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Reliant Energy aka Etiwanda LLC and Utility Workers of America, AFL-CIO. Cases 31-CA-25155 and 31-RC-8023

December 30, 2011

DECISION, ORDER, AND DIRECTION
OF SECOND ELECTION

BY CHAIRMAN PEARCE AND MEMBERS BECKER
AND HAYES

On April 29, 2002, Judge Gregory Z. Meyerson issued the attached decision. The Respondent Reliant Energy (Reliant) filed exceptions integrated with a supporting brief, as well as citations of supplemental authority, pursuant to *Reliant Energy*, 339 NLRB 66 (2003).¹

The National Labor Relations Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,² and conclusions consistent with the discussion below, to adopt the recommended remedy as modified,³ and to adopt the recommended Order, as modified⁴ and set forth in full below.⁵

This case involves alleged unfair labor practices and objectionable conduct related to a representation election at Reliant's Etiwanda electric power plant. The judge found that Reliant acted unlawfully by: (1) promising that the Etiwanda employees would be eligible for an "Extra Incentive Plan" (EIP) if they voted against the Union; (2) withholding the EIP and double-time holiday pay from the Etiwanda employees; and (3) causing the removal of an employee employed by a contractor from

Reliant's facility because he engaged in union activity. The judge found that Reliant, by promising and withholding the EIP, also engaged in objectionable conduct that warranted setting aside the election and holding a new one.

We agree with the judge's findings and conclusions, for the reasons stated by the judge, with one significant exception: We take a somewhat different analytical approach in concluding that Reliant violated Section 8(a)(1) and (3) by causing a contractor to remove its employee from the Etiwanda facility because of his union activity.⁶

I.

In 1997, Reliant bought five electric power plants from Southern California Edison (SCE) and contracted with SCE, whose workers were represented by the Utility Workers of America (the Union), to continue to operate them. On April 1, 2001, Reliant took over the operation of the five power plants. It engaged Fluor Daniel to perform the maintenance work performed at Etiwanda. Fluor Daniel, in turn, subcontracted the work to Edison Operation and Maintenance Service (EOMS), an affiliate of SCE created in early 2001. At about the same time, the Union began soliciting authorization cards from Reliant employees at the facility, while also seeking recognition from Reliant as an asserted successor employer to SCE/EOMS.

EOMS had employed Richard Baeza, a former SCE employee, to work at the Etiwanda facility starting on January 5, 2001. EOMS informed him that he would be working there through the upcoming summer. Because Baeza was a well-known union official and was active during the union organizing drive at Etiwanda, Reliant employees asked him questions about the Union during their lunch- and work-breaks. Reliant's employees gave authorization cards to Baeza while he was working, but he kept any related conversations brief (to less than a minute according to his uncontradicted testimony). Baeza did not hand out cards or any union literature dur-

¹ Reliant cited *New York New York, LLC*, 313 F.3d 585 (D.C. Cir. 2002), and *NLRB v. Pneu Electric, Inc.*, 309 F.3d 843 (5th Cir. 2002).

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

³ In accordance with our decision in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010), enf. denied on other grounds sub nom. *Jackson Hospital Corp. v. NLRB*, 647 F.3d 1137 (D.C. Cir. 2011), we shall modify the judge's recommended Order to require that backpay and benefits shall be paid with interest compounded on a daily basis.

⁴ We shall modify the judge's recommended Order to provide for the posting of the notice in accord with *J. Picini Flooring*, 356 NLRB No. 9 (2010). For the reasons stated in his dissenting opinion in *J. Picini Flooring*, Member Hayes would not require electronic distribution of the notice.

⁵ We shall substitute a new notice to conform to the judge's findings and to the Board's standard remedial language.

⁶ In finding that Reliant had withheld double-time holiday pay from the Etiwanda employees, the judge reasonably assumed—based on a June 24, 2001 letter from Plant Manager Danny Ross—that Reliant actually made double-time payments to employees at other plants. Reliant argues that there is no record evidence establishing such payments. In our view, Ross' statement is sufficient proof, because it is properly treated as a party admission by Reliant. On that basis, we find that double-time payments were made elsewhere. See *U.S. Ecology Corp.*, 331 NLRB 223, 225 fn. 12 (2000), enf. 26 F.Appx. 435 (6th Cir. 2001).

Our dissenting colleague asserts that the "judge's conclusion that Reliant simultaneously promised and withheld the EIP defies common sense," but the conclusion correctly reflects both aspects of Reliant's conduct: withholding the benefit from employees because they engaged in union activity and implicitly promising them that benefit if they refrained.

ing worktime. There is no evidence in the record that these brief verbal exchanges caused any employee to stop working or be less productive. The judge found, “The Respondent offered absolutely no evidence that Baeza was not performing his job properly, or that he was distracting other employees in the performance of their job duties.”⁷

Reliant employees at the Etiwanda facility typically engaged in conversation on nonwork subjects during worktime without Reliant supervisors or managers correcting or reprimanding them. Reliant had no rule barring conversations about nonwork subjects during worktime or barring or regulating solicitation in the workplace.

Martin Willis, Reliant’s supervisor of plant maintenance at Etiwanda, had heard that certain EOMS employees working for Fluor Daniel were engaging in union organizing during worktime. He asked Jim Biel, Fluor Daniel’s site superintendent, about the report. Biel told him that Baeza was soliciting employees and handing out leaflets during working time.⁸ Neither Willis nor any other Reliant official interviewed Baeza or investigated further in any manner. Rather, Willis told Biel that Reliant wanted Baeza, a highly experienced electrical and safety coordinator, removed from the property. On June 11, Biel ordered Baeza to leave the Etiwanda facility, stating that Reliant had requested his removal. After Baeza’s removal, Willis told an EOMS employee that Baeza had been removed for “doing union business” on company time and that Reliant preferred to be nonunion.

II.

The judge applied the Board’s traditional *Wright Line*⁹ analysis to cases under Section 8(a)(1) and (3) that turn on the employer’s motivation. Citing, among other things, his findings that Reliant had committed election-related misconduct, the judge determined that Reliant was motivated by antiunion animus in requesting Baeza’s removal. Reliant did not have a no-solicitation policy, and there was no evidence, the judge found, that Baeza’s union activity interfered with his own work or that his union activity prevented other employees from performing their work. Thus, Reliant’s assertion that

Baeza was removed for impermissibly engaging in union activity during worktime was pretextual.

On exceptions, Reliant emphasizes that Baeza was not an employee of Reliant, but rather the employee of a subcontractor (EOMS), who “was not continuously or exclusively assigned to [the] Etiwanda” facility and who therefore did “not have the same organizing rights as an employee of Reliant would have had.”¹⁰ Citing the Supreme Court’s decisions in *Lechmere*¹¹ and *Babcock & Wilcox*,¹² which involved nonemployee union organizers who sought access to employer property, Reliant argues that Baeza “exceeded his license to be on Reliant’s property by organizing Reliant’s employees improperly during working hours rather than doing the job he was engaged to do.”¹³ Even if Baeza were properly treated as if he were a Reliant employee, Reliant contends, “an employer may prohibit its workers from union distribution and solicitation during their working hours.”¹⁴ According to Reliant, Baeza either violated such a prohibition or, at a minimum, Reliant had a good-faith belief that he did.¹⁵

III.

“[I]t is well settled that an employer violates the Act when it directs, instructs, or orders another employer with whom it has business dealings to discharge, lay off, transfer or otherwise affect the working conditions of the latter’s employees because of the union activities of those employees.” *Black Magic Resources*, 312 NLRB 667, 668 (1993), citing *Dews Construction Corp.*, 231 NLRB 182 fn. 4 (1977) (collecting cases), enfd. mem. 578 F.2d 1374 (3d Cir. 1978). As the judge correctly recognized, this is what happened here.

A.

The judge applied the Board’s established *Wright Line* framework, which focuses on the employer’s motive in taking action against an employee. But here there is no real dispute that Reliant had Baeza removed because of his union activity. *Wright Line* is inapplicable in such circumstances. See, e.g., *Powellton Coal Co.*, 355 NLRB No. 75 (2010), incorporating by reference *Powellton Coal Co.*, 354 NLRB 419, 424 (2009) (unlawful warning for union solicitation and distribution during

⁷ The dissent adds color to these facts by setting the removal of Baeza against the backdrop of the ongoing energy crisis in California. But given the judge’s express finding that Baeza’s union activities did not in any way interfere with Reliant’s operations, we find that embellishment irrelevant.

⁸ Biel did not testify at the trial.

⁹ *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Mgmt. Corp.*, 462 U.S. 393 (1983).

¹⁰ Reliant Exceptions, p. 27.

¹¹ *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992).

¹² *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956).

¹³ Reliant Exceptions, p. 28.

¹⁴ *Id.*, p. 30.

¹⁵ *Id.*, p. 31.

working time, where employee violated no rule).¹⁶ The crucial issue is whether Baeza's union activity was protected by the Act.

B.

We have no difficulty in concluding that it was. Section 7 protects the right of employees "to form, join, or assist labor organizations," among other types of "concerted activities for the purpose of collective bargaining or other mutual aid or protection." Baeza accepted union authorization cards from Reliant employees during their workbreaks and answered their questions about the Union. There can be no question that the Reliant employees who handed Baeza cards and talked briefly with him about the Union while they were lawfully on Reliant's property to perform work were engaged in protected concerted activity.¹⁷

Baeza, in turn, is himself a statutory employee, a category that Section 2(3) of the Act expressly provides "shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise."¹⁸ The Supreme Court has explained that "[t]his definition was intended to protect employees when they engage in otherwise proper concerted activities in support of employees of employers other than their own." *Eastex, Inc. v. NLRB*, 437 U.S. 556, 564 (1978).¹⁹ Here, Baeza clearly was engaged in concerted activities in support of employees of an employer other than his own—activities that were protected by the Act, absent a finding that

¹⁶ See also *Saia Motor Freight Line*, 333 NLRB 784, 784–785 (2001) (unlawful discipline based on overbroad no-solicitation/no-distribution rule does not implicate *Wright Line*).

¹⁷ Compare *North Hills Office Service*, 345 NLRB 1262 (2005) (employer lawfully warned employee not to talk to nonemployee union organizer who was on company property, in violation of lawful employer no-access rule).

¹⁸ For its part, Reliant is undisputedly a statutory employer under the broad definition of Sec. 2(2) of the Act, falling within none of the exceptions spelled out there.

¹⁹ In light of this language in *Eastex* and countless Board holdings, cutting across doctrinal areas, holding that employees engage in protected concerted activity under Sec. 7 when they act in support of employees of employers other than their own, the dissent's suggestion that Baeza did not possess "his own Sec. 7 right to organize Respondent's employees" is without foundation. See, e.g., *Yellow Cab, Inc.*, 210 NLRB 568, 569 (1974) (employee "was peacefully seeking to enlist the aid of his fellow employees to support employees of other employers who were on strike and to oppose an alleged antilabor combination. This is a protected concerted activity for mutual aid and protection under Section 7."). Indeed, the words of Judge Learned Hand are apt here: "It is true that in the past courts often failed to recognize the interest which each [employee] might have in a solidarity so obtained [by acting in support of employees of other employers] . . . , but it seems to us that the act has put an end to this." *NLRB v. Peter Cailler Kohler Swiss Chocolates Co.*, 130 F.2d 503, 506 (2d Cir. 1942).

Baeza's Section 7 rights must yield to some legitimate interest belonging to Reliant.

C.

Reliant's primary argument, in essence, is that it was free to retaliate against Baeza because he was employed by its contractor rather than by Reliant itself. But this claim cannot be squared with the Act or with our case law. As the Supreme Court has recognized, the Board "has held that a statutory 'employer' may violate [the Act] with respect to employees other than his own." *Hudgens v. NLRB*, 424 U.S. 507, 510 fn. 3 (1976). See *New York New York Hotel & Casino*, 356 NLRB No. 119, slip op. at 5 (2011) (examining Board doctrine in case involving access rights of off-duty contractor employees). It does not follow, as Reliant maintains, that because the Section 7 rights of a contractor employee as against Reliant may be *different* from those of Reliant's own employees (depending on the circumstances), the contractor employee cannot exercise Section 7 rights at all while on Reliant's property to perform work.

Baeza's Section 7 rights arguably could be required to yield either to Reliant's management interests or to its property rights. But Reliant's property rights—centered on the right to exclude others—are not implicated, because Baeza was not seeking access to the worksite to engage in organizational activity as he was already on the site to perform work.²⁰ Where organizational activity is carried on by statutory employees "already rightfully on the employer's property . . . the employer's management interests rather than his property interests" are involved. *Hudgens*, supra, 424 U.S. at 522 fn. 10. See also *Eastex*, supra, 437 U.S. at 571–572, citing *Hudgens*.

Babcock and *Lechmere*, supra, the Supreme Court decisions cited by Reliant, involving access claims by non-employee union organizers barred from an employer's property, thus have no bearing here.²¹ Reliant insists that

²⁰ The dissent's repeated use of the term "access rights" to describe what is at issue here is thus misplaced.

²¹ The dissent's suggestion that "[f]or legal and practical purposes, there was no distinction between Baeza and any other nonemployee union organizer," fundamentally misunderstands the distinction drawn in *Babcock* and *Lechmere* between union organizers and employees. The reasoning used by the dissent to reach this conclusion, that Baeza was invited onto the property only to work and that "because Baeza went well beyond the scope of his invitation to be on the plant premises, Reliant was within its property rights in excluding him," would apply equally if Reliant fired its own employees for talking about a union in the plant. In other words, the dissent's logic would require overturning the Supreme Court's decision in *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945). As the court of appeals stated in the very case cited in the dissent, *ITT Industries, Inc. v. NLRB*, 413 U.S. 64, 72 fn. 2 (D.C. Cir. 2005), this form of analysis "just begs the question" because it applies equally to "on-site employees" of the property owner

Baeza somehow exceeded his (unwritten) license to be on its property. But even assuming that Reliant lawfully *could* have conditioned Baeza's access to the property on not engaging in union activity while on the property—a question we need not reach—there is no evidence (1) that Reliant actually imposed such a precondition on Baeza or any other contractor employee; (2) that Baeza knowingly violated a precondition imposed by Reliant; or (3) that Baeza demonstrated his unwillingness to comply with such a precondition in the future. Put somewhat differently, even if we were required to balance Baeza's Section 7 rights and Reliant's property rights—as we recently did in an access case involving *off-duty* contractor employees who sought to *return* to a workplace not owned by their employer, see *New York New York*, *supra*—there would be no basis to find that the balance favored Reliant under the circumstances here.

D.

Notwithstanding the absence of an employment relationship between Baeza and Reliant, this case is properly examined in light of Board doctrine governing employees engaged in organizational activity while at work. See generally *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945).

Under long-established Board law, an employer rule that prohibits solicitation during employees' working time is presumptively lawful. See, e.g., *Our Way, Inc.*, 268 NLRB 394, 394–395 (1983) (tracing doctrinal development since 1943). But Reliant had no rule at all prohibiting solicitation and Baeza did not engage in solicitation. As we have recently observed,

Notwithstanding the existence of authority lawfully to restrict employees' Section 7 activities, . . . if an employer fails to exercise that authority . . . by failing to promulgate any rule, . . . the employee activity that *could* otherwise be prohibited retains its protected character.

who are entitled "to engage in organizational activities on company property."

The Fifth Circuit's decision in *NLRB v. Pneu Electric, Inc.*, 309 F.3d 843 (5th Cir. 2002) cited by Reliant, is not to the contrary. In that case, the court directed the Board to reexamine the rights of contractor employees in light of *Lechmere*, *supra*, which the Board has since done in response to a decision by the District of Columbia Circuit, also cited by Reliant. See *New York New York*, *supra*, 356 NLRB No. 119, on remand from *New York New York LLC v. NLRB*, 313 F.3d 585 (D.C. Cir. 2002). But the court in *Pneu Electric* enforced the Board's order against the property owner with respect to the discharge of its contractor's employees for engaging in protected activity on the owner's property. *Pneu Electric* thus demonstrates that the issue of access rights is distinct from the situation posed here, a reprisal against an employee's union activity while the employee was already on the property to perform work.

Continental Group, Inc., 357 NLRB No. 39, slip op. at 3 (2011). In such circumstances, Board precedents hold that an employer lawfully may discipline an employee for soliciting during worktime only if the employer can prove that "that it acted in response to an actual interference with or disruption of work." *Cal Spas*, 322 NLRB 41, 56 (1996), *enfd.* in relevant part 150 F.3d 1095 (9th Cir. 1998), citing *Mast Advertising & Publishing*, 304 NLRB 819, 827 (1991).

On the credited evidence, Reliant cannot meet this burden. The judge found that Reliant "offered absolutely no evidence that Baeza was not performing his job properly, or that he was distracting employees in the performance of their job duties." Rather, "Baeza spent only a minimal amount of company time engaged in union activity." On exceptions, Reliant does not seriously challenge the judge's factual findings, which we adopt.²²

IV.

In sum, Baeza's conduct violated no rule established by Reliant, and Reliant never directed him not to engage in union activity. Instead, it instructed Fluor Daniel to remove him from its premises based on his protected activity.²³ The legality of *that* action—not a workplace rule or an access restriction—is the issue in this case.²⁴

²² Those findings also foreclose Reliant's argument, endorsed by the dissent, that it acted lawfully in directing Baeza's transfer because it had a good-faith belief that Baeza was engaging in unprotected activity. Such a defense is available in cases where discipline is based on alleged employee misconduct undertaken in the course of protected activity. See *NLRB v. Burnup & Sims, Inc.*, 379 U.S. 21 (1964). But even in a case where the employer acts on a good-faith belief that the employee engaged in misconduct, the defense is foreclosed if the evidence establishes that the employee, in fact, did not engage in misconduct. As the Court made clear in *Burnup & Sims*, *supra* at 23, "Over and again the Board has ruled that § 8(a)(1) is violated if an employee is discharged for misconduct arising out of protected activity, despite the employer's good faith, when it is shown that the misconduct never occurred." See, e.g., *Powellton Coal*, *supra*, 354 NLRB No. 60, slip op. at 10; *Alta Bates Medical Center*, 357 NLRB No. 31, slip op. at 2 (2011). As explained above and found by the judge, the record here demonstrates that Baeza engaged only in protected conduct. Thus, contrary to the dissent's suggestion, our holding is in no way based on Reliant's failure to conduct an adequate investigation.

²³ This case is easily distinguishable from *Sylvania Electric Products*, 174 NLRB 1067 (1969), cited by Reliant, in which the Board upheld a contractor-employer's "neutrality" rule that prohibited its employees from participating in organizing activity taking place on a customer's premises. Here, Baeza's employer, EOMS, had no such rule; rather, EOMS acted in response to Reliant's demand to remove Baeza, which was also not based on any preexisting rule.

²⁴ Reliant cites a footnote in the judge's decision in *Fabric Services*, 190 NLRB 540 (1971). There, the Board, adopting the judge's decision, found that an employer had unlawfully prevented a contractor employee from wearing union insignia. The judge observed that his "view of the case would have been different had it involved a prohibition against employee solicitation or other organizational activity." *Id.* at 543 fn. 11. The Board has since correctly characterized this state-

The remedy, in turn, simply requires Reliant to notify its contractor that it has no objection to Baeza returning to Reliant's facilities and to make Baeza whole for any loss of earnings and benefits suffered as a result of the transfer. The evidence is clear that Reliant caused Baeza's transfer because he engaged in protected concerted activity, and not to defend any legitimate management or property interest recognized by the Act.

Our decision hews to the facts as correctly found by the judge and follows Board and judicial precedent with care, but our dissenting colleague reads a narrow ruling as if it were something else altogether. He does not take issue with the crucial factual findings made, most notably that there was no evidence that Baeza was not doing his job or was interfering with the work of other employees. He refers, however, to Baeza's "distraction of co-workers" and the Respondent's belief that Baeza was neglecting his own work and disrupting the work of others. The judge, however, found no misconduct or disruption and there is no evidence in the record to the contrary. If the Respondent had demonstrated that Baeza's conduct trenching on its management or property interests—if Baeza actually had been guilty of violating a solicitation or distribution rule or disrupting production—then this case would be a different one. But the Respondent failed to make that showing—and that failure matters, under well-established labor law principles. As we have explained, the Supreme Court's decisions in *Babcock & Wilcox* and *Lechmere* and the Board's decision in *New York New York*,²⁵ access cases invoked by the dissent, do not bear on the situation here, where a statutory employee has been retaliated against for engaging in protected concerted activity while at his workplace to perform work.²⁶ "This should have been a straightforward case," our colleague opines. It is. Accordingly, we find that Reliant violated Section 8(a)(1) and (3) of the Act.

ment as "dicta." See *Southern Services*, supra, 300 NLRB at 1155 fn. 12. In any event, as we have emphasized, Reliant had no rule prohibiting solicitation and Baeza did not engage in solicitation.

²⁵ Our colleague argues that our holding is somehow inconsistent with *New York New York*, supra, because it deprives a property owner of effective control over a contractor's employees. That claim is mistaken. Reliant's ability to effect Baeza's transfer illustrates the control that property owners typically have over contractor employees. Today's decision simply requires that such control be exercised for a lawful purpose.

²⁶ No decision of the Board or the Supreme Court, in turn, supports the dissent's claim that Reliant's property rights would trump Baeza's Sec. 7 rights even if he had limited his organizing activity to nonworking time.

ORDER

Respondent, Reliant Energy aka Etiwanda LLC, Rancho Cucamonga, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Promising employees improved benefits in order to discourage employees from supporting the Union.

(b) Withholding benefits from certain of its employees while giving those benefits to other employees, in order to discourage membership in and support for the Union.

(c) Causing its contractor to remove employees from its facilities in order to discourage membership in or support for the Union.

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

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

(a) Make its Etiwanda facility employees whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the judge's decision, plus daily compound interest as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010).

(b) Within 14 days from the date of this Order, notify its contractor in writing that it has no objection to Richard Baeza returning to its Etiwanda facility, or to any of its other facilities.

(c) Make Richard Baeza 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, plus daily compound interest as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010), enf. denied on other grounds sub nom. *Jackson Hospital Corp. v. NLRB*, 647 F.3d 1137 (D.C. Cir. 2011).

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful demand to its contractor that it remove Richard Baeza from the Etiwanda facility, and within 3 days thereafter notify him in writing that this has been done and that the unlawful conduct will not be used against him in any way.

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

(f) Within 14 days after service by the Region, post at its Etiwanda facility in Rancho Cucamonga, California, copies of the attached notice marked “Appendix.”²⁷ Copies of the notice, on forms provided by the Regional Director for Region 31, 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. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. 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 June 1, 2001.

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

IT IS FURTHER ORDERED that Case 31–RC–8023 is severed and remanded to the Regional Director for Region 31 for the purpose of conducting a second election as directed below.²⁸

DIRECTION OF SECOND ELECTION

A second election by secret ballot shall be held among the employees in the unit found appropriate, whenever

²⁷ 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.”

²⁸ The dissent would not direct a second election based on the passage of time, but the extended, indeed inexcusable, delay in the issuance of a decision in this case was not due to any conduct on the part of the parties. The dissent would have the petitioner restart the process by filing a new petition supported by a new showing of interest. But we do not believe the petitioner should be prejudiced by the Board’s delay. Requiring a new election does not unfairly prejudice any other party when a proper petition was filed and the first election was tainted by objectionable conduct. The purpose of the showing of interest in a representation case is merely to determine whether there is sufficient employee interest in selecting a representative to warrant the expenditure of the agency’s time, effort, and resources in conducting an election. See 29 CFR Sec. 101.18; Casehandling Manual Sec. 11020. As such, the purpose of the showing of interest is purely an administrative one and is not litigable. *Borden Co.*, 101 NLRB 203, 203 fn. 3 (1952); Casehandling Manual Sec. 11028.3.

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 that 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 first election and who retained their employee status during the eligibility period and their replacements. *Jeld-Wen of Everett, Inc.*, 285 NLRB 118 (1987). 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 election date, and employees engaged in an economic strike that began more than 12 months before the date of the first election and who have been permanently replaced. Those eligible shall vote whether they desire to be represented for collective bargaining by Utility Workers of America, AFL–CIO.

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. December 30, 2011

Mark Gaston Pearce, Chairman

Craig Becker, Member

(SEAL)

NATIONAL LABOR RELATIONS BOARD

MEMBER HAYES, dissenting.

I. INTRODUCTION

My colleagues once again ride a contractor's Trojan Horse to further breach the legal barrier of Supreme Court precedent that generally proscribes individuals who are not employed by a property owner from engaging in Section 7 activities on that property.¹ In *New York New York*,² they required a casino/hotel owner to permit off-duty employees of a restaurant lessee on its premises to enter its facility in order to publicize to customers a campaign to organize restaurant coworkers. In *Simon De Bartolo*,³ they required a shopping mall operator to permit off-duty employees of a maintenance contractor to leaflet in the mall parking lot and at mall entrances to publicize a campaign to organize maintenance coworkers. In this case, they hold that a property owner must permit a contractor's *on-duty* employee to engage in organizational solicitation of *the property owner's employees*. Although I predicted in my *NYNY* dissent the majority's intent to further expand access rights for Section 7 activity, I could not have anticipated that they would travel so far and so fast as the result reached here. It is but a short step farther to hold that a union agent visiting a contractor's employees for legitimate business purposes must be permitted to organize the property owner's employees while on the premises. I dissent from this substantial erosion of the meaningful distinction between a property owner's employees and nonemployees and the relative rights of each to access private property to engage in Section 7 activity.⁴

¹ See *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992); *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956).

² *New York New York Hotel & Casino*, 356 NLRB No. 119 (2011) (*NYNY*).

³ *Simon DeBartolo Group*, 357 NLRB No. 157 (2011).

⁴ I also dissent from the majority's adoption of the judge's ruling that Reliant violated the Act (a) by promising that the Etiwanda plant employees would be eligible for an "Extra Incentive Plan" (EIP) if they voted against the Union, and (b) by withholding the EIP and double-time holiday pay from the Etiwanda employees. Reliant's handling of the potential EIP and double-time compensation was a good-faith effort to comply with the Board's difficult-to-follow rules regarding the grant and withholding of benefits during the critical period leading to an election. See, e.g., *Marshall Durbin Poultry Co. v. NLRB*, 39 F.3d 1312, 1323 fn. 26 (5th Cir. 1994); *Rosauers Supermarkets Inc.*, 300 NLRB 709, 711 (1990); Charles C. Jackson and Jeffrey S. Heller, *Promises and Grants of Benefits under the National Labor Relations Act*, 131 U. Pa. L. Rev. 1, 16 (1982). Indeed, the majority and the judge do not dispute that Reliant received considered legal advice to exclude Etiwanda plant employees from the EIP. Further, the judge's conclusion that Reliant simultaneously promised and withheld the EIP defies common sense.

Moreover, I dissent from the majority's decision to adopt the judge's recommendation that a second election be ordered. The first election was over a decade ago. Many (perhaps most) employees at the Eti-

II. BACKGROUND

Reliant Energy (Reliant or Respondent) purchased five California power plants from Southern California Edison (SCE) in 1997. One of these facilities was the Etiwanda power plant. Reliant contracted with SCE and later with an SCE affiliate, Edison Operations & Maintenance Services (EOMS), to operate the Etiwanda plant. The SCE and EOMS workers who operated the plant were represented by the Utility Workers Union of America (Union), the same union that had represented the operations and maintenance employees when SCE owned the plant.

Because SCE and EOMS operations were not cost-effective, Reliant assumed direct operation of the Etiwanda plant in April 2001. Reliant initially planned to hire the former EOMS employees and to recognize the Union as a statutory successor employer to EOMS. Most of the former EOMS employees, however, declined Reliant's employment offers. Consequently, the bulk of the employees in Reliant's new work force were not former EOMS bargaining unit employees. Reliant thus could not lawfully recognize the Union as a successor employer. When the Union later began an organizing effort among the new Etiwanda employees, Reliant decided to oppose the campaign.

After assuming direct plant operations, Reliant contracted with Fluor Daniel to perform maintenance and outage work. Fluor Daniel subcontracted some of that work to EOMS. Under its subcontract, EOMS assigned one of its employees, Richard Baeza, to do short-term outage work at Etiwanda. This was intense, pressing work that had to be completed quickly because of a severe California energy crisis and the heavy political and regulatory pressure on Reliant to restore the Etiwanda plant to 100 percent of its electrical generation capacity. It required the full time and attention of Baeza and the other workers involved.

Martin Willis, the Reliant maintenance supervisor at Etiwanda, heard that EOMS employees working on its subcontract with Fluor Daniel were engaged in union organizing activities during worktime. Willis asked Jim Biel, the Fluor Daniel site superintendent, whether this was true. Biel replied that he had personally seen Baeza "stopping employees, Reliant employees, in travels going from one job to another and [Baeza] was talking about union organizing stuff and handing out handbills, during

wanda plant may no longer be there. The Union's showing of interest became stale many years ago, and the unit may no longer be appropriate. The Sec. 7 rights of the current Etiwanda employees, therefore, would be best served by having the Union compile and present a new showing of interest. Then, if the Union can obtain such a showing and still wants to represent the Etiwanda employees, a new election could be run based on a timely showing of interest.

Company time.” Willis asked Biel again to make sure that Baeza’s organizing activities had not been during nonworking time. Biel reiterated that Baeza was conducting union organizing activities “on company time.”

Baeza, in testimony credited by the judge, said he did not hand out union literature during worktime but admitted that he accepted authorization cards from Reliant employees and spoke with them about the Union during worktime, although he claimed that these conversations were brief. Thus, even according to the judge and Baeza, Baeza engaged in union activity at a time he was supposed to be working. Baeza further acknowledged that it was improper to conduct union organizing activities during worktime. And a union handbill that Baeza himself distributed stated that employees were allowed to distribute or discuss union organizing material only “in non-work areas during non-work times, such as during breaks or lunch hours.”

After considering what Biel had reported, Willis asked the advice of a labor relations consultant whom Reliant had engaged. The consultant opined that Reliant “had a situation whereby they were trying to get [electrical generation] units up and running, and in essence, we had a contract employee who was not doing his job.” For those reasons, Willis decided to ask Fluor Daniel to remove Baeza from the site. EOMS assigned Baeza to a new worksite. He did not miss a day of work.

III. DISCUSSION

A. Reliant Did Not Violate Section 8(a)(3) and (1) by Requesting Baeza’s Removal from its Premises

The judge, applying a standard *Wright Line*⁵ analysis, found that the Respondent violated Section 8(a)(3) and (1) by requesting that its contractor and subcontractor, Fluor Daniel and EOMS, remove Baeza from the Etiwanda site. To establish such a violation, the General Counsel must prove that Reliant’s request to remove Baeza was motivated by his union activity. Although the judge found that Reliant acted because of union animus, direct evidence and the judge’s own words flatly contradict that finding. Martin Willis, Reliant’s maintenance supervisor responsible for requesting Baeza’s removal, testified without contradiction that he made the request based on the first-hand account of Jim Biel, Fluor Daniel’s site superintendent. Concededly, the judge credited Baeza’s more benign testimony, which still indicates that Baeza engaged in union activity on worktime, but the judge did not discredit Willis’ testimony. Rather, he admitted it over a hearsay objection because “it was

being offered not for the truth of the matter asserted, but rather *to establish why Willis took a certain course of action.*” (Emphasis added.) Thus, record evidence established that Willis had Baeza removed because he was told that Baeza was handbilling and soliciting Reliant employees at times when Baeza should have been working. As the Board and the courts have acknowledged, “‘Working time is for work’ is a long-established maxim of labor relations.” *Adtranz ABB Daimler-Benz Transportation, N. A., Inc. v. NLRB*, 253 F.3d 19, 28–29 (D.C. Cir. 2001); *Our Way, Inc.*, 268 NLRB 394, 395 (1983); *Peyton Packing Co.*, 49 NLRB 828, 843 (1943). The Respondent’s belief that Baeza was failing to do his job under time-sensitive demands was, according to Willis, the only reason for his removal and it was a valid one.⁶

According to the judge and the majority, Willis should not have taken Biel’s first-hand accounts of Baeza’s activities at face value; rather, he should have conducted an independent investigation. Neither the judge nor the majority cite any support for this proposition. There is none. Of course, the Board may in certain circumstances infer discriminatory motivation from the failure to investigate information about misconduct, but there is no mandate to do so.⁷ In sum, there is no record basis for

⁶ For purposes of this case, the judge’s admission of Willis’ testimony to show why Willis took the action he did more than sufficed to establish that the Respondent’s motive was lawful. Indeed, the majority does not dispute that Willis’ decision to request Baeza’s removal was based solely on first-hand reports that Baeza was disrupting work. Thus, Willis’ testimony is probative evidence on the motive issue even though it was not admitted for a broader purpose. After all, it was the General Counsel’s burden to show an unlawful motive—not the Respondent’s burden to prove that Baeza was engaged in disruptive conduct (as the majority suggests).

⁷ Ironically, the majority’s unfounded assertion also contravenes one of the basic tenets of its *NYNY* decision. The *NYNY* majority stressed that a property owner (such as Reliant) has a “legitimate interest in preventing interference with the use of its property.” 356 NLRB No. 119, slip op. at 10. The majority also recognized that there were valid concerns as to whether, in the absence of an employment relationship, a property owner would have adequate control over contractor employees (like Baeza) who had extensive access to its property. *Id.* at 11. Based on its “experience,” however, the majority concluded that the contractual relationship and mutual “economic interest” between the property owner and its contractor would give the property owner the ability “to quickly and effectively intervene, both through the [contractor] employer and directly, to prevent any inappropriate conduct by the [contractor] employer’s employees on the owner’s property.” *Id.* Despite the absence of an employment relationship, the property owner would have “sufficient control” over contractor employees to prevent disruption of its operations. *Id.*

Here, the Respondent “quickly and effectively intervened” based on a first-hand report of Baeza’s disruptive conduct by the lead contractor executive responsible for his performance. Now, however, the majority would require the property owner to perform a detailed “independent investigation” of the conduct of another employee’s employer before it could request his removal. That is hardly consistent with the “sufficient control” assurances in *NYNY*.

⁵ 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982).

inferring that the Respondent would have treated this conduct differently if Baeza had not been engaged in union activity when he should have been working.

Despite Baeza's undeniable misuse of work time, the majority contends that his actions were still protected because neither Reliant nor its contractors had a rule prohibiting solicitation during working time. This claim misses the point. Reliant did not ask that Baeza be removed because he violated a no-solicitation rule. It so requested because he was using paid worktime to do something other than work. An employer does not have to promulgate a no-solicitation rule to validly require that contractor employees use paid worktime for work.

In short, I would find that the Respondent lawfully requested that Baeza be transferred from its worksite because it believed that he was disrupting production and failing to work during worktime. For the reasons below, the activities the judge found Baeza engaged in on worktime do not shield his removal because Baeza, as a contractor's employee, did not enjoy the broader Section 7 rights possessed by Reliant's own employees.⁸

B. Baeza Did Not Have Section 7 Access Rights That Outweighed Reliant's Legally-Protected Property and Management Rights

The majority has no difficulty finding that Baeza's actions were protected. In so doing, it continues down the erroneous path it began with *Nyny*, supra, and does not properly consider—much less accommodate—Reliant's legally-protected property and management interests. First, the majority does not recognize the “critical distinction” between access rights of a property owner's employees and those of nonemployees (e.g., contractor employees), *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 533 (1992), a distinction which the Court termed “one of substance.” *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 113 (1956).⁹ Second, the majority ignores the Supreme

⁸ Because Baeza's worktime collection of cards and distraction of coworkers was unprotected, the Supreme Court's decision in *Burnup & Sims (NLRB v. Burnup & Sims)*, 379 U.S. 21 (1964), has no relevance. There, the Supreme Court held that an employer's good faith but mistaken belief as to its own employee's conduct was not a defense to the resulting interference with the employee's Sec. 7 rights. The key is that the employee there was in fact engaged in protected conduct. Here, because Baeza was not Reliant's employee, his worktime organizing activities were not protected.

⁹ My colleagues contend that the logic of my dissent would require the overruling of the Supreme Court's decision in *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945). That is clearly wrong. *Republic Aviation* involved the access rights of the property owner's employees while Baeza was indisputably a “nonemployee” of the property owner (the Respondent). By relying so heavily on this mistaken point, the majority again has ignored the Supreme Court's admonition that the Board must distinguish “between rules of law applicable to employees and those applicable to nonemployees.” *Babcock & Wilcox*, supra, 351

Court's mandate to accommodate Section 7 rights and the owner's property rights “with as little destruction of one as is consistent with the maintenance of the other.” *Hudgens v. NLRB*, 424 U.S. 507, 522 (1976). The *Hudgens* Court continued, “The locus of that accommodation . . . may fall at differing points along the spectrum depending on the nature and strength of the respective Section 7 rights and private property rights asserted.” *Id.* The majority fails to acknowledge any tension between these respective rights.

Rather, in utter disregard for the Supreme Court's teachings, my colleagues mistakenly assert that Baeza, like a Reliant employee, has full *Republic Aviation* access rights, an unprecedented expansion of the Board's access law. In contrast, Reliant's property rights “are not implicated because Baeza was not a stranger seeking to trespass at the worksite to engage in organizational activity.” Baeza, however, was a temporary employee of a second-tier contractor who was allowed on the site specifically to do pressing, time-sensitive outage work. He certainly had not been invited onto the property to use paid worktime to organize Reliant employees. Thus, because Baeza went well beyond the scope of his invitation to be on the plant premises, Reliant was within its property rights in excluding him. *ITT Industries*, supra, 413 F.3d 72 fn. 2 (“Purely from the perspective of trespass law, on-site employees may exceed the scope of their invitation to access, and so not be ‘rightfully’ on, the employer's property when they handbill at a place or time forbidden by their employer.”).

Baeza's Section 7 rights are further attenuated by the fact that he sought to organize Reliant's employees, and any access rights that Baeza might have exercised at Etiwanda would have been entirely derivative of the Section 7 organizing rights of Reliant's own employees. *Babcock & Wilcox*, supra at 113.¹⁰ There was no evidence that the Union could not effectively communicate its organizing message to Reliant employees without an on-

U.S. at 112–113. The majority's citation to the District of Columbia Circuit's opinion in *ITT Industries, Inc. v. NLRB*, 413 F.3d 64 (D.C. Cir. 2005), only underscores its error. That case addressed the access rights of off-site workers who were employed by the property owner—not nonemployees (like Baeza).

¹⁰ My colleagues assume, without explanation or support, that Baeza possessed his own Sec. 7 right to organize the Respondent's employees. But there was no such right here and, thus, no possibility of an 8(a)(1) or (3) violation based on such a right. The Supreme Court has firmly established that, as a nonemployee of the property owner, Baeza's Sec. 7 right (if any) would be entirely “derivative” of the Sec. 7 rights of the Respondent's employees. See e.g., *Lechmere*, supra, 502 U.S. at 533–534; *Babcock & Wilcox*, supra, 351 U.S. at 111–113. Further, there is no argument—much less the required showing—that Baeza's nonemployee organizing activities were necessary to the fulfillment of the Respondent employees' Sec. 7 organizing rights. See *id.*

site organizer employed by a contractor. As a result, Reliant had no obligation to grant access to Baeza to organize Reliant employees. *Id.* For all legal and practical purposes, there was no distinction between Baeza and any other nonemployee union organizer.¹¹

Baeza's highly attenuated Section 7 access rights are greatly outweighed by Reliant's property and management interests. Reliant was facing the pressure of an outage during the California energy crisis. There was a strong state and even national interest in restoring the full electrical generation capacity of the Etiwanda plant as quickly as possible. To do that, Reliant had to exercise its property rights and manage its ongoing operations to maximize the efficiency of its outage work. Reliant's property rights and management rights, therefore, are especially strong in this case. The limited rights of a contractor employee, temporarily assigned to the owner's worksite, who seeks to organize the owner's employees in a wholly different unit from his own, must yield to Reliant's rights. Had the majority made any attempt to accommodate competing interests here, a proper balance would have led to the inescapable conclusion that Reliant's request to transfer Baeza from its worksite and to end his disruptive activities was lawful.

IV. CONCLUSION

This should have been a straightforward case. Since the earliest days of the Act, there has been no dispute that paid work time is for work. That maxim is especially apt in this case given the importance of the outage work to which Baeza was assigned during the California energy crisis. When Reliant received an uncontroverted eyewitness report from a contractor executive that Baeza was disrupting his own outage work and the work of others during working time, it had no responsible choice but to request his removal in favor of another temporary employee who would stick to the task at hand.

Moreover, under the relevant Supreme Court and Federal appellate court precedent, Reliant's property rights far outweigh Baeza's organizing rights. Baeza was not a Reliant employee. He was not regularly assigned to the Etiwanda plant. He was trying to organize the employees of an entirely different employer, not his fellow second-tier contractor employees. In such circumstances,

¹¹ The majority notes that Baeza is an "employee" under Sec. 2(3) of the Act. But there is no claim that Baeza is a statutory "employee" of Reliant. As the majority conceded in *NINY*, union organizers may be statutory "employees" of the union but they are still "non-employees" for purposes of the Supreme Court's access cases. 356 NLRB No. 119, slip op. at 6 fn. 22. No case holds that a statutory "employee" of an entity other than the property owner has a Sec. 7 right to have access to a property owner's premises in order to organize the property owner's employees.

even if Baeza had limited his organizational activity to nonworking time, his protected right to engage in such "derivative" activity on Reliant's premises must yield to Reliant's property rights.

Dated, Washington, D.C. December 30, 2011

Brian E. Hayes, 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 make implied promises of incentive bonus programs, double-time pay for holidays, or other benefits to you in order to discourage you from supporting the Union.

WE WILL NOT deny incentive bonus programs, double-time pay for holidays, or other benefits to our employees at the Etiwanda facility, while giving those benefits to our employees at other plants, in order to discourage support for and pressure you to vote against, the Utility Workers of America, AFL-CIO (Union) or any other union.

WE WILL NOT demand or request that any contractor or subcontractor performing services for us remove from any of our facilities or fail to refer to any of our facilities Richard Baeza because of his union activities.

WE WILL make all our Etiwanda facility unit employees whole for any loss of earnings and benefits they may have lost because we did not give them the opportunity to participate in the "extraordinary incentive program" and/or double-time pay for working on holidays, when we gave these wages and benefits to our employees working at other plants.

WE WILL, within 14 days of this Order, notify the appropriate contractor or subcontractor in writing that we have no objection to Richard Baeza returning to our Etiwanda facility or to any of the other facilities.

WE WILL make Richard Baeza whole for any loss of earnings and other benefits he may have lost because of our demand that a contractor or subcontractor remove him from our Etiwanda facility, or stop sending him to perform work at any of our facilities.

WE WILL, within 14 days from the date of the Board's Order, remove from our files, and ask the Employer to remove from the Employer's files, any reference to our demand to our contractor or subcontractor that Richard Baeza be removed from the Etiwanda facility, and WE WILL, within 3 days thereafter, notify Richard Baeza in writing that we have done so and that we will not use the demand for his removal against him in any way.

RELIANT ENERGY AKA ETIWANDA LLC

Nathan Laks and *Ernesto Fong*, for the General Counsel.
L. Chapman Smith, of Houston, Texas, for the Respondent.
Ellen Greenstone, of Pasadena, California, for the Charging Party.

DECISION

STATEMENT OF THE CASE

GREGORY Z. MEYERSON, Administrative Law Judge. Pursuant to notice, I heard this case in Los Angeles, California, on February 26, 27, and 28, 2002. The charge in Case 31-CA-25155 was filed by the Utility Workers of America, AFL-CIO (Union, Petitioner, or Charging Party) on July 6, 2001.¹ Based on that charge, the Regional Director for Region 31 of the National Labor Relations Board (Board) issued a complaint on August 30. The complaint alleges that Reliant Energy aka Etiwanda LLC (Employer or Respondent) violated Section 8(a)(1) and (3) of the National Labor Relations Act (Act). The Respondent filed a timely answer to the complaint denying the commission of the alleged unfair labor practices.

Pursuant to a petition filed by the Union on May 23 in Case 31-RC-8023 and a stipulated election agreement thereafter executed by the parties, an election by secret ballot was conducted on July 3. The tally of ballots reflected that, of 33 ballots cast, 9 had been cast for representation by the Union, 23 had been cast against such representation, and 1 ballot was challenged. On July 6, the Union filed a timely objection to conduct affecting the results of the election. Thereafter, on January 4, 2002, the Regional Director for Region 31 issued a report on the investigation of the objection. In his report, the Regional Director ordered that the objection be consolidated with the complaint for purposes of trial before an administrative law judge.

¹ All dates are in 2001, unless otherwise indicated. See GC Exhs. 1(a) and (b).

All parties appeared at the hearing, and I provided them with the full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, and to argue orally and file briefs. Based on the record, my consideration of the briefs filed by counsel for the General Counsel, counsel for the Respondent, and counsel for the Charging Party, and my observation of the demeanor of the witnesses,² I now make the following findings of fact and conclusions of law

FINDINGS OF FACT

I. JURISDICTION

The complaint alleges, the answer admits, and I find that the Respondent is a corporation, with an office and place of business in Rancho Cucamonga, California,³ where at all times material it has operated a nonutility power plant; and that during the 12-month period ending August 30, 2001, the Respondent, in the course and conduct of its business operations, purchased and received goods at its Rancho Cucamonga facility, and furnished services valued in excess of \$50,000 directly from its Rancho Cucamonga facility to points located outside the State of California. During the same period of time, the Respondent, in conducting its business operations derived gross revenues in excess of \$500,000.

Accordingly, I conclude that the Respondent is now, and at all times material has been, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

The complaint alleges, the answer admits, and I find that at all times material, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

III. ALLEGED UNFAIR LABOR PRACTICES

A. *The Dispute*

The complaint alleges that in mid-June the Respondent promised employees improved benefits in the form of an "extraordinary incentive plan" if they did not support the Union. It further alleges that during the same time period, the Respondent withheld benefits from its employees by failing to implement at the Etiwanda facility the "extraordinary incentive plan" and increased pay for work performed on holidays. Allegedly, the Respondent took this action in an effort to discourage employees from supporting the Union. Also, the complaint alleges that the Respondent prohibited Richard Baeza, an employee of a subcontractor, from continuing to perform work at the facility because of his protected union activity.

² The credibility resolutions made in this decision are based on a review of the testimonial record and exhibits, with consideration given for reasonable probability and the demeanor of the witnesses. See *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962). Where witnesses have testified in contradiction to the findings herein, I have discredited their testimony, as either being in conflict with credited documentary or testimonial evidence, or because it was inherently incredible and unworthy of belief.

³ The parties stipulated at the hearing that although the facility at issue is referred to as the Etiwanda plant, it is physically located in Rancho Cucamonga, California.

The answer denies the commission of any unfair labor practices. According to the Respondent, the creation of the “extraordinary incentive plan” was unrelated to the union activity of its employees, and was solely an attempt to increase employee productivity during a period of energy insufficiency in California. Further, the Respondent contends that any failure to implement at the Etiwanda facility the “extraordinary incentive plan” was merely the result of its desire to avoid making any unlawful changes in employee benefits during the critical period between the filing of the election petition and the representation election. The Respondent denies that it withheld any increased pay for work performed on holidays from its Etiwanda facility employees. Also, the Respondent denies that it caused the removal of Richard Baeza from its property because of his protected union activity, and it supports the action of its contractor in removing Baeza from the project for allegedly engaging in union activity on work time.

B. *The Facts*

The Respondent, which is a Texas based energy company, purchased five electric power generating plants from Southern California Edison (SCE) in approximately 1997. This was part of California’s deregulation of its power industry. The Etiwanda facility was one of those five plants.⁴ As part of the purchase, the Respondent contracted with SCE for a minimum of 2 years to provide operation and maintenance services for the plants. SCE created an affiliate company, Edison Operation & Maintenance Services (EOMS), in early 2001. Thereafter, SCE’s operation and maintenance contract with the Respondent was transferred to EOMS. SCE’s operation and maintenance employees at the Etiwanda facility had been represented by the Union for many years, and these employees continued to be so represented after EOMS took over the contract. In approximately August 2000, the Respondent decided that its contract with SCE was not cost-effective, and a decision was subsequently made that the Respondent would directly assume the operations and maintenance functions at its five California plants, including the Etiwanda facility. For various reasons, the relationship between the Respondent and SCE/EOMS deteriorated, which culminated in the Respondent’s termination of the agreement with EOMS effective April 1, 2001. As of that date, the Respondent officially assumed the operation of its five California plants, hiring employees to perform the day-to-day operations of those facilities. However, the Respondent did enter into an agreement with another contractor, Fluor Daniel, to periodically perform certain major maintenance projects. In turn, Fluor Daniel subcontracted some of this work to EOMS.

As the Respondent began the process of operating the Etiwanda facility, efforts were made by the Respondent to encourage employees of SCE and EOMS who had worked at that facility to leave their employer and become employees of the Respondent. Both Danny Ross, the Respondent’s Etiwanda plant manager, and Matt Greek, the Respondent’s southwest operations manager, testified that it was the Respondent’s expectation and desire for the employees of SCE and EOMS to be

⁴ The five purchased plants included Etiwanda, Ormand Beach, Mandalay, Ellwood, and Coolwater.

hired by the Respondent at Etiwanda. Further, they alleged that they assumed a majority of the employees at Etiwanda would ultimately be comprised of former employees of SCE/EOMS, at which point the Respondent would recognize the Union as the collective-bargaining representative of its operations and maintenance employees at that facility. Because of its belief that a majority of its Etiwanda employees would likely be former SCE/EOMS employees, the Respondent had several meetings with the Union at which the Respondent’s representatives discussed proposed initial terms and conditions of employment.⁵ However, as time went on, it became apparent that less than a majority of the Respondent’s Etiwanda employees would have formerly been employed by SCE/EOMS.⁶

The Union began to solicit authorization cards the same day the Respondent took over the operation of the Etiwanda plant, April 1. Also on the same date, Bernardo Garcia, the Union’s regional director, sent the Respondent a letter asserting that the Respondent was a “successor employer.” By letter dated May 4, the Respondent’s counsel responded by indicating that it was not a successor employer and declining to grant recognition to the Union. Also by letter dated May 4, Garcia advised the Respondent that the Union had obtained a card majority showing of interest and requested recognition. Counsel for the Respondent in a letter dated May 10, declined recognition on the basis of a “good faith” doubt that the Union represented an uncovered majority of the Respondent’s employees at the Etiwanda facility.

Following this exchange of letters, the Union filed a representation petition with the Board on May 23 seeking to represent a unit of operations and maintenance employees at the Respondent’s Etiwanda facility. On June 5, the Union and the Employer entered into a stipulated election agreement, which resulted in an election being held on July 3. The employees voted against union representation.

The undersigned takes judicial notice⁷ that in the spring of 2001, California was experiencing a severe energy crisis. A significant rise in natural gas prices caused a corresponding increase in the price of electricity in late 2000 and early 2001. Despite record rate increases, California energy consumers experienced rolling blackouts during this period. According to the testimony of Matt Greek, in late 2000 and early 2001, the Respondent was facing inquiries and investigations regarding its California power plants by the Federal Energy Regulatory Commission, the California Public Utilities Commission, the California Independent System Operator, and the U.S. Department of Energy. He contended that the Respondent was under considerable pressure to minimize unit outages and make sure that its California plants were operating at maximum efficiency. Further complicating the problem, the Respondent had acquired

⁵ These meetings included representatives of the International Brotherhood of Electrical Workers (IBEW), which had represented a unit of SCE’s employees at the Coolwater facility.

⁶ While the precise reasons for this are unclear, it does appear that the Respondent did make a good-faith effort to attract the employees of SCE/EOMS.

⁷ In Board proceedings, judicial notice may be taken of well-known or public facts. See, e.g., *Casa Italiana Language School*, 326 NLRB 40, 41 fn. 6 (1998) (judicial notice of yellow pages).

plants with old generating equipment that would require millions of dollars worth of maintenance and improvements in order to face the increased demands of consumers. Greek testified that the Respondent was of the belief that the summer of 2001 would be a continuation of the blackouts and service interruptions that had been occurring and, therefore, it was necessary for the Respondent to do whatever it could to improve the operation of its California facilities. According to Greek, he perceived that there were problems with personnel performance at the California facilities, and he wanted to find a way to link pay to performance and to recognize and reward significant contributions from employees who were performing their jobs in an exemplary fashion.

Matt Greek testified that it was this situation which led to his considering an incentive plan for the employees at the California facilities. He contended that in late April or early May he created a handwritten proposal for an incentive plan. Unfortunately, there was allegedly no remaining copy of this handwritten proposal. Greek testified about various written documents that thereafter made reference to an incentive plan. However, Greek seemed badly confused regarding the sequence in which these documents were issued and he repeatedly contradicted himself. The earliest document that shows a date, is a copy of an email sent by Greek to the Respondent's labor counsel dated May 23. (R. Exh. 16.) Attached to that e-mail is a document entitled "West Region Summer Incentive Program." The document refers to the plan as an "extraordinary incentive program" and describes how employees may earn awards varying from \$1000 to \$4000 for superior performance. The incentive plan as referred to in this document was scheduled to begin in June 2001. It is very important to note that nowhere in this document is there any reference to the exclusion of any category of employees, including those who might be represented by a union, or covered by an election petition. The document has a handwritten notation indicating "done 5/23/01." Further, the email from Greek to counsel stated, "As we discussed. Please comment, early and often." It is clear to the undersigned that as of May 23, the "extraordinary incentive program" was still very much a work in progress with Greek seeking advice from the Respondent's labor counsel. Following advice from counsel, Greek prepared a presentation for some of the Respondent's managers including his boss, which presentation was dated June 11 and referred to as "California Emergency Response Incentives—Overview." (R. Exh. 17, p. 5.)

The next written document which shows a date and which makes reference to an "extraordinary incentive program" is an email from Matt Greek dated June 14 to various management officials describing an attached letter to employees which explained the program.

(CP Exh. 2.) The email indicated that the program was going into effect immediately for all the operations personnel at the Respondent's California facilities, with the exception of "represented employees at Coolwater and employees covered by an election petition at Etiwanda." Further, managers were asked to "distribute the attached to all eligible employees." The attached letter to employees shows the date of June 18, however, other copies of this letter which are in evidence show different dates. The letters to the employees were identical,

with the exception that each letter reflects the respective date that it was computer generated. The letters all appear to have been generated within the space of 4 or 5 days from about June 14 to 19.

Regarding the content of these letters, employees were advised of the implementation of an "extraordinary incentive program" for operation employees at the California facilities effective for the months of June through October. Further, the letter explained that, "Represented employees and those currently covered by an election petition are not eligible for this extraordinary program." Eligible employees were informed that they had the opportunity to earn a \$500 per month bonus if station performance levels exceeded the program threshold values, and, further, that discretionary awards of up to four times the threshold awards based on monthly performance were also available. According to Greek, the "extraordinary incentive program" as was reflected in these letters to the employees was implemented only after he had consulted with a number of people, including the Respondent's labor counsel, and had received approval from his superior.

At the hearing, reference was made to a handwritten document that Matt Greek acknowledged was prepared by him. (GC Exh. 14.) That document was very similar to the letter that issued to employees in the period of June 14 to 19. However, Greek was uncertain exactly when he prepared the handwritten document and contradicted himself several times. In any event, the handwritten document contained the same exclusions from the incentive program for represented employees and those covered by an election petition. Despite Greek's inability to definitively establish the date he prepared the handwritten document, based on the content of the various documents, it is clear to me that the handwritten document was a draft of the letter to employees. Therefore, it must have been prepared sometime after May 23, the date of the email from Greek to labor counsel, and before June 14, the date of the email from Greek to various managers attaching the letter to be issued to eligible employees.

The Respondent hired labor relations consultant, Harold Craft, to represent its interests in the representation election campaign at the Etiwanda facility and, according to Craft, to educate the employees as to their rights. Craft testified that a couple of days prior to June 14, the day eligible employees first began to receive notice of the incentive program, he was informed by Matt Greek that the letters would be issued. Thereafter, while conducting meetings with Etiwanda employees prior to the election, he was asked questions about the incentive program. Apparently, a number of employees asked questions about whether the program was "illegal." According to Craft, he told the employees that as he was not an attorney; he was not in a position to say whether the program was legal or not; and he referred them a NLRB handbook. Further, he allegedly told the employees that whether they ultimately received the incentive program would depend on negotiations, assuming the Union won the election.

Thomas Riddle was an electrician employed by EOMS. From October 2000, until the end of June 2001, he was assigned by his employer to perform work at the Respondent's Etiwanda facility. He testified that while working at the Eti-

wanda facility, he was given by an employee of the Respondent a copy of the letter to employees that explained the incentive program. Further, he testified that he saw copies of the same letter in the “cubbyholes” assigned to the Respondent’s operators in the control room.

By letter dated June 24 addressed to the employees, the Respondent’s Etiwanda plant manager, Danny Ross, “responded to several rumors and concerns” of the employees. (GC Exh. 9.) The letter took the form of question and answer. The question was phrased as follows:

I have heard that Mandalay and Ormond plants have just been informed about an incentive plan in addition to what we have at Etiwanda. I have also been told that the Company is paying double time for holidays at the other plants. Is this true? If so, are we going to get these programs, and if not . . . why not?

The first paragraph of the answer was phrased as follows:

Once the union filed a petition for an election at Etiwanda, everything became frozen, as it did at Coolwater. As a Company, we are prohibited by law from improving existing wages or benefits during the course of a union campaign. Whether or not you would receive these enhancements would be subject for negotiations if the union is voted in to represent you. I would remind you, the union can only ask. The Company is the only one in a position of giving the benefits.

The letter went on to describe the situation at the Coolwater facility where the IBEW had recently been elected to represent a unit of Respondent’s employees.⁸ It also stated the Respondent’s position that, “**we don’t need a union to interfere with the process.**” Further, referring to the enhanced benefits, the letter stated:

YES! These benefits have been implemented in all of our California plants which are not represented by a union, and who are not in the process of an organizational campaign.

The letter concluded with Ross asking the employees to “trust me by giving me a year in a non-union setting to prove to you what I feel would be in your best interest.” Employees were urged to “**vote no** on the day of the election.”

It should be noted that Matt Greek testified that the proposed initial terms and conditions of employment that had been sent to the Union in December 2000, at the time the Respondent believed it likely that a majority of the Etiwanda employees would be former SCE/EOMS employees, contained an incentive program. (R. Exh. 6.) This incentive program went into effect on April 1, when the Respondent began to operate its California facilities. It was, according to Greek, a 4 percent enhancement program. However, Greek testified that the “extraordinary incentive program” at issue in this case, which is also referred to as the “summer incentive program,” was in addition to that program which had been in effect since April 1. Further, it should be noted that Danny Ross testified that the

proposed initial terms and conditions of employment that had been sent to the Union, set holiday pay at the rate of time and a half. (R. Exh. 6.) It was that holiday pay which went into effect on April 1, with the commencement of the Respondent’s operation of its facilities. (Res. Exh. 21.)

Before leaving the subject of the Respondent’s alleged promise of enhanced benefits, it is significant to note that Matt Greek acknowledged that he knew by at least May 23, presumably prior to the filing of the representation petition, that the Union had been soliciting authorization cards at the Etiwanda facility. In fact, he admitted that he knew as early as May 4, the date of the Union’s letter demanding recognition, that the Union was claiming to have a card majority at the Etiwanda facility.

Further, it is necessary to mention a power point presentation which Matt Greek prepared for a group of Respondent’s managers on the status of the California plants and transition from EOMS to Respondent’s own operation. This presentation was prepared approximately August 25, 2000. It mentions the two unions with represented employees at the California facilities and stated, “Competitors have “broken” UWUA.” (R. Exh. 10.)

Regarding the ejection of Richard Baeza from the Etiwanda facility, Baeza was an employee of EOMS who was assigned to work at the Etiwanda facility from January 15 through June 11. At Etiwanda he was classified as the electrical and safety coordinator. Baeza testified that his supervisor at EOMS had informed him that he would be employed at Etiwanda throughout the summer.

Baeza was a 25-year member of Local 246 of the Utility Workers Union. While working at Etiwanda, Baeza was a member of the Union Executive Board and was elected as a delegate to the L.A. County Federation of Labor, with the election results posted in the Etiwanda plant maintenance lunchroom. The Respondent’s supervisor over the work being performed by Baeza was Martin Willis, the supervisor of plant maintenance. According to Baeza, Willis knew him as a union supporter and the two men had recently had a conversation about the Union. Baeza actively participated in the union organizing activities among the Respondent’s employees at Etiwanda. He wore a union T-shirt several times a week, and he participated in off-site meetings after work. The Respondent’s employees approached him during lunches and breaks, with questions about the Union. Further, employees handed him authorization cards at work and also left them for him on his car windshield. The Union received approximately 30 signed authorization cards during the period that Baeza was on the project.

According to Baeza, when employees approached him to hand in authorization cards, he would thank them and encourage them to attend the union meetings for more information. He testified that these conversations were short, lasting less than a minute, and that he did not hand out any union literature during work time. Further, he testified that prior to June 11, no manager of the Respondent, EOMS, or Fluor Daniel ever said anything to him about conducting union activity on work time. According to Baeza, while at the Respondent’s facility, he observed workers discussing subjects such as sports and their

⁸ The Respondent and IBEW Local 47 entered into a stipulated election agreement on May 9, for a unit of employees at the Coolwater facility. (GC Exh. 10.) Local 47 won the election held on June 6.

personal lives on worktime, and that he never heard any supervisor or manager tell workers that they could not discuss such subjects on worktime. There was no direct testimony or evidence offered to contradict any of Baeza's testimony, and I find him to be a credible witness. Additionally, there was no evidence offered of any kind that the Respondent had any rule, oral or written, prohibiting solicitation, or any rule prohibiting discussions among employees regarding personal matters, sports, or other topics.

On June 11, Baeza reported to work, at which time he was met by Fluor Daniel Superintendent Jim Biel.⁹ Biel informed Baeza that he had to leave the facility as Reliant had requested that he be removed. After calling his EOMS supervisor, Baeza left the facility. He was subsequently reassigned by EOMS to another job.

According to Martin Willis, Respondent's supervisor of plant maintenance at Etiwanda, in mid-June he had heard a report that certain EOMS employees working under the Fluor Daniel contract were engaging in union organizing activity during worktime. Willis approached the Fluor Daniel representative, Biel, about the report he had heard. Willis testified that Biel confirmed the report, indicating that he had seen Baeza stopping Reliant employees and talking to them about union organizing and handing out handbills, all during company time.¹⁰ Apparently, Willis then sought advice from labor relations consultant, Harold Craft. Craft testified that he told Willis that if an employee of a subcontractor was doing something that he should not be doing on company time, then Willis should notify the employee's employer that Reliant wanted that person removed from the facility. Willis contacted Biel again, and advised him that the Respondent wanted Baeza removed from the facility. Biel subsequently removed Baeza from the Etiwanda plant.

Thomas Riddle was an employee of EOMS who worked as an electrician at the Etiwanda plant from October 2000, through the end of June 2001. He testified that following the removal of Baeza from the facility, he had a conversation with the Respondent's supervisor, Martin Willis. During this conversation, Willis allegedly said that Baeza had been removed from the facility because he "was doing union business" during company time and that should have been done before or after work, at a different location. Further, Riddle testified that Willis told him that Reliant would prefer to be nonunion, as they felt "they could treat their employees better" without the Union. Willis denied ever having a conversation with Riddle where they discussed Baeza's removal from the facility or a desire by the

⁹ Biel's name is apparently misspelled as "Bell" in the complaint. While the Respondent's answer denies the supervisory and agency status of "Bell," this is not a significant issue, as the Respondent does not deny that its supervisor, Martin Willis, asked to have Baeza removed from the Etiwanda facility.

¹⁰ Biel did not testify at the hearing. The testimony of Willis regarding the substance of his conversation with Biel was allowed into evidence over the hearsay objection of counsel for the Union, because the undersigned concluded that it was being offered not for the truth of the matter asserted, but rather to establish why Willis took a certain course of action. Accordingly, Baeza's testimony is never contradicted by direct evidence.

Respondent to remain nonunion. However, I am of the view that Riddle testified in a credible fashion and that the conversation in question did occur. It is simply logical to assume that following Baeza's removal from the facility that the two men would have discussed the matter. Riddle's testimony is, therefore, inherently plausible.

IV. ANALYSIS AND CONCLUSIONS

A. *Implied Promise of Benefits*

1. The extraordinary incentive program

The undersigned has taken judicial notice of the crisis in the California energy markets in late 2000, and early 2001. In my view, Matt Greek testified credibly when he indicated that the Respondent was under great pressure to minimize unit outages and make sure that its California plants were operating at maximum efficiency. Further, I believe that it was this energy crisis which was the impetus for the creation of the "extraordinary incentive program." According to Greek, he began putting together this program in late April or early May when he created a handwritten proposal. I accept this testimony as truthful, as well as his testimony that the handwritten proposal resulted in the written document entitled "West Region Summer Incentive Program," which set out the nature of the "extraordinary incentive program" and was sent to Respondent's labor counsel. (R. Exh. 16.) It is important to recall that this document, which contained the first written reference to the "extraordinary incentive program," contained no exclusions for any category of employees, including employees represented by a union or covered by a representation petition.

This is really not surprising as the Respondent initially expected that after assuming the direct operation of its California facilities on April 1, a majority of its employees would have formerly been employed by SCE/EOMS. Greek credibly testified that the Respondent tried to encourage SCE/EOMS employees to seek employment with the Respondent, and had a majority of its employees at Etiwanda been former SCE/EOMS employees, the Respondent would have recognized the Union at Etiwanda. However, that did not happen, and it appears to the undersigned that the Respondent then had a "change of heart."

It was certainly clear to the Respondent by May 4, the date of the Union's card majority letter, that the Union was engaged in an organizational campaign at Etiwanda. (GC Exh. 2a.) I believe that there followed a period of changing attitude by the Respondent towards the Union. The Respondent took the position as of May 10 that it would not voluntarily recognize the Union. (R. Exh. 1.) The most obvious change in its attitude was the sudden exclusion of represented employees and those covered by a representation petition from the "extraordinary incentive program." Matt Greek's June 14 email to the plant managers, with the attached letter to employees, alerted all that employees represented by a union or considering such representation would be excluded from the program. (CP Exh. 2.)

I do not find credible Matt Greek's contention that employees represented by a union or considering such representation would be excluded because of concern about not wanting to commit an unfair labor practice. It was the Respondent's stated

position that whether the Coolwater employees received the incentive would depend on the outcome of negotiations with the IBEW, and, likewise, whether the Etiwanda employees received the incentive would depend on the outcome of negotiations with the Union, assuming the employees voted for representation. Rather, I believe that the decision to exclude these employees was part of the strategy to defeat the Union's organizational efforts, which the Respondent had embarked upon.

It is evident to me that Matt Greek viewed operating the Etiwanda facility without the Union as an option as early as at least August 25, 2000. It was on that date that he sent various management officials an email with a power point attachment entitled, "CA Holdings Transition Issues & Opportunities." (R. Exh. 10.) In making reference to its California facilities with union representation, Greek stated, "Competitors have 'broken' UWUA." I can reach no logical conclusion about this reference, other than that Greek was advising management officials of his opinion that as competitors of the Respondent had "broken" the Union, the Respondent might be able to do the same.

With the realization in April and May that a majority of its Etiwanda employees would not have formerly been employed by SCE/EOMS, and that the Union was in the process of organizing the facility, the Respondent obviously decided to fight the organizing effort. It hired Harold Craft, a labor relations consultant, for that purpose.¹¹ Further, I am of the view that it excluded the Etiwanda employees covered by the representation petition for the same reason.

The Board has traditionally held that an employer's legal duty during an organizing campaign is to proceed with the granting of benefits which would otherwise have been granted to employees in the normal course of the employer's business, just as it would have done had the union not been on the scene. *R. Dakin & Co.*, 284 NLRB 98 (1987); and *American Telecommunications Corp.*, 249 NLRB 1135 (1980). It certainly appears to me that the Respondent in the normal course of its business operation would have granted the "extraordinary incentive program" to all of its operations and maintenance employees at its California facilities, including Etiwanda. That was clearly what it originally intended to do, as is reflected in the May 23 email and "West Region Summer Incentive Program" memo from Matt Greek. (R. Exh. 16.) Of course, if the Respondent's principal interest was to operate its plants at maximum efficiency, it would want to encourage all its operations and maintenance employees to be as productive as possible. What then changed after May 23? The only thing that

¹¹ I found Craft's testimony to be somewhat disingenuous. He attempted to portray his service to the Respondent as primarily to educate the employees regarding their rights and the nature of the election process. However, under cross-examination he was forced to admit that a part of the education process was to communicate to the employees the Respondent's position that "it wanted employees to vote not to be represented by the Union." Further, he acknowledged that one measure of success in his job mission was whether the Respondent "won" the election, meaning of course that the employees voted against representation.

The Respondent's answer admits that during the time period in question, Craft was an agent of the Respondent within the meaning of Sec. 2(13) of the Act.

changed was the filing of the union representation petition at Etiwanda and the election at Coolwater.

Further, the Board has held that promising a benefit solely for the purpose of withholding its actual grant, although assertedly to avoid the commission of an unfair labor practice amounts to the "carrot on the stick" and constitutes interference with election campaigns. *Goodyear Tire & Rubber Co.*, 170 NLRB 539 (1968), enfd. as modified 413 F.2d 158 (1969). Also, the promise or grant of benefits during an organizational campaign may be unlawful interference even though no strings are explicitly attached. In the case of *Bendix-Westinghouse Automatic Air Brake Co.*, 185 NLRB 375 (1970), enfd. 443 F.2d 106 (6th Cir. 1971), a company's exclusion of unionized employees from an employee savings and stock plan was held to be a violation of the Act. The Board found that "employee benefit plans which on their face are restricted to participation or enjoyment by employees who are not members of a union, or who have foregone their right to select and bargain through a collective bargaining representative are inherently restrictive of employee rights guaranteed by Section 7 of the Act, and without further evidence of interference, restraint, or coercion are per se violations of Section 8(a)(1) of the Act." Id. at 378.

The Respondent's "extraordinary incentive program" was clearly a benefit promised only to those employees who were not represented by a union or covered by an election petition. This message was conveyed to the Etiwanda employees by means of the Matt Greek letter dated with various dates between June 14 and 19. (GC Exh. 4.) While it may not have gone directly to the employees covered by the representation petition, they learned about the incentive program almost immediately, as testified to by Thomas Riddle. Also, Hal Craft admitted discussing the incentive program with eligible voters at "buzz" sessions prior to the election. Thus, the employees at Etiwanda covered by the representation petition received notice that the Respondent was offering its other operations and maintenance employees the "extraordinary incentive program." Clearly, this would have had the effect of interfering with the employees' right to freely choose their bargaining representative by discouraging them from voting for the Union.

Typically, the Board looks at four factors to determine whether a pre-election grant of benefits is intended unlawfully to influence the outcome of an election: (1) the size of the benefit conferred in relation to the stated purpose for granting it; (2) the number of employees receiving the benefit; (3) how employees reasonably would view the purpose of the benefit; and (4) the timing of the benefit. *B & D Plastics*, 302 NLRB 245 (1991). The same action may in fact constitute both an unlawful promise of benefits to employees for their rejection of union representation and the unlawful withholding of benefits for exercise of the right to petition for representation. The Board uses the same test in unfair labor practice cases and in objection cases. *Holly Farms Corp.*, 311 NLRB 273, 274 (1993). In the case at hand, the potential benefit was very significant. During the 5 months of the "extraordinary incentive program," eligible employees had the ability to earn \$500 per month, plus part of a discretionary award pool for each facility. To put this in perspective, Matt Greek testified that if an employee received the maximum award under the program in each month, the total

award would be approximately 25 percent of the yearly income of a line employee. (R. Exh. 17, p. 5.) Considering the amount of money potentially available, withholding the benefit from certain employees only because they were covered by a representation petition or represented by a union would certainly have the effect of discouraging them from supporting the Union.

The number of employees who were eligible to receive the incentive was considerable, as the only employees excluded at the Respondent's five California facilities were the represented employees at Coolwater and the Etiwanda employees covered by the election petition. An employer violates the Act by withholding pay raises and/or benefits from employees who are awaiting a Board election or have chosen a union as their bargaining representative, if the employees otherwise would have been granted the pay raises and/or benefits in the normal course of the employer's business. When an employer implements new benefits across work locations, except for those locations which are represented by a union or where there is a pending election for union representation, the employer violates the Act where the employees awaiting the representation election would have received the benefits had there been no representation issue. *Florida Steel Corp.*, 220 NLRB 1201, 1203 (1975). In the case at hand, the Respondent offered no business justification for withholding the incentive from the Etiwanda employees. To the contrary, the Respondent acknowledged in its written communication to employees dated June 14 to 19 that all employees would be eligible, except for those represented by a union or covered by a representation petition. Thus, all employees understood that only those relatively few who were involved with a union would not be eligible for the benefit. Certainly, this would have had a chilling effect on the Section 7 rights of those employees contemplating union representation at Etiwanda.

The timing of the notification to the Respondent's employees that the Etiwanda employees would not be eligible for the incentive benefit was highly suspect. As noted above, the e-mail and attached "West Region Summer Incentive Program" from Matt Greek to counsel dated May 23 did not exclude any category of employees from the program. (R. Exh. 16.) While precisely when the Respondent decided to exclude the Etiwanda employees covered by the petition is uncertain,¹² it was clearly not until mid-June that employees learned of the program, and, significantly, of the exclusions. They received the news both in the letters from Greek dated June 14 through 19, and in conversations with Hal Craft. Of course, this news was communicated to them during the critical period between the filing of the petition on May 23, and the election on July 3. From the testimony of Craft, it is obvious that the employees at Etiwanda who were ineligible for the benefit were very concerned about their exclusion from the program, as they questioned him repeatedly at preelection "buzz" sessions. The

¹² The document entitled "California Emergency Response Initiatives—Overview" dated June 11, which was a document intended only for management, mentions that "Represented employees and those under petition" are to be excluded from a "special incentive program." (R. Exh. 17, pp. 1–5.)

release of this information only several weeks prior to the election was, in my view, intended to interfere with the exercise of the employees' Section 7 rights. It appears to have had its intended effect.

I am of the opinion that the only logical conclusion that the Etiwanda employees could have reached about why they were excluded from the "extraordinary incentive program" was that it was because of their willingness to consider union representation. If the Respondent was concerned about committing an unfair labor practice if it included the petitioned for employees in the program, then the Respondent had the responsibility to so inform the employees. This it did not do. The Board has held that where an employer has an arguably legitimate explanation for the timing of a benefit just prior to an election, where the employer fails to communicate that explanation to the employees, the employees reasonably view the timing of the benefit as designed to influence their voting in the election, and the employer, therefore, cannot rebut the inference of illegality. *Cooking Good Div. Of Perdue Farms, Inc.*, 323 NLRB 345, 352–353 (1997). Further, the Board has held that an employer may, in order to avoid creating the appearance of interfering with an election, "tell employees that implementation of expected benefits will be deferred until after the election—regardless of the outcome." *Noah's Bay Area Bagels, LLC*, 331 NLRB 188 (2001). In the matter at hand, the Respondent chose not to do so, and, in fact, it provided neither any explanation for its exclusion of employees covered by the representation petition, nor any assurance that the incentive benefit would be deferred until after the election, as opposed to simply being unavailable. Such conduct would have had the certain effect of discouraging employees from supporting the Union.

In summary, I have concluded, based on the above analysis, that the Respondent by promising certain of its employees improved benefits in the form of the "extraordinary incentive plan" interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed to them in Section 7 of the Act. This conduct took the form of letters from Matt Greek to employees and discussions which Hal Craft had with employees, all of which took place about mid-June. Further, this conduct constituted a violation of Section 8(a)(1) of the Act.

B. Withheld Benefits

1. The extraordinary incentive plan

As the undersigned has noted above, an employer's duty in deciding to grant or withhold benefits during a preelection critical period is to decide that question as it would if the union were not on the scene. *Noah's Bay Area Bagels*, 331 NLRB 188 (2000); *American Telecommunications Corp.*, 249 NLRB 1135 (1980). However, it appears that the Respondent in this case did just the opposite. By letter dated June 24 sent to the Etiwanda employees, Plant Manager Danny Ross informed them that they would not be receiving the incentive plan because there was a representation petition pending and "everything became frozen." (GC Exh. 9.) It was at that point

that the Etiwanda employees knew conclusively that they would not be receiving the “extraordinary incentive plan.”¹³ Further, they understood from Ross’ letter that the reason they would not be receiving the incentive was because some of them had sought union representation. Making matters even worse, the Etiwanda employees learned from the letter that almost all of the Respondent’s other California employees, with the exception of the Coolwater employees who were represented by a union, would be receiving the benefit.

Consistent with Board law, the letter of June 24 from Plant Manager Ross to the Etiwanda employees would likely discourage support for the Union just prior to the election. *Noah’s Bay Area Bagels*, supra, citing *Kauai Coconut Beach Resort*, 317 NLRB 996 (1995). This letter would reasonably suggest to Etiwanda employees that if the Union won the election, they would continue to forfeit the benefit of the incentive program, especially since the Respondent failed to assure the Etiwanda employees that they would receive the incentive regardless of the outcome of the election.

There can be no doubt that were it not for the filing of the representation petition that the Etiwanda employees would have received the incentive benefit along with other employees. The Respondent’s June 24 letter acknowledged this, and offered no business justification for withholding the benefit from the Etiwanda employees. Instead of making a decision about the incentive benefit based on factors unrelated to the union campaign, the Respondent’s decision to exclude the Etiwanda employees was, by its own admission, based entirely on the fact that a petition had been filed and an election was pending. As such, the exclusion of the Etiwanda employees from the “extraordinary incentive program” constituted discrimination in regard to the terms or conditions of employment of the Respondent’s employees, thereby discouraging membership in and support for the Union.

In summary, based on the above, I have concluded that by withholding the “extraordinary incentive program” from its Etiwanda employees, as confirmed in Danny Ross’ letter of June 24, the Respondent discriminated in regard to the terms or conditions of employment of its employees. By this conduct, the Respondent discouraged membership in and support for the Union in violation of Section 8(a)(1) and (3) of the Act.

2. The increased pay for work performed on holidays

The letter from Danny Ross dated June 24 also confirmed “rumors” that the Etiwanda employees would not be receiving “double time for holidays” which other employees would be getting. (GC Exh. 9.) However, in his posthearing brief, counsel for the Respondent takes the position that there is no evidence of double-time pay for holidays either being given or withheld from employees. While counsel correctly states that the original proposed “terms and conditions” document sent to the Union in December 2000 (R. Exh. 6) and the April 2001 pay summary (R. Exh. 21) provide only for time and one-half pay for holidays, he ignores the June 24 letter from Ross.

¹³ The “extraordinary incentive program” is also referred to as the “extraordinary incentive plan.” However, it is clear that they are one and the same.

Based on the letter from Ross, I must assume that the other employees at some point received the increased holiday pay. However, whether the other employees ever got double-time pay for holidays is not the point. What is crucial is that the Etiwanda employees reasonably assumed, based on the contents of the June 24 letter from Ross, that they were not getting what other employees had, namely double time, because of the representation petition.

As I have stated above in detail, an employer’s duty in deciding to grant or withhold benefits during a preelection critical period is to decide that question as it would if the union were not on the scene. *Noah’s Bay Area Bagels*, supra; *American Telecommunications Corp.*, supra. For the same reasons that the Respondent’s withholding of the incentive plan from Etiwanda employees violated the Act, the Respondent’s communication of June 24 informing the Etiwanda employees that they were not getting the double-time pay also violated the Act. It is important to remember that the only reason given the employees as why they were being excluded from the double-time pay benefit was because of their interest in being represented by the Union.

Once again I find, based on the above, that the Respondent by withholding from its Etiwanda facility employees the benefit of increased pay for work performed on holidays, as expressed in the June 24 letter, was discriminating in regard to the terms or conditions of employment of its employees, thereby discouraging membership in and support for the Union. By this conduct, the Respondent has violated Section 8(a)(1) and (3) of the Act.

C. *The Expulsion of Richard Baeza from the Etiwanda Plant*

There is no doubt that Richard Baeza, an employee of EOMS, was removed from the Etiwanda facility because Respondent’s supervisor, Martin Willis, learned that Baeza was engaged in union activity while on working time. Willis advised the Respondent’s contractor, Fluor Daniel, through Daniel’s supervisor, Jim Biel, that Baeza was to be removed from the project. That action subsequently transpired, with EOMS, a subcontractor of Daniel, transferring Baeza to another project.

An employer violates the Act when it directs, instructs, or orders another employer with whom it has business dealings to discharge, lay off, transfer, or otherwise affect the working conditions of the latter’s employees because of the union activity of those employees. *Black Magic Resources, Inc.*, 312 NLRB 667, 668 (1993); citing *Dews Construction Corp.*, 231 NLRB 182 fn. 4 (1977), enf. 578 F.2d 1374 (1978). That is precisely what transpired in this case, with the Respondent demanding that its contractor remove Baeza from the project.

In *Wright Line*, 251 NLRB 1083 (1980), enf. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989, the Board announced the following causation test in all cases alleging violations of Section 8(a)(3) or violations of Section 8(a)(1) turning on employer motivation. First, the General Counsel must make a prima facie showing sufficient to support the inference that protected conduct was a “motivating factor” in the employer’s decision. Then, upon such a showing, the burden shifts to the employer to demonstrate that the same action would have taken

place even in the absence of the protected conduct. The Board's *Wright Line* test was approved by the United States Supreme Court in *NLRB v. Transportation Mgt. Corp.*, 462 U.S. 393 (1983).

In the present case, I conclude that the General Counsel has made a prima facie showing that Baeza's protected conduct was a motivating factor in the Respondent's decision to have him removed from the Etiwanda facility. In *Farmer Bros. Co.*, 303 NLRB 638, 649 (1991), enfd. 988 F.2d 120 (9th Cir. 1993), the Board held that in order to establish a prima facie case, the General Counsel must show: (1) that the discriminatee engaged in protected activities; (2) that the employer had knowledge of such activities; (3) that the employer's actions were motivated by union animus; and (4) that the employer's conduct has the effect of encouraging or discouraging membership in a labor organization. As has been noted in detail above, Baeza engaged in extensive union activity while on the Respondent's Etiwanda facility from January 15 to June 11. He was a member of the Union Executive Board, elected a delegate to the Los Angeles County Federation of Labor, wore a union T-shirt, attended off-site organizational meetings, handed out authorization cards, and received signed cards from employees while on worktime and during brief conversations. Also, he credibly testified that the Respondent's supervisor, Martin Willis, knew he was active in the Union and had, in fact, discussed the Union with him. Further, there can be no doubt that the Respondent knew of his union activity as Willis acknowledged that the only reason for having Baeza removed from the facility was because he was engaging in union organizing on company time.

Regarding the question of whether the Respondent's actions were motivated by union animus, the undersigned as already noted my conclusion that following an initial period during which the Respondent made an effort to get former SCE/EOMS employees to work at Etiwanda, the Respondent's attitude towards the Union turned decidedly negative. As early as December 25, 2000, Matt Greek made reference to competitors having "broken" the Union. (R. Exh. 10.) Further, the exclusion from the "extraordinary incentive program" and double-time pay for holidays for those employees represented by a union or covered by a representation petition was a clear indication of the Respondent's considerable union animus. The Respondent hired Hal Craft, a labor relations consultant, for the purpose of representing its interest in the representation election at Etiwanda. However, the reality of the hiring was that Craft was expected to convince the employees to vote against union representation. He acknowledged as much when he testified that one way of measuring his success in the campaign was whether the Respondent "won" the election. Craft also testified that Willis consulted with him about what to do regarding information that Baeza was engaged in organizational activities on company time. It was Craft's advice that if Baeza was doing something he should not be doing while on company time, that Willis should instruct the contractor to remove him from the property. That, of course, was exactly what Willis did, having Baeza removed from the facility because he engaged in union activity.

I believe that the facts in this case amply demonstrate

animus. However, even without direct evidence, animus or hostility towards an employee's union activity may be inferred from all the circumstances. *Shattuck Denn Mining Corp. v. NLRB*, 62 LRRM 2401, 2404 (9th Cir. 1966); and *U.S. Soil Conditioning Co.*, 235 NLRB 762 (1978). Based on the above, I am of the view that the record evidence strongly supports an inference of union animus by the Respondent.

There can be little doubt that the Respondent's conduct in having Baeza removed from the facility had the effect of discouraging support for the Union. As a result of his extensive union activity, Baeza must have been well known at Etiwanda as a vocal and open union supporter. His removal for engaging in union activity, namely receiving union authorization cards from employees during worktime, must have had a chilling effect on the employees' willingness to support the Union or engage in union activities. According to the credible testimony of employee Thomas Riddle, Supervisor Willis told him that Baeza was removed because he engaged in union activity on company time. Obviously, the employees learned what had happened to Baeza. In this way, the Respondent was warning other Etiwanda employees that were risking disciplinary action by engaging in union activity.

The General Counsel, having met his burden of establishing that the Respondent's actions were motivated, at least in part, by antiunion considerations, the burden now shifts to the Respondent to show that it would have taken the same action absent the protected conduct. *Senior Citizens Coordinating Council of Riverbay Community*, 330 NLRB 1100 (2000); and *Regal Recycling, Inc.*, 329 NLRB 355 (1999). The Respondent must persuade by a preponderance of the evidence. *Peter Vitalie Co.*, 310 NLRB 865, 871 (1993). The Respondent has failed to meet this burden.

It is the Respondent's contention that Baeza was removed from the Etiwanda facility not because he was engaged in union activity, but because he was engaged in union activity while on company time. According to the Respondent, it had no problem with Baeza's union activity as long as it was performed on nonworktime, meaning during breaks and lunch. However, it is the Respondent's position that by engaging in union activity on company time, when he should have been working, Baeza was not performing his job duties. Allegedly, it was for that reason that he was removed from the facility.

All the witnesses agree, the Respondent did not have a no-solicitation rule at its Etiwanda facility. While Hal Craft initially thought such a rule existed, he was unable to locate it, and, so, ultimately testified that he could find no such rule. Further, Baeza credibly testified, without contradiction, that Etiwanda employees frequently discussed personal matters or sports while on company time, without management indicating it was creating a problem or disciplining the employees involved. The Board has held that an employer may not lawfully prohibit employees from discussing unionization during working time if the employer does not prohibit other worktime discussions. *Frazier Industrial Co.*, 328 NLRB 717 (1999); and *Teksid Aluminum Foundry, Inc.*, 311 NLRB 711, 713 (1993). However, it appears that this is precisely what the Respondent did with Baeza.

The Respondent offered absolutely no evidence that Baeza

was not performing his job properly, or that he was distracting other employees in the performance of their job duties. No evidence was offered that any management official ever disciplined or warned Baeza about union activity on company time, and he credibly testified that there were no such warnings or discipline. Further, Baeza credibly testified that his conversations with employees on company time were very brief, limited to receiving signed authorization cards, and that he did not pass out union handbills on these occasions. According to the testimony of Martin Willis, the Respondent did not conduct any kind of an independent investigation to determine the extent of Baeza's union activity on company time. Rather, Willis simply accepted the contention of Jim Biel, Fluor Daniel's supervisor, that Baeza was engaged in union activity on company time, including passing out handbills. It appears that the Respondent was overly anxious to remove Baeza from the facility and, so, instead of investigating the allegations, Willis had Baeza summarily removed from the property.

In the view of the undersigned, the credible evidence established that Baeza spent only a minimal amount of company time engaged in union activity, and that the Respondent did not have a no-solicitation policy prohibiting this conduct. It should be noted that the Board has held that solicitation to sign authorization cards is considered oral solicitation, rather than distribution of literature. *Rose Co.*, 154 NLRB 228, 229 fn. 1 (1965); and *Stoddard-Quirk Mfg. Co.*, 138 NLRB 615, 620, 621 fn. 6 (1962). Further, it appears to me that the Respondent was treating Baeza in a disparate fashion, as other employees had been able to discuss personal matters and sports on company time without any retribution.

I find that the Respondent has failed to establish by anything approaching a preponderance of the evidence that Baeza was removed from the Etiwanda property because he was not performing his job duties or was preventing other employees from doing so. The General Counsel's prima facie case has not been rebutted, as the reasons advanced by the Respondent are pretextual. It is, therefore, appropriate to infer that the Respondent's true motive was unlawful, that being because he engaged in union activity. *Williams Contracting, Inc.*, 309 NLRB 433 (1992); *Limestone Apparel Corp.*, 255 NLRB 722 (1981), *enfd.* 705 F.2d (6th Cir. 1982); and *Shattuck Denn Mining Corp.*, *supra*.

Accordingly, the undersigned finds that by requiring its contractor to remove Richard Baeza from its Etiwanda facility on June 11, the Respondent was discriminating in regard to the hire or tenure or terms or conditions of employment of its contractor's or subcontractor's employees, thereby discouraging membership in or support for the Union. By this conduct, the Respondent has violated Section 8(a)(1) and (3) of the Act.

The Objection to the Election

The Petitioner filed an objection to the election which was coextensive with the complaint allegations regarding the "extraordinary incentive program." As is noted in detail above, the undersigned concluded that the Respondent violated Section 8(a)(1) of the Act by promising employees the incentive benefit

if they did not support the Union, and violated Section 8(a)(1) and (3) by subsequently withholding the benefit from its Etiwanda employees because they were covered by a representation petition. This conduct occurred in mid-June 2001, in the critical period between the filing of the representation petition and the election.

It is well settled that conduct during the critical period that creates an atmosphere rendering improbable a free choice warrants invalidating an election. See *General Shoe Corp.*, 77 NLRB 124 (1948). Such conduct is sufficient if it creates an atmosphere calculated to prevent a free and untrammelled choice by the employees. As the Board stated, in election proceedings, it is the Board's function to provide a laboratory in which an experiment may be conducted, under conditions as nearly as ideal as possible, to determine the uninhibited desires of the employees. *General Shoe Corp.*, *supra*. I find that the Employer's actions regarding the "extraordinary incentive program" constituted objectionable conduct which interfered with the free choice of employees in the election. Such conduct constitutes grounds for setting aside the election. *Holly Farms Corp.*, 311 NLRB 273 (1993); and *Low Kit Mining Co.*, 309 NLRB 501 (1993).

The objectionable conduct had the potential to dramatically impact the earning capacity of the Respondent's employees. Those who were eligible for the incentive benefit had the potential to earn up to 25 percent more money on a yearly basis, having participated in the five months of the program, than those Etiwanda employees who were not eligible because they were covered by a representation petition. An action of such significance would clearly have had a tendency to seriously inhibit the employees' willingness to engage in union activity and would likely have created an atmosphere uncondusive to a free and untrammelled choice by the employees. The Employer's conduct destroyed the laboratory conditions required by the Board. Therefore, I recommend that the election be set aside.

CONCLUSIONS OF LAW

1. The Respondent, Reliant Energy aka Etiwanda LLC, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union, Utility Workers of America, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

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

(a) Promising employees improved benefits in the form of an "extraordinary incentive plan" in order to discourage them from supporting the Union.

4. By the following acts and conduct the Respondent has violated Section 8(a)(1) and (3) the Act.

(a) Withholding benefits from its employees by failing to implement at the Etiwanda facility the "extraordinary incentive plan" in order to discourage membership in and support for the Union.

(b) Withholding benefits from its employees at the Etiwanda facility by failing to implement increased pay for work performed on holidays in order to discourage membership in and

support for the Union.

(c) Causing its contractor to remove Richard Baeza from the Etiwanda facility in order to discourage membership in and support for the Union.

5. By the conduct set forth in Conclusions of Law 3(a) and 4(a), above, the Respondent has illegally interfered with the representation election conducted by the Board in Case 31–RC–8023. Accordingly, I recommend that the election be set aside and a new election be conducted at a time and date to be determined by the Regional Director for Region 31.

THE 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.

The Respondent having discriminatorily caused its contractor to remove Richard Baeza from the Etiwanda facility, my recommended order requires the Respondent to notify its contractor in writing that it has no objection to Baeza returning to the Etiwanda facility, or to any of the Respondent's other facilities, and to provide Baeza with a copy of said notice. My recommended order further requires the Respondent to make Baeza whole for any loss of earnings and other benefits, computed on a quarterly basis from date of his removal from the Etiwanda facility to date the Respondent notifies its contractor that it has no objection to Baeza returning to any of its facilities. This make-whole remedy shall be 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). Further, the Respondent is required to expunge from its records any references to its demand that its contractor remove Baeza from the Etiwanda facility, and to provide Baeza with written notice of such expunction, and inform him that the unlawful conduct will not be used as a basis for further personnel actions against him. *Sterling Sugars, Inc.*, 261 NLRB 472 (1982).

This recommended order further requires the Respondent to make its Etiwanda facility employees whole for any loss of earnings and other benefits based on the Respondent's discriminatory withholding from them of the "extraordinary incentive plan" and/or increased pay for work performed on holidays. Any such monies owed are to be computed on a quarterly basis, plus interest. Also, the Respondent shall be required to post a notice that assures its employees that it will respect their rights under the Act.

Additionally, as indicated above, I have found that the Respondent engaged in objectionable conduct affecting the results of the election in Case 31–RC–8023. I recommend, therefore, that the election in this case held on July 3, 2001, be set aside, that a new election be held at a time to be established in the discretion of the Regional Director, and that the Regional Director include in the notice of the election the following:

NOTICE TO ALL VOTERS

The election of July 3, 2001, was set aside because the National Labor Relations Board found that certain conduct of the Employer interfered with the employees' free exercise of a free and reasoned choice. Therefore, a new election will be

held in accordance with the terms of this Notice of Election. All eligible voters should understand that the National Labor Relations Act gives them the right to cast ballots as they see fit and protects them in the Exercise of this right free from interference by any of the parties.¹⁴

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹⁵

ORDER

The Respondent, Reliant Energy aka Etiwanda LLC, Rancho Cucamonga, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Promising employees improved benefits in the form of an "extraordinary incentive plan" in order to discourage employees from supporting the Union.

(b) Withholding benefits from its employees by failing to implement at the Etiwanda facility the "extraordinary incentive plan" in order to discourage membership in and support for the Union.

(c) Withholding benefits from its employees at the Etiwanda facility by failing to implement increased pay for work performed on holidays in order to discourage membership in and support for the Union.

(d) Causing its contractor to remove Richard Baeza from its Etiwanda facility in order to discourage membership in or support for the Union.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed to 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, notify its contractor in writing that it has no objection to Richard Baeza returning to its Etiwanda facility, or to any of its other facilities.

(b) Make Richard Baeza 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 this decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful demand to its contractor that it remove Richard Baeza from the Etiwanda facility, and within 3 days thereafter notify him in writing that this has been done and that the unlawful conduct will not be used against him in any way.

(d) Make its Etiwanda facility employees whole, in the manner set forth in the remedy section of this decision, for any loss of earnings and other benefits suffered as a result of the discriminatory withholding from them of the "extraordinary incentive plan" and/or increased pay for work performed on holidays.

¹⁴ *Lufkin Rule Co.*, 147 NLRB 341 (1964).

¹⁵ 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.

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

(f) Within 14 days after service by the Region, post at its Etiwanda facility in Rancho Cucamonga, California, copies of the attached notice marked "Appendix."¹⁶ Copies of the notice, on forms provided by the Regional Director for Region 31, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 1, 2001.

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

IT IS FURTHER ORDERED that the Regional Director for Region 31 shall set aside the representation election in Case 31-RC-8023, and that a new election be held at a time to be established in the discretion of the Regional Director.

Dated at San Francisco, California April 29, 2002

APPENDIX

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

¹⁶ 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."

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 deny incentive bonus programs, double-time pay for holidays, or other benefits to our employees at the Etiwanda facility, while giving those benefits to our employees at other plants, in order to discourage support for, and pressure you to vote against, the Utility Workers of America, AFL-CIO (Union) or any other union.

WE WILL NOT make implied promises of incentive bonus programs, double-time pay for holidays, or other benefits to you in order to discourage you from supporting the Union.

WE WILL NOT demand or request that any contractor or subcontractor performing services for us remove from any of our facilities or fail to refer to any of our facilities Richard Baeza because of his union activities.

WE WILL pay Richard Baeza for any wages or benefits he may have lost because of our demand that a contractor or subcontractor remove him from our Etiwanda facility, or stop sending him to perform work at any of our facilities.

WE WILL pay all our Etiwanda facility unit employees for any wages or benefits they may have lost because we did not give them the opportunity to participate in the "extraordinary incentive program" and/or double-time pay for working on holidays, when we gave these wages and benefits to our employees working at other plants.

WE WILL notify the appropriate contractor or subcontractor in writing that we have no objection to Richard Baeza returning to our Etiwanda facility or to any of our other facilities.

WE WILL notify Richard Baeza in writing that we have informed the appropriate contractor or subcontractor that we have no objection to him returning to our Etiwanda facility or to any of our other facilities.

WE WILL remove from our files any reference to our demand to our contractor or subcontractor that Richard Baeza be removed from the Etiwanda facility, and will notify him of this in writing.

RELIANT ENERGY AKA ETIWANDA LLC