Smithfield Foods, Inc. *and* United Food and Commercial Workers, Local 204 and United Food & Commercial Workers International Union[1]

Smithfield Packing Company, Incorporated *and* United Foods and Commercial Workers, Local 204 and United Food & Commercial Workers International Union. Cases 11–CA–18316, 11–CA–18415, 11–CA–18440, and 11–RC–6338

August 31, 2006

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On January 23, 2001, Administrative Law Judge Pargen Robertson issued the attached decision. The Respondent[2] filed exceptions and a supporting brief, the Union[3] filed an answering brief, and the Respondent filed a reply brief. In addition, the General Counsel and the Union each filed exceptions and a supporting brief to which the Respondent filed answering briefs.

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

The Board has considered the decision and record in light of the exceptions and briefs and has decided to affirm the judge's rulings,[4] findings,[5] and conclusions,[6] except as specified below, and to adopt the recommended Order as modified and set forth in full below.[7]

The issues in this proceeding pertain to alleged unfair labor practices and objectionable conduct surrounding the Union's organizing campaign at the Respondent's Wilson, North Carolina facility. The Respondent first became aware of the campaign on March 23, 1999,[8] when union organizers began handing out handbills at that facility. The Union filed an election petition on May 25. The election was held on July 8. The Union lost the election. The Union filed a series of unfair labor practice charges and objections relating to the Respondent's conduct during the organizing campaign.

The complaint alleges and the judge found numerous violations of Section 8(a)(1), (3), and (5). We will deal with these allegations in order.

A. Section 8(a)(1)

For the reasons found by the judge, we find that consultant Jeffrey White unlawfully threatened employee Larry Merrill with job loss when, after soliciting from Merrill that he supported the Union, he asked Merrill why he did not quit his job. In addition, in the absence of exceptions, we agree with the judge, for the reasons he stated, that Supervisor James Brown unlawfully threatened employee Rhonda Summerlin when he told her that only employees who opposed the Union would get recalled from future layoffs. We also find, in the absence of exceptions, that Plant Manager Phil Price and Human Resources Manager Sherman Gilliard unlawfully threatened Summerlin with unspecified reprisals for making radio ads for the Union. Finally, also having received no exceptions, we find for the reasons stated by the judge that Supervisor Tony Knight unlawfully required em-

[1] We have amended the caption to reflect the disaffiliation of the United Food and Commercial Workers from the AFL–CIO effective July 29, 2005.

[2] Smithfield Foods, Inc. and Smithfield Packing Company, Inc. are referred to collectively as "the Respondent." (Smithfield Foods is the parent corporation of Smithfield Packing. Lewis Little is the president and CEO of both corporations.) We find no merit to the Respondent's exception to the inclusion of Smithfield Foods, Inc. as a respondent. The Respondent failed to provide any argument in its brief in support of exceptions regarding this issue. Further, Smithfield Foods was directly responsible for several violations found herein, including Little's unlawful solicitation of grievances and threat of futility and Mary Fisher's threat of loss of benefits. Moreover, Lewis' involvement throughout the organizing campaign—from his April solicitation of grievances to his July threat of futility—demonstrates that he directly participated in the antiunion campaign from which the full panoply of violations found herein arose. See *Esmark, Inc.,* 315 NLRB 763 (1994) (parent corporation held liable for subsidiary's violations on a direct participation theory where the parent "intermeddl[es] in the transactions of the subsidiary" in disregard of orderly corporate procedures).

[3] The United Food and Commercial Workers, Local 204 and the United Food & Commercial Workers International Union are referred to as "the Union."

[4] The Respondent has excepted to the judge's denial of its motion to reopen the record to adduce further testimony regarding exhibits introduced into evidence by the General Counsel and the Union on the last two days of the hearing. We do not find merit to the Respondent's exception. The Respondent filed its motion 3 weeks after the close of the hearing. In that motion, it offered testimony to rebut only one exhibit. That exhibit, U. Exh. 36, which was offered on the penultimate day of the hearing, is identical to an exhibit offered by the General Counsel (GC Exh. 53) on April 14, 2000. Between April 14 and June 19, the Respondent had ample opportunity to proffer the evidence described in its motion, but it did not. Accordingly, the Respondent has provided no basis in its motion for reopening the record. Indeed, even in its brief to the Board, it has failed to point to any evidence that it would adduce that would be relevant to the exhibits whose admission it challenges.

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

[6] The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties

[7] We shall substitute a new notice in accordance with our decision in *Ishikawa Gasket America, Inc.*, 337 NLRB 175 (2001), enfd. 354 F.3d 534 (6th Cir. 2004).

[8] All dates are 1999, unless otherwise noted.

ployee Robert Adkinson to remove his "Vote Yes" stickers on the date of the Board election.[9]

We make the following additional findings.

1. Threats of plant closure

(a) References to facility's previous occupants

The judge found that the Respondent violated Section 8(a)(1) by threatening employees that the Wilson facility would close if the employees selected the Union as their bargaining representative. We disagree.

The judge credited testimony that in speeches, videos, and letters to employees during the organizing campaign the Respondent's representatives related to employees that the three previous occupants of the Wilson facility had had work forces organized by the Union and had closed. On March 26, Plant Manager Phil Price told employees to "[r]emember, this building has been unionized three times by UFCW. It has closed its doors three times and the UFCW could do nothing to keep it open." On June 17 and 18, Price again recounted for employees the history of three previous owners of the plant and told employees:

> In none of these three cases did a union contract provide long-term job security for employees. Maybe it was just the opposite. Maybe the union forced inflexible rules on these companies so they could not compete in today's environment. Maybe this union made it so these companies couldn't satisfy their customer's demands. It really doesn't matter. Whether this union caused these three plants to close is not for me to say. I don't know what happened.

Price also wrote to employees on July 6 that:

> I can't predict the future, especially if the Union were to get in, but I can tell you one thing: this Union has a terrible track record in this building. Three different companies have operated in this building . . . . This same union, UFCW, organized all three . . . . Did the UFCW cause these three companies to close the plant here on Wilco Boulevard? I don't know the answer to that. Maybe they did, maybe not. But I can spot a bad trend. When something happens to me three times in a row, I try another approach to whatever I'm doing . . . . The UFCW is obviously a jinx for this plant.

Finally, the judge found that also on July 6, Respondent President Lewis Little told employees that the three previous occupants "all had the UFCW and they all failed here. Don't hang the UFCW around this plant's neck for a fourth time; you have the chance to learn from the mistakes of the employees who lost with the UFCW three times before."

The judge found that by repeatedly informing employees that the three union-represented predecessor plants had closed, without offering any objective explanation as to the reasons for the closures, the Respondent could have had no other purpose than influencing employees to vote against the Union. The Respondent excepts to the judge's finding that Price and Little's statements constitute coercive threats of plant closure. Instead, the Respondent argues that its representatives provided employees with an accurate recitation of the factual history of the plant. We find that when the statements are viewed in context, there is merit to the Respondent's exceptions.

It is well settled that an employer "is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a 'threat of reprisal or force or promise of benefit.'" *NLRB v. Gissel Packing Co.,* 395 U.S. 575, 618 (1969). Moreover, Section 8(c) of the Act protects the rights of parties to "express[] any view, argument, or opinion . . . [which] shall not constitute or be evidence of an unfair labor practice . . . if such expression contains no threat of reprisal or force or promise of benefit."

We find no threat in the Respondent's statements. Instead, we find that the Respondent provided employees with relevant, factual information about the Union's history at the facility.[10] Such truthful statements are protected by Section 8(c), where, as here, they do not include coercive threats. Employers have the right to point to a union's past failures and to use them to encourage employees to vote against the union, just as a union may use its past success to encourage employees to support it. See *Manhattan Crowne Plaza*, 341 NLRB 619 (2004);[11]

[9] There are a number of allegations included in the complaint that the judge did not address. They include allegations that: Plant Manager Price threatened job loss, Marcella Guillen solicited employees to revoke their authorization cards, supervisor Sinclair threatened employees with the inevitability of strikes and/or loss of benefits if they selected the Union, Price informed Wooten that she violated an employee rule by discussing her salary with other employees, and Supervisor Hardison threatened the futility of union representation. Accordingly, in the absence of exceptions by either the General Counsel or the Charging Party to the judge's omissions, we shall dismiss those allegations.

The Union did except to the judge's failure to find that certain Respondent statements, which were not alleged as unlawful in the complaint, constituted 8(a)(1) solicitation of grievances and promises to remedy them. Because we find that several similar allegations constitute violations, we find it unnecessary to reach the Union's exceptions.

[10] Even if Little was making a prediction as to the consequences of a fourth unionization, that prediction was based on the prior three consequences of unionization.

[11] As in *Manhattan Crowne Plaza*, the Respondent here "provided a recent, concrete example of a negative outcome for employees who were represented by the same union" that was seeking to represent the Respondent's employees. Just as the Board in that case found that such

Farm Fresh, Inc., 326 NLRB 997, 1029–1030 (1998), enfd. in part 222 F.3d 1030 (D.C. Cir. 2000). Indeed, neither the General Counsel nor the Union disputes the basic facts conveyed by the Respondent's representatives—that the three previous occupants of the facility shuttered the facility after their employees chose representation by the Union.

We disagree with the judge that this case is controlled by *Quamco, Inc.*, 325 NLRB 222 (1997).[12] There, the employer displayed a poster with the names on tombstones of plants that had closed following unionization by the UAW. The employer put its name on a tombstone with a question mark. The Board found, in *Quamco, Inc.*, supra that the title of the display, "UAW Wall of Shame," clearly implied that the UAW was the cause of the plant closings depicted. In addition, the Board found that the depiction of the employer's plant as a new addition to the cemetery conveyed that the fate of the plant was in question. Here, however, the Respondent expressly disclaimed any certainty about the connection between the previous closures at the Wilson facility and the Union. Plant Manager Price literally told employees that he did not know what had happened under the facility's previous owners. In addition, the Respondent's representatives never predicted that it would close the Wilson facility if the employees voted for the Union. Indeed, they never mentioned closure. Instead, the Respondent's representatives used the fact of the Union's past failures to support its opinion, protected by Section 8(c), that the Union could not prevent a closure. Accordingly, we dismiss the allegation that the Respondent violated Section 8(a)(1) as alleged in those parts of paragraph 8(a) of the complaint relating to the conduct of Plant Manager Price and President Little.[13]

(b) Supervisor threats

agreement with the judge—we consider the 'full circumstances,' we do not find that the videotape converted Plant Manager Price's 8(c) comments into an unlawful threat of plant closure. Thus, unlike the few statements our colleague presents in isolation, the videos, letters and speeches, described above, in context, recount the failure of the three previous plant owners, whose employees were represented by the Union, to remain competitive and in business.

Contrary to her colleagues, Member Liebman would adopt the judge's finding that the Respondent violated Sec. 8(a)(1) by threatening to close its facility in the event of unionization. As recited above, through speeches and letters to employees, Plant Manager Price and President Lewis Little routinely linked prior closures of the plant to the Union. These statements also occurred in the context of videos shown by the Respondent in which Human Resources Manager Gilliard told the employees that the Union "pretty much ran [prior occupant Swift & Company] out of business," and that "it is a fact that the Union had an impact on Swift & Company closing their doors several years ago." It is true that the Respondent added words of equivocation to some of these threats, but the majority loses sight of the overall context, especially the utterly non-equivocal threats of Gilliard and the pervasive atmosphere of unfair labor practices by the Respondent. The majority claims that the Respondent "disclaimed any certainty" about unionization and the previous closures. But this ignores Gilliard's threats and President Little's exhortations not to again "hang the UFCW around this plant's neck." These are hardly disavowals of an intent to portray the future of the plant. And, the judge's procedural ruling as to the videotapes does not preclude their use as background and context for other coercive statements about plant closing. That use is entirely appropriate.

Furthermore, as the Board has emphasized, "*Gissel* does not differentiate between absolute statements predicting plant closure and statements which equivocate about whether plant closure will result." *Yoshi's Japanese Restaurant & Jazz House*, 330 NLRB 1339, 1341–1342 (2000). An employer may tell employees what it believes will be the consequences of unionization on the company, but only so long as its comments are "carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probably consequences beyond [its] control." *NLRB v. Gissel Packing Co*., 395 U.S. at 618. Here, the Respondent does not even argue, much less establish, that it based any of its comments linking plant closure to the Union on objective facts. See *Weldun International*, 321 NLRB 733, 746–747 (1996) (CEO's statement that he was afraid that if employees unionized it would doom the division not protected by Sec. 8(c), but was coercive because no discussion of objective fact and context of unfair labor practices).

Contrary to the majority, *Quamco, Inc.*, supra, does support finding a violation. The employer there did not expressly state that the named employers failed because of the Union or directly predict that the facility would close if it was unionized. The Board nevertheless found that "the clear implication of the display was that the fate of the plant would be thrown into question, if and only if, the employees chose union representation." Id. at 223. There is an even stronger case for finding a violation here because the statements of Price and Little occurred in the context of statements made by a high-ranking official, Human Resources Manager Gillard, expressly blaming the Union for a previous employer's closing. Accord: *Mid-Mountain Foods, Inc*., 332 NLRB 229, 246 (2000), enfd. 269 F.3d 1075 (D.C. Cir. 2001) (handbill that stated, "The UFCW petitioned these companies and now they are OUT OF BUSINESS!" violated Sec. 8(a)(1) because there was no evidence of reference to economic factors such as the give and take of bargaining). Accordingly, Member Liebman would find that the Respondent violated Sec. 8 (a) (1), as alleged.

a recitation of facts did not violate the Act, neither do the Respondent's statements here constitute violations. In *Manhattan Crowne Plaza*, the Board relied in particular on the fact that the employer disavowed that it was making a definitive prediction. Similarly here the Respondent's representatives disavowed any intent to predict the future of the plant.

[12] Chairman Battista and Member Schaumber did not participate in *Eldorado Tool* and do not express an opinion as to whether it was correctly decided.

[13] The General Counsel alleged that the Respondent's display of videos in which Respondent's representatives, including Human Resources Manager Gilliard, discussed the previous plant closures also violated Sec. 8(a)(1). Because the General Counsel failed to specify the portions of the videotapes that were alleged to violate the Act, the judge stated that he would not "rely on specific areas of the videos to make findings of unlawful conduct." We agree. The General Counsel failed to reasonably put the Respondent on notice of what portions of the videotapes were alleged to violate the Act. Accordingly, on procedural grounds, we disagree with our dissenting colleague to the extent that she relies on selected portions of Gilliard's videotaped comments [which she finds constitute "nonequivocal threats"] to find that the Respondent unlawfully threatened plant closure. Further, when—in

For the reasons stated by the judge, we find that the Respondent violated Section 8(a)(1) when consultant White told employee Lakenya Harris that if the Union won the election there was a good chance that the Respondent would close the Wilson facility and when Supervisor Brown told employees Atkinson and Hamilton that President Little would close the plant if the Union came in. Indeed, these threats offer a clear contrast with the speech by Plant Manager Price.[14]

2. Impression of surveillance

The judge found that the Respondent violated Section 8(a)(1) by creating the impression of surveillance by directing a video security camera to record employees' and union organizers' handbilling activity. We disagree.

At the outset of the organizing campaign, the Union began handbilling outside the Wilson facility, near the driveway to the plant. At one point, the Respondent's security guard noticed that union organizers were crossing onto the Respondent's property. The security guard eventually called the police, who instructed the organizers to remain on public property. Following this incident, the security guard redirected a security camera that was focused on the parking lot to the street where the handbilling was taking place. The video from the security camera played on a monitor in the guard's shack, where employees walking through the shack could see it.

The Respondent excepts to the judge's finding that the guard's conduct was unlawful. We find merit to the Respondent's exception. The General Counsel did not offer any evidence to contradict the security guard's testimony that he redirected the security camera in order to monitor any further trespassing incidents. The Board has recently held that it will not find a violation where an employer monitors protected activity because of a reasonable concern about a recurrence of trespassing. See *Washington Fruit & Produce Co.*, 343 NLRB 1215 (2004); cf. *Snap-On Tools, Inc.*, 342 NLRB 5 (2004) (repositioning of security camera to monitor handbilling violated Act where there were no previous incidents of trespassing); *Robert-Orr-Sysco Food Service*, 334 NLRB 977 (2001) (same). Here, in light of the physical proximity of the handbilling to the Respondent's property and the temporal proximity of the previous trespassing incident, the Respondent's concern about a recurrence was reasonable and, therefore, the security guard's redirection of the security camera was not unlawful.[15] Accordingly, we reverse the judge and dismiss the allegations in paragraph 8(d) of the complaint relating to the surveillance of handbilling.[16]

3. Soliciting grievances, promising to remedy grievances, and announcing benefits

We adopt the judge's findings that the Respondent violated Section 8(a)(1) as alleged in the complaint when President Little sent letters dated April 21 and May 14 and Plant Manager Price sent a letter dated June 18 to employees, promising to make workplace improvements. However, we find it unnecessary to pass, as cumulative, on the complaint allegations that Plant Manager Price promised employee Shaniqua Moore that he would look into her worker's compensation claim, Supervisor White promised employee Herrera that he would look into getting freezer coats for employees after the election, and consultant Marcos promised employee Rodriguez that he would raise her workplace complaints with the plant's administrators.[17]

4. Interrogations

We adopt the judge's findings that Supervisor Eddie Paula unlawfully interrogated employees Lakenya Harris and Eisonshafae Coppedge by asking them how they felt

[14] We find it unnecessary to pass, as cumulative, on the allegation that Supervisor Dallas Sinclair's discussion with Jimmy Ray Harris of the previous plant closures constituted a violation.

[15] We discount our dissenting colleague's reliance on the fact that the videotaping began early in the organizing campaign, as a basis for establishing a violation. As the videotaping was precipitated by the Union's trespass, its timing does not support a violation. Nor do we agree with our colleague's suggestion that this lawful videotaping became unlawful after some undisclosed period of time. As the Union never offered assurances that it would not trespass again, the Respondent was not obligated to halt its videotaping and wait to see if the Union resumed its trespass.

[16] For similar reasons, we also reject the General Counsel's exception to the judge's failure to find that the redirecting of the security camera also constituted unlawful *actual* surveillance of union activities.

Member Liebman would adopt the judge's finding that the Respondent's video surveillance violated Sec. 8(a)(1). The Respondent's video surveillance began virtually at the outset of the campaign in March—or after a one-time, promptly resolved trespass—and apparently continued throughout the campaign, at least until the July 8 election, well beyond the time justified by the single incident. This conduct created the impression of surveillance as well as constituting actual surveillance. As the Board has recently reaffirmed, "'the well established rule is that absent proper justification, photographing or videotaping employees as they engage in protected concerted activity violates Section 8(a)(1) of the Act.'" *Snap-On Tools, Inc*., supra at 5, 6 fn. 5, quoting *Robert-Orr-Sysco Food Services*. It is also noteworthy that the Respondent did not communicate to employees a justification for the prolonged videotaping. See *Randell Warehouse of Arizona, Inc.*, 347 NLRB No. 56, slip op. at 8 (2006). Member Liebman also disagrees with her colleagues' reliance on *Washington Fruit & Produce Co*., 343 NLRB 1215 (2004). Even assuming, arguendo, that *Washington Fruit & Produce* was correctly decided, the videotaping there went on for a total of 19 minutes.

[17] The Union has excepted to the judge's failure to find additional incidents of unlawful solicitation of grievances and promises to remedy grievances. We find it unnecessary to pass on these exceptions as the alleged additional incidents would be cumulative.

about the Union.[18] In addition, for the reasons stated by the judge, we find that Supervisor Brown engaged in unlawful interrogations when he asked employee Brenda Herrera if she supported the Union and if she had signed an authorization card and when Brown asked employee Summerlin if she had attended union meetings. Contrary to the judge, however, we find it unnecessary to pass, as cumulative, on the allegations that Supervisor King and consultants White and Marcos unlawfully interrogated employees.

5. Threat of loss of benefits

The judge found, and we agree, that the Respondent unlawfully threatened employees with a loss of benefits when it announced a new 401(k) program for employees but stated that they would lose their eligibility if they voted for the Union.

The judge also found that Plant Manager Price unlawfully threatened employees that their wages would be frozen if they voted in favor of union representation. The allegation is based on a memo Price sent to all employees on March 4, in which he informed them that "[c]ontract negotiations often take months or even years . . . . During the time the contract is negotiated, wages and benefits typically remain frozen. They usually don't change." The General Counsel did not allege in the complaint that this statement constituted an unlawful threat of loss of benefits, nor did the General Counsel amend his complaint to include this allegation. The General Counsel first sought to amend the complaint to include this allegation in his posthearing brief to the judge. Thus, the allegation was not litigated at trial. Neither party called any witnesses to address the allegation. Accordingly, we reverse the judge and dismiss this allegation.[19]

6. Threat of pay cut

The judge found that Supervisor King unlawfully threatened employees Whittaker and Stewart with a pay cut, if they signed union authorization cards. The General Counsel neither raised this allegation in the complaint, nor made it the subject of a motion to amend the complaint. Accordingly, this allegation is not properly before us and we reverse the judge's finding of a violation.

The Union excepts to the judge's failure to find that two other incidents constituted unlawful threats of pay cuts. First, the Union would have us find that, while interrogating employee Rhonda Summerlin about her support for the Union,[20] Supervisor James Brown threatened Summerlin that the Respondent could cut her wages to $7.30 per hour. In addition, the Union alleges that consultant Marcos threatened that employees would forgo their regular wage increases if they elected the Union. The complaint, however, did not include either of these allegations and the General Counsel did not move to amend the complaint until his brief to the judge. Moreover, the parties also failed to litigate at all the allegation that Marcos threatened employees. Indeed, neither party called Marcos as a witness and the judge did not make any findings regarding employee Adriana Rodriguez' testimony on this point. Accordingly, we deny the Union's exceptions and decline to find the violations.[21]

7. Threat of futility

The Union excepts to the judge's failure to find that the Respondent threatened employees that their choice of union representation would be futile. The record shows that on July 6, President Little made a speech to all the employees in which he told them that "this plant will continue to get pay and benefits similar to the other plants, not more, not less . . . . The UFCW will not win a strike against Smithfield." In addition, the Respondent earlier in the campaign had shown employees a video in which Human Resources Manager Sherman Gilliard said that "the Union cannot get anybody anything. The only thing the employees can get is what the company is willing to give." Although the complaint alleged that these incidents were unlawful, the judge did not address them.

We find merit in the Union's exception, as it relates to President Little's July 6 speech. Little's statements constitute unlawful threats of futility because they conveyed to employees that the outcome of negotiations between the Union and the Respondent, were the employees to vote for union representation, was foreordained. Little expressly stated that, no matter what the Union offered, the employees would continue to receive the same wages and benefits as the Respondent's employees at other plants. Such a statement is inconsistent with good-faith bargaining and tends to coerce employees. See *Aqua Cool,* 332 NLRB 95 (2000).

Human Resources Manager Gilliard's statement is also a threat of futility. He expressly stated that the Respondent was in complete control over the outcome of nego-

[18] Member Schaumber finds it unnecessary to pass, as cumulative, on this allegation.

[19] It is, therefore, unnecessary for us to pass on whether we would have found Price's statement to be unlawful, had it been properly alleged. Member Liebman finds it unnecessary to pass on this allegation because it is cumulative.

[20] As noted above, we adopt the judge's finding that Brown's conversation with Summerlin constituted an unlawful interrogation.

[21] Member Liebman finds it unnecessary to pass on the allegations that Supervisors King, Brown, Marcos unlawfully threatened pay cuts, as these allegations are cumulative.

tiations. Again, such an expression is not consistent with a commitment to good-faith bargaining. See *Swingline Co.,* 256 NLRB 704, 716 (1981). Although, as discussed above, we will not find any independent violations based on the Respondent's videos, we consider the videos relevant to the context in which employees understood the Respondent's other statements. As such, we find that Gilliard's statement, coming as it did prior to Little's statement, would tend to coerce employees.

8. Threat of unspecified reprisals

The judge found that in late May or early June, supervisor Fred Perry called employee Valerie Davis into his office. He told her that, although he was not concerned about her union activities, she needed to return from her breaks on time because "they" were watching her. The General Counsel excepted to the judge's failure to find that this incident created an unlawful impression of surveillance. The Respondent opposes the General Counsel's exception, arguing that the allegation of an impression of surveillance was not properly alleged in the complaint.

The Respondent is correct that this allegation was not initially included in the complaint. At the outset of the hearing, however, the General Counsel moved to amend the complaint to include an allegation "of threatened unspecified reprisals by Mr. Fred Perry in late May or early June 1999." In his brief to the judge and now before us, the General Counsel alleges that the incident constitutes the unlawful creation of an impression of surveillance. The General Counsel has never, however, moved to amend the complaint to include such an allegation.

We find, nevertheless, that the judge properly permitted the General Counsel to amend the complaint to include this incident as an unlawful threat of unspecified reprisals. In addition, we find that the incident did, indeed, constitute such an unlawful threat. The implication of Perry's statement to Davis was that there would be negative consequences if she continued her activities in support of the Union. As Davis testified, the Respondent did not have a practice of disciplining employees for returning late from breaks. Moreover, Perry made a direct connection between Davis' union activities and the Respondent's increased attention to her break schedule. Accordingly, an employee would reasonably understand Perry to be warning Davis that the Respondent was going to take unusual action against her because of her union activities. Such a threat is likely to coerce employees and, therefore, violates the Act.[22]

9. Promulgation, maintenance, and enforcement of a rule against discussing salaries

We adopt the judge's finding that the Respondent violated Section 8(a)(1) by discharging employee Lenora Wooten because she discussed her salary with a coworker. We do not, however, find merit in the General Counsel's exception to the judge's failure to find that the circumstances of Wooten's discharge compel a finding that the Respondent unlawfully promulgated, maintained, and enforced a general rule against employees discussing salaries.[23]

As the judge found, employee Lenora Wooten was a clerk on the first shift. On January 22, Plant Manager Price informed her that the Respondent was giving her a raise. Wooten told the second shift clerk about her raise. When the second-shift clerk received a less generous raise, she tendered her resignation. Price then asked Wooten if she had discussed her raise with the second shift clerk. When Wooten admitted that she had, Price told her that he could no longer trust her and discharged her.

The record does not support the General Counsel's contention that the foregoing facts establish that the Respondent promulgated a generally applicable rule regarding employees' discussion of their wages. Wooten testified that she was not instructed to refrain from discussing her wages with other employees. In addition, Price conceded in his testimony that he had never instructed Wooten or other employees that such a prohibition existed. Finally, the record does not show any other instance in which the Respondent applied such a prohibition against employee wage discussions. Accordingly, Wooten's discharge, although unlawful for the reasons articulated by the judge,[24] does not establish that the Respondent promulgated or maintained a generally applicable rule prohibiting employees' discussion of wages. We, therefore, dismiss the corresponding complaint allegation.

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[22] Member Schaumber finds it unnecessary to pass on this allegation of threat of unspecified reprisal, because it is cumulative of a similar violation found above, and thus would not affect the Order in this case.

[23] We find merit, however, in the General Counsel's exception to the judge's failure to address this allegation. The complaint clearly encompasses this allegation. See complaint par. 8(o).

[24] In addition to excepting to the judge's finding that Wooten's discharge was unlawful, the Respondent also excepted to the judge's imposition of a make-whole remedy, even if a violation is found. The Respondent argues that it made a valid offer of reinstatement and backpay to Wooten and that her rejection of that offer precludes any remedy, even if a violation is found. We defer resolution of these remedial issues to the compliance stage of these proceedings.

B. Section 8(a)(3)

For the reasons stated by the judge, we find that the Respondent violated Section 8(a)(3) by: discharging employees Clarence Williams and Denise Williams;[25] denying employee Shaniqua Moore's worker's compensation claim; and issuing disciplinary warnings to employee Larry Merrill.

We also make the following additional findings.

1. Margaret Liggins' discharge

The judge found that the Respondent discharged employee Margaret Liggins in violation of Section 8(a)(3). Specifically, the judge found that the Respondent discharged Liggins because of her vocal and active union support and not, as asserted by the Respondent, because she left work early on July 30.

Liggins ran a packaging machine on the bacon line. She was a vocal and well known union supporter. On July 30, the Respondent shut down several bacon lines early, allowing many employees to leave their shift early. Supervisor King asked Liggins if she would be willing to stay because the Respondent needed an employee to run the packaging machine on the line that was still in service. Liggins asked how long she would need to stay and her supervisor, Penny Holmes, told her that she would be able to leave by about 10:30 p.m. Liggins also asked Plant Superintendent Peterson who said that if the employees ran the line they way they were supposed to, they should be out by 11 p.m. When the run was not complete by 11:15 p.m., Liggins asked Supervisor Holmes if she could go home. Holmes responded that she must stay. Plant Superintendent Peterson also told Liggins that she had to stay until the run was complete. Despite these express instructions, Liggins told Peterson and Plant Manager Price that she was going home, saying that she did not feel like being there. When Liggins returned to work on her next scheduled workday, Human Resources Manager Gilliard questioned her about the incident. Peterson later suspended her. Later that week, Gilliard terminated her.

The Respondent excepts to the judge's finding that Liggins' discharge was unlawful. The Respondent argues that it carried its burden of proving that Liggins' misconduct—her leaving prior to the completion of the run—justified her discharge. We find merit in the Respondent's exception.

Assuming arguendo that the General Counsel made out his prima facie case that Liggins' union activities were a motivating factor in her discharge, we find that the Respondent carried its burden of proving that it would have discharged Liggins, even in the absence of her protected activities. Thus, Liggins left work before the run had been completed and in the face of express management directives that she remain.[26] Further, the Respondent

[25] Member Schaumber finds that the Respondent met its burden of showing that it would have discharged Clarence Williams, even in the absence of his union activities, for his use of egregious profanity (f—you) while disobeying supervisory orders. The judge, in rejecting the Respondent's defense, improperly relied on distinguishable, milder employee conduct that did not result in discharge. Thus, employee Gwendell Penny merely stated "hell no" toward her supervisor; and the record does not even show the nature of the profanity used by employee Toni Barfield.

Member Schaumber would also reverse the judge's finding that the Respondent unlawfully discharged Denise Williams. The Respondent discharged her for attendance failures, culminating in her misrepresentation of an absence for illness. As the Respondent's investigation of her final absence revealed, Williams, who missed yet another day due to illness, called in to describe a diagnosis she had purportedly received *before* she had even seen a doctor. In these circumstances, Member Schaumber finds that the Respondent met its burden of showing that it would have discharged Denise Williams even in the absence of her union activities.

In contrast to our dissenting colleague, we agree with the judge that the Respondent failed to carry its burden of proving that it would have discharged Clarence Williams, even in the absence of his union activities. As the judge demonstrates, the record shows that the Respondent was quite tolerant of the use of profanity in the workplace. The dissent is correct that none of the prior incidents upon which the judge relied in finding that the Respondent failed to treat Williams consistent with its past practice is exactly the same as Williams' situation. However, the record shows that the Respondent tolerated the use of profanity, and the record does not establish that the Respondent somehow distinguished between the relative profanity of particular words.

Similarly, we disagree with our dissenting colleague that the Respondent carried its burden of proving that it would have discharged Denise Williams, even in the absence of her union activities. Although the precise chronology of the evening Williams got sick is not clear in the record, the record is clear that (1) Williams was actually sick that evening; (2) she informed her supervisor that she was sick; and (3) she provided her supervisor with a valid doctor's note, substantiating the fact that she was actually sick. Moreover, Michele Mitchell, the human resources official who discharged Williams, disclaimed any connection between the timing of Williams' call from the hospital and her discharge. Because Mitchell instead relied on her discredited assertion that Williams lied about the fact of her illness, the judge correctly found that Williams' discharge was unlawful.

[26] Our colleague misconstrues the nature of the work Liggins was to perform. The Respondent requested that she remain at work to run the line. Although Liggins inquired as to when that run likely would be completed, it was the *run* she was assigned to perform. There is no evidence that the Respondent agreed that she was free to leave work at any specific time. On the contrary, the Respondent, at Liggins' request, estimated when the work likely would be complete. Further, any question about her departure time was expressly answered when Liggins' announcement that she was leaving was countered by the firm directives by a supervisor and the plant superintendent that she was to remain until the line had run. Although the Respondent initially *asked* Liggins to stay, the Respondent subsequently told her that she *must* stay to complete the work. There is no contention that the order was unlawful, and there is no dispute about the fact that the order was disobeyed. Thus, this is not a case of leaving without permission; it is a case of leaving in contravention of a direct and lawful order.

introduced evidence that it discharged another employee for leaving early on the same night that it discharged Liggins for the same offense. The General Counsel did not dispute this evidence. Instead, the General Counsel introduced evidence that other employees on other nights were not discharged for leaving early. There is no allegation of illegality in regard to the extension of Liggins' duties beyond 10:30 p.m. or the instruction that she stay. Thus, Liggins disobeyed a lawful order. This act of insubordination, coupled with the evidence that the Respondent had discharged other employees in the past for leaving early and had discharged at least one other employee on the same night that Liggins was discharged, was sufficient to carry the Respondent's burden of proving that it would have discharged Liggins, even in the absence of her status as an open and vocal union supporter. Accordingly, we reverse the judge and dismiss the allegation that the Respondent unlawfully discharged Margaret Liggins.[27]

2. Lavoris Barnes' discharge

We adopt the judge's dismissal of the allegation that the Respondent unlawfully discharged employee Lavoris Barnes. In doing so, however, we do not pass on the judge's finding that the General Counsel made out a prima facie case of discrimination. Because we adopt the judge's finding that the Respondent carried its burden of proving that it would have discharged Barnes even in the absence of his protected activities, we find it unnecessary to reach the question of whether the General Counsel showed, as an initial matter, that the Respondent was motivated to discharge Barnes by union animus.

C. Section 8(a)(5)

1. Objections

The judge found that the Respondent engaged in objectionable conduct sufficient to require that the election be set aside. That conduct consisted of numerous unfair labor practices [also alleged as objections] that occurred during the critical period. The Respondent excepts to the judge's finding that the election should be set aside. Although we have reversed several of the judge's recommended unfair labor practice findings,[28] we find that the remaining unfair labor practices that occurred during the critical period are sufficient to warrant setting aside the election. Thus, we agree with the judge that supervisors' threats of plant closure, interrogations, solicitation of grievances and promises of benefits, threats of job loss, threats of loss of benefits, threats of unspecified reprisals, and threats of loss of pay, and direction of union sticker removal constitute objectionable conduct, sufficient to warrant setting aside the election.[29]

2. Remedies

The judge concluded that, regardless of the results of the election, the Respondent engaged in repeated and pervasive unfair labor practices that warranted issuance of a remedial bargaining order based on proof that the Union had obtained valid authorization cards from a majority of unit employees. See *NLRB v. Gissel Packing Co.*, supra, 395 U.S. 575. Under the particular circumstances of this case, we disagree. We are concerned that due to the Board's "long and unjustified delay in processing the case," a *Gissel* bargaining order would likely be unenforceable. *Comcast Cablevision of Philadelphia*, 328 NLRB 487 (1999). See generally *Overnite Transportation Co. v. NLRB*, 280 F.3d 417, 434–438 (4th Cir. 2002); *Flamingo Hilton-Laughlin v. NLRB,* 148 F.3d 1166, 1171 (D.C. Cir. 1998). Accordingly, rather than possibly engender further litigation and delay over the propriety of a bargaining order, we decline to reach the question of whether a remedial bargaining order is ap-

Nor do we find persuasive our colleague's reliance on Liggins' testimony about previous instances when she sought to leave work early. Unlike here, there is no evidence that on other occasions when Liggins [or, indeed, other employees] left work early, there was an express directive to remain at work, which directive was disobeyed.

[27] Member Liebman would adopt the judge's finding that the Respondent violated Sec. 8(a)(3) and (1) by discharging employee Margaret Liggins. She disagrees with her colleagues' conclusion that the Respondent carried its burden of demonstrating that it would have discharged Liggins even in the absence of her union activities. She specifically disagrees with her colleagues' view that the Respondent's disciplinary practice with respect to other employees leaving early establishes a nondiscriminatory practice that simply was applied to Liggins. There is no evidence that the Respondent has ever treated as "insubordinate" an employee who simply attempted to hold the Respondent to a mutually agreed upon departure time, as occurred here when her supervisor initially told her that she could leave work by 10:30 p.m. and the plant superintendent said they should be out by 11 p.m. Although, Liggins stayed until 11:15 p.m., the Respondent claims that established practice supports her discharge notwithstanding the representations as to her departure time. But, the opposite is true. Liggins' credited testimony was that, prior to her discharge, the Respondent's past practice was to allow her to leave so long as she told her supervisor beforehand. And, as the judge detailed in his decision, the record is replete with evidence that the Respondent did nothing more than issue warnings to employees who left work without permission, in contrast to its discharge of Liggins.

[28] We have reversed the judge's findings that Price and Little's references to previous plant closures constitute threats of plant closure, that the Respondent created the impression of surveillance by repositioning security cameras, that Plant Manager Price threatened that employee wages would be frozen, and that supervisor King threatened employees Whittaker and Stewart that their wages would be cut. In addition, we found it unnecessary to pass on several of the judge's findings of unlawful promises to remedy grievances and interrogations.

[29] In addition, we find the Respondent's threat of the futility of selecting union representation constitutes further objectionable conduct.

propriate here.[30] Instead, we find that employee rights would be better served by proceeding directly to a second election.[31]

In order to ensure, however, that a second election is conducted in an atmosphere free from the effects of the extensive unfair labor practices found herein, we order certain extraordinary remedies. Consistent with the remedies we previously imposed on the Respondent in *Smithfield Packing Co.*, 344 NLRB 1 (2004), we find that the following remedies are appropriate to the circumstances of this proceeding: a broad cease-and-desist order; mail notice to all employees employed since January 22, 1999; the posting and mailing of a Spanish-language notice; a reading of the notice by a Board agent (in English and Spanish); and providing the Union with a list of the names and addresses of current employees, upon request, within 14 days of a request made within a year of this Decision.[32] These remedies were recently affirmed by the District of Columbia Circuit as appropriate in a previous case involving this Respondent. In *Food & Commercial Workers Local 204 v. NLRB*, 447 F.3d 821 (D.C. Cir., 2006), the court found that extraordinary remedies, including a broad cease-and-desist order, providing employee names and addresses to the Union on request, and requiring the Respondent to notify everyone employed over several years previous to the issuance of the order, were appropriate. Now that the Respondent again has been found to have committed serious unfair labor practices, its proclivity to violate the Act is further established and, for all the previous reasons that justified the imposition of such remedies earlier, the imposition of extraordinary remedies in the current proceeding is appropriate.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondents, Smithfield Foods, Inc. of Delaware and Smithfield Packing Company, Inc. of Virginia, their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with plant closure because of its employees' union activities.

(b) Unlawfully interrogating its employees about their union activities.

(c) Soliciting and offering to remedy employee grievances and promising improved benefits because of its employees' union activities.

(d) Threatening its employees with job loss because of its employees' union activities.

(e) Threatening its employees with loss of benefits because of its employees' union activities.

(f) Threatening unspecified reprisals because of its employees' union activities.

(g) Threatening loss of pay to employees and directing employees to remove union stickers and substitute "Vote No" stickers because of its employees' union activities.

[30] Accordingly, we also find it unnecessary to reach the issue of whether the judge correctly found that the Union had obtained valid, signed authorization cards from a majority of the bargaining unit employees.

Moreover, our decision not to issue a remedial bargaining order renders moot the Respondent's motion to reopen the record in order to proffer evidence of changed circumstances relevant to the propriety of a remedial bargaining order.

Finally, we find it unnecessary to address the General Counsel's pending request to file a special appeal. During the hearing, the judge ordered the General Counsel to produce the questionnaires that it procured from bargaining unit members regarding the circumstances under which they signed union authorization cards. The General Counsel filed a request for a special appeal of that ruling. The judge issued the attached decision before the Board acted on the General Counsel's request or the General Counsel had produced the questionnaires. On May 18, 2001, the Board granted the General Counsel's request and reversed the judge's ruling that the General Counsel had to produce the questionnaires. 334 NLRB 34 (2001). The Board remanded the case back to the judge, however, "in order to ensure that the Respondent has a full opportunity to present its defense in light of our ruling." On June 21, 2001, the judge issued an order reopening the hearing to permit "the Respondent to call witnesses for the sole purpose of receiving the relevant questionnaires." On June 29, 2001, the General Counsel filed a new request to file a special appeal in order to contest the judge's interpretation of the Board's May 18 Order. The Respondent opposed the General Counsel's request and reiterated in its exceptions its position that it is entitled to the questionnaires. The questionnaires are relevant only to the Union's contention that the authorization cards upon which it based its claim of majority support were valid. Because we have decided not to issue a remedial bargaining order for reasons unrelated to the validity of the Union's majority status, we find it unnecessary to act on either the General Counsel's pending request to file a special appeal or the Respondent's assertion of its right to the questionnaires.

[31] Because our denial of a bargaining order is based on delay, we conclude that even if we found merit to the allegations that were cumulative, the result would be the same as to the bargaining order. Member Liebman agrees that, because of the delay in processing this case, attempting to obtain enforcement of a bargaining order would be futile. On that basis alone, she joins her colleagues in denying a bargaining order.

[32] Member Schaumber does not join his colleagues in ordering extraordinary remedies. Precisely because these remedies are "extraordinary," it must be demonstrated, as a precondition for granting them, why traditional remedies will not sufficiently ameliorate the effect of the unfair labor practices found. See *Fieldcrest Cannon, Inc.*, 318 NLRB 470, 473 (1995), enfd. in relevant part 97 F.3d 65 (4th Cir. 1996) (extraordinary remedies appropriate only when "necessary to dissipate the coercive effects of the unfair labor practices found"). No such showing was made here.

(h) Threatening its employees with the futility of selecting the Union as their collective-bargaining representative.

(i) Discharging and refusing to recall its employees because of its employees' union activities or other protected activities.

(j) Warning its employees because of their union activities.

(k) Interfering with its employees' worker's compensation benefits because of its employees' union activities.

(l) In any other manner interfering with, restraining, or coercing its employees in the exercise of their rights under Section 7 of the Act.

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

(a) Within 14 days from the date of this Order, offer Lenora Wooten, Clarence Williams, and Denise Williams full reinstatement to their former jobs or, if those jobs no longer exist, offer them substantially equivalent positions, without prejudice to their seniority and other rights or privileges previously enjoyed; rescind warnings issued to Larry Merrill; and rescind and restore worker's compensation benefits to Shaniqua Moore.

(b) Make whole employees Lenora Wooten, Clarence Williams, Denise Williams, and Shaniqua Moore for any loss of earnings and other benefits suffered as a result of the discrimination against them. Backpay to be computed on a quarterly basis as prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

(c) Within 14 days from the date of this Order remove from its files any reference to the suspension and/or discharge of employees Lenora Wooten, Clarence Williams, and Denise Williams, the warnings to employee Larry Merrill, and the denial of benefits and recommendations for the denial of worker's compensation benefits to Shaniqua Moore, and notify each of them in writing that this has been done and that evidence of the unlawful actions will not be used against them.

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

(e) Within 14 days after service by the Region, post at its Wilson, North Carolina facility copies of the attached notice marked "Appendix."[33] Copies of the notice, on forms provided by the Regional Director for Region 11, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Mail copies of the notice to all its present employees and all former employees employed by the Respondent since January 22, 1999.

(g) Post, mail, and publish in the same manner a Spanish language translation of the Board notice.

(h) During the time the notice is posted, convene the unit employees during working time at the Respondent's Wilson, North Carolina facility, by shifts, departments, or otherwise and have a Board agent, in the presence of a responsible management official of the Respondent, read the notice to employees. The notice must also be read in Spanish.

(i) Supply the Union, within 14 days of a request made within 1 year of the date of this Decision and Order, the full names and addresses of its current unit employees employed at its Wilson, North Carolina facility.

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

IT IS FURTHER ORDERED that a second election by secret ballot shall be held among the employees in the unit found appropriate, whenever the Regional Director shall direct and supervise the election, subject to the Board's Rules and Regulations. Eligible to vote are those employed during the payroll period ending immediately before the date of the Notice of Second Election, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike that began less than 12 months before the date of the first election and who retained their employee status during the eligibility period and their replacements. *Jeld-Wen of Everett, Inc.*, 285 NLRB 118 (1987). Those in the military services may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or have been discharged for cause since the payroll pe-

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

riod, striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether they desire to be represented for collective bargaining by United Food and Commercial Workers, Local 204, AFL–CIO, CLC.

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

APPENDIX

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT threaten you with plant closure if you select the Union as your collective-bargaining representative.

WE WILL NOT unlawfully interrogate you about your union activities.

WE WILL NOT solicit and offer to remedy your grievances nor promise improved benefits to you because of your union activities.

WE WILL NOT threaten you with loss of jobs because of your union activities.

WE WILL NOT threaten you with loss of benefits because of your union activities.

WE WILL NOT threaten unspecified reprisals because of your union activities.

WE WILL NOT threaten you with loss of pay or direct employees to remove union stickers and substitute "Vote No" stickers because of your union activities.

WE WILL NOT threaten you with the futility of selecting the Union as your collective-bargaining representative.

WE WILL NOT discharge and refuse to recall you because of your union activities.

WE WILL NOT warn you because of your union activities.

WE WILL NOT interfere with your receipt of worker's compensation benefits because of your union activities.

WE WILL NOT in any other manner interfere with, restrain or coerce you in the exercise of your rights protected by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Lenora Wooten, Clarence Williams, and Denise Williams their former jobs, or if those jobs no longer exist, substantially equivalent positions without prejudice to their seniority and other rights or privileges previously enjoyed.

WE WILL rescind the unlawful warnings issued to Larry Merrill and the unlawful interference with Shaniqua Moore's receipt of worker's compensation benefits.

WE WILL make Lenora Wooten, Clarence Williams, Denise Williams, and Shaniqua Moore whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, less any interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful actions taken against Lenora Wooten, Clarence Williams, Denise Williams, Shaniqua Moore, and Larry Merrill and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the unlawful actions will not be used against them in any way.

WE WILL supply to the Union within 14 days of a request made within 1 year of the date of the Board's Order the full names and addresses of our current employees employed at our Wilson, North Carolina facility.

SMITHFIELD FOODS, INC. AND SMITHFIELD PACKING COMPANY, INC.

Rosetta Lane, Esq. and *Jane North, Esq.,* for the General Counsel.
William Barrett, Esq., Joel Katz, Esq., Josh Krasner, Esq., and *Robert B. Jones, Esq*., for the Respondent.
Renee L. Bowser, Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASES

PARGEN ROBERTSON, Administrative Law Judge. A hearing was held in Rocky Mount and Wilson, North Carolina, on various dates beginning on March 13 and ending on June 20, 2000. At material times Respondent Smithfield Packing has been a Virginia corporation with a facility located in Wilson, North Carolina, where it has engaged in the manufacture and nonretail sale of pork products. Respondent Smithfield Foods is the parent corporation and it was incorporated in Delaware. Smithfield Foods is a holding company and Smithfield Packing is an operating company. Respondent admitted jurisdiction (Tr. 11). During the 12 months before the complaint, in conducting its business operations, Respondent Packing purchased and received goods valued in excess of $50,000 at its Wilson facility directly from points outside North Carolina. Respondent Packing has been an employer engaged in commerce within the meaning of the National Labor Relations Act (the Act) at all material times. At material times the Charging Party (the Union) has been a labor organization within the meaning of the Act. Lewis Little, Phil Price, Sherman Gilliard, Tony Knight, Eddie Paula, Charles King, James Brown, and Dallas Sinclair were supervisors and agents and Jeffrey White was an agent, at material times.[1] Additionally, Mary Fisher testified that she is Respondent's benefits analyst and she explained benefits to Respondent's Wilson employees. The evidence was not in dispute that others including Marvin Peterson and Fred Perry were supervisors at material times. Joe Pittman, a security officer, admitted that he adjusted a surveillance camera on union organizers passing handbills to employees. There was a question as to whether two people named Marcos and Javier acted for Respondent in speaking with its Spanish-speaking employees and were its agents. The General Counsel amended the complaint to allege that Marcos was an agent (Tr. 940).

The complaint alleged that Respondent engaged in 8(a)(1), (3), and (5) unfair labor practices. Those include allegations of unlawful discharge of Lenora Wooten, Lavoris Barnes, Clarence Williams, Denise Williams, and Margaret Liggins, interference with workman's compensation benefits of Shaniqua Moore, and warnings to Larry Merrill. The complaint alleged that certain Wilson employees designated the Union as their bargaining representative on May 21, 1999. Additionally, I shall consider objections to the conduct of a July 8, 1999 election. I have considered the full record and briefs filed by the Respondent and the General Counsel.[2]

Counsel for the General Counsel alleged that the union campaign became apparent to Respondent no later than March 23, 1999, when union organizers[3] began passing out union handbills at Respondent's Wilson, North Carolina facility. Phil Price and Sherman Gilliard spoke to the employees on March 26 (R. Exh. 52). Respondent does not dispute that the Union started handbilling 2 days before that speech. The petition in Case 11–CA–6338 was filed on May 25, and an election was conducted on July 8, 1999.

In addition to numerous 8(a)(1) violations alleged in the complaint, the Union filed objections following the July 8, 1999 election. Many of those objections are included in the complaint unfair labor practice allegation.

Threat of Plant Closure

Rhonda Summerlin testified that before the election Human Resources Manager Sherman Gilliard spoke to the employees about other companies.[4] Those companies included employers that had previously occupied Respondent's Wilson facilities—i.e., John Morrell, Swift, and Dinner Bell. Gilliard said those companies went under because of the Union. Brenda Herrera attended meetings where Phil Price told the employees companies like John Morrell and Dinner Bell closed because of a union. In one meeting an employee named Valerie held up a paper and said that those companies closed because of bankruptcy. Harold Ivery attended company antiunion meetings with employees during the union campaign. Phil Price spoke to the employees and said that the former employers at their facility, John Morrell, Swift, and Dinner Bell were unionized and had to close. Phil Price asked what did the employees think would happen to them if they were unionized. Phil Price and Sherman Gilliard admitted that they did speak to Respondent's Wilson employees on several occasions during the union campaign. The first antiunion speech was given to employees on March 26, 1999.[5] Phil Price denied telling the employees that predecessor employers at its facility, John Morrell, Dinner Bell, and Swift, had closed after being unionized. He denied that he asked employees what they think would happen if the Union came in. Price admitted that he did say that those plants had been unionized and that some of the inflexible working rules may have aided in some of the closures. Sherman Gilliard testified that he addressed employees after a video on June 3 and 4,

[1] Respondent admitted the commerce, labor organization, supervisory, and agency allegations shown above.

[2] All outstanding motions not specifically dealt with in this decision are denied.

[3] Initially organizers from both the Union and the Laborers Union passed out handbills in Respondent's parking lot.

[4] There is no dispute but that Respondent's plant manager and human resources director spoke to employees on several occasions during the union organizing campaign including March 26 (R. Exh. 52), June 3 and 4 (R. Exh. 156), and June 10 and 11, 1999 (R. Exh. 157).

[5] R. Exh. 52 included comments about union salesmen in the area and disrupting traffic at Respondent's front gate; that the plant has been unionized three times by the UFCW under three different companies, none of which is still in business here; that Respondent is 100 percent opposed to the Union; another reference to the building being unionized three times by the UFCW and it closed the doors three times and UFCW could do nothing to keep it open; and that this is not a perfect place to work but no union could help solve the problems and it is better to work together to solve any problems than to have a union create greater problems.

1999,[6] and he read from a prepared text (R. Exh. 156). He also read from a prepared text (R. Exh. 157) when he addressed employees on June 10 and 11, 1999.[7] Gilliard denied that he told employees that the plant would close if the Union were voted in and he denied telling employees that Swift, Dinner Bell, and John Morrell closed because they were unionized. Respondent showed several videos to its employees. On one of those occasions Sherman Gilliard spoke (GC Exh. 54(a)). Gilliard said, among other things:

> This plant has an interesting history. Three different meatpacking companies have owned it: Swift & Company, Dinner Bell, John Morrell. Each time it was owned by different companies, the Union was here. That same Union that's outside our door today, the United Food and Commercial Workers Union. It is a fact that the Union had an impact on Swift & Company closing their doors, several years ago. The Union was here when it was Dinner Bell. Dinner Bell subsequently closed their doors. Whether it was because of the Union, I can't verify that. John Morrell, it is a fact that John Morrell told their employees that they did not want a Union here. The employees elected a Union here in 1992 and John Morrell subsequently closed the business. I would hope that people would see all the lives and all the families that's been damaged by the United Food and Commercial Workers Union in this building in this community and vote no. I think history sometimes says a lot and I hope people learn from the history that has existed in this building.

Plant Manager Phil Price spoke to the employees on June 17 and 18, 1999. His comments included:

> [T]his building when it was owned by Swift. They had union contracts, but the plant ended up closing. When Dinner Bell reopened the plant, it had a contract with the same union, the UFCW. That union contract did not mean that Dinner Bell employees kept their jobs. Instead, Dinner Bell closed the doors. Both Swift and Dinner Bell suffered through strikes caused by this same union, the UFCW. Finally, after Dinner Bell, there came John Morrell Company. It, too, ended up with union troubles. After the union got in, within six months, Morrell closed the door. [R. Exh. 54.]

Respondent President Lewis Little gave a speech to the employees 2 days before the election. Among other things, he said:

> Expansion was never achieved in this building by Swift, Dinner Bell or Morrell. They all had the UFCW and they all failed here. Don't hang the UFCW around this plant's neck for a fourth time: you have the chance to learn from the mistakes of the employees who lost with the UFCW three times before. [R. Exh. 44.]

Phil Price wrote the employees on July 6 (R. Exh. 55), saying, among other things:

> This union has a terrible track record in this building. Three different companies have operated in this building: Swift, Dinner Bell and John Morrell. This same union, UFCW Local 204, organized all three. Swift and Dinner Bell each suffered through strikes by this Union. Both companies saw chances of success strangled by unreasonable union demands. Both companies closed, throwing UFCW members—and citizens of this community—out of work. Then John Morrell tried to run the plant. They told employees they could not afford to run the plant with non–competitive UFCW wages and rules. The employees voted UFCW anyway. I guess they thought the company was bluffing. The employees lost the bet. John Morrell closed the door within weeks of the vote.

Employee Robert Atkinson talked with Supervisor James Brown around June 1999.[8] Brown said that he knew Atkinson was involved with the Union and that if the Union came in they would close the plant down. Simon Hamilton testified that Supervisor James Brown walked by as Hamilton and other employees were discussing the Union in June 1999.[9] Brown said that Lewis Little is a very wealthy man and if the Union came in he could close the plant. James Brown denied talking with Robert Atkinson or Simon Hamilton about the Union and he denied that he said that the owner of the Company was a wealthy man and if the Union came in the Company would close the plant. After a company antiunion meeting of employees Jeffrey White talked to employees including Lakenya Harris. He told them that he had helped close two plants and that if a union comes in there is a good chance the plant will close. White denied that he told employees the plant would close if the Union won the election. Around June 17, 1999,[10] Jimmy Ray Harris met with Supervisor Dallas Sinclair. Harris noticed that about eight other employees also met with Sinclair in his office that day. Sinclair asked Harris how he felt about the Union and Harris responded that they might need one. Sinclair said that "we don't need a union because we can solve our problems ourselves." Sinclair said that he had worked at a plant before and the plant closed because of a union. He also said that John Morrell, Dinner Bell, and Swift closed because of a union and that most companies don't like to deal with a plant that is unionized because they may go on strike. Sinclair denied that he asked Jimmy Ray Harris how he felt about the Union. He denied telling Harris that the employees did not need a union or that they could resolve problems themselves. He said that he probably said that he had worked in plants that had closed.

Impression of Surveillance

Daryl Artis testified that employees enter the plant through a

[6] This falls within May 25 through July 8, 1999 critical period for consideration of election objections. The Union has alleged this matter constitutes objectionable conduct.

[7] This falls within May 25 through July 8, 1999 critical period for consideration of election objections. The Union has alleged this matter constitutes objectionable conduct.

[8] This falls within May 25 through July 8, 1999 critical period for consideration of election objections. The Union has alleged this matter constitutes objectionable conduct.

[9] This falls within May 25 through July 8, 1999 critical period for consideration of election objections. The Union has alleged this matter constitutes objectionable conduct.

[10] This falls within May 25 through July 8, 1999 critical period for consideration of election objections. The Union has alleged this matter constitutes objectionable conduct.

guard shack. The guard shack is between the employees' parking lot and the plant. In February, while on break, Artis noticed a man installing a TV monitor in the guard shack that showed cars belonging to management and employees. After the union campaign started Artis noticed that the camera had been redirected and was pointed across the street showing the union representatives standing near the red line[11] and employees coming by and picking up handbills. A couple of months after the union campaign ended Artis noticed that the camera was pointed back toward the parking lot. Larry Merrill testified that the Company had cameras mounted on the production building and near the flagpole. The monitor was in the guard shack. The cameras initially were aimed at the guard shack showing employees and others going through the shack. During the union campaign the Company painted a red line outside the guard shack on the driveway into the plant. After the union campaign started Merrill saw the guard shack monitor and it showed the union representatives outside the red line passing out flyers. Joe Pittman was a security officer at Respondent's facility until March 1999. He saw union organizers handbill at the Wilson facility and stop traffic while giving out handbills. Pittman noticed the organizers cross over the red line into company property. In March 1999, Pittman approached the handbillers and asked them to stay behind the red line. However, after he escorted them across the line they followed him back across the line as he returned to the guard shack. He cautioned the handbillers that he would call the police. Pittman then called and four policemen in two police cars came to the facility. He and a policeman explained to the handbillers that they were to stay behind the red line. The police officer explained to the handbillers that he would take them in if they did not cooperate. Pittman testified that the security cameras normally monitor traffic at the security guard center and the gate entering the property. He reset the camera to monitor the union organizers outside the facility. Details such as facial identification could not have been determined by looking at the camera monitors.

Valerie Davis testified about a conversation with her supervisor, Fred Perry, in late May or early June 1999. Perry called her off the line and went into the mechanic's office. Perry told Davis that she had to start getting back from breaks on time because "they was watching me and he didn't care anything about my union activities because I did my job for him, he just wanted me to, you know, getting back to break on time."

Interrogation

Adriana Rodriguez testified that she met with Company Representatives Marcos and Javier about a week before the election.[12] Marcos asked her if she understood what the Union was about and what were the problems they were having at the plant. After Rodriguez replied, "Marcos said he was going to take those problems to the administrators." Rodriguez told Marcos that her supervisor, Eddie Paula, just cared about the job being done and he never heard anything the employees told him. Marcos asked her what benefits she would get from the Union and he said that the employees wouldn't get any benefit and would only pay the Union. Brenda Herrera testified that she was at her workstation when James Brown came up and asked her if she was going to vote for the Union and did she sign a card. She responded that was none of his business. James Brown denied talking to Brenda Herrera about the Union. Valerie Davis testified about a June 1999 conversation she had with Jeffrey White and her supervisor, Fred Perry. She asked White why he was so against the Union when they had helped him previously when he was on the Union side. Perry asked Davis if she was working for the Union. Later that afternoon Perry apologized. In May 1999, Lakenya Harris' supervisor, Eddie Paula, asked her and her friend, Eion Coppedge, how they felt about a union. Harris replied they did not know because they had never heard of unions. Before that conversation, Harris had done nothing to show that she favored the Union. Eionshafae Coppedge testified that she was involved in a conversation with Supervisor Eddie Paula and employee LaKenya Harris. Eddie Paula came up and asked, "[W]hat do you think about the Union." Coppedge replied that she was not sure because she did not know what a union was. Production Line Supervisor Eddie Paula denied that he asked Lakenya Harris how she felt about the Union. After a company meeting he did have a conversation with Harris and others about the Union. He asked the employees if they had any questions about the Union and Lakenya Harris asked how Paula felt about the Union. Paula replied that it did not matter how he felt because he was not allowed to vote. He denied that he had another conversation with Harris about the Union. Eddie Paula denied that he asked either Harris or Eionshafae Coppedge how they felt about the Union. While Larry Merrill was at the copy machine in mid-June 1999 Jeffrey White asked him, "So, what do you think about the Union?" Merrill said they could be better with a union and could get more respect. White replied, "Well, I get the feeling that you don't like the job, and if you don't like the job why don't you just quit." Jeffrey White denied that he asked Larry Merrill what he thought about the Union. He did tell Merrill that if he did not like his job that he should quit. Jeffrey White was an industrial relations consultant with Respondent during the 1999 union campaign at Wilson. White held group meetings with Wilson employees and he also met one-on-one with approximately 150 employees. He asked employees if they wanted to go "to a disclosed area where they could feel more comfortable." He did not tell any employee that he or she would be disciplined if the employee did not talk to him. White denied that he asked employees during the group meetings if they had signed a card, supported the Union or attended union meetings.

Almarie Whitaker talked with Supervisor Charles King in the third week of May 1999 while she was with Tanya Stewart. Charles King asked her if she had signed a union authorization card and Whitaker said, "yes." Tanya Stewart also replied, "yes." Charles King said to Whitaker, "[D]on't you know your pay could be cut." Whitaker replied that she did not know that. Tanya Stewart testified that in May 1999 her supervisor, Charles King, asked Stewart what she did the night before and

[11] Union Representative Lee Hageley told Artis that the red line designated company property and Artis would have to come out pass the red line before talking with a union representative

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Stewart replied that she attended a union meeting. Margaret Liggins testified that during the union organizing campaign Charles King came to her work and asked her how she felt about the Union. Liggins replied that her feelings about the Union were none of his business. Bacon Floor Supervisor Charles King denied that he saw Margaret Liggins wearing union stickers and he denied that he asked her how she felt about the Union. King denied that he asked Denise Williams in May 1999 if she attended a union meeting and he denied telling her that a union could not do anything for her except take her money and cause her to lose her ability to speak for herself. He denied that he asked Almarie Whitaker if she signed a union card. He did talk with Whitaker about the Union. She asked him what did it mean if she's already signed a union card. He admitted that he told Whitaker that the only thing he had heard was that if you have signed a union card the Union automatically gets her dues. He denied telling her that her pay could be cut if she signed a union card. On several occasions[13] during the week before the July 1999 election,[14] James Brown talked with Rhonda Summerlin. Among other things, Brown asked Summerlin if she had attended union meetings. Summerlin did not respond and Brown said that if they found out who attended the union meetings that employee would not be allowed to come back to work after the layoff. James Brown testified that Rhonda Summerlin asked Brown some questions about the Union but he did not tell her that her wages would be cut to $7.30 if the Union came in. Summerlin did ask if wages would be cut but Brown did not answer her. He denied asking Summerlin if she attended union meetings.

Soliciting Grievances

Lavoris Barnes testified about meetings held by Respondent President Lewis Little. Record evidence illustrated that those meetings occurred on April 8, 1999 (GC Exh. 14). Little asked the employees what the Company could do to help change the place to help make it better. Lavoris Barnes replied, "Get a union." Little asked what they could do to not have a union but to make the place better. Some employees raised complaints including the point system. Barnes complained that Respondent had charged his wife's absentee points after she provided a doctor's excuse that she had been with her sick child. A week after the meeting Plant Manager Phil Price thanked Barnes for bringing up that fact his wife had been penalized under the point system. Phil Price said they were going to change the point policy because of what Barnes said. On April 21 and 28 and May 14, 1999, Respondent wrote the employees (GC Exh. 14, 15, 16). The letters stated that Respondent had taken steps to correct some of the problems raised by the employees. Among other things the April 21 letter stated, "no *point will be added* to any employees for a verifiable absence due to taking a spouse or child to the emergency room for illness." In a June 3 and 4, 1999 speech (R. Exh. 156), Sherman Gilliard told the employees, among other things, "you met with Lewis Little to help improve productivity. He was responsive and made changes that improved things. What did the union do? They filed charges and asked the Labor Board to sue us in Federal Court." Lewis Little testified that he met with the Wilson employees in 1999 because of a continuing absentee and turnover problem. Those meetings included groups of seven, eight or nine employees. Little asked questions of the employees and made notes of their comments. After meeting with four groups of employees he met with management. He did not recall the exact date he went to Wilson but the meetings were in the February, March timeframe and he also went down to Wilson in April. He explained General Counsel's Exhibits 14, 15, and 16. Those letters were responses to employees' questions at his April 8 meetings. Little testified that he did not recall the Union coming up during those meetings. Lewis Little told each group of employees what he wanted to do with the Wilson plant; that he wanted to continue to expand the plant. He told the employees that he needed to understand what was causing their level of absenteeism and turnover. Problems mentioned by the employees included a lack of proper training, the point system and a credit union. Little had already thought of the need for a canopy between the buildings and the employees did not bring up that matter. He testified that the Union played no role in the decision to hold the employee meetings. Little denied that any employee responded in a meeting that the Union was a way the Company could improve turnover and absenteeism. Respondent's Exhibit 44 is the text of a speech Lewis Little gave to employee on July 6, 1999. He tried to follow the text but he did not read the speech to the employees. On the last page of the text the last paragraph is marked out. Little did not give that portion of the speech to the employees. Little denied telling the employees that the plant would likely close if the Union came in. He denied telling the employees that the Company would not meet the Union's demands. Instead he said that the Company did not have to meet demands that would make us uncompetitive in the industry.

Brenda Herrera talked with Jeffrey White in the freezer. She told White that the freezer was colder than normal. White said that he was going to try and get the employee's freezer suits after the election. White said if they bought the suits before the vote they would say the Company was trying to buy the election. White also said they could give the employees a 25-cent raise in October. Jeffrey White admitted talking to Brenda Herrera in the freezer. Herrera complained to him that they did not have adequate clothing to work in that cold department. He agreed with her and pointed out the Tar Heel Division where he worked had freezer coats. White denied telling Herrera that freezer suits would be provided the employees after the election.

Surveillance

Union Organizer Randy Tiffey was present at a union meeting of employees at the Wilson Hampton Inn on May 14 and again on May 21. During both meetings Plant Night Shift Superintendent Marvin Peterson walked pass the meeting several times. Marvin Peterson admitted that he stayed in the Hampton Inn in May 1999, when he was moving to Wilson. At that time

[13] Due to the segregated individual alleged 8(a)(1) violations these particular incidents, like others in this decision, may be discussed under more than one category.

[14] This falls within May 25 through July 8, 1999 critical period for consideration of election objections. The Union has alleged this matter constitutes objectionable conduct.

Peterson knew only that there was a union organizing campaign ongoing at the plant. He did not know any of the union organizers. Peterson denied that he either looked into a room where employees were in a union meeting or walked pass that room three or four times.

Threatened Loss of Jobs

Jeffrey White came to Larry Merrill at the copy machine in mid-June[15] and asked, "So, what do you think about the Union?" Merrill said they could be better with a union and could get more respect. White replied, "Well, I get the feeling that you don't like the job, and if you don't like the job why don't you just quit." Jeffrey White denied that he asked Larry Merrill what he thought about the Union. He did tell Merrill that if he did not like his job that he should quit. James Brown talked to Rhonda Summerlin on several occasions before the NLRB election. Summerlin testified that Brown told her that the Union shouldn't be in and that if the Union came in their wages would decrease to $7.30. Brown said that if the Union came in there would be a layoff and only employees that opposed the Union would be able to come back. He asked Summerlin if she had attended union meetings. Summerlin did not respond and James Brown said that if they found out who attended the union meetings that employee would not be allowed to come back to work after the layoff. James Brown testified that Rhonda Summerlin asked Brown some questions about the Union but he did not tell her that her wages would be cut to $7.30 if the Union came in. Summerlin did ask if wages would be cut but Brown did not answer her. He denied asking Summerlin if she attended union meetings.

Threatened Loss of Benefits

Rhonda Summerlin testified that employees were told about a 401(K) plan in a meeting held by the Company in June 1999. Phil Price and Sherman Gilliard were present. Price introduced a woman who spoke about the plan. The woman said the employees would not be able to get the 401(K) if the Union came in. Vernell Taylor attended a company meeting of employees in a trailer on June 30, 1999. A woman, Mary Fisher, spoke to the employees about a 401(K) plan and said that the employees could not have the plan if the Union came in. Otherwise the plan would go into effect in August 1999. Phil Price, Sherman Gilliard, Fred Perry, and Luther Harris were present in addition to a number of employees. Daryl Artis attended a company meeting of employees in a trailer in June 1999. Phil Price and Sherman Gilliard spoke to the employees along with a female from headquarters. The woman told the employees how to set up a 401(K)–retirement plan with their paychecks and gave them a 1–800–phone number to call. The woman said that hourly employees would not be eligible for the 401(K) if the plant went union. Tanya Stewart attended a company meeting of employees in late May 1999 regarding a 401(K) plan. Sherman Gilliard, Phil Price, and another man talked to the employees. His name may have been Greg White. The man said that if the Union got in the employees would not get the 401(K) plan. Valerie Davis attended a meeting in June 1999 regarding 401(K) plan. Price, Gilliard, and Jeffrey White were present along with Mary Fisher. Mary Fisher told the employees that their applications for 401(K) would not go through if the plant became union. Mary Fisher testified that she is Respondent's benefits analyst. She held 401(K) enrollment meetings with the employees in Wilson on June 29 and 30, 1999.[16] Respondent's 401(K) plan does not cover employees represented by Unions. The plan itself eliminated bargaining unit employees. The 401(K) plan came into existence in October 1992. In April 1998 Respondent opened its 401(K) plan to its Tar Heel Packing Plant employees. Before that time Fisher's predecessor had incorrectly excluded those employees believing they were bargaining unit employees. Approximately 3500 employees became eligible for the plan because of that action but only 22 employees actually signed up for the plan. The plan allows employees to invest anywhere from 1 to 20 percent of their income into the tax-free 401(K) plan. There is no matching contribution from Respondent. Before April 1998, the Wilson bargaining unit employees were not eligible for inclusion in the 401(K) plan because there was not a necessary percentage of nonhighly compensated employees in relationship to highly compensated employees. By opening the Tar Heel employees to the plan that prerequisite condition was satisfied. However, in view of the low level of participation at the Tar Heel facility (i.e., 22 of 3500 employees), Respondent elected to not offer the plan to Wilson employees in 1998. Respondent has experienced trouble finding providers such as Charles Schwab Fidelity because of its low rate of employee participation. The June 1999 employee meetings were held in a trailer and approximately 10 employees were called in at a time. The meetings were open to both production employees and management. Each meeting lasted an hour. Fisher testified that she was asked about the Union during those meetings. She was asked if the Union came in would they be allowed to participate in the plan. Fisher replied, "[N]o, because the plan document does not provide for a bargain-type employee to participate." She also said that if the Union got in and the employees felt strongly enough about the 401(K) they could negotiate for that benefit and the Company would provide it.

Threat of Unspecified Reprisals

Rhonda Summerlin supported the Union during its campaign by attending union meetings, wearing a union sticker to work, doing a radio ad for the Union and attending the Union's July 4 cookout. She talked with Phil Price about her radio ad in his office.[17] Price told her she should not have done the radio ad and that she knew she was lying about it. He said that her

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[17] I am unable to determine whether Summerlin's alleged conversations with Price and Gilliard occurred during the critical period. She testified the conversations occurred 1 or 2 weeks after the July 4 picnic. That testimony failed to place those events within the critical period since 1 or 2 weeks after July 4 would place the conversations after the July 8 election.

comment on the radio that employees have to wait to use the bathroom was untrue. Summerlin replied that it was true. She also talked to Sherman Gilliard. Gilliard also told her she should not have done the radio ad. He told Summerlin that he thought she was a smarter woman than that and that the Company had done a lot for her including starting to talk about a 401(K) plan. Those conversations with Price and Gilliard occurred within a week or two after the ads ran on July 4, 1998. Sherman Gilliard testified that Summerlin brought up the radio ad to him while he was in the breakroom. She said that it was a mistake and that the Union had put her up to it. Price denied telling Rhonda Summerlin that she should not have done a radio ad for the Union and that she knew she was lying when she made the ad. He did not tell her not to do future ads. Summerlin did come to Price and ask him how she could get the union people off her back. He replied that he could not give her advice concerning the Union but that if the Union was really bothering her at home she could call the Wilson police. He denied saying that the Company has done a lot for you like giving you a 401(K) plan.

Respondent has a free of cost, defined benefit retirement plan in existence at Wilson separate and apart from any 401(K) plan.

Promised Benefits

On June 18, Phil Price wrote the employees, among other things:

> Remember this: Smithfield guarantees that we will:
> continue to listen to you
> improve things when we can
> work as hard as we can to keep a good job and your steady paycheck coming in. [GC Exh. 17.]

Phil Price and Lewis Little wrote the employees on April 21 (GC Exh. 14), April 29 (GC Exh. 15), and May 14, 1999 (GC Exh. 16). In those letters the employees were advised of Respondent's efforts to improve the facility in light of employee concerns expressed to Lewis Little on April 8. Those Respondent efforts included improved benefits.

On July 6, Lewis Little wrote the employees, among other things:

> THE FUTURE
> Where do we go from here? We try to make the plant a better workplace by coming together. Talk to me personally; talk to your Supervisor. Talk to Sherman. If you think back, we have made many, many improvements in the working conditions here in the last two years. These improvements have come from management listening to employees, not because of any union. Can we make this place perfect for everybody? No. That is unrealistic. But we can keep imroving and we will.

Threatened Loss of Pay

Almarie Whitaker has worked for Respondent since January 1999. She talked with Supervisor Charles King in the third week of May 1999 while she was with Tanya Stewart. Charles King asked her if she had signed a union authorization card and Whitaker said yes. Tanya Stewart also replied, "Yes." Charles King said to Whitaker, "[D]on't you know your pay could be cut." Whitaker replied that she did not know that. Whitaker attended a company meeting with other employees in June 1999. Bacon Floor Supervisor Charles King denied that he asked Almarie Whitaker if she signed a union card. He did talk with Whitaker about the Union. She asked him what did it mean if she's already signed a union card. He admitted that he told Whitaker that the only thing he had heard was that "if you have signed a union card" the Union automatically gets her dues. He denied telling her that her pay could be cut if she signed a union card. Phil Price spoke after some videos were shown. Price said that if they went on strike they couldn't get any help or unemployment because they wanted the Union.

Promised to Remedy Grievances

A week or two before the NLRB election[18] Phil Price asked Shaniqua Moore why was she so angry with Smithfield Packing. Moore explained to Price that she was done wrong, that she was hurt, and did not get help with her workmen's compensation. Price said he was going to check into it and try to help Moore and that it was nice that she could come in and talk to him but if the Union comes in she would not be able to come in and talk to him like she had. Moore told Phil Price that the supervisors did not talk to the employees with respect. Price replied that he was trying to make a change and that was the reason why he got rid of Norman.

Directed Employees to Remove Stickers

Robert Adkinson was wearing several "Vote Yes" stickers on election day. Tony Knight told him to take off his union stickers and replace them with a "vote no" sticker. Adkinson told Knight it was their right to wear the "vote yes" stickers. Tony Knight told the guards not to talk to Atkinson because Atkinson was with the Union. Knight denied telling Atkinson to take off union stickers and put on a "Vote No" sticker. He denied that he told a security guard not to talk to Robert Atkinson because Atkinson was a union supporter.

Conclusions

Credibility

As shown below, I have considered the demeanor of each witness and the full record in determining credibility. Many of the alleged unfair labor practices in this section involve similar comments and I have been influenced in many of my findings by records that originated with Respondent.

Despite contrary testimony by Phil Price and Sherman Gilliard, I credit the testimony of Rhonda Summerlin, Brenda Herrera, and Harold Ivery that Price and Gilliard threatened the employees with plant closure. Respondent's own records show that Respondent's officials including its president, Lewis Little, its plant manager, Phil Price, and its human resources manager, Sherman Gilliard, repeatedly brought up that three predecessor employers at its Wilson facility had been unionized and had closed (e.g., R. Exhs 44, 52, 54, 55, 156, and 157; and GC Exh. 54(a)). Several comments in those documents conflict with the

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testimony of Little, Price, and Gilliard. For example, statements Sherman Gilliard made to employees (i.e., GC Exh. 54(a)), include, "It is a fact that the Union had an impact on Swift & Company closing their doors, several years ago." It is apparent that Respondent's comments had the tendency to prove to the employees that it ran a serious risk of closing if the Union was selected to represent the employees. I note that Phil Price admitted that he did say that the predecessor employers had been unionized and that some of the inflexible working rules may have aided in some of the closures. The credited evidence, including his own writings, illustrate that Price went further than that and threatened that plants at that facility closed in prior instances where the employees selected the Union. In view of the numerous references to previous plants closing and their demeanor, I credit the testimony of Robert Atkinson, Simon Hamilton, Lakenya Harris, and Jimmy Ray Harris regarding conversations with James Brown, Jeffrey White, and Dallas Sinclair.

Evidence is not in dispute that Respondent had cameras mounted near its plant entrance and those cameras were monitored inside the guard shack. Employees were able to observe the monitors. When security officer Joe Pittman re-aimed the camera to the union organizers outside Respondent's property, employees noticed the monitor and its direction toward organizing activities of the organizers and employees. As to the interrogation allegation**,** I was impressed with the demeanor of Brenda Herrera. As noted above, I was not impressed with the demeanor of James Brown or Jeffrey White, and I do not credit their testimony. I credit the testimony of Valerie Davis regarding her conversation with Jeffrey White and Fred Perry and Perry's subsequent apology. As noted above, I credit the testimony of Lakenya Harris. I also credit Eion Coppedge regarding the conversation she and Harris had with Eddie Paula. I credit the testimony of Larry Merrill in view of his demeanor and his testimony. As shown above, I do not credit the testimony of Jeffrey White. I credit Tanya Stewart and Almarie Whitaker and do not credit Charles King regarding both Stewart and Whitaker, as well as Margaret Liggins. As shown above, I credit Rhonda Summerlin and discredit James Brown. There is no dispute but that Respondent President Lewis Little asked employees on April 6 what could be done to improve conditions at its facility. Lewis Little testified that those meetings had nothing to do with the Union. However, the record evidence from both General Counsel and Respondent show that the union organizing campaign started around March 23 or 24 and there was nothing shown to indicate that Respondent advised the employees that Little's April 8 speech did not relate to the Union. In view of the demeanor of the witnesses and the uncontested evidence regarding Lewis' April 8 meetings with employees, I credit the testimony of Lavoris Barnes. I also credit the testimony of Brenda Herrera in view of her demeanor, the demeanor of Jeffrey White, and the full record.

I credit the testimony of Randy Tiffey on the basis of demeanor and the full record. A significant portion of his testimony was supported by testimony of Marvin Peterson and by other evidence. In regard to the alleged threats of loss of jobs and, as in several instances throughout this decision, I credit the testimony of Larry Merrill and Rhonda Summerlin in view of their demeanor, the demeanor of Jeffrey White and James Brown, and the full record. There is no dispute but that employees were told during the union organizing campaign that it was providing a 401(K) plan for their participation but that they could not participate if they were represented by the Union. I credit Rhonda Summerlin, Vernell Taylor, Daryl Artis, Tanya Stewart, and Valerie Davis. Again I credit the testimony of Rhonda Summerlin as to the threat of unspecified reprisals allegation. There is no dispute regarding the promised benefits allegation. The evidence is contained in letters received in evidence and written by Phil Price and Lewis Little. (GC Exhs. 14, 15, 16, and 17.)

As above, I credit the testimony of Tanya Stewart regarding the alleged threat of loss of pay. I also credit Almarie Whitaker in view of her demeanor and the full record. I credit the testimony of Shaniqua Moore as I did above in regard to the allegation of promise to remedy grievances. I credit the testimony of Robert Adkinson that he was told to remove union stickers, in view of his demeanor and the full record. As shown above, I have previously credited Adkinson's testimony.

Findings

The 8(a)(1) Allegations/Union Objections

Threat of Plant Closure

While "an employer is free to make predictions as to what it foresees will be the economic consequences of unionization, a prediction that unionization may cause job insecurity must be carefully phrased on the basis of objective facts so as to avoid any implication that the employer is threatening to act or not act in retaliation for union activities rather than for economic reasons." *Quamco, Inc.,* 325 NLRB 222 (1997).

The credited evidence shows that Respondent repeatedly told its employees of instances of plant closure during the 1999 organizing campaign. Respondent's own records including written correspondence to employees including speeches, videos[19] and letters show that Respondent repeatedly told that the three preceding employers at its Wilson facility had closed after their employees selected UFCW. *Quamco, Inc* presented a similar situation as here. There the employer informed its employees that a number of plants had closed while a union represented the employees. The administrative law judge found that the *Quamco, Inc.* employer's statements to the employees were factual and did not constitute unfair labor practices. The Board disagreed. There the employer repeatedly told its employees that specific plants where employees were represented by the union had closed and that the Union could not guarantee job security as evidenced by the closure of those represented plants. Here in March 26, June 3, 4, 10, 11, 17, and 18, and July 6 speeches and in a July 6 letter, Respondent told its employees that three predecessor-employers at that facility had been un-

[19] I agree with Respondent's contention that the entire circumstances should be considered in determining whether it threatened employees with plant closure and I agree that the General Counsel failed to provide it with specifics as to allegations based on videotapes that were received in evidence. Therefore, I shall consider those tapes in regard to the full circumstances but I shall not rely on specific areas of the videos to make findings of unlawful conduct.

ionized and all had closed. Respondent informed the employees that one of those employers had actually told its employees that it did not want the union but the employees selected the union and that plant closed. Sherman Gilliard told employees that they should see the lives and families damaged by the United Food and Commercial Workers Union in this building. The comments to employees emphasized two issues: (1) three predecessor-employers at the Wilson facility were organized by the Union; and (2) all three of those predecessor-employers closed. The record shows that Respondent routinely made those comments without objective explanations as to why the plants closed. I credited the testimony that an employee named Valerie stated in one meeting that the predecessor employers had closed because of bankruptcy and Respondent ignored her comments.

There was no evidence that Respondent informed its employees why the predecessor employers' closing had any objective relationship to its own situation at Wilson. There was nothing shown to illustrate that Respondent's comments were made for any purpose other than to influence employees to vote against the Union. I find in agreement with the General Counsel, that record evidence failed to show any objective basis for Respondent's comments and those comments tended to show its employees that a vote for the Union could cause the plant to close. *Bi–Lo.,* 303 NLRB 749, 750 (1991), enfd. 985 F.2d 123 (4th Cir. 1993); *Snyder Tank Corp.*, 177 NLRB 724, 730–731 (1969), enfd. 428 F.2d 1348 (2d Cir. 1970), cert. denied 400 U.S. 1021 (1971).

While its highest officials were telling employees of the danger of plant closure at its facility, supervisors were engaged in more intimate conversations with employees. Supervisor James Brown told Robert Atkinson that the plant would close if the Union came in. Brown told Simon Hamilton and other employees that Respondent's owner was a wealthy man and would close the plant if the Union came in. Jeffrey White told Lakenya Harris and other employees that he had helped close two plants and there is a good chance the plant will close if the Union comes in. Dallas Sinclair told Jimmy Ray Harris that he had worked in a plant that had closed because of the union and that the three predecessor-employers at Respondent's Wilson facility, closed because of the Union. Here, the record established that Respondent engaged in numerous activities that threatened employees with plant closure and thereby had the tendency to interfere with, restrain, or coerce the employees' exercise of rights guaranteed by Section 7. I find that Respondent engaged in unfair labor practices on each of those occasions by its threats its employees. *Quamco, Inc*., above. Moreover, that unfair labor practice that occurred during the critical period established objectionable conduct.

Impression of Surveillance:

Where an employer videotapes union headquarters while people including at least one employee, were present in the headquarters, and subsequently shows the video to employees, the employer is engaged in unfair labor practices through its actions of both videotaping the headquarters and showing that video to employees. *Seton Co.*, 332 NLRB 979 (2000).

In *National Steel & Shipbuilding Co.,* 324 NLRB 499, 499 (1997):

> The judge correctly observed that the fundamental principles governing employer surveillance of protected employee activity are set forth in *F. W. Woolworth Co.,* 310 NLRB 1197 (1993). The Board in *Woolworth* reaffirmed the principle that an employer's mere observation of open, public union activity on or near its property does not constitute unlawful surveillance. Photographing and videotaping such activity clearly constitute more than mere observation, however, because such pictorial record-keeping tends to create fear among employees of future reprisals. The Board in Woolworth reaffirmed the principle that photographing in the mere belief that something might happen does not justify the employer's conduct when balanced against the tendency of that conduct to interfere with employees' right to engage in concerted activity. Id: *Flambeau Plastics Corp.,* 167 NLRB 735, 743 (1967), enfd. 401 F.2d 128 (7th Cir.1968), cert. denied 393 U.S. 1019 (1969). Rather, the Board requires an employer engaging in such photographing or videotaping to demonstrate that it had a reasonable basis to have anticipated misconduct by the employees. "[T]he Board may properly require a company to provide a solid justification for its resort to anticipatory photographing." *NLRB v. Colonial Haven Nursing Home*, 542 F.2d 691, 701 (7th Cir.1976). The inquiry is whether the photographing or videotaping has a reasonable tendency to interfere with protected activity under the circumstances in each case. *Sunbelt Mfg., Inc.,* 308 NLRB 780 fn. 3 (1992), affd. in part 996 F.2d 305 (5th Cir. 1993).

There was no dispute but that one or more cameras were redirected from showing people entering by the guard shack, to showing union organizers and employees outside the plant. Moreover, there was no dispute but that employees saw the monitor in the guard shack and noticed that the picture changed from the guard shack entrance to the union handbill line during the organizing campaign. Respondent argued that it may videotape the employees' open union activities at the plant, citing *Brown Transport Corp.,* 294 NLRB 969, 971 (1989); *Hoschton Garment Co.,* 279 NLRB 565, 567 (1986). However, the evidence did not show reason to fear employee misconduct. The only evidence of that type involved union organizers crossing the red line into Respondent's property and the security guard calling the police. Moreover, the true question is why did Respondent videotape the employees at the union handbill line in a manner that illustrated to the employees that their union activity was under surveillance.

In *National Steel*[20] the captain of security operations positioned and subsequently operated, a tripod-mounted video camera with audio capability atop the roof of a building to occasionally document union leaders exhorting employees to demonstrate their solidarity. Those demonstrations were characterized as "noisy–but–peaceful." After initially operating the video camera by hand, the captain eventually set the camera to operate on a timer. The Board found the employer did not justify its

[20] 324 NLRB 499.

use of the video camera to achieve any legitimate security objective and found the conduct constituted an unfair labor practice. See *Flexsteel Industries, Inc.,* 311 NLRB 257 (1993); 288 NLRB 413, 425 (1988); *Honeycomb Plastics Corp*., 288 NLRB 413 (1988). Here, the record established that Respondent engaged in activities that created the impression of surveillance of employees' Union activity, and thereby had the tendency to interfere with, restrain, and coerce the employees' exercise of rights guaranteed by Section 7. (*Flexsteel Industries, Inc*., above.)

Interrogation

The several instances of alleged interrogation occurred in May, June, and on several occasions about a week before the July 8 election. *Seton Co.,* 332 NLRB 979, 982 (2000). [Footnote omitted.]

> In determining whether an employer's interrogation violates the Act, the Board examines whether under all the circumstances the questioning reasonably tends to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights. In this case, the interrogation occurred against a background of numerous other unfair labor practices including threats of plant closure, discharge, and more onerous working conditions. Further, Donaldson's inquiry as to whether Leavelle and another employee had been discussing the Union was explicitly tied to Donaldson's unlawful threat of discharge if Leavelle were caught talking about the Union. Thus, the inquiry was intended to obtain information based on which Leavelle could be disciplined. Under all these circumstances, we find that Donaldson's interrogation tended to interfere with, restrain, and coerce employees in the rights guaranteed by Section 7 of the Act.

Here, as in *Seton Co.*, the alleged interrogations occurred against a background of numerous other unfair labor practices including threats of plant closure, loss of jobs, loss of benefits, loss of pay and unspecified reprisals, surveillance, impression of surveillance, soliciting and promising to remedy grievances, and the promise of benefits. Additionally, the General Counsel alleged unlawful discharges, interference with workmen's compensation, and disciplinary warnings as well as an unlawful refusal to bargain. Moreover, during several instances of alleged interrogation the questioning supervisors made threatening comments that are alleged as separate unfair labor practices. Those threats included a supervisor telling one employee that employees found to support the Union would not be recalled after a layoff. See *Parts Depot, Inc.,* 332 NLRB 670 (2000); *Rossmore House Hotel*, 269 NLRB 1176 (1984), enfd. sub nom. *Hotel & Restaurant Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985); *Sunny Vale Medical Clinic*, 277 NLRB 1217 (1985). Here, there was no evidence that the Respondent or the questioning supervisor or agent knew that employees Rodriguez, Herrera, Lakenya Harris, Coppedge, Merrill, Whitaker, Stewart, Liggins, or Summerlin were involved with the Union before their interrogation.

The United States Fifth Circuit Court of Appeals considered whether an employer illegally interrogated its employees in *NLRB v. McCullough Environmental Services,* 5 F.3d 923 (1993):

> If interrogation is coercive in nature, it makes no difference that employees are not actually coerced. *NLRB v. Great Western Coca–Cola Bottling Co.,* 740 F.2d 398, 404 (5th Cir.1984). We consider the following factors, first announced in Bourne v. *NLRB,* 332 F.2d 47, 48 (2nd Cir.1964), *in determining whether interrogation tends to be coercive: 1) the history of the employer's* attitude toward its employees; 2) the nature of the information sought; 3) the rank of the questioner in the employer's hierarchy; 4) the place and manner of the conversation; 5) the truthfulness of the employee's reply; 6) whether the employer had a valid purpose for obtaining the information sought about the union; 7) whether a valid purpose, if existent, was communicated to the employee; and 8) whether the employer assured the employee that no reprisals should be forthcoming should he or she support the union.[21]

The record does not reveal Respondent's historical attitude toward its employees. However, as shown above, Respondent repeatedly referred to past instances of alleged union problems with predecessor employers at the Wilson facility. As to the nature of the information sought, employees were questioned on how they felt about the Union, whether they had signed union authorization cards, what problems the employees were having at their work, whether the employees understood what the Union was about, whether the employees would vote for the Union, whether the employee worked for the Union, whether the employees knew their pay could be cut, whether the employees attended union meetings and what benefits would the employees receive from the Union. The ranks of personnel that allegedly interrogated employees ranged from supervisors to an industrial relations consultant. The alleged interrogation instances occurred in the Wilson plant. Oftentimes, as shown herein, the interrogation was accompanied by threats and other alleged unlawful comments. Some of the employees replied truthfully to the alleged threats and others refused to answer. Respondent failed to show that it had a valid purpose for obtaining requested information and no valid purpose was communicated to the questioned employees. There was no evidence of the employer assuring an employee that no reprisals should be forthcoming should he or she support the Union. Respondent argued that all the circumstances should be considered including the background of Lewis Little's efforts to deal with the absenteeism and turnover problems at the Wilson facility. I have considered that evidence and argument but I find that does not justify the April 8 speech to employees and the subsequent responses to employee questions raised at that time. The absenteeism and turnover problems had existed from a time before Phil Price took over as plant manager in August 1998 but President Little did not see fit to visit the Wilson employees and seek their input into the Wilson problems until after Respondent learned of the union organizing campaign. Moreover, before the union campaign Respondent did not advise its employees of its efforts to improve conditions at Wilson. For those

[21] See also *NLRB v. Brookwood Furniture*, 701 F.2d 452, 460 (5th Cir. 1983).

reasons I am not convinced that consideration of the totality of circumstances including Respondent's approach to preunion campaign problems, proved that Respondent's actions do not constitute 8(a)(1) violations. Here, the record established that Respondent engaged in numerous instances of interrogation that had the tendency to restrain, coerce, or interfere with the employees' exercise of rights guaranteed by Section 7. Moreover, those unfair labor practices that occurred during the critical period established objectionable conduct.

Soliciting Grievances

Promised benefits

Promised to remedy grievances

Lewis Little spoke to Wilson employees on April 8 (GC Exh. 14). He asked them to identify their problems at work. Lavoris Barnes replied they should get a union to help make things better and Little asked what they could do to not have a union but to make the place better. Little said he came to the Wilson plant first in the February—March time frame but credited testimony showed he did not speak to employees before April 8. Otherwise, Little had not visited employees at Wilson plant since August 1998. He has not been back to Wilson since the election. Subsequently Little and Plant Manager Price wrote the employees in response to problems raised by the employees (GC Exh. 14–16). Two weeks before the election Phil Price told Shaniqua Moore he was going to check into her compensation claim, that it was nice that she had talked with him but that she would not be able to do that if the Union came in. Price said that he was trying to make a change and that was the reason he got rid of the second shift superintendent and hired a new one. Respondent wrote the employees on April 21 responding to matters raised to Lewis Little. The letter pointed out that Respondent had made favorable changes to the absenteeism policy and stated it would provide a canopy to keep employees out of the weather when they walked between buildings (GC Exh. 14). As shown above, Respondent also wrote the employees in response to their grievances on April 29 (GC Exh. 15) and May 14 (GC Exh. 16). See *Schaumburg Hyundai, Inc.,* 318 NLRB 449 (1995). Brenda Herrera testified that Jeffrey White talked to her about conditions on her job. Herrera complained about the cold and White explained that employees at Respondent's Tar Heel facility had freezer suits and that he would see about getting freezer coats for Herrera and her fellow workers. General Counsel alleged that White's comments constitute solicitation of grievances and are an unfair labor practice. *KOFY-TV-20,* 332 NLRB 771, 772 (2000). On June 18, Phil Price wrote employees that "Smithfield guarantees that we will: continue to listen to you; improve things when we can; work as hard as we can to keep a good job and your steady paycheck coming in." (GC Exh. 17). The General Counsel alleged that constituted another violation of section 8(a)(1). Id.; *Yale New Haven Hospital*, 309 NLRB 363, 366–367 (1992). Respondent representative Marcos met with Adriana Rodriquez in late June or early July in the nurse's office. He asked Rodriquez if she understood the Union and what were her problems. Rodriquez told Marcos that the employees were not allowed to go to the bathroom and Supervisor Eddie Paula did not listen to the employees. Marcos said that he was going to take her problems to Respondent's administrators and he told her she would not get any benefits from the Union.

Respondent cited *House of Raeford Farms,* 308 NLRB 568 (1992), and argued that while it did take certain actions as claimed by the General Counsel, those actions were initiated in the summer of 1998 and before, in an effort to combat a serious absenteeism and turnover problem at Wilson. Plant Manager Phil Price testified that he was instructed to correct some outstanding problems at the Wilson facility when he was given the job in August 1998. Those problem included product quality, yield and production issues. Price testified that inexperienced supervisors contributed to those problems. There were problems with employee turnover and absenteeism when he became plant manager. Those two problems compounded the training problem by having employees trained but then through absences and turnover, not being available to work. That in turn, necessitated training additional employees. In order to correct those problems some supervisors were replaced, a more positive program was initiated to improve employees' attitude and an improved benefit program was initiated. Respondent prepared two presentations for Lewis Little, Tom Ross, and Rodney O'Rell in February 1999 regarding the Wilson problems (R. Exh. 128— 129). At that time Price was not aware of any Union activity. Price made an employee announcement of March 4, 1999 (R. Exh. 50) before learning of any union activity. Respondent published its attendance bonus program, which was referred to in RX 50, on March 29, 1999 (R. Exh. 51). Phil Price gave a speech to employees around March 26, 1999 (R. Exh. 52). That was two days after the Union started handbilling at Respondent's Wilson facility. He read that speech to the employees. As a result of the February meeting, Lewis Little came to the plant and addressed the employees in early April 1999. Price read employees' speeches on June 10 and 11 (R. Exh. 53), June 17 and 18 (R. Exh. 54), and July 6, 1999 (R. Exh. 55). Price admitted telling employees they did not need a union during June or July meetings. He told employees that because of some of the inflexible rules that the union had employed, it made it difficult for the companies that had been in the Wilson plant before Respondent, to operate profitably. Price denied that he predicted to employees the plant would close if the Union were elected. He denied telling the employees that John Morrell, Dinner Bell and Swift had closed after being unionized and that he asked employees what did they think would happen if the Union came in. He did say that those plants had been unionized and that some of the inflexible working rules may have aided in some of the closures.

However, the record established that Respondent engaged in numerous activities that had the tendency to restrain, coerce or interfere with the employees' exercise of rights guaranteed by Section 7. Respondent's absenteeism and turnover problems existed from before August 1998 and its clear from the evidence including Lewis Little's April 8 visit to Wilson and the following letters addressing employee grievances, all delivered during the union campaign, that those actions were speeded up because of the Union. Moreover, Respondent made no effort to show the employees that its solicitation and partial remedy of grievances had nothing to do with the Union. On the basis of

the full record, I am convinced that Respondent engaged in soliciting and partially remedying grievances and that action had the tendency to interfere with, restrain or coerce employees in the exercise of Section 7 rights in violation of Section 8(a)(1).

Surveillance

The General Counsel alleged that Respondent engaged in illegal surveillance by having Superintendent Marvin Peterson walk past the door of a hotel room where the Union was holding a meeting. It is important to keep in mind that the allegation here is surveillance as opposed to impression of surveillance. No employee testified to seeing Peterson walking past the union meeting and the General Counsel elected not to allege that Respondent engaged in conduct, which tended to impress on employees that their union activities were under surveillance. As to the actual allegation,—i.e., surveillance as opposed to impression of surveillance,—there are other factors to consider. As shown above, the testimony of Union Organizer Tiffey illustrated only that a Marvin Peterson walked past the hotel room where the Union was holding a meeting. There was no showing that Peterson either identified or had the capability of identifying, any employees. In fact the evidence showed that Peterson was in the process of moving to Wilson and had recently been assigned work there. If Respondent wanted to engage in actual surveillance it would appear more logical to assign someone to the task that was more familiar with the Wilson employees. Moreover, there was no showing that Peterson knew or had reason to know, that any of Respondent's employees were attending or were otherwise directly involved in the meeting. The fact that a Union organizing drive was underway at Respondent's Wilson facility, may be sufficient to cause Peterson to reasonably belief the meeting involved that campaign. Nevertheless, that would not show that Peterson knew or learned by walking by, that employees were in attendance. Moreover, there was no showing that Peterson walked out of his way in passing the room where the Union was meeting. I am aware of situations where employees witnessed supervisors appearing to observe union meetings and where the Board found surveillance. However, here there was no such testimony by an employee nor was there evidence that any supervisor said to an employee that the meeting was being watched. Therefore, I am not convinced that the General Counsel proved that Respondent engaged in surveillance of its employees' union activities during the meeting at the Hampton Inn and I recommend dismissal of that allegation. (Cf. *Seton Co.*, 332 NLRB 979 (2000); *Sands Hotel & Casino,* 306 NLRB 172 (1992); and *Flexsteel*, supra.)

Threatened Loss of Jobs

As shown above, after Larry Merrill replied to Jeffrey White's interrogation, that things could be better with a union, White told him that he should quit if he did not like things there. James Brown told Rhonda Summerlin that she would not be allowed to return from a lay off if Respondent learned that she had not opposed the Union. A threat of loss of job is one of the more serious actions prohibited by Section 8(a)(1). The evidence shows that Respondent's comments had the tendency to interfere with, restrain, or coerce employees in the exercise Section 7 rights in violation of Section 8(a)(1). Those unfair labor practices that occurred during the critical period also established objectionable conduct. The comment to Merrill may appear weak but it does connect his feelings for the Union with Respondent's concern that those feelings show a discontent with his job that should result in his seeking other employment. That comment tends to coerce the employee into concern for his job. Brown's comments to Summerlin involved a more direct threat. If she is among those discovered by Respondent as supporting the Union, she will be denied reinstatement after a layoff. That comment also tends to coerce the employee in exercise of her section 7 rights. The Board recently held "threats of job loss violate Section 8(a)(1) 'because these acts reasonably tend to coerce employees in the exercise of their rights, regardless of whether they do, in fact, coerce. *Central Transport v. NLRB*, 997 F.2d 1180, 1191 (7th Cir. 1993) (respecting employer's claim that alleged comments were not threats because they were merely 'man–to–man confidence' and 'merely statements of opinion based on 'gut feelings." *Clinton Electronics Corp.*, 332 NLRB 479 (2000).

Threatened loss of benefits

On June 10 Respondent showed its employees the video, "Collective Bargaining—The Party's Over." (GC Exh. 55(b).) Phil Price spoke to the employees and he told them that collective negotiations often take months or even years. He said that wages and benefits are typically frozen during the time the contract is being negotiated. The record also shows without dispute that Mary Fisher spoke to the Wilson employees about their eligibility for a 401(K) plan. Before that time the Wilson employees had not been told of their eligibility. The plan specifically excluded employees represented by a union and Fisher told the Wilson employees they would not be eligible for the plan if they elected the Union. I find those comments tend to interfere with, restrain, or coerce employees' Section 7 rights and constitute unfair labor practices. Those unfair labor practice that occurred during the critical period established objectionable conduct. The comments that wages and benefits are typically frozen includes a veiled threat that wages and benefits will be frozen if the employees select the Union until the Union is successful in negotiating a contract. Mary Fisher's comments were even more direct. She told the employees that the 401(K) plan she was announcing would not be available if the employees elected the Union. Those comments tend to coerce employees in the exercise of their rights and violate Section 8(a)(1). In a situation such as is present regarding the alleged threats of loss of benefits, a defense that the statements made by Respondent's agents were true, does not mitigate the coercive nature of the threat. [Cf. *Camvac International,* 288 NLRB 816 (1988).] For example, Mary Fisher's comment was supported by language in the 401(K) plan. However, as shown above, the employees were first told about their eligibility for the plan during the same meetings they were told they would not be eligible if they elected the Union. Moreover, the plan itself had been in effect in some of Respondent's facilities from long before commencement of the union campaign and the announcement and threat were withheld until after the campaign started. At

that time the 401(K) plan announcement served two purposes. By announcing the plan Respondent illustrated that it was continuing to make improvements without a union. By threatening to withhold the plan Respondent showed its employees that the Union would be costly and result in loss benefits. I find that the comments by Phil Price and Mary Fisher shown above constitute independent 8(a)(1) violations.

Threat of Loss of Pay

In the third week of May 1999, Charles King asked Almarie Whitaker if she had signed a union authorization card and Whitaker said, "yes." Tanya Stewart also replied, "yes." Charles King said to Whitaker, "[D]on't you know your pay could be cut." Whitaker replied that she did not know that. In view of my credibility findings, I have determined those comments were made by King and I find those comments tended to interfere with, restrain, or coerce with its employees exercise of Section 7 rights.

Threat of Unspecified Reprisals

After the July 4th weekend Plant Manager Price and Human Resources Manager Gilliard criticized Rhonda Summerlin because of her radio ad for the Union. Neither Price nor Gilliard threatened a specific action but Price said the radio ad was a lie and that Summerlin better not do any more ads like it. Gilliard told Summerlin that she should not have done the ad that he thought she was smarter than that and that Respondent had done a lot for her. Those comments had the tendency to interfere with, restrain, or coerce employees' exercise of rights guaranteed by Section 7 by holding out Respondent displeasure with Summerlin. Respondent was her employer and it had the power to control her job, her job progression and her working conditions. The record did not establish how soon after the July 4th weekend, those comments were made to Summerlin. Therefore, I am unable to determine that the comments occurred on or before July 8 and for that reason, I cannot find those actions constitute objectionable conduct. I do find both the comments by Price and those by Gilliard constitute unfair labor practices in violation of Section 8(a)(1).

Directed Employees to Remove Stickers

On election day Tony Knight told Robert Atkinson to remove "vote yes" stickers and replace them with vote no stickers. Knight then told the guard not to talk to Atkinson because Atkinson was for the Union. Those actions had the tendency to interfere with, restrain, or coerce employees in the exercise of rights guaranteed by Section 7. *E & L Transport Co.,* 331 NLRB 640 (2000); *ITT Automotive,* 324 NLRB at 622; and *A. O. Smith Automotive Products Co*., 315 NLRB 994 (1994).

Objectionable Conduct

The above findings show that Respondent engaged in several incidents of unfair labor practices in violation of Section 8(a)(1), during the critical time period of May 25[22] through July 8, 1999.[23] As shown above Respondent engaged in unfair labor practices in violation of Section 8(a)(1) during the critical period, including threats of plant closure, loss of jobs, loss of benefits, loss of pay, and unspecified reprisals, impression of surveillance, soliciting and promising to remedy grievances, and promising benefits. Sherman Gilliard spoke to the employees on June 3, 4, 10, and 11 and threatened plant closure; Phil Price also threatened the employees with plant closure when he wrote to them on July 6 (R. Exh. 55); James Brown threatened Robert Atkinson, Simon Hamilton, and other employees with plant closure in June; and, on June 17 Dallas Sinclair threatened Jimmy Ray Harris with plant closure. Respondent engaged in the impression of surveillance in violation of Section 8(a)(1) during the critical period as shown above on page 6. Respondent engaged in coercive interrogation in violation of Section 8(a)(1), when representative Marcos[24] interrogated Adriana Rodriguez about a week before the election; Fred Perry along with Jeffrey White interrogated Valerie Davis in June; Jeffrey White interrogated Larry Merrill in mid-June; and James Brown interrogated Rhonda Summerlin about union meetings during the week before the July 8 election. In mid-June Jeffrey White threatened Larry Merrill that Merrill should get another job because of Merrill's support for the Union. In June Respondent told its Wilson employees they qualified for its 401(K) plan but they could not qualify if they were represented by the Union. During the week before the election Phil Price told Shaniqua Moore he was going to check into why she did not receive her full workmen's compensation benefits and help her if he could, and Price told her she would not be able to come to him for help if the Union was selected. Tony Knight directed Robert Atkinson to remove vote yes stickers and replace them with vote no stickers on election day. It is the Board's "traditional practice under *Dal-Tex Optical Co*., 137 NLRB 1782, 1786–1787 (1962), of nullifying any representation election conducted amid contemporaneous unfair labor practices. The *Dal-Tex* rule is premised on the notion that unfair labor practices committed during the 'critical period' prior to an election is 'a fortiori conduct which interferes with the exercise of a free and untrammeled choice in an election." *Diamond Walnut Growers, Inc*., 326 NLRB 28 (1998).[25] The *Diamond Walnut* Board recognized an exception to the *Dal-Tex* rule where some actions, although violations of Section 8(a)(1) of the Act, may be so minimal or insolated that it is 'virtually impossible to conclude that they could have affected the results of the election." Here the unfair labor practices were neither so minimal nor so isolated to make it impossible to conclude that they could have affected the results of the election. As shown above from before the May 25 filing of the RC petition and throughout the critical period, Respondent repeatedly engaged in 8(a)(1) violations. Those violations included actions by Respondent's highest ranking officials that had the tendency to cause bargaining unit employees to fear selection of the Union

[22] The Union filed the Case 11–RC–6338 petition on May 25, 1999.
[23] The election was conducted on July 8, 1999.

[24] The record showed without dispute that Marcos was acting as Respondent's agent and talking with Respondent's Spanish-speaking employees during the election campaign.

[25] Board Member Fox wrote a separate opinion, which was joined in relevant part by Chairman Gould. Member Hurtgen dissented on the grounds that the unfair labor practice was isolated. Here, the unfair labor practices were not isolated.

could lead to plant closure and loss of benefits among other violations. The violations by high-ranking officials were included in speeches and letters to all unit employees. The violations were pervasive and they continued right up to the election. I find that the election must be set aside.[26]

Section 8(a)(3)

Here, I have considered all the matters alleged as illegal discharge, warnings, and prevention of receipt of workman's compensation even though one of the discharges—that of Lenora Wooten—did not involve union activity.

Discharges

Lenora Wooten

Lenora Wooten was discharged before the union campaign.[27] Nevertheless, the General Counsel alleged that her discharge constituted an unfair labor practice. Wooten was discharged on January 22, 1999, while classified as a baking clerk. Her job included writing up disciplinary actions at the direction of the supervisor and she sometimes sat in on disciplinary interviews with the supervisor. In January 1999, Wooten was given an increase in pay and a bonus. That night she told Clarinetta Williams, the second-shift clerk, of her increase in pay and bonus. Wooten was called in by plant manager on January 22 and asked if she had discussed her wage increase and bonus with Clarinetta Williams. Wooten agreed that she had and Price told her that they no longer needed her since they felt they could not trust her with employee files. Wooten was involved in union activities. She wore union stickers and badges during the campaign for the December 1996 election; and she signed a union authorization card in December 1998. However, she had not openly supported the Union before her January 1999 discharge.

Plant Manager Phil Price testified that he discharged Lenora Wooten in January 1999. Wooten was a clerk and her work involved information that should not have been disclosed to others. Wooten was given a pay increase in January and she was asked to keep the information regarding her increase private. However, Wooten shared that information with the second shift clerk and the second-shift clerk complained when she did not receive a similar increase as Wooten. Upon learning of her wage increase and bonus Clarinetta Williams gave Respondent 2-week notice of resignation. Price interviewed Lenora Wooten and she admitted that she had told Clarinetta Williams about her pay increase. There was nou activity at the time of Wooten's discharge. Price denied that he told Shaniqua Moore that he had made an example of Lenora Wooten because she talked about her pay. Clarinetta Williams testified that Lenora Wooten was baking clerk on the shift before her in January 1999. One day Wooten was happy and said that she had her evaluation that day. Wooten told Williams that she had gotten a dollar and something raise and a $200 bonus. That night Phil Price gave Williams her evaluation and Williams became upset by the evaluation. She told Superintendent Norman Kirkland that she was giving her 2-week notice, that she would just find another job. The next day Lenora Wooten phoned Williams at work and said that she had been fired. Shortly after that Phil Price called Williams and told her that he had fired Wooten to make an example because they were not supposed to discuss their pay.

Credibility

Despite minor disputes over facts, as shown above, I find there were no material conflicts in the evidence over Lenora Wooten's discharge.

Findings

I find that the record does not show that Respondent had knowledge of Wooten's union activities. Therefore, I find that the General Counsel failed to prove the Wooten was discharged because of her union activities. However, General Counsel argued that Wooten was fired because she engaged in protected activity by discussing wages with another employee. The record shows that she was discharged after she told another employee about her pay increase and bonus. Respondent did not dispute that fact. However, Respondent contended that Wooten held a confidential position that involved knowledge of disciplinary actions against employees and, by discussing her own pay with another employee, she demonstrated that she could not be trusted to keep that information confidential. As shown above, Phil Price testified that he told Wooten not to discuss her pay with other employees. According to Price he told Wooten that was the reason she was being discharged.

The General Counsel argued that Lenora Wooten was an employee at the time of her discharge and that she was neither a managerial employee (*NLRB v. Yeshiva University,* 444 U.S. 672 (1980)), a supervisor (*Adco Electric*, 307 NLRB 1113, 1120 (1992); *Transportation Repair & Service*, 328 NLRB 107 (1999)), or a confidential employee (*RCA Communications*, 154 NLRB 34, 37 (1965). The General Counsel argued that Section 7 of the Act protects the rights of employees to discuss their wages. (*Super One Foods,* 294 NLRB 462 (1989).)[28]

Respondent pointed out that Plant Manager Price asked Wooten how he could trust her with confidential information in employee files if he could not trust her to keep her own salary confidential and Wooten responded that he could not trust her. Respondent contended that response by Wooten constituted the only reason for her discharge and that did not involve protected activity. However, there is no dispute but that Price called Wooten in and questioned her because she had discussed her salary with another employee. Moreover, Respondent failed to show that there is any logical connection between Wooten discussing her salary and her disclosure of confidential information. No evidence was received showing that Wooten did anything to compromise confidential information.

I find no evidence showing that Wooten was either a managerial employee or a supervisor. She did handle confidential

[26] The Union contended there was objectionable conduct in addition to that alleged as unfair labor practices. However, in view of my determination that the evidence in support of the unfair labor practices is more than sufficient to justify setting aside the election, I have not considered that additional evidence.

[27] In that regard the discharge of Lenora Wooten has not been considered in regard to 8(a)(5) allegations in the complaint.

[28] Enf. denied in part and granted in part at 919 F.2d 359 (5th Cir. 1990).

information. However, as shown above, there was no showing that her alleged protected concerted activity had any relationship to her duties with confidential files. The Board in *Super One Foods* found that employees have a right under Section 7 of the National Labor Relations Act to discuss their wages and an employer engages in an unfair labor practice by discharging an employee because the employee discussed wages with another employee. On appeal, the U.S. Fifth Circuit in the *Super One Foods* matter concluded that that employer's rule prohibiting employees from discussing their wages was unlawful under Section 8(a)(1).[29] Nevertheless, the court denied enforcement of the Board's illegal discharge finding, on the grounds that the activities of the alleged discriminatee that led to his discharge were not protected. Instead the court found that those activities which included misconduct by the employee in unlawfully acquiring wage information from a supervisor's desk, should be examined under the test applied in *NLRB v. Burnup & Sims, Inc.,* 379 U.S. 21, 23 fn. 3 (1964).[30] Under that test, according to the Court, the employer was justified in discharging the employee for engaging in misconduct by unlawfully acquiring wage information. For that reason the activity of the employee[31] did not constitute protected activity. As shown above, there was no evidence that Lenora Wooten engaged in misconduct. Instead she discussed her wage increase and bonus with another employee. That conduct is protected by section 7 of the Act. The Board stated in *Super One Foods*, that employees have a right under Section 7 of the Act, to engage in discussions regarding wages with other employees despite the existence of an employer rule prohibiting such discussions. Therefore, the proper standard here, as opposed to that applied in *NLRB v. Burnup & Sims*, is to determine whether the General Counsel proved that Respondent discharged Wooten because of her protected activities and, if so, whether Respondent proved it would have discharged Wooten in the absence of her protected activities. I find that the General Counsel did prove that Wooten was discharged because she discussed her wages with another employee. Respondent failed to show that it would have discharged Wooten in the absence of her protected concerted[32] activities. In fact Respondent's evidence illustrated that it did discharge Wooten because of her protected activities.

As shown above, Plant Manager Phil Price testified that Wooten's discussion of her wage increase with another employee, led him to believe that she could not be trusted to keep information gained through the exercise of her employee duties, confidential. However, the record failed to show any connection between Wooten's discussion of her wages and her duty to keep matters she learned during the course of her job such as employee personnel matters, confidential. Obviously, if she had been discharged for discussing wages of other employees after discovering those wages during her work, the situation would have been different. In fact, that was the situation in *Super One Foods,* 294 NLRB 462 (1989), where the Board found a violation. However, that was not the situation here. I find that General Counsel proved that Wooten was discharged because of her protected concerted activity and Respondent failed to prove that Wooten would have been discharged in the absence of her protected activity. (See *Manno Electric*, 321 NLRB 278, 280 fn. 12 (1996); *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp*., 462 U.S. 393 (1983).)

Clarence Williams

The General Counsel alleged that Respondent discharged Clarence Williams because of Williams' union activities. He was discharged shortly before the Union filed its Case 11–RC–6338 petition but well after the Respondent first learned of the union organizing activities. Clarence Williams signed one Union authorization card on March 8 and another on May 13, 1999. Williams testified that he passed out union leaflets in front of the plant every Tuesday and Thursday during the union campaign and was seen doing so by supervisors including his own supervisor, James Brown. Phil Price testified that he never saw any employees passing out union materials outside the plant. Michelle Mitchell testified that she works in human resources. Mitchell never saw Shaniqua Moore or Clarence Williams out handbilling for the Union. Williams testified that around the time that handbilling started he talked with Supervisor James Brown near his workstation. Andre Farmer was present. James Brown asked Williams if he was going to vote for the Union. Williams responded, "yes." James Brown said that the Union wasn't going to do any good; he didn't care if they take our money, and he wouldn't have anything to do with it. Brown admitted talking to employees about the Union but he denied that he asked Williams if he would vote for the Union or that he told Williams that the Union would only take his money. An employee did ask him about union dues and Brown said that he guessed they would have to pay union dues.

On the next workday after May 5,[33] Williams asked James Brown if he could work on the press because he was feeling sick. James Brown replied, "No, hell no, I ain't doing no damn favors. Take your ass over there. Load them into a cart or go home and get a doctor's note." Williams admitted that he replied, "F—k you." Brown denied making those comments to Williams. Brown testified that he twice caught Williams performing a different job than the one he had been assigned. On the second occasion, after Brown told him to return to his assigned job, Williams said f—k you to Brown and continued his unassigned job. Later, James Brown and Superintendent Norman Kirkland took Williams down to Sherman Gilliard's office. Gilliard told Williams that he was suspended. Sherman Gilliard subsequently discharged Williams. Supervisor James

[29] In its initial discussion of that rule the court noted that Appellant had not contested the NLRB finding that the rule was unlawful. However, later in discussing the allegation of illegal interrogation the Court found the rule was an unfair labor practice.

[30] In *NLRB v. Burnup & Sims*, above, there was a question regarding the impact of employee misconduct while the employee is engaged in protected activity.

[31] The activity of the employee according to the Court included both the misconduct of acquiring the wage information, and the subsequent discussion of that information with other employees.

[32] Discussion between two employees constitutes concerted activities.

[33] Clarence Williams worked last on May 7, and was discharged on May 17, 1999 (R. Exh. 142).

Brown admitted that Clarence Williams told him that he was sick after Williams came to work on May 7, 1999. Brown told Williams that he needed to leave but Williams did not leave. Later Brown saw Williams working on a job that was different than his assigned job. Williams was operating a press even though his assigned job was pushing carts. Brown told Williams to return to his regular job of pushing carts. After that Brown returned to the line and found Williams had again moved to the operating press job. Brown told him that he needed to be pushing carts but Williams replied, "f—k you," and Williams did not return to his assigned job. Brown reported the incident to Norman Kirkland. Brown brought Williams into Kirkland's office where Kirkland asked Williams why he had used profane language and why was he working at a job other than the one he was assigned. Kirkland sent Williams home. Several days after Kirkland sent him home and after he had tried to see Sherman Gilliard at the plant, Williams was called into Gilliard's office.

Sherman Gilliard testified about the discharge of Clarence Williams. According to Gilliard, James Brown called, then brought Clarence Williams to Gilliard's office. Brown told Gilliard that Williams was operating a press even though he was assigned the job of pushing carts. When Brown told Williams to return to his job Williams responded, "I don't feel well, I want to do this job today." Brown told Williams that he needed him pushing carts and Williams said, "Come on, man, you know I don't feel well today, let me do this job." James Brown insisted that Williams go back to his assigned job and Williams said, "f—k you." Williams then continued to operate a press. Williams told Sherman Gilliard that he did not see that as a big deal and that people talked like that all the time. Williams said that he planned on going back to his job even though he did not go at the time. He said that he did not feel well and Brown could give him a break. Williams was very loud in Gilliard's office. The Union was not mentioned by anyone during the meeting in Gilliard's office. Gilliard testified that he did not know how Williams felt about the Union. Williams was suspended and eventually discharged. (R. Exh. 142(a) and (b).)

Credibility

As noted above, I was not impressed with the demeanor of James Brown. I have discredited Brown's denials that he threatened employee Robert Atkinson with plant closure; that he threatened employee Simon Hamilton that Lewis Little was a wealthy man that would close the plant if the Union came in; that he interrogated employee Brenda Herrera about her Union activity; and that he interrogated employee Rhonda Summerlin and threatened her with loss of work. I was impressed with Clarence Williams' demeanor and testimony in light of the full record and I credit his testimony especially that regarding his encounters with James Brown as well as other testimony including that he passed out union materials in front of the plant.

Findings

The credited testimony of Clarence Williams established that he was involved in union activity before his discharge. He signed two union authorization cards and passed out union literature in front of the plant. He was asked by his supervisor, James Brown, if he was going to vote for the Union and he replied that he was. The credited testimony of Clarence Williams established that after he was known to favor the Union, James Brown told him, "No, hell no, I ain't doing no damn favors. Take your ass over there. Load them into a cart or go home and get a doctor's note." Subsequently, Brown escorted Williams to see the superintendent and Williams was eventually suspended, then discharged. In consideration of the allegation that Williams was suspended and discharged in violation of Section 8(a)(3), I shall consider whether the General Counsel proved that those actions were taken against Williams because of Respondent's antiunion animus and, if so, whether Respondent proved it would have suspended and discharged Williams in the absence of his union activities. (*Manno Electric*, supra; *Wright line*, supra; and *Transportation Management Corp*., supra.) I credited Clarence Williams' testimony showing that he engaged in union activity including signing two union authorization cards and distributing union literature in front of the plant and that he responded to his supervisor's unlawful interrogation by saying that he was going to vote for the Union. The record established that Respondent harbored antiunion animus. Before Williams last time to work at the Wilson facility, Respondent knew of his union activities and his intent to vote for the Union. After learning that Williams intended to vote for the Union, Supervisor James Brown refused his request for lighter work due to illness by saying, "No, hell no, I ain't doing no damn favors. Take your ass over there. Load them into a cart or go home and get a doctor's note." I am persuaded on the basis of that evidence that Respondent was motivated by its animus to suspend and discharge Clarence Williams.

Respondent contended that it would have discharged Williams in the absence of his union activities because he cursed his supervisor. As shown herein, Williams admitted that he told James Brown, "f—k you," after Brown cursed and told him he would not do any favors because Williams was sick. Respondent contended that it was its practice to discharge employees for cursing a supervisor and that it would have discharged Williams even though he did not have any prior disciplinary actions in his record. However, the General Counsel introduced records from Respondent's files showing that Respondent had tolerated employees cursing without suspension or discharge on numerous occasions (GC Exhs. 47, 48, 49, 53, R. Exh. 12). As to Respondent's contention that it did not tolerate employees cursing supervisors (CP Exh. 28) shows that probationary employee Tony Barfield was not disciplined when he used profanity towards a supervisor that was directing his work. Instead Respondent had a discussion with Barfield. Gwendell Penny received a first notice when she responded to a supervisor's direction to sweep the floors by saying, "I will not sweep no floor, hell no, I'm not sweeping no floors." Moreover, there was testimony that employees have cursed without discipline. Latasha Williams cursed Supervisors Bridges and Bryant. Larry Merrill testified that he has heard supervisors curse. Lavoris Barnes has heard Supervisors Knight, Perry, Parker, and Pitts curse in the plant. Simon Hamilton has heard James Brown curse in the plant. Daryl Artis has heard supervisors and employees curse and he has not heard of any of those being discharged. Respondent offered some of its records to support its position including

Respondent Exhibits 144(a) and (b), 145(a) and (b), 146, 146(b), 147(d), 171(b) and (c), 173(b), 143 and 143(b). However, the General Counsel contended that Respondent Exhibits 144(a) and (b) show that Chitita Pigford voluntarily quit after refusing a job and she told a supervisor in a loud manner four time to kiss her ass and also told the supervisor "you ain't shit mother fucker, you are a stupid ass cracker;" as to Respondent Exhibits 145(a) and (b), record documents show that employee Applewhite was terminated on March 1, 1999, for cursing after having been suspended on February 25 for using language that almost caused a fight and the February 25 incident was the fourth time Applewhite had almost caused a fight; Respondents Exhibits 146 and 146(b) show that Craig Best was not fired but that he threw his hat on the floor and said, "F—k you I quit;" Respondent Exhibit 147(d) failed to show disciplinary action was taken for cursing; instead it shows disciplinary action for "creating a disturbance, yelling, using abusive language and arguing with another employee;" and instead of showing an employee was discharged on the first disciplinary action, Respondent Exhibits 171, 171(b) and (c), show that Linda Whited was fired after telling a supervisor "I'm going to kick your ass" at a time after she had received disciplinary actions after her supervisor told her to clean up her work area she started fussing, got angry and said "fuck this shit," and she had walked up to the supervisor as though she wanted to fight and another supervisor separated her from the supervisor. In view of the above and the full record I find that Respondent suspended and discharged Clarence Williams because of its antiunion animus and Respondent failed to prove that it would have suspended and discharged Williams in the absence of his union activities.

Margaret Liggins

Margaret Liggins worked for Respondent from June 1998 until August 1999. She supported the Union by wearing union stickers, being on the handbill line 2 days before the election and speaking up in support of the Union during company meetings. On election day she wore union stickers in the presence of Acting Supervisor Charles King. During the union organizing campaign Charles King came to Margaret Liggins at her work and asked her how she felt about the Union. Liggins replied that her feelings about the Union were none of his business. On July 30, 1999, Liggins' supervisor, Penny Holmes, asked if she wanted to stay after the end of her regular shift. Liggns asked how long she would have to stay and Holmes said 10:30. Liggins also asked Superintendent Marvin Peterson and he said they would be out of there by 11 p.m. At 11:15 p.m., Liggins asked Penny Holmes if she could go home and Holmes told her that she must stay. Liggins then talked to Marvin Peterson and Phil Price, telling them she was going home and that she didn't feel like being there. Phil Price told Liggins that she would have to be paid on Friday instead of Thursday, for the next 3 weeks. Liggins went back to the line and reported she was going home. She waited while Penny Holmes brought up a replacement worker, then left. As she was leaving, Penny Holmes said to her that she couldn't get her paycheck until Fridays for the next three weeks. When Liggins next reported she was directed to Sherman Gilliard. Gilliard asked her what happened on Friday night and Liggins told him. Then, on the next Thursday night Liggins was sent to Marvin Peterson. Peterson told Liggins that she was not a team player and that Sherman Gilliard had told him to suspend her until Tuesday. Peterson told Liggins not to wait around the plant. She replied that she would have to wait in her car for the two other employees that rode with her. On Tuesday afternoon Margaret Liggins phoned Gilliard and asked if she was still suspended. Gilliard said he would call her back at 3 p.m.. Liggins phone was disconnected so she did not wait on Gilliard's call. She reported for work. She waited for 2 hours before talking with Gilliard. Gilliard told her that he, Marvin Peterson and Phil Price had decided to terminate her since she had walked off her job. She replied that she had told three people she was leaving. Gilliard asked if she was sure that no one had told her that she could not go. She replied they had not. Gilliard said that she was terminated. Liggins testified that she had left work before and that the practice was to tell her supervisor she was leaving.[34]

Bacon Floor Supervisor Charles King supervised Margaret Liggins. He denied that he saw Margaret Liggins wearing Union stickers and he denied that he asked her how she felt about the Union. Sherman Gilliard testified that he did not see any Smithfield employees handbilling at its Wilson facility and he did not see any "Union Yes" buttons or stickers in the plant. Plant Manager Phil Price testified that Margaret Liggins was vocal in the company meetings in favor of the Union but that did not play a role in her termination. On the last night worked by Liggins, Phil Price talked with her. She told him that she planned to go home. The supervisor asked Price what should they do and he told the supervisor not to let Liggins go home. Liggins then came in the office and said she was going home and Price replied that she could not go home. Liggins said that she was going to leave anyhow and she did. Marvin Peterson is the second shift superintendent. On July 30, 1999, a decision was made to shut down several of the product lines that were running at that time. Only two of seven lines continued to run. Margaret Liggins was one of only two operators that could run an operation required on the remaining functions. Peterson was prepared to have the supervisor, Penny Holmes, do the job if Margaret Liggins decided to leave when a number of other employees were released. However, Liggins volunteered to stay. At the 9 o'clock lunchbreak Margaret Liggins asked Peterson when would they be getting off. He replied they should be finished in 2 hours. Later, Penny Holmes told Peterson that Margaret Liggins wanted to go home and Peterson told Holmes that Liggins could not leave, that she had to stay until we finished running the product. Around 11 p.m. Liggins came in the office and asked for her timecard saying that she was going home. Phil Price, Marcella Guillen, and Eddie Paula were also present. Peterson told her she could not leave and Liggins replied that he had said they would be done by 11 p.m. Peterson replied that they should have been done in a couple of hours if the operation had run like it normally ran. Liggins replied that she was leaving because this is what she was told. Phil Price

[34] A week after the July 8 election Respondent posted a bulletin stating that employees had to tell their supervisors before leaving work early.

told Liggins, "Margaret, if you leave and go home you will not be getting your paycheck until Friday night at the end of the shift because of a new policy that we had just put in place because attendance was so bad on the second shift on Friday and Saturday nights." Peterson recalled that the shift ended at 12:30 p.m. Peterson left after that shift and was gone for several days. When he returned he spoke with Sherman Gilliard and Phil Price about Liggins. The three of them decided to suspend Liggins and that led to her termination. She was terminated because of her conduct in walking off the job on July 30. Peterson knew nothing of Liggins engaging in union activity and union activity had nothing to do with the decision to discharge her. Peterson was asked if he told Liggins that she was not a team player and he replied, "We had conversation, not only with Ms. Liggins but the whole night shift . . . every department about teamwork, about commitment, about attendance and about creating an environment where everyone could come in, do their job and excel."

Eddie Paula did not recall a meeting with Phil Price, Marvin Peterson and Margaret Liggins where Liggins asked to go home. Sherman Gilliard recalled meeting with Margaret Liggins in his office a few days after she left work. Gilliard told Liggins the meeting involved her leaving Friday night without permission. Liggins said that she did not leave without permission. Liggins said that she elected to stay and work on Friday night after being told they would finish by 11 p.m. At 11 p.m. they were still pressing meat and Liggins told Supervisor Penny Holmes that she had been told they were going to be out of there around 11 p.m. and she had to go home. Liggins was then relieved at her job to go to the restroom and during that time, Liggins went into the office. Marvin Peterson and Phil Price were in the office. Liggins said that she had been told they would be off at 11 p.m. and that she was leaving. Phil Price told her that if she left she would not be able to get her paycheck on Thursday for the next three Thursdays. Instead she would be getting her check on Fridays. Gilliard told Liggins that the matter was not concluded and that they would talk again when Marvin Peterson returned from out of town. On August 10, after calling twice, Margaret Liggins came to Sherman Gilliard's office. Gilliard contacted Marvin Peterson by phone. Peterson told him that he and Penny Holmes had determined that Liggins should be terminated. Liggins said that Peterson and Price were lying and this was their way of getting back at her. The Union was not mentioned during the conversations with Liggins and the Union did not play a part in the decision to discipline her.

Lakenya Harris was disciplined regarding a clock-out incident. Her ride was ready to leave 5 minutes before Harris was scheduled to leave on Memorial weekend. She told Eddie Paula that she needed to leave and he told her to see Marvin. Marvin told her that she would not receive her holiday pay if she left then. Harris left. The following Monday she met with Sherman Gilliard and Marvin. They told Harris that she would not have a job if that happened again. Velma Lee Hinnett also works for Respondent. In July 1998 she had to leave early and she told her supervisor. The supervisor told her that she could not leave. When a supervisor named Greg came up she asked him and he told her that she could leave and that they did not have a right to require her to stay at work. She left and her supervisor gave her a writeup when she returned to work (GC Exh. 9). Sherman Gilliard testified about Charging Party 16 and Respondent Exhbit 148(l). Serap Adymir was disciplined for the same offense of throwing good meat into inedible tubs on the same night as Margaret Liggins. Adymir said that Liggins had coerced her into throwing the meat into the inedible tubs. She was suspended just like Liggins.

Supervisor Luther Hardison Jr. issued four writeups (GC Exh. 31–34) over a single incident. Eleven employees were assigned the same task and the four press operators that were given writeups, left before completing the assigned task. The four left around 3:30 p.m. Their shift routinely ended at 3:15 p.m. The seven remaining employees stayed and finished the task. Hardison did not discharge the four because their shift had actually ended and the assignment was an additional task.

Credibility

I have closely examined the several versions of events of the evening of July 30. It appears that no one recalled exactly what occurred but that several of the witnesses correctly recalled some of the chain of events. In that regard I have credited Margaret Liggins because her testimony was supported in large measure, by other evidence and because of my observation of her demeanor. I am also convinced that Phil Price and Marvin Peterson honestly testified in at least some respects. In that regard I am convinced that Margaret Liggins was a known union supporter as recalled by Phil Price and I am convinced that Liggins left work on July 30 without receiving permission to leave. I also credit the testimony of both Liggins and Peterson that Phil Price told Liggins that she would not receive her pay until Fridays at the end of the shift because of a new policy.

Findings

The test for determining whether Respondent discharged Margaret Liggins because of her union activities is set out in *Manno Electric*, 321 NLRB 278, 280 fn. 12 (1996); *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); and *NLRB v. Transportation Management Corp*., 462 U.S. 393 (1983). I shall consider whether the General Counsel proved that Liggins was fired because of Respondent animus and, if so, whether Respondent proved it would have discharged Liggins in the absence of her union activity. The credited evidence proved that Margaret Liggins was heavily involved in union activities and Respondent knew her feelings for the Union. Plant Manager Price admitted that Liggins was a vocal union supporter. During the organizing campaign Liggins's supervisor asked her how she felt about the Union and Liggins replied that was none of his business. Shortly before her discharge Superintendent Marvin Peterson told Liggins that she was not a team player and that Sherman Gilliard had told him to suspend Liggins. Against that background and in view of the full record showing that Respondent strongly opposed the Union, I find that the General Counsel proved that Respondent suspended and discharged Margaret Liggins because of its opposition to the Union.

Respondent contended that Liggins walked off the job on

July 30 despite supervisory directives not to leave and that she would have been suspended and discharged in the absence of her union activities. In that regard the credited testimony shows that after being asked whether she would work over on July 30, Liggins asked Supervisor Penny Holmes how long they would need to work that night. Holmes replied, "[N]o later than 10:30." Later, Liggins asked Marvin Peterson and Peterson replied that if the employees ran the lines like they were supposed to they would be out of there no later than 11 p.m. Around 11:15 p.m. Liggins told Supervisor Holmes that she wanted to go home. Holmes told Liggins that she could not leave. Liggins then saw Marvin Peterson and Phil Price and told them that she was going home. Liggns said that she did not feel well. Price told Liggins that if she went home, she could only get her paycheck on Fridays for the next three weeks. Liggins went back to the job and waited until Supervisor Holmes found someone to relieve Liggins. She clocked out in the presence of Price and Peterson. Price told Liggins to remember that she could only get her paycheck on Fridays for the next three weeks. In determining whether that evidence supports Respondent and shows it would have suspended and discharged Margaret Liggins in the absence of her union support, I shall consider what the record shows as to Respondent's normal practice under similar situations. Liggins testified that before her termination it was Respondent's practice to permit her to leave and she had done so on a number of occasion after telling her supervisor that she was leaving (Tr 154). Shortly after the July 8 NLRB election Liggins discussed a bulletin board notice with Superintendent Marvin Peterson. The notice advised employees not to leave work without telling their supervisor. Peterson told Liggins that employees did not have to ask their supervisor for permission to leave but the employees did have to notify their supervisor before leaving (Tr 155). Denise Williams received a warning showing that the supervisor had advised Williams to inform her supervisor or a manager if she had to leave work early (GC Exh. 11). Robert Atkinson was warned on December 9, 1998, for failing to follow instructions and leaving work without permission (GC Exh. 7). Lakenya Harris was warned for leaving the plant without consulting a supervisor ((GC Exh. 8). Probationary employee Alfred Bates was warned for walking off the job during the lunchbreak (GC Exh. 40). Respondent's records include two memos to file and a warning to Jerry Brown for two instances of his walking off the job contrary to direction of his supervisor (GC Exh. 18(a)–(c)].

I find the above evidence shows that it was not Respondent's practice to discharge employees for walking off the job after notifying a supervisor. Respondent failed to show that it would have suspended and discharged Liggins in the absence of her union activity. I find that Respondent engaged in an unfair labor practice by suspending and discharging Liggins.

Lavoris Barnes

Lavoris Barnes worked for Respondent as a palletizer from March 1998 until April 20, 1999. He wore union stickers to work and placed some union stickers on his pallet jack. Barnes spoke to other employees about the Union. He signed a union authorization card on March 11, 1999 (GC Exh. 135), and he talked with Supervisor Tony Knight about the Union while at work. Knight said that the Union was no good for the employees. Supervisor Fred Perry asked Barnes why he had a union sticker on his pallet. Barnes replied that a lot of people have various stickers on their jacks. Perry said that employees "can't put union stickers on the pallet jacks." During work Barnes would yell out what time is it and union supporters would respond that it is union time. Harold Ivery noticed supervisors including Tony Knight, Dwight Weaver, Fred Perry, and Phil Price around when Barnes yelled what time is it. Barnes attended a meeting where Lewis Little spoke to the employees. Little asked the employees what the Company could do to help change the place to help make it better. Lavoris Barnes replied, "Get a union." Little asked what they could do to not have a union but to make the place better. A week after the meeting Plant Manager Phil Price thanked Barnes for bringing up that his wife had been penalized under the absenteeism point system.[35] Phil Price said they were going to change the point policy because of what Barnes said. As Barnes was leaving the plant on his last day of work, his supervisor told him to go see Sherman Gilliard. Gilliard told Barnes that Julius Joyner and Arbutus had heard Barnes make threats about Fred Perry and that he was going to terminate Barnes but not yet. Sherman Gilliard told Barnes to call back on Friday. As Barnes walked away he threw a marker down the hallway. Barnes went to his locker to get a sweater and saw Sherman Gilliard and police at the doorway. Gilliard told the police to escort Barnes off the premises. After getting home Barnes phoned Phil Lytle who told him that Sherman Gilliard had said that Barnes had quit. Barnes then phoned Lewis Little who said he would look into the matter. Gilliard phoned Barnes and said they had discovered that Barnes had not made any threats and that if he had not quit he would be coming back to work. Barnes denied he had quit.

Shipping Manager Phillip Lytle was Lavoris Barnes' supervisor. He was at an April 20, 1999 meeting with Barnes and Sherman Gilliard. Gilliard asked Barnes for his version of an incident that may have involved Barnes threatening his supervisor. Barnes did not deny that he made a threat. Barnes said that he just did not think it was right the way that supervisor had treated Barnes' wife. Gilliard told Barnes that he was getting all sides of the story and he told Barnes to go home and call Gilliard on Friday. Barnes said that he wasn't going to be suspended and he'd quit before he was suspended. Barnes took off his helmet and slammed it down on the floor. Lytle denied that Gilliard told Barnes that he was going to fire him but not yet. Sherman Gilliard asked Lytle to go with Barnes to Barnes' locker. As Barnes was leaving Gilliard's office her took a magic marker out of his pocket and threw it across the administrative office. After they left Barnes' locker Gilliard was standing nearby with a police officer. The officer told Barnes that she was there to escort him off the property.

Arbutis Nolasco is a records entry clerk for Respondent. She talked with Lavoris Barnes in the cafeteria on April 20, 1999. Nolasco told Barnes that he didn't need to have a glass Snapple bottle with him in view of safety rules. Barnes said that he

[35] The point system was changed so as to avoid penalizing employees for taking time off to care for sick children.

wasn't worried about it and Nolasco said that Barnes could get written up. Barnes said that the bottle would make a good weapon if was broke, "you could stab somebody with it." Later during her testimony Nolasco said that Barnes also said, "[I]f the bottle couldn't do the job that he had a gun in his vehicle that could take care of the problem." Nolasco told Barnes that he should not make statements like that in view of what had happened on the floor.[36] About 5 to 10 minutes after her conversation with Barnes, Nolasco reported what Barnes had said to Sherman Gilliard. Later that day Nolasco was in the locker room, which adjoins Sherman Gilliard's office, and she could hear Barnes arguing in the office. Sherman Gilliard testified that he also talked with Julius Joyner and Joyner corroborated Nolasco. Gilliard talked with Security Guard Boris Farmer about the possibility that Barnes had a gun in his car. Gilliard then told Phil Price he was calling Barnes down to his office. Gilliard alerted the police to have an officer present because there may be trouble. He met with Supervisor Phil Lydle and Barnes and Gilliard told Barnes that some allegations had been made that Barnes made disturbing comments in the break room and that he was being suspended pending an investigation. Barnes became loud saying that he didn't believe this and that he was going to be suspended then fired. Barnes said, "I'll tell you what, I'm not going to give you the opportunity to fire me, I quit." Barnes continued to talk in a loud voice saying he was going to get his stuff and as he left the office he threw a magic marker across the room. Barnes told Gilliard on the phone the following day that he would take the suspension and was not going to quit. Sherman Gilliard replied it was too late that Barnes had already quit. Gilliard denied telling Barnes that he was going to fire him but just not yet and Gilliard denied that the Union had anything to do with the incident involving Barnes. Julius Joyner was a supervisor during the union campaign. He did not supervise Lavoris Barnes but he recalled the incident of April 20, 1999. He and a coworker named Arbutus walked into the break room and sat near Barnes. Arbutus asked Barnes if he had a bottle in his hand. Barnes became angry and said something like I'm going to knock somebody in the head or something like that. Joyner left before Arbutus. Later, Sherman Gilliard talked with Joyner about the incident. Joyner told Gilliard that he didn't want to get involved in view of Barnes' character and attitude. A week or so later he saw Lavoris Barnes at a gas station. Barnes said to Joyner, "[S]omebody told me that you had said something about me with a bottle and my gun and stuff like that to Sherman." Joyner told Barnes that he didn't know what Barnes was talking about and Barnes said that he just wanted to know. Quality Assurance Manager Casey Tribble saw Lavoris Barnes in Sherman Gilliard's office on April 20, 1999. He did not hear anything until the door opened and Barnes walked out with a marker in his hand. Barnes was screaming and yelling and he threw the marker toward Phil Price's office. Barnes phoned Supervisor Lytle the following afternoon. Barnes said that he wanted to take the suspension and that he did not want to quit. Lytle told Barnes that he would have to call Sherman Gilliard about that.

[36] Barnes had a confrontation with Supervisor Fred Perry.

Credibility

In view of the full record and corroborative testimony I am convinced that Lavoris Barnes did support the Union by, among other things, placing union stickers on his pallet jack. I am convinced that Respondent knew that Barnes supported the Union. However, I am also convinced that Arbutis Nolasco and Julius Joyner were credible witnesses. Arbutis Nolasco was corroborated to the extent Joyner was present in the conversation with Barnes. I credit Nolasco's version of the events in the cafeteria. I find that Lavoris Barnes was not truthful in his testimony that he did not raise his voice in his meeting with Sherman Gilliard and Phil Lytle on April 20. Arbutis Nolasco overheard Barnes in Gilliard's office and Casey Tribble overheard him screaming and yelling as he left Gilliard's office. Due to the full record and demeanor of the witnesses, I credit the testimony of Phil Lytle regarding that meeting in Gilliard's office. Lytle's testimony appears to be the most reliable of those in the meeting.

Findings

The standard applied in discharge cases in that applied in *Manno Electric*, supra at 280 fn. 12; *Wright Line*, supra; and *Transportation Management Corp.*, supra. The General Counsel must show that Respondent discharged Lavoris Barnes because of antiunion animus. The record does show that Barnes supported the Union and that Respondent knew of his support for the Union. Moreover, as in all the other alleged unlawful discharges than occurred after the Union campaign became known around March 24, the evidence of Respondent's antiunion animus was strong. Therefore, I find that the General Counsel proved a prima facie case of discriminatory discharge. I shall consider whether Respondent proved that Lavoris Barnes would have been terminated on April 20 in the absence of his union activities.

The credited testimony of Arbutis Nolasco proved that Barnes made strong comments in the cafeteria including threats that he could use a bottle as a weapon and if the bottle did not do the job there was a gun in his car. Barnes was holding the bottle and his threat had the appearance of immediate danger. In any event, I have credited Nolasco's testimony including her report of the incident to Sherman Gilliard. I also credit her testimony that she subsequently overheard Lavoris Barnes in Sherman Gilliard's office and I credit evidence including that of Casey Tribble that Barnes was screaming and yelling and he threw a magic marker[37] as he left Sherman Gilliard's office. As shown above I also credit Phil Lytle's testimony about the meeting involving Gilliard, Barnes, and Lytle on April 20. That testimony shows that Gilliard told Barnes he was being suspended while Gilliard investigated the allegations. Barnes became upset and loud and said that he was not going to be suspended, "he'd quit before he was suspended." Barnes slammed his helmet on the floor. Lytle testified that Barnes said he was not going to be suspended again.[38] Lytle testified that as Bar-

[37] Barnes admitted that he threw a magic marker.

[38] Lytle testified that Lavoris Barnes had an earlier suspension a few weeks before April 20. Lytle testified that on that occasion a woman started cursing at Barnes, that Barnes took it for a while and then he

nes left Gilliard's office he threw a magic marker across the administrative office toward Plant Manager Phil Price's office. After Lytle walked Barnes to his locker they met Sherman Gilliard with a police officer. The police officer escorted Barnes out of the plant. The next day Barnes phoned Lytle and Gilliard and said he would take the suspension. Gilliard told him that he had quit. Barnes termination paper (PTF) shows "suspended/elected to quit" (GC Exh. 5). In view of that evidence I am convinced that Respondent proved that Lavoris Barnes would have been terminated in the absence of his union activities. I find that Respondent did not commit an unfair labor practice by suspending and discharging Lavoris Barnes.

Denise Williams

Denise Williams worked from February 22 until July 20, 1999. She supported the Union by attending union meetings, signing a union authorization card,[39] and standing on the handbill line where the Union and other employees were passing out flyers. Williams became sick at work and called Marcella Guillen. Marcella told her to clock out while Marcella found the superintendent. Williams borrowed another employee's car and drove to Wilson Hospital. The emergency room was full so Williams drove home and phoned Brenda Flood. Brenda Flood drove by the plant with Williams to return the other employee's car keys and then on to the Wilson Hospital where Denise Williams returned to the emergency room. She saw a doctor and was diagnosed with a virus. Denise Williams phoned Marcella Guillen and told her that she would not be returning to work that night. When Williams next returned to work she saw Marvin Peterson who told her that she had to see Marcella. Phil Price came by and Williams asked to speak to him. Price said they needed to get Marvin Peterson. Price told Peterson that Williams could not get a point for missing work because she had a doctor's excuse (GC Exh. 10). Price told her to go wash up and report for work. Later, around 6:20 p.m., Charles King told Williams that she was to see Michelle. Michelle Mitchell told her they were going to have to get rid of her because she had missed work after signing a paper that she would not miss any more. Williams talked to Phil Price the next morning but he said they were going to have to let her go. Price said it was because she did not enter the hospital when she left the plant.

Marcella Guillen testified that on July 16, 1999, before the 6:30 p.m. break, Denise Williams was sick in a restroom. Williams complained to Guillen that her tummy was hurting. At Guillen's suggestion Williams went to see the plant nurse. Subsequently Superintendent Marvin Peterson asked Guillen to check on Williams. She found Williams in the picnic area complaining about her tummy. Denise Williams said that she wanted to go home but she was afraid of going home because of her absentee points and she did not want to be fired. Guillen, who is Williams's timekeeper, told Williams that if she went to a doctor and brought Guillen a doctor's note, she would not have any trouble. Williams asked to see Marvin Peterson and Peterson came down and talked with Williams. Guillen picked up keys from another employee and gave them to Williams at the guard shack. Marcella Guillen testified that she maintained a daily absentee report. Respondent introduced Respondent's Exhibit 47 as her report for July 16, 1999, which shows that Denise Williams had 5.5 points[40] and she left work at approximately 7:30 p.m. That night Williams phoned Guillen around 9:30 to 10 p.m. and said that she was at the hospital about to leave. Williams said that she was okay and would bring a doctor's note in the next day. Penny Holmes, a supervisor, then told Guillen that she had seen Denise Williams jumping up and down in the parking lot during the 9 to 9:30 p.m. break. Williams brought a doctor's note in the next day and Guillen observed that the note indicated that Williams left the doctor at 11 p.m. Guillen asked Marvin Peterson to show that to Michelle Mitchell and Guillen also mentioned Penny Holmes's report that Williams was in the parking lot during the 9 p.m. break.

Michelle Mitchell works in human resources. On July 20, 1999, while Sherman Gilliard was out of town, Phil Price told Mitchell to investigate a July 16 instance of Denise Williams leaving early. Williams had a bad attendance record (R. Exh. 34). In addition to Respondent Exhibit 34, Phil Price gave Mitchell General Counsel's Exhibit 10, which is a slip showing the time Denise Williams checked into the hospital and the time she was released. Michelle Mitchell then called Marcella Guillen. Guillen verified that Denise Williams had left around the time of the first break, at 6:30 or 7 p.m.[41] Mitchell phoned the hospital and was told that Denise Williams had checked into the hospital at 10:05 p.m. and was released at 11:05 p.m. Mitchell also reviewed General Counsel's Exhibit 11. She then called Denise Williams into the office. Williams told Mitchell that she first left the plant around 8 p.m., went to the emergency room, then left and returned to the plant to give somebody car keys and then went back to the hospital. Williams also said that she had called Marcella Guillen around 9:45 or 10 p.m. and told her of the diagnosis from the doctor. Subsequently, Marcella Guillen confirmed to Mitchell that Denise Williams had phoned with her doctor's diagnosis around 9:45 or 10 p.m. Mitchell also talked to supervisor Penny Holmes. Holmes told her that she saw Denise Williams outside "jumping around, dancing around" during her lunch break at 8:30 or 9 p.m. Mitchell told Denise Williams she had been discharged but, according to Mitchell, Williams kept saying that she was "really sick and why didn't I believe her." Mitchell testified that she was unaware of any Union activity by Denise Williams.

Phil Price testified that Respondent was having a difficult time with attendance on Friday nights and that had been especially true regarding Denise Williams. After learning that she may be discharged Williams talked with Price. She told him about having to leave on the previous Friday night because of illness. Price then called in Marvin Peterson while Williams was still present. Peterson[42] said that he had not had an oppor-

started cursing back. Both the woman and Lavoris Barnes were suspended.

[39] Denise Williams signed an authorization union authorization card on May 21, 1999 (GC Exh. 281).

[40] Guillen explained that points are recorded under "badge numbers."

[41] See R. Exh. 47 which shows that Williams left the plant at19:50 (either 7:30 or 7:50 p.m.).

[42] Marvin Peterson testified that he was told about Denise Williams being ill on July 16. Between 6:30 and 6:55 p.m. Marcella Guillen

tunity to look into the matter. Price said that if Williams had been out sick and had a doctor's excuse then she had a legitimate reason for being absent. On the way out that night Price talked with Michelle Mitchell. Mitchell asked if he was aware that Denise Williams did not see a doctor until 10 p.m. and that she had been in Respondent's parking lot at 9 p.m.[43]

Credibility

On initial reflection the evidence regarding Denise Williams and the evening of July 16 appears confused. However, on close examination the record shows that several points are not disputed. The evidence includes the testimony of Denise Williams and records from Respondent and the hospital, plus testimony of witnesses including Marcella Guillen, Marvin Peterson, and Michelle Mitchell. It appears that after being told that she would need a doctor's excuse to avoid disciplinary action, Denise Williams left work between 7:30 and 8 p.m. but did not log in to the Wilson Hospital until 10 p.m. Williams testified that she returned to the plant with Brenda Flood to deliver some car keys and a supervisor saw Williams in the parking lot around 9 p.m. It is not disputed that Williams phoned the plant around 9:30 or 10 p.m., and told Marcella Guillen that she would not return that night but would bring a doctor's excuse in the next day. It is also not disputed that Williams did not leave the hospital until 11 p.m. The record shows that Williams testified in substantial accord with records from Respondent and the hospital plus testimony by Marcella Guillen and Marvin Peterson. To the extent her testimony was not disputed by records or credited testimony, I do not discredit the testimony of Denise Williams.

Moreover I am not persuaded that Respondent's witnesses were always truthful. For example, I do not credit testimony that Respondent was unaware of Williams' union activities. Throughout the hearing, Respondent offered testimony that supervisors and management officials were unaware of which employees if any, were involved in handbilling in front of the plant. However, as shown above, Respondent's surveillance cameras were directed on the handbilling activity. Moreover, Plant Manager Phil Price testified that he was aware of Denise Williams's support of the Union. He admitted that she was involved but not as extensively as Margaret Liggins and Shaniqua Moore, whom he characterized as strong union activists. Therefore, I credit evidence showing that Respondent was aware of her union activities and I discredit testimony to the contrary.

Findings

The standard I shall apply is that outlined in *Manno Electric*, 321 NLRB 278, 280 fn. 12 (1996); *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); and *NLRB v. Transportation Management Corp*., 462 U.S. 393 (1983). The General Counsel has the burden of proving that Respondent discharged Denise Williams because of its antiunion animus and, if that is done, Respondent may prove that it would have discharged Williams in the absence of her union activity. The credited evidence shows that Williams engaged in activity on behalf of the Union, that Respondent was aware that Williams supported the Union and that Respondent harbored antiunion animus. Moreover, the events that led to Williams's discharge occurred 8 days after the NLRB election. Therefore, the timing favors a finding that Williams was fired because of her union activity. The evidence regarding the evening of July 16 shows that Respondent was aware that Denise Williams became ill while at work and there is no dispute but that she saw a doctor that evening and, as directed by her superintendent, Williams brought a doctor's excuse in the following day. In view of that evidence I find that the General Counsel proved that Respondent discharged Denise Williams because of its animus against the Union.

Respondent, on the other hand, offered evidence that it would have discharged Williams in the absence of her union activity. Before leaving work on July 16, Williams had accumulated 5.5 absentee points. The determinative level for discharge is 6.0 or more points. There is no dispute but that an unexcused absence on July 16, would have caused Williams to accumulate 6.0 or more absentee points. The evidence shows that Williams was aware of her situation. Respondent apparently decided to discharge Williams despite the fact that Williams brought in a doctor's excuse allegedly because Williams had misrepresented facts and compromised the integrity of her doctor's excuse.[44] The General Counsel argued that the undisputed evidence showed that Williams was ill early on the evening of July 16. That position appears to coincide with testimony by Marcella Guillen and Superintendent Marvin Peterson. Both Guillen and Peterson saw Williams before she left the plant on July 16, and there was no dispute in either's testimony but that Williams was sick. Moreover, the General Counsel contended that Williams did not misrepresent the facts and that she admitted that she initially drove to the hospital but did not check in because the emergency room was crowded, she then drove home and returned to the plant with another employee to return yet another employee's keys, that she then returned to the hospital and logged in and that she phoned Marcella Guillen at the plant and told Guillen she would not return that night but would bring in a doctor's excuse the next day. The General Counsel argued that Williams's testimony squares with docu-

came in and told Peterson that an employee was ill. Peterson went to Denise Williams along with Guillen. Williams said she had eaten something and may have food poison and that she needed to see a doctor. Williams asked if that would count against her. Peterson told her that if she left and brought back a doctor's note, it would not count against her. Peterson checked to make sure Williams had left and was told by the guard that she drove away in a car from the parking lot.

[43] Jane Rosenmarkal is the director of risk and health at Wilson Hospital. Respondent introduced R. Exh. 41 through her testimony. Those documents showed which patients checked into the hospital emergency room between 6 p.m. and 11 p.m., on July 16, 1999. Denise Williams signed in only at 10 p.m. R. Exh. 42A was received and showed that Denise Williams was treated in triage at 2158 (9:58 p.m.) and R. Exh. 42B was received and showed that Denise Williams was treated by a nurse at 2200. Those exhibits show that Denise Williams was treated in a hospital room at 2210 and seen by a physician at 2220.

[44] Respondent's records reflect that Williams's doctor's excuse was ignored. There is no mention of the excuse and the record shows she was "terminated for attendance—was warned previously last infraction on 7–16–99.–(GC Exh. 12).

mented evidence and with a report that she was seen in the parking lot around 9 p.m.; that her testimony squares with that of Marcella Guillen regarding Williams phoning her between 9:30 and 10 p.m.; and her testimony squares with records showing her treatment at the hospital. Moreover, there is no dispute but that she gave Respondent a doctor's excuse the following day. In view of that evidence and the full record, I find that Respondent failed to prove that it would have discharged Williams in the absence of her union activities. Despite the fact that her story about events on July 16 was somewhat peculiar, that story was corroborated rather than confused by other events. The evidence did not show that she was dishonest regarding events on the evening of July 16. Moreover, as to Respondent's absentee policy, the evidence proved that Williams did what she was told to do. Even though she did not check into the hospital immediately after leaving work, she did check in later that night and there was no showing that Respondent had any basis to question that she initially left the hospital without checking in because of the crowd in the emergency room. Also there was no evidence that she didn't have a reasonable basis to return to the hospital later perhaps on the belief that the crowd would have thinned. Michelle Mitchell testified on direct examination that Williams was discharged because of her absentee record. However, that testimony was disputed by evidence available to Respondent, which showed that Williams produced a legitimate doctor's excuse. Respondent failed to refute evidence that Superintendent Marvin Peterson told Williams she would not be disciplined if she produced a doctor's excuse. On cross–examination, Mitchell added that dishonesty was an additional reason for Williams's discharge but, as shown above, despite the peculiar state of events, Williams's recitation of events on the evening of July 16, was not shown to be untrue. She admitted that she left the hospital, that she drove home and then returned to the plant, that she then went back to the hospital that she phoned Marcella Guillen and that she was treated at the hospital. I find that Respondent failed to prove that Williams would have been discharged in the absence of her union activities and that Respondent discharged Denise Williams in violation of Section 8(a)(1) and (3) of the Act.

Warnings

Larry Merrill

Larry Merrill worked as a crew-leader for the press operators. He was employed by Respondent from June 18, 1998, until February 25, 2000. Merrill was active in the union campaign. He passed out handbills, attended Union meetings and was a union observer during the election. He signed a union authorization card on April 14, 1999. During the union campaign Sherman Gilliard told Merrill to stop by and see him after his break. Gilliard asked Merrill what they could do to make the plant better, to try to keep the Union out. Larry Merrill suggested talking with him, Val Davis and Pop to work out a list of things. Gilliard said they would be bound by a legal document if they put things in writing. Gilliard said they had already given the people a credit union and a 401(K) plan and a lot of things are in the process to be done for the employees. Merrill told Gilliard that it was not a money issue but it was a respect level that he got from the supervisors. Gilliard said they had been holding attitude classes on Saturdays and that the supervisors' attitudes would be getting better toward the employees. Jeff White came to Merrill at the copy machine and asked, "[s]o, what do you think about the Union?" Merrill said they could be better with a union and could get more respect. White replied, "Well, I get the feeling that you don't like the job, and if you don't like the job why don't you just quit." Jeffrey White denied that he asked Larry Merrill what he thought about the Union. He did tell Merrill that if he did not like his job that he should quit. White denied telling Merrill that White helped close down two plants. He denied telling any employee that a union could help or hurt but it usually hurts employees. But he did tell employees that sometimes in collective bargaining the union could help them and sometimes it could hurt them, as far as giving them more or less money. White denied telling employees that if the Union won the election the employees would lose benefits.

Larry Merrill received a June 21, 1999, warning (GC Exh. 2) for returning late after picking up his paperwork. He was stopped in the administration building by Sherman Gilliard and asked how work was going. Merrill testified that after leaving Gilliard, he was no later than usual and that the line was not affected by his arrival time. After serving as union observer during the July 8, 1999 election, Merrill returned to his job. His supervisor, Luther Hardison, walked up to him and asked Merrill who did he work for, did he work for the UFCW or did he work for Smithfield Packing. Larry Merrill replied, "Smithfield Packing, why." Luther Hardison testified that he did not know that Merrill supported the Union until the day of the election when Merrill was an observer for the Union. Merrill was 10 minutes later than he should have been returning from acting as union observer and Hardison asked Merrill "who did he work for, if he worked for me." Hardison denied that he asked Merrill if he worked for the Union and he denied telling Merrill that management was coming down hard on him because of his union activity. Merrill received a warning (GC Exh. 3) on the day after the election. Merrill noticed Supervisor Hardison on a catwalk watching him return from picking up the inventory forms. Hardison subsequently called Merrill into the office where another supervisor, Mel Parker, was also present. Hardison handed Merrill a warning (GC Exh. 3) and told him to sign it. Merrill explained that he had been getting inventory sheets. Afterward, at the cooler, Hardison told Merrill, "You know they're coming down hard on (you) because of your Union activities. You're a crew leader and you're suppose to be for management, not against management."

Merrill received yet another writeup on the Monday after the election,–July 12. He went to pick up the inventory forms at the usual time but the forms were not ready so he returned after lunch, and the forms were ready. Around 2 o'clock he was called on the intercom to the office. Luther Hardison gave him a writeup. In October Luther Hardison told Merrill that he should not go to the office anymore to pick up inventory forms because they were changing that process.

Luther Hardison Jr. denied that Merrill was ever required to go to the front office to either deliver or pick up paperwork. Hardison testified that it was Hardison's responsibility, to pick up inventory sheets. Occasionally, when Merrill was at the

finance office for other reasons, he would pick up the inventory sheets for Hardison. However, that was not part of Merrill's job and Hardison testified that he never directed Merrill to pick up the inventory sheets. On the occasions when Merrill received warnings received in evidence as General Counsel's Exhibit 2–4, he was in the Finance Office talking with another employee during and after his break. On other occasions Merrill was late for other reasons such as going to the bank during the lunch break. Occasionally, he as well as other employees that were late for similar reasons received writeups. Hardison testified that Merrill was late on a daily basis. On several of those occasions Hardison did not issue a warning. Instead he talked with Merrill about his tardiness.

Credibility

I was impressed with Larry Merrill both as to demeanor and in view of the full record. As shown herein, I do not credit the testimony of Jeffrey White. I also do not credit Luther Hardison in view of his demeanor and the full record. In fact, Hardison's testimony reveals a clear basis for concern. Hardison testified that Larry Merrill was late on a daily basis and more often than not Hardison elected to not issue a warning. However, that all changed with the union campaign. Hardison issued Merrill first warning well into the union campaign (June 21, 1999), the second on the day after election day and another on July 12, 1999.

Findings

Here as in many of the other matters considered herein, the standard used is that outlined in *Manno Electric*, 321 NLRB 278, 280 fn. 12 (1996); *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 393 (1983); and *NLRB v. Transportation Management Corp*., 462 U.S. 393 (1983). The General Counsel has the burden of proving that Respondent warned Larry Merrill because of its antiunion animus and, if that is done, Respondent may prove that it would have warned Merrill in the absence of his union activity. Here, the evidence is not in dispute but that Larry Merrill served as union observer during the July 8 election. Although the evidence shows that Respondent knew of Merrill's union activity before the election, his supervisor, Luther Hardison testified that he learned on election day that Merrill supported the Union. I have credited Merrill's testimony, which shows that he had talked with Human Resources Manager Gilliard on occasions during the union organizing campaign and that testimony shows that Merrill told Gilliard some of the things that bothered the employees supporting the Union. Additionally, the credited evidence shows that Merrill answered Jeffrey White's questions in mid-June, saying that the employees would get better respect and working conditions with a union. I find that from at least mid-June 1999 Respondent knew that Larry Merrill supported the Union. The record also shows that Respondent acted out of antiunion animus. That is illustrated by the numerous other unfair labor practices found in this decision, the mid-June conversation with Jeffrey White, when White told Merrill he should leave after Merrill said the Union could improve conditions; and by Luther Hardison's comments on July 9 that "they are coming down hard on (Hardison) because of (Merrill's) union activities—you're supposed to be for management, not against management." In view of the record, the timing of the warnings against Merrill and the evidence of animus, I find that Respondent issued the warnings on June 21 ((GC Exh. 2), and July 9 (GC Exh. 3) because of Merrill's union activities. Respondent contended it would have issued those warnings to Merrill in the absence of his union activities on showing there was no dispute but that Merrill was late as shown in the warnings. However, as shown herein, Supervisor Luther Hardison testified that Merrill was late every day. The credited evidence shows that it was only after Respondent learned of Merrill's support of the Union, that he received the June 21 and July 9 warnings. For that reason I find that Respondent did not prove that it would have issued those warnings to Merrill in the absence of his union activities. I find that Respondent's actions constitute violations of Section 8(a)(1) and (3) of the Act.

Workman's Compensation

Shaniqua Moore:

Shaniqua Moore worked for Respondent from October 1998 until August 20, 1999. She solicited employees to sign cards and attended Union meetings during the organizing campaign. Moore was injured at work in March 1999. She was off work because of that injury for a month and a half. Moore talked to Sherman Gilliard about her injury while she was off work. Gilliard referred her to Angela Littlejohn with Respondent's insurance company. During various conversations, Gilliard and Littlejohn told Moore that it was up to the other, whether she received workman's compensation. About a week before she returned to work Sherman Gilliard told her that all the paperwork had come in from her doctors and it looked to him like she would receive her workman's compensation. Moore spoke with Sherman Gilliard when she returned to work in May. He told Moore that he was going to make sure she received her workman's compensation and that she should call Angela Littlejohn for the details. Littlejohn was unavailable that day on the occasions when Moore phoned. The following morning Moore came in early and for the first time, she stood on the Union's handbill line along with some union representatives. Human Resource Assistant Michelle Mitchell and Sherman Gilliard rode by while Moore was on the handbill line. Shaniqua Moore reached Angela Littlejohn by phone on the next day. Littlejohn said that she had talked with Sherman Gilliard and he had said, "[I]t doesn't make any sense for (Moore) to have workman's comp because (her) doctor's notes were from week to week." Littlejohn told Moore she wasn't going to get her workman's compensation because Gilliard said no. A week or two before the NLRB election Shaniqua Moore had a conversation with Phil Price. Price asked her "why was I so angry with—with Smithfield Packing, and I explained to him that I was—I was done wrong, I was hurt and I didn't get no compensation, I didn't get no help, I didn't get anything." Price said he was going to check into it and try to help Moore and that it was nice that she could come in and talk to him but if the Union comes in, she would not be able to come in and talk to him like she had. Moore told Phil Price that the supervisors did not talk to the employees with respect. Price replied that he was trying to make a change and that was the reason why he got rid

of Norman. Phil Price denied that Shaniqua Moore presented a press clipping during one of his meetings that purported to contradict his statement regarding the history of the Wilson plant. He admitted that he had a conversation with Moore in which she expressed bitterness with the Wilson facility and he asked her why she was so bitter. She said that no one would listen and Price told her that she had never been to see him and that his door was open to her.

Michelle Mitchell denied that she ever saw Shaniqua Moore handbilling for the Union. Sherman Gilliard testified about Shaniqua Moore's workman's compensation claim. He sent Moore to Wilson Orthopedic but she was unhappy with the doctor she saw there. At one point Gilliard told Moore that he didn't see any reason why she shouldn't get workers compensation. He called Angela Littlejohn and told her that he felt Moore should receive workman's compensation. Littlejohn questioned whether Moore should receive benefits and sent Gilliard documents showing that Moore had gone through several doctors (R. Exh. 61). Gilliard concurred with Littlejohn after reading Respondent's Exhibit 51, that Moore should not receive benefits. Ultimately Travelers Insurance made the decisions regarding Shaniqua Moore. Angela Littlejohn is a claims representative for Travelers Insurance. Respondent employee Shanique Moore had a workman's compensation claim, which Littlejohn investigated. During that investigation she had approximately 10 conversations with Shanique Moore. Sherman Gilliard appeared to be fed up with Moore's claim and he told Littlejohn to just accept the claim or whatever. The claim was accepted to the extent Travelers Insurance paid Moore's medical bills including doctor visits. The claim for lost time at work was denied. Claims Representative Anthony Martin handled that denial. That portion of the claim was denied because Shanique Moore elected to be treated by her own physician instead of the Traveler's doctor. Moreover, she did not return to work at light duty as the medical documentation stated she could do. Littlejohn confirmed with Respondent at the time that there was light duty available for Moore. Littlejohn testified that she explained to Moore that she would not receive lost time benefits because Moore was going to her own doctor and based on that doctor's notes Moore was capable of returning to light duty and had not done so.

Credibility

In view of the evidence regarding Respondent's surveillance of union handbilling activity, and the full record, I am convinced that Respondent was aware of Moore's handbilling for the Union on the day she was denied her claim for lost time under workman's compensation. In consideration of demeanor and the full record, I credit Moore's testimony that she hand billed that day and that Sherman Gilliard and Michelle Mitchell rode by while she was handbilling. On the basis of that testimony I am convinced that Respondent learned of Moore's working on the union handbill line on the day before she was told that Respondent wanted to deny some of her workman's compensation benefits.

Findings

Here, again, the standard is that found in *Manno Electric*, 321 NLRB 278, 280 fn. 12 (1996); *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); *NLRB v. Transportation Management Corp*., 462 U.S. 393 (1983). In view of the credited testimony of Shaniqua Moore, I find that Respondent learned of her union activity on the day before she was told that Sherman Gilliard asked Respondent's insurer to deny compensation for pay during the time Moore was out of work. Before that date according to the testimony of Sherman Gilliard and Angela Littlejohn, Gilliard told both Moore and the insurer that she should receive those benefits. That evidence shows both knowledge and timing in support of my finding that Moore was denied benefits because of Respondent's antiunion animus. As shown above, the evidence established Respondent's animus through its unfair labor practices including Phil Price's comments to Moore about 2 weeks before the election. I find that the General Counsel proved that Respondent recommended to its insurer denial of a portion of Moore's workman's compensation benefits because of its antiunion animus.

Respondent contended that Moore would have been denied compensation for lost wages in the absence of union activities, in view of Angela Littlejohn's testimony that benefits were denied because Moore's physician Okayed her to return for light duty and she did not return to work. However, Shaniqua Moore testified that Angela Littlejohn told her during a phone conversation recorded by Littlejohn, and again in another phone conversation, that the decision of whether Moore would receive benefits was up to Gilliard and Littlejohn did not dispute that testimony. Moreover, I credit Moore's testimony that Gilliard told her about a week before she returned to work, that he felt she was going to get her workman's compensation (Tr. 508) and that Gilliard told her on the Wednesday before she returned to work that he was going to make sure she received her workman's compensation (Tr. 509). Finally, I credit the testimony of Moore that when Littlejohn told her she would not receive the disputed workman's compensation benefits; Littlejohn said that Sherman Gilliard had made that decision. I find that Respondent failed to prove Moore would have been denied workman's compensation benefits in the absence of Union activity and that Respondent engaged in unfair labor practices by causing the denial of workman's compensation benefits to Shaniqua Moore. (*Baddour, Inc*., 281 NLRB 546 (1986).)

Section 8(a)(5)

The General Counsel contended that Respondent violated section 8(a)(5), that the Union represented a majority of the bargaining unit employees on May 30, 1999, and that a bargaining order should issue (*NLRB v. Gissel Packing Co*., 395 U.S. 575 (1969)). Respondent contended, among other things, that the Union never achieved majority status. Respondent provided an *Excelsior* list of 327 unit employees on May 30, 1999 (GC Exh. 23).[45] Respondent's attorney wrote the NLRB representa-

[45] As shown herein, the *Excelsior* List included 327 names while the list prepared by Richard Shipp and used by the General Counsel in an effort to authenticate union cards, included 333 names although 134 of those names were stricken. Those represented all the authorization cards given to Shipp. The General Counsel elected to not try and authenticate 134 cards through Shipp and those names were stricken on

tion case agent noting corrections to the *Excelsior* list (GC Exh. 24). Respondent also provided a list to the NLRB regional office, of unit employees employed on May 27, 1999 (GC Exh. 25) and a list of all bargaining unit employees that were working on May 23, 1999 (GC Exh. 22). At the hearing Respondent intro Respondent Exhibit 140 is an alpha log dated December 3, 1999.[46] The General Counsel contended that employees unlawfully discharged before the July 8 election should also be included as eligible cards for the Union. As shown above, I find herein that Respondent unlawfully discharged Lenora Wooten before the July 8 election and I find that she was prevented from voting because of her illegal discharge. Respondent and the Union reached a stipulation on June 1, 1999, that the appropriate bargaining unit included: *all full time and regular part time production, maintenance and warehouse employees, and lead persons employed by Respondent at its Wilson, North Carolina, plant but excluding all office clerical employees, quality control employees, and professional employees, guards and supervisors as defined in the Act*. (GC Exh. 27.)

Richard Shipp testified that he is a forensic document examiner. His testimony showed that he was an expert in handwriting comparisons.[47] He testified that he used a 5-point system[48] in determining whether the handwriting samples provided in this case were signatures of employees that purportedly signed Union authorization cards. Number 1 would demonstrate a positive opinion that the same person that signed the Union authorization card signed the samples. Grade numbers 2 through 4 would show in descending degrees a probability that the person that signed the samples also signed the union authorization card. Number 5 would demonstrate a positive opinion that the person that signed the union authorization card did not sign the samples. The results of Shipp's study (see GC Exh. 13)[49] of signatures provided by Respondent against Union authorization cards show the total number of ratings.[50] Some of the actual cards authenticated by Shipp and reflected on GC Exh.13, were received at one time during the hearing[51] (see Tr.

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the list. Included in those stricken names were cards for which Shipp was not provided with respective signature samples and cards that could not be used for comparison for some other reason, such as a missing signature or the card was dated after May 30.

[46] I shall rely on the *Excelsior* list (GC Exh. 23) as corrected by Respondent's July 7 letter (GC Exh. 24), in consideration of whether the Union represented a majority on May 30, 1999. Despite arguments that it was not an original record, Respondent was fully aware of its significance at the time of its preparation. At that time Respondent realized the *Excelsior* list would be used in determining whether the Union won the July 8 election and I am not convinced that this was a document prepared hastily without proper consideration. Moreover, as shown herein, I have adjusted the list on showing that certain employees were discharged before the date on which the Union claimed to represent a majority.

[47] Respondent argued that recent decisions call handwriting expert testimony into question. *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579 (1993); *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999). In the instant matter the contested Union authorization cards were provided to all parties for examination including, if desired, examination by the party's respective expert. Subsequently, no evidence or expert testimony was offered in opposition to the qualifications of Richard Shipp and no evidence was offered to show that his rating of the various signatures was in error. Moreover, in addition to Shipp's testimony and the introduction of GC Exh. 13, which was prepared by Shipp, the contested authorization cards were received in evidence and are available for examination by this ALJ and by any reviewing authority. Therefore, I reject Respondent's contention that I should not credit the testimony of Richard Shipp as showing those particular employees signed respective Union authorization cards.

[48] Respondent argued that the 5-point system was not the generally accepted system and that I should not receive cards rated # 2, as proof of signature. However, as noted above, Respondent had full opportunity to offer contrary evidence through expert testimony by use of a 9-point system or any other system, but failed to do so. As to the argument that cards rated # 2 by Richard Shipp should not be counted in determining majority status, I again note that the cards are in evidence and may be examined by the ALJ and all reviewing authorities and I am not convinced that those cards rated # 2 are generally unreliable as a showing of the employees' signatures.

[49] Shipp testified as to GC Exh. 13. The first column lists the name of the alleged employee that purportedly signed a Union authorization card. The second column lists the date shown in the space marked date, on each respective authorization card. The third column lists the number of known signature samples provided Shipp for each employee that purportedly signed that respective authorization card. The fourth column lists the number assigned to that respective signature in comparison with handwriting samples, provided by Shipp (i.e., One, two, three, four or five). The strike through names occurred in those instances where Shipp was not provided with signatures to compare with the signature on the respective card or for some other reason, such as no signature or dated after May 30, 1999, The General Counsel elected not to try and authenticate that particular card through Shipp's testimony.

[50] As shown in the following footnote, the General Counsel introduced 133 cards at Tr. pp. 636 through 647, as having been identified by Richard Shipp and rated # 1 or # 2, and dated on or before May 30, 1999. Counsel for the General Counsel commented that other cards were introduced at other times in the hearing. Respondent admitted that General Counsel introduced into evidence over 180 cards or photocopies of cards. My count of GC Exh. 13 showed 133 signatures rated # 1; 44 signatures rated # 2; 17 signatures (Latish Stokes was rated twice) rated # 3; 4 signatures rated # 4; 0 signatures rated # 5; and 134 names were stricken (total count of 333). [Respondent, at p. 229 of its brief, appeared to argued there were 39 cards rated # 2 if those are not counted that would leave 148 cards rated # 1. Respondent also contended there were 12 cards rated # 3, and 2 cards rated # 4. The General Counsel contended that Shipp had authenticated 149 cards rated either # 1 or # 2.] Of those rated # 1, two cards had no date (*Erika Edwards*, *Mary Harris*), five cards had no year in the date (*Velma Hinnant*, *Je Lynn Lofton*, *Adriana Rodriquez*, *Marquita A. Thomas,* and *Losunda Webb*); and of those rated # 2, one card had a month and day but no year in the date (*George D. Taylor*). Additionally, Shipp authenticated a card signed by Lavoris Barnes and I find herein that Barnes was legally discharged before May 30. By deducting those nine cards, my examination of GC Exh. 13 reflects 168 cards rated # 1 or # 2.

[51] Respondent subpoenaed questionnaires received by the General Counsel from employees that signed cards authenticated by Richard Shipp and others. Counsel for the General Counsel refused to produce questionnaires except for those employees that testified. I ruled that Respondent was entitled to production of questionnaires completed by employees whose authorization cards were admitted even though the employee did not testify, despite the provisions of Sec. 102.118(a) and 102.118(b)(1) of the Board's Rules and Regulations. Those questionnaires involved matters within the scope of the Board's subpoena powers and the documents were not shown to "not relate to any matter . . . in question in the proceedings" (Sec. 102.31(b) of the Board's rules and

615—636).[52]

The General Counsel argued that the cards of Neburu (Shun) Applewhite, Daryl Artis, Dana Barrett, Marcus Battle, John T. Beal, Lourdes Jaramillo Campos, Gloria Carr**,** Juanita A. Coronel, Jeffrey Ramior (Cruz), Marshall Coley, Denise Farmer, Mary Harris, Alicia Harrison, Sherri Hinnant, Rochune Howell, Minerva Jimenez, Maria Leach, Trista Melton, Linda Mitchell, Angel Saez, Alton Smith, Marquita A. Thomas, Angelia Williams, Clarinetta Williams, Clarence Williams, James Henry Wilson**,** and Lenora Wooten should be included (total of 27) in determining the majority question. As seen in General Counsel's Exhibit 13, Richard Shipp considered sixteen of the cards allegedly signed by the abovementioned employees. Those are Daryl Artis, Dana Barrett, Marcus Battle, John T. Beal, Lourdes Jaramillo Campos, Gloria Carr, Denise Farmer, Alicia Harrison, Rochune Howell, Trista Melton, Linda Mitchell, Alton Smith, and James Henry Wilson who were rated # 3 by Shipp and, for that reason, cannot be considered as proved signatures. *Angel Saez* was rated # 4 and *Mary Harris* and *Marquita A. Thomas* were rated # 1, but whose cards were not dated, and, for that reason, cannot be considered as cards signed before May 30, 1999. However, as to those sixteen it is possible their signatures were proved through evidence other than General Counsel's Exhibit 13. Additionally, since the remaining 11 of the abovementioned signatures were not included on General Counsel's Exhibit 13 or, if included, were stricken, it is possible those signatures were proved through evidence other than General Counsel's Exhibit 13.

Credibility

As to this section I have made credibility determinations below in the "Findings."

Findings

The questions to be applied in considering whether a Section 8(a)(5) violation occurred and a bargaining order is required include: (1) Did the Union enjoy majority status at any time; and (2) Did the Respondent engage in unfair labor practices which are sufficiently widespread, serious and pervasive to warrant a finding 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 the employees sentiment once expressed through authorization cards would, on balance, be better protected by a bargaining order. *NLRB v. Gissel Packing Co.,* 395 U.S. 575, 614 (1969). Two types of employer misconduct may warrant the imposition of a bargaining order. Either (1) Outrageous and pervasive unfair labor practices; or (2) Less extraordinary cases marked by less pervasive practices which nonetheless still have the tendency to undermine majority strength and impede the election process. *Overnite Transportation Co*., 329 NLRB 990 (1999).

As shown above, General Counsel's Exhibit 13 reflected that Richard Shipp authenticated 168 cards through ratings of 1 or 2. (*Overnite Transportation Co.*; above; *Parts Depot, Inc*., 332 NLRB 670 (2000)). However, my examination revealed that there were 19 names counted as number 1 or 2 on General Counsel's Exhibit 13, but not included on the *Excelsior* list (GC Exh. 23).[53] Therefore, my count shows 149 cards[54] where each employee was listed on the Excelsior list and where the respective card signature was rated # 1 or # 2. Additionally, employees Lenora Wooten (Tr. 52, GC Exh. 101), Clarinetta Williams (Tr. 65, GC Exh. 102), Clarence Williams (Tr. 101, GC Exh. 104), Daryl Artis (Tr. 398, GC Exh. 119), and Marcus Battle (Tr. 493, GC Exh. 130) testified and authenticated their own cards. That brings the total number of cards that should count toward a majority on May 30, to 154. Employees Valerie Davis, Robert Atkinson and Shaniqua Moore testified and authenticated cards of other employees. Davis authenticated cards signed by employees Marshall Coley, Maria Leach[55], Denise Farmer, Linda Mitchell and Shun (Neburu) Applewhite[56] (Tr. 246–248). Atkinson authenticated cards signed by Dana Barrett, Angel Saez, Alton Smith, and James Henry Wilson (Tr. 327–329). Moore authenticated cards signed by Alicia Harrison, Angelia Williams and Sherri Hinnant[57] (Tr. 501–504). That brings the count to 166. Union organizers Randy Tiffey, Barbara Dotson, Sylvester Fields and Grace Comontofski testified and authenticated cards signed by several employees. Tiffey authenticated cards signed by employees John T. Beal, Mary Harris and Marquita A. Thomas (Tr. 651–656). Dotson authenticated a card signed by employee Trista Melton (Tr. 678). Fields authenticated a card signed by employee Rochune Howell (Tr. 719–720). Comontofski authenticated cards signed by employees Juanita A. Coronel, Lourdes Jaramillo Campos, Minerva Jimenez and Jeffrey Ramior (Tr. 696–702).[58] That brings the count to 175. However, as shown above, three employees—Maria Leach, Naburu Applewhite and Sherri Hin-

regulations). The Board has not replied to the General Counsel's special appeal. Those questionnaires have not been provided to Respondent.

[52] GC Exh. 103, 115–118, 120–128, 131–134, 136–154, 156– 190, 192–193, 195, 197–204, 206–231, 234–235, 237–239, 241– 266, and 275–276, were received at Tr. 636; while GC Exh. 240 was received at transcript 647–648. Apparently other cards authenticated by Shipp were also received but at different parts of the record.

[53] The names not previously discounted that appeared on General Counsel's Exhibit 13 but not on the *Excelsior* list (GC Exh. 23), included Chris Applewhite, Christopher Blanchard, Martina Brown, Mahaunace Bunch, Russell D. Coley, Latrice Covington, Dennis Ellis, Ponjella Hawkins, James E. Hebbard, Felicia Ann Hunter, Je Lynn Lofton, Pamela Lucas, Steve Earl Peterkin, Felicia Puente, Rasheeda Smith, Tenisa Staton, Latonya Taylor, Kenneth E. Vaughn, and Sharon Warren. I did count Sally Castillo who appears as Castillo Sally on the Excelsior list and Gordon Williford who appears as Loyd G. Williford on the Excelsior list.

[54] As noted above in fn. 46, the General Counsel also contended that 149 cards were authenticated by Phillip Shipp and should be counted in determining the majority question.

[55] See GC Exh. 24, Maria Leach as a name to remove from the Excelsior list.

[56] See GC Exh. 24, Neburu Applewhite as a name to remove from the Excelsior list.

[57] See GC Exh. 24, Sherri Hinnant as a name to remove from the Excelsior list.

[58] Of all the above cards authenticated by employees and Union organizers, only Jeffrey Ramior is not included on the *Excelsior* list (GC Exh. 23). I have excluded Ramior's name from the total number of authenticated cards which now stands at 171.

nant,—were removed by Respondent on July 7 (GC Exh. 24). That brings the number down to 171. Counsel for General Counsel asked that I examine the card of Gloria Carr and writing samples (GC Exh. 129), and receive Carr's card. However, the proceedings regarding cards included examination by General Counsel, the Union and Respondent including use of a handwriting expert at each party's discretion. With that in mind I find it would be improper for me to consider the card of Gloria Carr absent Respondent having an opportunity to examine the card with a handwriting expert.

There are 327 names listed on the Excelsior list (GC Exh. 23). Respondent wrote the NLRB on July 7 recommending striking 28 names from the Excelsior list (see GC Exh. 23 as modified by GC Exh. 24). If those names are stricken, that would leave 299 names on the Excelsior list. Of those 28 names, eight were included on General Counsel's Exhibit 13 and rated either # 1 or # 2. Those eight are Hubert Eatmon (rated # 1), Gloria Freeman (# 1), Walena Lofton (# 1), Maria Martinez (# 2), Phillip Richardson (# 1), Reginald Ward (# 2), Andre Williams (# 2) and Corey Wooten (# 2). If those names are removed from General Counsel's Exhibit 13, the total authenticated card signers would be 163 and the total number on the *Excelsior* list would be 299.[59]

In view of the above and the full record, I find that the Union established a majority through count of the authenticated cards that were signed on or before May 30, 1999. However, Respondent argued that certain specific cards should not be counted.

Respondent argued that Clarence Williams should not be counted because he was the subject of an 8(a)(3) allegation. As shown above I find that Clarence Williams was discharged in violation of Section 8(a)(3) and I shall not reject his card. Respondent argued that Lavoris Barnes' card should not be counted and, as shown above, I agree and have not counted Barnes' card. Respondent contended that Margaret Liggins card should be discounted. As shown herein I find that Respondent discharged Liggins in violation of Section 8(a)(3) and I shall not discount her card. Respondent contended that I should reject the card of Erika Edwards and I agree. As shown above, I have rejected her card because the card was not dated. Respondent contended that Milton Todd Dickson, Hubert Eatmon, Jr., and Renee Anderson allegedly signed their respective card a day or more before he or she was hired. However, all were employed on May 30. Respondent contended that Vearnon Lee Baines does not read well and his card should be discounted in the same fashion as though he could not read English. Respondent contended that the card of Carisa Latonya Applewhite should be discounted because she was not offered an explanation of the card. Respondent contended that the card of Susie W. Jones should be discounted because she was told that by signing the card, it did not mean that she was going for the union. Respondent contended that Tim Martin's card should not be counted because he did not read the card and nothing was explained to him. Respondent argued that employees Deborah Rasberry signed the card to keep the Union from harassing her and her card should not be counted. Indeed, Rasberry testified that she just signed the card to keep them from harassing me. However, there was no evidence of actual harassment and, in fact, Rasberry's testimony shows that she was visited and asked to sign the card so they could see how many people they could get so we could have a vote. Respondent contended that the cards of Angelia Williams should not be counted because she was terminated on March 12, 1999; Russell Coley because he was terminated on May 27, 1999; Chris Applewhite because he was terminated on May 28, 1999; Sally Castillo because she cannot speak or read English; Calixto Rodriguez because he speaks Spanish; Donna Carter because Valerie Davis asked her to sign and said the language on the card did not mean anything; Bernice C. Bunn because Valerie Davis asked her to sign and Davis said she should sign so she would be able to vote and if she did not sign she could not vote; and Jean Bass because the union organizer that solicited her vote said they want to get so many cards signed so they could come in and have a vote.

Respondent argued that Hilda J. Williams' card should be discounted because she was told the card was to see what the Union had to offer us and you know, election for the Union. Respondent contended that Shirley Ann Dixon was told that she would get to vote for the union later if she signed the card. Respondent contended that those employees' cards should not be counted because each was told they had to have a certain amount of people to sign the card before they can have an election. Respondent contended that Hilda Sanchez had not read the card and that Sanchez was promised good benefits if she signed. Respondent contended that several cards were defective because of the date. Clarinetta Williams testified that she mistakenly put her hire date down for the date of the card and she mistakenly testified that Randy had initialed the card on the back. However, Robert Atkinson testified that he was the one that initialed the card. Williams testified that she signed the card well before May 30, 1999. Respondent contended that Maria J. Davila's card should be rejected because the date on the card is the same as her date of hire. However, there was no showing that the date of hire was not the same date on which Ms. Davila signed the card. Respondent contended that Ronald Johnson's card should be rejected because the date is illegible and the signature is rated # 2. However, the date on Johnson's card (GC Exh. 202) is partly legible showing 4–15–9 and the number, if there was one, after the 9 in the year, appears faded. However, Johnson's card is date stamped on the back by the Region 11 office as May 25, 1999. Respondent contended that Sally Castillo, Calixto Rodriguez, Juan Rodriguez, and Maria Villanueva, should be discounted since the cards were written in English and those employees cannot read English. Castillo, Rodriguez were called by Respondent and testified. Respondent argued that Mary Harris's card is not dated and should be rejected. I would agree provided the card was the only evidence

[59] General Counsel conceded that subsequent to receipt of the *Excelsior* list (GC Exh. 23), the parties agreed that the names of quality control employees and one employee who had never been employed by Respondent should be taken off the *Excelsior* list (GC Exh. 27 and 24). Counsel for General Counsel argued quality control employees should be removed along with a person that was never employed but names of alleged discriminatees Lenora Wooten and Lavoris Barnes should be added. I note that Respondent's letter (GC Exh. 24) included several terminated employees and several quality assurance employees, for a total reduction of 28 employees.

received and have so ruled herein. However, as shown in Respondent's brief there was testimony including that of Mary Harris and Randy Tiffey regarding Harris's card. Harris testified that she was unable to read the card when it was given her because she did not have on her glasses. Tiffey testified that when the card was returned to him from Mary Harris, he initialed it and put the date in the upper-right hand corner. Respondent contended that the card of Marquita A. Thomas is undated. However, there is a date of 5/13/99 in the upper right hand corner. Respondent contended there are suspicious markings on the cards of Denise Farmer, Linda Mitchell, John R. Gear, Dana Barrett, and Angel Saez. Respondent contended that the cards of Alton Smith, James Henry Wilson, Shirley Brown, Eionshafae Coppedge, Daryl Artis, Agapito Saez, Lourdes Jaramillo Campos, Minerva Jimenez, Alicia Blanchard, Alicia Harrison, Trista Melton, Jeffrey Ramiro, and Juanita A. Coronel are clearly false and should be rejected.

As to Respondent's arguments on specific cards the Board has held that authorization cards which clearly designate the Union as bargaining representative even though procured through representation that they were to be used to obtain an election, would be counted to establish the majority status unless the employees were told that the card was to be used solely for the purpose of obtaining an election *Cumberland Shoe Corp.*, 144 NLRB 1268 (1963), enfd. 351 F.2d 917 (6th Cir. 1965*); Audubon Regional Center*, 331 NLRB 374 (2000); and *Custom Bent Glass Co*., 304 NLRB 373 (1991).[60] In view of that standard I reject Respondent's argument regarding Vearnon Lee Baines, Carisa Latonya Applewhite, Tim Martin, Donna Carter, Bernice C. Bunn, Jean Bass, Hilda J. Williams, Shirley Ann Dixon, and Hilda Sanchez because the record failed to show that any of those employees were told the authorization card was for the sole purpose of getting an election (see *Overnite Transportation*, 329 NLRB 990 (1999)). I reject Respondent's argument that the cards of Milton Todd Dickson, Hubert Eatmon Jr., and Renee Anderson should not be counted because each of those cards showed a date, which was before the employee's actual hire date. The record shows without dispute that Respondent employed Dickson, Eatmon, and Anderson on May 30, 1999. I reject Respondent's argument that the card of Deborah Rasberry should be rejected. The record failed to show that Rasberry was actually harassed. All that was shown was that Rasberry felt she was signing the card to keep from being harassed (see *PCC Structurals, Inc*., 330 NLRB 868 (2000)). I find that the card of Maria Villanveva should not be discounted because she cannot speak English. The card Villanveva signed (GC Exh. 258) is written in both English and Spanish. Calixto Rodriguez's card (GC Exh. 236) is written in both English and Spanish and I cannot discount the card on the basis that he testified he has trouble reading. (*Douglas Foods Corp*., 330 NLRB 821 (2000).) The record did not support Respondent's argument that several cards were defective because of the date including Clarinetta Williams, Maria J. Davila, and Ronald Johnson. Williams' testimony along with that of Robert Atkinson established that the card was signed and dated well before May 30, 1999. As to Maria J. Davila, there was no showing that the date on her card was incorrect. The evidence showed simply that the date on the card was the same as her date of hire. As to Ronald Johnson, both the record evidence and the law support a determination that his card is valid. It was dated even though the second digit of the year is missing or faded but the card includes a May 25, 1999 date stamp by the Regional NLRB Office and the handwriting expert certified Johnson's signature rating at number 2.

Juan Rodriguez (GC Exh. 237) and Sally Castillo (GC Exh. 154), each testified to being unable to read English and the card each signed is written entirely in English. However, Juan Rodriguez testified that he could read some English,—"Maybe twenty percent" (Tr. 1507)—and that he filled in the card, and he checked several places on the card showing that he worked the day shift, that he worked full time and that he did not want to participate in an organizing committee. Rodriguez understood some of what the card solicitor said and he testified that the solicitor said he was from the Company and later on cross-examination, Rodriguez testified that the solicitor—"they were also part of the government." At the beginning of his testimony Juan Rodriguez testified that he signed the authorization card (GC Exh. 237). Later he testified that he printed his name on the card and he looked at some papers given him by the solicitor but he denied there was a signature on the card (Tr. 1511). Later on redirect Rodriguez admitted that he wrote everything on the card. The card is filled out to include a printed name, a signature, an address, the name and address of the employer and places to check for day shift, night shift, full–time, part–time and "Would you participate in an organizing committee? Yes___ No___." I noticed during his testimony that Rodriguez appeared to understand what was being asked by the attorneys in English and I directed the interpreter to let him try and answer a question without interpretation. His answer was not fully responsive to the question and I directed the Interpreter to continue to interpret both questions and answers. I am convinced on the basis on his testimony, including his demeanor and his full testimony, that he understood he was given and asked to sign a union authorization card. Moreover, I find that Rodriguez was intent on having his card thrown out. He initially testified that he only understood a little English but subsequently the union organizers allegedly told him they represented the Company. Later still, he testified that the union organizers claimed to be from the government. It is hard to understand how on the one hand he understood only maybe 20 percent English, but on the other realized the union people were claiming to be from the Company, then from the Government. Additionally, he first testified that he signed General Counsel's Exhibit 237, then he testified that was not a signature on the card but later he testified that he completed the entire card. I do not credit Rodriguez's testimony and I am convinced that he was aware that he was signing a Union authorization card. Sally Castillo testified that she does not read English. She testified that she was given a Union authorization card (GC Exh. 154) as she was going to work and she was asked to fill out and sign the card. The person that gave her the card did not tell her anything

[60] The cards state in English, Spanish, or both, "I hereby authorize United Food and Commercial Workers International Union, AFL–CIO/CLC, or its chartered local union(s) to represent me for the purpose of collective bargaining.

about the purpose of the card. When asked how she filled out the card Ms. Castillo said, "[W]e would ask each other where the name were—we're supposed to put the name on . . ." (Tr. 1531). After carefully reviewing the testimony of Rodriguez and Castillo I have decided against throwing out either card. As shown above, I do not believe Rodriguez and Castillo's testimony shows that she had help from other Spanish-speaking employees in completing the card. (See *Montgomery Ward & Co*., 288 NLRB 126 (1988).)

I agree with Respondent's argument that the cards of Angelia Williams, Russell Coley, and Chris Applewhite should be rejected because each of those employees was terminated before May 30, 1999. Therefore, I shall deduct 3 cards from the total leaving a total card count at this point of ***160***. In view of my finding that there were ***299***[61] employees in the bargaining unit on May 30, 1999, I find that the Union represented a majority of the employees in the above-described appropriate bargaining unit on that date. As to all other cards contested by Respondent, except the three noted above, I find nothing in the record that justifies discounting any of those cards.

I shall consider whether a bargaining order should issue because of Respondent's unfair labor practices. Respondent argued among other things, that some of the alleged unfair labor practices including all the alleged unlawful discharges occurred outside the critical period before the election. That argument is misguided. As to the question of whether the July 8 election should be overturned, it is of significance whether unfair labor practices and other objectionable conduct, occurred during the critical period. However, at this point in time, the question I am now considering is not whether the July election should be overturned, but whether conditions are such that the Regional Office of the NLRB could or could not successfully stage a rerun election. *Overnite Transportation Co*., above 991, citing *NLRB v. Gissel Packing Co*., 395 U.S. 575 (1969).

> If the Board finds that the possibility of erasing the effects of past practices and of ensuring a fair election (or a fair rerun) 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, then such an order should issue.

In making that determination I shall consider whether a particular unfair labor practice may or may not impact on the issue of whether a fair rerun election could be held and the issue of whether the employees' sentiment would be better protected by a bargaining order, regardless of whether it falls within or without the critical period. In that regard I am convinced that the discharge of Lenora Wooten does not impact on either question and I shall not consider that unfair labor practice in determining whether a bargaining order should issue. However, I shall consider all the remaining discharges found unlawful herein because in my view, they all impact on the "employee sentiment" and "bargaining order" questions. As shown herein all the discharges found unlawful with the exception of Wooten, occurred after the July 8 election and, from a time standpoint, are closer to the relevant issues of employee sentiment and bargaining order, than anything that occurred on or before July 8.

The unfair labor practices that I consider relevant in determining the bargaining question include the illegal discharges of Clarence and Denise Williams and Margaret Liggins, the unlawful warnings issued to Larry Merrill and the unlawful interference with Shaniqua Moore's workman's compensation benefits; the repeated threats of plant closure through pervasive actions including speeches and letters from officials including Respondent's highest official as well as its plant manager, its human resource manager, its agents and first line supervisors; the unfair labor practice of impression of surveillance which was apparent to any of its employees as they entered its facility; the unlawful interrogation by Respondent's supervisors and agents; the solicitation and partial remedy of employee grievances by Respondent's highest officials including its president, its plant manager, its human resource manager and its agents; its threats of lost jobs by its supervisors; it threats of loss of benefits by its highest ranking officials at Wilson and its benefits analysts through pervasive actions including speeches; its threats of unspecified reprisals by its highest ranking officials at Wilson; and its promise of benefits, threats of lost pay and directives to remove union stickers and substitute Vote No stickers. Respondent engaged in repeated and pervasive unfair labor practices of a hallmark nature by its pervasive and continuing threats of plant closure and its unlawful discharges after July 8. I find that a bargaining order should issue as determined in *NLRB v. Gissel Packing Co*., 395 U.S. 575 (1969), in view of the nature of the unfair labor practices, the involvement of Respondent's president as well as its plant manager and human resources manager, the pervasive nature of their activities including speeches and letters to unit employees. (*Climatrol, Inc*., 329 NLRB 946 (1999).)

CONCLUSIONS OF LAW

1. Respondent Smithfield Foods is a holding company and the parent corporation of Respondent Smithfield Packing Company, Incorporated, which is an operating company. Respondent Smithfield Packing Company, Incorporated is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. United Food and Commercial Workers, Local 204 and United Food & Commercial Workers International Union, AFL–CIO, CLC, the Union, is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent engaged in unfair labor practices in violation of Section 8(a)(1) of the Act by its repeated threats to employees of plant closure through pervasive actions including speeches and letters from officials including Respondent's highest official as well as its plant manager, its human resource manager, its agents and first line supervisors, because of its employees' union and protected activities.

4. The Respondent engaged in unfair labor practices in violation of Section 8(a)(1) of the Act by creating the impression of surveillance of its employees' union activities, which was apparent to any of its employees as they entered its facility.

5. The Respondent engaged in unfair labor practices in viola-

[61] The addition of Lenora Wooten increases the number of unit employees on May 30 to 300.

tion of Section 8(a)(1) of the Act by the unlawful interrogation of employees about their union activities by Respondent's supervisors and agents.

6. The Respondent engaged in unfair labor practices in violation of Section 8(a)(1) of the Act by the solicitation and partial remedy of employee grievances by Respondent's highest officials including its president, its plant manager, its human resource manager and its agents because of its employees' union activities.

7. The Respondent engaged in unfair labor practices in violation of Section 8(a)(1) of the Act by its threats to its employees of lost jobs by its supervisors because of its employees' union activities.

8. The Respondent engaged in unfair labor practices in violation of Section 8(a)(1) of the Act by its threats to its employees of loss of benefits by its highest ranking officials at Wilson and its benefits analysts through pervasive actions including speeches, because of its employees' union and protected activities.

9. The Respondent engaged in unfair labor practices in violation of Section 8(a)(1) of the Act by its threats of unspecified reprisals to its employees by its highest-ranking officials at Wilson, because of its employees' union and protected activities.

10. The Respondent engaged in unfair labor practices in violation of Section 8(a)(1) of the Act by promising improved benefits to its employees because of their union activities.

11. The Respondent engaged in unfair labor practices in violation of Section 8(a)(1) of the Act by its threats of lost pay to employees and by its directives to employees to remove union stickers and substitute Vote No stickers, because of its employees' union activities.

12. The Respondent engaged in unfair labor practices in violation of Section 8(a)(1) by discharging and refusing to recall Lenora Wooten, and Section 8(a)(1) and (3) of the Act by discharging and refusing to recall Clarence Williams, Denise Williams, and Margaret Liggins, by its warnings to Larry Merrill and by its interference with Shaniqua Moore's receipt of workman's compensation, because of its employees' union and protected activities.

13. The following unit is appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full time and regular part time production, maintenance and warehouse employees, and lead persons employed by Respondent at its Wilson, North Carolina, plant but excluding all office clerical employees, quality control employees, and professional employees, guards and supervisors as defined in the Act.

14. Since on or about May 30, 1999, and at all times thereafter, the Union has represented a majority of the employees in the above-described unit, and has been the exclusive representative of these employees for purposes of collective bargaining within the meaning of Section 9(a) of the Act.

15. By failing and refusing to recognize and bargain collectively with the Union since May 30, 1999, the Respondent has violated Section 8(a)(5) and (1) of the Act.

16. The unfair labor practices found above are unfair labor practices having an effect on commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily suspended and discharged Lenora Wooten, Clarence Williams, Denise Williams, and Margaret Liggins, it must offer them reinstatement, and having discriminatorily warned Larry Merrill on two occasions and interfered with the workmen's compensations benefits of Shaniqua Moore, it must make Lenora Wooten, Clarence Williams, Denise Williams, Margaret Liggins, and Shaniqua Moore whole for all loss of earnings and other benefits, computed on a quarterly basis from the date of the suspension, discharge or loss of workmen's compensation benefits, to date of proper offer of reinstatement or conclusion of workmen's compensation entitlement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.,* 90 NLRB 289 (1950), plus interest as computed in *New Horizons For The Retarded*, 283 NLRB 1173 (1987). The Respondent must remove any reference to the foregoing discharges, suspensions, warnings and interference with workman's compensation, from the files of the foregoing employees and notify each of them of that action. Having found that a bargaining order is appropriate, Respondent, on request, shall bargain collectively with the Union as the exclusive bargaining representative of the employees in the appropriate unit. Respondent's violations of the Act are sufficiently egregious to warrant a broad cease-and-desist order. Cf. *Hickmont Foods,* 242 NLRB 1357 (1979).

[Recommended Order omitted from publication.]