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Stabilus, Inc. and International Union, United Automobile, Aerospace & Agricultural Implement Workers of America (UAW). Cases 11–CA–20386, 11–CA–20396, 11–CA–20443, and 11–RC–6567

August 27, 2010

DECISION, ORDER, AND DIRECTION
OF SECOND ELECTION

BY CHAIRMAN LIEBMAN AND MEMBERS SCHAUMBER
AND BECKER

On September 26, 2005, Administrative Law Judge Michael A. Marcionese issued the attached decision. The Respondent filed exceptions and a supporting brief. The Charging Party filed an answering brief, and the Respondent submitted a reply 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 briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions only to the extent consistent with this Decision, Order, and Direction of Second Election.²

Introduction

The Respondent manufactures gas springs for the automotive and furniture industries at its facility in Gastonia, North Carolina. On February 16, 2004, the Union began a campaign to organize the Respondent's employ-

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

There are no exceptions to the judge's recommended dismissal of the complaint allegations that the Respondent violated Sec. 8(a)(1) by (a) engaging in surveillance of employees; (b) creating the impression of surveillance; (c) threatening that bargaining would begin from scratch; (d) threatening job loss in the event of a strike; (e) threatening maintenance employees with changed working conditions; (f) disparately enforcing bulletin board posting policy; and (g) soliciting grievances and promising to remedy them by forming departmental advisory committees in May–July 2004. There are also no exceptions to the judge's dismissal of allegations that the Respondent violated Sec. 8(a)(2) by forming the departmental advisory committees.

² We will modify the judge's conclusions of law and recommended Order, which is set forth in full below, to conform more closely to the findings herein. We shall also substitute a new notice in conformity with the Order as modified.

ees at the facility.³ In an election held pursuant to a Stipulated Election Agreement on May 20 and 22, 242 votes were cast for and 244 against the Union, with two nondeterminative challenged ballots. The Union filed objections to the election and unfair labor practice charges. The judge found that the Respondent committed a number of unfair labor practices, and that some of these unlawful acts also constituted objectionable conduct affecting the election. As discussed below, we adopt the judge's findings that certain conduct by the Respondent violated Section 8(a)(3) and (1) of the Act, and his determination that the results of the election must be set aside and a second election directed. We reverse his finding, however, that the Respondent violated Section 8(a)(1) by disparately enforcing its food and drink policies against a union supporter.

For the reasons the judge stated, we adopt his finding that the Respondent violated Section 8(a)(3) by discharging employee Dennis McSwain.⁴ The judge additionally found that the Respondent violated Section 8(a)(3) and (1) by granting pay increases to maintenance employees in April and to lead operators in May. For the reasons the judge stated, we agree with his finding that the Respondent violated Section 8(a)(1) by increasing the pay of the maintenance employees and the lead operators. We find it unnecessary to pass on the judge's finding that the pay increases also violated Section 8(a)(3), as such a finding would not materially affect the remedy.⁵

For the reasons the judge stated, we adopt his findings that the Respondent violated Section 8(a)(1) of the Act by (a) soliciting employee grievances; (b) threatening to terminate employees who picket in support of the Union; (c) promising an employee he would not be fired if he removed his prounion T-shirt and insignia; (d) coercively interrogating, by Human Resources Director Douglas Lea on April 1, employee McSwain; (e) threatening, by

³ All dates are 2004, unless otherwise noted.

⁴ In adopting the judge's finding that McSwain's discharge was unlawful, we do not rely on his speculations that Supervisor John Nichols orchestrated the discharge or that the Respondent knew of employee Billy Hudspeth's bad relationship with McSwain and therefore secured a damaging statement from Hudspeth.

⁵ In finding the 8(a)(1) violation, the judge properly analyzed the pay-increase allegations under *NLRB v. Exchange Parts Co.*, 375 U.S. 405 (1964). In the course of his analysis, however, the judge stated that the Respondent had failed to rebut "the presumption" that its increases were intended to interfere with employee free choice. We disavow that statement. "The Board makes no presumption that increases granted during an organizing campaign are unlawful, but it will draw an inference of improper motivation and interference with employee free choice from all the evidence and Respondent's failure to establish a legitimate reason for the timing of the increases." *Cardinal Home Products*, 338 NLRB 1004, 1016 (2003) (citing *Speco Corp.*, 298 NLRB 439 fn. 2 (1990)). For the reasons the judge explained, however, we agree that such an inference is warranted here.

Supervisor Robert Hasson on February 18, employees Tina Shuler, Donald Grant, and Robin Braswell with plant closure if the Union were to come in;⁶ (f) threatening, by Supervisor John Nichols in April and May, employee McSwain with unspecified reprisals for engaging in union activity; (g) restricting, by Supervisor Dennis Mehaffey on May 21, employee Fred Sisk from talking about the Union; (h) threatening, by Mehaffey on May 21, employee Sisk with discipline if he continued to talk about the Union; (i) closely monitoring, by Supervisor Bill Vinesett in April and May, employees Clarence McClure and Scott Stiles after they openly supported the Union;⁷ and (j) restricting, by Supervisor Mike Ellington on May 21, the movements of employees Tony Bollinger and William Phelps.⁸

In agreement with the judge, but for different reasons, we find that the Respondent also violated Section 8(a)(1) by prohibiting employees from wearing pronoun T-shirts during the election. We need not reach the judge's conclusion that the Respondent failed to make the required showing that special circumstances justified the application of its uniform policy under the facts of this case because we find that, even if the Respondent had made the required showing, its actions here would have violated the Act for two independent reasons. First, quite apart from the Respondent's failure to establish special

⁶ In adopting the judge's finding that Hasson unlawfully threatened Shuler, Grant, and Braswell with plant closure, we note that there are no exceptions to the judge's admission into evidence of a written statement about the February 18 conversation signed by the three employees, or to the judge's reliance on that statement as corroboration of their testimony.

⁷ In adopting the judge's finding that Vinesett closely monitored McClure and Stiles after they came out in favor of the Union, we find it unnecessary to rely on the judge's finding that Vinesett did not explain why he needed to take breaks with both employees or how he had the time to take breaks with them as well as with other employees.

⁸ Having adopted the judge's findings of the foregoing unfair labor practices, we find it unnecessary to pass on the following additional 8(a)(1) violation findings because they would be cumulative and not affect the remedy: (a) Lea's alleged questioning of employee Rick Myers in mid-February; (b) Manufacturing Manager Thomas Napoli's alleged questioning of employee McSwain on April 1; (c) Lea's alleged threat of plant closure to employee Myers in mid-February; (d) Mehaffey's alleged threat of plant closure to employees Sisk and Robert Parrot in January; (e) Supervisor Reggie Ballard's alleged threat of plant closure to employee Stiles on April 8; (f) Ballard's alleged threat of plant closure to employee Sisk in early May; (g) Ballard's alleged threat of unspecified reprisals to a group of employees on May 24; (h) Lea's alleged restricting, on April 1, of maintenance employees and employee Scott Mayes from talking about the Union; (i) Supervisor Kathy Crumbley's alleged restricting, on April 18, of employees Brian St. Laurent and Jerry Lockridge from talking about the Union; (j) Mehaffey's alleged restricting, in early May, of employee Sisk from talking about the Union; and (k) Nichols' and Supervisor Layne Turner's alleged closer supervision and monitoring of employee McSwain in April.

circumstances, the record shows that the Respondent enforced its policy in a selective and overbroad manner against union supporters. Second, the policy was applied in a disparate manner to Section 7 activity relative to comparable non-Section 7 activity.

The Respondent maintained a uniform policy, set forth in its employee handbook. Under that policy, the Respondent required employees to wear shirts bearing the company name. The Respondent explained that the purpose of this policy was to present a uniform appearance to customers and to instill a sense of teamwork among employees. However, the policy did not require temporary employees to wear a company uniform of any kind. Moreover, one acceptable style of company shirt buttoned completely down the front and the Respondent permitted employees to wear it unbuttoned with T-shirts underneath displaying various messages. Finally, on several occasions not long before the election, the Respondent relaxed its enforcement of the policy for short periods of time based on special circumstances, such as on the anniversary of the tragedy on 9-11, when the local football team was in the Super Bowl, and on Halloween.

On May 5, employee Dennis McSwain purchased T-shirts with pronoun slogans inscribed on the front and back and distributed the T-shirts to other pronoun employees. On at least one occasion in May, Human Resources Director Lea told McSwain that he could not wear his pronoun T-shirt in the plant. At about 3 p.m. on May 22, the second day of the 2-day election, Supervisor Jimmy Walker told employee Robert Nix to change out of his pronoun T-shirt into a company shirt. Nix complied with the instruction and also reported it to employee Robin Braswell who also changed her shirt. Shortly thereafter, however, Walker told Braswell that she could still wear the union shirt as long as she wore a company shirt over it. In addition, also on the second day of balloting, Lea asked McSwain as a "favor" to take his pronoun T-shirt off and not display support for the Union that day. Lea promised McSwain that, if he complied, nobody would fire him. The judge found that Lea's promise to McSwain was unlawful. We have adopted the judge's finding in this regard. Based on the foregoing facts, the judge found that the Respondent violated Section 8(a)(1) of the Act by prohibiting employees from wearing pronoun T-shirts.

Applying a "special circumstances" analysis, see *Great Plains Coca-Cola Bottling Co.*, 311 NLRB 509, 515 (1993), the judge found that the Respondent did not claim that its uniform policy was necessary in order to maintain production or discipline, or because the employees worked directly with customers or interacted with the public as part of their job. He further found that the re-

spondent's purported desire to portray a uniform appearance for visitors and to instill a sense of teamwork was undermined by the absence of a requirement that temporary employees wear company shirts. Thus, the judge found no special circumstances justifying the union T-shirt ban. The Respondent filed exceptions, arguing that nondiscriminatory enforcement of a uniform policy does not violate the Act.

A.

As the Supreme Court has held, employees have a Section 7 right to wear union insignia on their employer's premises, which may not be infringed, absent a showing of "special circumstances." *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 801–803 (1945). These protections of Section 7 expression have always extended to articles of clothing, including prounion T-shirts.⁹ There is no basis in precedent for treating clothes displaying union insignia as categorically different from other union insignia, such as buttons. See, e.g., *Great Plains Coca-Cola Bottling Co.*, 311 NLRB at 515 ("The Board treats article[s] of clothing the same as a button.").

An employer cannot avoid the "special circumstances" test simply by requiring its employees to wear uniforms or other designated clothing, thereby precluding the wearing of clothing bearing union insignia. The Board has consistently applied that test where employers have required employees to wear particular articles of clothing and have correspondingly prohibited them from wearing clothing displaying union insignia. For example, in *Great Plains Coca-Cola Bottling Co.*, supra, the Board found that the employer had unlawfully banned the wearing of union jackets shortly before an election, based on the employer's policy of permitting employees to wear only company jackets.¹⁰ The many Board cases finding that special circumstances existed amply illustrate that there is no need to depart from existing precedent to ensure that employers' legitimate interests, for example, in maintaining a particular public image, are accorded proper weight.¹¹

⁹ E.g., *Wal-Mart Stores*, 340 NLRB 637, 638–639 (2003), enfd. in relevant part 400 F.3d 1093 (8th Cir. 2005); *Aldworth Co.*, 338 NLRB 137, 203 (2002), enfd. sub nom. *Dunkin' Donuts Mid-Atlantic Distribution Center v. NLRB*, 363 F.3d 437 (D.C. Cir. 2004); *Broadway*, 267 NLRB 385, 404 (1983); *United Parcel Service*, 195 NLRB 441, 448 fn. 24 (1972); *De Vilbiss Co.*, 102 NLRB 1317, 1321 (1953).

¹⁰ See also *Meijer, Inc.*, 318 NLRB 50, 56–57 (1995) (union jacket instead of required jacket; test not met with respect to employee in non-customer-contact area), enfd. 130 F.3d 1209 (6th Cir. 1997).

¹¹ E.g., *Con-Way Central Express*, 333 NLRB 1073, 1075–1077 (2001) (union cap instead of required hats; test met); *Produce Warehouse of Coram*, 329 NLRB 915, 916–918 (1999) (same); *Noah's New York Bagels*, 324 NLRB 266, 275 (1997) (employee defaced the employer T-shirt he was required to wear, employer prohibited him from wearing it, the Board applied the "special circumstances" test and

While the judge found that the Respondent failed to establish special circumstances, we find it unnecessary to pass on his conclusion for the following two reasons.¹²

B.

First, even if the Respondent had carried its burden of proving that special circumstances justified its uniform policy here, we would find that the Respondent impinged on employees' Section 7 rights because its agents went beyond enforcing the uniform policy in requiring union supporters to remove union T-shirts and other displays of support for the Union that could have been worn consistent with the policy.¹³ As the judge found, Supervisor Walker initially told employee Nix, and through Nix employee Braswell, during the second and final day of the election, that they could not wear their union T-shirts, but, shortly thereafter, told Braswell that she could wear her union T-shirt under a company shirt. Also on the second and final day of the election, when Respondent's human resources director, Lea, solicited employee Dennis McSwain to remove his union T-shirt and other union insignia, Lea observed that "this vote is going to be very, very close" and "everybody was watching what McSwain did." Moreover, as the judge also found, Lea asked McSwain to take off the union shirt, not to put on his company shirt or to wear the company shirt over the union shirt and, unlike Walker, Lea did not clarify the request at any subsequent time. In addition, Lea asked McSwain to remove all other visible displays of support for the Union, displays that unquestionably were consistent with the uniform policy, and McSwain complied by removing the T-shirt as well as a protractor with a union logo on it and a union hat. Thus, Respondent's intention with respect to McSwain was not to enforce the uniform policy but to induce an influential employee, on the second and final day of the election, to remove all displays of support for the Union, including his union T-shirt, which (as acknowledged by Walker) could have been worn *consistent with* the uniform policy and in a manner

found no violation); *Casa San Miguel, Inc.*, 320 NLRB 534, 540 (1995) (employee marked her required hospital smock with a prounion message, hospital objected, the Board found that the employer had met the "special circumstances" test).

¹² The dissent offers an extended analysis of the question of whether the judge correctly required a showing of special circumstances. Because we do not rely on the judge's reasoning in this regard, we do not address the dissent's analysis.

¹³ The dissent states that this theory was not advanced by the General Counsel, but the complaint plainly alleges that the Respondent "[p]rohibited its employees from wearing prounion 'T' shirts because of their participation in union activities." Moreover, the facts material to the incidents in which this prohibition was enforced were fully litigated.

that still publicly displayed support for the Union.¹⁴ The Respondent's overbroad and targeted use of its policy to force McSwain to take an action that would influence "everybody" who "was watching what [he] did" would have been unlawful even if the Respondent had justified a narrow application of its uniform policy.¹⁵ The Respondent thereby violated Section 8(a)(1).¹⁶

C.

Second, even if the Respondent had justified its uniform policy under the "special circumstances" test and the Respondent had enforced that policy consistently and narrowly against union supporters during the election, the Respondent nonetheless acted unlawfully by disparately enforcing the policy against statutorily protected activity while not enforcing it against other similar activity under similar circumstances.

The Respondent concedes that it permitted all employees to wear noncompany clothing for short periods of time on various occasions: employees were permitted to wear clothing with the logo of the Carolina Panthers, the hometown football team, leading up to the team's participation in the Super Bowl; employees were permitted to wear costumes during the Halloween period; and employees were also permitted to depart from the uniform policy on the anniversary of the September 11 terrorist attacks. Given this background, forbidding employees to wear union T-shirts on the last day of the 2-day election constituted disparate enforcement.¹⁷

¹⁴ The dissent characterizes the request that McSwain remove his union T-shirt as merely an "incidental aspect of the coercive overtures," but the request was hardly incidental as the T-shirt was the most prominent display of support for the Union McSwain was wearing. The dissent's further suggestion that Lea's failure to ask McSwain to put on a company shirt instead of to remove his union T-shirt or to clarify that the union shirt could be worn under a company shirt is "meaningless" is best answered by asking whether Lea would have been satisfied if this influential union supporter had responded to his request in the waning hours of a very close election by putting on a fully unbuttoned, button-down company shirt over his union T-shirt, thereby continuing to display his support for the Union while fully complying with the Company's uniform policy.

¹⁵ The dissent mischaracterizes this basis of our holding as based on discriminatory application of the uniform policy. In fact, the evidence reveals an overbroad application, i.e., that the Respondent ordered or asked employees to take off their union T-shirts when the policy did not require the requests.

¹⁶ We need not pass on whether Walker's statement to Nix would have constituted a separate violation of Sec. 8(a)(1), absent the discriminatory enforcement discussed below, as such a conclusion would be cumulative and would not affect the remedy.

¹⁷ See *Honda of America*, 260 NLRB 729 (1982) (rule against wearing union insignia disparately enforced where employer allowed employees to wear certain other items containing emblems). The cases cited by the dissent, such as *Hertz Rent-A-Car*, 305 NLRB 487, 488 (1991), are inapposite as in those cases the Board held that "occasional lapses in enforcement" involving individual employees did not privi-

Accordingly, quite apart from whether the Respondent's uniform policy was or could have been justified under the special circumstances test, we would find that the restrictions the Respondent imposed on the wearing of union T-shirts violated Section 8(a)(1).

The Respondent maintained an unwritten policy prohibiting food in work areas, and a written policy prohibiting beverages in work areas except in a company-provided spill-proof container. The judge found that on April 1, the Respondent violated Section 8(a)(1) by disparately enforcing its food and drink policies against a union supporter. For the reasons that follow, we reverse.

On April 1, maintenance employee Brian St. Laurent, an open supporter of the Union, was assigned to work on the 7 p.m. shift in the final assembly area under the supervision of Production Supervisor Kathy Crumbley. When St. Laurent arrived for work, he brought with him a bag of food from Wendy's and a bottle of Pepsi. Although his first scheduled break was not for 3 hours, at about 7:15 p.m. he sat down and began eating his dinner at a table in the maintenance work area, near the production floor. Crumbley approached and told St. Laurent that he was not allowed to eat or drink on the production floor and that he should take his dinner to the cafeteria. St. Laurent complied.

St. Laurent testified that, at the time Crumbley spoke to him, more than 10 other employees were either eating or drinking beverages from noncompany containers, yet Crumbley did not talk to any of them. He testified that Jerry Lockridge, another open union supporter, was standing behind him when Crumbley spoke to him. Lockridge testified at the hearing, but he did not testify about this incident. Crumbley denied seeing anyone else violating the policies when she spoke to St. Laurent. St. Laurent also testified more generally that he had seen employees eating and drinking in the production area without being told they could not do so. Employees Clarence McClure and James McKinney similarly testified that employees did not always follow the food and drink policies.

The judge found that Crumbley told St. Laurent he could not eat in the production area, that other employees

lege continued wearing of union insignia in violation of an employer's dress policy. See also *Kendall Co.*, 267 NLRB 963, 965 (1983) ("isolated instances where employees wore nonwork-related items (such as a stickpin worn by an employee for several days)"); *United Parcel Service, Inc.*, 195 NLRB 441, 450 (1972) ("The examples of violation only show that UPS is having problems in attempting to carry out its neat uniform policy effectively. The evidence does not in any way show UPS is letting down on this effort." Only "occasional lapses" shown during 40 year period.) Here, in contrast, the exceptions were deliberate and companywide and for occasions analogous to and no less significant than a union election (e.g., Halloween and the Super Bowl).

have been known to violate the food and drink policies, and that there was no evidence that the Respondent had enforced these rules before April 1. Although acknowledging that the allegation might seem trivial, he found that the Respondent violated Section 8(a)(1) by disparately enforcing its food and drink policies as part of a general crackdown on union supporters after the Union filed its petition. We disagree.

St. Laurent acknowledged that he was violating food-and-drink rules on the evening in question.¹⁸ He testified that others were as well, and that Crumbley spoke only to him. Crumbley denied seeing anyone else violating the policies at that time. The judge did not discredit either witness, but St. Laurent's testimony did not directly contradict Crumbley's denial. Reading their testimony together, it is reasonable to find that Crumbley did not notice other employees breaking the food-and-drink rules. Moreover, Lockridge, who could have corroborated St. Laurent's testimony, failed to testify about the incident.¹⁹

The judge relied on the general testimony of McKinney and McClure that other employees disregarded the policies. His reliance on their testimony is misplaced. Both employees worked in a different department with different supervision. Their testimony about lax enforcement is not directly probative of the manner in which supervisors in the final assembly area, particularly Crumbley, enforced these policies. St. Laurent acknowledged that Crumbley was a "my way or else" type of supervisor who enforced the Respondent's rules and policies more strictly than did other supervisors.²⁰ Crumbley, furthermore, testified about having previously enforced the food or drink policies with other employees.²¹ In these circumstances, testimony that other supervisors in other departments were lax in enforcing food and drink rules does not prove that an exacting supervi-

sor's enforcement of the rules in this instance was disparate.²² And, as stated above, the evidence fails to demonstrate that Crumbley cracked down on St. Laurent while knowingly letting other violators off the hook. Accordingly, we reverse the judge's finding and dismiss the allegation.

AMENDED CONCLUSIONS OF LAW

1. The Respondent, Stabilus, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. By the following acts and conduct, the Respondent has violated Section 8(a)(1) of the Act:

(a) Interrogating an employee about his union sympathies.

(b) Threatening employees with plant closure.

(c) Threatening to fire employees who picketed on behalf of the Union.

(d) Threatening an employee with unspecified reprisals for engaging in union activity.

(e) Prohibiting a prounion employee from talking with employees about the Union at work.

(f) Threatening an employee with discipline for talking about the Union.

(g) More closely monitoring and supervising prounion employees.

(h) Restricting the movement of prounion employees.

(i) Soliciting employee grievances and impliedly promising to remedy the grievances.

(j) Promising an employee he would not be fired if he agreed not to display support for the Union.

(k) Granting pay increases to its lead operators and maintenance employees.

(l) Prohibiting employees from wearing prounion T-shirts.

3. The Respondent has violated Section 8(a)(3) of the Act by suspending Dennis McSwain on June 14, 2004, and discharging him on June 17, 2004.

ORDER

The National Labor Relations Board orders that the Respondent, Stabilus, Inc., Gastonia, North Carolina, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Coercively interrogating employees about their union sympathies.

(b) Threatening employees with plant closure, discharge, or other unspecified reprisals if they select a union to represent them or otherwise engage in union activities.

¹⁸ The judge suggested that St. Laurent was not in a work area. St. Laurent admitted that the work table was not a recognized break area, however. St. Laurent also acknowledged that he was not supposed to be on break at the start of the shift when this incident occurred. The judge observed that Crumbley did not reprimand St. Laurent for taking an early unscheduled break. But her leniency in that regard weakens any inference that she was singling out St. Laurent as part of a "general crackdown" on union supporters.

¹⁹ The lack of corroboration from Lockridge weakens the General Counsel's case. See *C & S Distributors*, 321 NLRB 404, 404 fn. 2 (1996) (failure to call a potentially corroborative witness may be considered in determining whether the General Counsel has established a violation by a preponderance of the evidence), citing *Queen of the Valley Hospital*, 316 NLRB 721, 721 fn. 1 (1995).

²⁰ St. Laurent also acknowledged that he and Lockridge did not like to work for Crumbley and had complained to their maintenance supervisor about her.

²¹ Although not specifically related to the food or drink policies, the record contains evidence of Crumbley's prior strict enforcement of other respondent rules.

²² For the same reason, the absence of evidence about enforcement of the policies before April 1 does not suffice to prove the policies were disparately enforced on this single occasion.

(c) Promising employees they will not be fired if they refrain from engaging in activities in support of the Union.

(d) Impliedly promising to remedy employees' grievances by soliciting their grievances.

(e) Prohibiting employees from engaging in nondisruptive conversations about the Union that do not interfere with work.

(f) Threatening employees with discipline for engaging in nondisruptive conversations about the Union that do not interfere with work.

(g) Restricting employees' movements around the plant because of their union support or activities.

(h) More closely monitoring and supervising employees who support the Union.

(i) Granting pay increases to employees in order to induce them to not support the Union.

(j) Prohibiting employees from wearing prounion T-shirts.

(k) Suspending, discharging, or otherwise discriminating against any employee for supporting the Union or any other labor organization.

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

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

(a) Within 14 days from the date of this Order, offer Dennis McSwain 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 Dennis McSwain whole for any loss of earnings and other benefits suffered as a result of the discrimination against him 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 Dennis McSwain's unlawful suspension and discharge, and within 3 days thereafter notify him in writing that this has been done and that the suspension and discharge will not be used against him 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 facility in Gastonia, North Carolina, copies of the attached notice marked "Appendix."²³ Copies of the notice, on forms provided by the Regional Director for Region 11, after being signed by the Respondent's authorized representative, shall be posted by the 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 the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 2004.

(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.

DIRECTION OF SECOND ELECTION

A second election by secret ballot shall be held among the employees in the unit found appropriate, whenever the Regional Director deems appropriate. The Regional Director shall direct and supervise the election, subject to the Board's Rules and Regulations. Eligible to vote are those employed during the payroll period ending immediately before the date of the Notice of Second Election, including employees who did not work during the period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike that began less than 12 months before the date of the election directed herein and who retained their employee status during the eligibility period and their replacements. Those in the military services may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the payroll period, striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the date of the election directed herein, and employees engaged in an economic strike that began more than 12 months before the date of the election directed herein and who have been permanently replaced. Those eligible shall vote

²³ 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."

whether they desire to be represented for collective bargaining by International Union, United Automobile, Aerospace & Agricultural Implement Workers of America (UAW).

To ensure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969). Accordingly, it is directed that an eligibility list containing the full names and addresses of all the eligible voters must be filed by the Employer with the Regional Director within 7 days from the date of the Notice of Second Election. *North Macon Health Care Facility*, 315 NLRB 359 (1994). The Regional Director shall make the list available to all parties to the election. No extension of time to file the list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

Dated, Washington, D.C. August 27, 2010

Wilma B. Liebman,	Chairman
Craig Becker,	Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER SCHAUMBER, dissenting in part.

My colleagues find for the first time that the well-recognized right of employees to display union insignia extends to substituting a prounion T-shirt for a required company uniform. Under their theory, unless an employer can carry the burden of establishing the existence of “special circumstances,” employees can cavalierly disregard preexisting and consistently enforced uniform policies and, presumably, show up to work dressed head-to-toe in clothing touting union causes. And even if an employer could carry the “special circumstances” burden, my colleagues will still find a violation on disparate enforcement grounds if the employer has ever permitted isolated exceptions to its uniform policy, as, for example, to celebrate Halloween or commemorate the 9-11 tragedy. Because my colleagues’ decision represents a radical rebalancing of the relevant interests and a sharp cur-

tailment of legitimate management prerogatives, I respectfully dissent.¹

I.

For a number of years, the Respondent had maintained a uniform policy requiring employees to wear shirts bearing the company name. The expressed purpose of this policy was to present a uniform appearance to customers and to instill a sense of teamwork among employees. While on rare occasions, the Respondent relaxed the policy, it was generally consistently enforced. Employee witnesses acknowledged that they were expected to wear only company shirts at work.

Before the election, and without interference from the Respondent, many employees wore or otherwise displayed union buttons, pins, stickers, and other union insignia in the workplace. In early May, employee Dennis McSwain purchased T-shirts with prounion slogans and distributed them to prounion employees. The judge found that on at least one occasion in May, Human Resources Director Lea told McSwain that he could not wear his prounion T-shirt in the plant. On May 22, Supervisor Jimmy Walker also instructed employees Robin Braswell and Robert Nix, who were wearing the prounion T-shirts, to comply with the uniform policy. Applying a “special circumstances” analysis, the judge found no “special circumstances” justifying the union T-shirt ban and that the Respondent’s enforcement of its uniform policy violated Section 8(a)(1).

While my colleagues assert they do not reach this conclusion by the judge, they, nevertheless, affirm the judge’s “special circumstances” analysis, conclude that the right to display union insignia extends to wearing articles of clothing, and further assert that an “employer cannot avoid the ‘special circumstances’ test simply by requiring its employees to wear uniforms or other designated clothing, thereby, precluding the wearing of clothing bearing union insignia.” Unlike my colleagues, I disagree that a “special circumstances” analysis applies in this case and find that the Respondent lawfully enforced its preexisting uniform policy.

The Board, with Supreme Court approval, has long held that the wearing of union buttons or insignia is protected under Section 7 of the Act.² But the law is equally

¹ In all other respects, I join my colleagues’ decision.

² In *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945), the Supreme Court affirmed the Board’s conclusion in *Republic Aviation Corp.*, 51 NLRB 1186 (1943), *enfd.* 142 F.2d 193 (2d Cir. 1944), that the employer had unlawfully discharged three employees for wearing union steward buttons. Quoting the Board, the Court approved the conclusion that “‘the right of employees to wear union insignia at work has long been recognized as a reasonable and legitimate form of union activity, and the respondent’s curtailment of that right is clearly violative of the Act.’” *Id.* at 802 fn. 7 (quoting 51 NLRB at 1187–1188).

well settled that there is no absolute right to wear union insignia, or other union attire, in the workplace. Rather, a balance must be struck between the employees' right to self-organize and the employer's right to maintain production and discipline. *Republic Aviation*, 324 U.S. at 797–798; *United Parcel Service*, 312 NLRB 596, 597 (1993), enf. denied 41 F.3d 1068 (6th Cir. 1994).

In general, this balancing of employee and employer rights involves application of the “special circumstances” principle. Since 1945, a substantial body of law has evolved as to what constitutes “special circumstances” justifying restrictions on the wearing of union insignia. The Board has found such “special circumstances” where the display of union insignia may jeopardize employee safety, damage machinery or products, exacerbate employee dissension, or unreasonably interfere with an employer's public image, or when necessary to maintain decorum and discipline among employees. See *Airport 2000 Concessions, LLC*, 346 NLRB 958, 960 (2006); *Komatsu America Corp.*, 342 NLRB 649, 650 (2004); *Nordstrom, Inc.*, 264 NLRB 698, 700 (1982).

The question of whether there are “special circumstances,” however, has arisen either in cases where (i) an employer without a uniform policy or dress code prohibited employees from wearing union insignia or attire,³ or

The Board based its conclusion on *Armour & Co.*, 8 NLRB 1100 (1938), which held that a union officer was entitled to wear a button signifying his position in the labor organization and that the employer unlawfully discharged him for refusing to remove it. See 51 NLRB at 1188.

³ In some of these cases, no “special circumstances” were established justifying a restriction on wearing union insignia or attire. See, e.g., *NLRB v. Autodie International, Inc.*, 169 F.3d 378, 384 (6th Cir. 1999) (absent dress code, employer failed to demonstrate “special circumstances” or “an announced policy of general applicability justifying its restrictions of protected Section 7 activity”); *NLRB v. Mead Corp.*, 73 F.3d 74(6th Cir. 1996) (absent dress code, employer unlawfully prohibited union pins and T-shirts with protected message); *North Hills Office Services*, 346 NLRB 1099 (2006) (absent a requirement that a uniform be worn by night-shift employees, employer unlawfully directed them to remove union T-shirts); *Painting Co.*, 330 NLRB 1000, 1006 (2000), enf. 298 F.3d 492 (6th Cir. 2002) (absent a dress code or rule about wearing T-shirts, employer unlawfully prohibited union T-shirts while permitting other T-shirts); *Boise Cascade Corp.*, 300 NLRB 80, 84–85 (1990) (absent a dress code, employer unlawfully prohibited T-shirts with protected message).

In other cases, even in the absence of a dress code or uniform policy, employers have established “special circumstances” justifying restrictions on union attire. In these cases, the restrictions were generally justified because the message was obscene, denigrated the employer, or might arouse dissension among the employees. See, e.g., *Southwestern Bell Telephone Co.*, 200 NLRB 667, 669–671 (1972) (permitting employer to ban sweatshirt criticizing the employer in an obscene manner); *Midstate Telephone Corp. v. NLRB*, 706 F.2d 401, 404 (2d Cir. 1983) (employer could ban wearing of T-shirts that denigrated public utility's image by suggesting that company was coming apart); *Borman's, Inc. v. NLRB*, 676 F.2d 1138 (6th Cir. 1982) (permitting employer to ban employees from wearing T-shirts bearing the slogan “I'm

(ii) an employer with a uniform policy or dress code prohibited employees from adding union insignia (such as a button or pin) to the required attire.⁴ But the Board has never held that, where an employer lawfully maintains and consistently enforces a policy requiring employees to wear a company uniform, its employees have a right under Section 7 to disregard the policy and wear union attire in place of the required uniform.⁵ Indeed, the Board has implicitly recognized that an employer may promulgate and enforce a nondiscriminatory uniform rule. See

tired of bustin' my ass,” which employer perceived as unfair and inaccurate); *Caterpillar Tractor Co. v. NLRB*, 230 F.2d 357, 358–359 (7th Cir. 1956) (permitting employer to forbid the wearing of buttons bearing a slogan disruptive of production and employee discipline).

⁴ See, e.g., *NLRB v. St. Francis Healthcare Centre*, 212 F. 3d 945, 959–960 (6th Cir. 2000) (prohibition on union pins unlawful, in part, because hospital did not show “an announced policy of general applicability justifying its restrictions”), quoting *Autodie International, Inc.*, supra; *Meijer, Inc. v. NLRB*, 130 F.3d 1209 (6th Cir. 1997) (employer unlawfully prohibited union pins and buttons on uniforms); *United Parcel Service*, supra at 1073 (employer lawfully enforced uniform policy to ban lapel pins on uniforms); *Pay'n Save Corp. v. NLRB*, 641 F.2d 697 (9th Cir. 1981) (employer unlawfully maintained and disparately enforced ban of buttons on store jackets); *Burger King Corp. v. NLRB*, 725 F.2d 1053(6th Cir. 1984) (employer lawfully prohibited wearing buttons on uniforms); *NLRB v. Harrah's Club*, 337 F.2d 177 (9th Cir. 1964) (employer lawfully prohibited wearing buttons on uniforms); *Hertz Rent-A-Car*, 305 NLRB 487 (1991) (employer lawfully prohibited union steward pins on rental car employees' uniforms); *Malta Construction Co.*, 276 NLRB 1494 (1985) (employer unlawfully prohibited union stickers on company hardhats), enf. 806 F.2d 1009 (11th Cir. 1986); *Kendall Co.*, 267 NLRB 963, 964–965 (1983) (employer lawfully prohibited nonwork-related items such as pins and key chains because of safety concerns under lawful dress code); *Honda of America*, 260 NLRB 725, 729 (1982)(employer unlawfully maintained and disparately enforced rule prohibiting wearing of union insignia on required uniform); *United Parcel Service*, supra, 195 NLRB at 441 fn. 2 (employer lawfully prohibited union buttons on drivers' uniforms).

⁵ None of cases cited by the majority address or decide the issue posed here. *Great Plains Coca-Cola Bottling Co.*, 311 NLRB 509 (1993), does not involve the substitution of union attire for required company attire under a nondiscriminatory uniform policy. In that case, supervisors told different employees that they should not be wearing union attire but should be wearing, in one incident, a “Coke jacket” and, in another incident, a “Coke uniform.” *Id.* at 515. The judge cited no evidence of a uniform policy and the employer did not argue that the supervisors were enforcing an established policy. *Id.* The judge's cursory discussion of these incidents suggests that if there were any “policy”, it was not well established nor was it strictly enforced or consistently followed. Further, it was applied disparately to union supporters in that case. *Id.*

Meijer, Inc., 318 NLRB 50, 56–57 (1995), enf. 130 F.3d 1209 (6th Cir. 1997), likewise does not involve nondiscriminatory enforcement of a uniform policy to preclude substituting union attire for company attire. The employer's dress code applied to employees dealing with customers. The judge found that the respondent disparately enforced the dress code by prohibiting employees from wearing union pins and also found that, on one occasion, a supervisor unlawfully prevented an employee from wearing a union jacket in a noncustomer area. It is not clear that there were exceptions to that finding as the discussion by the Board and the court of appeals centers on the wearing of union pins.

Noah's New York Bagels, 324 NLRB 266, 275 (1997) (finding that employer lawfully enforced policy requiring employee to wear company T-shirt and lawfully insisted that she remove a company shirt with an added phrase mocking its products, but that employer unlawfully prohibited employee from wearing union buttons on company T-shirt); *Casa San Miguel, Inc.*, 320 NLRB 534, 540 (1995) (employer lawfully refused to allow nursing assistant to wear required uniform smock with prounion slogan printed directly onto the uniform fabric).⁶

Furthermore, in *Republic Aviation*, supra, the Supreme Court predicated the right to wear union insignia on an employee's right to communicate with other employees regarding self-organization at the workplace. Here, the Respondent did not interfere with its employees' rights in this regard. As the judge found, employees freely wore and otherwise displayed union insignia. They were simply not permitted to substitute a prounion T-shirt for the required company shirt.

I conclude that, in balancing employee and employer rights as required under *Republic Aviation*, supra, a "special circumstances" analysis is inappropriate here. If employees have the right to wear union attire *instead* of a company uniform, the employer's right to promulgate and enforce reasonable, nondiscriminatory apparel rules is negated entirely. Such a result would not strike a balance between employee and employer rights; rather, it would completely submerge the employer's rights.⁷

⁶ In these cases, the finding that the employer lawfully prohibited the employee from wearing union attire did not turn on a showing of "special circumstances." Rather, the critical fact in both cases was that the employer was enforcing its nondiscriminatory uniform requirement. See *Flamingo Hilton-Laughlin*, 330 NLRB 287, 292-293 (1999) (finding that absent evidence of discriminatory application, hotel lawfully enforced preexisting, nondiscriminatory rule against wearing hotel uniform off hotel premises without permission).

⁷ As the cases cited above demonstrate, neither the Board nor any court has squarely faced and decided the issue of whether Sec. 7 permits an employee to substitute union attire for a uniform or attire required by an employer's lawful, nondiscriminatory uniform policy or dress code. The case before us presents that precise issue and, hence, is a case of first impression.

The majority asserts that a "special circumstances" test applies and that, under *Republic Aviation*, only by showing "special circumstances" can any restriction be placed on employees' Sec. 7 right to wear union insignia. I disagree that the "special circumstances" analysis is applicable here.

As noted earlier, the scope of what constitutes "special circumstances" has developed through cases deciding whether employees could add or attach union insignia to a uniform or attire required by their employer's policy. The "special circumstances" analysis, therefore, focuses on the effect that the added or attached insignia might have on safety, production, public image, or other employer concerns that would justify its prohibiting the wearing of insignia on the uniform. Significantly, unquestioned in that analysis is the employer's right to establish the uniform policy or dress code in the first place. Aside from cases of unlawfully promulgated or disparately enforced policies, the

Thus, I would hold that where, as here, an employer maintains and consistently enforces a lawful uniform rule, Section 7 does not guarantee employees the right to wear union attire in place of the required company uniform. Accordingly, I would find that the Respondent did not violate the Act by prohibiting employees from wearing union T-shirts in place of company shirts.⁸

II.

I also cannot agree with my colleagues' alternative conclusions that the Respondent violated Section 8(a)(1) by disparate enforcement of its policy or by Lea's "selective" enforcement of the policy against McSwain on May 22. The General Counsel litigated, and the judge found, a violation, incorrectly in my view, on the basis that the Respondent did not show any "special circumstances" justifying enforcement of its policy. Neither of the majority's alternative theories was litigated by the General Counsel, and it is inappropriate to substitute them at this stage in the proceedings.

employer's right to institute the policy is undisputed. Thus, the nature of the "special circumstances" analysis is distinctly different and, consequently, ill-suited for considering the question posed here: does an employee have a right to substitute union attire for the attire required by the employer.

Further, the majority's assertion that only a showing of "special circumstances" can overcome an employee's Sec. 7 rights gives primacy to the employee's rights over the employer's competing right to establish reasonable rules. The elevation of employee rights over the employer's rights simply is not supported by *Republic Aviation* or any case law. Indeed, the core principle of *Republic Aviation*, and subsequent Board cases, is one of balancing and accommodating the equal but competing rights of employees and employers. Inherent in the notion of balancing and accommodating those competing rights is that both employer and employee interests must be fairly considered and weighed. The "special circumstances" test as applied by the judge totally ignores the employer's undisputed right to establish reasonable workplace rules and policies and, thus, would not fairly weigh and balance the competing interests. Accordingly, I find that the "special circumstances" analysis inappropriate here.

⁸ The judge in his analysis said that the failure to apply the policy to temporary employees undermined the policy's stated purpose of portraying a uniform appearance and instilling a sense of teamwork among employees. I disagree. Contrary to the judge, the analysis is unaffected by the fact that Respondent did not require temporary employees to wear a company uniform. Because I find that the employees have no Sec. 7 right to disregard the Respondent's uniform policy, it is not relevant that the policy did not extend to temporary employees. In addition, as stated above, one of the reasons for the uniform was to instill a sense of teamwork among employees. The Respondent could reasonably decide that the "team" consisted of its regular employees, excluding temporaries. I do not second guess the Respondent's business judgment to establish a uniform policy nor fault its decision not to extend the policy to temporary employees. See, e.g., *NLRB v. Columbus Marble Works*, 233 F.2d 406, 413 (5th Cir. 1956) ("[A]s we have so often said: management is for management. Neither Board nor Court can second-guess it or give it gentle guidance by over-the-shoulder supervision.").

Moreover, in any event, the judge found that the Respondent consistently enforced the policy. The only exceptions were when the Carolina Panthers went to the Super Bowl in 2004, on Halloween, and on the anniversary of the September 11 terrorist attacks. The judge did not find that these few exceptions established that the Respondent had disparately enforced its uniform policy. I agree that the evidence does not support a finding of disparate enforcement.⁹

My colleagues next find that Lea's request that McSwain remove all union paraphernalia on May 22, including his pronoun T-shirt, constituted unlawful selective enforcement of the uniform policy. While I agree that Lea's interaction with McSwain on that date violated the Act, I would not find that the request to remove the union T-shirt, standing alone, was unlawful. On May 22, Lea asked McSwain, as a "favor," not to display any support for the Union that day. He also asked him to take off his pronoun T-shirt, his union hat, and the protractor with a union logo attached to his badge and to "vote no today." Lea promised McSwain that, if he complied, nobody would fire him.

As my colleagues correctly observe, "[Lea's] intention with respect to McSwain was *not to enforce the uniform policy but to induce an influential employee . . . to remove all displays of support for the union. . . .*" Lea's obvious goal was to have McSwain eschew all union support for the day, including wearing even those insignia that the Respondent had tolerated throughout the campaign. Those requests were coupled with the unlawful promise that McSwain would be retained if he complied. Lea's request that McSwain remove his T-shirt, therefore, was simply an incidental aspect of the coercive overtures to McSwain to refrain from showing support for the Union. On that basis I would agree there was a violation. Merely asking McSwain to remove the shirt, however, standing alone would not constitute selective or overbroad enforcement, as it was consistent with the policy and the Respondent's established practice.

My colleagues point out that, when Lea requested that McSwain remove his T-shirt, he did not give McSwain the option of wearing the front-buttoning shirt open over the pronoun T-shirt, as the policy permitted. But the record does not show whether McSwain even wore the front-buttoning style of company shirt. Further, the record reflects that employees were well aware that the uniform policy permitted the option of wearing the front-

buttoning shirt open over a noncompany shirt, so the fact that Lea did not reiterate that option is meaningless.¹⁰ Thus, I do not agree that the incidental request alone to remove the pronoun T-shirt constituted unlawful enforcement of the T-shirt policy.¹¹

For the foregoing reasons, I dissent in part.

Dated, Washington, D.C. August 27, 2010

Peter C. Schaumber, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated 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 coercively question you about your union sympathies.

WE WILL NOT threaten you with plant closure, discharge, or other unspecified reprisals if you select International Union, United Automobile, Aerospace & Agricultural Implement Workers of America (UAW) (the Union) to represent you or if you otherwise engage in union activities.

WE WILL NOT promise you, directly or implicitly, that we will not terminate your employment if you refrain from supporting the Union.

¹⁰ My colleagues ask rhetorically whether Lea would have been satisfied if, in response to his request, McSwain continued to wear his pronoun T-shirt exposed under an unbuttoned company shirt. Obviously, that is not the case in this instance, since, as already noted, Lea was not attempting to enforce the policy but was trying to persuade McSwain to abandon all visible support for the Union that day.

¹¹ For the same reason, I would not find that Walker's statement to Nix was a violation even if he may not have mentioned the front-buttoning shirt option. Although Nix did not testify whether or not Walker mentioned that option, Walker testified that he did mention it.

⁹ See *Hertz Rent-A-Car*, 305 NLRB 487, 488 (1991) (finding occasional lapses in an otherwise consistent application of a detailed uniform policy do not establish inconsistent and discriminatory enforcement); *Kendall Co.*, 267 NLRB 963, 965 (1983) (same); *United Parcel Service*, 195 NLRB 441, 450 (1972) (same).

WE WILL NOT solicit your grievances and impliedly promise to remedy them if you refrain from supporting the Union.

WE WILL NOT prohibit you from engaging in nondisruptive conversations about the Union that do not interfere with your work, and WE WILL NOT threaten you with discipline for engaging in nondisruptive conversations about the Union that do not interfere with your work.

WE WILL NOT restrict your movements around the plant because you support the Union.

WE WILL NOT more closely monitor and supervise you because you support the Union.

WE WILL NOT grant you pay increases in order to induce you to not support the Union or any other union.

WE WILL NOT prohibit you from wearing prounion T-shirts.

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

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

WE WILL, within 14 days from the date of the Board's Order, offer Dennis McSwain 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 Dennis McSwain whole for any loss of earnings and other benefits resulting from his suspension and discharge, less any net interim earnings, plus interest.

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

STABILUS, INC.

Ronald C. Morgan, Esq., for the General Counsel.

Charles P. Roberts III, Esq. and *John J. Doyle, Esq.*, for the Respondent/Employer.

James D. Fagan, Esq., for the Charging Party/Petitioner.

DECISION

STATEMENT OF THE CASE

MICHAEL A. MARCIONESE, Administrative Law Judge. This case, which involves alleged unfair labor practices and election objections, was tried in Gastonia, North Carolina, over 12 days, commencing November 15, 2004, and concluding January 13, 2005. Based on charges filed by International Union, United Automobile, Aerospace & Agricultural Implement Workers of

America (UAW or the Union),¹ a consolidated complaint and notice of hearing issued on September 30, 2004,² alleging that Stabilus, Inc. (the Respondent) violated Section 8(a)(1), (2), and (3) of the National Labor Relations Act (the Act) during a union organizing campaign at the Company's Gastonia, North Carolina facility. Specifically, the complaint alleges numerous acts of interrogation, surveillance, threats, promises, and other conduct allegedly restraining, coercing, and interfering with employees' exercise of their rights under the Act; assistance to and domination of department advisory committees that are alleged to be labor organizations within the meaning of the Act; the discriminatory grant of wage increases and the discriminatory suspension and discharge of one employee. On October 13, the Respondent filed its answer denying the unfair labor practice allegations. By order dated October 12, the complaint was consolidated for hearing with election objections filed by the Union in Case 11-RC-6567.

The Union filed the petition in Case 11-RC-6567 on March 30, seeking to represent a unit of employees employed by the Respondent at the Gastonia plant. Pursuant to a Stipulated Election Agreement approved on April 12, the Board's Regional Director conducted an election by secret ballot on May 20 and 22 among employees in the following appropriate unit:

All production and maintenance employees, prototype employees, quality employees, shipping and receiving employees, schedulers, warehouse employees, and plant clerical employees employed by Stabilus, Inc., at its Gastonia, North Carolina facility; but excluding all office clerical employees, manufacturing engineers, special technical engineers, associate quality engineers, customer service representatives, draftsmen, professional employees, guards and supervisors as defined in the Act.

The tally of ballots cast at the election shows the following results:

Approximate number of eligible voters	503
Number of Void ballots	0
Number of Votes cast for International Union, United Automobile, Aerospace & Agricultural Implement Workers of America (UAW)	242
Number of Votes cast against participating Labor organization	244
Number of Valid Votes counted	486
Number of Challenged ballots	2
Number of Valid votes counted plus challenged ballots	488

The challenged ballots are not determinative of the results of the election.

On May 24, the Union filed timely objections to conduct affecting the results of the election. After conducting an initial investigation, the Regional Director issued a Report on Objections on October 12, approving the withdrawal of Objections 4,

¹ The charge in Case 11-CA-20386 was filed on June 14, 2004. The charge in Case 11-CA-20396 was filed June 22, 2004, and the charge in Case 11-CA-20443 was filed August 9, 2004.

² All dates are in 2004, unless otherwise indicated.

5, 6, 8, 11, and 13³ and directing a hearing on the remaining objections. The objections remaining for resolution are set forth in Appendix A. As previously noted, the objections have been consolidated with the unfair labor practice allegations.

At the hearing, all parties had an opportunity to call witnesses and cross-examine opposing witnesses, to offer documentary evidence and present oral arguments as to evidentiary and procedural issues. On March 11, 2005, the General Counsel, the Respondent, and the Charging Party filed well-written briefs advocating their respective positions. On the entire record, after having considered the arguments raised on brief, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation, manufactures gas springs for the automotive and furniture industries at its facility in Gastonia, North Carolina, where it annually purchases and receives goods and materials valued in excess of \$50,000 directly from points outside the State of North Carolina. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Overview

In May 2004, the Respondent employed approximately 600 employees at its Gastonia plant. The Gastonia plant is part of the North American operations of a multinational corporation based in Koblenz, Germany. The Respondent's North American operations also included a manufacturing facility in Mexico. The evidence in the record indicates that the Respondent at one time had another manufacturing facility in Colmar, Pennsylvania, which was the subject of an unfair labor practice proceeding. See *Gas Spring Co.*, 296 NLRB 84 (1989). In his brief, counsel for the General Counsel requested that I take judicial notice of the Board's decision in that case, which found that the Respondent had failed and refused to reinstate, and had delayed the reinstatement of, unfair labor practice strikers upon their unconditional offer to return to work in October 1986. I have taken administrative notice of this prior case only for background purposes and because the Board's decision in that case was the subject of discussion during the organizational campaign here. However, I will not rely on the findings and conclusions therein to establish animus, motive, or any other element of the General Counsel's case because the events portrayed in that case were remote in time to the events at issue here and there is no showing that individuals involved in the unfair labor practices found there had any role in this case.

David Richeson was the Respondent's president of North American operations during the January–June 2004 period relevant to this case. At the time of the hearing, he was no

³ The objections filed by the Union included two items numbered 12. The second of these was referred to by the Regional Director in his report as Objection 13.

longer employed by the Respondent, having been terminated in about September. Reporting to Richeson were two vice presidents. The next level of management consisted of 10 directors, including Douglas Lea, the director of human resources. Lea has been the Respondent's director of human resources at the Gastonia facility since March 2000. Tom Napoli was the Respondent's production manager during the organizing campaign with responsibility for the manufacturing operations that employed the unit employees. The Respondent had three focus area managers reporting to Napoli, i.e., Brett Whobrey,⁴ Reggie Ballard, and John Nichols, responsible for final and paint, tubing and main assembly, and the rod department, respectively. Below these managers were the frontline supervisors, four to eight per department, who directly supervised the work of the unit employees.⁵ Finally, the Respondent employed a number of lead persons in each department who acted as nonsupervisory group leaders. The lead persons were included in the stipulated unit.

The evidence in the record reveals that the Respondent's employees began talking about a union in January. The first unfair labor practice alleged in the complaint, that Supervisor Dennis Mehaffey threatened employees with plant closure, is alleged to have occurred in late January. James Brymer, the Union's International representative in charge of the organizing campaign who has since retired, testified that the Union held its first meeting with the Respondent's employees on February 16. The complaint alleges that several unfair labor practices occurred around this time. The Union continued to hold regular meetings with the employees over the next 3 months, until the election on May 20 and 22. The complaint alleges that the Respondent engaged in surveillance of two of these meetings, one on March 10 at the union hall in Mount Holly, North Carolina, and the other on May 18 at a park near the Respondent's facility.

Brymer testified that the Union distributed buttons, pins, stickers, hats, and other paraphernalia to employees at these meetings. Testimony from witnesses for both sides establishes that many employees openly wore or displayed union buttons and stickers in the workplace. These witnesses also testified that the Respondent generally did not interfere with the wearing of buttons or stickers. The evidence indicates that the Respondent focused its efforts at restricting the wearing of union T-shirts and hats pursuant to a purported uniform policy. The testimony further revealed that, within the last few weeks before the election, alleged discriminatee Dennis McSwain paid to have T-shirts silk-screened with prounion slogans and distributed these free of charge to other employees. Several of the unfair labor practice allegations relate to the Respondent's reaction to the display of these T-shirts in and around the Respondent's facility.

Brymer also testified that, during the union meetings, he and other union representatives advised employees to be on the lookout for unfair labor practices and solicited employees to

⁴ Whobrey's name is misspelled in the record as Red Jubri.

⁵ Lea identified the departments as the rod department, tubing and main assembly, final assembly and paint, and warehouse and shipping department.

document any perceived unfair labor practice by making notes. The Union even distributed a flyer entitled “*KNOW* what Managers, Supervisors, and Group Leaders *Can NOT* do” (emphasis in original). These handwritten notes were collected by the Union and were the basis for many of the objections and charges that were filed after the election. The General Counsel offered some of these notes into evidence as corroborative of the testimony of his witnesses. I received these documents over the Respondent’s objection, despite the hearsay nature of the evidence, because the Respondent had the opportunity to cross-examine the declarant in each case. In some cases, which will be pointed out later in this decision, the written notes contradicted the testimony of the witnesses. They thus became a tool to test the credibility of the witnesses.

On March 31, the Union, through a group of 10–15 employees, hand delivered a letter to Richeson, the Respondent’s president, demanding recognition. The Respondent declined to voluntarily recognize the Union and the petition was filed the same day. The period between the filing of the petition and the election was marked by vigorous campaigning by both sides. The bulk of the unfair labor practices alleged in the complaint occurred during this period. The Union’s efforts were advanced by a number of employees who were members of the volunteer organizing committee, or “VOC.” In addition to handbilling and talking to other employees, the VOC created a website which became a source of information for employees regarding the Union, including dates and locations of meetings. This website could be accessed by anyone, including the Respondent’s supervisors and managers. The evidence establishes that although a number of employees were open and active in support of the Union, only one employee is alleged to have suffered adverse consequences as a result of his protected activity. McSwain, the alleged discriminatee who was fired several weeks after the election, did not even become a union supporter until the closing weeks of the campaign. Brymer testified that he did not meet McSwain until late April or early May. The allegation involving McSwain’s discharge was perhaps the most hotly contested by the parties at the hearing. This allegations was also perhaps the most difficult to decide and will be discussed in much detail later in this decision.

As noted above, the Respondent conducted a vigorous campaign to convince its employees to vote against the Union. Lea initially testified that he first became aware of the union campaign in late February or early March, but conceded on cross-examination that it was probably as early as mid-February when he learned that union authorization cards were being circulated among the employees. Richeson also acknowledged being aware of the Union in February. Lea testified that the Respondent began responding to the Union’s organizing efforts several weeks before the Union filed its petition. Part of the Respondent’s response was a series of weekly captive audience meetings held throughout April and May at which power point presentations were made detailing the negative consequences of unionization. Several of the complaint allegations relate to statements made by Richeson and Lea at these meetings. In addition, there are multiple allegations of individual supervisors and managers making statements to employees during this intense campaign that are alleged to have crossed the line and

threatened or coerced the employees in their choice in the election. In mid-April and mid-May, the Respondent granted wage increases to maintenance employees and group leaders, respectively. The General Counsel alleges that these increases were unfair labor practices while the Respondent contends that the decision to grant the increases was in motion before the advent of the Union.

The evidence presented by the Respondent indicated that, contemporaneous with the Union’s organizing campaign, the Respondent was pursuing a process of enhanced communication with employees to improve employee morale and working conditions. According to Lea and assistant human resources director, Kelly Rice, the Respondent announced in January that it was going to conduct an employee survey. The Respondent did not conduct such a survey, however, choosing to hold “roundtable meetings” with employees in each department instead. The first of these roundtable meetings were conducted during the week of February 1, in the final assembly department. The primary issue discussed at that time was scheduling. On February 12, the Respondent announced that it would hold small group meetings in each department to provide the opportunity for employees plantwide to raise issues and concerns. These small group meetings occurred between February 16 and 24, about the time the Union held its first meeting with the Respondent’s employees. After the small group meetings, Lea prepared a document for management consideration listing a number of recommendations for the Respondent to consider in response to issues raised by the employees. Some of the issues raised and recommendations made involved the raises that were implemented later and became the subject of unfair labor practice charges. Another of Lea’s recommendations was to conduct more regular plantwide meetings to obtain feedback from the employees. The first of these were held at the beginning of March. The Respondent continued to communicate with its employees at these plantwide meetings throughout the month of March, until it received the Union’s petition at the end of the month. At that point, the Respondent shifted its focus to preparing for the election.

At the end of the hard-fought campaign, the election was held on two nonconsecutive dates, May 20 and 22. The resulting tally of ballots was so close it was a virtual tie. Following the election, the Respondent invited several employees who had been active on both sides to meet with Lea and Richeson. This was followed within a few months by the formal establishment of “department advisory committees” which the General Counsel alleges functioned as labor organizations which were dominated and controlled by the Respondent. These committees were still meeting at the time of the hearing.

I will now review each allegation of the complaint. Because many of the allegations based on the testimony of McSwain turn on credibility and because of the importance of credibility resolutions to the outcome of the allegations regarding his suspension and discharge, I shall discuss those allegations when reviewing the 8(a)(3) allegations.

*B. The 8(a)(1) Allegations*1. Interrogation, impression of surveillance,
and threat of plant closure

Paragraph 8(a) of the complaint, as amended at the hearing, alleges that Human Resources Director Lea interrogated employees in mid-February and early April, and that Production Manager Napoli interrogated employees in early April. Only the first instance of alleged interrogation involved an employee other than McSwain. As previously noted, I will address those allegations affecting McSwain later in this decision. The one allegation remaining involved employee Rick Myers.⁶ Resolution of this allegation turns exclusively on credibility.

Myers was hired by the Respondent October 4, 1993. At the time of the hearing, he was a training and certification coordinator in the tubing department, reporting to Heidi McMinn, an assistant human resource manager. McMinn in turn reported to Lea. Myers had held this position for 5 years. He was an active supporter of the Union during the campaign, handbilling and wearing a union button to work every day beginning about April 1. He was not a member of the VOC, nor did he participate in the group which presented the Union's demand for recognition to Richeson on March 31. Myers signed a union authorization card on March 8 but could not recall when he attended his first union meeting.

Myers testified that, about mid-February, while he was in the outside smoking area, Lea asked him what he felt about the union drive. According to Myers, he was unaware of the union campaign at that point in time so he responded to Lea's inquiry by asking, "[W]hat union drive?" Lea told Myers that some employees were trying to get people to sign cards to get a union in at Stabilus. Myers recalled telling Lea about an earlier union drive, 5 to 5-1/2 years earlier, during which he attended a few meetings but had not been impressed by anything the Union said so he didn't support it. Myers testified that Lea then said that the Respondent had been looking at property elsewhere and that "the only thing left to do if the Union gets in, is sign the contract or paperwork and it'll be done." According to Myers, Lea said the Respondent would move once this was done. This was Myers only conversation with Lea about the Union during the campaign.

On cross-examination, Myers recalled that there had been five other employees in the smoking area when he first arrived but that all had left before Lea approached him. He could not recall any of these other employees. Myers also acknowledged that he did not often have conversations with Lea in the smoking area. Although employees had been discussing the Union since January and the first union meeting was held on February 16, about the same time as this conversation, Myers claimed he had heard no rumors or talk of a union before this conversation. According to Myers, he did ask two close friends, after his conversation with Lea, about the Union. These friends told Myers that they had not said anything to him about the Union

⁶ The incident involving Myers contains two other allegations that will be addressed here, a statement alleged in par. 8(c) to have created the impression of surveillance, and a threat of plant closure alleged in par. 8(d).

because they believed he would not be interested because of the position he held, which was assigned to the human resources department. Unlike other witnesses for the General Counsel, Myers kept no notes, diaries, or other written record of this conversation. He did mention it to a member of the VOC after he started attending union meetings and learned what supervisors could not do during a campaign.

Lea denied having any conversation with Myers about the Union and "absolutely" denied having any conversation with employees about the possibility of the plant closing or moving. According to Lea, Myers is the "quiet type." Lea testified that he rarely spoke to Myers in the 4 or 5 years he's known him and the only conversations that they have had have been in passing each other while going about the plant. On cross-examination, Lea did acknowledge having a conversation with Myers on the smoking patio sometime in the spring. Lea conceded it could have occurred in February. In any event, according to Lea, the conversation was no more than a greeting and was not the conversation Myers claimed. With respect to the subject of plant closing, Lea acknowledged that he himself heard rumors from employees that the Respondent was looking at property in Tennessee or Kentucky for a possible move. Lea testified that he denied these rumors when asked about them by employees. Lea further denied in his testimony that the Respondent was looking at other property for a new plant.

Respondent, on brief, concedes that Myers did not appear to be deliberately deceptive. The Respondent argues, nevertheless, that his testimony should be disregarded because a conversation as he described it was unlikely to have occurred. The Respondent points to the alleged timing of the conversation, before the union campaign was formally launched at Brymer's first meeting with the employees. The Respondent suggests that if Myers himself was unaware of the union campaign, Lea could not have known of it. Regardless of the source of his information, Lea conceded, after significant effort on the part of the General Counsel, that he was probably aware of union activity among employees as early as mid-February. The Respondent also argues that, in view of Lea's limited interaction with Myers in the past, it was unlikely he would have chosen Myers as someone with whom to discuss the union campaign. The limited nature of Lea's prior communications with Myers does not persuade me that this conversation did not take place as Myers recalled. On the one hand, Lea acknowledged being on the smoking patio with Myers at about that period in time and that the two men had a conversation. As the Respondent concedes, Lea is a gregarious individual and will talk to anyone he finds himself with. I noted his loquacious nature at the hearing. Because Myers' duties placed him within the ambit of Lea's department, it is conceivable that Lea would have considered Myers to be someone with whom he could speak candidly about the union activity of which Lea had recently become aware. Once Myers revealed to Lea his history of not supporting the Union, Lea probably would have been emboldened to share more information with him, thus, the talk about other property being scouted by the Respondent. On balance, I find that Myers' recollection of this conversation is more plausible than Lea's absolute denial and shall credit his version of the conversation.

Having found that the conversation occurred as alleged by the General Counsel, the question remains whether the statements of Lea amounted to unlawful interrogation. In *Rossmore House*,⁷ the Board rejected a per se approach to allegations of interrogation. Instead, the Board held that such allegations must be decided on a case-by-case basis, determining whether an employer's questioning of employees, under all the circumstances, would reasonably tend to interfere with, restrain, or coerce employees in the exercise of their statutory rights. Some of the factors to be considered in this analysis are the background of the conversation, the nature of the information sought, the identity of the questioner and the place and method of questioning. *Id.* Accord *Sunnyvale Medical Center*, 277 NLRB 1217 (1985); *Westwood Health Care Center* 330 NLRB 935, 939–940 (2000). Under this test, either the words themselves, or the context within which they are used, must suggest an element of interference or coercion.

There is no dispute that, at the time of this conversation, Myers was not an open union adherent. In fact, his credible testimony establishes that he was unaware of the union campaign at the time. Lea was the head of the human resources department, a high-ranking official in the chain of command for Myers' job. Although the scene of the conversation, the smoking area during a break, was not inherently coercive, the information sought, i.e., Myers personal views and opinions on an ongoing attempt to organize the Respondent's employees, probed deep into matters that Myers had a right to conceal from his employer. Despite the casual, and seemingly spontaneous, nature of the questioning, it had the reasonable tendency to chill an employee, particularly since no assurances were given that no adverse consequences would flow from whatever answer Myers gave.

The question Lea asked must also be considered in the context of the remainder of the conversation. The General Counsel alleges that Lea's statement that "some employees were trying to get some employees to sign cards . . ." created the impression of surveillance. The Board's test for such allegations is whether employees could reasonably assume from the statement in question that their union activities had been placed under surveillance. *Flexsteel Industries*, 311 NLRB 257 (1993); *Schrementi Bros., Inc.*, 179 NLRB 853 (1969). The Board has found that a supervisor's statement that contained only general or known facts, which the supervisor claimed to have "heard," could not lead an employee to reasonably believe that the employer had embarked on a course of monitoring its employees' union activities. *Clark Equipment Co.*, 278 NLRB 498, 503 (1986). Accord *Register Guard*, 344 NLRB 1142 (2005). Similarly, a supervisor's statement indicating awareness of a rumor pertaining to union activities of the employees would not create an impression of surveillance so long as there is no evidence indicating that the Respondent could only have learned of the rumor through surveillance. *G. C. Murphy Co.*, 216 NLRB 785, 792 (1975). Applying this precedent to the statement at issue here, I do not agree with the General Counsel that Lea's remark about ongoing union activity created the impression that the

Respondent was surreptitiously monitoring its employees' union activities. The evidence in the record reveals that employees had been discussing the Union since January and the Union's first formal meeting with the employees occurred about the time of this conversation. The information conveyed to Myers could have been obtained by Lea without any untoward surveillance. Thus, it would not be reasonable for an employee to believe that unlawful surveillance was the source of Lea's information. Accordingly, I shall recommend dismissal of this allegation of the complaint.

The conversation in which Lea asked Myers his views of the union organizing campaign also contained another statement that the General Counsel alleges violated the Act, i.e., the threat of plant closure implicit in Lea's reference to the Respondent's search for new property. Regardless of the truth of the statement, Lea's remark, that the Respondent was looking at other property and only had to sign the paperwork if the Union got in, clearly had the tendency to convey to an employee that the Respondent would rather close the plant and relocate than deal with a union. This type of threat has routinely been found violative of Section 8(a)(1) of the Act. Based on Myers' credited testimony, I find that the Respondent did violate the Act through Lea's threat to Myers. This threat also supports a finding that Lea's questioning of Myers as to his thoughts on ongoing union activity was unlawful. What might otherwise be a spontaneous, casual inquiry took on a coercive tone when uttered in the context of this threat. Accordingly, I find that the Respondent unlawfully interrogated and threatened Myers during his mid-February encounter with Lea.

2. Surveillance

The complaint alleges two instances of actual surveillance. The first allegedly occurred about March 10 outside the union hall in Mt. Holly, North Carolina, and the second allegedly occurred on May 18, a few days before the election, at Rankin Park near the Respondent's plant.

a. March 10 incident

On March 10, the Union held a meeting for employees at its union hall in Mt. Holly, North Carolina, about 15 miles from the Respondent's plant. A group of employees who worked nights went to the meeting in a caravan. Several of these employees claimed to have seen Lea outside a restaurant across the street as they were leaving the meeting. A written statement purporting to document this was drafted the same day and signed by three employees, Laura Bollinger, Jeffrey Scott Stiles, and John Bloomer. These three employees provided the testimony in support of this allegation. Lea, testifying for the Respondent, denied being anywhere near the Mt Holly meeting on March 10. According to Lea, he was at a breakfast meeting of a local employers' association (Western Carolina Industries) in downtown Gastonia from 7:30 until 9 a.m., at which time he returned to the plant. Kelly Rice, the Respondent's assistant human resources manager at the time, and Bob Tierney, the Respondent's manager of environmental and facilities, corroborated Lea's attendance at the meeting. However, Lea admittedly left the meeting alone and no one was with him on his return trip to the plant. Lea also conceded that he had enough time to

⁷ 269 NLRB 1176 (1984), *enfd.* sub nom *UNITE HERE Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985).

drive from his meeting to the Mt. Holly location by 9:30 a.m., the time at which the General Counsel's witnesses claimed to have seen him there. The Respondent also called Belinda Bumgardner, another employee who was at the union meeting, to rebut this allegation. In addition, Clarence McClure, another employee who attended the union meeting, was called as a witness by the General Counsel in support of other allegations in the complaint. Although the General Counsel did not question him about this incident, the Respondent inquired about it on cross-examination. Resolution of this allegation turns primarily on credibility.

Bollinger was the first witness to testify about this incident. She has been employed by the Respondent since July 25, 1994. At the time of the hearing, she was a training coordinator for main assembly, a position reporting to Lea in the human resources department to which she had only recently been promoted. At the time of the alleged unfair labor practice, Bollinger was a machine operator in main assembly, reporting to Supervisor Jim Kirkland. Bollinger was an active and open union supporter, wearing a union button every day to work. She acknowledged on cross-examination that no supervisors or managers ever said anything negative to her about her button or union activities.

According to Bollinger, she went to the union meeting in Mt. Holly with about 5–10 other employees after having worked all night. She testified that, as she was leaving the meeting at about 9:30 a.m., she heard coworker John Bloomer say, "Hey y'all, Doug Lea is going into the restaurant." When she looked up, Bollinger saw a man she recognized as Lea from his gait and posture walking into the restaurant across the street. Bollinger testified that the restaurant was about 100 feet from where she was at the time, across a two-way road divided by railroad tracks. Bollinger did not claim in her testimony to have seen Lea's face. Bollinger testified that, shortly after observing Lea, she, Bloome, and Scott Stiles, who was leaving the meeting at the same time, returned to the union hall and wrote out a statement documenting this alleged unfair labor practice. The statement she signed at the time, offered into evidence by the General Counsel, is inconsistent with Bollinger's testimony. In the statement, Bollinger and the others claim to have witnessed Lea observing employees leaving the meeting. On cross-examination, the Respondent's counsel elicited other testimony that conflicted with testimony of later witnesses. For example, Bollinger denied walking over to the restaurant and denied waiting there while two or three other employees went into the restaurant to look for Lea. Bollinger testified that she walked straight to her car. She also denied having any conversation with Bumgardner about this incident.

Bloomer has been employed by the Respondent since 1998. At the time of this incident, he was a maintenance technician, reporting to Supervisor Joel Kendrick. He was promoted to a maintenance lead position about 2 months before he testified at the hearing. Bloomer attended union meetings and openly displayed his support for the Union by wearing buttons and stickers to work. Bloomer testified that he also attended this meeting after working all night. He was in the same caravan of cars as Bollinger. According to Bloomer, as he was leaving the meeting, at about 9–9:30 a.m., he saw Lea going into the restaurant

with a woman. At the time, Bloomer was on the sidewalk in front of the union hall, about 100 feet away. He was about to cross the street headed toward the parking lot past the restaurant where the employees had parked their cars. He recalled that Bumgardner was walking in front of him and that Bollinger and Stiles were a few feet behind him. On cross-examination, Bloomer admitted that he did not see Lea's face. He also claimed that he recognized Lea from his posture and gait. On cross-examination, Bloomer also testified that he, Bumgardner and McClure went into the restaurant to look for Lea. He recalled that this happened about 5–10 minutes after the employees first saw Lea. He and Bumgardner remained in the lobby while McClure searched the restaurant. According to Bloomer, McClure returned and told them that Lea was not there. The three employees then went outside and told the other employees who were there and that Lea was not there. On redirect, the General Counsel was able to have Bloomer testify that someone could have exited the restaurant unseen during the 5–10 minutes the employees stood in the parking lot before Bloomer and the others entered the restaurant.

When shown the statement bearing his signature, Bloomer denied that he had signed it. According to Bloomer, he learned that such a statement had been prepared when he went to work that night, after this incident. Bloomer testified that the statement and his signature appeared to be the handwriting of Bollinger. Although he did not sign the statement, Bloomer testified that he agreed with its contents. Bloomer also testified that he wrote his own statement, sometime after being shown the statement prepared by Bollinger, when a member of the VOC told him he had to write a statement about the incident. The statement he prepared, although shown to Bloomer at the hearing, was not offered into evidence. Bloomer testified further that the employees had been told at the meeting on March 10 to be on the lookout for unfair labor practices, in particular for spying by management and supervisors.

Stiles was the last of the General Counsel's witnesses to testify on direct about this incident. He has been employed by the Respondent since 1998 as a tubing operator. He worked the same shift as Bollinger and Bloomer. At the time of this incident, Bill Vinesett was his supervisor. According to Stiles, he was leaving the union meeting at about 9:30 a.m. when he heard someone say, "[T]here's Doug Lea!" When Stiles looked up, he saw Lea across the street, standing inside the glass doors of the restaurant, facing the employees who were leaving the union hall. Stiles denied that Lea was walking into the restaurant, or that Lea was with a woman. His recollection, thus, differs dramatically from that of the other witnesses. This difference can not be explained by a difference in the timing of Stiles' observation as he acknowledged that Bollinger and Bloomer were with him when he saw Lea's face. He also placed himself at the same location, about 100 feet away from Lea. Stiles testified further that he and Bollinger went back into the union hall after seeing Lea and wrote out the statement in evidence. According to Stiles, Bollinger wrote the statement and the two signed it. Stiles did not recall whether Bloomer was with them when Bollinger wrote the statement but he did not see Bloomer sign it. Stiles recalled that, after 5 or 10 minutes, he went back outside and McClure and other employees told

him that they had gone into the restaurant and Lea was not there.

McClure has been employed by the Respondent since April 10, 1995, and was working with Stiles in the tubing department during the union campaign. As noted above, McClure was questioned about this incident during cross-examination by the Respondent's counsel after the General Counsel did not ask any questions about the alleged surveillance on direct.⁸ McClure testified that he walked out of the union hall with Bumgardner and that they were the last to leave the meeting. By that time, according to McClure, the rest of the employees were already across the street, outside the restaurant. Bollinger, Stiles, and Bloomer waved to him to come over. They told him that Lea was in the restaurant. At that point, Bumgardner tried to look through the window into the restaurant but wasn't able to see anything. McClure testified that he then went into the restaurant to look for Lea. He confirmed that Bloomer and Bumgardner were with him. According to McClure, he checked all areas of the restaurant, including the bathrooms, and did not see Lea. When he came out of the restaurant, he reported this to the other employees. McClure also testified that, although he and Bumgardner did not leave the union hall until about 5 minutes after the others, he did not see Bollinger and Stiles come back into the hall to write out a statement. On redirect by the Charging Party's counsel, McClure testified that he had gone back to the restaurant after March 10 and determined that there was a back exit that could have been used by someone without being seen by people in front of the restaurant.

The Respondent called Belinda Bumgardner to testify about this incident. Bumgardner has been employed by the Respondent for about 17 years. She was a machine operator in tubing, working the same shift as Bollinger and the others. Bumgardner testified, consistent with McClure, that the two of them left the meeting a short time after Bollinger, Bloomer, and Stiles. She also recalled that, by the time they walked out of the union hall, the others were on the other side of the street, on the sidewalk near the restaurant. Bumgardner testified that Stiles was waving and hollering that Doug Lea was in the restaurant. When she and McClure caught up with the other employees, Stiles and Bloomer repeated that they had seen Lea. Bumgardner did not recall seeing Bollinger outside the restaurant. Bumgardner testified further that she tried to look through the window but was unable to see anything in the restaurant so she suggested they go inside. Bumgardner then entered the restaurant with McClure and Bloomer. As she and Bloomer waited at the counter, McClure walked through the restaurant. Bumgardner testified that when he returned, McClure said that Lea was not in there. According to Bumgardner, McClure said he had also checked in the bathrooms and did not see Lea. When they came out of the restaurant, they reported to the other employees that Lea was not there. Bumgardner also testified that, not long after this incident, while handbilling for the Union outside the plant, Bollinger told her that she had put Bumgardner's name down

⁸ Although the Respondent's cross-examination regarding this matter exceeded the scope of direct, I permitted counsel to inquire provided he took McClure as his witness and did not elicit the testimony through leading questions.

on "the ULP" about seeing Lea at the restaurant. According to Bumgardner, she told Bollinger not to put her name on the "ULP" because she did not see Lea at the restaurant. After Bollinger told her that her name was already on it, Bumgardner talked to Stiles and asked him if he put her name down for the "ULP" and Stiles told her he had not. This is confirmed by the written statement in evidence that does not include Bumgardner's name.

Of all the witnesses who testified regarding this incident, I found McClure and Bumgardner to be the most credible. The testimony of Bollinger, Bloomer, and Stiles was not consistent with one another, nor with the written statement that was purportedly prepared contemporaneously. Because of these inconsistencies, their testimony is not reliable proof that Lea actually surveilled the union meeting on March 10. In the context of the Union's advice to the employees to be on the lookout for such surveillance, it is possible that the employees saw someone who looked like Lea and jumped to the conclusion that the Respondent was spying on them. I find this to be more likely than that they deliberately fabricated evidence of such surveillance. In this regard, I note that the testimony of Bollinger, Bloomer, and Stiles appeared to be genuine and sincere. I also found other aspects of their testimony to be credible.⁹ At the same time, it is clear from the testimony of McClure and Bumgardner, as well as Bloomer, who entered the restaurant to investigate whether Lea was there, that Lea was not there. Accordingly, because I find that the General Counsel has not sustained his burden of proof as to this allegation, I shall recommend dismissal of that portion of paragraph 8(b) alleging surveillance by Lea.

b. May 18 incident

On May 18, 2 days before the start of voting in the NLRB-conducted election, the Union held an all-day meeting at the community center in Rankin Lake Park. The park is approximately a half mile from the Respondent's facility. The date and location of the meeting was well-publicized throughout the plant through flyers and by a posting on the VOC's website, accessible to all. The General Counsel offered the testimony of three witnesses, Kenneth Bradley, Angelita Carnatzie, and Ricky Gentle that Reggie Ballard, the Respondent's focus area manager, drove up the driveway next to the community center and parked his car outside a window of the room where the meeting was being held. The General Counsel also put in evidence a handwritten statement, signed by the three witnesses and a fourth employee, Roddy Orr, who did not testify, purportedly documenting this incident.¹⁰ Ballard testified as a witness for the Respondent, denying that he was anywhere near the meeting. Again, resolution of this allegation turns on credibility.

Bradley was the first to testify about this incident. He has been employed as a tube-line operator since he started working

⁹ My credibility finding here is similar for Lea. Although I found many aspects of his testimony not worthy of belief, I found his denial of this allegation credible. The Board has frequently recognized that a witness may be credible as to some things and not others.

¹⁰ No explanation was given for Orr's failure to appear at the hearing in support of this allegation.

for the Respondent in April 2000. Ballard had been his immediate supervisor in the past. He was an active union supporter, a member of the VOC and was among the employees who presented the Union's demand for recognition to Richeson on March 31. Bradley testified that, at about 2 p.m., while he was sitting inside the meeting room, facing a row of windows, he saw Ballard's distinctive red camaro drive up the dead-end driveway, pull into a parking space, back out, turn around and drive back down the driveway. Bradley claimed he was able to see Ballard's face inside the vehicle, even though he was about 30 feet away. Bradley recalled that, at about the same time he saw Ballard, Gentle, who was standing up at the time, said "there's Reggie Ballard" and, that in response, the 25-30 employees in the room all looked and saw him.

Carnatzie, who is Gentle's girlfriend, has worked for the Respondent since June 2000. During the union campaign, she worked in the tool crib under Supervisor Jim Wright. Carnatzie testified, similarly to Bradley, that she was sitting in the meeting at about 2 p.m., listening to union organizer, Brymer, when she saw Ballard's distinctive red camaro pull in and out of the parking lot. Unlike Bradley, Carnatzie did not say that she saw Ballard in the car. Carnatzie was sitting next to Bradley while Gentle was up walking around. She testified that Gentle said, at about the same time she witnessed Ballard's car, that an "ULP" had been committed. According to Carnatzie, she responded, "[Y]ou just seen Reggie Ballard, didn't you?" Carnatzie recalled that there were about 15 to 20 people in the room at the time. Carnatzie estimated that Ballard's vehicle was about 30 feet away when she saw it.

Gentle has been employed by the Respondent since 1991. At the time of the campaign, he was an electrical technician in the maintenance department, reporting to Joel Kendrick. He was also an active union supporter, being a member of the VOC and one of the employees who initiated the campaign by setting up the first meeting with Brymer on February 16. Gentle's testimony differed slightly from the others. According to Gentle, he observed Ballard drive around the building and park in the back next to a window, about 15 feet away. Gentle claimed to have seen Ballard's face and that he was parked outside the building for about 15 seconds looking into the building through the window. Gentle testified, as did the others, that he made a comment when he saw Ballard, i.e., "there's Reggie Ballard!" and that other employees looked when he said this.¹¹ However, Gentle recalled that there were only 4-5 employees inside the building when he saw Ballard surveilling the meeting. According to Gentle, there were about 10 other employees outside the building, smoking. Gentle acknowledged that Ballard's very distinctive car would be visible to anyone standing outside the building as it entered and left the driveway.

Ballard, who was not a completely credible witness as to other aspects of his testimony, credibly denied being at the Rankin Lake Park community center on the day in question. Ballard admitted being familiar with the park and community center, having taken his son to play at the adjacent playground more than 10 years before this incident. Ballard also acknowl-

¹¹ On cross-examination, Gentle testified that he said, "[T]here's a ULP. That's Reggie Ballard outside."

edged eating his lunch there many times and even going to the park during the day at times when he needed to get away from the plant. However, he adamantly denied driving by or parking at the community center when the Union was holding a meeting there.

As with the other allegation of surveillance, I find that the General Counsel has not met his burden of proving that actual surveillance occurred on May 18. The testimony of the three witnesses seemed contrived and not very believable. In particular, I note that the only witnesses called to establish this violation were all active union supporters, including two members of the VOC, and that none of the other employees who were at the meeting, as many as 30 of them, who were in a position to witness this shocking turn of events, came forward to testify about it. What was most suspect was that the fourth employee who signed a contemporaneous statement attesting to this unfair labor practice, Roddy Orr, was not called as a witness and no explanation for his absence was given. Finally, I have taken into consideration the testimony of Belinda Bumgardner who testified that, when she complained to Bradley about her name being put on a "ULP" that she believed was not true, he replied that he "didn't like to lie either, but whatever it takes."

Accordingly, based on the above, I shall recommend dismissal of that portion of complaint paragraph 8(b) alleging surveillance by Ballard.

3. Additional threats of plant closure

In addition to the threat made by Lea to Rick Myers in mid-February, found unlawful above, the complaint, at paragraph 8(d), alleges several other threats of plant closure, attributed to Supervisors Mehaffey (late January), Bob Hasson (February 18), and Ballard (April 8 and early May). These allegations also turn on credibility.

a. Mehaffey

Fred Sisk, a maintenance department employee since March 1995, testified that he had a conversation with Dennis Mehaffey, his supervisor at the time, sometime around the end of January. Sisk recalled that Robert Parrott, another maintenance employee, was also present. According to Sisk, the conversation started out as a general discussion of the plant and low employee morale. At some point in the conversation, Sisk told Mehaffey that, if things kept going the way they had been going, with the Respondent moving people around from shift to shift, etc., they might need a union in there. Sisk testified that Mehaffey replied by saying that he felt if a union came into the plant, it would close within a year. According to Sisk, he was able to recall the date of the conversation because he placed in the context of other events going on in the plant, which were discussed during the conversation. Sisk also recalled that this conversation occurred before any actual union activity got underway. On cross-examination, Sisk acknowledged that Mehaffey was one of the best supervisors he'd ever had, that they had a good working relationship, and that he found Mehaffey to be sincere.

Parrott, who was present for this conversation, was not called by the General Counsel as part of his direct case. Instead, the Charging Party called him as a rebuttal witness, ostensibly to

rebut Mehaffey's denial. Parrott testified that this conversation occurred at a later time than Sisk recalled. According to Parrott, it was in late March, about 3 weeks after he started wearing a union button, that Mehaffey approached him and Sisk at work and commented about his union button. Parrott testified that Mehaffey said he "wished we wouldn't wear those buttons." Then, according to Parrott, Mehaffey said, "[I]f the union gets in, Stabilus would shut down and move to Mexico." Mehaffey also told Sisk and Parrott that they had a good job and good benefits. At that point, as Parrott recalled, Mehaffey and Sisk got into a little argument and walked away. Parrott did not hear any more of their conversation.

Mehaffey admitted having a conversation about the Union with Sisk and Parrott in January, but he denied making any threats about the plant closing. According to Mehaffey, who was no longer employed by the Respondent at the time of his testimony, he knew better than to make such a threat because he had received "TIPS" training from the Respondent.¹² Mehaffey also claimed that he would not have told employees that the plant might move to Mexico because he was convinced this would not happen. According to Mehaffey, the Respondent was so busy, working 7 days a week trying to keep up with production commitments, that it would be impossible for the Respondent to shut down and move to Mexico.

Although there are discrepancies between the testimony of Sisk and Parrott regarding this conversation, most notably as to timing, I found Sisk to be a credible witness. Parrott's conflicting testimony as to the timing of the conversation and the lack of detail he provided as to the substance of the conversation, beyond repeating the alleged threat, makes his testimony less reliable. For whatever reason, his recollection of this event was faulty. While this might seem to doom the General Counsel's case, there were significant credibility issues with Mehaffey's denial. The fact that he was no longer employed by the Respondent, and seemingly had no reason to be untruthful, is not enough to make him a believable witness. What convinced me that his denial was unworthy of belief was his stated rationale for not having made the threat. There is no evidence in this record that the Respondent provided any training to Mehaffey before he had this conversation with Sisk. In fact, the testimony of other supervisors suggest he could not have received such training. In addition, Mehaffey's claimed ignorance as to the fact that most of the maintenance department employees supported the Union is suspect in light of testimony from other witnesses for the Respondent that this was common knowledge. Finally, Mehaffey claimed that the possibility of the plant closing was not even a matter of discussion in the months leading up to the union vote. This testimony was contradicted by numerous other witnesses and by the text of the captive audience speeches given by Lea and Richeson which specifically addressed the topic of plant closure.

Based on the credited testimony of Sisk, I find that the Respondent, through its supervisor, Mehaffey, in fact threatened employees with plant closure in or about late January. The fact

¹² TIPS is an acronym for "Threats, Interrogation, Promises, and Surveillance," often used as shorthand for teaching supervisors what not to do during a union campaign.

that Sisk and Mehaffey had a good relationship probably led Mehaffey to believe he could speak freely with Sisk and his response to Sisk's comment about employees needing a union seemed genuine. Even if Mehaffey was expressing only his own belief as to the consequences of unionization, his statement would reasonably tend to coerce an objective employee in the exercise of their right to join or support a union. Because of his position of authority, Sisk could reasonably believe that Mehaffey had knowledge of the Respondent's plans which would not be known to the employees, including a plan to close in the event of unionization. Under these circumstances, I find that the Respondent violated Section 8(a)(1) of the Act as alleged.

b. Hasson

Three employees testified for the General Counsel regarding a conversation with Bob Hasson, a quality engineer and admitted supervisor, that occurred in the outside smoking area on February 18. This was 2 days after union organizer Brymer's first meeting with the Respondent's employees. The three employees were Tina Shuler, a quality lab technician employed by the Respondent since July 1985, Donald Grant, a rework operator employed since April 1983, and Robin Braswell, a mini-machine operator who has worked for the Respondent since September 1994. Although Shuler and Grant were members of the VOC, Braswell was a union supporter with minimal union activity. These three long-term employees testified consistently regarding this incident. According to them, they were in the smoking area discussing the Union when Hasson joined them. After listening to their conversation, Hasson said, if the Union came in, the Respondent would close the plant down and move to Mexico. At that point, Hasson abruptly put out his cigarette and walked away. Grant then took a napkin that was on the table and wrote out what Hasson had just said. Shuler, Grant and Braswell each signed the napkin and later, when the statement was transcribed to a piece of paper, they signed it again. This later statement is in evidence and corroborates their testimony.

Hasson did not deny being in the smoking area with these employees on or about February 18. He also acknowledged that the employees were talking about the Union when he joined them. According to Hasson, the employees asked his opinion of the Union. He responded by telling them that he had helped close two plants, in previous jobs, that were unionized. He denied telling the employees that the Respondent would close if a union were voted in. He also denied linking the closure of those two plants to the fact they were unionized. Hasson also claimed that he would not have made the threat attributed to him by the General Counsel's witnesses because he had received "TOPS" (sic) training and knew not to say this. On cross-examination, Hasson admitted that he had not received TIPS or TOPS training from the Respondent. According to Hasson, the last time he received such training was at least 5 years before this conversation, at a time when he did not work for the Respondent.

I found the testimony of Shuler, Grant, and Braswell regarding this incident to be more credible than Hasson's recollection. I note that all three testified consistently, that they immediately documented the incident to preserve their recollection. All three

were long-term employees who generally impressed me as honest and candid witnesses. In contrast, Hasson's attempt to rewrite history by claiming to have merely reported his experiences seemed contrived to avoid liability for a threat. In light of his experience having worked at unionized facilities that in fact closed, it is not a stretch to believe he would have told these three employees, whom he encountered discussing the union campaign, that the same fate would befall them if they pursued their efforts to get union representation. I also note that this incident occurred early in the campaign, before the Respondent had organized any concerted campaign or conducted any training of its supervisors. It is more likely at that point in time that a supervisor would be less circumspect in expressing his views, including the belief that the Respondent would close rather than deal with a union. Accordingly, I find that the Respondent violated Section 8(a)(1) of the Act on February 18 when Hasson threatened employees with plant closure.

c. Ballard

Stiles, who testified about Lea's alleged surveillance of the March 10 union meeting, also testified that he had a conversation with Ballard about the Union. At the hearing, he testified that the conversation occurred on April 8. In an affidavit he provided closer to the event, he stated that the conversation occurred on March 15. Stiles was unable to explain this discrepancy at the hearing. Regardless of when it occurred, Stiles recalled that Ballard approached him while he was working on the tube line. No one else was present. According to Stiles, Ballard first asked him if it was okay if they talked about the Union. When Stiles said, yes, Ballard asked what Stiles thought about it. Stiles replied that he thought it would make the Respondent a better place to work. Stiles then asked Ballard what he thought about the Union. Ballard responded that "personally he thought they would close the plant down and move." Stiles, being a good member of the VOC, immediately documented this incident in the notebook he kept by his machine. Stiles' note about this incident is dated April 8.

Ballard admitted that he frequently talked to employees about the Union because it was a hot topic of conversation during the campaign. According to Ballard, because he had worked his way up the ranks, he knew many of the employees well and did not hesitate to express his belief that the employees did not need a union at Stabilus. Ballard also acknowledged talking to the employees about his experience working at the nearby unionized Freightliner plant. At the same time, Ballard denied having a conversation with Stiles like the one Stiles described. The only conversation Ballard recalled having with Stiles was one in the smoking area during which he claims to have told Stiles that the employees had a right to an election but that, in the end, they would all have to work together.

Although I did not credit Stiles with regard to the alleged surveillance incident, I do not agree with the Respondent's contention that his testimony regarding that incident was a "complete fabrication." As discussed previously, I found that the employees, having come from a meeting where they were told to be on the lookout for spying by management, saw someone who looked like Lea and, in the heightened atmosphere of the campaign, sincerely believed it was Lea. Stiles was

perhaps overzealous when he testified that he observed Lea watching the employees but I do not think he deliberately lied about it. Similarly, I do not believe he made up the story about his conversation with Ballard. The handwritten note on the page from his notebook appeared genuine. Stiles did not appear to be the type of individual who would go to that much effort to fabricate evidence. Moreover, his description of the conversation is plausible when considered against Ballard's admission that he frequently talked to employees about the Union and did not hesitate to express his views on the subject. He conceded that he did not think the employees needed a union and he was willing to tell employees that every chance he got. I also observed that Ballard seemed to be afflicted with the same personality trait as Lea, i.e., a certain loquaciousness that led him to speak freely and often to anyone who would listen. It is perfectly believable that he would not have been able to limit his conversations with employees on the subject of the Union, about which he felt strongly, and avoid the pitfalls of the Act's restrictions. Accordingly, I find that Ballard did threaten Stiles that the Respondent would close if employees voted for the Union and that this threat violated Section 8(a)(1) of the Act. I also find, based on the date on Stiles' contemporaneous note, that this unfair labor practice occurred on April 8.

Sisk, whom I've previously described as a generally credible witness, also testified to a conversation with Ballard. Sisk testified that a few weeks before the election, he had a conversation with Ballard in the final assembly area where he was working. According to Sisk, Ballard asked him generally how things were going. Sisk, apparently believing that Ballard was inquiring about the union campaign, said he thought things were going real well and it looked like the Union would be voted in. At that point, Ballard said that if the Union came in, the plant would be shut down within the year. Sisk testified that he frequently talked to Ballard who he knew well as someone who came up through the ranks. Ballard testified that he did not recall having any conversation with Sisk about the Union. According to Ballard, he did not even know that Sisk supported the Union. I find this denial patently incredible because Sisk testified that he wore a union button on his uniform at least 2-3 times a week during the month of May. Moreover, Sisk's testimony about having frequent conversations with Ballard is consistent with Ballard's testimony describing his interactions with employees. As between the two witnesses, I find Sisk to be the more credible. Accordingly, I find that the Respondent violated the Act as alleged in early May when Ballard threatened Sisk with plant closure.

4. Bargaining from scratch

Paragraph 8(e) of the complaint alleges that Lea and the Respondent's president, Richeson, "threatened employees that bargaining would start with a blank sheet of paper, or from scratch, if employees selected the Union as their bargaining representative." It is alleged that these threats were made on various dates in April and May during captive audience speeches. The General Counsel offered a number of witnesses who attended different meetings at different times who generally had only a vague recollection of what was said at these meetings. The General Counsel's witnesses did recall, not sur-

prisingly, the statements at issue. The Respondent countered by placing these statements in context. The Respondent offered the testimony of Lea and Richeson as well as the written text of their speeches and copies of the overhead projections they used to illustrate their points.

The nine employees who testified for the General Counsel recalled a similar scenario taking place at meetings conducted by Lea during the month of April and then by Lea and Richeson around May 10.¹³ All of the employees recalled that either Lea or Richeson, or both, at some point during these meetings, when discussing the topic of collective bargaining, held up a blank sheet of paper and said, in more or less the same words: “this is what you start with when you go into negotiations, not your current wages and benefits. What you come away with depends on negotiations. The company will bargain hard for the best deal for the company and it is up to the Union to bargain for the best deal for the employees.” On cross-examination, most of these witnesses acknowledged that Lea or Richeson, or both, told the employees that the Respondent would bargain in good faith with the Union. Most also conceded that neither Lea nor Richeson ever said that the employees would automatically lose the wages and benefits they currently enjoyed if the Union were selected as their bargaining representative. The General Counsel’s witnesses also acknowledged that during at least some of these meetings, overhead projections were used which addressed the same topic. Some of the witnesses recognized the documents in evidence as the projections that were used and recalled Lea or Richeson making the statements that appear in the projections.

Lea admitted holding three series of meetings with employees in April, after the Union filed the petition. Although the subject of collective bargaining was not included in the text of these meetings, he acknowledged that it did come up during question and answer sessions from the employees. He conceded that his answers to such questions were not scripted but he denied ever threatening employees at these meetings that they would lose benefits if they voted for union representation. Lea did admit using a blank sheet of paper during some of the meetings he conducted as a prop to show the employees how collective bargaining works. According to Lea, what he told employees was that he had been in a union environment and had negotiated with unions, that when you go into negotiations, you could come out with less or you could come out with more but that the Respondent would bargain in good faith if the Union won the election. Lea further acknowledged telling employees that the Respondent would bargain hard in the best interests of the company and would let the Union bargain for the employees.

Lea and Richeson testified that another series of meetings were held in May, closer to the election and that Richeson was the primary speaker at these meetings. All of these meetings

¹³ The following employees testified regarding this allegation: Ricky Myers, Brian St. Laurent, Jeffrey Scott Coggins, Tina Shuler, Charles Murphy III, Karen Hagan, John Bloomer, James McKinney, and Ricky Gentle. In addition, the General Counsel offered into evidence several statements signed by some of these witnesses purporting to document the unfair labor practice.

were conducted through the overhead projections that are in evidence. One series of meetings, conducted between May 6 and 10, addressed the subject of bargaining. Lea testified, on cross-examination, that he believed Richeson also used a blank sheet of paper during these meetings when describing the bargaining process. Richeson, on the other hand, denied using such a device, testifying that he “felt uncomfortable with any idea that you started with a blank piece of paper.” Lea and Richeson denied that any statements were made during these meetings suggesting that employees would automatically lose any wages or benefits upon selection of the Union. The overhead projections contain no such threat. On the contrary, they are carefully worded to convey the reality of bargaining, using quotations from Board and court decisions on the subject.

The Board has addressed this type of allegation many times over the years. The weight of the case law is that, without an actual or implied threat that employees will lose benefits if they vote for union representation, or that union representation would be futile because the employer will not bargain in good faith with a union, an employer’s description of the collective-bargaining process, including the reality that employees may end up with less as a result, does not violate the Act. *Wild Oats Markets, Inc.*, 344 NLRB 717 (2005); *Noah’s New York Bagels, Inc.*, 324 NLRB 266, 267 (1997), and cases cited therein. See also *La-Z-Boy*, 281 NLRB 338, 339 (1986) (employer’s reference to a blank sheet of paper not unlawful). Even crediting all of the General Counsel’s witnesses, I find that he has not met his burden of proof as to this allegation. The use of the blank sheet of paper as a prop to describe the bargaining process is not per se unlawful but must be considered in the context of the statements used by Lea and Richeson and reflected in the overhead projections. In addition, the concessions made by the General Counsel’s witnesses on cross-examination, i.e., that neither Lea nor Richardson ever said that the Respondent would reduce their wages or take away benefits unilaterally upon selection of a union as the employees’ bargaining representative, and that employees were told that the Respondent would engage in good-faith bargaining with the Union, are fatal to the General Counsel’s case. I find nothing in the record here regarding what was said at these captive audience meetings that would lead a reasonable employee to believe that the Respondent was threatening them with reduced wages or a loss of benefits if they voted for the Union or suggesting the futility of union representation. Accordingly, I shall recommend dismissal of this allegation of the complaint.

5. Threat of job loss in the event of a strike

Paragraph 8(f) of the complaint alleges that the Respondent, through President Richeson, threatened employees with job loss in the event of a strike during a meeting on May 18.¹⁴ William Phillips was the only employee called by the General Counsel to testify regarding this allegation. Phillips has been employed by the Respondent since January 1995. He was a facilities technician reporting to Mike Ellington at the time of the union

¹⁴ Supervisor John Nichols is alleged to have made a similar threat in early May. Because the evidence shows that this threat was allegedly made in a one-on-one conversation with McSwain, it will be addressed in connection with the allegations regarding McSwain’s discharge.

campaign. He was an active and open supporter of the Union and a member of the VOC. Phillips testified that he attended a meeting conducted by Richeson on May 18 at which the subject of strikes was discussed. Phillips recalled that before the meeting, he and Tony Bollinger set up about 150 chairs for the meeting and that the room was full for the meeting. According to Phillips, Richeson told the employees that, in the event of a strike, the Respondent could allocate production to other plants, taking it away from the Stabilus plant, and run the plant at a minimum with management and people who crossed the picket line. Phillips testified that Richeson also told the employees that "as long as they seen fit to leave production at the other plants, if it was feasible, they could leave production at the other plants." On cross-examination, Phillips testified that Lea was also present and was operating the overhead projector while Richeson spoke. Phillips acknowledged that Richeson appeared to be reading from the text on the projector as he spoke.

The copy of the overhead used at this meeting, placed in evidence by the Respondent, tends to corroborate Phillips' testimony. The title of this presentation is "Job Security and Strikes." Included in the presentation are a number of items showing the UAW's history of strikes, news reports of UAW-represented plants that have closed, and the negative impact of a strikes on employees generally and on the Respondent's employees specifically. The following overheads reflect the statements made by Richeson that Phillips described:

Stabilus Will Operate During Strike

- We would hire permanent replacements for economic strikers.
- We would use salaried employees and employees who crossed picket line.
- If necessary, we would temporarily relocate work to other Stabilus facilities

WE WILL DO WHAT IS NECESSARY TO
CONTINUE OPERATIONS!

What If?

- If the Company discovers during the strike that work which was temporarily relocated to other Stabilus facilities can be made at these locations more economically, the Company has a right to propose that this work be permanently relocated, even if this means a loss of jobs in Gastonia.

If the Union Doesn't Agree

- The Company would have an obligation to bargain in good faith over this proposal, as well as any other contract proposals.
- If the Union refused to agree, and the parties reached good faith impasse, the Company would have the right to implement its proposal!

On cross-examination, Phillips acknowledged hearing Richeson say that the Company has the right to propose leaving production at other plants. However, he did not recall Richeson saying

that the Respondent would propose this to the Union. Richeson denied making any threats that employees would lose their jobs in the event of a strike. According to Richeson, he merely read from the above overhead projection, word for word, without deviation.

Phillips testimony was generally credible and consistent with the text of the overhead projection. Although Richeson's statement, as recalled by Phillips, would at first blush imply that the Respondent would relocate production permanently in the event of a strike, the full text of this section of Richeson's speech shows that such a threat was not made. As the Respondent correctly points out, Richeson did nothing more than describe the rights an employer has to continue operations in the face of a strike including the right to temporarily relocate production. See *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333, 345 (1938); *NLRB v. Brown*, 380 U.S. 278, 283 (1965). In addition, Richeson also advised the employees that, if the Respondent chose to permanently relocate the transferred operations, it would have to bargain with the Union about it. I find that nothing in these statements crossed the line of permissible speech. Accordingly, I shall recommend that this allegation of the complaint be dismissed.

6. Threats of unspecified reprisals

Paragraph 8(h) of the complaint alleges that Lea, Ballard, and Nichols, on various dates, threatened employees with unspecified reprisals for engaging in union activities. The alleged threats attributed to Lea and Nichols involved conversations with McSwain which will be discussed in connection with the allegations related to his discharge. Only the alleged threat by Ballard will be discussed here. It is alleged that Ballard, whose credibility has already been called into question, made this threat 2 days after the election, on May 24, to a group of employees he encountered in the cafeteria. The General Counsel called one of the employees who was present, James McKinney. The Respondent called as its witnesses, in addition to Ballard, two other employees who were there, Ron Hudson and Craig Hammett. The fourth employee who was present during this incident, Lisa Jenkins, was not called by any party.

McKinney has worked for the Respondent since September 1994. During the relevant period here, he was working in the tubing department for supervisor Jimmy Walker. His union activity was limited to signing a union authorization card at the beginning of the campaign. McKinney testified that 2 days after the election, he was in the canteen eating lunch when Ballard came over to the table where he was sitting. Also seated at this table were Craig Hammett, Ronnie Hudson, and Lisa Jenkins. As best he could recall, one of the people at the table called Ballard over. According to McKinney, he was not paying much attention when Ballard first came over to the table but at some point he heard Ballard say, "[I]f the people would work as hard in the plant as they did outside the plant organizing all these activities, we could get more done, and that whoever supported the Union better cross their 't's' and dot their 'i's'."

Ballard admitted having a conversation with a group of employees while they were eating lunch a couple days after the election. Ballard could not recall everyone who was there but

he did remember Jenkins and McKinney being there.¹⁵ Ballard also did not remember being called over by one of the employees. Ballard testified that he was talking to the employees about the Respondent's production problems, i.e., regularly missing shipments, being in danger of losing a quality rating for one of the Respondent's customers, etc., when he said: "[T]he election is over with, one way or the other, you know, it doesn't matter, we've all got to start making these shipments, making the parts right because we have some quality issues that caused us to do some late shipments. We better all start crossing our t's and dotting our i's, we need to start doing it right the first time. . . ." Ballard also recalled that later in the conversation, he and the employees started talking about the union supporters who were rallying outside the plant during the election. Ballard testified that he told the employees at the table "if we can get the same enthusiasm in here, we can turn this thing around and we won't lose our Ford business or our GM business."

The employee witnesses called by the Respondent tended to corroborate more than contradict McKinney's testimony. Hudson is a 10-year employee who works in main assembly. He acknowledged that he supported the Company during the union campaign although he was not vocal about his opinions. He testified that he was eating lunch with McKinney, Hammett, and Jenkins a couple days after the election when Jenkins called Ballard over to the table while the employees were talking about the election. According to Hudson, Jenkins asked Ballard what company officials thought regarding the outcome of the election.¹⁶ Hudson testified that Ballard replied that they were obviously pleased and that he himself was glad because he thought the employees really didn't need a union. Ballard then said that, without the Union, opportunities would open for job advancement, etc. Hudson testified that Jenkins commented that some of the union organizers in the plant were probably shaking in their boots to which Ballard replied, while making a "hand's off" gesture, "we've all got to dot our i's and cross our t's because we're in danger of losing our Q-1 status."¹⁷ Hudson denied that Ballard said only the union organizers had to watch out. Hudson testified further that he then made a comment about the union organizers who were standing outside the plant during the election, blowing horns, and carrying on. Ballard responded to these comments by saying that he "wished they'd put that much energy into their work."

Hammett has been employed by the Respondent as a tube welder operator for 6 years. Ballard was his focus area manager, one level above his immediate supervisor. Hammett also recalled that someone called Ballard over to the table and asked him how "upper management" felt about the election. Although Hammett claimed that he was talking to his wife on the cell phone on and off during this conversation, he recalled two comments by Ballard. The first statement he recalled Ballard

making was that if people would apply themselves in the plant like they did outside on the road, then we would get more production, or get more done. The other comment Hammett recalled was in response to a question from one of the employees about how they felt about people still wearing union badges and stuff. According to Hammett, Ballard responded that "everybody needs to cross their t's and dot their i's." A little later in the conversation, Ballard said, "[W]e've got to get back to business and get production rolling."

Both Hudson and Hammett testified that, after this incident in the cafeteria, they heard rumors in the plant that Ballard had threatened retaliation against union supporters and that someone had complained to human resources about it. On cross-examination, McKinney acknowledged that he was also aware of these rumors. Hammett testified that he was called to the human resources office and asked about this conversation. Doug Lea and Heidi McMinn, a human resources assistant, were there along with Ballard and the employee who complained, Steve Blakely. According to Hammett, Lea asked him if Ballard had said anything about "retaliation." Hammett said he did not hear "retaliation." Lea said it was obviously a misunderstanding. Before Hammett left the room, Lea assured him the Respondent had no intention of retaliating, that they just wanted to get production going again.

Of all the witnesses who testified about this incident, I found Ballard the least credible. As noted above, he did not impress me as a generally credible witness. Moreover, his testimony about this particular conversation was contradicted on several points by the employee witnesses who testified for the Respondent. McKinney, although he recalled only a small part of the conversation, was a credible witness. I note that he was not a strong union supporter and had no reason to fabricate his testimony. In addition, Hammett's recollection of the critical statement about "crossing t's and dotting i's" is very similar to that of McKinney. Specifically, Hammett recalls this statement being made in response to a specific question from one of the employees about how the Respondent felt about employees still wearing union badges. Despite Ballard's denials and Hammett's and Hudson's attempts to make this comment more general, the clear implication, when considered in the context of the entire conversation, is that the union supporters, whose activities were apparently blamed for the Respondent's production difficulties, had better watch out. Why else would Ballard suggest they apply the "energy" they had exhibited in their union activities to their work activities? I find, as alleged in the complaint, that the Respondent threatened employees with unspecified reprisals because of their union activities through Ballard's postelection comments in the canteen.

7. Threat to change working conditions

Paragraph 8(i) of the complaint alleges that the Respondent, through Supervisor Joel Kendrick, threatened employees in the maintenance department on May 19 with a change in their working conditions if they selected the Union as their bargaining representative. The General Counsel relies on the testimony of Bloomer to establish this allegation. Bloomer testified that on the day before the polls opened, i.e., on May 19, his supervisor, Kendrick, approached him on the production floor and said

¹⁵ Ballard recalled that another employee, Keith Nix, was there. The other witnesses who were there do not identify Nix as being present.

¹⁶ As noted at the beginning of this decision, the tally at the election showed the Union lost by two votes with two challenged ballots. This conversation occurred before the Union filed its objections to the election.

¹⁷ The Q-1 status was a certification the Respondent needed to remain a vendor for Ford Motor Company.

that he would appreciate it if Bloomer voted no in the election. According to Bloomer, Kendrick also said that, depending on the outcome of the election, the maintenance crew was going to go back into the maintenance shop and be under a maintenance directive and would no longer be out on the floor taking orders from the production supervisors. According to Bloomer and other maintenance department employees who testified, this statement referred to a change in operations that had taken place before the onset of the union campaign. In the past, maintenance employees were supervised by a maintenance supervisor. Under the new system, which it is undisputed was not liked by the maintenance employees, they had to take orders from the production supervisors in the departments to which they were assigned. In addition, the production supervisors could make the maintenance employees operate machines and do other production work to fill in for production employees who were out or on break. There is no dispute that the maintenance employees' unhappiness with this arrangement had been the subject of discussion between the employees and supervisors as well as within management for some time. Bloomer conceded that he was aware that Kendrick had been attempting to revert to the preferred system before this conversation.

Kendrick denied making the statements attributed to him by Bloomer. He acknowledged, however, that he was aware that the maintenance employees did not like working under production supervisors and being required to do production work. Kendrick testified that he was in the process of changing the organizational structure to one preferred by the maintenance employees at the time of the election and that, after the election, the Respondent did revert to the old structure, i.e., with maintenance employees taking orders from maintenance supervisors only. This change was fully implemented by August, about 5 months after the election. Kendrick denied that the outcome of the election had anything to do with the change.

Although I found Bloomer generally credible as a witness, his testimony does not establish that any "threat" was made. On the contrary, it appears the change that Kendrick told Bloomer "depend[ed] on the outcome of the election" was a change the employees wanted. If anything, Kendrick's statement amounted to a promise of benefit, not a threat. The complaint does not allege such a violation. However, even if the complaint could be read to include such an allegation, I can not find that a promise was made based on Bloomer's testimony. The statement described by Bloomer is ambiguous. It is unclear what Kendrick meant when he said, "[D]epending on the outcome of the election." Significantly, he did not tell Bloomer that the Respondent would implement the desired change if the employees voted against union representation, or that the Respondent would keep the status quo if the employees voted for the Union. As the Respondent argues, this statement merely indicates that the Respondent was not taking any action until the issue of union representation was decided, which it would be perfectly lawful to do if no decision had been made before the onset of union activity. There is no allegation, nor evidence, that the Respondent had decided, before it became aware of the union campaign, to change the supervision of maintenance employees and suspended implementing that change in order to influence the results of the election. Under these circumstances, I do not

find that any threat or promise was made in Kendrick's conversation with Bloomer. Accordingly, I shall recommend dismissal of this allegation of the complaint.

8. Disparate enforcement of work rules and related allegations

Several paragraphs in the complaint allege violations with respect to the promulgation or application of various rules. At paragraph 8(j), it is alleged that the Respondent disparately enforced work rules regarding the use of food and drink in work areas and employee postings on bulletin boards. Paragraph 8(m) alleges that the Respondent prohibited employees from wearing prounion T-shirts.¹⁸ Finally, at paragraphs 8(o) and (p), the General Counsel alleges that the Respondent prohibited employees from talking about the Union at work and threatened them with discipline if they did.

a. Disparate enforcement of work rules

Brian St. Laurent has been employed by the Respondent in the maintenance department since June 1999. He was an active and open union supporter. During the campaign, he was assigned to work in the final assembly area. As described above, he had dual supervision, from Mehaffey, the maintenance supervisor, and Kathy Crumbley, a production supervisor in final assembly. St. Laurent testified that, on April 1, he arrived for work at about 7 p.m. with a Wendy's bag and a container of Pepsi. As he sat down at a table in the maintenance work area, off the production floor, to eat his dinner, Crumbley came over and told him he was not allowed to eat or drink on the production floor, that he had to take it to the cafeteria. Jerry Lockridge, another union supporter, was present. Although Lockridge also had his dinner with him, he had not started to eat when Crumbley approached them.¹⁹ St. Laurent testified that he observed more than 10 other employees drinking beverages in non-Stabilus containers at the same time yet Crumbley did not talk to any of them about it. St. Laurent also testified that, even after this conversation, he observed employees eating and drinking in the production area without being told they could not do this. According to St. Laurent, he spoke to Lea about this incident later the same evening. St. Laurent told Lea that he had no trouble playing by the rules as long as everyone played by the same rules. Lea told St. Laurent he would take care of it. According to St. Laurent, he heard nothing further after this conversation.

On cross-examination, St. Laurent acknowledged being aware of the Respondent's policy generally prohibiting food and drink on the production floor. He was also aware that the Respondent had adopted a policy allowing employees to have water or other beverages in their work area only if they used a company-provided spill-proof container. The Respondent placed in evidence an October 21, 2003 memo to employees regarding the use of the Stabilus water bottles. According to St.

¹⁸ The complaint also alleges, at par. 8(n), that Lea promised McSwain he would not be terminated if he removed his union T-shirt. As with the other allegations involving McSwain, this will be discussed later in the decision.

¹⁹ Although Lockridge testified as a witness for the General Counsel, he did not testify regarding this incident.

Laurent, however, these rules were not always followed. Clarence McClure corroborated St. Laurent in this regard by testifying that he routinely carries food and beverages in non-Stabilus containers throughout the work area, in view of supervisors, without anyone saying anything to him about it. James McKinney also testified that he has taken a Pepsi container on the floor just about every day and has consumed food on the production floor at least 20 times, including at times when supervisors were present. According to McKinney, no supervisor has ever said anything to him about this. St. Laurent did concede, during cross-examination, that Crumbley was a “my way or else” type of supervisor who strictly enforced the rules. He also admitted that he was eating his dinner shortly after arriving for work even though his scheduled break wasn’t until 10 p.m.

Crumbley, testifying for the Respondent, recalled an incident where she saw St. Laurent sitting at a worktable with a Wendy’s bag, a hamburger, and a drink. She admitted that she approached him, reminded him of the policy against food in the work area, and told him he could take his dinner to the cafeteria. St. Laurent left and that was the end of the conversation. Crumbley claimed that she is generally a stickler when it comes to enforcing work rules. The Respondent placed in evidence a number of documents that Crumbley drafted to document her enforcement of various rules in 2001, 2002, and 2003. However, as the General Counsel correctly points out, none of these memos deal with the food and beverage policy at issue. The Respondent’s witnesses did not contradict the testimony of St. Laurent, McClure and McKinney regarding other employees being permitted to have food and non-Stabilus drink containers in the production area.

As the Respondent concedes, resolution of this allegation does not turn on credibility. There is no dispute that Crumbley told St. Laurent he could not eat his dinner in the production area, even though he was at a table away from any machines. There apparently is also no dispute, since the General Counsel’s witnesses were not contradicted on this point, that employees have been known to violate the unwritten policy regarding food and the written policy on water bottles. There is not a shred of evidence that the Respondent had ever enforced these rules before April 1 when St. Laurent, wearing his union buttons, attempted to eat his dinner. While the allegation may seem trivial, it must be considered in the context of the other allegations to be discussed showing a general crackdown by the Respondent on union supporters after the Union filed its petition. In fact, this incident occurred the day after a group of employees presented the Union’s demand for recognition to Richeson and 2 days after the petition was filed. Under the circumstances, I find that the Respondent did disparately enforce its work rules on April 1 when Crumbley prohibited St. Laurent from eating his dinner in the work area.²⁰

²⁰ The Respondent points out that St. Laurent wasn’t even supposed to be eating dinner when this incident occurred because his break was not until 10 p.m. However, Crumbley did not chastise him for taking an unscheduled or unauthorized break, indicating her acceptance of this alleged violation of work rules. Her only concern at the time was his having food and a drink, a concern she did not express to any other employees.

The complaint also alleges disparate enforcement of rules regarding the posting of employee notices on bulletin boards. There is no dispute regarding the facts related to this allegation. Stiles testified that a few days before the May 20 election, he posted two documents from the NLRB and a newspaper article about the upcoming election on a bulletin board near his machine. Bill Vinesett, his supervisor, removed them at Ballard’s direction. Vinesett testified that he did this because the items were posted on the wrong bulletin board and did not have a stamp from the human resources department indicating approval for posting. Although Stiles and his work partner McClure testified that they had seen other personal items posted on this particular bulletin board without being removed before the union campaign, their testimony lacked specificity and detail. No other employees testified that the Respondent allowed nonwork-related notices to be posted without approval from human resources.

The Respondent’s employee handbook contains the following rules regarding the posting of notices on bulletin boards:

Actions that will result in disciplinary action include:

- Posting of unauthorized material on company bulletin boards or other company property; Defacing or removing company notices without authorization.

Solicitation and Distribution of Literature

- All literature and material that an associate wishes to be posted must submit all information to Human Resources for approval prior to posting. Human Resources will date and post all information in the proper areas.

There is no dispute that the Respondent did permit other union supporters, including Ricky Gentle, to post union notices on the bulletin board with prior approval. The Respondent argues that this demonstrates the nondiscriminatory application of its rules.

The Board, in *St. Joseph’s Hospital*, 337 NLRB 94, 95 (2001), reaffirmed the principles applicable to this type of allegation, as set forth in *Honeywell, Inc.*, 262 NLRB 1402 (1982), enf. 722 F.2d 405 (8th Cir. 1983):

In general, there is no statutory right of employees or a union to use an employer’s bulletin board. However, where an employer permits its employees to utilize its bulletin boards for the posting of notices relating to personal items such as social or religious affairs, sales of personal property, cards, thank you notes, articles, and cartoons, commercial notices and advertisements, or, in general, any nonwork related matters, it may not validly discriminate against notices of union meetings which employees also posted. Moreover, in cases such as these an employer’s motivation, no matter how well meant, is irrelevant.

Accord *Miller Industries Towing, Inc.*, 342 NLRB 1074 (2004).

The evidence here establishes that, while the Respondent allows employees to post all kinds of personal nonwork-related notices on company bulletin boards, it routinely requires that

such notices be reviewed and approved by the human resources department to ensure against offensive or inappropriate material being posted. The testimony of Gentle confirms that the Respondent was willing to approve union material for posting when it was submitted. Because there is no dispute that Stiles did not seek approval before posting the notices that Vinesett removed, I find no violation in this incident. Accordingly, I shall recommend dismissal of this aspect of paragraph 8(j) of the complaint.

b. Restrictions on wearing union T-shirts

Paragraph 8(m) of the complaint alleges that Lea, Nichols, and Supervisor Jimmy Walker prohibited employees from wearing union T-shirts on various dates in May. The allegations regarding Lea and Nichols involve McSwain and will be discussed later in this decision. Employees Braswell and Nix testified regarding the Walker incident. Braswell and Nix testified that, on May 22, the second day of voting in the union election, McSwain gave them each one of the pronoun T-shirts he had made up. Although both employees acknowledged being aware of the Respondent's uniform policy, they put the union T-shirt on before going to work that day. Braswell testified that she thought employees were allowed to wear these shirts because of the election. Braswell and Nix wore the T-shirt for most of the day, until about 3 p.m., when Walker, their supervisor, told Nix to change into a Stabilus shirt. Nix reported this to Braswell and she also changed her shirt. Braswell testified that Walker later approached her and told her that she could still wear the union shirt as long as she wore a Stabilus shirt over it. Walker corroborated the employees regarding this incident. According to Walker, he did not say anything to Braswell or Nix earlier in the day because he thought the Respondent was allowing this deviation from the uniform policy because it was election day. When he learned that there was no change in policy, he enforced it.

There is no dispute that the Respondent has maintained a uniform policy for some time preceding the union campaign. The policy is set forth in the employee handbook and requires employees to wear only shirts and hats with the company logo. The Respondent maintains this policy to present a uniform appearance to customers who frequently visit the plant and to instill a sense of team work among employees. Although a number of employees testified that either they, or other employees, had worn non-Stabilus shirts and hats at work, the exceptions to the rule appear to be rare. Most employees acknowledged that they were expected to wear only company-logo clothing at work. At the same time, the Respondent's witnesses acknowledged that it did not require temporary employees to wear company clothing. At the time of the union campaign, there were temporary employees in street clothes working side-by-side with the Respondent's employees in their Stabilus uniforms. The Respondent's witnesses acknowledged that a visitor to the plant would not be able to tell which employees were temporary or permanent. It is also undisputed that the Respondent has lifted its prohibition on noncompany clothing during other special occasions. For example, when the hometown Carolina Panthers wear in the Super Bowl in 2004, employees were permitted to wear clothing with the team's logo.

Employees were also permitted to depart from the uniform policy on the anniversary of the September 11 terrorist attacks. Finally, employees have been known to wear costumes at Halloween without interference by the Respondent.

The Board and the courts have consistently held that an employee's right to wear union insignia at work is protected by Section 7 of the Act. Absent "special circumstances," the promulgation or enforcement of a rule prohibiting the wearing of union insignia violates Section 8(a)(1). *Brandeis Machinery & Supply Co.*, 342 NLRB 530 (2004), *enfd.* 412 F.3d 822 (7th Cir. 2005). The special circumstances exception is a narrow one and a rule restricting the right of employees to wear union clothing or paraphernalia is presumptively invalid. To prevail, the respondent must show that the rule is necessary to maintain production or discipline, or that the wearing of union insignia would unreasonably interfere with a public image which the employer has established as part of its business plan. *Quantum Electric, Inc.*, 341 NLRB 1270, 1280 (2004), and cases cited therein. *Accord Oghara America Corp.*, 343 NLRB 809 (2004).

Although the Respondent's uniform rule is neutral on its face and there is evidence that the Respondent has endeavored to enforce this rule on a consistent basis, I nevertheless find that Walker's statements to Braswell and Nix violated the Act under this well-established precedent. The Respondent has demonstrated no special circumstances that would justify such a restriction on employees' right to display their support for the Union. There is no claim that the uniform rule was necessary for production or discipline. The Respondent's claim that it wanted to portray a uniform look to visitors and instill a sense of team work is undermined by the fact that no effort was made to ensure that temporary employees, who performed work indistinguishable from permanent employees, presented the same image. I also note that unlike other cases where the Board or the courts have upheld such restrictions on this basis, the Respondent's employees did not work directly with customers or interact with the public as part of their job duties. See *Con-Way Central Express*, 333 NLRB 1073 (2001); *United Parcel Service*, 312 NLRB 596, 597 (1993). Although there is no dispute that employees were permitted to wear union buttons and to display union stickers on their clothing and toolboxes, this does not excuse the prohibition of union clothing. Respondent has not shown any special circumstances that would justify such a partial ban. Accordingly, I find that the Respondent's restriction on employees' wearing of union T-shirts violated the Act as alleged in the complaint.

c. Restrictions on union talk

There is no dispute that Lea held a meeting of the maintenance department employees working on the night crew on April 1 to address the subject of union activity in the workplace. Three employees who were at the meeting testified for the General Counsel, i.e., St. Laurent, Lockridge, and Bloomer. There were a total of 8-10 maintenance employees at the meeting along with Production Supervisors Crumbley and Vinesett. All three employees recall Lea saying that they were not allowed to discuss the Union on the production floor. He told them they could talk about the Union on breaks, in the canteen,

and out in the parking lot, but not on the production floor. St. Laurent and Lockridge recalled that Lea said he would respect their rights if they respected his, and that “worktime is for work.” Bloomer, unlike the other employees, recalled that Lea told the employees they could discuss the Union on the floor if it didn’t interfere with production and if the person they were talking to didn’t object. The employee witnesses also recalled that Lea told them he came to the plant that night because he had received a call to come in. He would not tell the employees who called or what the complaint was that initiated his unusual visit. Lea also told the employees that he would be meeting with the production employees to convey the same message but there is no evidence that Lea met with any other employees that night.

All three employees, as well as others who testified for the General Counsel, said that employees had always been free to talk about nonwork subjects while they were working as long as it did not interfere with production. However, this was not something employees had previously been told. Rather, it appears it was more in the nature of common-sense understanding on the part of employees that you could converse freely as long as you were getting your work done. The Respondent’s supervisors did not contradict this understanding of the practice at the Respondent’s plant.

Lea testified that he went to the plant that night, an admittedly unusual event, because he had received a call from Supervisor Crumbley complaining that employees were standing around talking about the Union and work was not getting done. Crumbley contradicted this testimony when she denied calling Lea. Crumbley did talk to her manager, Brett Whobrey, after observing a maintenance employee standing around the toolcrib for 30 minutes. She also claimed to have an issue with the maintenance guys in her area standing around the machines talking to the operators. She did not know what they were talking about but apparently assumed it was related to the union campaign. It was Whobrey who called Lea based on his belief that the employees were discussing the Union during these incidents. Lea denied telling the employees that they could not talk about the Union on the production floor. According to Lea, he explained to the employees that the Respondent had to make shipments, that he was aware of the union activity and would respect their right to campaign, distribute information, etc., on breaks, in the canteen, and on the property, but he wanted them to respect his right to perform work. Lea testified that he told the employees if they could not agree to that, then “we need to draw up our battle plans right now because I’m respecting your right to campaign and I’m asking you to respect our right to run a business and make shipments.”²¹ Although Whobrey and Crumbley corroborated Lea’s version of the meeting, it took leading questions from the Respondent’s counsel to get Crumbley to parrot the words Lea claimed he used. When first asked what Lea told the employees, Crumbley said, “[T]hey could do it [talk about the Union] on their breaktime, in the parking lot, anytime that it was nonworking production floor area or work time.” Lea, Whobrey, and Crumbley all acknowledged being

²¹ Bloomer recalled Lea making a similar statement about “drawing battle lines.”

aware that the maintenance department employees overwhelmingly supported the Union.

It is well established that an employer violates Section 8(a)(1) of the Act if it imposes restrictions on employees’ conversations that prohibit union talk while allowing other non-work-related topics to be discussed in the workplace. *Industrial Wire Products*, 317 NLRB 190 (1995). See also *Opryland Hotel*, 323 NLRB 723, 729 (1997). Such rules are much broader than a nonsolicitation rule and unduly interfere with employees right to engage in protected concerted activities. As the court of appeals recently said, in affirming a Board order finding such a violation:

[An employer] is free to adopt nondiscriminatory policies that forward its legitimate objectives of maintaining plant productivity and discipline. However, those policies may not target, either through design or enforcement, activity protected by the Act. Because the oral rule promulgated by Muraski was directed only at discussions concerning the Union, the NLRB’s conclusion that the prohibition violated the NLRA is supported by substantial evidence.

Brandeis Machinery & Supply Co. v. NLRB, supra, 412 F.3d at 834.

There is no dispute that the focus of Lea’s meeting with the maintenance employees was union conversations between the maintenance employees and production employees. Although Lea may have told the employees he was concerned about such conversations interfering with production, he expressed no such concern about the multitude of other nonwork discussions that took place in the plant on a daily basis. He was clearly singling out union talk and conveying the message to the employees that such conversations were prohibited in the workplace. All of the employees who testified already understood that they could not stand around, “shooting the breeze” for 20–30 minutes instead of working and all of them denied that they had done anything like that. I do not credit the testimony of Crumbley and Whobrey that employees generally, or maintenance employees in particular, were standing around talking instead of working on April 1. Instead, I find that what concerned Crumbley and Whobrey was the content of employee conversations, i.e., the Union. This meeting occurred the day after the employees as a group went to Richeson and sought voluntary recognition of the Union and 2 days after the Union filed the petition with the NLRB. Moreover, the Respondent only met with employees in the maintenance department whom it knew overwhelmingly supported the Union. The Respondent also was aware that, because of the nature of their work, the maintenance employees had the opportunity to move about the plant and speak to employees in many different departments. The Respondent used its putative concerns about production to single out these employees and restrict them from communicating the Union’s message to their fellow employees. Accordingly, I find that the Respondent violated Section 8(a)(1) of the Act, as alleged, when Lea told the maintenance employees on April 1 that they could not discuss the Union on the production floor.

The complaint alleges that Lea also threatened an employee, on April 1, with discipline if he talked about the Union on worktime and in work areas. This allegation is based on the

testimony of Scott Mayes. Mayes had been employed by the Respondent since October 2000 and was working in the tubing department at the time of the campaign. He was a member of the VOC and in the group that presented the Union's demand for recognition to Richeson on March 31. Mayes testified that, on April 1, at about 10:40 p.m., Lea approached him at his workstation and asked to speak to him. Mayes' machine was running at the time. He and Lea stepped away from the machine. According to Mayes, Lea said he looked upon Mayes as one of the leaders of the organizing committee. Lea then proceeded to tell Mayes the things the employees could not do on the floor for the Union. Specifically, Lea told Mayes he could not talk about UAW proceedings or organize the employees at work, that all this had to be done off the clock, on one of Mayes' breaks, before or after work, or in the parking lot. Mayes documented this conversation in writing when he took his next break. A few days later, when another member of the VOC asked Mayes if he had turned in his notes of the conversation yet, Mayes wrote out another statement to be sure. Both handwritten statements, which are in evidence, are consistent with his testimony at the hearing.

Lea admitted seeking out Mayes on the night of April 1, after his meeting with the maintenance department employees, because he considered him a union leader. Lea claims he told Mayes the same thing he told the maintenance employees, i.e., that he respects Mayes' right to campaign and that he wanted Mayes to respect his right to allow people to work. He denied telling Mayes that he could not talk about the Union at work.

I credit Mayes' version of this conversation. It was consistent with the two statements he wrote close in time to the event. There was nothing in his testimony or demeanor to suggest that the written statements or testimony were a fabrication. At the same time, Lea's testimony was generally not reliable as most of his answers appeared well rehearsed so as to avoid admitting any violation of the Act. Because of the timing of his conversation with Mayes, admittedly soon after the meeting with the maintenance employees, and the fact he singled Mayes' out as a union supporter, I find that this conversation was part of the Respondent's effort, soon after the Union made known its desire to represent the employees, to quash any effort by pro-union employees to organize their coworkers. Significantly, despite Lea's claimed concern for production, he only spoke to union supporters about not "interfering with production" by discussing the Union. As noted above, such efforts by an employer to target union-related conversations, while allowing other nonwork conversations, violates Section 8(a)(1) and I so find.

Several weeks later, the Respondent again found an opportunity to caution union supporters about conversations supposedly interfering with production. It is undisputed that, on April 8, Crumbley spoke to St. Laurent and Lockridge, the two maintenance employees assigned to her department, individually, about speaking to production employees. According to St. Laurent and Lockridge, Crumbley told each of them that they were not to talk to the operators. Both conversations occurred around 6:30 a.m., near the end of the shift. No explanation was given by Crumbley for this new restriction. Lockridge conceded on cross-examination that in response to this new direc-

tive, he told Crumbley that from now on he would not even speak to the operators about work-related issues. Crumbley replied that was not what she meant, that he could still speak to the operators about work, he just couldn't stand around talking to them. According to both St. Laurent and Lockridge, Crumbley's directive was a departure from past practice in which the maintenance employees were encouraged to communicate with the production employees to facilitate a better relationship and enhance their ability to do their jobs, i.e., performing maintenance and making repairs to the machines run by the operators.

Crumbley admitted talking to both St. Laurent and Lockridge and acknowledged being aware that they were union supporters. According to Crumbley, she spoke to Lockridge after observing him standing and talking for 25 minutes with one of the operators, Stephanie Hawkins.²² According to Crumbley, she asked Lockridge if there had been a problem with Hawkins' machine. When he said no, Crumbley said, if there's no problem, there's work to do, you can't just stand around talking. Lockridge responded by telling Crumbley that in that case, he just wouldn't talk to the operators. Crumbley told Lockridge that he needed to talk to the operators about work. Crumbley then spoke to St. Laurent because she claimed he was Lockridge's lead. Crumbley told St. Laurent about her conversation with Lockridge. She also told St. Laurent that they needed to stay busy and that, if they didn't have any work to do, she would find them a project. She admittedly did not say anything to Hawkins about this even though Hawkins was a participant in the conversation. She also did not talk to any other maintenance employees who worked in her area.

I do not find Crumbley's testimony about St. Laurent's and Lockridge's asserted interference with production believable. I find that this was a post-hoc justification for her interference with these two union supporters right to talk to their fellow employees. The Respondent has not shown by objective evidence that union-related conversations by St. Laurent, Lockridge, or any other maintenance employees disrupted operations or interfered with the work of other employees. Since there is no dispute that the Respondent has always tolerated nonwork-related talk among its employees, as long as work was getting done, Crumbley's singling out of two union supporters to limit their interaction with other employees amounted to unlawful interference in violation of Section 8(a)(1) of the Act. Crumbley's conduct in this regard was simply a continuation of Lea's efforts since April 1 to limit union talk among the employees.²³ Accordingly, I find that the Respondent violated Section 8(a)(1) of the Act on April 18, as alleged in the complaint.

²² When asked about this by the Respondent's counsel on cross-examination, Lockridge denied that he stood around talking to an operator for 20 minutes.

²³ Shuler and Mayes both testified that Lea told employees, at meetings they attended during the month of April, that they could not talk about the Union at work, that these conversations were limited to breacktimes and nonwork areas. The complaint does not allege these incidents as separate violations of the Act. Nevertheless, they tend to support the General Counsel's argument that the Respondent generally restricted its prounion employees activities within the plant.

The complaint also alleges that Maintenance Supervisor Mehaffey attempted to limit employees' right to talk about the Union during two separate incidents in May. Both involved employee Scott Sisk. Sisk testified that in early May, the day after attending one of the Respondent's meetings with employees, Mehaffey approached him at work and said, "[I]t's nothing personal between you and Doug Lea, but you're no longer allowed to talk to more than one person at a time on the floor, until after the election." Later that month, on May 21, the day between the two voting sessions in the election, Mehaffey approached Sisk again. According to Sisk, Mehaffey told him it would be "in his best interest," not to talk to anybody else about the Union until after the election was over. Mehaffey also advised Sisk that there would be no disciplinary action taken at this time, but he should avoid talking about the Union. Sisk testified on cross-examination that Mehaffey told him that some employees had complained about things Sisk had said. When Sisk asked who complained or what he said that had offended others, Mehaffey would say only that it was something Sisk said about the Union. Sisk denied that Mehaffey warned him not to "intimidate" or "harass" employees. According to Sisk, Mehaffey said he was not to speak to anyone until after the election.

Mehaffey denied ever having any conversation with Sisk or any other employee about where or when they could talk about the Union. According to Mehaffey, he tried to avoid the topic of the Union altogether. Mehaffey also specifically denied telling Sisk that he was not allowed to talk to more than one employee at a time until after the election. Mehaffey testified that the only conversation he had with Sisk on the subject was the one Sisk described as occurring on May 21. According to Mehaffey, he spoke to Sisk after Whobrey told him that employees in final assembly were complaining that Sisk was threatening them. Whobrey told Mehaffey he wanted him to put a stop to it.²⁴ Mehaffey testified that he met with Sisk and told him complaints had been filed and that people felt threatened and intimidated by his comments. Mehaffey told Sisk he had no intention of taking any formal disciplinary action at that time but he advised Sisk to think about what he said to people. He told Sisk not to say anything that would make people feel uncomfortable. Mehaffey recalled that Sisk was apologetic and told Mehaffey he did not know what he could have said that would make anyone feel threatened. Mehaffey acknowledged being aware of Sisk's support for the Union, because Sisk told him about it. However, he claimed to be unaware that most of the other maintenance employees under his supervision supported the Union. This testimony is surprising in view of the testimony of other supervisors and managers, such as Lea, Whobrey, and Crumbley, that it was common knowledge that the maintenance employees were overwhelmingly in favor of the Union.

As with the earlier allegation involving Mehaffey and Sisk, I found Sisk to be more credible. Mehaffey's feigned ignorance as to the union support of the employees he supervised is unbelievable. The first conversation Sisk had with Mehaffey, in

²⁴ Whobrey corroborated this portion of Mehaffey's testimony and identified the two employees who had complained about Sisk "bothering them" about the Union.

early May, is consistent with the other evidence showing a pattern of the Respondent's supervisors singling out pro-union maintenance employees and restricting their interactions with other employees. It makes sense that the Respondent would do this. After all, the maintenance employees had much more mobility and frequent opportunity to communicate with the more stationary production employees. If the Respondent allowed this group of pro-union employees to freely converse, as it had in the past, the union campaign might be successful. Thus, it was in the Respondent's interest to limit as much as possible the ability of the maintenance employees to talk to their co-workers. I, thus, find that the Respondent violated Section 8(a)(1) of the Act in early May when Mehaffey restricted Sisk's right to talk to other employees about the Union.

There is no dispute that Mehaffey talked to Sisk on May 21 about his union conversations with other employees. Although Mehaffey claims he merely advised Sisk of the complaints of other employees and urged him to be careful what he said, I find based on Sisk's testimony that he went further and told Sisk that it "would be in his best interest not to talk to anyone about the Union until the election was over." This was a veiled threat of discipline. Because the Respondent has not shown that Sisk's conversations with other employees were threatening or intimidating, this warning was overly broad and would reach even protected union conversations. Accordingly, I find that the Respondent also violated Section 8(a)(1) of the Act by Mehaffey's May 21 threat of discipline if Sisk persisted in talking to other employees about the Union.

9. Restrictions on employee movement and closer supervision

a. Monitoring and supervision

Paragraph 8(k) of the complaint alleges that the Respondent violated Section 8(a)(1) of the Act by "more closely supervising and monitoring the work of pro-union employees." Two supervisors are allegedly responsible for this conduct, i.e., Bill Vinesett and Jon Nichols. The latter's action involved McSwain and will be discussed later in this decision along with the other allegations involving McSwain, McClure and Stiles, who worked together in the tubing department, on the same line as McSwain but on a different shift, testified regarding Vinesett's conduct.

McClure and Stiles testified consistently that Vinesett's conduct toward them changed noticeably once they openly displayed their support for the Union by wearing buttons, etc. According to McClure and Stiles, they rarely saw Vinesett during their 12-hour shift. McClure testified, for example, that if he needed to speak to Vinesett, he had to search for him. McClure would usually find Vinesett in the supervisor's office or in the smoking area. During the height of the union campaign, however, in April and May, Vinesett would frequently come to their work area and check the paperwork, examine parts they produced, and walk or stand near the machines they were running. McClure and Stiles further testified that Vinesett also began following them on breaks and to the restroom. As soon as the election was over, according to these employees, Vinesett reverted to his former ways. McClure and Stiles acknowledged on cross-examination that, despite this apparent

loser supervision, Vinesett never took any adverse action against them, nor criticized their performance or work habits.

There is no dispute that Vinesett did not become McClure's and Stiles' supervisor until sometime in February, around the start of the campaign. He was only their supervisor for about 4–5 months, until July. Vinesett acknowledged that he spent more time in their work area, that he reviewed paperwork, and checked parts. However, Vinesett claimed this had nothing to do with their support for the Union, of which he was admittedly aware. Instead, according to Vinesett, he did this because he was new to the department and wanted to learn the operation he was supervising. Vinesett also admitted going on meal and smoking breaks at the same time as McClure and Stiles but claimed this was something he routinely did with all employees.²⁵

I found Vinesett's explanation for his activities during the union campaign unbelievable. He had worked for the Respondent for 10 years, had been a supervisor for 2 years and, at the relevant time period was supervising employees in rod and tubing, similar departments. Moreover, Stiles and McClure testified that it was not necessary for Vinesett to review their paperwork or check their parts because this is what the lead persons were supposed to do. The Respondent argues that the testimony of McClure and Stiles is "unlike that of any other witness" so therefore it's unlikely that Vinesett was more closely monitoring or scrutinizing them. The Respondent argues further that the employees merely perceived Vinesett's harmless efforts to learn the job as being union motivated. I disagree. The testimony of McClure is consistent with the pattern of the Respondent's behavior toward the maintenance department, toward other leading union supporters like Scott Mayes and, as will be shown, toward McSwain. The Respondent, by telling a union supporter he could not eat lunch where he had routinely eaten before, telling employees who were normally free to converse with their coworkers that they could not talk about the Union, and standing around watching and monitoring the activities of McClure and Stiles all amount to efforts by the Respondent to crack down on union supporters and inhibit their ability to organize their fellow employees.

Based on the above, I find that the Respondent violated Section 8(a)(1) of the Act by more closely supervising and monitoring the work of prounion employees during the April–May period prior to the election.

b. Restrictions on movement

Paragraph 8(1) of the complaint alleges that the Respondent, through Supervisor Mike Ellington, "restricted the movement of prounion employees in the work areas of the plant" on May 21, the day in between the two voting sessions. Employees Tony Bollinger and William Phillips testified regarding this allegation.

Bollinger and Phillips are facilities maintenance technicians, the only two in the department. They are supervised by Ellington, the facility manager. These are the only employees that

Ellington supervises. Bollinger and Phillips are responsible for maintenance of the physical plant, including the exterior of the building. Bollinger testified that, at about 9:30 a.m. on May 21, Ellington approached him in front of the waste treatment center door and told Bollinger that he and Phillips could not be on the floor that day. When Bollinger asked why? Ellington responded, you just can't be on the floor and that if they were, he (Ellington) would get in trouble. Bollinger testified that he had never before been told that he could not be on the floor. He also testified that many of their regular job duties would require them to be on the floor at some point in the day, such as removing hazardous waste from the paint line. Bollinger relayed Ellington's instruction to Phillips and he and Phillips worked outside the plant, cleaning a fountain and sweeping the back parking lot, that day. Phillips corroborated Bollinger regarding the instructions relayed by Ellington that day. There is no dispute that Ellington usually conveyed work instructions to one or the other and expected the instruction to be relayed to the other.

Ellington denied specifically telling Bollinger or Phillips that they could not be on the production floor on May 21. He had no recollection of any conversation he had with either of them that day. There is no dispute that Phillips was a very active supporter, being a member of the VOC, and that Bollinger openly displayed his support for the Union by wearing buttons, having a union sticker on his toolbox, handbilling, and speaking to other employees about the Union during breaks. As with the other maintenance department employees, the facilities techs were highly mobile in the job and usually roamed freely through the plant, interacting with other employees as they went about performing their duties.

I find no reason to discredit Bollinger or Phillips, who both impressed me as credible witnesses. They would have no reason to fabricate this incident since they are still being supervised by Ellington on a daily basis. Ellington's denial was self-serving. Accordingly, I find that Ellington in fact instructed Bollinger, and indirectly Phillips, to stay off the floor on May 21. I find that this instruction was consistent with the pattern found above of the Respondent trying to limit the opportunities prounion maintenance employees had to campaign for the Union. On May 21, there had already been 1 day of voting with another scheduled the next day. The Respondent may have believed that the vote was close and was attempting to prevent a union victory by keeping these two union supporters away from other employees who had yet to vote. I find that this conduct violated Section 8(a)(1) of the Act as alleged in the complaint.

10. Solicitation of grievances via formation of employee committees

Paragraph 8(q) of the complaint alleges that various supervisors, on various dates before and after the election, "initiated, sponsored, promoted, and formed department advisory committees for the purpose of soliciting employee grievances and promising to remedy employee grievances." Because several of the incidents that occurred before the election involved conduct directed toward McSwain, these allegations will be discussed and resolved in connection with the other allegations involving

²⁵ McClure and Stiles, because of the nature of the operation they ran, had to take breaks separately. Vinesett did not explain why he needed to go on break with both employees or how he found the time to go on breaks with other employees as well.

him. The remainder of the allegations covered by paragraph 8 are inextricably related to the 8(a)(2) allegation in paragraphs 13 and 14. I will address those allegations together in the last section of this decision.

C. The 8(a)(3) Allegations

1. Wage increases

The complaint alleges, at paragraph 11, that the Respondent granted pay raises to its maintenance employees on or about mid-April, and to its lead operators on or about mid-May in violation of Section 8(a)(1) and (3) of the Act. There is no dispute that the Respondent gave its employees in these two categories wage increases in April and May, respectively. The issue is whether the increases were granted for discriminatory reasons and/or to influence the outcome of the election, or whether the raises were part of a plan already in place before the Respondent became aware of the Union's organizing campaign.

At the beginning of 2004, before the employees began their organizing activities, the Respondent maintained two pay systems, one for production jobs and the other for maintenance employees. As described by Lea, the production employees' wage rate was determined under a "pay-for-skills" system consisting of five levels (job classifications). Within each level, employees could increase their rate of pay by obtaining additional certifications showing that they had acquired new skills. The Respondent's 24 lead operators were all classified as level IV with their individual rates of pay ranging from \$16.32 to \$19.53 per hour, depending upon the number of certifications each possessed. Because of differences in the number of skills, machines and employees in the different departments, some lead operators were able to progress along the pay scale faster than others, leading to some dissatisfaction among the leads.

The Respondent's maintenance employees were paid under a "non-pay-for-skills" system, according to Lea. Under this system, maintenance employees were classified either as a level V maintenance technician or a level VI maintenance specialist.²⁶ Within each level, employees progressed at 1-year intervals without being required to demonstrate additional skills. To progress from a level V to a level VI, however, a maintenance employee had to have an associates degree or equivalent experience in electronics. Joel Kendrick, who was a maintenance supervisor during the campaign and became the assistant maintenance manager, testified that the primary difference between level V and level VI was that the higher level required expertise or training in electronics. Because 90 percent of the maintenance work in the plant was mechanical rather than electronic, these additional skills were seldom utilized. Consequently, level V technicians were frequently required to perform the same work as level VI specialist, often working side-by-side, without receiving the higher pay. Needless to say, this engendered considerable unhappiness among the maintenance technicians. According to Kendrick, this issue had been around for several years before 2004.

As noted at the beginning of this decision, the Respondent embarked upon a new and improved employee communication

program about the time its employees started talking about the need for union representation. In the course of employee meetings held in January and February, lead operators and maintenance employees voiced their dissatisfaction with the current pay system. Thus, Lea and other management personnel were well aware of these concerns when they first learned of the union campaign.

a. Maintenance employees' raises

Charles Murphy, who was a level V maintenance technician during the campaign, testified in detail regarding a meeting that the Respondent's acting maintenance department manager, Ed Twist, held with the maintenance employees on February 20. At this meeting, Twist announced that the Respondent had developed a new job description combining the level V and level VI classifications. Twist told the employees that the Respondent would provide on-site and off-site training to current level V techs so that they could perform the level VI work. According to Murphy, Twist told the employees that he expected it would take about a year for the level V techs to be performing level VI work. When Murphy asked Twist if he would receive level VI pay for performing level VI work, Twist put up his hand and said he was not there to talk about money. Murphy's testimony regarding this meeting was substantially corroborated by the other maintenance employees who testified.²⁷ Twist was not called as a witness in this proceeding. Kendrick, who was at the meeting, corroborated the employees' testimony that Twist refused to discuss pay in response to employee questions. Although Kendrick did not recall Twist saying that the employees had to complete training before receiving level VI pay, he did recall Twist telling the employees that he expected all level Vs to be trained to perform level VI work.

The General Counsel's witnesses testified consistently that nothing else was said after this meeting about the newly combined job classification or about their rate of pay. They also agree that no additional training, either in-house or off-site, was provided before the election. It is undisputed, however, that all maintenance employees, except for the two facilities maintenance employees, received a raise in mid-April. The employees learned of the raise when they received it. When Bollinger and Phillips, the facilities maintenance employees, found out that the other maintenance employees had received a raise, they went to human resources about it. Phillips testified that, when he asked Kelly Rice why he and Bollinger didn't get a raise, Rice replied that they were in a different classification. According to Phillips, Rice also said that if their supervisor didn't have a problem with it, they would get the raise as well. Phillips and Bollinger then spoke to their supervisor, Mike Ellington, who agreed that they should get the same raise as the other maintenance employees. Bollinger and Phillips received the same raise in their April 22 paycheck without being required to undergo any additional training. Rice essentially corroborated Bollinger and Phillips, acknowledging that the facilities maintenance employees were not initially included in the pay raise

²⁷ St. Laurent, Lockridge, and Gentle also testified about this meeting.

²⁶ Level V techs were paid at the rate of \$19.53 per hour and level VI specialist received \$20.09 per hour.

and were only given an increase after they complained about this.

Kendrick testified for the Respondent and essentially confirmed the testimony of the General Counsel's witnesses. Kendrick testified that, although a decision was made by February to address employee complaints by combining level V and level VI into one classification, no decision was made regarding a change in pay at that time. In fact, according to Kendrick, Twist was opposed to giving the employees any more money before they were trained and qualified to do level VI work. Kendrick testified that he disagreed with Twist and believed that the employees should be receiving the same rate of pay if they were doing the same work. Kendrick recalled that, sometime in March, after the jobs had been combined, two maintenance employees, Steve Parris and Robert Green, requested a meeting to discuss their complaints about the different rates of pay in the maintenance department. At this meeting, Twist adhered to his position that the employees had to prove themselves before getting a raise. After this meeting, Kendrick spoke to Lea and Richeson about his disagreement with Twist over the pay issue. According to Kendrick, it was at this point that a decision was made to give the level V techs a raise, bringing them up to the level VI rate of pay. It was also around this time that Twist was moved to a different position and Kendrick took over management of the maintenance department.

Although the stated rationale for giving a raise to maintenance employees was to address the employees' complaints that they were all doing the same work without receiving the same pay, the Respondent gave its level VI maintenance employees a 50-cent-per-hour raise at the same time that it raised the level V pay. Kendrick testified that the level VI employees received a raise to compensate them for additional training they were expected to provide to the level V techs. He referred to this as payment for "mentoring". However, on cross-examination, Kendrick was unable to point out what additional training the level VI employees provided to the level V employees to justify the increase. Although Kendrick claimed that some training was provided to the level V employees, he could not recall whether it was before or after the raise was implemented. Kendrick also testified that he did not know why the facilities maintenance employees received a raise in April because they did not maintain machines and therefore were not required to have level VI training or skills. Kendrick did not know that Bollinger and Phillips received the same increase until afterward.

Lea also testified about the maintenance department raises, but his testimony was not consistent with that of Kendrick. According to Lea, the decision was made to combine level V and level VI in March, after he was called into the meeting with the two maintenance employees that Kendrick described. Although he claimed that he was aware Kendrick and Twist had been discussing the issue for some time before this, it was only after this meeting that a decision was made. Lea also testified that it was Richeson who decided to go ahead with a wage increase over the objections of Twist. According to Lea, Twist's objection to giving a raise to level V technicians was based on a lack of training funds to bring them up to level VI skills. Lea testified that the level VI employees were given an extra 50

cents an hour to assist with training and address these concerns. Although Kendrick and Lea claim that the decision was made in March to go forward with the increases, it was not until mid-April that the employees actually received the raises.

There is no question that Lea, Richeson, Kendrick, and the rest of the Respondent's management were aware of the union campaign at the time they made the decision to implement these increases. As noted above, Lea acknowledged he was aware of union talk among the employees as early as mid-February and Kendrick admitted knowing about it in January. Kendrick and Lea also acknowledged that they were aware of the strong support for the Union among the maintenance employees. By mid-April, when the raise went into effect, the Union had filed its petition and an election was imminent.

In *NLRB v. Exchange Parts Co.*, 375 U.S. 405, 409 (1964), the Supreme Court recognized the inherent danger in well-timed increases in wages and benefits and found that a grant of benefits intended to influence employees' choice in an election violates Section 8(a)(1) of the Act. Although the grant of benefits during an election campaign is not per se unlawful, the Board will draw an inference of improper motivation and interference with employee free choice where the evidence shows that employees would reasonably view the grant of benefit as an attempt to interfere with or coerce them in their choice of representative. An employer may rebut this inference with proof of a legitimate business reason for the timing and grant of the benefit. *Southgate Village, Inc.*, 319 NLRB 916 (1995); *Holly Farms Corp.*, 311 NLRB 273, 274 (1993), *enfd.* 48 F.3d 1362 (4th Cir. 1995), *affd.* 517 U.S. 392 (1996). More recently, the Board held that the timing of an employer's announcement of wage increases during a union campaign may be unlawful even if the wage increase itself does not violate the Act. *Mercy Southwest Hospital*, 338 NLRB 545 (2002), and cases cited therein. *Accord Sun Mart Foods*, 341 NLRB 161 (2004).

I find that the Respondent has not rebutted the presumption here with respect to either the timing of the increase or its announcement. The issue of unequal pay for equal work was a concern to the maintenance employees for some time before the union campaign and, in all probability, was one of the reasons the maintenance employees sought union representation. Although the Respondent was admittedly aware of this concern, and had discussed ways to address it, it clearly had not decided to give the employees a raise before learning of the union activity among its employees. At most, the Respondent had decided to combine its level V and level VI maintenance jobs and provide training to the lower-paid employees so that they, eventually, could receive the higher pay. Only after becoming aware of the maintenance employees' interest in the Union was a decision made to pay the employees first and train them later. Moreover, rather than simply raise the pay of the level V employees so that they were equal to their colleagues in level VI, the Respondent went further and gave the level VI employees a raise, which would only continue the pay inequity that purportedly was the impetus to combining the job classifications in the first place. Then, when the two maintenance employees who had nothing to do with maintaining machines, and thus no need to acquire level VI skills, complained that they had been left out of the Respondent largesse, the Respondent promptly gave

them a raise as well. It is obvious that these raises were not part of a process that had already been implemented, such that to withhold a raise would lead to unfair labor practice charges. The only plan the Respondent had before the Union was to provide training and decide whether to increase wages later. Once the Union appeared, the Respondent gave employees a raise and all but forgot about the training.

Based on the above, I find that the Respondent violated Section 8(a)(1) and (3) of the Act, as alleged in the complaint, by giving its 27 maintenance employees a raise in mid-April to influence them to vote against union representation.

b. Lead operators

There is no dispute that the Respondent gave all its lead operators a raise, in their paychecks received on May 20, which brought them all to the level V rate of pay, i.e., \$19.53 per hour. Blair Heffner was the only lead person to testify for the General Counsel. He recalled being called into a meeting with all the other leads, sometime in mid-May, and being told that the Respondent had decided to recertify all the leads on every machine in the plant, give them a new base wage and eliminate the need to recertify every year. According to Heffner, Kelly Rice and Heidi McMinn, from human resources, conducted this meeting. Heffner testified further that he did not attend any meetings prior to this at which lead operator pay was discussed.

Heffner and the Respondent's witnesses agreed that there was a longstanding complaint among the leads about the "pay-for-skills" system. Under that system, some leads who worked in departments that did not have a lot of different machines could receive certifications and reach the top of the scale without much effort while leads in other departments had to learn more machines to get to the same level. In addition, in order to keep their current rate, all leads had to recertify every year. In a busy department with more employees, the leads were pressed for time and had difficulty recertifying. In contrast to Heffner's testimony, the Respondent witnesses, Lea and Rice, described a series of meetings beginning in January at which these and other issues were discussed with employees, including the lead operators, and plans were made to address them.

The testimony of Lea and Rice, and documents offered by the Respondent, show that the Respondent first discussed the possibility of moving all the lead operators to a nonpay-for-skills level V at meetings in early March. According to Lea and Rice, some of the lead operators at the meeting voiced objection to this idea and the Respondent decided to hold off implementing it until Rice had a chance to meet with the lead operators to discuss these objections.²⁸ Although Lea testified that Rice and Heidi McMinn held these meetings in mid-March and reported back to him before the end of March, Rice testified that he and McMinn did not meet with the leads regarding their objections until late April.²⁹ In fact, a document purporting to be a slide shown to employees during a series of plantwide

²⁸ The objection, which was raised by a very few lead operators, had to do with the apparent unfairness of everyone now receiving the same rate as those lead operators who had spent years certifying in enough skills to receive the higher rate.

²⁹ According to Rice, he was unable to meet with the leads before late April because he was busy responding to the Union's petition.

meetings held during the week of March 29 states: "Lead pay will not be adjusted at this time." According to Rice, it was after this meeting, and presumably after the Union's petition was filed on March 30, that he and McMinn met with the lead operators and determined that the objections they had were not sufficient to warrant holding off any longer. At that point, the decision was made to reclassify all the lead operators to a level V. The amount of increase each received depended on where each was at on the level IV scale. The Respondent's records show that four lead operators were already receiving \$19.53 per hour and received no raise. The other lead operators received raises ranging from \$.66 to \$3.21 per hour. In all, 28 lead persons received raises in May.

As with the raise given to the maintenance employees, the Respondent clearly had not made a decision to implement this increase before the Union's petition was filed. On the contrary, the Respondent had told employees there would be no pay adjustment for lead operators. Then, almost 2 months later, and within days of the election, the Respondent went ahead with the adjustment. I find the explanation offered by Lea and Rice as to the reason for the change in position and the timing of the announcement wholly incredible. Even assuming I accepted the Respondent's explanation for its change from the March 29 decision not to grant a raise, the timing of the announcement, so close to the election, was clearly unlawful under the rationale of *Mercy Southwest Hospital*, supra. In reaching my conclusion that the lead operator raises violated the Act, I also note that the evidence establishes that the Respondent was aware of union activity among its employees by mid-February, at the latest. Thus, even assuming it made a decision to adjust these employees' pay in February, the inference would still be strong that it was intended to influence these key employees to withhold their support for the Union.³⁰ There is no dispute that the issues raised regarding the pay-for-skills system as it applied to the leads were not new in January and February 2004. The Respondent has not rebutted presumption that the timing of the Respondent's plan to address these concerns was unrelated to the union organizing campaign. Accordingly, I find, as alleged in the complaint, that the raises given to 28 lead persons on or about May 20 violated Section 8(a)(1) and (3) of the Act.

2. The discharge of McSwain and related allegations

The complaint alleges, at paragraphs 9, 10, 11, and 15, that the Respondent suspended Dennis McSwain on June 14, and discharged him on June 17, in violation of Section 8(a)(1) and (3) because of his union activities. In addition, as noted above, McSwain was the sole witness to a number of independent 8(a)(1) allegations in the complaint that I have previously deferred ruling on. I will now consider all of these allegations together because credibility of McSwain and his opposing witnesses is key to their resolution.

McSwain had been employed by the Respondent at the Gastonia plant since December 11, 1998. During the relevant pe-

³⁰ Although the degree of union support among lead persons was not as strong as it was among the maintenance employees, the Respondent's witnesses conceded that the lead operators were in a position to influence other employees one way or another because of their role in the plant.

riod, from January to June, 2004, he worked in the tubing department, running line 4 on the A shift, working from 7 a.m. until 7 p.m. His line consisted of four machines that made the outside shell of gas spring tubes. McSwain's partner on the line was Chris Paysour, an employee whom all parties acknowledge was frequently absent during this period. Heffner was his lead person and Lane Turner his immediate supervisor. Turner reported to Jon Nichols, the focus area manager for the rod and tubing departments.

There is no dispute that, except for a brief period in early 2004 when McSwain missed some work during his brother's illness and subsequent death, he was a hardworking, dependable employee on whom the Respondent could rely when it needed to get the job done. McSwain testified that he "worked every hour they ever asked me to work." A summary of the Respondent's payroll records confirms that they, i.e., the Respondent's supervisors, asked him to work a lot. Particularly during the period of the campaign, from late February until his termination in June, it was common for McSwain to work more than 20 hours of overtime a week. The undisputed evidence shows that the Respondent frequently asked McSwain to fill in for absent employees not only on his shift but on others as well because his line was so critical to the Respondent meeting its production goals. In fact, McSwain was working so many hours that his supervisor, Turner, expressed concern for his health in a memo to Nichols dated June 13 that will figure prominently in the discussion of McSwain's termination.

McSwain became aware of the union activity when he returned to work in late February following the death of his brother. According to McSwain, he did not become involved initially because he didn't believe a union would bring about change in upper management.³¹ McSwain testified that his first conversation with any supervisor or manager about the Union occurred on April 1 when Lea approached him on the line while he was working. According to McSwain, he and Lea had a good relationship and spoke frequently on a wide range of topics. On April 1, Lea asked McSwain how he felt about the Union. McSwain told Lea he didn't think the Union would help the employees and that he, personally, did not want a union. According to McSwain, Lea then asked him what was the biggest complaint among employees in the department. McSwain replied that he didn't know but would try to find out. Lea did not specifically deny having this conversation with McSwain. He corroborated McSwain's testimony about the nature of their relationship before the union campaign, testifying that the two spoke frequently and openly about many issues in the plant. Lea claimed, however, that the first time the two men spoke about the Union was several weeks to a month before the election when he saw McSwain wearing a union button. According to Lea, he said, "I'm surprised at that Dennis." McSwain answered by saying that he was not for the Union but was only wearing the button so other employees wouldn't harass him. Lea claimed that McSwain told him he was voting no in the

³¹ Despite his feelings about the Union, McSwain did sign a union authorization card presented to him by Gentle soon after he returned to work, sometime in early March. According to McSwain, he did this just to get a vote on the union issue.

election. The only other discussions about the Union that Lea admits having with McSwain involved the T-shirts that McSwain had made and was distributing in the shop, conversations which will be discussed later.

The General Counsel amended the complaint at the hearing to allege that Lea's questioning of McSwain amounted to unlawful interrogation in violation of Section 8(a)(1) of the Act. This allegation was probably not included in the complaint initially because McSwain failed to mention it in his affidavit during the investigation. When confronted with this discrepancy during cross-examination, McSwain testified that he did not mention it to the investigator because the investigator asked if any supervisors had talked to him about the Union and McSwain did not consider Lea at the time to be one of his supervisors because he worked in human resources. He explained the fact that he included other conversations with Lea in his affidavit because in those instances he was asked by the investigator what happened during specific instances. The Respondent argues that McSwain's testimony as to this allegation and others should be disregarded because he displayed a tendency to embellish the truth and exaggerate the facts. The Respondent also questioned several witnesses, including other employees, to show that McSwain had a reputation for untruthfulness. On rebuttal, the General Counsel was successful in establishing that the alleged fabrications of McSwain that these witnesses described actually had a basis in fact and were not lies. Nevertheless, McSwain's testimony was not entirely free from doubt. At the same time, I have previously noted my concerns with Lea's overall credibility and have found that Lea engaged in other acts of interrogation. Considering all of the evidence in the record, as well as the demeanor of McSwain and Lea, I find that McSwain's testimony about this conversation is more credible. Because McSwain was someone that Lea admittedly felt comfortable talking to about workplace issues, it is reasonable to believe he would have sought McSwain's opinion on the union issue. Subsequent events confirm this view. Because Lea's questioning of McSwain, at a time when he had not openly displayed any support for the Union, and directed at learning the views of other employees, violated the Act under the Board's test for interrogation, I find that the Respondent violated the Act as alleged in the amended complaint. See *Westwood Healthcare Center*, supra.

McSwain testified that he also had a conversation on April 1 with Tom Napoli, the Respondent's manufacturing manager for fabrication and assembly and Nichols' boss at the time. According to McSwain, Napoli opened the conversation by saying that he knew he couldn't talk to him about the Union. McSwain replied that, as long as they talked "man-to-man," he didn't mind. Napoli then asked McSwain the same question Lea had, i.e., what was the biggest complaint among employees in the department and how McSwain thought the Union might help. McSwain told Napoli the biggest complaints were pay and certification. McSwain explained that the issue was favoritism affecting whether supervisors gave employees the certification they needed to receive raises under the pay-for-skills system. McSwain testified that Napoli came back a couple hours later and asked McSwain if he would be willing to talk to Kelly Rice in human resources about this and McSwain said he would.

Napoli then set up a meeting with Rice for the following Wednesday. Napoli admitted having a conversation like this with McSwain but denied there was any mention of the Union. According to Napoli, he spoke to McSwain because the tubing department was a focal point in problems the Respondent was having in meeting production during the Spring. Napoli questioned McSwain and other employees in the department to try to find out what the problem was. Napoli also admitted asking McSwain to participate in a committee to address the issues he raised.

The General Counsel also amended the complaint to allege this conversation as unlawful interrogation. To the extent Napoli disputes McSwain's testimony that his questioning related to the ongoing union campaign, I credit McSwain. The other evidence in the record establishes that the Respondent was keen on learning what issues were of concern to the employees in order to address them. The Respondent's efforts in this regard increased once the Union filed its petition. It is thus probable that, as part of that effort, Napoli would have sought out someone like McSwain to find out what employees' concerns were. Accordingly, I find that the Respondent violated Section 8(a)(1) of the Act on April 1 through Napoli's questioning of McSwain.

McSwain testified that, during his meeting with Napoli and Rice the following week, Napoli relayed to Rice the concerns that McSwain had expressed and told Rice that other employees were complaining about pay and certifications in the group meetings that the Respondent was holding during the month of March, alluded to above in connection with the unlawful raises. Rice told McSwain and Napoli that the only way the Respondent could address these concerns was by setting up a committee. Napoli told Rice to go ahead and set up the committee and have McSwain run it, reporting back to Napoli.³² According to McSwain, within a few days, there was a posting on the bulletin board soliciting employees to sign up for a pay and certifications committee. McSwain signed up for the committee and was told by Napoli that the committee was selected and would meet the following week, which was sometime in mid-April. McSwain testified that when he showed up for the scheduled first meeting of the committee, only he and Nichols were there. When McSwain asked Nichols where was everybody, Nichols identified the rest of the committee members as Ruben Jackson, a lead person, Boyd Mason and Matt Williams. McSwain told Nichols these were all "no" votes, meaning they were against the Union, and that Napoli and Rice told him the committee would be open to everyone. Nichols replied that these were the only people who signed up.

Because none of the other employees showed up for this first meeting, another was scheduled for the following week. Everybody showed up for this meeting. The committee first met with Bill Jordan, the individual in charge of the Respondent's Kaizen program.³³ Jordan gave a class on the guidelines the com-

³² As noted above, Napoli admitted asking McSwain to participate in such a committee.

³³ Kaizen is a process improvement program first developed in Japanese manufacturing facilities which uses work teams to solve produc-

tion and similar problems. The Respondent had utilized such a program since about 1997.

tee had to follow to change company procedures. The committee then moved to a conference room in the human resources department where Nichols told the employees they would have to have officers, i.e., a president, a vice president, a secretary, and a "flunky." Nichols then appointed the officers, Jackson would be the president, Mason the vice president, Williams would be the secretary, and McSwain would be the "flunky." At that point, according to McSwain, he got up and left the meeting to speak to Rice. He complained to Rice that Napoli and Rice had promised McSwain that he would run the committee and that Nichols would not be involved. Rice responded that it was Nichols' department and he had to run the committee. He suggested that McSwain speak to Napoli. McSwain then went to see Napoli and made the same complaint to him about Nichols taking command of the committee. Napoli told McSwain that Nichols needed the experience, that it was his department. Napoli also reassured McSwain that anything that came out of the committee would still have to go through Napoli and that he would ultimately control it. Napoli asked McSwain to please rejoin the committee and McSwain agreed.³⁴

Napoli and Rice corroborated McSwain regarding how the committee was set up in response to issues raised by McSwain in his conversation with Napoli.³⁵ They both recalled the meeting in Rice's office and Napoli admitted soliciting McSwain to be on the committee. Napoli and Rice dispute McSwain's testimony that they promised or otherwise led him to believe that he would run the committee. According to Napoli and Rice, it was always envisioned that Nichols, as manager for that department, would be responsible for its activities. Rice also corroborated McSwain's testimony that he complained to Rice about Nichols' involvement in the committee. Rice recalled that McSwain's complaint was that Nichols did not have an open mind toward changing procedures and was not being receptive to the employees' ideas. Rice testified that he discussed these complaints with Nichols and told Nichols that he would have to respect employees' ideas and discuss them with the committee even if he disagreed. Rice denied that McSwain ever complained that Nichols called him a "flunky." Napoli, on the other hand, denied receiving any complaints from McSwain after the committee was formed. According to Napoli, after the committee was formed, he had no further involvement with it. The only complaint Napoli recalled from McSwain involving Nichols was made before the committee was formed and related to Nichols' management style. According to Napoli, McSwain complained that Nichols' tone toward him when presenting things was derogatory. Napoli did not recall McSwain ever complaining that Nichols referred to him as a "flunky." Nichols and the other three employees on the committee testified for the Respondent about the initial organizational meeting but their recollection is somewhat different from that of McSwain.

tion and similar problems. The Respondent had utilized such a program since about 1997.

³⁴ McSwain admitted to having a low regard for Nichols, referring to him in conversation with other supervisors as a "dumbass."

³⁵ In fact, Rice admitted on cross-examination that, had McSwain not come forward with the issues he raised, no committee would have been formed.

While Nichols corroborated McSwain's testimony that the group met initially with Jordan to learn the guidelines for such a committee and that Nichols told the committee they would need someone to be a spokesman and someone to take notes, he denied dictating who would fill these positions and specifically denied telling McSwain that he would be the "flunky."

Of the three employees who testified for the Respondent on this issue, only Williams claimed to have volunteered to be on the committee. Jackson expressly denied that he volunteered, testifying instead that Nichols asked him to be on the committee. According to Mason, he "got volunteered" to be on the committee. Jackson, Mason, and Williams all recalled attending the training session with Jordan where they received guidelines on the operation of such a committee. After this, they met with Nichols to organize the committee. Although all three claim that Nichols did not "dictate" roles for the employees on the committee, Jackson testified that Nichols wanted him to be the leader because he was already a lead person.³⁶ Jackson testified that he did not want to be the leader and kept trying to push the job off on someone else. After going back and forth on the matter, Jackson finally consented to take the leadership role. He denied that Nichols referred to this position as the "president" and denied that Nichols referred to McSwain as "the flunky." Mason's testimony was the closest to that of McSwain. He testified that, after meeting with Jordan, Nichols told the committee they had to pick a leader and that the four employees, without Nichols present, picked a "president, vice president, secretary, etc." While denying that Nichols called McSwain "the flunky," Mason recalled that he was referred to as "the member" of the committee since all the other employees had titles. Finally, Williams testified that the employees themselves picked people to fill various roles after Nichols told them they had to pick someone to take notes. Although he claimed that Nichols did not identify any other positions to fill, he testified that because Jackson was already a lead person, "it migrated to him to be the leader," that Mason, as a backup lead and trainer was "next-in-line," and that Williams ended up taking notes. Although Williams also denied that Nichols referred to McSwain as the "flunky," there clearly was no role left for him. It is significant to note that the written guidelines for such committees maintained by the Respondent provide for organizing a committee with a leader, subleader, scribe, and one or more members.

After the initial meeting, the committee continued to meet to come up with a recommendation to improve the testing and certification process and address employees' concerns regarding how raises were determined. From the testimony of the four employees on the committee, who were pretty consistent on this point, they met three or four times in total in the latter half of April and were successful in developing a new procedure for testing and certification. When the employees presented their plan to Nichols, he accepted it and said he would get back to them, but never did. All four employees agree that no more was said about the committee or its work and none of their recommendations were ever implemented.

³⁶ Shortly after the election, Jackson was promoted to supervisor.

Having considered the testimony of McSwain and the other employees regarding the formation and organization of the employee committee, it is clear, despite the conflicts in certain parts of the testimony, that the committee came about as a result of Napoli's solicitation of grievances during his conversation with McSwain at the beginning of April. Because the committee was formed precisely to address a concern that McSwain cited in connection with the union campaign, I find this was an attempt to convey to employees early in the campaign that the Respondent was attempting to resolve their grievances without the need for a union. As such, the conduct amounted to an implied promise of benefits and violated Section 8(a)(1) of the Act as alleged at paragraph 8(q) of the complaint. *Traction Wholesale Center Co.*, 328 NLRB 1058 (1999).

The complaint does not allege that Nichols reference to McSwain as the committee "flunky" was unlawful. At most, if credible, it would be evidence of the Respondent's animus toward him. However, I agree with the Respondent that the use of the term "flunky" was a matter of perception on McSwain's part. None of the other employees who were at the initial organizational meeting of the committee corroborated McSwain in this regard. Although it is true that all testified for the Respondent and would have an interest in testifying favorably toward the Respondent to protect their jobs, it did not appear to me that they were being untruthful. At the same time, they did corroborate McSwain to the extent that, after all the positions identified by Nichols had been filled, there was nothing left for McSwain than to be a "member." This had to have been a let-down for McSwain since he clearly was the motivating force in the formation of the committee and I credit his testimony that Napoli and Rice led him to believe he would lead the committee. Once Nichols became involved, McSwain's influence was eroded. I credit Jackson's and Mason's testimony that Nichols selected the other members of the committee and that it was Nichols who essentially determined that Jackson would be the leader. Thus, although Nichols may not have used the word "flunky," his actions when the committee commenced operations clearly conveyed to McSwain that this was the role left for him.

McSwain testified further that, at one of the committee meetings, sometime in the latter half of April, the subject of the Union came up. According to McSwain, he had been handed a flyer by union supporters on the way into work which was a reprint of a newspaper article regarding the unfair labor practice case involving the Respondent's former plant in Colmar, Pennsylvania. The article, dated March 7, 1991, and carrying the headline, "*Top court backs UAW Local in Montco dispute*," referred to the Supreme Court's decision not to hear the Respondent's appeal of the NLRB's Order in that case and the potential for a backpay award to striking employees. McSwain brought the flyer with him into the committee meeting. At first, only he and Jackson were there. While they were talking about the article, Nichols walked in. According to McSwain, he asked Nichols if they could talk about the article. Nichols said he could talk to them about it "off the record" since they were all "no" votes. After reading the article, Nichols threw the flyer down on the table and said, "[T]his is just UAW bullshit." McSwain told Nichols that this wasn't just something the Un-

ion said, that it was from a national newspaper, the Philadelphia Daily News. McSwain also told Nichols that statements in the article contradicted what the Respondent had been telling employees at meetings, i.e., that the Respondent did not have to pay anybody at the Colmar plant when they went on strike.³⁷ According to McSwain, Nichols picked up the flyer again, looked at it and threw it back down, saying, “[L]et me tell you something, I’ll fire any s— of a b— that pickets with the Union.” McSwain told Nichols to calm down, that he was only seeking the truth about the statements in the flyer. At that point, Nichols stomped out of the room. McSwain testified that Nichols came back after a short time and called Jackson out of the room. When Jackson returned he told McSwain there would be no more committee because McSwain had made Nichols look like a child.

Nichols denied that there was ever a point during the committee’s existence at which he was in the room with only Jackson and McSwain. Nichols further denied that McSwain ever raised the issue of the Colmar plant, showed him any flyer about it, or demanded to know the truth about Colmar. Although he did not recognize the flyer when shown it at the hearing, he acknowledged being aware of it.³⁸ Nichols also denied making the specific threat attributed to him by McSwain. According to Nichols, he did not know anything about Colmar, having come to Gastonia from a plant in Cincinnati. On cross-examination, Nichols admitted that the subject of unionized plant closings came up during the employee meetings conducted by the Company. He recalled Lea saying something about the Colmar plant at one of these meetings but he did not remember what was said or how it came up.

Jackson testified that he recalled a committee meeting at which McSwain raised the subject of the union. According to Jackson, McSwain said he had some information he got from the Union and he wanted to talk to Nichols about it. Jackson recalled that McSwain had some papers in his hand and tried to give them to Nichols but Nichols wouldn’t take them. Jackson claimed that he was not in a position to see what was in McSwain’s hands. Jackson testified further that Nichols was very “professional” and declined McSwain’s invitation to talk about the union information and finally left the room. Although he denied that Nichols made any threat to McSwain or threw any papers down on the table, he acknowledged that “words were exchanged” between Nichols and McSwain. On cross-examination, he also acknowledged hearing McSwain say, “John, tell me the truth about what happened in Pennsylvania.” Jackson’s recollection that Williams and Mason were also present but sat by silently was contradicted by Mason and Williams who denied being present for this incident.³⁹ However, Mason did testify that he recalled one meeting where he arrived after Nichols had left the room. According to Mason, Jackson told him that McSwain and Nichols had some “words.” Mason claimed not to know what it was about.

³⁷ The article quotes a union official as saying that the Respondent would owe striking employees “more than \$1 million” in backpay.

³⁸ Napoli testified that he had seen this flyer when someone left it in his mailbox at work.

³⁹ In this respect, Mason and Williams corroborate McSwain.

The General Counsel alleges at paragraph 8(g) of the complaint that the Respondent, through Nichols’ statement at this meeting, unlawfully threatened employees with termination if they engaged in a strike. This issue turns exclusively on credibility. Having considered the testimony of McSwain, Nichols and Jackson, I find that McSwain’s testimony is more credible than Nichols’ denial. I note that Nichols’ testimony that no such conversation ever occurred was contradicted by Jackson, who had a specific recollection of McSwain trying to engage Nichols in a discussion of what happened in Pennsylvania. His recollection that “words were exchanged” supports McSwain’s testimony as to the heated nature of the conversation. Moreover, Nichols’ overall credibility was adversely affected by his refusal to acknowledge that there were any problems in his relationship with McSwain. Other witnesses for the Respondent, including Napoli confirmed there was animosity between the two men.⁴⁰ Accordingly, I find that Nichols’ statement that he would “fire any s.o.b. that pickets with the Union” was an unlawful threat in violation of Section 8(a)(1) of the Act.

According to McSwain, it was after this meeting that his views began to change regarding the Union. He attended his first union meeting and began regularly wearing union buttons at work. He also placed a UAW sticker on his wall locker and toolbox. McSwain testified that, not long after displaying these indicia of union support, sometime near the end of April, Nichols said to him one day in his work area, “I thought that’s where you stood and how you would vote.” McSwain, referring to that earlier meeting of the committee, accused Nichols of having lied to him. Nichols then said, “Dennis, I can’t make you take those stickers off your wall locker. There’s going to be consequences.” Nichols shook his head and walked away. Nichols denied making any such statement to McSwain. According to Nichols, he said nothing to McSwain about union buttons, hats, or T-shirts he was wearing because the Company made a decision that employees could wear buttons and shirts. Of course, this latter testimony is totally inconsistent with the position that the Respondent took during the campaign and at the hearing, i.e., that buttons were permitted but not union shirts. I credit McSwain as to this conversation as well because I found him to be a more believable witness than Nichols.

McSwain testified further that he attended another union meeting after this conversation at which he approached one of the Union’s organizers and asked if it would be okay if he made up some T-shirts supporting the Union and distributed them to his coworkers. When the Union told him it was okay to do this, McSwain and his wife had a number of T-shirts printed up, at their own expense, with slogans on the front and back supportive of the Union. On the front of the T-shirt was a drawing of clasped hands above the following message:

⁴⁰ Lea testified, for example, that he had several conversations with McSwain, before and during the union campaign, about Nichols. According to Lea, McSwain expressed his belief that Nichols was an idiot and didn’t know what he was doing.

United We Stand
Divided We Fall
Vote

Yes

On the back of the shirt was the following:

They Provided
The Job,
But Our Sweat
Keeps It Running.

Unite Now or
Forever Be in Doubt!

An invoice shows that McSwain purchased these shirts on May 5. McSwain then took them to work and distributed them to other employees whom he knew supported the Union. He also hung the shirts on a rail on one of the machines in his work area. He recalled that he did this on May 12 and 13. McSwain testified that when Nichols saw the shirts hanging on the machine, he told McSwain that the Chamber of Commerce was coming in and he could not hang his shirt on the machine. McSwain then hung the shirts on his wall locker and Nichols told him that he could not hang the T-shirt there either. When McSwain told Nichols he could put anything he wanted on his locker, Nichols replied, "Boy, there's consequences to what you're doing." As noted above, Nichols denied having any such conversation with McSwain about his shirts. I shall credit McSwain as to this incident because I found Nichols' denial unbelievable.

The complaint alleges, at paragraph 8(h), that these two statements by Nichols, in late April and on May 12, amounted to unlawful threats of unspecified reprisals. The Respondent argues, on credibility grounds, that McSwain's testimony suggesting that Nichols used the same phrase on both occasions is contrived. I disagree. It is not uncommon for an individual to have a favored expression that they use on multiple occasions, as Nichols did here. The statement that there would be "consequences" to McSwain's changed position and now open support for the Union was an implied threat of unspecified reprisals. Accordingly, I find this violation as alleged in the complaint.

McSwain testified further that Lea saw him giving one of his shirts to another employee on May 12, the same day that Nichols threatened him. According to McSwain, Lea asked him who was selling those shirts. McSwain said no one, that he was giving them out to employees who supported the Union.⁴¹ Lea then told McSwain that although he was allowed to display anything he wanted, he could not wear the T-shirts anywhere in the plant. McSwain testified that Lea then said the same thing that Nichols had said, i.e., "Boy, there's consequences to what you're doing." After this incident, McSwain and his wife had

⁴¹ The Respondent attempted, without success, to show that McSwain tried to make money from the sale of these T-shirts. Not a single employee testified that he paid for these shirts. They all corroborated McSwain's testimony that the shirts were free. The Respondent was also unable to show that McSwain was reimbursed by the Union for the cost of making these shirts.

more shirts printed up, which he distributed on or about May 20, which was the first day of the election. On that day, McSwain's wife Kelly came to the plant to pick him up after work. She parked in the 15-minute spot to wait for her husband. As she was waiting, she hung some of these T-shirts on the side of the van. According to Kelly McSwain, Lea walked past the van, turned around and came back to speak to her. She testified that Lea asked her if she was an employee. According to K. McSwain, she gave Lea a funny look because she had met him several times before and believed he knew who she was. She replied that she was not an employee and was there to pick up Dennis. Lea then told her she was not allowed to display or distribute the union T-shirts on company property. K. McSwain testified that Lea then walked back toward the plant where she saw him speaking to her husband. McSwain testified that on that same day, as he was leaving the plant, Lea stopped him and told him that, while McSwain could display anything he wanted, his wife could not display or distribute anything with a UAW logo on it. According to McSwain, Lea then said, "Dennis, you work more hours than anybody. Everybody was looking to see which way you were going to go. Dennis, you was with us." McSwain responded by saying that he had been on the Company's side until Nichols started putting him down. Lea tried to end the conversation by saying they would talk more later. McSwain started to walk away, then turned and asked Lea, "[W]hat kind of b— s— is this? You've known my wife for six years, you've talked to her many times." Lea again said that he would talk to McSwain later and repeated the refrain, "there's going to be consequences."

McSwain testified about one more conversation with Lea regarding his T-shirts. On May 22, the final day of voting, McSwain wore his T-shirt and attended a rally in front of the plant before going into work. When he went into the plant to clock in, Lea was waiting for him. According to McSwain, Lea apologized for being rough with his wife the other day and said, "Dennis, you know this vote is going to be very, very close." Lea again referred to the amount of hours McSwain worked and repeated the statement from their earlier conversation that everybody was watching what McSwain did. Lea then asked McSwain to do him a "favor" by taking the shirt off and not supporting the Union that day. McSwain replied by expressing his fear that, if he removed the T-shirt, Nichols would fire him if the Union lost the vote. Lea then said that nobody could fire him, not Nichols, not Napoli, nobody could fire him but Lea. Lea told McSwain he was his best worker, that he would not fire him. When Lea again asked McSwain to do him a favor and remove all displays of support for the Union, McSwain expressed doubt and repeated his fear that he would be fired. Lea reassured him by saying that Richeson gave him the authority to make changes and that he had the balls to make changes. He then promised McSwain that nobody would fire him. At that point, according to McSwain, he removed his union T-shirt, a protractor with the union logo on it, and his union hat. He went to work and engaged in no other activity in support of the Union that day.

Lea generally denied making any threats to McSwain regarding his union activities and he specifically denied the conversation on May 22 in which he allegedly promised that McSwain

would not be fired if he removed his T-shirt and other union paraphernalia. As noted previously, Lea admitted to having a conversation with McSwain, about 1–2 weeks before the election, regarding the union T-shirts. According to Lea, he saw McSwain coming out of the employee entrance from the production area during a break, wearing one of these T-shirts. He said, “Dennis, you know you can’t wear that shirt to work.” McSwain said, “Doesn’t it look nice?” to which Lea replied, “[Y]ou know the rules.” Lea asked McSwain to change his shirt and McSwain agreed. According to Lea, he had no further conversation with McSwain that day and did not see him wearing the T-shirt again. Lea testified further that, the same day, when he was walking outside for a smoke break, he saw the McSwains’ van in the visitor lot with the union T-shirts hanging on the doors. Because he didn’t recognize her, Lea stopped and asked K. McSwain if she was an employee. When she told him she was Dennis McSwain’s wife, Lea told her that, while Dennis would be allowed to display the shirts, handbill, or otherwise engage in union activity on the property, she could not because she was not an employee. Lea told her she would have to remove the shirts. As he was returning to the plant, Lea encountered McSwain leaving. When he relayed to McSwain what had just happened with his wife, McSwain said that he would take care of it. The next day, according to Lea, McSwain told him he didn’t have to worry about it anymore because McSwain, “tore her up for messing with my business.” Lea denied apologizing for the way he talked to K.. McSwain. In Lea’s view, he had nothing to apologize for, since he had been polite to her.

The General Counsel alleges that the Respondent violated Section 8(a)(1) of the Act during Lea’s encounters with McSwain on May 12 and 20 in two respects. At paragraph 8(h), Lea’s statements “there will be consequences,” are alleged as threats of unspecified reprisals. At paragraph 8(m), Lea’s prohibition on McSwain’s wearing of the union T-shirt is alleged as unlawful. Because there is no dispute that Lea did tell McSwain on at least one occasion that he could not wear a union T-shirt in the plant, and based on my finding above that such a prohibition violated the Act, I find that the General Counsel has established the violation alleged in paragraph 8(m).

The allegation that Lea also threatened McSwain in these conversations is more difficult. Although I generally found McSwain to be a credible witness and have expressed my doubts about Lea’s credibility, McSwain’s testimony in this instance does not ring true. While it is one thing for an individual like Nichols to have a favored expression and use it repeatedly, it seems more than a coincidence that Lea would say the same thing on two other occasions. At the same time, McSwain’s testimony that Lea referred to McSwain’s change of position and expressed concern about how others would be influenced by what McSwain did is believable. There is no question that the Respondent considered McSwain a loyal, dependable employee because of his willingness to work whenever needed. It is also undisputed that Lea had considered McSwain as an employee he could talk to freely about issues in the plant. McSwain’s sudden change of position on the Union had to have concerned Lea. Thus, I find it probable that Lea

would have expressed these feelings when he saw McSwain wearing the union T-shirt even if he did not threaten any “consequences.”⁴² I also had serious doubts about Lea’s version of the conversation with McSwain. Lea’s testimony indicating that McSwain was upset with his wife’s display of the T-shirts in the parking lot is patently unbelievable. Why would McSwain have “tore up” his wife for doing something that he fully supported? It is clear that McSwain and his wife voluntarily made up the T-shirts and distributed them to other union supporters. McSwain simply would not have been upset about his wife displaying them on the van in the parking lot. Because neither version of these conversations is fully credible, I find that the General Counsel has not met his burden of proving that Lea actually threatened McSwain with unspecified reprisals on May 12 and 20.

The complaint also alleges, at paragraph 8(n), that the Respondent violated the Act when Lea promised, on May 22, that McSwain would not be terminated if he removed his union T-shirt. I find McSwain’s version of this conversation more credible than Lea’s denial. I note that Lea had a practice of asking employees to remove union T-shirts whenever he saw them being worn. I have also found credible McSwain’s testimony above that Lea expressed concern on May 12 and 20 about how other employees would view McSwain’s support of the Union. Because McSwain was a loyal employee whom Lea had confided in previously, it is believable that he would not want other employees to be influenced by McSwain’s actions. When McSwain expressed fear that he would be fired if he removed the T-shirt and the Union lost, Lea made the promise that he would make sure that did not happen. By doing so, the Respondent violated the Act as alleged.

In addition to the discrete incidents described above, McSwain also testified to a general change in Nichol’s treatment of him after he openly displayed his support for the Union in April. Although McSwain may not have had the best working relationship with Nichols before he got involved with the Union, at least Nichols did not check his production paperwork looking for mistakes, time his breaks or otherwise closely scrutinize his work. According to McSwain, after he started wearing his union buttons, Nichols and supervisor Turner increased their monitoring of his work and breaks. Their conduct in this regard is similar to how Vinesett treated union supporters McClure and Stiles who worked on the same line as McSwain on a different shift. Because I find this was part of a pattern of conduct engaged in by the Respondent, I shall credit McSwain and find the violation alleged at paragraph 8(k).

After the election, there is no dispute that the Respondent established a number of department advisory committees made up of employees to address workplace issues. Lea invited McSwain to participate in one of these committees, as well as on another committee to address concerns about the job bidding procedure. According to McSwain, Lea told him the only way that changes would be made is if employees participated in these committees. McSwain also testified that, after one of these meetings, Lea called him aside. Lea showed McSwain a

⁴² As noted above, Lea admitted expressing surprise when he first saw McSwain wearing a union button.

paper that showed the hours McSwain had worked in the past 3 months and told McSwain that he was Lea's best employee. He then asked McSwain if he wanted Lea to set up a meeting with Napoli and Nichols, presumably to address the concerns McSwain had expressed before the election. McSwain responded that Lea had given him his word that he would not be fired and that was good enough for McSwain. According to McSwain, Lea patted him on the back and again assured him that he would not be fired. McSwain testified further that Lea also asked him how he was holding up working all those hours, to which McSwain replied that he was experiencing stomach problems but was trying to make it until a scheduled vacation when he was going to see his doctor about the problem. This conversation occurred on or about June 8.

McSwain testified that on June 13, he reported to work as usual at 6:30 a.m. and learned from Calvin Moony, the lead on the night shift, that his line had not run because no one came into work. Moony told McSwain, "[T]hey were screaming for parts." McSwain started up his line and began work. At about 7 a.m., his supervisor, Turner, told McSwain that Paysour, his partner on the line, had called to say he would be late. McSwain continued working alone, something he was routinely required to do because of Paysour's frequent absences. At about 8 a.m., Karren Hagan, who was acting as the lead that day because Heffner was out, stopped by McSwain's line to see how he was doing. She told McSwain that Turner told her that Paysour was not coming in. McSwain said he already knew that and, joking, told Hagan that he was going home too, that he would let her run the line. When Hagan said, "[D]on't do that," McSwain said he was just kidding. McSwain worked the rest of the morning without taking a break. At about noon, he went to the canteen to eat a boxed lunch he had purchased from a church group that regularly provided this service to the employees. McSwain left his machine running, expecting to eat quickly and return. He recalled seeing Billy Hudspeth, an employee who works on the line next to his, with whom he had a documented history of conflict, in the canteen. McSwain denied having any conversation with Hudspeth about problems on the line or being upset about having to work alone. The only conversation he had with Hudspeth was Hudspeth asking McSwain if Paysour was coming into work and McSwain saying he didn't know. After quickly eating his lunch of meatloaf and potato salad, McSwain returned to the line.

McSwain testified further that, after lunch, the production scheduler, Frank Nichols, had McSwain stop the line and change over to producing another part that was a hot order. At some point during the changeover, McSwain began feeling ill. According to McSwain, he was experiencing stomach pains and diarrhea. McSwain testified he went to look for Turner but couldn't find him so he went to Hagan, his lead. McSwain told Hagan that he had an upset stomach and was going home. Hagan asked if he was kidding. McSwain told her he was not kidding, that he was sick and going home. He placed her hand on his forehead and she felt it and said, "[Y]ou're just hot." McSwain told Hagan he was sorry and left. According to McSwain, he did not notice if any other employees were around. There were machines running at the time and the noise level was high. McSwain testified that he clocked out at 1:08

p.m. and the Respondent's records confirm this. McSwain rested at home the remainder of the day and returned to work the next morning. According to McSwain, he worked a full day, saw Turner and Napoli during the day, and no one questioned him or said anything to him about the previous day until about 3 p.m., when Lea asked to speak to him.

McSwain met with Lea and Rice in Lea's office. When Lea asked McSwain where he had been all day, McSwain said, working. Lea seemed surprised at this, looked to Rice and said, "[Y]ou told me he wasn't here." After Lea and Rice whispered something to one another, Lea asked McSwain what happened yesterday. McSwain told him he had an upset stomach and was bleeding, so he went home. Lea told McSwain he was under investigation for leaving the plant without authorization and that he needed to make a statement. McSwain then wrote the following statement:

I told my lead that I was sick at my stomach and I did not feel well so that I left at 1:30.

After he wrote this statement, Lea told McSwain he would have to leave the plant until further notice, pending an investigation. Lea then asked McSwain if he had any witnesses. McSwain gave him the names of Hagan, Matt Parker, and Glen Brown. McSwain explained that he gave Brown's name because Brown, his material handler, told McSwain that morning that people were talking about McSwain leaving early the day before and that Parker had been questioned about it. According to McSwain, he had asked Parker what he knew about it and Parker told him that he was working at the neat band machine near Hagan when McSwain told her he was leaving. McSwain testified that Parker told him he had heard McSwain say he was sick. After providing these names to the Respondent, McSwain punched out and went home.

McSwain heard nothing further from the Respondent until June 16, when Lea called him to come in for a meeting the next morning. The following day, June 17, McSwain met in Rice's office with Lea, Rice, Napoli, and Nichols. According to McSwain, he was handed a document that said he left the plant unauthorized. McSwain asked what they were talking about, he didn't leave unauthorized. He told them he had never been written up, he worked all those hours for them, and this is what they do? He told them it was b— s—. Rice then told McSwain they were not there to discuss it, that he was fired. When McSwain asked what was he fired for, Rice replied, for leaving the plant unauthorized without clocking out. McSwain disputed this and Lea left the room briefly. When he returned, Lea confirmed that McSwain had clocked out, but then said, "[W]e're not here to discuss anything. You're fired." When McSwain again tried to argue his case, suggesting they call his doctor, Rice interrupted and again said they were not going to discuss it. At that point, Nichols got up, saying he would walk McSwain out of the plant. McSwain objected, saying, "[T]hat s.o.b. is not going to walk me out of the plant." Napoli then intervened and said he would walk McSwain out. Before leaving, Rice asked him to sign the paper, presumably his discipli-

nary action form, and McSwain refused to sign it.⁴³ McSwain was then escorted out of the plant.

Hagan was called as a witness by the General Counsel. She essentially corroborated McSwain. She recalled McSwain joking with her in the morning about going home when he found out Paysour wasn't coming in. She testified that she didn't believe McSwain because he never went home early, in contrast to many of the Respondent's other employees. According to Hagan, she saw McSwain later that day, sometime between 1 and 1:30 p.m., when McSwain came to her and said he was going home. Hagan thought he was still joking so she said, "Dennis, you can't go home, you're not sick." McSwain took her hand and placed it on his forehead. Hagan testified that he was sweating a lot. She told him, joking, that he couldn't go home because he wasn't running a fever. McSwain then walked away and Hagan thought nothing of it. Later, when Hagan went to look for a part for her machine, she went to McSwain's line and he wasn't there. Hagan looked for McSwain and, when she couldn't find him, she went to see the supervisor, Turner. Hagan asked Turner if he had seen McSwain. She told him that McSwain told her he was going home and asked Turner if he had left. Turner looked something up on his computer and told Hagan that McSwain hadn't clocked out.⁴⁴ After speaking to Turner, Hagan went back to McSwain's line to run it. According to Hagan, she could not get the line to run and had to call maintenance to fix it. Hagan testified that it was not unusual to have problems starting up a line after it had been shut down for awhile. Maintenance was able to get the line running again after about 1-1/2 hours. Hagan expressed the view that McSwain had nothing to do with the problem on the line.

Hagan testified that she saw McSwain the next day. She told him that she hadn't believed him when he said he was going home. McSwain told her he got sick eating some meatloaf. Hagan learned later that McSwain had been sent home. Either that day or the next, Turner told her they wanted to see her in Rice's office. Rice asked her to tell him what happened, which she did. He asked her if she would write a statement and Hagan agreed. Hagan's statement is as follows:

On 6-13-04 around 1:30 pm, Dennis McSwain told me he was going home. He had already told me this earlier in the morning, kiddingly, after finding out that Chris Paysour would not be in. I thought at 1:30 he was only kidding. He did not say he was sick or that he had gotten an emergency call from home. He did not even tell me to tell Layne Turner. Layne and I asked for him all over the plant when we could not find him. Layne checked time clock and he had punched out & went home. I was then asked to run line four but it was not operational.

Hagan was off work for several days after this and, when she returned to work on June 19, she learned that McSwain had

⁴³ The form, which is in evidence contains the notation, with Rice's initials: "refused to sign".

⁴⁴ Turner, who testified for the Respondent, explained that when Hagan came to his office, the computer didn't reflect that McSwain clocked out because he hadn't updated the timekeeping system. Turner confirmed that McSwain in fact clocked out at 1:08 p.m., as he testified.

been fired. Hagan spoke to Turner about it, telling him that she hadn't meant for McSwain to get fired. According to Hagan, Turner said it wasn't her fault, that there was more to it than that. Hagan also went to see Ballard, one of the Respondent's managers, about McSwain's discharge. Hagan testified that she told Ballard that she didn't think what McSwain had done was reason to be terminated. Ballard responded, "[J]ust between you and me, there's people saying it could be the Union." Although Turner and Ballard contradicted Hagan as to these conversations, I found her to be a far more credible witness than either Ballard or Turner.

In addition to the testimony of McSwain and Hagan, the General Counsel offered testimony from a number of employee witnesses regarding the practice in the plant for leaving work early. Many witnesses testified that it was there practice to simply tell their lead person they were leaving. Although some employees testified that they would give the lead person a reason for leaving early, this appeared to be more out of courtesy than any requirement imposed by management.⁴⁵ Some of the General Counsel's witnesses testified that they would tell a supervisor they were leaving, if the supervisor was around, but many employees felt free to leave with notification to no one higher up than their lead person. Although the Respondent, during the presentation of its case, attempted to establish the existence of a rule requiring an employee to get authorization from a supervisor before leaving work early, Lea conceded no such written rule exist. When the supervisors who testified for the Respondent were asked about their practice in dealing with employee's leaving early, it became clear that there was no consistent rule. For example, Supervisors Crumbley, Kendrick, and Vinesett conceded that they would not normally require an employee to provide a reason if they said they had to leave early "for personal reasons." Crumbley testified that she would not pry into an employee's reasoning if it was "personal." Vinesett, who had been a lead before becoming a supervisor, testified that it was not essential for an employee to explain why he was leaving. If they told their lead they were going home, that was sufficient. Even McSwain's supervisor, Turner, acknowledged on cross-examination that other employees under his supervision had gone home early after notifying only their lead person without being disciplined.

The evidence in the record also shows that, at least initially, Turner did not perceive that McSwain had done anything wrong when he left early on June 13. Hagan testified that, when she first went to see Turner after she could not find McSwain, Turner did not say anything to her indicating that he felt McSwain should be disciplined for leaving early. In fact, even the memo that Turner wrote to Nichols about the situation does not convey the impression that McSwain might be fired for what he had done. On the contrary, Turner expressed concern for McSwain's well being due to the number of hours he was being asked to work. Turner's memo, in its entirety, reads as follows:

Today at approx. 2:20pm Karen came to my office and ask me if I had seen Dennis McSwain. I told her not since around

⁴⁵ Even Kelly Rice, testifying for the Respondent, said it was a matter of "common sense."

1:00pm. She then told me he had informed her he was leaving a little after 1:00pm. Karen said she thought he was joking. I then went to look for him myself. I was unable to locate him. I then check Uni-time and found he had clocked out at 1:08pm. This put us in a very bad situation due to the fact that the other operator (different issue that will be dealt with in the morning) on the line had already called in this morning. Early in the morning I had talked to Dennis about needing some help. He told me it would be nice to have a weld operator due to the amount of changeovers but, he would do the best he could. I did try to call several people in but, had no replies. I also tried to call in 3 different people from the rod department to stack parts out but, had no replies. The issue is this! After I found out that Dennis had left Karen went over to start the machine up. We found that the machine would not run due to the carriage that holds to the shuttle bar had a broke pin in it and was making the machine fault out due to short tubes. This problem took us until 4:00pm to fix. I will find out why Dennis left in the morning. **The reason I am writing this is because I truly believe that 1 of the reason he left was due to the extensive amount of hours he has been working for a long period of time. Even after our discussion last week about this subject he was still allowed to work 67.5 hrs. I think if he does not get some time off during 4 day cycle this kind of situation will get worse. Let me know if you have any input on how you want this situation handled.**

(Emphasis added.) The case presented by the Respondent shows that, rather than address Turner's concerns, the Respondent seized upon this memo as a basis for initiating the investigation that led to McSwain's termination.⁴⁶

The Respondent, in its brief, claims that it was Turner who initiated the investigation because he perceived McSwain's "walking off the job" to be a "very serious" infraction. Although Turner did say this in his testimony, I found his belated attempt to rewrite history unbelievable. Turner testified that he wrote the above-quoted memo on the afternoon McSwain left work. Despite the "serious" nature of the incident, he made no recommendation in the memo, nor did he otherwise suggest, that disciplinary action be considered. On the contrary, he asked that McSwain be given some relief from the work burdens imposed on him by the Respondent. In fact, as the memo indicates, and Turner confirmed in his testimony, Turner had spoken to Nichols about this problem a week before the incident in question and nothing had been done to assist McSwain.⁴⁷

At the hearing, Turner did not even mention his concerns about McSwain's being overworked in his direct testimony. Instead, Turner testified that he went to see Rice in human re-

⁴⁶ Interestingly, although Turner indicated in his memo he would "take care of" the issue with McSwain's partner not showing up for work, there is no evidence that the Respondent ever launched an investigation into why he was late or absent so frequently. Apparently, they merely accepted his claims that his wife had medical problems even though his failure to show up for work on a consistent basis led to severe production problems on that line.

⁴⁷ Nichols acknowledged having a discussion with Turner about the hours McSwain was working.

sources on Monday morning because he viewed what McSwain had done to be a very serious disciplinary issue. Only when confronted on cross-examination with the words he wrote in the memo, did he acknowledge having any concern for McSwain's well being. On direct examination, Turner testified further that it was Rice who decided to launch the investigation after Turner described what had happened. Although his memo was addressed to Nichols, Turner did not mention speaking to Nichols about the incident until this was brought out on cross-examination. It was significant that all of the Respondent's witnesses who testified about the investigation and decision to terminate McSwain scrupulously avoided any mention of Nichols involvement other than his presence at a meeting where the decision was made.⁴⁸ Also significant in considering the credibility of Turner's testimony is his admission that, although he was very concerned about McSwain walking off in the middle of the job, Turner never bothered to ask McSwain, when he saw him at work on June 14, why he left work.

Rice followed up Turner's testimony by claiming that it was Turner who brought the issue to his attention and that he conducted the investigation after consulting Lea. According to Rice, as part of his investigation, he took statements from Hagan and another employee, Billy Hudspeth. Rice claimed that Hagan recommended that he talk to Hudspeth because Hudspeth might know why McSwain left work. This testimony was contradicted by Hagan who denied saying anything about Hudspeth to Rice and by Hudspeth's manager, Ballard, who recalled that Rice interviewed Hudspeth before he spoke to Hagan. Hudspeth gave the Respondent a statement that was very damaging to McSwain, claiming that McSwain told him during lunch that he was mad because Paysour hadn't come into work and Turner didn't get anyone to help him. Hudspeth told Rice that McSwain said he had a lot of work to do in his shop and he was going to go home. Rice apparently accepted this testimony from Hudspeth without question even though there was a history of conflict between Hudspeth and McSwain known to the Respondent's supervisors and even though Hudspeth was on final warning at the time for a serious infraction.⁴⁹

Rice testified that, after taking these statements from Hagan and Hudspeth, he met with Lea and reviewed what he had learned. Lea suggested they call in McSwain. Rice claimed that Lea met alone with McSwain because McSwain objected to his presence. Lea did not corroborate Rice in this regard and McSwain credibly testified that he met with both men. This

⁴⁸ Nichols attempted to explain his apparent noninvolvement in the investigation by claiming he was on vacation on June 14 and did not learn of the incident until he returned to work on June 15. Nichols was contradicted in this regard by Turner, who testified that he went to see Nichols about the incident on Monday morning, and by Napoli, who claimed that he learned of the incident from Nichols on Monday morning.

⁴⁹ Hudspeth was not a very credible witness. His testimony about McSwain working in his shop was contradicted by evidence on rebuttal from McSwain's neighbor that McSwain did not have an auto shop or any other business at his home. Moreover, Hudspeth's attempts to downplay his problems with McSwain were contradicted by the lead operator, Heffner, who was a very credible witness.

meeting was presumably McSwain's opportunity to tell his side of the story yet, surprisingly, Rice and Lea didn't bother to mention to him that they had the damaging statement from Hudspeth. Thus, McSwain was never given an opportunity to rebut this accusation. Rice testified further that, after the meeting with McSwain, he continued his investigation by talking to Parker, the witness identified by McSwain. Although Parker corroborated McSwain's claim that he told Hagan he was going home, he did not corroborate the statement that McSwain told Hagan he was sick. Parker, in his statement, said he did not hear McSwain say this. At the hearing, when testifying as a witness for the Respondent, Parker said he was not present for the entire conversation between Hagan and McSwain because he had only gone into the area to retrieve a part.

Rice testified that, after completing his interviews of the witnesses, he researched the Respondent's past practice and came up with two prior instances where the Respondent had terminated an employee for walking off the job. Based on this, he recommended to Lea that McSwain be terminated. Rice admitted that, as part of his investigation, he also reviewed Turner's June 13 memo which documented the incident. Rice claims that this memo was prepared by Turner at his request when he asked Turner to write down what happened. Of course, this is not true because the memo was addressed to Nichols and only forwarded to Rice the next day. Turner also contradicted Rice on this point.

The Respondent's witnesses then describe a meeting that occurred sometime on June 15 in Richeson's office. In addition to Richeson, Lea, Rice, Napoli, and Nichols were there. Turner, who had been off work that day, was included by speaker phone. Richeson asked what happened and Turner relayed the events of June 13. Rice then reviewed all the statements he had obtained and the evidence of past practice he had uncovered. At that point, Turner was asked for his recommendation and he recommended termination. Everyone in the room agreed with this recommendation. Although several of the witnesses who were at the meeting recalled a discussion of McSwain's dedication to his job being discussed, only Richeson acknowledged that Lea made the point that McSwain had also been active in support of the Union. These two factors made no difference in the Respondent's decision, according to the witnesses. As noted above, the Respondent conveyed its decision to McSwain on June 17.

The two prior instances of past practice relied upon by Rice involved Anita Truesdale and George Brown. Rice testified he found the Truesdale discipline in a log that had been maintained by the former human resources manager. Rice had no independent knowledge of the specifics leading to her termination. He only knew what was contained in the disciplinary records. As to Brown, Rice testified that Turner brought this incident to his attention because he had been the supervisor involved. Truesdale's disciplinary action form shows that she was terminated October 19, 2000, for "walk[ing] off the job—violation of company policy." Memos from the leadman, Bill Vinesett, and the supervisor, Leroy McCaskill, attached to the form describe what happened. They reflect that, after Truesdale was reassigned to a job she did not like, she became angry and told the leadman she was going home. The leadman apparently

relayed this to the supervisor. The supervisor told the lead that they could not make her stay. This was relayed to Truesdale who, at some point after this, left work. The memo from the leadman indicates that she was slamming parts before she left.

The second incident, in which Turner was involved, actually involved three employees who were terminated when they walked off the job. This incident occurred in 1999. Turner testified that the three employees, George Brown, Eric (last name unknown) a/k/a Chico, and Reggie Butler, left in the middle of the shift. Although Turner believed that all three left together without telling anyone, he learned subsequently, after Butler complained about his termination, that Butler left separately from the others. According to Turner, although the other two employees sneaked out the back, Butler walked out down the main aisle and waved to his lead person. Turner testified that Butler got his job back because it was determined he had made contact with the highest authority at the time. In rebuttal, the General Counsel called Butler as a witness. Butler testified that he was told, in a meeting with human resources to discuss his termination, at which Turner was present, that it was sufficient that he communicated to his lead person that he was leaving. Butler's description of the Respondent's policies in 1999 is remarkably similar to what current employees, lead persons and supervisors described as the practice in 2004.

At the hearing, the Respondent offered over the objection of the General Counsel and the Charging Party, records of three other employees who were disciplined for leaving work without authorization. These terminations occurred on July 31, November 13, and February 23, 2000. The only information about these incidents is what is contained in the records. The Respondent acknowledged at the hearing that it was not aware of these other incidents when it made the decision to discharge McSwain. Although I received the records into evidence, I now conclude they are irrelevant to a determination of the Respondent's motives at the time it made the decision to terminate McSwain.⁵⁰

In *Wright Line*,⁵¹ the Board held that, in cases where employer motivation is the issue, the General Counsel must first establish, by a preponderance of the evidence, that union or protected concerted activity was a "motivating factor" in the decision to discharge an employee. In order to meet his initial burden, the General Counsel must show that the employee was engaged in protected activity, that the employer was aware of this activity and that the employer exhibited animus against such activity. The Board has approved reliance upon circumstantial evidence to establish elements such as knowledge and animus, acknowledging the reality that direct proof of motivation will seldom be available. *Naomi Knitting Plant*, 328 NLRB 1279 (1999); *Abbey's Transportation Services*, 284 NLRB 698, 701 (1987), enfd. 837 F.2d 575 (2d Cir. 1988). Only if the General Counsel has made the requisite showing will the burden

⁵⁰ The General Counsel placed in evidence a record of a December 2002 verbal warning issued to maintenance lead Farrar by Supervisor Kendrick for leaving work early without notifying the production supervisor. This warning merely highlights the inconsistent nature of the Respondent's treatment of employees who leave work early.

⁵¹ 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981).

shift to the respondent to “demonstrate [by a preponderance of the evidence] that the same action would have been taken even in the absence of the protected conduct.” *Id.* See also *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 399–403 (1983). Where an employer asserts, as here, that some type of employee misconduct was the reason for discharge, the employer “does not need to prove that the employee *actually* committed the alleged offense. It must show, however, that it had a *reasonable belief* the employee committed the offense, and that the employer acted on that belief in taking the adverse action against the employee.” *Midnight Rose Hotel & Casino*, 343 NLRB 1003 (2004).

I find here that the General Counsel has met his initial burden of proving that McSwain’s union activity was a motivating factor in the decision to suspend him on June 14 and to discharge him on June 17. The evidence clearly establishes that McSwain became an open, active union supporter beginning in late April, after his run-in with Nichols during his involvement with the employee committee. There is no question that the Respondent was aware of his union activities. Although it is true, as the Respondent argues, that there were many strong union supporters among the Respondent’s employees and some who had been involved with the campaign longer, McSwain clearly distinguished himself from the others by preparing and distributing the T-shirts bearing statements of union support that had to be troubling to the Respondent because they suggested the Respondent was profiting from the “sweat” of its employees. In addition, McSwain had been an employee the Respondent considered to be on its side because he had always been someone the Respondent could depend on to do whatever was asked. Lea himself had a close relationship with McSwain and spoke frequently to him about workplace issues. When McSwain switched sides, it would be reasonable for the Respondent’s management to feel betrayed.

The evidence in the record also clearly establishes the Respondent’s antiunion animus. I have found that the Respondent committed a number of independent 8(a)(1) violations in response to the Union’s organizing campaign, including unlawful conduct directed at McSwain personally. Nichols, in particular, had threatened McSwain on two occasions that there would be “consequences” to his having switched sides. When Nichols received Turner’s June 13 memo indicating that McSwain left early, he was presented with an opportunity to carry out this threat. The circumstances of McSwain’s discharge also support an inference that his union activity played a role in the Respondent’s actions. Thus, the Respondent’s management took a memo expressing concern for McSwain’s well-being and used it to launch an investigation that would lead to his termination. In addition, the conduct for which he was terminated appeared to be no different than conduct engaged in by other employees without any discipline.⁵² When the Respondent’s harsh treat-

⁵² Heffner, McSwain’s lead person, testified, for example, that just 3 weeks before McSwain’s discharge, Paysour came to Heffner and said he had to leave. According to Heffner, Paysour gave no reason, left work and nothing was done about it, despite the fact that Paysour’s frequent tardiness and absences were causing considerable problems with meeting production goals on the line he and McSwain operated. Paysour admitted that he occasionally left work early after telling his

ment of McSwain is considered against his good record, with no prior discipline and a history of working as many hours as the Respondent required, the motivation becomes suspect. I note in particular that McSwain was not the kind of employee to walk off his job with no reason, that he was always there working. Rather than try to find out what would make an employee like this leave in the middle of the day, which seemed to be Turner’s concern, the Respondent undertook an investigation designed to lead to his termination. I conclude that the General Counsel has met his burden and presented sufficient evidence to support an inference that McSwain’s union activity motivated the Respondent’s disciplinary decisions in this case.

Because the General Counsel satisfied his *prima facie* burden, the burden was on the Respondent to establish that it would have taken the actions it did even if McSwain had not been a union supporter. I find, in agreement with the General Counsel, that the Respondent has not met this burden. Respondent claimed to have suspended and then fired McSwain because it reasonably believed he abandoned his job, relying on the statements obtained in the investigation. The problem with the Respondent’s argument is that no investigation would have been conducted had McSwain not been active in support of the Union and had the Respondent not demonstrated its hostility to that activity. The objective evidence shows that the only thing the Respondent knew on June 14 is that McSwain left work early the day before, that he told his lead he was leaving but she thought he was joking, and that the Respondent encountered some problems getting his machine up and running after he left. These facts were communicated to McSwain’s nemesis, Nichols, by a supervisor who was concerned that the Respondent was taking advantage of McSwain’s willingness to work as many hours as the Respondent would give him.⁵³ The only thing Turner recommended in his memo was that some way be found to give McSwain time off. I don’t think that Turner had in mind the solution the Respondent came up with.

With this information in hand on the morning of June 14, Respondent chose to conduct a disciplinary investigation when it could have simply asked McSwain what happened. McSwain’s conduct on June 13 was, as far as everyone who testified was concerned, out of character. McSwain simply never left work early so he must have had a good reason. Yet Respondent didn’t care to find out until it had built a case to fire him.⁵⁴ The case the Respondent built is also suspect because there is no credible evidence in the record to explain

lead that he had to leave “for personal reasons,” without further explanation.

⁵³ Respondent’s attempt at the hearing to cast McSwain’s willingness in terms of greed, i.e., “he liked making the overtime,” is unseemly. There is nothing wrong with an employee trying to earn as much as he can to support his family. Respondent certainly took advantage of this “greed” to deal with critical productivity need in the face of other employees who could not be relied on to show up for their scheduled hours of work!

⁵⁴ Even if McSwain didn’t tell Hagan he was sick on June 13, he certainly would have told Turner, or anyone else who asked, that this was the reason he left. Turner himself conceded that, if McSwain told Hagan he was leaving because he was sick, he would not have been fired.

Hudspeth's involvement in the investigation. In light of the history of animosity between Hudspeth and McSwain, it is unlikely that McSwain would have chosen to tell Hudspeth he was leaving to work in a shop he didn't have. Aside from the damaging statement of Hudspeth, which the Respondent never gave McSwain an opportunity to rebut, all that the investigation disclosed is that McSwain left work after telling his lead he was going home.⁵⁵ This was something that many other employees have done over the years without repercussion. Even if McSwain hadn't given a reason for leaving, as Hagan and Parker reported in their statements to the Respondent, such conduct was not outside the norm in the Respondent's plant. The "past practice" relied upon by Respondent at the time of its decision amounted to a total of three employees who were terminated in 1999 and 2000. Even with respect to this evidence, one employee who was terminated by Turner in the 2000 incident got his job back when it was determined he waved good-bye to be lead person on the way out.

Based on the above, I find that the Respondent has not proven, by a preponderance of the evidence, that it had a reasonable belief that McSwain engaged in the kind of misconduct that would warrant discharge of a valuable employee like McSwain. On the contrary, I find that the Respondent seized upon the incident on June 13 as a pretext to rid itself of a strong union supporter, at a time when the Union's objections were pending and a rerun election was a possibility. By suspending McSwain on June 14 and terminating him on June 17, the Respondent has violated Section 8(a)(1) and (3) of the Act. *Midnight Rose Hotel & Casino*, supra, and cases cited therein; *Doctors' Hospital of Staten Island, Inc.*, 325 NLRB 730 fn. 3 (1998). See also *SCA Tissue North America*, 338 NLRB 1130, 1136-1138 (2003).

D. The 8(a)(2) Allegations

The complaint alleges, at paragraph 14, that the Respondent violated Section 8(a)(1) and (2) of the Act, since in or about late April, by initiating, forming, sponsoring, and promoting department advisory committees and, since that date, by rendering aid, assistance and support to and dominating these committees. The threshold question for determining whether an employer has violated Section 8(a)(2) is whether the entity involved is a labor organization within the meaning of Section 2(5) of the Act. In *Electromation, Inc.*,⁵⁶ the Board held that an entity is a labor organization if (1) employees participate; (2) it exists, at least in part, for the purpose of "dealing with" employers; and (3) these dealings concern conditions of employment or other statutory subjects. The Board held further that, if an employer representation committee or plan is involved, there must be evidence that the committee is in some way representing the employees. *Id.* at 996. Accord *E. I. du Pont & Co.*, 311 NLRB 893, 894 (1993).

⁵⁵ Although Turner, in his memo, described the problems encountered with McSwain's machine after he left, this never became the subject of the Respondent's investigation and was not cited as a reason for his discharge. Based on the testimony of Hagan, as well as that of the maintenance mechanics who repaired the machine, McSwain had nothing to do with the breakdown.

⁵⁶ 309 NLRB 990 (1992), enf. 35 F.3d 1148 (7th Cir. 1994).

There is no dispute that, on June 9, the Respondent distributed a notice to its employees announcing the creation of 10 "Advisory Committees" representing various areas of the plant. The stated purpose of the committees was to meet every other week at predetermined times to discuss "Issues, Solutions and Implementation." Each committee would consist of the department manager, supervisor, and one hourly employee from each shift (3 or 4 employees in total depending on whether the department operated on three or four shifts). The announcement invited employees to nominate themselves or a coworker to be on the committee and stated that team members would rotate off the committee at predetermined times to give other employees an opportunity to participate. A representative from the human resources department would serve as a facilitator for each committee. Feedback from the committee meetings would be posted by each area manager after the meetings and "team members" were expected to provide updates to their respective shifts at bimonthly departmental meetings.

The record indicates that, after the period for submitting nominations expired, several employees were notified by human resources that they had been selected to participate in these committees. As noted above, McSwain was informed shortly before he was fired that he was to be on the tubing department advisory committee. Donald Grant testified that he was notified by a letter from Lea, given to him by his supervisor on or about July 12, that he had been nominated by his fellow employees to be on the committee for his department, main assembly and testing. Grant did not know how he was selected. Phillips, the facilities maintenance tech, was also selected to be on one of these committees, for the maintenance department, after he submitted his name on the nomination form. Phillips received the same letter as Grant. Attached to the letter was a copy of the "Operating Structure and Guidelines" for the committees. These guidelines explained in more detail than the initial announcement how the committees were to function.

The written guidelines provide that each committee would have a minimum of three and a maximum of ten members, a majority of whom must be nonmanagement employees. One or two manager/supervisors would also serve on each committee, but would have no greater authority than the employee members. No member would have veto power and decisions were to be made by consensus. Each committee was also assigned a representative from the human resources department to act as facilitator, whose function was to schedule and arrange meetings, keep the meetings moving along in an orderly fashion and answer questions that might arise regarding company policy. The facilitator could also suggest topics for the committee to consider but would not be able to vote. The guidelines also provided that any member of the committee could suggest topics for discussion and the committee would then prioritize the topics. As to the type of subjects that could be raised, the Guidelines provided as follows:

Each Departmental Committee may address any issue of concern or relevance to their department. Without limiting the topics that may be raised, appropriate topics would include operations, safety, quality, productivity, training, scheduling, preventive maintenance, overtime, supplies,

staffing, etc. While there are no specific limitations on topics that may be suggested, there may be legal or policy reasons why a particular topic cannot be addressed. The facilitator is responsible for making any such determination.

If an issue is raised that relates more appropriately to some other department, the facilitator may refer that issue to the appropriate Departmental Committee. If an issue is raised that more appropriately relates to the entire plant or multiple departments, the facilitator may convene a special committee to address the issue. In such circumstances, specific and unique guidelines will be established for the operation of such special committee.

Under the guidelines, each committee would have the authority to direct the implementation of whatever course of action was decided upon, "subject only to budgetary or financial restraints." The guidelines continued:

In this regard, it is the intent to give actual management authority to the committee. The committee is not intended to function as a labor organization, and there will be no bilateral dealing between management and the committee. Although committee member come from specific departments, they are expected to bring their own unique views, opinions, talents, and observations. They may look to guidance from any source they choose, but they are not required to seek the opinions, or to represent the interests of, other Associates.⁵⁷

The guidelines envisioned that topics might be raised in the committees that, "because of unusual sensitivity, plantwide impact, legal concerns, financial concerns, or company policy, will need to be submitted to higher management for review and approval." It was the facilitator's responsibility to determine which subjects required higher review. The facilitator would forward the committee's recommendation as to such subjects to the appropriate level of management and would communicate the decision to the committee. If management approved the recommendation, it would be sent back to the committee for implementation. If the recommendation was not approved, the facilitator would report to the committee the reasons and the committee could "revisit" the topic. Finally, each committee was responsible for communicating to their respective departments as to the decisions made and implemented by the committee.

Grant and Phillips testified for the General Counsel regarding how their respective committees functioned. Kelly Rice, who was a facilitator for the warehouse committee, testified for the Respondent. In addition, minutes of committee meetings for several of the departments that had been held from August, when they started meeting, through the hearing are in evidence. As previously noted, the committees were still meeting as of the close of the hearing. There is no dispute that the Respondent provides space for the meetings, that the meetings are held during worktime and that employees receive their regular pay for time attending the meetings. The Respondent also provides whatever materials the committee needs to carry out its functions. After each meeting, the Respondent prepares and distrib-

utes the minutes. The minutes are posted on department bulletin boards so that other employees will be informed of decisions and recommendations made by the committees.

Based on the testimony of Grant, Phillips, and Rice, as well as the minutes of the meetings, it is clear that employees have raised all kinds of issues in the course of these meetings. Most of the issues raised are production, process, machinery, and similar issues not related to working conditions. These are also the types of issues that have been prioritized for solution. The evidence in the record shows that the committees have actually implemented some solutions to these manufacturing issues. At the same time, there is no dispute that issues involving safety, pay, certifications, raises, coverage during vacations, overtime, profitsharing, environmental conditions in the shop, and potholes in the parking lot have been raised and discussed in these meetings. Grant testified that, in his committee, when such issues were raised, either Lea, the facilitator, or Ballard, the management member of the committee, told employees that there was nothing the committee could do about the particular issue, that it was outside their authority, or that the issue was in the nature of a complaint and that the committee should focus on making the plant function better. Phillips, who was only able to attend the first two meetings of his committee, testified that, when employees raised issues involving pay, for example, the facilitator, Lea, told them the issue could not be addressed in the committee. Lea said the issue would be passed on to whomever could address it. Nevertheless, Phillips recalled that an issue with respect to vacation by seniority was addressed and resolved in the committee. Phillips also testified that he would solicit his fellow employees before going to meetings as to issues they wanted to be addressed by the committee and he then raised these issues at the meetings.

The evidence in the record establishes that the Respondent's department advisory committees satisfy at least two prongs of the test for a labor organization, i.e., employees participate and the committees discuss subjects that are terms and conditions of employment. The real question in this case is whether these committees exist for the purpose of "dealing with" the Respondent as to these statutory subjects. In *NLRB v. Cabot Carbon Co.*,⁵⁸ the Supreme Court held that the term "dealing with" in Section 2(5) of the Act is broader than the term "collective bargaining." Whereas bargaining connotes a process by which two parties seek to compromise their differences and arrive at an agreement, the concept of "dealing" does not require that compromise be sought. In *E. I. du Pont & Co.*, supra, the Board provided a more precise definition of "dealing", citing extensively from its earlier decision in *Electromation, Inc.*, supra. According to the Board, "dealing"

involves only a bilateral mechanism between two parties. That "bilateral mechanism" ordinarily entails a pattern or practice in which a group of employees, over time, makes proposals to management, management responds to these proposals by acceptance or rejection by word or deed, and compromise is not required. If the evidence establishes such a pattern or practice, or that the group exists for the purpose of

⁵⁷ The Respondent refers to its employees as associates.

⁵⁸ 360 U.S. 203 (1959).

following such a pattern or practice, the element of dealing is present. However, if there are only isolated instances in which the group makes ad hoc proposals to management followed by a management response of acceptance or rejection by word or deed, the element of dealing is missing.

311 NLRB at 894 (footnotes and citations omitted). The Board further explained the concept of dealing by noting that a “brainstorming” group or a committee that exists for the purpose of sharing information are ordinarily not engaged in “dealing” because these groups simply develop ideas or pass along information and management may do what it wishes with the ideas and information received. In those situations, the committee is not making proposals that require a response. *Id.* See also *Miller Industries Towing Equipment, Inc.*, 342 NLRB 1074 (2004). The Board has also declined to find “dealing” where an employer establishes employee committees and delegates to those committees managerial authority such that the committees function as part of management with the power to implement solutions within certain parameters. *Crown Cork & Seal Co.*, 334 NLRB 699 (2001); *General Foods Corp.*, 231 NLRB 1232 (1977). See also *Georgia Power Co.*, 342 NLRB 192 (2004).

After considering the evidence and legal precedent, I find that the General Counsel has not met his burden of proving that the department advisory committees at issue here “deal with” the Respondent regarding employees’ terms and conditions of employment. Although such topics have been raised and discussed, they are not the primary focus of these committees. Rather, as explained in the written guidelines, and as carried out in practice, the committees have focused on manufacturing and production issues. As to these issues, the committees have the authority to determine a course of action and implement it subject only to budgetary, financial or similar constraints. In these areas, they function as a level of management. In those situations where employee working conditions have been raised in a committee, the issues are ordinarily passed along to higher management for action without any proposal from the committee. Only in rare instances have discrete labor issues been addressed and resolved by one of these committees. The Board held in *E. I. du Pont & Co.*, *supra*, that such evidence is insufficient to convert an employee committee into a statutory labor organization.

Having found that the Respondent’s committees do not exist for the purpose of dealing with the Respondent regarding employees’ wages, hours, and other terms and conditions of employment, I conclude that they are not labor organizations within the meaning of Section 2(5) of the Act. It is therefore not necessary to address the allegations regarding unlawful domination and assistance. Accordingly, I shall recommend dismissal of paragraphs 14 and 16 of the complaint.

III THE UNION’S ELECTION OBJECTIONS

The Union’s election objections, set forth in Appendix A, essentially parallel the unfair labor practices alleged in the complaint. I have found merit to some of these allegations. Thus, I have found that Respondent’s supervisor, Ballard, threatened employees with plant closure in early May, which is encompassed by Objections 1 and 3; that Lea, at a meeting with the

maintenance department employees on April 1, told the employees that they could not talk about the Union while working, encompassed by Objection 9, and that on or about May 10, the Respondent gave raises to its lead operators to discourage them from supporting the Union, which is encompassed by Objection 12. Although not mentioned in the objection, the raise given to the Respondent’s maintenance employees in April is sufficiently similar to the allegation in Objection 12 to be considered as part of this objection. I have also found that the Respondent engaged in other unfair labor practices during the critical period between the filing of the petition and the election, which are not specifically covered by any of the objections, but would warrant a new election. Thus, I found that the Respondent engaged in a pattern of restricting the movement of prounion employees and more closely monitoring and supervising them during the months of April and May. The Respondent also prohibited several employees from wearing union T-shirts in the last month before the election.

The Board has long held that it will set aside an election where one party engages in conduct which could have the reasonable effect of destroying the “laboratory conditions” necessary to ensure that employees have the opportunity to make an uninhibited choice on the question of representation. *General Shoe Corp.*, 77 NLRB 124, 127 (1948). Conduct may be objectionable even where it does not rise to the level of an unfair labor practice. Conversely, conduct which violates the Act is, a fortiori, conduct which interferes with an election unless it is so de minimis that it is virtually impossible to conclude that the violation could have affected the results of the election. *Airstream, Inc.*, 304 NLRB 151, 152 (1991); *Dal-Tex Optical Co.*, 137 NLRB 1782, 1786 (1962). The unfair labor practices found above could hardly be called de minimis. Accordingly, I shall sustain the Union’s Objections 1, 3, 9, and 12. Because I have recommended dismissal of the bargaining from scratch allegation, the allegation that Richeson threatened that employees would lose their jobs if they went on strike, and the surveillance allegation at Rankin Lake Park, I shall recommend that Objections 2, 7, and 10 be overruled.

The objectionable conduct and related unfair labor practices found here were sufficiently serious and pervasive to warrant setting aside the election. I note, in particular, that the raises given to the lead operators and the maintenance employees affected a significant portion of the bargaining unit. Because of the closeness of the vote, even an unfair labor practice affecting only one or two employees could have changed the outcome of the election. Accordingly, I shall recommend that the election conducted on May 20 and 22, 2004, be set aside and a new election be conducted, after the Respondent has remedied the unfair labor practices found here.

CONCLUSIONS OF LAW

1. By the following acts and conduct, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act:

(a) Interrogation of employees by Supervisors Lea, in mid-February and on April 1, and by Napoli on April 1, 2004.

(b) Threatening employees with plant closure through statements of Supervisors Mehaffey in late January, Lea in mid-

February, Hasson on February 18, and Ballard on April 8 and in early May 2004.

(c) Threatening to fire employees who picketed on behalf of the Union in mid-April, 2004 (Nichols).

(d) Threatening employees with unspecified reprisals in late April and on May 12 (Nichols), and on May 24, 2004 (Ballard).

(e) Prohibiting prounion employees from talking about the Union at work, on April 1 (Lea), April 18 (Crumbley), in early May, and on May 18, 2004 (Mehaffey).

(f) Prohibiting employees from wearing union T-shirts, during the month of May 2004.

(g) Disparately enforcing work rules against prounion employees on April 1.

(h) More closely monitoring and supervising prounion employees in April and May 2004.

(i) Restricting the movement of prounion employees on May 21, 2004.

(j) Soliciting employees' grievances and impliedly promising to remedy them in early April 2004 (Napoli and Rice).

(k) Promising not to fire an employee if he agreed not to wear union insignia on May 22, 2004 (Lea).

2. By granting its lead operators and maintenance employees raises in mid-April and mid-May 2004, respectively, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (3) and Section 2(6) and (7) of the Act.

3. By suspending Dennis McSwain on June 14, 2004, and discharging him on June 17, 2004, because of his activities on behalf of the Union and to discourage other employees from engaging in such activities, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (3) and Section 2(6) and (7) of the Act.

4. The Respondent has not engaged in any other unfair labor practices alleged in the complaint.

REMEDY

Having found that the 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. To remedy the Respondent's violations of Section 8(a)(1) of the Act, I shall recommend that the Respondent post and abide by the attached notice to employees.

The Respondent having discriminatorily discharged Dennis McSwain, 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).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁵⁹

⁵⁹ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

The Respondent, Stabilus, Inc., Gastonia, North Carolina, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Coercively interrogating any employee about union support or union activities.

(b) Threatening employees with discharge, plant closure, or other unspecified reprisals if they select a union to represent them or otherwise engage in union activities.

(c) Promising employees they will not be fired if they refrain from engaging in activities in support of the Union.

(d) Impliedly promising employees improvements in their wages, hours or working conditions by soliciting their grievances.

(e) Prohibiting employees from wearing union clothing.

(f) Prohibiting employees from engaging in nondisruptive conversations about the Union that do not interfere with work.

(g) Restricting employees' movements around the plant because of their union support or activities.

(h) Disparately enforcing work rules against employees who support the Union.

(i) More closely monitoring and supervising employees who support the Union.

(j) Granting raises to employees in order to discourage them from supporting International Union, United Automobile, Aerospace & Agricultural Implement Workers of America (UAW), or any other union.

(k) Suspending, discharging or otherwise discriminating against any employee for supporting the Union or any other labor organization.

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

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

(a) Within 14 days from the date of the Board's Order, offer Dennis McSwain 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 McSwain whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of the Board's Order, remove from its files any reference to McSwain's unlawful suspension and discharge, and within 3 days thereafter notify him in writing that this has been done and that the suspension and discharge will not be used against him 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 facility in Gastonia, North Carolina, copies of the attached notice

marked "Appendix B."⁶⁰ Copies of the notice, on forms provided by the Regional Director for Region 11, after being signed by the Respondent's authorized representative, shall be posted by the 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 the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 2004.

(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 complaint is dismissed insofar as it alleges violations of the Act not specifically found.

DIRECTION OF SECOND ELECTION

IT IS FURTHER ORDERED that a second election by secret ballot be conducted in Case 11-RC-6567 in the stipulated appropriate unit at such time and place as the Regional Director deems appropriate. The Regional Director shall direct and supervise the election, subject to the Board's Rules and Regulations. Eligible to vote are those employed during the payroll period ending immediately before the date of the Notice of Second Election, including employees who did not work during the period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike that began less than 12 months before the date of the election directed herein and who retained their employee status during the eligibility period and their replacements. Those in the military service may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the payroll period, striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the date of the election directed herein, and employees engaged in an economic strike that began more than 12 months before the date of the election directed herein and who have been permanently replaced. Those eligible shall vote whether they desire to be represented for collective bargaining by International Union, United Automobile, Aerospace & Agricultural Implement Workers of America (UAW).

To ensure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear*, 156 NLRB 1236 (1966);

⁶⁰ 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."

NLRB v. Wyman-Gordon Co., 394 U.S. 759 (1969). Accordingly, it is directed that an eligibility list containing the full names and addresses of all the eligible voters must be filed by the Employer with the Regional Director within 7 days from the date of the Notice of Second Election. *North Macon Health Care Facility*, 315 NLRB 359 (1994). The Regional Director shall make the list available to all parties to the election. No extension of time to file the list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election if proper objections are filed.

Dated, Washington, D.C. September 26, 2005

APPENDIX A

PETITIONER'S OBJECTIONS

1. Management and or it's agents interfered with employee's rights to a free and fair election by making threats that the Stabilus employees would lose their jobs if they chose the UAW as their collective representative.

2. On 1/16/04, in a captive audience meeting with fifty (50) employees, Doug Lea, HR Manager, stated "If we join a Union we are Anti-American and held up a blank piece of paper and said this is where your wages & benefits start at the bargaining table if you get your Union. This meeting was held in the company training room.

3. On 2/18/04 Bob Hasson, Manager, stated if the UAW is voted in the plant will close.

4. [Withdrawn]

5. [Withdrawn]

6. [Withdrawn]

7. On 5/2/04, while in an antiunion meeting, Doug Lea stated that if they go on strike they could be replaced with permanent workers.

8. [Withdrawn]

9. On 4/1/04 all maintenance men were summoned to the training room for a meeting with Doug Lea. He stated that we are not to discuss union matters with anyone while on the production floor.

10. On 5/18/04 Reggie Ballard, manager of the Tubing Dept and Main assembly, rode by where the union meeting was being held.

11. [Withdrawn]

12. On 5/10/04 all lead persons were moved from a level 4 to level 5 with a \$.50 raise.

12. (sic) [Withdrawn]

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 coercively question you about your union support or activities.

WE WILL NOT threaten you with plant closure, discharge, or other unspecified reprisals if you select the union to represent you or otherwise engage in union activities.

WE WILL NOT promise you, directly or implicitly, that we will improve your wages, hours, or working conditions if you refrain from supporting the Union.

WE WILL NOT prohibit you from wearing union clothing.

WE WILL NOT prohibit you from engaging in nondisruptive conversations about the Union that do not interfere with your work.

WE WILL NOT restrict your movements around the plant because you support the Union

WE WILL NOT disparately enforce work rules against you because you support the Union.

WE WILL NOT more closely monitor and supervise you because you support the Union.

WE WILL NOT grant you raises in order to discourage you from supporting International Union, United Automobile, Aerospace & Agricultural Implement Workers of America (UAW), or any other union.

WE WILL NOT suspend, discharge or otherwise discriminate against any of you for supporting International Union, United Automobile, Aerospace & Agricultural Implement Workers of America (UAW), or any other union.

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

WE WILL, within 14 days from the date of this Order, offer Dennis McSwain 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 McSwain whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

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

STABILUS, INC.