

Plastic Film Products Corp. and Cleveland Joint Board, Amalgamated Clothing and Textile Workers Union, AFL-CIO. Case 8-CA-10335

September 15, 1978

DECISION AND ORDER

BY CHAIRMAN FANNING AND MEMBERS PENELLO AND MURPHY

On January 20, 1978, Administrative Law Judge Benjamin K. Blackburn issued the attached Decision in this proceeding. Thereafter, Respondent, General Counsel, and Charging Party filed exceptions and supporting briefs, Respondent filed an answering brief to Charging Party's exceptions, and Charging Party filed a brief in opposition to Respondent's exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,¹ and conclusions² of the Administrative Law Judge and to

¹ The Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an Administrative Law Judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (C.A. 3, 1951). We have carefully examined the record and find no basis for reversing his findings.

² We agree with the Administrative Law Judge's decision declining to find that Respondent committed certain additional violations of Sec. 8(a)(1) and (4) of the Act by its alleged prehearing intimidation of employee witnesses in December 1976, and its alleged January 1977 threat to discipline employees attending the Board hearing under subpoena. These violations were not alleged in the complaint and, as to each, the General Counsel, although specifically requested to do so, refused during the course of the hearing to state whether he relied on any of the incidents to establish an independent violation of the Act; they were asserted to be unfair labor practices for the first time in the General Counsel's exceptions to the Administrative Law Judge's oral decision herein.

In these circumstances, we find that Respondent did not receive adequate and timely notice of the 8(a)(1) and (4) allegations. Accordingly, we agree with the Administrative Law Judge that neither of the incidents relied on by the General Counsel has been fully litigated and, therefore, the Board is precluded from passing on the issues raised by the General Counsel.

We also decline to find, contrary to Chairman Fanning's position set forth below, that Respondent acted unlawfully by issuing certain unexcused absences to four employees under subpoena by the General Counsel and incident to their appearance at the December session of the hearing. The issuance of such absences is neither alleged in the complaint nor referred to by the Administrative Law Judge in his decision; it was first raised by the General Counsel as an independent unfair labor practice in the General Counsel's exceptions above referred to.

In the absence of any complaint allegation that Respondent acted unlawfully in issuing the December unexcused absences, we find that Respondent has had insufficient notice of, or opportunity to meet, the General Counsel's 8(a)(1) and (4) allegations. Accordingly, due process considerations preclude the Board from basing a violation on Respondent's December conduct.

adopt his recommended Order, as modified herein.³

We agree with the Administrative Law Judge that Respondent violated Section 8(a)(3) and (1) of the Act by discriminatorily promulgating and enforcing a no-solicitation rule which admonished employees "not to discuss union business on Company time." Contrary to the Administrative Law Judge, however, we further conclude that Respondent's prohibition against soliciting "on Company time" violated Section 8(a)(1) of the Act.

The Board has repeatedly condemned the promulgation of rules prohibiting protected activity "on Company time" as unduly ambiguous and reasonably likely to be interpreted by employees as a prohibition against soliciting during nonworking time. *Florida Steel Corporation*, 215 NLRB 97, 98-99 (1974); *Stewart-Warner Corporation*, 215 NLRB 219, 224-225 (1974). Accordingly, in the absence of evidence in the instant case that Respondent's rule was justified by a need to maintain discipline or production in its plant, we conclude that Respondent's rule prohibiting solicitation "on Company time" constitutes an unlawfully broad restriction on the employees' right to engage in union activities in violation of Section 8(a)(1) of the Act.

The Administrative Law Judge concluded, and we agree, that a bargaining order is necessary to remedy Respondent's unfair labor practices herein. Respondent, however, contends that it has undertaken certain remedial actions designed to remove the coercive effects of its unfair labor practices and, accordingly, that a bargaining order is not justified in the present

³ Chairman Fanning, contrary to the Administrative Law Judge, would find that Respondent's intimidation of employee witnesses by its agent, Blankenship, and its recording of "unexcused absences" for four employees who were subpoenaed constitute 8(a)(1) and (4) violations, though not specifically urged as such by the General Counsel at the hearing. It appears that these incidents were fully litigated and therefore should be found to be violations. See *Thompson Manufacturing Co., Inc.*, 132 NLRB 1464, fn. 1 (1961). These actions involve material issues of unlawful conduct related to earlier 8(a)(1) intimidation of employees by Blankenship as discussed by the Administrative Law Judge in his Decision, as well as serious interference with Board processes, as urged by the General Counsel and the Charging Party. Though not specifically pleaded, they should be decided here. See *Kux Manufacturing Corporation and Continental Marketing Corporation: A Joint Employer*, 233 NLRB 317 (1977), and *Fremont Manufacturing Company, Inc.*, 224 NLRB 597 (1976).

It appears that the majority misinterprets the thrust of the Chairman's position as stated above. The lengthy hearing in this case was held on certain days in December, January, February, and March. In December, several days before the hearing opened, Blankenship threatened the employees who had been subpoenaed with his ability as a cross-examiner and with the prospect of their being brought to the hearing by the sheriff if they failed to appear. Incident to appearance at the December session of the hearing four employees who had been subpoenaed were given unexcused absence slips by Respondent. At the January session of the hearing, Blankenship threatened subpoenaed witnesses with "disciplinary steps" if more than two were in the hearing room at one time, even though Blankenship had made no issue on that score with parties to the proceeding. In the Chairman's view, the Blankenship threats before and during the hearing, and the unexcused absence slips issued by Respondent, are simply part of a clear pattern of intimidation and discrimination with respect to giving testimony under the Act, in violation of Sec. 8(a)(1) and (4).

circumstances. We find no merit in Respondent's position.

I. FACTS

A. *The Unfair Labor Practices*

On August 13, 1976, the Union demanded recognition. As of that date, the Union had obtained signed authorization cards from a majority of the unit employees. Meanwhile, in the period from July 23 through August 31, 1976, Respondent engaged in the following conduct in violation of Section 8(a)(1) of the Act. On July 23 and August 3 and 20, Respondent held three plantwide meetings during each of which it threatened its employees with plant closure should they select the Union as their bargaining representative. On August 30 and 31, Respondent conducted interviews with employees in the office of the president during which it unlawfully questioned numerous employees as to which of Respondent's employees had signed authorization cards, who had attended union meetings, and what had transpired at such meetings. In the period from late July through September 1, Supervisors Benner, Roush, and Everly repeatedly threatened employees with plant closure and loss of jobs should they select the Union as their bargaining representative, unlawfully interrogated employees, and created the impression of surveillance of an employee's union activities.

In addition, in August 1976, Respondent violated Section 8(a)(1) and (3) of the Act by discriminatorily promulgating and enforcing an invalid no-solicitation rule and discriminatorily instituting and enforcing a written warning system.

B. *Respondent's Remedial Actions*

In the period between February 4 and March 11, 1977, Respondent prepared a series of five letters, four of which were mailed to all employees individually, and several of which were posted on Respondent's premises. Respondent's first letter, dated February 4, 1977, advised employees that it was confident that it would be found innocent of any wrongdoing and informed employees that no reprisals would be taken against them because of pending proceedings before the Board. The following two letters, dated February 25 and March 9, advised employees that Respondent had no intention of closing its plant, that it respected employee rights to support or join the Union, and that its interrogation and disciplinary measures were not "meant to discourage any of your union activities" or "designed to intimidate you because of your rightful union activities." Respondent's

March 9 letter, in addition, acknowledged the Company's gratefulness to employees who continued to support it and pledged that the Respondent would protect those employees in their right to be free from interference because of their support for the Company. On March 10, Respondent posted a notice to employees advising them of their Section 7 rights and pledging that Respondent would respect all such rights. In contrast to the remaining contents of the notice, the right to refrain from union and other protected activity was printed in boldface capitals. On March 11, Respondent issued its final letter which advised employees of Respondent's right to maintain discipline and efficiency in its plant and, further, that an employee's support for the Union did not exclude him from coverage of the Company's rules.

II. DISCUSSION

Based on the above violations of Section 8(a)(1) and (3) of the Act, we find that the lingering effects of Respondent's past coercive conduct render uncertain the possibility that traditional remedies can insure a fair election. We therefore conclude that the Union's card majority, obtained for the most part before the unfair labor practices occurred, provides a more reliable test of employees representation desires and better protects employee rights than would an election. Accordingly, we find, in agreement with the Administrative Law Judge, that by refusing to recognize and bargain with the Union on and after August 13, 1976, while simultaneously engaging in the aforesaid unfair labor practices, Respondent violated Section 8(a)(5) and (1) of the Act and that the policies of the Act will best be effectuated by the imposition of a bargaining order⁴ to remedy such violations.⁵

We further find that our analysis as to the necessity and appropriateness of the remedy we order herein is not substantially affected by Respondent's remedial efforts instituted subsequent to its commission of extensive and pervasive unfair labor practices. As noted, Respondent's antiunion campaign, which con-

⁴ *N.L.R.B. v. Gissel Packing Co., Inc.*, 395 U.S. 575 (1969). We find it unnecessary to resolve whether Respondent's unlawful conduct falls within the first or second category described by the Court in *Gissel* since we find that, even if the unfair labor practices do not come within the first category, they come within the second category, and a bargaining order is warranted under either finding.

⁵ We agree with the Administrative Law Judge that remedies provided by the Board in *Heck's Inc.*, 215 NLRB 765 (1974), and awarded for the purpose of deterring frivolous and bad-faith litigation, are inappropriate in the circumstances of the present case. However, we do not agree with the Administrative Law Judge's statement that if this case had been tried exclusively as a *Gissel* first category case and ultimately found to fall within that category, such a remedy would be warranted. We disavow these comments since we conclude that litigation as to the Union's majority status does not constitute frivolous litigation under either category of cases defined by the Supreme Court in *Gissel*.

tinued unabated in the 5-week period from July 23 to August 31, encompassed numerous threats of plant closure. The Board and the courts have long recognized that threats to close down a facility because of union activity are among the most serious and flagrant forms of interference with the free exercise of employee rights.⁶ Indeed, as the Supreme Court has indicated, threats to close an employer's operations are among the most effective unfair labor practices "to destroy election conditions for a longer period of time than others."⁷ In addition to its threats of plant closure, Respondent's campaign included unlawful interrogations, threats of job loss, and other reprisals should the employees select the Union as their bargaining representative, and the adoption of a no-solicitation rule and written warning system specifically designed to deter employees in the exercise of their Section 7 rights. Further, Respondent's interrogations and threats, conducted both in the context of plant-wide meetings and confrontations between supervisors and individual employees, were effectively communicated to *all* unit employees with particular force and vigor. In these circumstances, we find that the nature and extent of Respondent's violations render ineffective its subsequent institution of voluntary remedial measures to remove the lingering and coercive effects created by unfair labor practices of the type herein.

The particular measures instituted by the Respondent and intended to rectify the situation created by its unfair labor practices fall far short of dissipating the effects of its past coercive conduct. Respondent did not unequivocally disavow its past conduct; rather, it asserted that it was confident it would be found "innocent of" any wrongdoing and further attempted to dissociate itself from its unlawful conduct by placing sole responsibility for its unfair labor practices on an outside labor consultant whom it hired and whose advice it consistently followed. Further, Respondent's letters and notice failed to convey a neutral view regarding unionization. Thus, they included expressions of gratitude towards company supporters, emphasized the employees' right to refrain from union and other concerted activity, and reminded those employees favoring the Union that they were subject to the Company's disciplinary rules. In this posture, Respondent's voluntarily instituted measures are insufficient to offset its past coercion or to create an atmosphere whereby employees are assured that their Section 7 rights will be respected in the future.

⁶ *Textile Workers Union of America v. The Darlington Manufacturing Company, et al.*, 380 U.S. 263 (1965); *Irving N. Rothkin d/b/a Irv's Market*, 179 NLRB 832 (1969), *enfd.* 434 F.2d 1051 (C.A. 6, 1970).

⁷ *N.L.R.B. v. Gissel Packing Co.*, 395 U.S. at 611, fn. 31.

Nor do we find that Respondent's general disavowal of an intention to close down its operation is effective to eradicate the effects of its previous and numerous threats of plant closure. Respondent's threats tended to communicate two messages to the employees: (1) that unionization would inevitably place unreasonable economic demands on Respondent, thereby leaving it no choice but to close down its operations, and (2) that the economic considerations which dictate plant closure are beyond Respondent's control. In these circumstances, Respondent's mere statement that it had no intention of closing down its operations simply does not negate the unlawful implications contained in its threats.

Finally, Respondent's attempts to rectify its misconduct were instituted for the first time some 5-6 months subsequent to the commission of the unfair labor practices and during the course of a formal hearing on these unfair labor practices before an Administrative Law Judge.⁸ The qualified statements of this Respondent at this time and in this posture could not remove the impact of its earlier and pervasive unlawful conduct.

Accordingly, based on the foregoing explication of the effects of Respondent's unlawful conduct and the ineffectiveness of a remedy other than a bargaining order, we shall adopt the Administrative Law Judge's recommended Order requiring Respondent, upon request, to bargain collectively with the Union as the exclusive representative of employees in the appropriate unit concerning wages, hours, and other terms and conditions of employment.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Plastic Film Products Corp., Akron and Marion, Ohio, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Insert the following as paragraph 1(e) and reletter the following paragraphs accordingly:

"(e) Maintaining in effect, enforcing, or applying any rule or regulation prohibiting its employees from soliciting on behalf of any labor organization in work areas during their nonworking time."

2. Substitute the attached notice for that of the Administrative Law Judge.

⁸ See, generally, *N.L.R.B. v. The Great Atlantic and Pacific Tea Company, Inc.*, 409 F.2d 296, 299 (C.A. 5, 1969).

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 having found, after a hearing, that we violated Federal law by threatening to close the plant, we hereby notify you that:

The National Labor Relations Act gives all employees these rights:

- To engage in self-organization
- To form, join, or help unions
- To bargain collectively through a representative of their own choosing
- To act together for collective bargaining or other aid or protection
- To refrain from any or all of these things.

WE WILL NOT threaten you with plant closure and other reprisals in the event a union becomes your collective-bargaining representative.

WE WILL NOT interrogate you about your union activities, sympathies, or desires.

WE WILL NOT poll you about your desire to be represented by a union.

WE WILL NOT create the impression that we have your union activities under surveillance.

WE WILL NOT maintain in effect, enforce, or apply any rule prohibiting you from soliciting on behalf of any union in work areas during non-working time.

WE WILL NOT discriminatorily promulgate and enforce a no-solicitation rule.

WE WILL NOT discriminatorily adopt and use a written warning system.

WE WILL NOT refuse to recognize and bargain with Cleveland Joint Board, Amalgamated Clothing and Textile Workers Union, AFL-CIO, as your collective-bargaining representative.

WE WILL NOT in any other manner interfere with you or attempt to restrain or coerce you in the exercise of the above rights.

WE WILL rescind our no-solicitation rule.

WE WILL cease using our written warning system.

WE WILL expunge from our records all material relating to violations of our no-solicitation rule and all written warnings.

WE WILL make whole Diane Risner and any other employees who have lost wages as a result of receiving a written warning, with interest.

WE WILL, upon request, bargain collectively with Cleveland Joint Board, Amalgamated

Clothing and Textile Workers Union, AFL-CIO, as your exclusive representative in a unit of all production and maintenance employees, including shipping and receiving employees and plant clerical employees, at our Marion, Ohio, facility, excluding office clerical employees, professional employees, guards, and supervisors as defined in the Act, and, if an understanding is reached, embody such understanding in a signed contract.

All our employees are free, if they choose, to join Cleveland Joint Board, Amalgamated Clothing and Textile Workers Union, AFL-CIO, or any other labor organization.

PLASTIC FILM PRODUCTS CORP.

DECISION

STATEMENT OF THE CASE

BENJAMIN K. BLACKBURN, Administrative Law Judge: The charge was filed on July 30, 1976,¹ and amended on August 25 and September 3. The complaint was issued on September 20 and amended on December 13. The hearing was held on December 13-16, January 24-28, 1977, February 28, 1977, and March 1 and 14-17, 1977, in Marion, Ohio. On the last day of the hearing, as the final portion of the transcript, I issued an oral Administrative Law Judge's Decision in which I found that the Union had, as of August 13, represented a majority of Respondent's employees in a unit appropriate for collective bargaining and that Respondent had violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act, as amended. The 8(a)(5) finding was predicated on the principle enunciated by the Supreme Court in *N.L.R.B. v. Gissel Packing Co., Inc.*, 395 U.S. 575 (1969), that authorization cards are a valid indication of employee desires when an employer's unfair labor practices have made a fair election impossible. I recommended, *inter alia*, that Respondent be ordered to recognize and bargain with the Union.

On September 30, 1977, the Board remanded the proceeding to me for preparation and issuance of a written Decision on the ground that "by reading his decision into the record, the Administrative Law Judge has not satisfactorily complied with the requirements of Section 10(c) of the National Labor Relations Act, as amended, and Section 102.45 of the Board's Rules and Regulations, as amended, with regard to the preparation of a written decision." The Board further found "that the procedure followed herein does not comply with the requirements of Section 102.42 of the Board's Rules and Regulations, as amended, which provides that the parties, upon request made before the close of the hearing, 'are entitled' to file briefs and/or proposed findings and conclusions with the Administrative Law Judge." The Board's Order is found at 232 NLRB 722 (1977).

On October 7, 1977, Respondent moved that I disqualify myself and issue "a decision ordering the within matter to

¹ Dates are 1976 unless otherwise indicated.

be set for re-hearing in accordance with National Labor Relations Board Rules and Regulations" on the ground that I had prejudged the case by making up my mind before receiving its brief. On October 12, 1977, I denied Respondent's motion on the ground that dictating a Decision into the record after all parties have rested and declined the opportunity to argue orally does not constitute prejudgment of the merits of a judicial proceeding. Respondent has renewed its motion in its brief. I hereby deny it again for the same reason.

Briefs were received from all parties on November 7, 1977. Upon the entire record, including my observation of the demeanor of the witnesses, and after due consideration of those briefs, I make the following:

FINDINGS OF FACT

I. JURISDICTION

Respondent, an Ohio corporation whose principal office is located in Akron, Ohio, is engaged at its only plant, located in Marion, Ohio, in the manufacture of plastic draperies and related products. It annually ships goods valued in excess of \$50,000 directly to customers located outside the State of Ohio.

II. THE UNFAIR LABOR PRACTICES

A. Overview

The management hierarchy at Respondent's plant runs from General Manager David Bixler to Plant Manager Charles Sidner to Chief Supervisor Ruth Benner to firstline supervisors. On the morning of July 19, 1976, an employee named Virginia Almendinger informed Ms. Benner that the Union was trying to organize Respondent's employees. Ms. Benner reported to Bixler. Bixler immediately telephoned Neil Baker, president of Aeroplastics in nearby Bucyrus, Ohio, and a business associate of Bixler. Bixler called Baker because he was aware Aeroplastics was also involved in a union situation and he remembered Baker had spoken highly of the labor consultant it had retained. Baker told Bixler that the man he wanted was Rayford Blankenship of the firm of Blankenship and Williams, Indianapolis, Indiana, and that, as luck would have it, Baker was scheduled to meet with Blankenship that very day. Baker invited Bixler to come to Bucyrus to meet Blankenship. Bixler did so, taking Sidner with him. The upshot of their conference with Blankenship and Baker on July 19 was that Bixler retained Blankenship to represent Respondent.

Blankenship launched a campaign designed to cause Respondent's employees to reject the Union as their collective-bargaining representative. He addressed a plantwide meeting on July 23. The thrust of his remarks was that unionization leads to plant closing. He addressed a second such meeting on August 3. His message was the same. As a result, rumors that Respondent would close the plant if the employees went Union were rampant. Blankenship's technique offended many of Respondent's employees, and Bixler became aware of the controversy Blankenship had stirred up in the plant. Consequently, Bixler rather than

Blankenship, was the principal speaker at the third plantwide meeting attended by Blankenship, held on August 20. Bixler's message was the same as Blankenship's. The message was also picked up and repeated by various supervisors in their day-to-day dealings with various employees. In addition, Respondent cracked down on union talk in the plant, and Sidner instituted a written warning system.

The inevitable unfair labor practice charge was filed on July 30. It alleged only that Respondent was violating Section 8(a)(1) of the Act by engaging "in acts of coercion, interrogation in an effort to deny employees their rights as guaranteed by Section 7 of the Act as amended." The Union demanded recognition in a mailgram dated August 13. Blankenship responded with a mailgram, signed by Bixler, on August 16 which reads, "This is to advise you that we believe you do not represent an uncoerced majority of our employees. Any further communications concerning this matter should be directed to the National Labor Relations Board." The Union filed a petition for an election in a unit of Respondent's production and maintenance employees, now blocked by this proceeding, on August 16 in Case 8-RC-10550.

The amended charge filed August 25 expanded the scope of this case to cover 8(a)(3) and (5) as well as 8(a)(1). The 8(a)(3) violation specifically alleged was the discharge of employees named Sally O'Dell and John Weaver on August 20. Blankenship elected not to cooperate with the Regional Office's investigation. He spent August 30 at the plant systematically screening numerous employees by summoning them individually to an office for questioning. During the day, he sent a mailgram to the Regional Director which reads, "Re Plastic Film Prods Corp. 8-CA-10335 Dear Sir The company requests that the charge filed in this case proceed to a hearing rather than giving evidence and sworn statements, respectfully." (Blankenship's request did not deter the Regional Director from carrying out his duty to investigate before issuing complaint. Sally O'Dell and John Weaver are not named as discriminatees in the complaint because, I gather, the Regional Director found the evidence did not justify a conclusion other than that O'Dell and Weaver had been discharged for cause.) Bixler continued the screening on August 31 in Blankenship's absence, following a format left with him by Blankenship.

On September 24 Blankenship filed Respondent's answer to the complaint issued on September 20. In it, he set forth five affirmative defenses based on alleged misconduct by the Union such as obtaining authorization cards by duress and falsely promising unnamed employees various benefits to persuade them to sign up. He also included a "Cross Claim" in which he asked that the Union's cards be voided and that it "be punished for the conduct contained herein." During the first two phases of the hearing—i.e., the periods December 13-16, 1976, and January 24-28, 1977—I permitted Blankenship to cross-examine the General Counsel's witnesses, over the General Counsel's and the Union's objection, on the allegations contained in Respondent's affirmative defenses on the ground that Blankenship had a right to begin presenting his defense, if he chose, during the General Counsel's case-in-chief. The complete record contains no evidence to support Blankenship's affirmative defenses.

On the morning of January 28, 1977, Steven Nobil, a member of the firm of Millisor, Rice, and Nobil and a

nephew of Mortimer Atelson, Respondent's executive vice president, entered an appearance for Respondent and participated in the hearing that day in association with Blankenship. (Atelson is headquartered in Akron. He is the man to whom Bixler reports.) A few days later Respondent discharged Blankenship and retained new counsel. It embarked on a campaign designed to rectify the situation which Blankenship had created in its plant in order to forestall a bargaining order. To that end, on advice of counsel, Bixler read letters to assembled employees on February 4 and 25 which disavowed and apologized for Blankenship's conduct. William Rice and Thomas Rooney, associates of Nobil, represented Respondent during the last two phases of the hearing—i.e., February 28-March 1, 1977, and March 14-17, 1977. The first 2 days were devoted to presentation of the remainder of the General Counsel's case-in-chief, the last 4, to presentation of Respondent's defense. In the interim, Respondent issued a letter to employees along with their paychecks on March 9, 1977. Bixler held another meeting with employees on March 11, 1977, and Respondent posted a large notice patterned on a Board "Notice to Employees" which employees saw for the first time on the morning of March 11. The material which Respondent presented to employees on February 4 and 25 and March 9 and 11, 1977, and the wording of the notice are reproduced in full below in the section entitled "The application of Gissel."

B. *The Details*

1. The meetings of July 23 and August 3 and 20

This, and the following section entitled "The interviews on August 30 and 31," are based principally on the credited testimony of David Bixler as a witness for Respondent. (Bixler was also called as a witness by the General Counsel. His testimony at that early stage of the hearing lacked the candor which he displayed following Respondent's change of counsel.) There is no conflict in the record as to these facts. Bixler admitted, and his notes corroborate, that Blankenship and he said essentially what the employees called as witnesses by the General Counsel testified they said. There are, of course, the sort of minor discrepancies which always occur when two or more persons try to recall what was said by one of them after a lapse of several months.

A list of topics which Blankenship covered on August 3 was produced after the change in counsel. Earlier, Respondent refused to produce material subpoenaed by the General Counsel which related to the three plantwide meetings as well as the events of August 30 and 31. The General Counsel elected to proceed with the hearing rather than seek enforcement in a United States District Court. Respondent eventually turned over much material relating to these areas. However, it persisted in its refusal, despite the General Counsel's repeated demands, to produce the signed statements which Blankenship took from some employees on August 30.

a. *Facts*

On July 23, Bixler introduced Blankenship to the assembled employees and read to them the following policy statement which he had prepared:

TO: All Employees, Plastic Film Products
 FROM: The Management, Plastic Film Products
 SUBJECT: Union Organization of Plastic Film Products Plant

We have called you together to discuss a matter which is of great concern to you as employees of Plastic Film Products and to us, The Management of Plastic Film Products.

Many employees have informed us that the Amalgamated Garment Workers Union has been soliciting the signing of union cards by visiting your homes and/or by other means. We are very disappointed to learn that some of you have expressed a desire for a union by signing these cards. We are sure that the union organizer, Mr. Charles A. Litell and/or others, while soliciting your signature has told you only one side of the story—the Union's side. We want to tell you the truth.

Plastic Film Products has been in business for 30 years as a Non-Union Shop, competing for business in the market place on an equal basis against other Non-Union Shops and has successfully been able to maintain an adequate sales level to provide continuous employment for most of you over these many years. By our ever-expanding outlook on new products, we feel that we can maintain this trend. However, it is our opinion that if a union is successful in organizing Plastic Film Products, the advantage we now have in the market place could be lost. As a net result, sales could suffer; and trend we have established could suffer set backs.

The success of our past and present business is not due to the efforts of any one person—but to the combined efforts of all of you employees working together as a team with management to supply our customers with well-made products, produced efficiently and shipped quickly.

This is called customer service which is an absolute must to maintain a good customer relationship. It is our opinion that with an organized union in our plant, we could not be flexible enough to maintain the customer services which are so critical to any manufacturing plant.

It has always been a policy of the Management to offer to every employee the opportunity to discuss openly any problems which you might have, whether these problems be of a personal nature or directly connected with your work here in the plant. Any problem that you discussed openly with the Management were acted upon as quickly as possible.

Management has also attempted to provide the most favorable working conditions possible by providing a safe, clean, comfortable working environment. We have always considered each employee as a member of the Plastic Film Products family, and we have all worked with a very close personal working relationship. We, as the Management, would hope that this family relationship will continue.

The Management of Plastic Film Products would like to make all employees aware of its position regarding any union organization which may try to establish a union within our plant. We will not stand idly by and allow this to happen. We, the Management, do

not want a union in our plant and will do everything legally possible to prevent the organization of any union.

We hope that you, the employees, will recognize the serious nature of this situation and will consider all of the details involved before making any decision. Also, we sincerely hope you will consider the adverse effects that a union will have upon you as a member.

PLASTIC FILM PRODUCTS CORPORATION

David W. Barbour, President
Mortimer Atleson, Executive Vice-President
David R. Bixler, General Manager

Blankenship then spoke. He told the employees about his experience with companies, both in and out of the area, which had been organized by unions and then had been forced to close their doors because they could not meet the unfair economic demands made on them by the unions. He pointed out that Barbour, Atleson, and Bixler were the owners of the business and, as such, had a constitutional right to lock the doors and go out of business if they wanted to. In fact, he said, Bixler had a right to strike a match and burn the plant down if he wanted to.

Blankenship told the employees they could expect to see the Union's organizers outside the door of the plant and in the parking lot. An organizer might even come to their homes, he said, but they did not have to let him in. One employee asked what they should do if the organizer refused to leave. "Take a broom to him," Blankenship replied.

Blankenship closed his presentation by pointing to each employee as he said, "Now, I have not threatened to close this plant, I have not coerced anybody, is that right?"

Some of the employees replied, in chorus, "No, you haven't."

On August 3, Blankenship covered a list of topics which Bixler had prepared for him, based on the feedback Bixler had received following the July 23 meeting. The list reads:

1. More explicit on signing of cards
2. Explain election
3. Who makes decisions on classifications
4. Super seniority—explain
5. Explain promises made by organizer
 - (a) 10 paid holidays
 - (b) Paid hospitalization
 - (c) Increase in pay—.10 to 1.00 increase
 - (d) Retroactive on pension plan (already based on yrs. service)
 - (e) Overtime (back pay) over 8 hrs not 40 hrs
6. Organizer states vacation policy no good
7. Organizer states union could force Co. to open books to disclose profits. If no profits they would not press for any wage increases or additional benefits.
8. Explain wages of union officers—inside & outside plant
9. Grievance procedures
10. Organizer telling employees he has 51% signed but wants to be sure this time that plant is organized
11. Organizer states that he could not get international laws and by laws

12. Organizer is showing list of names he says are signed *not cards*

13. Bomb threat by unknown people 7-29-76—(3 seconds for bomb to go off from time of call)

14. Have employee ask organizer to put in writing, promise

15. Employee dissatisfaction because Ray Blankenship was brought in

16. Organizer says company has lots of money just look at expensive cars they drive

17. Explain job classifications

On point 1, Blankenship stressed that, by signing an authorization card, an employee designated a third party to represent him in his dealings with management, thus giving up the right to speak for himself. On points 1 and 2 together, he stressed that, while the cards would be used to get a Board election, the Union could get into the plant without an election on the basis of the cards alone. He did not elaborate. (It was clear, however, from the overall thrust of his remarks, that he was not referring to a voluntary recognition situation.) On point 4, he said that someone, possibly the main in-plant organizer, would go automatically to the top of the seniority list. On point 11, he held up a copy of the international union's constitution and bylaws and offered to make them available to the employees so that they could read for themselves the restrictions and duties they would accept if they joined the Union. On point 17 he stressed that institution of a jobs classification system under a union would mean an end to the Company's policy of shifting employees to another operation in order to keep them working when work ran out in their basic jobs.

Blankenship did not cover items 13 and 15 on Bixler's list. At the end of his extemporaneous remarks (he did not have Bixler's list before him as he spoke), he asked for questions from the audience. By prearrangement, Ruth Benner asked, "Does this company have any intention of closing this plant?" Blankenship replied that it had no such intention. He repeated the point he had made on July 23 that unreasonable demands by the Union could lead to a decision to close for economic reasons. At the end of the meeting Blankenship once again pointed his finger at each of the employees as he said, "Now, I have not threatened or coerced any of you employees, is that right?" Once again, some of the employees agreed with him.

On August 20 Bixler spoke from and covered all the points on the following outline:

I. HISTORY OF COMPANY

Started 1946 by David Barbour after discharge from Navy. (use newspaper clipping)

1948 Fratex Home Fashions (Home Party Plan)

1953-1954 Business Declined because of competition by chain stores sabotaging of orders by union workers

Stuck with union contract—could not adjust prices, Had 5 plants-Akron, OH.-Marion, OH.-Dallas, Tx.-Atlanta, GA.-Reno, Nev.

Total Gross Volume—over 5 million dollars

Stuck with leases—had to pay penalty to obtain release

People with work contracts—had to pay off
 Business on verge of Bankruptcy
 People layed off [sic]
 Result of fixed wage contract—competition & recession

Transferred work to Frazier Mfg.—Marion
 Struggled until Akron lease was up, 1962.—2 of 107 to survive

Moved out of Akron completely except Gen. offices
 We are the head of this Co.—Show me the head of any Union in country that doesn't have a new car or cars—big cars—every year—also 1mm dollar jet aircraft, not 1 but a fleet with pilots and on and on.

Speaking of Unions have you read about trouble at Fairfield—violence just like Power Shovel—off work for long time. How do they support families—Some of you have husbands that work so it won't hurt but the rest will suffer. B. F. Goodrich on strike since April—Union dues continue on even though on strike—The Union gets theirs.

3.A. JOB CLASSIFICATIONS

Under Union rules each person will have a job classification—each classification by seniority—no work [sent?] Home-Co. no longer able to shift you around to give you 40 hrs. wk.—You could lose you're present job by higher seniority person bumping you.

Plants closed because of Unions

Freezer Queen—Wyandot

Vasil Mfg. Co.—Bucyrus

Abbott Co.—Prospect

Profits of Co.

Rumor 1mm Dollars

Total Dollar Sales 1.8mm to 2.3mm

Not possible to make rumored amount

4. From profit stock holders must rcv. dividends

I am stockholder

I rcvd. \$.10 per share yrly dividend—borrowed money to buy yrs. ago.—Stock value approx \$5.00

This is 2% return on money—could get better from any local bank Balance of earnings retained by Co. to grow—buy new equip. Additional mtl.—New drape pattern costs 20m for contract just bought screen print. equip.—New dept.—More emp. Co. has good credit—New compressor—Conveyor—office mach.

UNION HAS FINANCIAL STATEMENT

Could not have unless they stole one

Need court order—we would know about

Could have Dunn & Bradstreet report (show one & explain)

Concentrated efforts on curtain & draperies contract work wholesale sales

Built this business through yrs. to present

Still highly competitive

Started Prem.[jum] Business 8 yrs. ago with help of

D. LeFold

Slow start highly competitive—Submit many samples—get 1 order out of 200

Just now getting rolling

Have to know buyers

Supplements wholesale chain store business

Provides additional jobs

Takes a lot of money and hard work to develop new lines

2. ISSUES

FIRE AT AKRON PLANT (use clippings & photos after discuss)

Fire occurred night of May 1, 1951

Plastic Film shared bldg. with Harwick Standard Chem. Co.

Chem. Co. on top floor—Plastic Film beneath

Fire originated in Chem. Co.

Burnt through floor to Plastic Film

Damage extensive

Insurance not 1mm but 256m—Needed to replace mach. & mtl.

Plastic Film did not move to Marion

Started up in other bldg.—Back in production 2 mo.

Moved to Marion 10 years later

CLOSURE OF PLANT IN AKRON

Date of Union Contract in Akron—1952

Plant was closed in Akron

Union was directly involved & responsible

Woman directly responsible for Union—Marge Riley

Marge Riley said biggest mistake she ever made

Inefficient—Unreasonable demands—time consuming

3. WHO OWNS BUILDING

Plastic Film Prod. does not own but rents building owned by A.B.M. Corp. of Ohio

Officers Automobiles

Mr. Barbour—1973 Cad.—1974 Cheap Gremlin

Mr. Atleson—1973 Mercedes

Mr. Bixler—1973 Ford.

Co. Chev. wagon 1975—bought because truck wore out

Does this sound like we are as prosperous

You employees drive newer cars

ADA ROTH

Quit 4th day of June

Ada gave quit notice on June 4th—no advance warning

Advised that husband wanted her to quit to be with children

She had done this once before and we took her back.

5. EMPLOYEE BENEF. NOW ENJOYED

Employee Use of Company Mach.

Co. & employee donations to needy families at Christmas

Bail bond for employee

Donations to various groups Rep. by employees

Personal loans to employees

Advance on pay checks

Extra vacation

Days off when needed by employees

Open door for problems

Domestic sewing mach. for emp. at cost

Empl. buying auto parts etc. using Co. name

Good Fri. off to go to church—paid by Co.

Let off at noon or 2.00 P.M. on Christmas Eve—
Paid to 3:30 P.M.

Kroger Food coupons \$15.00 to emp. at Christmas
Pot luck dinners New Years eve—Co. furnish Meat
& drink—Co paid for extra time

Flowers to employees in Hosp. or deaths in family
Profit from vending Mach. in employee fund

Air cond. work areas

Clean safe work areas

Private parking lot for cars

Employee dis. in retail store

Employee chg. in retail store

Loaning of tools to Emp. from Maint. shop

Personal coffee pots & toasters

Pay sales room chgs by Aug. 27.

Christmas party and gifts

Vending Mach. at cost

Hospitalization not taken out of short pay week

\$.10 per hr. 2nd shift prem.

Flu shots

6 paid Holidays

Vacations—1 yr. = 1 wk. 2 yr. = 2 wk. 10 yr. = 3
wk.

Insurance policy \$1,500.00

Sick pay—\$25.00 wk. after 1st wk.

Retirement pension plan

Bixler went into the fire which destroyed the Company's Akron plant in 1951 because of rumors among the employees that Respondent had burned it down, received \$1 million in insurance, and moved to Marion immediately thereafter. In talking about the history of the Company, including the fire, he displayed newspaper clippings which were subsequently posted on the plant bulletin board. In making the point, as part of his effort to counter rumors about Respondent's wealth, that Respondent does not own the building it occupies, Bixler neglected to mention that the landlord, A.B.M. Corp. of Ohio, is owned by Barbour, Atleson, and another principal of Respondent named Walter Martin, who at one time was plant manager in Marion. He stressed the fact that Respondent pays its rent in Marion on a monthly basis.

Bixler went into details about Freezer Queen, Vasil Mfg. Co., and Abbott Co., three nearby companies which closed their plants because of unions. He stressed the reliability of his information. As to the first two, he cited his own friendship with the managers. In the latter case, he said his information came from the wife of Respondent's president who was personally acquainted with the owners. In each instance, he said, the plant had been closed when the union involved struck to enforce its unreasonable demands.

During a question period which followed Bixler's presentation, an employee asked if Respondent would increase its fringe benefits. Bixler and Sidner had been working on an improved medical insurance plan since February or March. Bixler had that plan in mind when he replied that there was nothing he could do at the present time because, referring to the Union's organizing campaign, the employees had his hands tied.

b. *Analysis and conclusions*

The issue around which all else revolves in this case is whether Respondent threatened to close the plant. That employees and even lower level supervisors got such a message from Blankenship's and Bixler's presentations is clear. The employees' testimony about what was said at the three plantwide meetings demonstrates their understanding of the point being made. The fact that supervisors repeated it, as detailed in the section below entitled "8(a)(1) violations by other supervisors," shows that their understanding was the same. Most importantly, Bixler's testimony about his knowledge of rumors in the plant demonstrates Respondent was aware of the impression which had been created in the minds of the employees. That Blankenship planned Respondent's antiunion campaign is equally clear. He stressed to Bixler in their private dealings that Respondent had a constitutional right to go out of business rather than accept a union.

The Supreme Court in *Gissel, supra*, at 618, laid down the principle which controls this aspect of this case as well as the bargaining order issue discussed below. With respect to the line which separates a legal prediction from an illegal threat, it said an employer "may even make a prediction as to the precise effect he believes unionization will have on his company. In such a case, however, the prediction must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control or to convey a management decision already arrived at to close the plant in case of unionization. . . . If there is any implication that an employer may or may not take action solely on his own initiative for reasons unrelated to economic necessities and known only to him, the statement is no longer a reasonable prediction based on available facts but a threat of retaliation based on misrepresentation and coercion, and as such without the protection of the First Amendment. We therefore agree with the court below that '[c]onveyance of the employer's belief, even though sincere, that unionization will or may result in the closing of the plant is not a statement of fact unless, which is most improbable, the eventuality of closing is capable of proof.'" (Citations omitted.)

Respondent relies on such cases as *Gaedke Cutlery Manufacturing Co.*, 220 NLRB 843 (1975); *L. Tweel Importing Co.*, 219 NLRB 666 (1975); and *Swift Textiles, Inc.*, 214 NLRB 36 (1974), in arguing that the point Respondent made about plant closings "was not the kind of mindless ranting found by the Supreme Court" in *Gissel* "to cross the line from permissible predictions . . . to impermissible threats." None of them is apposite, for in each the statement being weighed by the Board was totally different from the situation presented here. In *Gaedke*, the issue only involved part of a preelection letter issued by the employer, not the basic theme of the employer's antiunion campaign. In *Tweel*, the employer had already received excessive bargaining demands from the union. In *Swift*, the employer's remark was made in the context of a union promise to obtain a certain minimum pay rate, thus giving the employer reasonable cause to anticipate excessive demands. Here, the Union had made no demands or promises, and the plant closing theme was the centerpiece of the campaign com-

posed and orchestrated by Blankenship to frighten Respondent's employees into rejecting unionization.

One case cited in Respondent's brief is arguably analogous on its facts, but it, too, falls short of the situation presented here. In *East Side Shopper, Inc., Tri-County Printers, Inc., Circulation Service, Inc., d/b/a Dawn (Detroit Area Weekly Newspapers, Inc.)*, 204 NLRB 841, 844 (1973), two officials "sought to portray that the Company was in poor financial condition." One "stated that 'if a union got in and made unnecessary wage demands . . . management would be forced to reduce the departments even more than they were.'" The other "told the employees that, if a union came in, it would mean unreasonable demands made on the Company which might necessitate the cutting of certain department personnel." Here, Blankenship's and Bixler's remarks went much further. Blankenship emphasized Respondent's absolute right to do whatever it pleased with its property by saying Bixler could burn the plant down if he wanted to. Respondent's constitutional right to go out of business in lieu of going union, as laid down by the Supreme Court in *Textile Workers Union of America v. Darlington Manufacturing Co., et al.*, 380 U.S. 263 (1965), is not an issue in this case, for Blankenship and Bixler did not tell the employees, and Respondent does not now contend, that they were speaking about "a management decision already arrived at to close the plant in case of unionization." Yet Blankenship made the point so strongly that he started the rumor Respondent had burned down its plant in Akron to escape a union. His and Bixler's account of the trouble other plants had suffered stressed that a similar fate for Respondent was a certainty even though the Union had done nothing to justify their premise that its demand would be unreasonable or its tactics implacable. Having Ruth Banner ask a planted question about Respondent's intentions on August 3 did not rectify the impression Blankenship had created on July 23. It merely created an occasion for repeating the theme that the Union would force it to close the plant despite its intentions. Bixler reinforced this point on August 20 when, as his notes make clear, he told the employees in no uncertain terms that Respondent had elected to close its Akron plant because it could not get along with a union. Finally, the fact that Blankenship told the employees on July 23 and August 3 that he had not coerced or threatened them did not change the legal nature of the words he had spoken to them. It only emphasized the coercive nature of the threat he had intended to convey. Blankenship and Bixler went far beyond objective fact, carefully designed to convey Respondent's belief as to demonstrably probable consequences beyond its control when, on July 23, August 3, and August 20, they talked about the possibility of the plant closing in the event of unionization. I find, therefore, Respondent violated Section 8(a)(1) of the Act by threatening to close its plant on these occasions.

Another 8(a)(1) allegation is based on Bixler's reply to a question about fringe benefits at the end of his August 20 speech that the employees had his hands tied. Respondent had not decided on an improved medical insurance package for its employees as of August 20. There is nothing in the record to indicate that it had announced its intentions to the employees prior to that date or had given any reason to

anticipate such a benefit in the near future. Similarly, there is nothing in the record to indicate that Respondent regularly reviewed and upgraded its programs on a periodic basis. When Bixler informed the employees that Respondent's plans were being put on hold pending the outcome of the union situation, he accurately, albeit somewhat short-handedly, stated the law applicable to the situation Respondent found itself in; i.e., granting an increase in benefits after learning of a union campaign where the decision to do so has not been reached prior thereto is an unfair labor practice. The way Bixler phrased his reply to the employee's question did not place the onus for the delay on the Union. I find, therefore, Respondent has not violated the Act either by not granting its employees an improved medical insurance benefit or by the manner in which Bixler revealed the suspension of its activities in that area on August 20. *Sta-Hi Division, Sun Chemical Corporation*, 226 NLRB 646 (1976).

2. The interviews on August 30 and 31

a. Facts

Respondent was served with a copy of the first amended charge, the one which names Sally O'Dell and John Weaver as alleged discriminatees, on August 27. Rayford Blankenship and his associate, John Wolfe, came to the plant early on the morning of August 30 as a result. They occupied the office of the president, David Barbour, and interviewed employees who were summoned to the office individually throughout the day. (Barbour, I gather, is ill and does not participate actively in the management of the company.) David Bixler and Charles Sidner were in the office with them most of the day. Blankenship conducted the interviews. Around midday he dispatched the mailgram to the Regional Director in which he requested this case be sent to hearing without agency investigation.

After being introduced to the employee, Blankenship recited the following statement:

I am going to ask you some questions. The questions are about the Union. You have a right to answer or not to answer.

You also have a right to volunteer any information that you might feel you want to tell us, all without any fear of reprisal.

If the employee indicated a willingness to cooperate, Blankenship then asked questions about the Union's effort to get the employee to sign an authorization card and about Sally O'Dell and John Weaver. Some employees balked and were sent back to their work. Blankenship took sworn statements from those employees who were willing to sign them. (The record does not indicate what authority, if any, Blankenship has to administer oaths.) Since Blankenship refused to produce the statements he took from employees on August 30, and both Bixler and Sidner were evasive when asked how many employees Blankenship interviewed that day, the number cannot be stated any more precisely than "numerous."

In the area of the Union's efforts to organize the employees, Blankenship was interested in whether they had been told the cards would be used to get a Board election,

whether the organizer had threatened or misled them in any way, which employees, other than the one being questioned, had signed cards, who had attended union meetings and what had happened there, and the like. When Blankenship left the plant that evening, he arranged for Bixler to continue the interviews on August 31. He gave Bixler precise instructions. He told Bixler to open each interview with the same set speech he had used that day and, if the employee agreed to cooperate, to ask four questions and no more. He wrote out the opening statement and the questions for Bixler. The questions were:

1. Have you ever signed a union card?
2. Has anyone asked you to sign a union card?
3. Who asked you?
4. Would it be used for an election?

Bixler did as Blankenship asked him. Since the record contains Bixler's tabulation of the results, it is possible to find with precision that he summoned 10 employees to his office on August 31, read each the statement Blankenship had used, and put none, some, or all of the four questions to them as the situation developed.

b. *Analysis and conclusions*

Respondent defends against allegations that Respondent coerced employees on these occasions by interrogating them and polling them on the ground that Blankenship's purpose, as revealed to Bixler, was preparation of Respondent's defense for the hearing of this case. Assuming, *arguendo*, that such was, in fact, Blankenship's motive, the defense is still without merit. Blankenship and Bixler did not communicate the purpose of their questioning when they called employees into the final locus of authority in the plant. The interviews took place in a context fraught with hostility to union organization. The questions exceeded any legitimate purpose of weighing the Union's claim to majority status by prying into other union matters and the union activities of other employees. The poll was not conducted by secret ballot. I find, therefore, that Respondent, regardless of its agents' motive, violated Section 8(a)(1) of the Act on August 30 and 31, 1976, by interrogating employees about their union activities, sympathies, and desires and by polling them about their desire to be represented by a union. *Johnnie's Poultry Co., and John Bishop Poultry Co., Successor*, 146 NLRB 770 (1964), enforcement denied 344 F.2d 617 (C.A. 8, 1965); *Struksnes Construction Co., Inc.*, 165 NLRB 1062 (1967).

The most significant fact about the events of August 30 and 31, in my view, is that Blankenship ostensibly elected to begin preparing Respondent's defense for the hearing immediately upon receipt of the amended charge and nearly 3 weeks before the complaint issued. I am convinced that Blankenship's purpose from the beginning was to thwart the Union's organizing campaign by coercing Respondent's employees and that he seized on the amended charge as a pretext in order to reinforce the impression he had already created among the employees for militant opposition to unionization. His conduct on August 30 is the single most persuasive element in the record in leading me to that conclusion. Respondent's reliance on *Madison Brass Works, Inc.*, 161 NLRB 1206 (1966), in this respect is mis-

placed. There, the Board found nothing coercive in questions which the employer's attorney put to employees, after charge and before complaint, about the union's solicitation of them to sign authorization cards because the questions were pertinent to the refusal-to-bargain allegation in the charge. Here, Blankenship went beyond the conduct found legal in *Madison*. His explanation to the employees, including his assurance against reprisals, was inadequate. His questioning exceeded by far the needs of preparation for hearing.

3. The 8(a)(1) violations by other supervisors

a. *Charles Sidner*

The following findings of fact are based on the credited testimony of Donald Greenawalt.

Sometime in late September, Wynn Elliott, another employee, stopped at Greenawalt's machine to ask a question about union matters. When Elliott left, Charles Sidner, the plant manager, said to Greenawalt, "What are you guys doing, having another meeting?"

Greenawalt said, "No."

Sidner said, "What did Wynn want?"

Greenawalt said, "He was asking me something about the work."

The General Counsel would find an unlawful interrogation by Sidner in this exchange based on his inquiring whether the two employees were "having another meeting" in a situation where their conversation did, in fact, amount to a miniunion meeting. I find the remark too ambiguous to support such a conclusion.

b. *Ruth Benner*

The following findings of fact are based on the uncontroverted testimony of General Counsel's witnesses. Ruth Benner, ill at the time of the hearing, did not testify.

One day during the last week in July, Donald Greenawalt ran out of work in the cutting department. He went to Ruth Benner, Respondent's chief supervisor, and asked her to give him something to do. She said she had nothing for him at the moment and told him to see if Calvin Willmeth, the warehouse supervisor, needed any help. She added that she could send him to Willmeth now but that, if the Union came in and he ran out of work in his department, she would have to send him home.

A few days later, Ms. Benner encountered Greenawalt as he was trying to get his machine fixed. She asked if he had started the project she had put him on. He explained that the machine was broken and he was looking for the mechanic to get it fixed. He added, "I can do it myself."

Ms. Benner said, "You can do it now, but, if a union comes in, you won't be able to."

In late July, Ms. Benner approached Terry Tilley and asked if the union man had been around to see her yet. Ms. Tilley said he had. Ms. Benner said, "You know what that will do. That will close the doors."

Ms. Tilley said, "Why is that?"

Ms. Benner said, "Because the company can't afford it."

Ms. Tilley said, "Well, I know they can't afford to pay us what we're worth, but I know they can afford to pay us more." Ms. Benner walked away.

Around July 23, Ms. Benner asked Wanda Davidson, Cheryl Cafagno, and Bonnie Bowman if the union man had been around to see them yet. Ms. Bowman said, "Not lately."

Ms. Benner said, "I feel Nancy Mead started this union. Nancy thinks she is being pushed around now but wait until they get a union in here and she will see how she gets pushed around."

Around August 8, Ms. Tilley got into a conversation with Ms. Benner about Ms. Benner's plan to leave Respondent for another job in Mansfield, Ohio. Ms. Tilley asked who was going to succeed Ms. Benner as chief supervisor. Ms. Benner said, "The way things look, there aren't going to be any jobs." She hastily added, "I'm sorry, I'm not supposed to say that. I take it back."

Around September 1, Yvonne Price was seated at the lunch table with Brenda Temple and Betty Willmeth when Ms. Benner walked up. Ms. Benner asked Ms. Price if going to the union meeting had changed her mind against the Company. (The Union held meetings for Respondent's employees on August 5 and 31.) Ms. Price said it had not, she was still for the Company.

Respondent contends that these remarks by Ms. Benner were not coercive and, thus, not violative of the Act, for various reasons. Briefly summarized, its argument stresses the casual, friendly, jesting nature of the conversations, the ambiguity of some of them, and the assertion in some of them of permissible campaign propaganda. I disagree. Occurring, as they did, in the context of Blankenship's all-out campaign to frighten the employees, each contained the element of coercion required to support an unfair labor practice finding. Ms. Benner interrogated Ms. Tilley, Ms. Price, Ms. Davidson, Ms. Cafagno, and Ms. Bowman. She threatened Ms. Tilley, Ms. Davidson, Ms. Cafagno, Ms. Bowman, and Greenawalt with various reprisals, up to and including plant closure, in the event employees selected the Union as their bargaining representative. In the conversation with Ms. Bowman she created the impression of surveillance of an employee's union activities by her remark that Ms. Mead was the instigator. I find, therefore, Respondent violated Section 8(a)(1) in each of these ways by the conduct of Ruth Benner.

c. Betty Roush

I credit Nancy Mead's version of the following conversation over Betty Roush's. Ms. Roush denied saying anything about the plant closing. However, she admitted talking to Ms. Mead about Respondent's policy of shifting employees to other jobs when their work ran out but insisted it was not in the context of a discussion about the Union. Given the situation which prevailed in the plant at the time, Ms. Roush's account of what she did say strikes me as highly unlikely.

In late July, Betty Roush, supervisor in the fiberglass department, overheard Nancy Mead say she intended to quit in the course of complaining to another employee about

working conditions. Ms. Roush called Ms. Mead to her desk and said, "What did you say, Nancy? What are you going to tell me?"

Ms. Mead said she intended to quit because "I am tired of getting shit on around here." Ms. Roush asked why, and Ms. Mead detailed a grievance over being taken off the rod pocket machine. Ms. Roush explained that the woman who was on the machine had more seniority. Ms. Mead said, "I hope things change pretty soon around here."

Ms. Roush said, "Do you mean the Union?"

Ms. Mead said, "Yes, the Union."

Ms. Roush said, "Well, Nancy, you know if the Union gets in here, the place will close down in 3 to 6 months. You know, if we can't move the people around, then they would have to be laid off."

I find Respondent, in the person of Betty Roush, violated Section 8(a)(1) of the Act by threatening an employee with reprisals, including plant closing, in the course of this conversation.

d. Eileen Everly

I credit Fred Smith over Eileen Everly as to the following conversation. Ms. Everly denied that it ever occurred.

In late July, Fred Smith discussed the Union with a number of other employees in the shipping department in the presence of Eileen Everly, the shipping supervisor. Ms. Everly said, "If the Union gets in, the company will shut the doors."

I find Respondent, in the person of Eileen Everly, violated Section 8(a)(1) of the Act by threatening employees with plant closure in this conversation.

e. Linda Jackson

The following findings of fact are a synthesis of the testimony of Judy Howard and Linda Jackson. Ms. Howard placed the first conversation in June and said Ms. Jackson quoted David Bixler on the subject of plant closing. Since I have credited Bixler as to the precise date on which he learned of the Union's organizing campaign—July 19—it is unlikely that he would have made such a statement in June. However, it does not follow that Ms. Jackson did not utter a threat to close the plant that early. She admitted telling Ms. Howard her own views on the subject. The Union's organizer began soliciting cards in a somewhat desultory manner in February, then moved into high gear in late June.

As to the October conversations, Ms. Jackson admitted talking to Ms. Howard about having to go to court, but denied that the conversation occurred in the manner Ms. Howard testified and that she spoke the words Ms. Howard attributed to her. Once again, given the situation which existed in Respondent's plant, especially after the employees became aware that they were about to be involved in a Board unfair labor practice hearing, Ms. Howard's version is the more credible of the two. However, I credit Ms. Jackson's denial that she saw the affidavit Ms. Howard had given to a Board investigator.

Sometime in June, Judy Howard got into a discussion with Linda Jackson, supervisor of the premium department,

about the Union. They were comparing Respondent's plant with the union plant at which both of their husbands work. In the course of their discussion, Ms. Jackson said Respondent could not afford to operate with a union and, if the Union got in, the plant would have to close.

In October, Ms. Jackson blamed Ms. Howard because she "had to go to court." Ms. Jackson said she had read the things Ms. Howard "had sworn and the things that they had said about Ruth Benner and they were all lies."² Ms. Howard said they both knew that what she had said about Ms. Jackson (i.e., the conversation in June) was the truth. Ms. Jackson said, "Well, no one was there. No one heard it. Who's to say who's telling the truth, me or you?"

Shortly before, Ms. Howard had telephoned Ms. Jackson at home one evening to ask for a cookie recipe. They discussed the posture of the case and their respective versions of what had happened in June. Ms. Howard got the mistaken impression that Ms. Jackson had read her affidavit.

I find, on the basis of the June conversation, that Respondent, in the person of Linda Jackson, violated Section 8(a)(1) of the Act by threatening an employee with plant closure. I further find Respondent did not violate Section 8(a)(1) by Linda Jackson's unlawfully and coercively informing "an employee she had read the affidavits that that employee and other employees had given to the National Labor Relations Board and that said affidavits 'were all lies.'"

4. The no-solicitation rule and written warnings

a. Facts

The following findings of fact are either admitted, undisputed, or uncontroverted.

On August 3, 1973, Walter Martin, at that time plant manager, issued a memorandum to all employees "REGARDING: Several items of rules and regulations" the first paragraph of which reads:

There have been times when there has been an excess of conversation in the plant during working hours. As you know, this practice not only interferes with the work of the one who is doing the talking but to the other people as well. This practice must stop immediately. This is not to say that we do not appreciate friendliness and helpfulness between people—because we do—but excessive talking about things outside the work itself is to be avoided. Please remember and conform to this.

On August 29, 1974, Martin issued a memorandum to all employees "SUBJECT: Excessive talking in the factory" which reads in its entirety:

As you all know, it is the responsibility of each of our employees to do the best kind of production job that he possibly can. This can best be done by consistent attention to the work being performed.

Excessive visiting and conversing are to be avoided

² I interpret this statement to be a reference to the complaint in this case and not to Ms. Howard's affidavit as par. 14(K) of the complaint, the 8(a)(1) allegation which is based on the October events, presumes.

at all times. If you have questions regarding the work being performed, talk first with your supervisor.

This item of excessive and unnecessary visiting, which some continue to do, must stop immediately. This letter is for your own benefit. Please remember this.

Also, the practice of lining up at the time clock at 3:25 will cease. You will do your productive work until the 3:25 bell rings and then clean up your work area to the best of your ability. Please remain in your work area until the 3:30 bell rings.

We appreciate the helpfulness of each of our employees, but after all, we are here to do a job and to conform to the necessary regulations.

On August 17, 1976, Nancy Mead received a document typed on Respondent's letterhead and signed by David Bixler, Charles Sidner, and Betty Roush which reads:

On August 9, 1976 at 3:24 PM you were warned verbally not to discuss Union business on Company time.

You again violated this warning by discussing union business on August 13, 1976 on or about 2:45 PM. Further violation of this matter will result in your discharge.

A copy was placed in Ms. Mead's personnel file.

On August 20, a similar document signed by Bixler, Eileen Everly, Calvin Willmeth, an employee named Becky Redmond, and Fred Smith was placed in Smith's personnel file. It memorialized a conference that day among Bixler, Ms. Everly, and Smith in which Smith was counseled about seven numbered shortcomings in his work. It reads, in pertinent part:

7. [Smith's] discussing of union business on Company time [was discussed].

A signed statement was made by employee Becky Redmond as follows:

About two weeks ago Fred Smith said that if I didn't have a union card to sign he would give me one. He would give me five hours to make up my mind as to whether I would sign a card or not.

The above took place in the presence of four other employees and during working hours while they were painting Quaker Oats tents. Fred Smith was advised verbally, in the presence of his supervisor Eileen Everly, that he had been discussing union business on Company time and any further violations of this warning would result in disciplinary action, up to and including discharge.

* * * * *

Immediately after his leaving my [i.e., Bixler's] office, he made the following statement to supervisor Calvin Willmeth: That I had threatened him and the future of his job.

Sidner instituted a formal written warning system utilizing a printed form in mid-September because of the union activity in the plant. He issued seven between then and the beginning of the hearing, one in January 1977. These eight

warnings are all of the written warnings contained in employee personnel files as of the close of the hearing.

The first warning was issued to Joan Shirk on September 15. Under "Nature of Violation" Sidner checked the lateness and absence boxes. Under remarks he entered "You were verbally warned Aug. 17 by Ruth Benner. You were late 8-23, absent 9-9, 9-14."

The four warnings issued to Bonnie Bowman, Cheryl Cafagno, Wanda Davidson, and Sandra Oiler on September 16 are identical. Sidner checked disobedience and entered, "You were observed out of your work area 9-15-76 at 3:28 PM. Further violation of this rule will result in disciplinary action." This incident involved the rule set forth in the second half of Martin's August 29, 1974, memorandum to employees. Ms. Bowman, Ms. Cafagno, Ms. Davidson, Ms. Oiler, Amy Thompson, Mary Belle Saunders, and DeLois LeMaster worked on September 16 on the shower curtain machine near the back of the plant. They normally work in the drape department, near the front. The timeclock is near the drape department. At 3:25 p.m., all seven women went to the drape department in order to be closer to the timeclock. They did so with the permission, granted several days before, of Ruth Benner on the reasoning that the drape department was their "work area." They did not line up at the timeclock. Ms. Bowman, Ms. Cafagno, Ms. Davidson, Ms. Oiler, and Ms. LeMaster had signed authorization cards for the Union. Ms. Thompson and Ms. Saunders had not.

Diane Risner was issued a warning on October 27. Sidner checked absence and entered, "You have been warned by written notice and [sic] your absence of the following days 9-27-76, 10-4-76, 10-26-76. You will be off the following days 10-27-76, 10-28-76, 10-29-76. You are directed to return to work 11-1-76 at 7:00 AM. Further absence will result in disciplinary action."

Francine Williams was issued a written warning on December 8. Sidner checked defective work and carelessness. He entered, "You have been verbally warned about defective work and or quality of your work. Further violation will result in disciplinary action."

Finally, Don Greenawalt was issued a written warning on January 14, 1977. Sidner did not check any of the boxes on the form. He entered, "Warned verbally about too much talking and wandering around."

Ms. Mead, Smith, and all eight of the persons who received the form warnings signed authorization cards for the Union. No employee who did not sign a card has received a written warning.

b. Analysis and conclusions

The General Counsel contends, and Respondent denies, that Respondent promulgated a no-solicitation rule as a result of the Union's organizing campaign. Respondent relies on Martin's letters of 1973 and 1974 as proving the existence of an earlier rule. Its position is without merit. A rule which cautions employees about excessive social visiting and talking with other employees has nothing to do with the legal concept of a no-solicitation rule. The latter, if properly worded and enforced, is a legal limitation on employees' rights to engage in activities, including, but not limited to, union activities, in working areas of a plant dur-

ing working time. The fact that Respondent's rule and a no-solicitation rule are based on the idea that worktime is for work is not sufficient to make Respondent's rule a no-solicitation rule.

The letters issued to Nancy Mead on August 17 and to Fred Smith on August 20 establish that Respondent did promulgate a no-solicitation rule as part of its response to the Union's organizing campaign. Since it is couched in terms of barring union talk "on company time," it is legal on its face.³ *Essex International, Inc.*, 211 NLRB 749 (1974). However, it was limited to union activity and invoked only against union advocates. Thus, it was discriminatorily motivated both in its promulgation and its application. I find, therefore, Respondent violated Section 8(a)(3) and (1) of the Act by discriminatorily promulgating and enforcing a no-solicitation rule.

Sidner admitted that he introduced a system of written warnings into the plant, thus:

Q. Mr. Sidner, there has been introduced into evidence Exhibits 58 through something, warnings. Can you tell us when you first began the use of written warnings?

A. I would have to say somewhere around July, somewhere around the beginning of the activities, the excessive activities.

Q. When you say July, what year are we referring to?

A. '76, I'm sorry.

Q. Can you tell us what prompted the use of written warnings?

A. Well, at that time, there seemed to be an excessive amount of talk and discussion among employees, more so than there was prior to that. I think at that point, prior to that or as a verbal warning, seemed to be doing what we wanted to do. At this particular time, it did not serve the purpose.

There is nothing in the record other than the statements of Respondent's witnesses that union talk was "excessive," which I do not credit, to indicate that Respondent's operations were in any way impeded by the union activities of its employees. Cf. *Willow Mfg. Corp.; Oak Apparel, Inc.*, 232 NLRB 344 (1977). Since the switch to a written warning system was discriminatorily motivated, it follows that each warning issued pursuant to it was discriminatorily motivated. That conclusion is strengthened by the fact that only pronoun employees received written warnings and others who engaged in the same conduct for which some of them were warned were not reprimanded at all. (I do not credit Sidner's testimony that he did not warn Amy Thompson, Mary Belle Saunders, and DeLois LeMaster for being in the drape area at 3:28 p.m. on September 16 because he did not see them.) I find, therefore, that Respondent violated Section 8(a)(3) and (1) of the Act by discriminatorily adopting and using a written warning system.

³ Apparently Respondent picked the right word to use in its August 17 and 20 letters by accident, for, in its apologia of February 25, 1977, reproduced in the section below entitled "The application of *Gissel*," it couched the rule in terms of "working hours." Whether the rule in existence is or is not illegal on its face is unimportant for, having been discriminatorily motivated in the first place, it must be rescinded as part of the remedy herein.

5. Matters not alleged in the complaint

a. *Facts*

(1) The December 10, 1976, meeting

Blankenship convened a fourth plantwide meeting of employees on December 10, the Friday before the Monday on which the hearing began. He cautioned those employees who had been subpoenaed to appear as witnesses on Monday to show up. One employee asked what would happen if they did not. Blankenship replied that the counsel for the General Counsel would send the sheriff (or the marshal, the record is not clear as to just which word Blankenship used) after them.

(2) The events of January 25, 1977

The first two phases of the hearing were marked by hostility between Blankenship on the one hand and counsel for the General Counsel and counsel for the Union on the other. At times, their tactics approached, although they never quite crossed, the fine line which separates professional from unprofessional conduct. They argued over such things as where the witness chair was to be placed and where counsel would sit or stand. One of the problems, not uncommon in Board hearings, that precipitated a clash was the fact that employees waiting in the hearing room to be called as witnesses for the General Counsel were not available to do the work Respondent had for them at the plant. Since the plant was only a few blocks from the hearing room, they easily worked out the obvious solution once their tempers had cooled. Respondent cooperated with the General Counsel so that only two employees would be away from the plant during shift hours, one on the stand and the other in reserve. During a recess, on the morning of January 25, 1977, this problem came to a head when Blankenship told counsel for the General Counsel, in the presence of an employee, that he would take disciplinary action against employees if the General Counsel persisted in having more than one on-duty employee at the hearing at any one time. The compromise was worked out when counsel returned from lunch that day.

(3) The February 25, 1977, meeting

Bixler's reading of one of Respondent's apology letters on February 25, 1977, provoked a shouting match between prounion and antiunion factions in the plant. Clydia Hyatt, a supervisor, asked Bixler if he did not think the antiunion group had also been discriminated against. Bixler replied, "I'm no lawyer." Bonnie Bowman asked Ms. Hyatt why she thought it had. Ms. Hyatt said it was obvious from what Judy Howard, an employee, had testified that the antiunion employees did not want to talk to the organizer.

Ruth Benner asked Ivy Hempy, an employee, "Ivy have you even been contacted by the Union?"

Ms. Hempy replied, "No, never."

Ms. Bowman said she thought the first union meeting had been open to everybody. Ms. Hyatt said, "No, I wasn't asked."

Brenda Temple, an employee, began to say something but was interrupted by Ms. Benner. Ms. Benner said, "Brenda, the Union is not in yet."

All this occurred as Bixler and Sidner looked on without comment.

b. *Analysis and conclusions*

One of the things that made this hearing a trying experience was my inability to persuade counsel for the General Counsel to be forthright in the presentation of his case. Time after time, when I asked him to state his position on the record, he declined on the ground that he preferred to study the complete record before doing so. When I pointed out the due process problem inherent in such trial tactics, he took his stand on the Board's rule that matters which have been fully litigated at a hearing may be found to be unfair labor practices even though not expressly pleaded in the complaint. These three incidents were among those as to which counsel for the General Counsel took such a position. He has not moved to amend the complaint so as to allege them formally as violations of the Act. In his brief, for the first time, he asks that I make various independent 8(a)(1) findings based on them.

I have no quarrel with the fully litigated rule. In fact, I rely on it, over Respondent's protest, to justify some of the findings I have already made. With respect to the events of August 30 and 31, the complaint does not specifically state that Respondent is accused of violating the Act by polling its employees illegally. With respect to the written warnings, only those issued to Joan Shirk and Bonnie Bowman are specifically alleged in the complaint. However, in both these areas, the way the record developed gave Respondent ample notice that the General Counsel was pursuing a polling theory as well as an interrogation theory as he presented his evidence about what happened on August 30 and 31 and that he was contending the written warning system was illegal in its inception and, therefore, all warnings issued pursuant to it were illegal.

The same is not true of these three incidents. While the testimony as to the first two was presented by the General Counsel before he rested his case-in-chief, he refused to state whether he was relying on it as evidence of unfair labor practices committed by Respondent. The testimony as to the third was not even adduced until rebuttal, when the General Counsel repeated his argument about the fully litigated rule. Respondent was not given adequate notice at the hearing with respect to any of the three as to the positions and arguments counsel for the General Counsel takes in his brief. "Fully litigated" means litigated in such a way that Respondent is given adequate and timely notice of the allegations against which it is required to defend itself in the adversarial process. I decline to base any unfair labor practice findings against Respondent on these three incidents on the ground that they were not fully litigated.

6. The 8(a)(5) issue

a. *Prerequisites to bargaining*

The parties are in agreement that all production and maintenance employees, including shipping and receiving

employees and plant clerical employees, employed at Respondent's Marion, Ohio, facility, excluding office clerical employees, professional employees, guards, and supervisors as defined in the Act, constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act. On August 13, the day the Union demanded recognition, there were 58 employees in that unit, and the Union had in its possession either 31 or 32 authorization cards signed by unit employees depending on whether John Weaver, the employee who was discharged, apparently for cause on August 20, was in or out of the unit.

There is no dispute about inclusion in the unit of 57 of the 59 persons who arguably were part of it. Respondent would exclude John Weaver as a temporary employee and include Calvin Willmeth as a nonsupervisor. The General Counsel would include Weaver as a regular employee and exclude Willmeth as a supervisor. The General Counsel has the better of both arguments.

John Weaver was hired on May 24, 1976, to dismantle some used machinery in Respondent's storage warehouse. David Bixler told him at the time that he was being hired temporarily and that the work would only take him a week or two. His classification was noted as "general factory work" in his personnel file. He received a 25-cent raise after 30 days. When he finished dismantling the machinery (the record does not indicate the precise date), he was transferred to the job of screen printing inside the plant. Sometime in August, he received a "general factory raise" of 35 cents, and a notation was made in his personnel file that he had completed the probationary period. He was discharged on August 20. The notation entered in his file was "job complete laid off." However, another employee did screen printing work after Weaver left. He signed an authorization card on July 19. Weaver may have been hired originally on a temporary basis. It is obvious, however, that he achieved permanent status by August 13. I find, therefore, John Weaver is properly included in the unit as of that date.

Calvin Willmeth's title is "warehouse supervisor." "Supervisor" is the title Respondent uses for all its firstline, working supervisors below the level of Ruth Benner, its chief supervisor. They are, in addition to Willmeth, Clydia Hyatt, Betty Roush, Eileen Everly, and Linda Jackson. Respondent initially took the position that all were leadmen rather than supervisors within the meaning of the Act. However, when it changed counsel in midhearing, it stipulated that the four women were supervisors within the meaning of the Act. The only difference between Willmeth's duties and those of the four women is that he usually works alone in the warehouse while they always work with other employees. All attend the production meeting for supervisors usually held on Tuesday. All attended a meeting conducted by Blankenship on July 23 prior to the first plantwide meeting at which he undertook to instruct supervisors within the meaning of the Act as to how they should conduct themselves during the campaign. All sign various documents for Respondent as supervisors. All are known to rank-and-file employees as part of Respondent's managerial hierarchy. Willmeth is not always alone in the warehouse. Annually, at inventory time, he has a crew of employees under him. During the year one or more employees are assigned to help him for short periods from time to time. On

these occasions, he responsibly directs their work in a manner which requires the use of independent judgment. I find, therefore, that Calvin Willmeth is a supervisor within the meaning of the Act and is excluded from the unit.

The Union obtained a total of 35 authorization cards during its campaign. Two cannot be counted toward majority as of August 13 because the persons who signed them—Carla Conley and Gwendolyn Wright—had left Respondent's employ by that time. Of the other 33, one was signed by Wanda Hecker after August 13. Respondent challenges the validity of only four—Thongpoon (Chim) Bailey (May 5), Ginger Timmons (July 26), Joe Willmeth (August 13), and Wanda Hecker (September 3).

Respondent challenges Chim Bailey's card "not only because of her limited ability to understand and the card solicitor's failure to explain, but the explanation given that it was to get a vote in the plant." The first ground grows out of a remark I made, during an off-the-record settlement discussion shortly after the card was introduced, that I was dubious about Ms. Bailey's ability to comprehend English. The second and the third are based on these excerpts from her testimony:

Q. (By Mr. Blankenship) In—Chim, in being friends with Chuck Litell for a number of years, do you remember him making any kind of a statement where he used the word "NLRB election"?

A. No, sir, since we been friends. That is the only time I know that he work for the union, because it's not my business. I never ask.

* * * * *

Q. And, what did you think the card was for?

A. If they have enough union cards, so we have chance to vote.

Q. That is what you thought?

A. Yes.

However, she also testified that she read the card on the instructions of Charles Litell, the organizer who conducted the campaign among Respondent's employees; and, more importantly, I credit the testimony of Litell that he gave her the same detailed explanation of what the card was and the uses to which it could be put that he gave to every employee he signed up. I am satisfied that Ms. Bailey's command of the English language, halting though it may be, was good enough on May 5 to be no impediment to her ability to understand what she read. Chim Bailey's card is, therefore, valid. *Hedstrom Company, a subsidiary of Brown Group, Inc.*, 223 NLRB 1409 (1976).

Respondent challenges Ginger Timmons' and Joe Willmeth's cards on the ground they were told it was to get a vote into the shop. Ms. Timmons was solicited by Litell. The relevant portion of her testimony is:

Q. Did you read the union authorization card on that date?

A. (Nodded.) I'm sure I read it before I signed it.

JUDGE BLACKBURN: I take that as a simple, flat, affirmative yes, despite the note of indecision in the answer. That is a yes answer, Mr. Rooney.

MR. ROONEY: Okay.

Q. (By Mr. Rooney) Based on what Mr. Litell said

to you on that date, what was your impression of the purpose for signing the card?

MR. ROSS: Objection.

JUDGE BLACKBURN: Sustained. You may make an offer of proof if you wish.

MR. ROONEY: I will restate the question, Your Honor.

Q. (By Mr. Rooney) What did Mr. Litell say was the purpose for signing the card?

MR. ROSS: Objection.

JUDGE BLACKBURN: Overruled. Now, that's not the question. The question is, what did Mr. Litell say to you; that is the crucial reason that you have been called to the stand.

THE WITNESS: They were trying to get a majority of the girls in the company to sign cards that a vote could be taken within the company as to whether or not they wanted a union in the company.

JUDGE BLACKBURN: Off the record.

(Discussion off the record.)

JUDGE BLACKBURN: Okay, back on the record.

Q. (By Mr. Rooney) Did Mr. Litell mention what purpose the card would be used for?

MR. ROSS: Objection.

JUDGE BLACKBURN: Overruled.

THE WITNESS: They were trying to get the girls - they were talking to anyone that they could talk to, including the girls on layoff, about unions, if they got enough of the girls to sign the cards a vote would be taken inside the company as to whether or not they could get a union in.

JUDGE BLACKBURN: Now, are you simply repeating your previous answer, or are you telling me something in addition to what you said before? I'm interested in what Mr. Litell said to you.

THE WITNESS: I don't remember exactly what Mr. Litell said.

Joe Willmeth was solicited by Fred Smith. The relevant portion of Willmeth's testimony is:

Q. Did you have any additional conversation concerning the cards, at that time?

A. At the time that I signed it?

Q. Right.

A. No. He just told me that it was used for - well, to get an election into the shop.

Q. Did you read the card?

A. Yes.

Q. And, you did sign it?

A. Yes.

* * * * *

JUDGE BLACKBURN: Okay. You are over by [Smith's] car.

THE WITNESS: Yeah.

JUDGE BLACKBURN: All right, from that point on tell me what you remember was said, and happened between you.

THE WITNESS: Okay.

I went over to his car, and he asked me if I wanted to sign a Union card, and I asked him what it was for,

and he told me it was to get a vote into the shop, to get an election in, and then I said, "Okay, I will sign one." And, I signed it.

JUDGE BLACKBURN: Now, when did you read it?

THE WITNESS: During that time. I read it as I filled it out.

JUDGE BLACKBURN: I see, and did he hand you the card after you said you would sign it?

THE WITNESS: Yes.

JUDGE BLACKBURN: And, then you read it and filled it out and handed it back to him?

THE WITNESS: I filled it out as I read it.

Whatever words were actually used by the solicitors, it is clear that neither Ms. Timmons nor Willmeth was told, either explicitly or implicitly, that an election was the only use the card could or would be put to. Once again, as with Chim Bailey's card, the controlling fact is that both read the card before handing it over to the Union. Ginger Timmons' and Joe Willmeth's cards are, therefore, valid. *Hedstrom, supra*.

Adding the Bailey, Timmons, and Willmeth cards to the 29 about which there is no dispute gives the Union 32 valid cards in a unit of 58 employees at the time of the demand for recognition, 2 more than the 30 necessary for a majority. A continuing demand theory is unnecessary, and the validity of Wanda Hecker's post-August 13 card is immaterial. If the question of majority turned on her card, I would find it valid also. I do not credit her story that she declined to sign an authorization card for Litell, expressed an interest in getting material from the Union, and then signed the card on Litell's instructions as a way of giving him her name and address for mailing purposes. I credit Litell's version of what happened when he called on Ms. Hecker.

b. *The application of Gissel*

Following is the material which Respondent used between February 4 and March 11, 1977, in an effort to remedy the unfair labor practices committed by Blankenship:

The February 4, 1977, letter

TO: All Employees, Plastic Film Products, Marion
FROM: David Bixler, General Manager, Plastic Film Products, Marion

As many of you know, the Company has replaced Mr. Ray Blankenship as labor consultant after we concluded that many of the things he did and advised us to do, caused more problems than they solved. We are retaining a very respected labor law firm in Akron, Ohio, who will be representing the Company, both at the current Labor Board hearings, and advising us in our employee relations. We are confident that the Company will be found innocent of any wrongdoing by the Labor Board.

The Labor Board hearing has been postponed until February 28, 1977. In the meantime, we will be working with representatives of the Labor Board and the union to resolve the issues raised by the Labor Board proceedings.

I personally want to assure you that the Company is going to try to undo some of the damage that has been

done to you, the company and our relationship by the events of the last 6 or 8 months. We need your cooperation if we are going to turn this thing around. I am going to try, and I hope you will too.

Let me assure each of you that there will be no reprisals taken against any employees as a result of the Labor Board proceedings or anything said or done either on behalf or against the union. Let me also assure each of you that the time has now come for all of us to get back to work and stop the petty bickering and carping. We all have jobs to do and we want to do these jobs in as pleasant an atmosphere as possible. Let's all of us pledge to get back to work and try to resume normal, pleasant operations.

Thank you for your attention. I will keep you advised as to the status of the Labor Board and related proceedings.

(This letter was also posted on the bulletin board and copies were made available to employees who wanted them.)

The February 25, 1977, letter

TO: All employees, Plastic Film Products Corporation
FROM: David Bixler, General Manager, Plastic Film Products Corporation

As many of you know the Labor Board Proceedings resume Monday morning in the Holiday Inn. The Company's ultimate goal in these proceedings is to insure that our employees will get the opportunity to freely express their feelings about the union by voting in a secret ballot election. Whatever else happens, it has not changed my opinion that the best, most democratic and most American way of deciding a question like this is by a secret vote.

This hearing involves the Labor Board and union against the Company. It is not a proceeding against our employees or between the Company and you employees. The Labor Board is seeking to impose the union on the Company and its employees without having to go to an election. We don't think that's fair or proper and that is why we are fighting it.

From the testimony that has already been given at the hearing, it is apparent that many of you felt offended and intimidated by the attitude and conduct of Ray Blankenship. Well, he's gone now and he won't be back. I want you to know that I personally feel terrible about the feelings which Mr. Blankenship created around here. If any of you felt coerced or intimidated by him or his conduct, I want to apologize to you and assure you that we are going to try to undo that feeling and correct any wrongs that may have been done to you. We realize now that the Blankenship approach was not fair to our employees.

You should know that as far as this company and I are concerned, we all intend to respect your rights to support a union and engage in union activities (not during working hours, of course) without interference by myself, Mr. Sidner, Mrs. Benner or any other supervisor in this plant.

You should also be aware that our employees have an equal right to refrain from supporting the union and its activities. I will not tolerate any interference with or

intimidation by any employees because of their refusal to support the union activities. These rights are equally as important as the rights to support a union and we intend to see that they are equally enforced and protected.

If any of you have interpreted our behavior as in any way interfering with your rights, I am sincerely sorry. That was not our purpose or intention and it won't happen again. Ray Blankenship and his advice are gone—and good riddance.

I want here and now to specifically say that we have no intention of closing this plant with or without a union. If any of you feel that such a terrible threat was made, let me disavow any such statement or inference. It simply isn't so.

We did not mean to threaten any of you because of your union sympathies or activities, nor interrogate or question you improperly about your support of the union. Any interrogation or questioning that occurred in preparation for the Labor Board hearing was for use at that hearing and should not be interpreted by you as in any way designed to intimidate you because of your rightful union activities. Any discipline that was issued was not intended to discourage any of your union activities, but merely to insure that our operation would not be unduly disrupted. We realize that any of that type of behavior is totally improper and we are sorry if any of you felt you were subjected to anything like that, and specifically disavow any of that type of conduct.

I want you to know and understand that whatever the outcome of this Labor Board matter, we intend to make Plastic Film Products the kind of place where each of us would like to work. I need your help too. Let's each of us forget about what's gone before and direct our attention to making Plastic Film Products a better and happier place to work. I'll try if you will.

Thank you for your attention.

(This letter was also posted on the bulletin board.)

The March 9, 1977, letter

TO: All Employees, Plastic Film Products Corporation
FROM: David Bixler, General Manager, Plastic Film Products Corporation

Since many of our employees who were working back in July and August are no longer with us, I felt this letter would be the best way to get to all of you. As I said in a plant meeting a couple weeks or so ago, I feel very bad about some of the things that were said and done back at the beginning of the union organizing attempt at Plastic Film Products. Many of the things that happened were a result of our lack of knowledge and experience. Let me apologize to any and all of you who felt you were subjected to any coercion, intimidation, threats or interference because of any union activities.

I have before specifically disavowed any threat to close this plant because of the union. The Company has no such intentions and intended no such threat.

We also specifically disavow any discrimination in applying our work rules. We do not intend to discrimi-

nate against employees in the application of our rules and regulations because of their support for the Union.

Further, we disavow any coercion or interference by interrogations which may have taken place in conjunction with our preparation of our defense to the union's unfair labor practice charge.

We are sincerely sorry if any of you were in any way affected by any of the above improper activities and pledge to respect your organizational rights in the future.

We are grateful to those employees who have continued to support the Company through all this and pledge to you the protection of your rights to be free from interference by others because of your support.

(Copies of this letter were mailed to employees who did not receive their paychecks in person on March 9, 1977.)

The 28-inch × 40-inch notice posted on the evening of March 10, 1977

ATTENTION EMPLOYEES!!! [2-inch capitals]

Plastic Film Products Corp recognizes that its employees have the right:

- 1 To self organization
- 2 To form, join or assist labor organizations
- 3 To bargain collectively through representatives of their own choosing
- 4 To engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection
- 5 To be free from any interference, coercion or restraint in the exercise of the above rights AND
- 6 TO REFRAIN FROM ANY OR ALL SUCH ACTIVITIES [1-1/4-inch bold face capitals]

Plastic Film Products Corp pledges to respect these rights and specifically will not nor has ever intended to engage in any of the following because of union activities

- 1 Threaten plant closure
- 2 Discriminatorily enforce plant work rules
- 3 Improperly question employees concerning union activities and/or support
- 4 Improperly or discriminatorily withhold or grant benefits
- 5 Threaten employees with layoff

[Balance of notice: capital letters in 1-1/4-inch light face and lower case letters in 3/4-inch light face]

The March 11, 1977, letter

TO: All Employees, Plastic Film Products Corporation
FROM: David Bixler, General Manager, Plastic Film Products Corporation

The Labor Board hearing between Plastic Film Products and the ACW resumes Monday morning. It is the Company's turn to present its evidence and testimony. We expect the hearings to conclude this week, but we don't expect the judge's decision for another three or four months. And even after the judge decides, the case goes to the Labor Board for review. That means we're still a long way from resolving this matter.

As I told you before, the basic issue in this Labor Board proceeding is whether or not our employees will have the opportunity to vote on the question of union representation.

While we are awaiting the outcome of this Labor Board matter, we still have a plant to run and jobs to do. On previous occasions I have offered my personal and the Company's apology for any of our conduct which you felt interfered with your rights under the law. We have specifically disavowed any such unlawful behavior and have pledged to respect your rights in the future. I'm sure you've all taken note of the new poster on the bulletin board.

Just as you have rights, so does the Company. We have the right to maintain discipline and efficiency in our plant. Our few common sense work and safety rules are our way of doing that. Those work rules are still very much in effect and will be enforced. They will be enforced by appropriate disciplinary action if necessary.

Some of you seem to feel that your support for the union excludes you from coverage of the Company's rules and keeps the Company from disciplining you for violations of those rules. That just is not true. Labor Board or no Labor Board, *any* employees who repeatedly and willfully violate the Company's work rules will be disciplined—and severely disciplined, if necessary. If any of you are in doubt about our rules, I suggest you find out what they are. Others of you who support the union seem to feel that you can come to work and put forth less than your best efforts. An employee's support for the union does *not* entitle him or her to special privileges or favored treatment. *All* employees are expected to do a full day's work for a full day's pay regardless of their feelings about the union.

I'm asking for your cooperation. We're going to be working together long after this Labor Board thing is over and forgotten.

Thank you for your attention.

(When Bixler finished this letter, he told the assembled employees it would be posted. The record does not indicate whether it was or not.)

The first category of cases delineated by the Supreme Court in *Gissel, supra*, when it laid down the rules for determining whether a bargaining order is an appropriate remedy for unfair labor practices, which do not fall literally within the ambit of Section 8(a)(5), were those "without need of inquiry into majority status on the basis of cards or otherwise" because they are " 'exceptional' cases marked by 'outrageous' and 'pervasive' unfair labor practices." One of the areas in which counsel for the General Counsel declined to state his position during the hearing was whether this is, in the General Counsel's view, such a case. He has taken that position for the first time in his brief. He has cited no case in support of that proposition, and I am aware of no first category Board decision since the Supreme Court handed down its decision in *Gissel*. I rely on *The Stride Rite Corporation*, 228 NLRB 224 (1977), where the Board recently found "it unnecessary to determine whether the violations are within the first [*Gissel*] category since we find that, even if the unfair labor practices do not come within

this category, they come within the second category and a bargaining order is warranted under either finding," in declining to pass on the first category issue here. By his trial tactics, counsel for the General Counsel violated the requirements of due process in this area also. This case is, therefore, an inappropriate vehicle for the Board to set guidelines as to just how "outrageous" and "pervasive" 8(a)(1) and (3) violations must be before it will invoke *Gissel's* first category. If the Union had not achieved majority status by August 13, I would recommend that the Board find Respondent's unfair labor practices do rise to the first category level.

The second category in *Gissel* is "less extraordinary cases marked by less pervasive practices which nonetheless still have the tendency to undermine majority strength and impede the election process." In those situations, a bargaining order is appropriate only "[i]f the Board finds that the possibility of erasing the effects of past practices and of ensuring a fair election . . . by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order." It was this language about erasing the effects of past practices which counsel for Respondent had in mind when, as he forthrightly conceded,⁴ Respondent changed its tactics halfway through the hearing on his advice.

That this is a second category case, absent Respondent's efforts to undo what Blankenship had done, is, I think, beyond argument. The threats to close the plant alone were so outrageous and precluded the relationship between Respondent and its employees so extensively that they are sufficient without more to justify a bargaining order. When added to the threats of other kinds of reprisals and to the imposition of a no-solicitation rule and a written warning system specifically designed to deny the employees their

Section 7 rights, the conclusion that a traditional Board remedy would never eradicate completely the memory of the climate of fear created by Respondent's unfair labor practices is inescapable. *Hedstrom, supra*.

The real issue is whether Respondent's belated disavowal of Blankenship and apology for his activities alter the situation in any way. I think not. If a traditional Board remedy is insufficient, an unofficial one in which Respondent still emphasizes that aspect of employees' Section 7 rights which favors Respondent's antiunion attitude by assuring them that they have a right to refrain from union activities in bold face capital letters while setting forth their right to engage in union activities in light face capitals and lower case letters will not do the trick. If find, therefore, that Respondent violated Section 8(a)(5) of the Act by refusing on and after August 13, 1976, to recognize and bargain with the Union, which represented a majority of Respondent's employees in a unit appropriate for purposes of collective bargaining and had requested recognition on behalf of those employees.

Upon the foregoing findings of fact, and upon the entire record in this proceeding, I make the following:

CONCLUSIONS OF LAW

1. Plastic Film Products Corp. is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Cleveland Joint Board, Amalgamated Clothing and Textile Workers Union, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. By threatening employees with plant closure and other reprisals in the event a union became their collective-bargaining representative; interrogating employees about their union activities, sympathies, and desires; polling employees about their desire to be represented by a union, and creating the impression of surveillance of an employee's union activities, Respondent has violated Section 8(a)(1) of the Act.

4. By discriminatorily promulgating and enforcing a no-solicitation rule and by discriminatorily adopting and using a written warning system, Respondent has violated Section 8(a)(3) and (1) of the Act.

5. By refusing to recognize and bargain with the Union as the collective-bargaining representative of its production and maintenance employees, Respondent has violated Section 8(a)(5) and (1) of the Act.

6. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

7. Allegations of the complaint that Respondent violated the Act in ways not specifically found herein have not been sustained.

8. All production and maintenance employees, including shipping and receiving employees and plant clerical employees, employed at Respondent's Marion, Ohio, facility, excluding office clerical employees, professional employees, guards, and supervisors as defined in the Act, constitute a unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act.

⁴ The following colloquy occurred on the morning of March 16, 1977:

JUDGE BLACKBURN: Isn't it a fact, Mr. Bixler, we might as well face it once and get it over with. Isn't it a fact that the purpose of this conduct since the hearing began and since Mr. Rice replaced Mr. Blankenship, is to forestall, if that is the right word, to avoid a Board order and Court decree requiring the company to recognize and bargain with the union as a result of the unfair labor practices being litigated in this place?

THE WITNESS: Mr. Blackburn, not being an attorney, I really can't answer that.

JUDGE BLACKBURN: Okay. That is a good answer from you. Is there any secret about that, Mr. Rice?

MR. RICE: No, there isn't, Your Honor.

JUDGE BLACKBURN: All right. Go ahead. Mr. Ross.

MR. ROSS: If I might just ask, is the purpose of these notices and letters, et cetera, that we have been talking about, is the purpose of all of that to attempt to recreate laboratory conditions in this plant?

JUDGE BLACKBURN: Mr. Ross, ask Mr. Rice; would you put it in those words, Mr. Rice?

MR. RICE: If laboratory conditions, if they were ever destroyed, to begin with, then of course, that is our purpose.

JUDGE BLACKBURN: Okay. You are trying to create a situation in which the Supreme Court Standard in *Gissel*, that an election in this situation would be a better indication of the desires of employees than the cards which have been introduced. That is the objective, to create that sort of a situation, to lead to that sort of a finding by the Board and/or a Court.

MR. RICE: Very well stated.

JUDGE BLACKBURN: Thank you. Stated well enough for you, Mr. Ross?

MR. ROSS: Perfect.

JUDGE BLACKBURN: How about you, Mr. Schneider?

MR. SCHNEIDER: Fine.

THE REMEDY

In his brief, the General Counsel takes the position for the first time that a so-called *Heck's* remedy (*Heck's Inc.*, 215 NLRB 765 (1974)) is required to effectuate the purposes of the Act. If this case had been heard from the beginning as a *Gissel* first category case, even if only as an alternative theory, I would not hesitate to recommend an order requiring Respondent to pay litigation expenses and the Union's organizing costs. The affirmative defenses which Blankenship pleaded in his answer and tried to establish in the first phases of the hearing were frivolous and advanced in bad faith. However, under the theory which the General Counsel elected to pursue from the outset, he could not prevail if he failed to prove majority. The issue was a close one. Therefore, that part of the total defense which Blankenship elected to pursue was debatable, not frivolous. I decline to recommend a *Heck's* remedy.

The Union urges more. It seeks an order requiring Respondent not only to pay litigation expenses and organizing costs but also to mail copies of the Board's Order to all employees, give the Union reasonable access to its bulletin boards and other places where notices are normally posted, and give it the names and addresses of all employees and keep the information current. The General Counsel requests none of these additional extraordinary remedies. For that reason, I decline to recommend them also.

What is required to effectuate the purposes of the Act here is the usual cease-and-desist order, an order to bargain, a notice, and affirmative provisions designed to remedy the wrongs committed. In those areas, I shall recommend that Respondent be ordered to rescind its no-solicitation rule, cease using its written warning system, expunge all material relating to violations of the no-solicitation rule and all written warnings from its records, and make Diane Risner, and any other employees who have lost wages as a result of receiving a written warning, whole for such losses, as set forth in *F. W. Woolworth Company*, 90 NLRB 289 (1950), with interest to be computed in the manner prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1977).⁵

Upon the basis of the foregoing findings of fact, conclusions of law, and the entire record in this proceeding, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER⁶

The Respondent, Plastic Film Products Corp., Akron and Marion, Ohio, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:
 - (a) Threatening employees with plant closure and other

⁵ See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

⁶ In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

reprisals in the event a union becomes their collective-bargaining representative.

(b) Interrogating employees about their union activities, sympathies, and desires.

(c) Polling employees about their desire to be represented by a union.

(d) Creating the impression of surveillance of employees' union activities

(e) Discriminatorily promulgating and enforcing a no-solicitation rule.

(f) Discriminatorily adopting and using a written warning system.

(g) Refusing to recognize and bargain with Cleveland Joint Board, Amalgamated Clothing and Textile Workers Union, AFL-CIO, as the collective-bargaining representative of its employees in the unit found appropriate herein.

(h) In any other manner interfering with or attempting to restrain or coerce employees in the exercise of the rights guaranteed in Section 7 of the Act.

2. Take the following action necessary to effectuate the purposes of the Act:

(a) Rescind its no-solicitation rule.

(b) Cease using its written warning system.

(c) Expunge from its records all material relating to violations of its no-solicitation rule and all written warnings.

(d) Make Diane Risner, and any other employees who have lost wages as a result of receiving a written warning, whole for such losses in the manner detailed in the section above entitled "The Remedy."

(e) Upon request, bargain collectively with Cleveland Joint Board, Amalgamated Clothing and Textile Workers Union, AFL-CIO, in the unit of employees found appropriate herein and, if an understanding is reached, embody such understanding in a signed contract.

(f) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this recommended Order.

(g) Post at its plant in Marion, Ohio, copies of the attached notice marked "Appendix." Copies of said notice, on forms provided by the Regional Director for Region 8, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(h) Notify the Regional Director of Region 8, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

IT IS FURTHER ORDERED that the complaint be dismissed insofar as it alleges Respondent violated the Act in ways not specifically found herein.

⁷ In the event that 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."