATEMENT OF ERIC ROGERS

MARCH 2, 1999  
NORTON, VIRGINIA

THE FOLLOWING STATEMENT IS TRUE TO THE BEST OF MY ABILITY, AND IS BASED ON MY PERSONAL KNOWLEDGE.

1. ANYTHING THAT HEATH AND I TALKED ABOUT THAT HAD TO DO WITH THE UNION WAS BETWEEN FRIENDS AND I DON'T THINK ANYTHING WAS INTENDED TO BE A BRIBE OR A THREAT. IF IT WAS UNDERSTOOD THAT WAY I THINK IT WAS A MISUNDERSTANDING.

2. ANYTHING THAT CLAYTON CAUDILL AND I TALKED ABOUT THAT HAD TO DO WITH THE UNION WAS BETWEEN FRIENDS AND I DON'T THINK ANYTHING WAS INTENDED TO BE A BRIBE OR A THREAT. IF IT WAS UNDERSTOOD THAT WAY I THINK IT WAS A MISUNDERSTANDING.

THESE STATEMENTS ARE TRUE AND CORRECT TO THE BEST OF MY ABILITY.

Caudill could not recall this incident, but remembered how three other similar statements were prepared, about which more below. Canny never testified. Thus, Respondent presented no testimony that what Rogers related did not take place, and I find that it did. I conclude that it violated Section 8(a)(1) of the Act, constituting a threat to Rogers' employment if he did not sign a statement relating to Respondent's attempt to interfere with his and other employees' concerted activities, protected by Section 7 of the Act. If the threat coerces him from testifying or stating truthfully what transpired, by necessity his Section 7 rights are being interfered with. By the threat, Respondent has attempted to interfere with Rogers' right to engage in concerted and protected activities. I further conclude that it is a threat to obtain a false statement to prevent an employee from giving truthful testimony under the Act and interfere with the Region's processing of the pending unfair labor practice charges.<sup>2</sup>

In finding a violation, I note that this allegation resulted from an amendment made at the hearing. Respondent contends that

<sup>2</sup> Respondent's brief states: "[T]he statement at issue was known to and had been provided to the Board in March of 1999 as part of Respondent's submission of evidence and further as an attachment to Respondent's motion for summary judgment."

my "failure . . . to grant a recess to permit [Respondent] an opportunity to prepare a defense violated Respondent's due process [rights]." In its request for special permission to appeal my grant of the amendment to the Board, dated December 7, 1999, Respondent stated that it appealed "the ALJ's denial of Respondent's Motion for Recess of the hearing to permit an opportunity to prepare for and defend the allegations which the Counsel for the General Counsel intentionally and without any justification under the Board's rules interposed so as [to] surprise Respondent and deny an opportunity for preparation consistent with Due Process." Respondent omits and misstates a material fact not only in its brief to me but also in its request to the Board. At no time did Respondent request a recess in order to prepare a defense to any of the amendments, particularly the amendment concerning Caudill's coercion of Rogers in order that he would sign a statement exonerating Respondent. The only request that Canny made was for time to prepare its request for special permission to appeal, which I denied because there was too much to do that day. Canny had earlier insisted that four of Respondent's drivers, who were subpoenaed by the counsel for the General Counsel, could not all appear on the same day, and could not appear earlier than mid- or late afternoon. In a lengthy telephone conference preceding the hearing, the parties had a difficult problem of scheduling, including Canny's insistence on the names of the witnesses, and the counsel for the General Counsel's refusal to reveal those names. The issue was finally reconciled, only after Canny conceded that one of the four people she was talking about was not a driver and had no time restrictions at all, contrary to what she had said earlier. Be that as it may, the counsel for the General Counsel needed to call his own witnesses that afternoon, as well as the driver who was coming in late as a result of the ultimate agreement between the counsel for the General Counsel and Canny. The record shows that the hearing adjourned the first day at 7 p.m. The record also shows that I began the hearing late the following morning at 10:30 a.m., to permit counsel to work on her request for special permission and that the request was filed that day. In sum, there is no basis for Respondent's contention.

In light of my findings and conclusions, Respondent's additional objection that the amendment was offered by the counsel for the General Counsel in bad faith is baseless and unsupported.<sup>3</sup> Regarding the timing of the amendment, this happened when the second witness was called. Even though I had asked for amendments earlier on the first day of the hearing, the fact that the amendment was offered within an hour or two, when Rogers was called as the General Counsel's second witness, was not prejudicial to Respondent. Respondent contends, as it did at the hearing, that the allegation is not supported by a timely filed charge. But the allegation relates to the disclosure of certain of the unfair labor practices that are alleged in the

<sup>3</sup> Equally unsupported is Respondent's charge that the General Counsel has "personal animosity" and is "vindictive" toward Respondent, that the Regional Director "has improperly and with malice targeted Respondent [as] punishment" for Respondent's complaints against the Region, and that "agency bias" has violated Respondent's "due process rights." I deny Respondent's motion in its reply brief to dismiss the complaint on these grounds.

complaint and are not attacked by Respondent as untimely. The fact that Respondent felt it necessary to submit Rogers' statement in support of its motion for summary judgment is ample proof that Respondent believed that the statement was related to the charges under investigation and the allegations of the complaint.<sup>4</sup>

This unfair labor practice has a direct bearing on the credibility of Caudill and Heath Chandler, Respondent's sales manager in charge of the four facilities involved in this proceeding. They undoubtedly had something to hide. They had made some statements that they (and Canny) understood could be interpreted as bribes or threats, and they were attempting to find some means to escape from what they did. Caudill was used in this instance to coerce Rogers to sign a statement, despite the fact that Rogers had nothing to say about Caudill's other unfair labor practices. Rather, the gist of Rogers' testimony was aimed at Chandler, whom Caudill never even mentioned when he "asked" for Rogers' statement. It was Canny, knowing the charges against Respondent, who wrote this statement covering both Chandler and Caudill on behalf of her client, presumably with the client's advice and consent.

There were more documents prepared, similar or identical to the one prepared for Rogers. On February 2, 1999, employee Shane Jessee, about to quit his job with Respondent in order to take a position with the State prison, signed, in Caudill's presence, a statement, prepared by Canny, as follows:

THE FOLLOWING STATEMENT IS TRUE TO THE BEST OF MY ABILITY, AND IS BASED ON MY PERSONAL KNOWLEDGE:

1. I HAVE TALKED TO THE COMPANY'S LAWYER ABOUT THE UNION CHARGES AGAINST HEATH CHANDLER AT NORTON, VIRGINIA. I UNDERSTAND I DID NOT HAVE TO TALK TO HER OR GIVE THIS STATEMENT. I AM GIVING THIS STATEMENT VOLUNTARILY

2. HEATH CALLED ME A "BENEDICT ARNOLD" ONE DAY BUT IT WAS ABOUT SOME STUFFING AND HE WAS JOKING ABOUT IT.

3. HEATH NEVER TOLD ME THAT WE WOULD NOT GET THE GOLDEN 80 AND WOULD NOT GET BENEFITS LIKE JOHNSON CITY, HE JUST SAID EVERYTHING HAD TO BE NEGOTIATED.

4. ANYTHING THAT HEATH AND I TALKED ABOUT THAT HAD TO DO WITH THE UNION WAS

<sup>4</sup> Although Respondent submitted the Rogers statement (as well as similar statements of three other employees) in support of its motion for summary judgment, the purpose of which is to demonstrate that there are no material facts involved, Respondent contends in its brief that the statement is meaningless, as follows:

As the Board is aware, an employee's subjective perception of how communications were intended is irrelevant to the analysis of whether the conduct violated section 8(a)(1). Therefore, the statement is not evidence one way or the other as to whether any violation of section 8(a)(1) occurred, because it contains no facts whatsoever but only Rogers' subjective perception as to what the intention of unspecified statements was, and how Rogers understood those unspecified statements.

BETWEEN FRIENDS AND I DON'T THINK ANYTHING WAS INTENDED TO BE A THREAT AGAINST ME. IF IT WAS UNDERSTOOD THAT WAY I THINK IT WAS A MISUNDERSTANDING.

Jessee did not tell Canny what to write in his statement, just as Rogers did not tell her what to write. Jessee signed this statement, which noted that the above statements were true and correct, and then added, in his own hand, complying with a request from Caudill to add it because Canny did not write anything exonerating Caudill, a repetition of paragraph 4, substituting "Clayton Caudill" for "Heath." Jessee explained his actions:

I told Clayton Caudill that I would be glad to write out some sort of statement to release him and Heath from my charges if I could because I was changing jobs. I didn't have no hard feelings toward them, we just got on different sides of the fence and all I wanted to do was [for it to] be over with. I didn't want to drag nobody in on nothing that's going to cost them their job because I was afraid I was going to cost them their job.

...

So Clayton told me that he would get hold of the lawyer, which now I know is you [Canny]. Later, I think it was the same day, he told me, he said—I've got her on the phone and if I recall our conversation correctly you [Canny] asked me. You said, "I heard you were willing to sign a statement for Heath, releasing him from the charges." I said, "Yes ma'am." I said it would according to what you write on the statement I guess. You said, "I'll write anything you want to." I said, "Well, I really don't know what to write, why don't you just write something out." So you typed that out and you faxed it to me and I signed whatever you wrote out. All I wanted to do was get rid of the problem.

At another point of his testimony, Jessee stated: "I did not want anything hanging over those guys heads or the other route men's heads because of me. I was leaving. That's all I wanted to do is get on with the job I've got now. I don't even want to be here today."

On November 23, 1999, another witness in this proceeding, William Harvey, petitioned to revoke a subpoena served on him. His grounds were the same as related in the Rogers' statement, often in haec verba, that he knew nothing about the complaint and that anything that Chandler or Caudill and he talked about during the time that the union organizing was going on "was between friends and I don't think anything was intended to be a bribe or a threat. If it was understood that way I think it was a misunderstanding." To the contrary, Harvey, as did Rogers and Jessee, presented material evidence which, if credited, constituted unfair labor practices. The circumstances of the preparation of his petition were not explored, but he said that he wanted to avoid appearing as a witness. It is obvious that Canny's law firm, who represented Respondent, aided in that effort. The moving papers were faxed from her firm, apparently to Respondent, and then faxed from Respondent to me. Yet another document, identical to the Rogers' statement, was used to support a petition to revoke filed by Mark Mullins, who

did not testify. It was also prepared by Canny's law firm. Regarding both motions, Canny, although acting as if she had nothing to do with and was not the attorney for either of these employees, criticized me at the hearing for deciding the merits of the petitions only after reading the petitions and the General Counsel's opposition and not affording Harvey and Mullins the opportunity to be heard in a telephone conference. Canny also represented that she provided Jessee's statement to the Region during the investigation. The statements of Jessee, Rogers, Mullins, and Charlie Barker, which was the same as the Rogers statement, were attached to Respondent's motion to the Board for partial summary judgment, dated May 27, 1999.

I credit the testimony of Rogers, Jessee, and Harvey, none of whom had anything to gain by their testimony or any reason to fabricate. Jessee, in particular, had voluntarily left his job and had no interest in whether any of the charges were found true or not. I also conclude from these machinations that the statements that they signed may be reasonably considered admissions of wrongdoing by both Chandler and Caudill, requested by Caudill on behalf of himself and Chandler, and Canny, on behalf of the two supervisors and Respondent, who were trying to either conceal their activities or misrepresent the purpose of those activities. Both Chandler and Caudill, I conclude, participated in events they wished to conceal; and, because Caudill and Canny went to such extremes to conceal what Chandler and Caudill did, the events in which they participated must have been serious. Because Caudill participated in this venture, with the knowledge, I infer,<sup>5</sup> of Chandler, my view of their credibility is such that I find that they would do and say anything to avoid responsibility. And so I do not believe them at all, except when they testified against the interests of Respondent or when their testimony was corroborated by unimpeachable sources or when the employee testifying against them related alleged facts that were inherently improbable. Accordingly, I find many of the violations against them, discrediting their denials.

In doing so, I found the employees called by the General Counsel sincere, truthful, and generally reliable. Various incidents occurred, and, although sometimes I had difficulty finding that the General Counsel's witnesses accurately perceived those events, and although sometimes their testimony was not wholly consistent, I also find that they did not make the events up from nothing. So, I have more often credited them than not, wholly independent from, but certainly consistent with, Board law, which recognizes that the testimony of current employees that contradicts statements of their supervisors is likely to be particularly reliable. *Flexsteel Industries*, 316 NLRB 745 (1995), enfd. mem. 83 F.3d 419 (5th Cir. 1996). The testimony of current employees that is adverse to their employer is ". . . given at considerable risk of economic reprisal, including loss of employment . . . and for this reason not likely to be false." *Shop-Rite Supermarket*, 231 NLRB 500, 505 fn. 22 (1977). For example, Harvey, who petitioned to revoke the subpoena that the General Counsel served on him, was very concerned about his testimony. In preparing for his testimony, he asked the

counsel for the General Counsel, "[I]f I could be fired or anything because of these hearings you know because I'm looking out for my welfare you know also."

In making these and other credibility findings, I have fully reviewed the entire record and carefully observed the demeanor of all the witnesses. I have also taken into consideration the apparent interests of the witnesses; the inherent probabilities in light of other events; corroboration or the lack of it; and the consistencies or inconsistencies within the testimony of each witness and between the testimony of each and that of other witnesses with similar apparent interests. Testimony inconsistent with or in contradiction to that upon which my factual findings are based has been carefully considered but discredited. See, generally, *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962). Where necessary, however, I have set forth the precise reasons for my credibility resolutions, bearing in mind the oft-quoted advice: "It is no reason for refusing to accept everything that a witness says, because you do not believe all of it; nothing is more common in all kinds of judicial decisions than to believe some and not all." *NLRB v. Universal Camera Corp.*, 179 F.2d 749, 754 (2d Cir. 1950).

### III. THE ALLEGED UNFAIR LABOR PRACTICES

In late August 1998, Caudill, who was the supervisor of Tim Harvey (Tim), asked him if he had attended a union meeting. Tim denied knowing anything about it. Caudill then asked if Rogers had gone. Tim repeated that he did not know anything about it. About the same time, Chandler talked to both William Harvey (William) and Rogers. Chandler asked William to identify who was going to vote for and against the Union. William denied knowing, noting that he was "a new man" and "no one trusted him." Chandler asked Rogers, who said that he did not know, either. Chandler asked both if they had attended a union meeting at the Holiday Inn, which had been held earlier that week. Rogers told him that he did; but William denied knowing anything about it, because, he said, he was not invited. Chandler, naming each of the other employees at the warehouse—he said that he knew that Jessee was there, because Jessee was "really, really involved with the Union"—asked Rogers who had attended the meeting. Finally, Chandler said that the Union's success would not guarantee the employees the same conditions that prevailed at Johnson City. Respondent might pay 5 percent rather than 10-percent commissions, and Respondent would not provide them with the same medical and retirement benefits. Everything would change.

Chandler told Jessee about the same thing in September 1998: if the employees got a Union, they would get less than what they had then. They would take a cut in pay, with as little as a 5-percent commission and a base salary of \$100; and Respondent would not give the employees the "Golden 80" retirement plan, which is an early retirement plan negotiated through the Union at Johnson City establishing early retirement eligibility for an employee whose years of employment and age totaled 80.<sup>6</sup> Chandler's expressions to William, Rogers, and Jessee were threats that, if the employees elected the Union, their terms and conditions of employment would change for the

<sup>5</sup> Chandler was in charge of sales at the four facilities; Caudill was in charge of sales at the Norton facility. Chandler was Caudill's superior. The activities of the two of them, related below, appear coordinated.

<sup>6</sup> The Golden 80 plan also maintains retirees' health care coverage.

worse, in violation of Section 8(a)(1) of the Act. Although, in his brief, the General Counsel withdrew the complaint's allegation that the statement regarding the Golden 80 plan constitute a threat that support for and the election of the Union would be futile and urges me to find a violation of Section 8(a)(1) based solely on the threat of adverse consequences of negotiations if the Union won the election, I find that that statement sustains the allegation of threatening futurity. Chandler was threatening that the election of the Union would never result in the more favorable plan that prevailed at Johnson City and was not, by this comment alone, threatening that anything would be taken away.<sup>7</sup> On November 13, Chandler telephoned William and asked if he was the "ringleader" of the union campaign, claiming that he had heard that William was the "mastermind" of the campaign. William denied that he was. In early December, Chandler asked Jessee several times who was involved with the Union and who he thought was trying to organize the employees. I conclude that each of the incidents, involving the employees' immediate or overall supervisors grilling of employees to find out who was promoting and in favor of the Union, giving the impression that action might be taken against employees for engaging in union activities, constituted illegal interrogation under Section 8(a)(1) of the Act. *Westwood Health Care Center*, 330 NLRB 935, 939-940 (2000); *Rossmore House*, 269 NLRB 1176 (1984), enfd. sub nom. *Hotel & Restaurant Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985).

Sometime in December Caudill got up on Jessee's truck and told him that he was "the Union leader at Big Stone Gap." Caudill had been told that, he said, by another employee, and Caudill added that Chandler was referring to Jessee as a "Benedict Arnold" and that had become Jessee's new nickname. That reference to Jessee was Respondent's attempt to disparage him for his support of the Union, in violation of Section 8(a)(1) of the Act. Chandler's reference to William on November 13 as the "ringleader" or "mastermind" of the union organizing attempt, referred to above, clearly demonstrates that Chandler believed that William was a union supporter and leader and gave the impression that William's union activities were under surveillance, in violation of Section 8(a)(1) of the Act. But that violation was not alleged, and those words do not rise to an accusation of disloyalty to Respondent. *Westwood Health Care Center*, supra at 939-940 fn. 21. I conclude that neither "ringleader" nor "mastermind" constituted unlawful disparaging remarks and dismiss that allegation; but I find Caudill's reference to Jessee as "the Union leader" gave the impression that Jessee's union activities were under surveillance, in violation of Section 8(a)(1) of the Act.

In the same conversation in which Caudill told Jessee that he was the union leader, Caudill threatened Jessee "with a lot of extra stops." That threatened Jessee with more onerous work assignments in order to discourage his union activities, in violation of Section 8(a)(1) of the Act. On another occasion in December, Chandler and Caudill told Jessee that, if the employees went on strike, "it was guaranteed that if we come back that we would get no benefits, that we'd take a pay cut and that we'd be

replaced by other drivers." The Board has "made it clear that employers cannot tell employees without explanation that they would lose their jobs as a consequence of a strike or permanent replacement." An employer must convey to employees that they would have recall rights in the event of a strike. *Baddour, Inc.*, 303 NLRB 275 (1991). Caudill further threatened "if we were Union that we would probably done been fired because if we were Union life was going to get a whole lot harder and he'd be by the book, he wasn't going to be like he was then." This constituted an impermissible threat of stricter enforcement of Respondent's rules and policies and violated Section 8(a)(1) of the Act. On yet another occasion in December or January, Caudill told Jessee "that Dick Wedding [Respondent's sales director who was Chandler's superior] said that if we went on strike, when we went to negotiate that we would get no more than five percent on name brand, which we were getting ten then." This threat to reduce the commissions paid to employees if the Union were voted in violated Section 8(a)(1) of the Act.

On January 10, 1999, Chandler told Rogers and William that, if the Union was voted in, the employees would strike and they would "be out of a job," the same kind of unlawful threat that he and Caudill had made to Jessee the month before. But, Chandler continued, in any event, if the Union won, William "would be the first one to be gone" because the Norton facility did not have enough routes to support more than one loader, and seniority would rule. Another consequence of voting in the Union would be that the employees would keep their current pay rate of \$8.20 per hour; but, if the Union did not win, they would receive a pay increase to \$11.08 per hour. Yet a final consequence of a union victory would be that Respondent would not pay the drivers the same commissions earned by employees in Johnson City: it would pay them 5 percent rather than 10-percent commissions. These statements violated Section 8(a)(1) of the Act by promising a wage increase in the event that the employees rejected unionization and threatening the inevitability of strikes.<sup>8</sup>

On January 14, Rogers again spoke with Chandler, who advised that the election had been postponed. Rogers asked whether the employees would still be getting the promised wage increase, and Chandler replied that they would. But that was not to be. A week later, on January 21, Chandler told Rogers and William that they would not receive the raise "because the Union had put it on freeze" or "had put a freeze on everything." Regarding the January 14 conversation, the complaint alleges that Respondent violated Section 8(a)(1) by promising a wage increase as a result of the postponement of the election, but that is not so. The increase had been promised before and was going to be granted despite the postponement on the election, not because of it. I find no violation, but I do conclude that Chandler violated Section 8(a)(1) a week later by blaming the Union for the failure to grant the increase. *Atlantic Forest Products*, 282 NLRB 855, 858 (1987).

On March 9, 1999, William Boyd and Union International Representative Dale Nichols visited Respondent's Norton facil-

<sup>7</sup> The General Counsel's withdrawal of the futurity allegation is accordingly denied.

<sup>8</sup> The complaint did not allege that, by threatening a reduction of the commissions paid to the employees, this also constituted a violation of Sec. 8(a)(1) of the Act, as found above.

ity and first spoke to Tim. Caudill, seeing them, asked Boyd what he was doing there; and Boyd replied that he had a letter from an agent of the Region (Field Examiner Norman Reese), which he showed to Caudill, and he was telling “the guys”<sup>9</sup> that they needed to come to the motel and give an affidavit. Caudill told Boyd and Nichols to leave, which they did. About 5 minutes later, Caudill asked Tim what they wanted, and Tim answered that they wanted him to meet with Reese at the Holiday Inn. Caudill asked whether he was going, and Tim thought that he had to “since it’s a government letter.” Caudill told Tim that he did not believe that Tim had to meet with Reese and said that he would find out. About 5 or 10 minutes later, Caudill called Tim into his office and said that there was someone on the telephone who wanted to talk to him. It was Canny, who asked if what he received was a subpoena. Determining from Tim’s responses that it was not, she advised that he did not have to go, and that, if he did go, “you go on your own free will. Nobody can do nothing to you for going.” Tim went back to his truck and proceeded to do his work. I conclude that Caudill interrogated Tim in violation of Section 8(a)(1) of the Act.<sup>10</sup>

On January 12, 1999, Cindy Jackson, plant office manager at Johnson City, asked Hoss, a 31-year route salesman, who refused to serve as Respondent’s observer at the election, whether his refusal indicated that he was mad at anybody, and particularly at Respondent, and whether his anger was directed to the question of the Golden 80. She said, raising her right hand, “Don, I swear to you that if the Union goes in you will not receive this Golden 80, or you cannot get this Golden 80.” On Respondent’s case, Jackson explained: “The reason I told him why, you know, that if the Union is voted in there’ll be a new contract, start with a blank piece of paper, and any and all terms of the contract would be negotiated on between the Company and the Union. And that I did not feel personally that the Golden 80s would be part of that contract.” She testified that she explained to Hoss the basis of her opinion.<sup>11</sup> She admitted that she told several employees that bargaining would “start from scratch” and told Hoss that there would be “a new contract, start with a blank piece of paper, and any and all terms of the contract would be negotiated on between the Company and the Union.” When asked if she told employees that they would lose anything in negotiations, she responded: “I couldn’t tell them whether they would or wouldn’t [lose any benefits that they had now]. I did share with them that their commission rate

<sup>9</sup> Reese asked in his letter to see Tim, Jessee, Mullins, Rogers, Charles Barker, Donald Hoss, and Jimmy King.

<sup>10</sup> Caudill denied recollection of any of this incident, but recalled that the union representatives came to Respondent’s facility in the fall of 1998, and that he told them to leave. On March 16, 1999, Canny complained to Region 11 that the Region was treating Respondent unfairly, noting that the Union *in the previous week* had come to Respondent’s facility “armed with a letter from the NLRB” (emphasis in original), attempting to speak to the same employees who had already given interviews to the Region and had provided statements “to the NLRB via the Company.”

<sup>11</sup> She never explained that basis, because a proper question was never asked of her.

was higher than any other commission rate in the Company. That would also be negotiable.”

I find that Hoss accurately recalled what Jackson told him. I was particularly impressed by his recall of her raising her hand, and she would not have done so if she were only stating her opinion. I find, as she testified, that she “emphatically” told him that there was not going to be a Golden 80 plan, but her addition of the words “in my opinion,” which was not required in answer to one question, appeared to be the result of coaching and not truthful. I conclude that she was threatening, as Chandler did earlier, that the election of the Union would be futile and would not lead to the result that Hoss wanted, the Golden 80 plan, and that it was futile to support the Union based on that hope, in violation of Section 8(a)(1) of the Act.<sup>12</sup> The General Counsel also moves in his brief to amend his complaint to add an allegation that Jackson “violated Section 8(a)(1) of the Act through admitted supervisor Cindy Jackson by informing employees that if they selected the union to represent them, all negotiation[s] would start from scratch or from a blank sheet of paper.” Clearly, this allegation flows from the same conversation that the complaint alleges is illegal because Jackson absolutely eliminated the Golden 80 plan as a possible result of bargaining. As a result, the allegation is closely related to the subject matter of the complaint, but the question remains as to whether it was fully and fairly litigated. *Pergament United Sales*, 296 NLRB 333, 334 (1989), *enfd.* 920 F.2d 130 (2d Cir. 1990). The Board stated in *Taylor-Dunn Mfg. Co.*, 252 NLRB 799, 800 (1980), *enfd. mem.* 679 F.2d 900 (9th Cir. 1982):

It is well established that “bargaining from ground zero” or “bargaining from scratch” statements by employer representatives violate Section 8(a)(1) of the Act if, in context, they reasonably could be understood by employees as a threat of loss of existing benefits and leave employees with the impression that what they may ultimately receive depends upon what the union can induce the employer to restore. On the other hand, such statements are not violative of the Act when other communications make it clear that any reduction in wages or benefits will occur only as a result of the normal give and take of negotiations.

By not moving to amend the complaint until the filing of briefs, the counsel for the General Counsel deprived Respondent of fully developing the record to place her comments in context. The unanswered question, noted in footnote 10, would have become important, as well as a full exploration of all other communications which related to this issue. As a result, I find that the allegation was not fully litigated and decline to amend the complaint.

There are three 8(a)(3) cases alleged in the complaint. The first involves Tommy Duncan, who was a salesman and whose duties included not only selling and delivering Respondent’s baked products to its customers but also ensuring that whatever

<sup>12</sup> The complaint alleges as a separate violation that Jackson threatened that its employees would not receive the Golden 80 pension plan if the Union won the election. That is the same as the threat of futility, and I do not find a separate and distinct violation.

he delivered remained fresh and was not stale.<sup>13</sup> Sometime during December 1998, Chandler told Jessee that Duncan was the union ringleader at the Jenkins facility. A month or so later, on January 5, 1999, Chandler and Campbell, the sales supervisor of the Jenkins and Norton facilities,<sup>14</sup> found, they claimed, that Duncan had left out-of-date products in six of his shops, some products being as old as pumpkin candies for Halloween, that should have been removed long before they found them. They terminated Duncan that day. Duncan testified that he had left no out-of-date products in the shops of customers, except that there may have been some left as a result of the fact that there was an intervening New Year's holiday and one shop had been closed for a funeral, thus causing some goods to be left at shops that he had not yet visited that day. On January 7, Chandler told Jessee that Respondent had rid itself of the union ringleader, who was Duncan. A few weeks later, Jessee asked Caudill why Respondent had discharged Duncan but not Bill Clogston, who was reputed to have the worst record as a salesman and whom Jessee represented as having a work record much poorer than Duncan. (Jessee testified that Clogston "had hundreds of pieces of out-of-code product. He was just unreal." Jessee knew that because he had seen supervisors return with the stale products.) Caudill answered that Respondent had not discharged Clogston because he was a "no vote." About the same time, Chandler told Jessee that Clogston had put price labels over the dates on some buns and left them at the customer's until they molded; and Jessee asked why Chandler did not do something about him, especially because he had fired Duncan for the same thing. Chandler explained that "Dick [Wedding] might need that no vote."

Thus, the General Counsel presented a prima facie case: that Duncan had been identified as a union ringleader, that he had done nothing wrong, that Respondent rid itself of the union ringleader, and that the reason for discharging him was his feelings in favor of the Union, whereas another employee with a worse record remained because he opposed the Union. The General Counsel contends that Caudill's statement that Clogston had not been fired because he was a "no" vote violated Section 8(a)(1) of the Act because employees would receive more favorable treatment if they opposed the Union. I agree. He also contends in his brief that Chandler's statement that Respondent had rid itself of the union ringleader independently

violated Section 8(a)(1) of the Act, despite the fact that the counsel for the General Counsel withdrew the allegation upon a motion to dismiss made by Respondent at the end of the General Counsel's case-in-chief. Clearly, the statement supports the proof of Respondent's motive for the discharge and proves Respondent's knowledge of Duncan's union activities. It also constituted unlawful interference under Section 8(a)(1) because of its likely chilling effect on Jessee's exercise of his Section 7 rights. *Mediplex of Danbury*, 314 NLRB 470, 472 (1994). Despite the withdrawal of the allegation, the matter was fully and fairly litigated, because, in part, the finding of knowledge and motive depended on it; and I conclude that Respondent violated the Act. Respondent contends that Chandler did not play a significant role in the discharge of Duncan and his knowledge therefore cannot be imputed to Respondent. However, Respondent's counseling form used in its discharge of Duncan, is signed by Campbell as "company representative" and Chandler as "other person attending conference" and states: "We feel in the best interest of the company that due to previous infractions we must terminate this employee." (Emphasis added.) Thus, it is clear that Chandler participated fully in the decision. In addition, even without this evidence, because Chandler was Campbell's supervisor and engaged in so many of the violations found herein, including the interrogations, I find that he was intimately involved in all decisions that touched on the Union's organizing campaign and was particularly involved in ridding Respondent of the person he believed to be the Union's principal organizer.

The finding of a prima facie 8(a)(3) case does not end matters. Board law holds that, even if Respondent discharged Duncan for reasons that violate the Act, if Respondent showed that it would have taken the same action even in the absence of Duncan's perceived union activities, it would escape liability. *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982); approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983); *Naomi Knitting Plant*, 328 NLRB 1279, 1281 (1999); *Manno Electric*, 321 NLRB 278, 280 fn. 12 (1996). Here, even if Duncan left stale goods in the shops of his customers, Respondent would nonetheless not have disciplined him if he were a "no vote." Thus, its discipline was disparate and would not have been taken in the absence of Duncan's adherence to the Union.<sup>15</sup> Furthermore, I discredit Respondent's defense because Chandler, as I have found, is generally untrustworthy and unworthy of belief. I thus find that he and Campbell concocted a story to set up Duncan, and I believe neither of them. In addition, I note that their testimony was contradictory. On cross-examination, Chandler, in great detail, testified to the fact that, as he and Campbell traveled from shop to shop on January 5, Campbell took notes of what transpired—not only the notes of Duncan's stale items but also notes concerning the placement of displays and how better to demonstrate the worth of and to market Respondent's products—and kept the separate pieces of paper in a folder. That was all a tissue of lies. When Campbell

<sup>13</sup> On the first day of the hearing, the counsel for the General Counsel moved to amend the complaint by adding two earlier warnings given to Duncan as 8(a)(3) and (1) violations, allegations that the Union had specifically deleted from its earlier unfair labor practice charge. After argument, including the request of Canny for an adjournment if the amendment were granted, the counsel for the General Counsel withdrew his request to amend the complaint. In his brief, he renews the motion, claiming that the allegations were fully litigated. In light of his specific withdrawal of his original, and perhaps untimely, motion to amend, and Respondent's waiver of her right to prepare to defend against those allegations, which may have led Respondent to defend against them differently, I deny this new motion. I reject the General Counsel's contention that Respondent waived its initial objection by presenting testimony regarding the two earlier warnings. That evidence was elicited as background, to explain Respondent's discipline of Duncan in January 1999.

<sup>14</sup> In March 1999, Campbell assumed Chandler's position.

<sup>15</sup> Hoss testified that leaving stale items was common and that one of Respondent's supervisors had admitted that he could write up any salesman he wanted to, any day he wanted to.

was examined on cross-examination, he testified that he took no other notes other than those supporting Duncan's discharge. One of them was, or both of them were making up facts as they went along in order to fire Duncan. I find that their story was fabricated<sup>16</sup> and discredit both of them. I conclude that Respondent discharged Duncan in violation of Section 8(a)(3) and (1) of the Act.

The second 8(a)(3) case concerns Barry Mullins, a garage mechanic in Jenkins. In May 1998, he learned that the Union was attempting to organize the employees at Norton, Jenkins, and Pikeville, Kentucky; he attended a union meeting in Norton, he talked to his fellow employees, and he passed along to the Union signed cards that had been given to him. Chandler got wind of his activities and interrogated him about them on June 23: Chandler said that he had heard that Mullins had been talking to the guys about the Union and Dave Farmer, who worked at Johnson City and was his immediate supervisor, and Jackson said that he had better stop it. Mullins denied that he had been talking to the employees about a union. I find this a threat of unspecified reprisals<sup>17</sup> should Mullins continue with his union activities.

On Respondent's case, Chandler admitted that he told Mullins, as he has told other employees, that employees were not allowed to talk about the Union on company property. He explained at the hearing that that rule was absolute and that it did not matter if the employee was on break or working or on lunch. This was not a valid no-solicitation rule because he barred employees from talking about the Union while on break or at lunch. The Act protects the right of employees to solicit in nonworking areas or during nonworking times. Because Chandler's rule prohibited all solicitation, including that which the Act protects, it is overly broad and violates Section 8(a)(1) of the Act. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945); *Our Way, Inc.*, 268 NLRB 394 (1983); *Essex International*, 211 NLRB 749 (1974); *Stoddard-Quirk Mfg. Co.*, 138 NLRB 615 (1962). Furthermore, an employer that maintains a valid no-solicitation rule must uniformly enforce the rule. Chandler may not enforce it sporadically only in response to union activities, and it may not single out union activities for enforcement of its rule. *Willamette Industries*, 306 NLRB 1010

<sup>16</sup> Respondent's exhibit states that Duncan was guilty of having left stale products in six places, yet the supporting document lists items left at only five shops.

<sup>17</sup> Respondent contends that this allegation is time barred by Sec. 10(b) of the Act. Under *Redd-I, Inc.*, 290 NLRB 1115, 1118 (1988), the Board looks at: (1) whether the untimely allegation involves the same legal theory as the timely charge; (2) whether the untimely allegation arises from the same factual circumstances or sequence of events as the timely charge; and (3) whether the respondent would raise the same or similar defenses to both allegations. The untimely allegation need not involve the same section of the Act as the other alleged violations. *Nickles Bakery of Indiana*, 296 NLRB 927, 928 fn. 5 (1989). Here, the charge was filed on July 8, 1998, and alleged that Mullins was discriminatorily transferred under Sec. 8(a)(3) and (1) because of his union activities. The fact that he was "talking to the guys about the Union" was the subject of the threat, which involves the same legal theory, arises out of the same facts, and as to which Respondent raised the same defense, to wit, it never happened. I thus reject Respondent's 10(b) defense.

fn. 2 (1992). I find a violation of Section 8(a)(1) of the Act and grant the General Counsel's motion, opposed by Respondent, to amend the complaint in this respect.<sup>18</sup>

Two days later, on June 25, Farmer told Mullins that he had heard from a reliable source that Mullins had been sitting on his "ass not doing nothing" and that he had been "campaigning for the Union and got a Petition signed" and that he had better stop it. Mullins denied that he had been campaigning for the Union. Farmer added that his boss did not like "out of Depot mechanics" and that "we would probably end up closing the mechanic shops outside the area and bring those mechanics in to Johnson City." By threatening to close the Jenkins garage and transfer Mullins to Johnson City because he campaigned for the Union, Farmer violated Section 8(a)(1) of the Act.<sup>19</sup>

That threat was carried out. Farmer telephoned on June 26 and informed Mullins that his supervisor had ordered him to close the mechanic shop at the Jenkins depot, effective July 3, 1998. He offered Mullins either a layoff or a transfer to Johnson City, which is what he accepted;<sup>20</sup> and he transferred to Johnson City on July 21, 1998, after he had had some surgery. The day before, he requested that Farmer allow him to use the service truck, which had been assigned to him for his use at the Jenkins depot, to commute to Johnson City. Farmer refused, telling Mullins that he would have to use his personal vehicle. He did not lose any hours, pay, or benefits; and, after about 5 weeks, Farmer, having allegedly decided that he could not adequately perform maintenance on Respondent's equipment in the Jenkins area from Johnson City, decided to reopen the garage at Jenkins and reassigned Mullins there on August 28. The General Counsel has proved a prima facie case. Mullins was engaged in union activities, Chandler found out about them and warned Mullins about engaging in them; and, within 3 days Farmer directed that Mullins stop campaigning for the Union, threatened the closure of the Jenkins facility and transfer of Mullins to Johnson City, and then offered Mullins the choice of a layoff or a transfer.<sup>21</sup>

Respondent, however, contends that there were independent reasons for his transfer that would have occurred even in the absence of Mullins' union activities. The first is that Mullins was not working as well as Farmer had hoped when he hired Mullins, who had been a mechanic for Kern's Bakeries, a part of CooperSmith, which Respondent bought in early 1998. Farmer asked Mullins to install handrails on all trucks that did

<sup>18</sup> See fn. 17. To the extent that the amendment concerns a new allegation, it was fully and fairly litigated. *Pergament United Sales*, 296 NLRB 333, 334 (1989).

<sup>19</sup> See fn. 17.

<sup>20</sup> The General Counsel makes much of the fact that Mullins was asked to accept the transfer in writing, but I find that not meaningful.

<sup>21</sup> That Mullins, by accepting the transfer, incurred transportation costs that he otherwise would not have, had he remained in Jenkins, and that Farmer allowed another mechanic, Sam Bentley, to use his service truck to commute to Johnson City, and did not permit Mullins to use his truck, do not support the General Counsel's prima facie case. Bentley worked at a satellite facility in Richlands, Virginia, and was required to service Respondent's trucks in Richlands, Wytheville, and Dublin, Virginia, so he needed his service truck to perform his job, whereas Mullins punched a timeclock and worked steadily at Johnson City and had no need of a truck.

not have them and to extend and make all the buddy seat brackets so Respondent's buddy seats would fit.<sup>22</sup> Mullins, Farmer complained at the hearing, was not putting buddy seat brackets on the trucks, was not painting the wheels or bumpers on the trucks, and was not servicing his trucks properly or, at least, was not performing preventative maintenance as fast as other mechanics did and as fast as Farmer expected. On the other hand, Mullins testified that Farmer had several times complimented him on his work. There was nothing in Respondent's file that showed that anyone was dissatisfied with Mullins' work. Farmer testified that he counseled Mullins, but even a counseling may result in a warning that is written, yet there was nothing there. Respondent produced no forms demonstrating Mullins' inefficient or slow preventative maintenance work, forms that Farmer relied on in assessing how fast Mullins was working. One would think that there was one piece of paper that would support Farmer, yet none was produced. In light of the fact that Farmer's claim was utterly unsupported, I credit Mullins and find that there was nothing wrong with his work.

In addition, Farmer testified that, as a result of the further reorganizations and consolidations in operations, the Johnson City terminal was picking up extra business from two other depots that had previously been serviced in Knoxville, Tennessee, and Farmer needed an additional mechanic, whom he wanted to supervise, to do some major overhaul of former Kern's trucks that had previously been operated in Kern's business. Why he would trust Mullins to do that job, with his bad experience in the past few months, Farmer was not asked. But it appears, according to Farmer, over the next 5 weeks, Mullins became a model citizen and improved enormously. Further, there were two additional developments. First, the former Kern's trucks, that Farmer thought would be in such bad shape that they needed a major overhaul, did not need that kind of attention after all. Second, Farmer was beginning to have problems servicing the Norton, Jenkins, and Pikeville area trucks as the depots were located hours away from Johnson City. When Farmer discovered this was left unsaid; but what is clear is that two of the reasons for transferring Mullins to Johnson City were no longer valid, and the third reason, Mullins' incompetence, I have found, never existed. So Mullins was sent back to Jenkins 5 weeks after he was transferred, and about 3 weeks after the unfair labor practice charge had been filed protesting his original transfer.

Respondent is required to show by a preponderance of the evidence that it would have done precisely the same as it did in the absence of its unlawful activity. This record does not supply a preponderance. On the basis of my credibility findings, Mullins was doing a good job in Jenkins. On the basis of what Farmer said he learned, albeit too late, there was no urgent need to fix additional trucks and what had been covered out of the Jenkins facility could not be adequately covered from Johnson City. I do not believe Farmer's testimony. Rather, I find that, having ascertained that Mullins was engaged in union activities, Chandler wanted him out of Jenkins; so Mullins was sent to Johnson City, which was organized anyway, where he could do

<sup>22</sup> A buddy seat permits a person to ride on the passenger side of the truck.

no harm. Respondent's justification for the transfer fails. Accordingly, I conclude that Respondent violated Section 8(a)(3) and (1) of the Act by transferring Mullins to Johnson City.

The third and final 8(a)(3) allegation concerns Tim Harvey,<sup>23</sup> who became aware of the union campaign during August 1998 but, according to this record, was on vacation at that time and never engaged in any union activities. At some point in time, Harvey had informed Caudill that he would be interested if a truck loading position became available. On March 8, 1999, Caudill informed Harvey that a truck loading position might soon be opening. Harvey told him that he was still interested in the position. The next day, Boyd and Nichols visited Respondent's facility, recited above, and they began talking with Harvey. After the two union representatives had left, and after Caudill and Canny had advised Harvey that he did not have to give a statement to NLRB Field Examiner Reese, Harvey asked Caudill about the truck loading position, and Caudill replied that he would see what he could do for him. Harvey met with Reese the next afternoon. Two days later, on March 12, Harvey again asked Caudill about the truck loading position. Caudill said that he would check with Campbell and, shortly after, Caudill informed him that he would begin working as a truck loader on Sunday, March 14. Harvey inquired into how much Respondent would pay him in his new position. Caudill responded that the job paid a flat rate based on \$11.08 an hour for 40 hours. Caudill said that some weeks he would work more than 40 hours and some weeks less, but the hours would balance out to what he was then working.

The duties of Respondent's two truck loaders (Rogers was the other one) included loading trucks at night, general cleaning duties in and around the warehouse, washing trucks, and servicing two "pull-up" routes, the Kentucky route (it ran through Harlan, Kentucky) and the Virginia route (it ran through Coeburn, Virginia) on Wednesdays and Sundays. The work in the warehouse often did not involve a full 8 hours of work. On the pull-up routes, the loaders would travel to the customers' stores to restock and straighten their shelves, including "pulling the bread out of the back room." Because the Kentucky route was longer and required 1 or 2 hours more time to service, according to Harvey (4 hours, according to Rogers), Rogers and Harvey agreed to share the duties equally: Rogers worked the Kentucky route on Sundays and Harvey worked it on Wednesdays.

On April 29, 6 weeks after Harvey started, Campbell advised Rogers and Harvey that Respondent would no longer pay them for the full week based on the \$11.08 hourly rate, but would pay them that rate for 28 hours (25 for loading and 3 for washing trucks and picking up garbage)<sup>24</sup> and \$65 for the days they worked pull up, based on an hourly rate of \$6.50 for 10 hours (even if they did not work 10 hours), which was the way that other loaders were paid by Respondent at all its facilities other than Norton-Jenkins-Pikeville area. Campbell computed the 28 hours in order to ensure that the total received by the loaders

<sup>23</sup> All references to "Harvey" from this point shall be to Tim Harvey.

<sup>24</sup> Previously the loaders were paid 3 hours overtime pay for washing trucks. Under the new rates, they would be paid 2 hours of regular time for washing Respondent's 12 trucks. Respondent agreed to pay another hour's pay to pick up garbage around the building.

would be within about \$3 of what they had earned before. On the same day, the first consolidated complaint in Cases 11-CA-18006-1, 11-CA-18202, 11-CA-18223, and 11-CA-18230 issued. Although Respondent did not receive it until May 4, the normal practice of the Regional Offices is to give advanced notice to potential respondents of the fact that they have determined to issue complaints and to give them an opportunity to settle them. Thus, it is probable that, even before April 29, when the pay was recomputed, Respondent knew that the complaint would issue. Then, 2 days later, on May 1, Caudill assigned Rogers to service the Virginia route and Harvey, the Kentucky route. That reassignment is alleged in the complaint as unlawful, the imposition of more onerous working conditions, because Respondent paid both Rogers and Harvey the same wage, despite the fact that Harvey was working more hours (albeit less than the 10 hours that the employees were being paid for) on the Kentucky route.

In addition, Harvey complained that shortly thereafter, and until July or August 1999, he began to experience an increasing number of "call-backs," where the customer on the pull-up route needed more bread products for that day, so he was required to obtain more bread from the warehouse or bakery and return to the customers to deliver those products. His workday increased by approximately 5 hours per day. His claim that he worked 18 to 20 hours per week more than Rogers was unsupported, assuming that Rogers had perhaps one call-back a month, as Harvey testified. If Harvey's call-backs took 5 hours and his route was 1 or 2 hours longer, at most he would be working 7 hours more per day, or 14 for the 2 pull-up days, not 18 to 20. Harvey also claimed that he requested overtime pay for the excess hours that he worked on approximately 20 occasions, but Respondent paid him for only 5 of those requests. Campbell, however, testified that he paid Harvey for overtime work on two or three occasions, which were the only times that Harvey submitted requests. Harvey countered this by saying that Caudill refused to pay him overtime, claiming that Campbell would not authorize it.

The basis of the General Counsel's claim is that Respondent discriminated against Harvey because of his union activities and because he cooperated with the Region in the investigation of the charges against Respondent. Although there is ample evidence that Caudill is unworthy of belief, that does not mean that the General Counsel's theory must be automatically accepted. Harvey, not even proved to be a union supporter, asked for a favor of being switched from his present job to a loader so that he could reduce his working hours to have more time to study to become an electrician and to spend with his family. Caudill granted his request within days after Boyd visited Respondent's facility armed with Reese's letter looking for Harvey, among others, to give a statement that would support the Union. If Respondent intended to discriminate against Harvey for his support of the Union or for his cooperation with the Region, that was surely a curious way to show it. Indeed, Harvey never told Caudill that he met with Reese; and there is no evidence that he told anyone else, either, or that Respondent had any knowledge at all.

The fact that Respondent changed the conditions of the job does little to support the General Counsel's claim. As Respon-

dent showed, it was paying top rate to its loaders for traveling to customers' stores to rearrange its products and for washing trucks and picking up garbage. In addition, it was paying a guarantee of 40 hours of employment, despite the fact that neither of the loaders appeared to work that amount of time. Finally, when the pay arrangement was changed, it was done to ensure that the difference between the old rate and the new one was only a few dollars, surely a unique way to discriminate against an employee who represented such a threat to Respondent's existence. It must also be noted that, at least up to this point, Respondent treated Harvey and Rogers the same, that is, it changed both of their pay rates. To the extent that the General Counsel's brief contends that Harvey was discriminated against rather than Rogers because Respondent knew that Rogers had cooperated in the investigation by signing his statement exonerating Chandler and Caudill, Harvey was treated no differently from Rogers.

The real harm done to Harvey resulted from giving him the Kentucky route. Respondent's witnesses were none too consistent about that reason, but it appears that having one employee service one route all the time, rather than Harvey and Rogers alternating, led to a better relationship with the customers, and that Rogers was having some difficulties on the Kentucky route, although his problems did not rise to the level of having to discipline him for them. The difficulty with the Kentucky route was not that the distances were greater and the route took a little longer time than the other. Rather, the problem was the number of call-backs, a problem that arose *after* Caudill assigned Harvey to the route. How difficult it had become is difficult to gauge. Neither the General Counsel nor Respondent had any documents that supported their respective positions.<sup>25</sup> Harvey's testimony was inflated regarding his computation of his hours worked. I find similarly inflated his recollection of how many weeks he had to work the route with these long hours. He admitted that he was paid overtime. Why Campbell would pay him overtime on some occasions, but not pay him all the time, was not adequately or believably explained. Campbell advised both loaders to write out and submit their time records in writing for every day they did pull ups. I believe Campbell, that he paid overtime each time that Harvey claimed it. And if Harvey claimed it only a few weeks, it follows that those were the only weeks for which overtime was due.

I thus believe Campbell to the effect that once he found out that Harvey was complaining about the nature of the route, being overwhelmed by call-backs, Campbell quickly arranged to resolve the problem, and did so. The General Counsel's claim that Caudill "manipulated orders to cause shortages requiring call-backs on the Kentucky route" is sheer speculation, and based on nothing other than the inflated testimony of Harvey. The fact that the change of the pay scale occurred on the same day as the first consolidated complaint issued proves nothing. It was, at best, a coincidence. I dismiss this allegation. I recognize that I have stated that I do not trust Caudill, but I would agree that his testimony makes more sense than Har-

<sup>25</sup> William Harvey was named as one of the salesmen who caused the call-backs by not supplying sufficient product to the customer. The General Counsel never asked him about these incidents.

vey's. If Harvey complained that he was constantly running back and forth to deliver bread products, it would not only be difficult for him but costly to Respondent, in increased wear on the trucks and costs for fuel and loss of confidence by the customers, who would have constantly complained that they were never given enough product. And so I believe Caudill's testimony that no store ran out of product more than 2 pull-up days in a row (Harvey testified that one store ran out 9 weeks in a row) and that he quickly fixed Harvey's complaint that his run was longer than Rogers' by shifting four accounts from Harvey to Rogers, testimony that neither Harvey nor Rogers ever rebutted. I also believe Campbell, that he promptly attempted to solve Harvey's complaints and did so.

Accordingly, I find that there was no discrimination here. Harvey's route had some problems, but upon his complaints, he was paid overtime when he requested it, and the route was changed to lessen his work and equalize the amount of time that it took to service both routes. Further, Respondent talked with the salesmen to rid itself of the call-back problem. I dismiss this allegation.

#### IV. ATTORNEY MISCONDUCT

The General Counsel requests in his brief that I recommend that "the Board appropriately sanction Canny for her conduct" in preparing the Rogers' statement, as set forth in the section of this decision captioned "Credibility." I will do so. The document was false. Canny prepared it without even asking what

Rogers knew, but with the knowledge that he would sign anything that she prepared, because he was coerced into doing so. She then, knowing that the statement had been coerced, submitted it to the Region and the Board, to support Respondent's defense. I also recommend a review of the record of this hearing, in which Canny's conduct was disruptive and abrasive, bordering on contemptuous, so that I had to caution her not to continue with her behavior.

#### V. REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, Respondent having discriminatorily discharged Tommy Duncan, it must offer him reinstatement and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). I shall also order that Respondent make whole Barry Mullins for any expenses he incurred as a result of Respondent's unlawful transfer of him, plus interest as computed above.

[Recommended Order omitted from publication.]