Miller Industries Towing Equipment, Inc. *and* International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL–CIO. Cases 10–CA–33712 and 10–RC–15274

September 17, 2004

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On January 21, 2003, Administrative Law Judge Margaret G. Brakebusch issued the attached decision. The Respondent filed exceptions and a supporting brief and the Charging Party filed cross-exceptions.

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

The Board has considered the decision in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions only to the extent consistent with this Decision and Order and to adopt the recommended Order as modified below.

We agree with the judge that, during the course of the Union's organizing campaign at the Respondent's Ooltewah, Tennessee plant,[2] the Respondent violated Section 8(a)(1) by threatening that unionization would result in stricter enforcement of rules relating to lunch and breaktimes and by prohibiting off-duty employees from engaging in protected concerted activities in a nonwork area.[3]

We further agree that these unfair labor practices provide sufficient basis to set aside the results of the election and that a second election must be held.[4]

In recommending that the election be set aside, the judge did not rely on certain threats made by Supervisor Charlie Self, which she characterized as "isolated."[5] We affirm the judge's findings that these threats violated Section 8(a)(1), but given the other instances of objectionable conduct found above, we find it unnecessary to consider whether Self's conduct would also be a basis for setting aside the election.

Further, we adopt the judge's finding that, following the representation election, the Respondent violated Section 8(a)(2) and (1) by creating and dominating the continuous improvement committee, an in-house organization designed to deal with employee working conditions.

However, we reverse the judge's findings (1) that statements by General Manager Michael Baker and Chief Executive Officer Jeff Badgley unlawfully threatened that unionization would result in layoffs and (2) that Vice President of Operations Jerry Driscoll threatened employees with loss of overtime opportunities. For the reasons stated below, we dismiss these 8(a)(1) allegations and overrule the corresponding election objections.

1. *The Statements of Baker and Badgley*: The judge determined that General Manager Baker and CEO Badgley, unlawfully threatened employees with layoff. The Respondent argues that Baker's statements are protected under Section 8(c) of the Act, that the complaint does not allege that Badgley threatened layoff, and that the substance of Badgley's remarks do not support a finding of threatened layoff. We agree that these allegations should be dismissed.

(a) *Baker*: The evidence concerning General Manager Baker is brief. Prior to the election, Baker held small group meetings with employees. In one meeting, Baker talked about two companies that had experienced financial difficulties while in the process of bargaining with a union for a contract. Relying on testimony from em-

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

[2] The April 11, 2002 election resulted in 134 votes for International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, AFL–CIO (the Union) and 147 votes against representation. The Union filed objections, some of which were coextensive with alleged unfair labor practices and were consolidated for hearing.

[3] For institutional purposes, Chairman Battista and Member Schaumber acknowledge *Tri-County Medical Center*, 222 NLRB 1089 (1976), as controlling precedent in adopting the judge's conclusion that the Respondent violated Sec. 8(a)(1) by prohibiting off-duty employees from engaging in a preelection rally in the parking lot.

[4] We deny the Charging Party-Union's request for special notice and access remedies under *Fieldcrest Cannon*, 318 NLRB 470, 473 (1995), enfd. in relevant part 97 F.3d 65 (4th Cir. 1996), and its request for an award of its organizing expenses. However, we grant the Charging Party-Union's request for the inclusion of language in the notice of election in accordance with *Lufkin Rule Co.*, 147 NLRB 341 (1964). Such language is standard when requested. See NLRB Casehandling Manuel (Part Two), Representation Proceedings, Sec. 11452.3. See, e.g., *Community Action Commission*, 338 NLRB 664, 667 fn. 14 (2002) (citing NLRB Casehandling Manual (Part Two), Representation Proceedings, Sec. 11452.3); *Guardian Automotive Trim, Inc.*, 337 NLRB 412, 413 fn. 5 (2002); *Mercy General Hospital*, 334 NLRB 100, 109 fn. 54 (2001).

[5] In sec. IV,A of the judge's decision, she summarized that "the evidence reflects that Supervisor Charlie Self threatened employees with . . . plant closure, plant relocation and layoff if the employees selected the Union as their bargaining representative." This threat as to layoff was directly supported by employee Wilton Shrader's testimony, quoted by the judge in sec. II,B,3 of her decision, that, "Charlie told me . . . if the Union came in they [there] would be a layoff and a lot of guys would get laid off." We accordingly find that the judge inadvertently omitted reference to a threat of layoff, when she concluded in sec. III,B of her decision that, "Respondent, acting through Charlie Self, threatened employees with closure and relocation if the Union won the election."

ployee Chad Hicks,[6] the judge found that Baker told employees of "the possibility of plant closures if there is a Union due to costing the Company money," and that he "mentioned that the possibility of layoff depends upon the Union and whether the Union forced Respondent to lay off employees." Although the judge found that Baker's reference to plant closure was vague and too abbreviated to be an unlawful threat,[7] she nevertheless found that Baker's equally vague and abbreviated reference to layoff was unlawful. With only a reference to Baker's "undenied threat" as enhancing the allegations against Badgley, discussed below, the judge summarily concluded that Baker's comments unlawfully threatened layoff. We disagree and find instead that the testimony concerning Baker's remarks is in all respects too vague and insubstantial to support a finding of any unlawful threat.

The record reveals that on direct examination, Hicks was asked whether Baker talked about the possibility of a layoff at any time. He responded, "It could be a possibility, just depends on the Union pretty much" and, "It depended on the Union if—if it forced the company to." When asked what Baker specifically said about a layoff at Miller Industries, Hicks replied, "That it might be a possibility of a layoff, if the Union came in, and they really couldn't afford it."

Contrary to the judge and our dissenting colleague, we find that these general references to "possibilities" are inadequate to establish that Baker threatened that unionization would result in layoffs. The statements do not detail how or why the Union would force the Respondent to lay off employees, but they do clearly indicate that these possibilities would be based on the Respondent having no alternative in the face of either a union initiative or some other economic circumstance. Hicks' testimony conveys little more than that he had an impression that Baker was connecting the Union to layoffs. It lacks any semblance of detail that would provide a reliable basis for concluding that Baker was making a threat. We find no difference between Hicks' testimony on the layoff statement and his testimony regarding the allegation that Baker threatened plant closure in the same meeting, which the judge dismissed as "vague and too abbreviated to constitute sufficient evidence of a threat." Without greater specificity as to Baker's words or elaboration on his manner of delivery, we are unable to conclude, on the strength of this evidence, that the phrases attributed to Baker contain an unlawful threat.

(b) *Badgley:* On the day before the election, the Respondent held a meeting with employees in the cafeteria. Reading from a prepared text,[8] CEO Badgley described the Respondent's economic condition, citing declining sales figures and financial losses in the prior 2 years. He pointed out that to keep from laying off employees, the Respondent had shifted, to the facility involved herein, work that had previously been out-sourced. He also observed that several years earlier, two unionized competitors had gone bankrupt and that the Respondent's current competitors were all nonunion. Badgley said he believed competitors might use the prospect of the Respondent's unionization to gain competitive advantage. Stating that he was not predicting a strike, Badgley voiced concern about the possibility of a strike and that an interruption in business could harm relationships with customers. He said that the Union could not help, and could even hurt, the Respondent's economic situation. He ended by asking employees to work with management through the rough times and for their vote.

The judge described the overall effect of Badgley's speech as equating unionization with dire consequences and, specifically, unlawfully threatening that employees would be laid off.[9] She found that Badgley's unexplained prediction that nonunion competitors would take sales from the Respondent lacked a demonstrable underlying premise.[10] She also found that Badgley sent the message that just as not laying off employees was Respondent's choice, decisions about future layoffs were also within the Respondent's control. Describing Badgley's threat as further enhanced by Baker's earlier undenied layoff threat,[11] the judge concluded that the Respondent violated Section 8(a)(1) in both instances.

[6] Baker did not testify about these threat allegations, so Hicks' testimony is undisputed.

[7] No exceptions have been filed regarding this dismissed allegation. Therefore, unlike our colleague, we find it of little probative value in assessing whether Baker made an unlawful threat of layoff.

[8] A copy of the written remarks was entered into evidence as R. Exh. 6. Badgley testified that he did not vary from what was on the page.

[9] Acknowledging that the complaint alleges that Badgely threatened plant closure rather than layoff, the judge reasoned that, because the complaint alleged other layoff threats (i.e., by Baker and Self), the Badgley statement was fully litigated, and the Respondent suffered no prejudice, there is adequate foundation for finding the violation. In the circumstances of this case, we will assume that this allegation was appropriately before the judge for consideration. We further observe that the judge dismissed the allegation that Badgley threatened plant closure, to which no exceptions have been filed.

[10] The judge cited *Ipilli, Inc.*, 321 NLRB 463 (1996), and *Crown Cork & Seal Co.*, 308 NLRB 445 (1992), for the asserted proposition that employers must substantiate, with objective evidence, predictions that unionization will result in loss of competitiveness with nonunion rivals, or they will be held unlawful.

[11] In light of our dismissal of the allegation concerning Baker's layoff threat, we find it of little probative value in assessing the impact of Badgley's speech.

We disagree. Badgley's statements were based on demonstrable facts, including sales and earnings (loss) figures, and verifiable accounts of past events. The declining market was a reality of the business downturn, about which employees were fully aware. The bankruptcy and relocation of former area unionized plants were also actual occurrences, not matters of opinion. So, too, was the fact that the Respondent had made a choice to keep its employees working by bringing into the plant work previously done by outside contractors.

Other parts of Badgley's speech that were not strictly fact based were limited to his views about the possible impact of the Union in dealing with the less-than-vigorous industry climate. He observed, "I do not believe the Union can do anything to help our ability to continue to deal with the economic problems we face." Citing his own past business experience, Badgley alluded to how others in the industry might attempt to use the Respondent's unionized status to gain competitive advantage in a tight market. Badgley did not predict unavoidable consequences,[12] but only offered his perspective that unionization could have some effect on the Respondent's business condition based on the conduct of its competitors.[13] This statement cannot be reasonably described as a threat. Likewise, Badgley's reference to what might result in the event of a strike, an event which he specifically assured employees he was not predicting, is merely an apt description of the likely effects of interrupted production.[14]

In contrast to the comments found unlawful in *Ipilli, Inc.*, supra, relied on by the judge, Badgley's comments were not premised upon notions that the Union necessarily would make particular wage demands, that unionization would render the Respondent less competitive, or that unionization would lead inevitably to the Company's demise. And unlike the statements found unlawful in *Crown Cork & Seal Co.*, supra, Badgley was expressing concern for potential economic consequences beyond the Respondent's control that could result from unionization, not threatening retaliation as a result of employees' choosing the Union. Neither was he warning that the Respondent would not meet its lawful bargaining obligations if the Union were selected. Instead, Badgley merely communicated certain objective facts and, devoid of threats or promises, offered his assessment on the possible impact of unionization on the Respondent's situation. Unlike the dissent, we do not impute an unlawful threat in Badgley's honest recounting of events beyond the Respondent's control. We find, therefore, that his speech to employees falls within the standard of *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 620 (1969). Accordingly, we dismiss allegations that the Respondent unlawfully threatened employees that unionization would result in layoffs.

Our colleague says that she "hears a more threatening message." We disagree. The issue is what the employees who were there would reasonably understand in the circumstances. In our view, employees would reasonably understand that Badgley was talking about the possible economic consequences of unionization, not a threatened retaliation for unionization.

Our colleague also says that the Baker and Badgley remarks must be considered together. However, as she acknowledges, the remarks were made by different people, at different times, and in different settings. Accordingly, even if one remark was unlawful we could not rely on it to taint the other one. In addition, as set forth above, we find both remarks lawful.

2. *The Statements of Jerry Driscoll*: Undisputed evidence establishes that on the day before the Good Friday holiday, Vice President of Operations Driscoll held a meeting to solicit employees who would be needed to work the next day. As an inducement, the Respondent offered to modify the overtime policy to permit employees to opt for compensatory time and take a day off at another time. Following the meeting, Driscoll spoke with a group of about five or six employees and told them that if a union were present, the Respondent's ability to modify policies to accommodate such last-minute needs would be hard or might not happen at all. The judge reasoned that because Driscoll offered no explanation about the bargaining process and the role of the union in workplace governance, his statement unlawfully threatened that the Respondent would more strictly enforce overtime rules if employees voted in the Union.[15]

The Respondent contends that the judge failed to consider the context of Driscoll's remarks and asserts that the record shows that employees did not receive Dris-

[12] Cf. *Reeves Bros., Inc.*, 320 NLRB 1082 (1996).

[13] Badgley's remarks may be compared with those in *Action Mining*, 318 NLRB 652 (1995), where the day before the election, the company president referred to the negative economic industry conditions and the possibility of losing customers because of their concern that the company could face a strike. In reversing the judge's finding of a violation, the Board focused on the speculative nature of the remarks and found no suggestion that the company would be taking retaliatory action solely on its own initiative for reasons unrelated to economic necessity.

[14] See *General Electric Co. v. NLRB*, 117 F.3d 627, 632–634 (D.C. Cir. 1997) (discussion of employer citing economic risks of unionization).

[15] The judge contrasted Driscoll's statement with those found lawful in *Trash Removers, Inc.*, 257 NLRB 945 (1981), and *Beverly Enterprises*, 322 NLRB 334 (1996). In each of those cases, the employer made reference to the bargaining process and the role of the union as a participant in the implementation of workplace policies.

coll's words as threatening or coercive. Our review of the evidence supports the Respondent's position.

In setting forth the facts giving rise to this allegation, the judge relies on Driscoll's testimony as to what was said. In his analysis, he focuses on Driscoll's statement, but fails to take into account the response of Anthony Cartwright, one of the employees who was a part of that discussion. In response to Driscoll's observation that the Respondent's flexibility would be curtailed in a unionized environment, Cartwright immediately interjected, "You're right, that's why we want a union, we want a contract, we want everything written down so you can't change policy." Driscoll apparently accepted the employee's reply and the conversation ended.

This part of the conversation, disregarded by the judge, demonstrates that Cartwright understood precisely the point Driscoll was making; that is, with a union, agreed-upon contractual terms govern the workplace and the Respondent would not have the discretion to make policy changes at will. Once Cartwright said what he did, it was unnecessary for Driscoll to elaborate on the issue. None of the other employees present asked a question or offered further commentary.[16] There is no evidence that the exchange, including Cartwright's response, would reasonably threaten the employees. Driscoll did not say that with a union overtime would not be available or that compensation options would be less advantageous for employees, only that the Respondent would not be free to make last minute changes to accommodate its needs. Cartwright's assertion indicates that employees recognized that a union contract would play a role in these restrictions. Accordingly, we find no basis to conclude that Driscoll's comment unlawfully threatened employees.

ORDER

The National Labor Relations Board adopts the recommended order of the administrative law judge as modified below and orders that the Respondent, Miller Towing Equipment, Inc., Ooltewah, Tennessee, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Delete paragraph 1(e), and reletter the subsequent paragraphs.

2. Substitute the attached notice for that of the administrative law judge.

MEMBER LIEBMAN, dissenting in part.

In addition to committing the unfair labor practices found by my colleagues, the Respondent here—through its plant manager, its vice president of operations, and its CEO—threatened employees with layoff and loss of overtime opportunities. As the judge did, I would find these violations, contrary to the majority, which tolerates precisely the sort of employer brinksmanship condemned by the Supreme Court in *Gissel Packing Co.*[1] In all other respects, I agree with the majority, including their decision that the conduct they have found to be unlawful warrants a second election and granting the Charging Party-Union's request for the inclusion of language in the notice of election in accordance with *Lufkin Rule Co.*, 147 NLRB 341 (1964).

1. *The Layoff Threats*: It is appropriate to assess the import and impact of Plant Manager Michael Baker and CEO Jeff Badgley's remarks together, as the judge did. Although the statements were delivered at different times and settings, their message was part of a single theme, designed to create fear and uncertainty about the effect of unionization on job security.

While testimony regarding Baker's remarks is not extensive, it is sufficient to establish their coercive tendency. Employee Hicks described the meeting which took place just a few days before the election, with about 20 employees present, as one of a series held by Baker to discuss the disadvantages of having a union. Reading from note cards,[2] Baker began by raising the possibility of plant closure if costs increased and named two unionized companies that were facing bankruptcy or had closed.[3] He said that those companies could not afford to stay open, and had to lay off employees. He warned that the same thing could happen to the Respondent.

The message was clear, even if Hicks' testimony lacks the precision the majority deems necessary. Baker equated unions with higher costs for businesses, leading to their failure and the loss of jobs. He was not lawfully predicting potential consequences of unionization based on objective fact, as required by *Gissel Packing Co.*, supra. Citing examples of financially troubled companies and implying that the same thing could happen to the Respondent, without providing a factual basis, would reasonably tend to coerce employees. Hicks' testimony reveals that Baker was successful in delivering his mes-

[16] Thus, we do not agree with our colleague's assessment that we are relying on Cartwright's reply to mitigate the impact of Driscoll's statement. Instead, we are relying on Cartwright's reply as evidence that he understood—and articulated in the presence of the other employees who had heard Driscoll's statement—that collective bargaining would be required before the Respondent could make any changes in terms and conditions of employment. As noted above, neither Driscoll or any of the other employees refuted or questioned Cartwright's reply.

[1] *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 620 (1969).

[2] Hicks was clear and certain in testifying that Baker's comments were not in response to any employee question.

[3] No exceptions were filed with respect to the judge's dismissal of allegations that Baker's remarks threatened plant closure.

sage. Thus, in agreement with the judge, I would find that Baker unlawfully threatened that unionization would result in layoffs.

As is made even clearer in CEO Badgley's formal remarks, the issue of job security was a major concern during the campaign. Shortly after Baker's smaller group meeting, Badgley met with the entire work force to review business conditions and ask for support in the election. He recounted the negative economic climate and the plight of others in the industry. He pointed out that other companies had imposed layoffs in response to the downturn, but the Respondent had chosen to bring into its facility certain work that had previously been done by outside contractors in order to keep from laying off employees. He added that moving the work in-house was more expensive than to have left it with contractors, but that Respondent had placed the employees' interests first in making its decision. He then expressed concern that if the Union entered the picture, the possibility of business interruptions could place the Respondent at further competitive disadvantage during the current rough economic times. He ended with the hope that they would continue to work together and asked for their vote.

The *Gissel* Court has made clear that in deciding whether a statement reasonably tends to coerce employees, who are dependent on their employer, the Board must be alert "to pick up intended implications of the [employer] that might be more readily dismissed by a more disinterested ear." 395 U.S. at 617. My colleagues should listen more closely here. Unlike them, I hear a more threatening message in Badgley's reminding employees that the Respondent holds the power over the decision to implement layoffs. Sales numbers and loss figures notwithstanding, Badgley unsubtly reminded employees that just as the Respondent had saved their jobs in the past, it could also decide to make a different choice in the future particularly if employees rejected his request that they work together without the involvement of the Union. On the heels of Baker's tying the presence of the Union to layoffs, Badgley's veiled reference becomes somewhat more transparent. Accordingly, I would find his remarks also unlawfully threatened layoffs as a consequence of choosing the Union.[4]

2. *The Threat of Losing Overtime*: In further agreement with the judge, I find Vice President Jerry Driscoll's statement regarding the Union's impact on overtime opportunities to be unlawful. Driscoll had just ended a meeting in which he was attempting to meet the Respondent's last-minute holiday staffing needs by offering incentives for employees to work overtime. Talking informally with a few employees right after the meeting, Driscoll took the opportunity to raise the subject of the Union. Driscoll commented that he might not be able to offer such inducements for overtime work with a union present. He said that it would be hard, if it could happen at all, for the Respondent to adjust to last-minute needs in this way. He did not refer to there being an agreement with the Union about how such situations would be addressed or that a contract would specify the manner in which such needs could be filled. The message was simply that employees would be losing something they valued if they chose the Union. I am not persuaded by my colleagues' efforts to mitigate the impact of this manager's unlawful threat by relying on an employee's quick retort.

[4] See, e.g., *AP Automotive Systems*, 333 NLRB 581 (2001) ("scenario conveyed to employees was that, if they chose union representation, the Petitioner would inevitably make exorbitant demands, which would 'hurt the Troy Plant's competitive position' the Employer would not agree to those demands, a strike would ensue, and the plant would close").

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 more strict enforcement of plant rules if you select the International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America, (UAW), AFL–CIO or any other union as your collective-bargaining representative.

WE WILL NOT threaten you with plant closure, plant relocation, or layoff if you select the UAW or any other union as your collective-bargaining representative.

WE WILL NOT discriminatorily prohibit you from engaging in any union or protected activity on nonworking time in nonworking areas.

WE WILL NOT form, administer, or render unlawful assistance or support to the continuous improvement committee, or any other labor organization.

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

WE WILL immediately withdraw all recognition from and completely disestablish the continuous improvement committee, and refrain from recognizing the continuous improvement committee as your representative concerning terms and conditions of employment.

MILLER INDUSTRIES TOWING EQUIPMENT, INC.

Sally Cline, Esq., for the General Counsel.
Townsell G. Marshall Jr., Esq., for the Respondent.
Lesley Troope, Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

MARGARET G. BRAKEBUSCH, Administrative Law Judge. The charge was filed by the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL–CIO (the Union) on May 6, 2002,[1] and an amended charge was later filed by the Union on June 12, 2002. The complaint issued on September 30, 2002. Based upon the allegations contained in the charge and amended charge, the complaint alleges that Miller Industries Towing Equipment, Inc. (Respondent) engaged in various violations of Section 8(a)(1) of the National Labor Relations Act (the Act) between March 1 and April 19, 2002. The complaint also alleges that since on or about April 19, 2002, Respondent has dominated and interfered with the formation and administration of, and has rendered unlawful assistance and support to, a labor organization in violation of Section 8(a)(1) and (2) of the Act.

Case 10–RC–15274 involves a Board-conducted election on April 11, 2002, in which 134 votes were cast for the Union and 147 votes were cast against the Union with no challenged or void ballots. On April 18, 2002, the Union filed timely objections to the election alleging the Respondent's misconduct and requesting the Board to set aside the April 11, 2002 election and direct a new election. In its objections, the Union alleged 42 separate incidents of misconduct interfering with the employees' free choice of a collective-bargaining representative. On October 9, 2002, the Regional Director for Region 10 issued a Report on Objections, Order Directing Hearing and Consolidating Cases and Notice of Hearing. In the order, the Regional Director found that certain of the Union's objections were coextensive with certain of the conduct alleged in the complaint issued in Case 10–CA–33712. The Regional Director also approved the Union's withdrawal of Objections 1, 2, 4–7, 9, 10, 12–15, 20–34, and 36–43. The remaining objections were thus consolidated with those allegations contained in Case 10–CA–33712 and set for hearing.[2]

I heard this consolidated case in Chattanooga, Tennessee, on November 20 and 21, 2002. The General Counsel, the Union, and Respondent filed briefs, which I have considered. On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs, I find that Respondent engaged in certain conduct in violation of Section 8(a)(1) and (2) of the Act. I further recommend that the April 11, 2002 election be set aside and that the Board direct a second election.

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation, has been engaged in the manufacture, sale, and distribution of vehicle towing and recovery equipment, and parts at its facility in Ooltewah, Tennessee, where it annually sells and delivers goods from its Tennessee facility valued in excess of $50,000 directly to customers outside the State of Tennessee. The Respondent admits, and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Issues

On February 28, 2002, the Union filed a petition with the Board to represent certain[3] of Respondent's employees at its Ooltewah, Tennessee facility. Pursuant to a Stipulated Election Agreement approved on March 12, 2002, the secret-ballot election was conducted on April 11, 2002. The General Counsel alleges that during the course of time between March 1 and April 19, 2002, Respondent engaged in various violations of Section 8(a)(1) of the Act. In its remaining objections, the Union alleges that a number of these same acts of misconduct interfered with Respondent's employees' free choice of a collective-bargaining representative sufficient to require setting aside the April 11, 2002 election.

B. Alleged Violations of Section 8(a)(1)

1. Threatening employees with stricter enforcement of plant rules (complaint paragraph 7 and Objection 8)

Employees at the Ooltewah facility are allowed two 10-minute breaks and one 30-minute lunchbreak during each shift. Employees Jeff Nathan Stacey, Stevie Ruley, and Richard Fields testified that prior to the Union's campaign, Respondent did not strictly enforce the scheduled break and lunchtimes for its employees. Fields recalled attending a meeting of approximately 10 to 12 employees conducted by General Manager Michael Baker approximately 2 weeks before the election. Fields recalled: "He said our breaks wouldn't be as lenient if we had a Union, and you know, our lunch times would be like back in our work area." Stacey recalled that during a meeting with employees in early March, Baker told the employees that

[1] All dates are 2002 unless otherwise indicated.
[2] Objection 19 was withdrawn by the Union at the hearing.
[3] The stipulated appropriate unit is:
All full-time and regular part-time production and maintenance employees, warehouse employees, shipping and receiving employees and truck drivers, employed by the Respondent at its Hilltop Drive and Ooltewah Georgetown Road, Ooltewah facilities, but excluding all other employees, technical employees, office clerical employees, professional employees, guards and supervisors as defined in the Act.

if they had a union, Respondent would have to enforce the breaktimes more strictly and there wouldn't be any "dilly-dallying around before and after." Bobby Wilson recalled that during a meeting at the end of the campaign, Baker told employees that "if the Union got in that everybody would have to buckle down more than what they do now." He quoted Baker as saying, "We're pretty lenient now, but if this comes in, you know we'll all have to abide by rules, stricter rules pertaining to lunch and breaks."

Baker testified that early in the Union's campaign, he held small group meetings with employees, averaging 15 to 20 employees in the groups. Baker explained that his intent was to introduce himself in terms of his background and experience. During the meetings, Baker allowed employees to ask questions. He recalled that in response to a question, there had been some discussion about lunch and breaktimes and what might happen if the Union were to be voted in. Baker could not recall the exact question but he believed that it had to do with the differences between a union shop and a nonunion shop. Baker told employees that based upon his past experience in a union environment, a union environment is more structured and regimented as far as breaktimes and not nearly as relaxed as Respondent's facility. When asked if he had ever stated in the meetings that Respondent would have to more strictly enforce breaktimes or lunchtimes if there was a Union, Baker testified that he didn't believe that he had ever said that.

In further support of paragraph 7 of the complaint, the General Counsel presented the testimony of employee Steve Ruley. Ruley could not identify the date, however he recalled a conversation that he had with Supervisor Charlie Self during the campaign period. Self was not Ruley's supervisor at the time of the campaign, however he and Ruley were involved in a discussion about animals. During the course of the conversation, Ruley asked Self how he would feel if the Union won the election. Self replied, "Well, the only thing I can tell you is that the breaks that people take now, we'd have to enforce it now. Your lunch would have to be enforced more, and your last break enforced more." Employee Bobby Wilson also testified concerning a conversation with Self. Wilson did not give the date or the location of the conversation nor did he mention whether any other employees were present during the conversation. He testified:

> At one time he said that if the Union got in here that they would have to reinforce the break policy and said ten minutes is all you'd get; you'd have to stay in your hole and—until the buzzer went off, be back in your hole before the buzzer went on. Said they'd have to crack down on that.

Self denied telling either Wilson or Ruley that the break policy would be enforced more strictly. Self recalled that he had conversations with Ruley before the election but denied that Ruley ever asked him how he felt about the Union. Self maintained that Ruley was one of the main employee organizers in the union campaign and he saw no need to talk to Ruley about the Union.

2. Threat of plant closure and threat of plant relocation if employees selected the Union as their bargaining representative (complaint paragraphs 8 and 9 and Objections 16 and 17)

Paragraph 8 of the complaint alleges that Supervisors Charlie Self, Michael Baker, and Jeff Badgley threatened plant closure if the employees selected the Union as their bargaining representative. The complaint alleges that these threats occurred on March 11, 21, and 28 and April 10, 2002. Paragraph 9 of the complaint alleges that Supervisor Charlie Self threatened employees with plant relocation on or about March 11 and 21, 2002.

Employee Bobby Wilson testified that approximately a month before the election, Supervisor Self came to his work area and spoke with him about the Union. Wilson recalled that during the conversation, Self mentioned that Respondent had a facility in Greenville, Tennessee, that was not being used very much. Wilson quoted Self as stating: "They close this place down and we'll all be out of a job." Wilson recalled that he had responded "Well, if that's the case of it, then I guess they'll have to retrain everybody when they hire men up there, won't they?" Wilson testified that Self gave no explanation as to why the Ooltewah facility might close, but only stated that when the Union came in, Respondent might close down the plant. Wilson also recalled am earlier occasion when Self had spoken to him and to employees Allen Rodgers and an employee known as (Pup) or Jason. Self referred to Respondent's plant in Greenville, Tennessee, and mentioned that only a small portion of it was being used. Self then added, "What are we going to do when they shut it down, move everything up there? We'll all be out of a job then." Self denied that he ever had any conversation with Wilson concerning the closure of the Ooltewah plant or about Respondent's plant in Greenville, Tennessee.

Employee Chad Douglas Hicks testified that he attended a meeting held by Baker a few days before the election. Hicks recalled that Baker explained the disadvantages of having a union and volunteered that it was not smart to have a union. Hicks recalled, "He said there's a possibility of a plant closure due to the Union of drying the Company out of money." Baker referenced two specific companies; Wayland Foundry and Accuride, that were going through the process of bargaining for a contract with a union. The companies had either gone into bankruptcy or had been forced to close or get temporary help. Hicks recalled that Baker's comments about the closure had been made as he read from index cards and had not been in response to any particular questions. While Baker testified about the small group meetings that he held with employees prior to the election, he did not specifically address the alleged threat of plant closure or deny the alleged statement.

Employee Wilton Shrader testified concerning Chief Executive Officer Jeff Badgley's speech to employees the day before the election. Shrader recalled that the cafeteria had been filled with employees for Badgley's speech. While reading from a statement, Badgley talked about the Union closing Challenger, Wayland, and Ernest Holmes. Shrader recalled that Badgley said that the Union would conflict with or hamper the Company's way of doing business. He denied however, that Badgley had said anything about closing down the facility. Shrader

added: "I can't remember his exact words, said something to the effect that he had been watching out for our families and trying to avoid a layoff, but if a Union came in there would be a layoff." Shrader further recalled that Badgley told the employees that if they didn't like their jobs, they could go somewhere else and find another one.

Respondent submitted into evidence the text of Badgley's speech on April 10. Badgley testified that prior to the speech, he told employees that he was going to read from the text and he read it in its entirety and did not vary from the prepared remarks. The written remarks include the following language:

> Today, none of our major competitors are unionized. Jerr-Dan, Dynamic, NRC, Nomar, A-Tach, Kilar and True Hitch are all non-union. That was not always true. In fact, before the last business downturn in our industry in the early 1990's, Challenger, in Elkhardt and Chicago, was unionized. As most of you know, in 1992, we bought the bankruptcy assets of Challenger, as well as Holmes, which had been unionized before it moved from Chattanooga. I am not saying these companies went bankrupt because of the union, but is clear that the union did not have a positive affect on the ability of those companies to successfully compete.

As Badgley continued his speech, he spoke about the decreased sales and losses for Respondent in 2000 and 2001 and certain factors that had contributed to the Company's losses. In talking about certain manufacturing processes that had been moved to the Ooltewah plant, Badgley stated:

> Frankly, leaving this work with outside contractors would have saved us money in the short run, but these decisions were made to avoid layoffs in this down economy. We did not have to do this, but we did it to keep people working at the Ooltewah facility. We thought it was better that we do this rather than have people out of work and receiving unemployment which amounted to less than half of what they would have earned working here.
>
> I am encouraged by what we have done in this economy. We have been able to keep you working while those at many other companies have been laid off or have lost their jobs. I also believe that the cost savings we have accomplished, such as a 25 percent reduction in selling, general, and administrative expenses, puts us in a position to benefit and become profitable when the economy does pick up. We are not out of the woods yet, but we are moving in the right direction.

Badgley continued by telling employees:

> I am concerned, however, about our ability to continue to deal with our economic problems in the face of this union organizing campaign. If the UAW should somehow win the election, I firmly believe that our competitors, all of whom are non-union, will use this to create uncertainty and concern in the market in order to take sales away from us.

Badgley also added that while he was not predicting a strike, he was concerned about the possibility of a strike if the UAW won the election. He explained that any interruption of their business might seriously harm their relationship with their customers and their business.

3. Threat of layoff if the employees selected the Union (complaint paragraph 10 and Objection 18)

Paragraph 10 of the complaint alleges that on or about March 28, 2002, Respondent, acting through Mike Baker and Charlie Self threatened employees with layoff if they selected the Union as their bargaining representative.

Employee Chad Douglas Hicks testified that during a meeting with employees a few days before the election, Baker had not only spoken with employees about the possibility of plant closure but had also mentioned the possibility of a layoff. Hicks recalled that Baker had said that the possibility of layoff depends on the Union and if the Union forced the Company to layoff employees. In his testimony, Baker did not address the alleged threat of layoff and did not deny the alleged statement.

During his conversation with Self prior to the election, Shrader recalled a discussion of layoffs. Shrader recalled: "Charlie told me that I knew that I had enough seniority that if there was a layoff that I wouldn't get laid off, but if the Union came in they [there] would be a layoff and a lot of the guys would get laid off." Self denied that he had ever made such a statement to Shrader or that he had any discussion with Shrader about layoffs. Self recalled that during the campaign he was asked several times if he thought that there would be a layoff if the Union came in and he had responded that he didn't know.

4. Threat to decrease or eliminate overtime options if the employees selected the Union (complaint paragraph 11 and Objection 3)

Complaint paragraph 11 alleges that on or about March 28, 2002, Vice President of Operations Jerry Driscoll threatened employees with a decrease or elimination of overtime options if the employees chose the Union as their collective-bargaining representative.

Employee Jeff Stacey recalled that Driscoll spoke with a small group of employees after his having had a meeting with a larger group of employees. Stacey did not identify the approximate date of the meeting or the number of employees who were present during Driscoll's comments. Stacey recalled that Driscoll told employees that if they elected the Union, they would not have overtime options.

General Manager Baker attended a meeting held by Driscoll prior to the Good Friday holiday. Baker explained that the purpose of the meeting was to tell employees that they had the option of compensatory time in lieu of overtime if they worked the Good Friday holiday. Driscoll testified that Respondent's policy on overtime is to pay double time to employees who work on holidays. Because Respondent needed more people to work on that particular holiday, the overtime policy was modified to allow employees the option of receiving comp time and taking their holiday at another time. Driscoll recalled that after the meeting, a group of approximately five or six employees, including Stacey and Anthony Cartwright, were talking with Mike Baker. Driscoll joined the conversation. Driscoll admitted that he initiated the subject of the Union. Driscoll recalled saying that if a union were voted in, the Company's ability to come down just before an event and modify policy to make

things work would be harder or not happen. Driscoll recalled that Cartwright had responded, "You're right, that's why we want a union, we want a contract, we want everything written down so you can't change policy."

5. Prohibiting employees from engaging in Union activity during nonworking time in nonworking areas and unlawfully denying nonworking employees access to Respondent's premises to engage in union activities (complaint paragraphs 12 and 13 and Objection 11)

Complaint paragraph 12 alleges that on or about April 9, 2002, Human Resources Director Bill Beckley prohibited employees from engaging in union activities during nonworktime in nonworking areas. Paragraph 13 further alleges that on the same date, Beckley unlawfully denied off-duty employees access to Respondent's premises to engage in union activities.

Employees Stacey testified that prior to the Union's campaign, employees were allowed to congregate in the parking lot before or after their regular shift. Union Organizer Cindy Adams testified that she had observed employees visiting with each other in the parking lot after work. Warehouse Manager Denny Powers also confirmed that there was no rule prohibiting employees from remaining in the parking lot after they stopped working.

Employees Stacey and Shrader testified that they attended a rally of off-duty employees prior to the election. Human Resources Director Bill Beckley recalled that the rally had been the day before the election at the beginning of second shift. Stacey recalled that a group of approximately 20 employees gathered outside the main gate to the Respondent's facility and then circled through the parking lot, exiting back at the main gate. It is undisputed that the employees held large "Union Yes" signs and chanted their support for the Union. Shrader estimated that the rallying employees did not come any closer than 150 to 200 feet of the working area of the plant. Employees Stacey and Shrader recalled that Beckley came out of the facility while the employees were conducting their rally and told them that they would have to leave company property. While union organizer Cindy Adams had initially been outside the main gate, she later entered company property during the course of the employees' rally. She took photographs from a vantage point on the ground as well as from the back of a truck parked in the parking lot. Adams confirmed that she had also heard Beckley tell employees to get off the company property.

Employee Stevie Ruley was working inside the plant at the time of the employees' rally. As he was working in the stockroom near the dock, he overheard employees yelling something about the Union which sounded like "Vote Union, Vote Union." He recalled that when he and Warehouse Manager Denny Powers neared the doors that opened to the parking lot, he observed a group of employees walking toward the plant from the main gate. Ruley overheard Powers contact someone on the two-way radio and report that some "employees were starting trouble."

Powers testified that he had been walking to the stockroom on April 10 when he heard chanting outside. He observed 15 to 20 employees who did not work in that area standing at the bay door. When he walked to the door, he saw a group of employees walking toward the receiving gate. He saw the employees with signs and heard them yelling, "When do we want the Union? Right now." Powers recalled that he called Beckley by telephone and reported that there were a group of employees coming through the parking lot yelling and that other employees were standing and watching. Powers testified that in the eight years that he had worked for the Company, he had never seen this kind of conduct. Powers explained that he had not known if the employees were violent or what they intended to do.

Beckley testified that approximately 15 to 20 minutes after the start of the second shift on April 10, 2002, he was contacted by Powers. Powers told him that a number of employees were standing at the bay doors observing a demonstration in the parking lot. Beckley told Powers to get the employees back to work and he would go out and see what was going on in the parking lot. He said that he observed employees marching in the parking lot and chanting loudly, "Union now, Union now" as well as approximately 15 to 20 employees standing and watching the demonstration from the warehouse's bay doors. He also observed Adams coming toward him with a camera. Beckley confirmed that he told employees that they were disturbing the work force. He recalled that he told the organizer that she was trespassing and directed her to get off the property.

6. Interrogation of employees about their union activity (complaint paragraph 14 and Objection 35)

Paragraph 14 of the complaint alleges that on or about March 28, 2002, Supervisor Charlie Self interrogated employees about their union membership, activities, and sympathies. Wilton Shrader testified that a few days before the election, Supervisor Charlie Self came into his work area. Shrader was wearing a union sticker on his welding helmet. Self, who was not Shrader's supervisor, asked him, "What's that?" Shrader replied by saying that it was the next thing to the Teamsters. Shrader explained that he had mentioned the Teamsters because he had been told that Self had previously signed a union card for the Teamsters. Self asked Shrader what he thought that a union could do for him. Shrader explained that he wanted a pension. Self remarked that if Shrader had stayed in the Army, he would have a pension. Shrader alleges that it was after that point in the conversation that Self talked with him about his having too much seniority to be laid off.

Self denied that he made any comment to Shrader about the sticker on his helmet or that he ever asked Shrader what he thought that the Union would do for him. Self explained that not only had he not supervised Shrader, but Shrader had worked on a different shift. Self recalled only one conversation with Shrader about pension benefits. Self recalled that it was Shrader who pointed out that he had no pension while Self received a pension from the military.

7. Maintenance of a rule that prohibits employees from posting union-sponsored materials on its bulletin board, while permitting nonwork-related notices

Paragraph 15 of the Complaint alleges that since on or about March 1, 2002, Respondent has maintained a rule that prohibits employees from posting union-sponsored materials on its bulletin board, while permitting nonwork-related notices. The General Counsel submitted into evidence the section of the em-

ployee handbook entitled "Swap and Shop Bulletin Board." The section provides:

> The company has provided a bulletin board for limited employee use. This board is to be used only for the sale, purchase or trade of personal items such as cars, motorcycles, boats, appliances, etc. Ads pertaining to transportation needs to and from work are also acceptable. However, the bulletin board is not to be used in connection with solicitation for or notices of meetings of charities, clubs, fund drives, political announcements or messages, meetings or organizational activity, or for the sale of commercial products such as Tupperware or Mary Kay cosmetics.
>
> If you wish to have a notice posted on this bulletin board, please come to the Human Resources office and fill out a 3 x 5 index card listing the items you wish to buy or sell. The Human Resources office will see that these notices are posted. Notices will be removed after two weeks.

Beckley testified that the bulletin board had been instituted for the benefit of employees wanting a ride or offering a ride to work for transportation purposes and to sell automobiles, boats, and personal items. Beckley explained that the bulletin board was limited to certain subjects because it was thought that there was nothing controversial about selling cars or getting rides to work.

8. Respondent's formation, administration, and assistance to and support of a continuous improvement committee

Paragraph 16 of the Complaint alleges that on or about April 19, 2002, Respondent formed a continuous improvement committee to deal with Respondent, on behalf of employees, concerning wages, hours, and other terms and conditions of employment. Paragraphs 17 and 18 of the complaint further allege that the committee has been a labor organization within the meaning of Section 2(5) of the Act and, thus, Respondent has dominated and interfered with the formation and administration of a labor organization.

Approximately 60 days after Michael Baker began working for Respondent in February 2001, Baker attended Respondent's round table employee meetings conducted by Respondent's vice president of operations, Jerry Driscoll. Baker explained that while he had wanted some continuation of the employee committee program and a format for communication, he wanted something different than the round table meetings. Baker had not regarded the round table meetings as effective because the employees selected for the committee had served on the committee only for a short time and there had been no continuity or followup. In selecting employees to participate on the continuous improvement committee (CIP), Baker and Beckley selected employees who would likely participate and get involved in the committee. Employees were notified by their immediate supervisors that they had been selected to participate on the committee and the first meeting occurred on April 16, 2002. Since the first meeting of the CIP in April 2002, Respondent has given committee members the opportunity to withdraw from the committee and has solicited other employees who may be interested in participating in the CIP.

Dennie Ray Sullivan was one of the employees initially selected for the CIP. He understood that the employees on the committee were to be permanent. Baker explained at the first meeting that he was seeking to get input from employees. committee member Mike Bundy recalled that Baker told the members that they were not a round table group nor were they a committee. He likened the members to representatives of employees and asked them to get employee suggestions to present to the CIP. CIP member Samuel Dean King recalled that Baker told the members that they had been hand picked for the group and that changes needed to be made in the plant. Respondent was looking for help from the people who were doing the work. The members were told that they were to inform employees in their immediate work area and solicit ideas. Baker recalled that he had told the members that they were not a "committee" because he felt that there was a negative connotation to "committee." He did not think that he had referred to the members of the CIP as representatives. He recalled that he told them that their role was to assist in communicating his vision for the plant. He had told them that they were free to go back to tell other employees about their meetings but they were not obligated to do so.

Baker confirmed that the subject of random drug testing, the attendance policy, and the 401(k) plan were all brought up during the first meeting. There is no dispute that Baker included random drug testing for the agenda for the second meeting held on April 24, 2002. Baker included the topics of random drug testing and the attendance policy for the agenda for the CIP's April 30, 2002 meeting. Employees Sullivan, Bundy, and King recalled the CIP's discussion of attendance and random drug testing. Sullivan confirmed that both random drug testing and the attendance policy had been issues during the Union's election campaign. King also recalled that the CIP discussed a program for facilitating changes in training programs for employees.

On April 30, 2002, Beckley and Baker issued two announcements to employees concerning changes to Respondent's attendance policy and the random drug testing policy. In its announcement concerning the attendance policy, Respondent confirmed that upon having received input and having listened to the concerns of many employees, changes had been made in the attendance policy. In the second announcement, Respondent included a summary of the feedback from employees concerning the random drug testing policy. Respondent further announced that effective immediately, it would discontinue random drug testing for employees.

While Baker confirmed that employees raised the topics of random drug testing and the attendance policy during the CIP meetings, he denied that employees were ever told that their comments would determine what action would be taken concerning these issues. Baker maintained that he told employees that Respondent was interested in their views but decisions would be made by management. Baker recalled that he told employees that Respondent would take their input under advisement. Baker recalled that the random drug testing policy and the attendance policy were discussed during the first two meetings of the CIP and the changes to the policies were announced during the third meeting. Baker testified that CEO

Badgley, Vice President of Operations Driscoll, Human Resources Director Beckley, and he were all involved in changing these policies. While Baker maintained that changes in these policies were already under consideration by management prior to the committee's discussion, he acknowledged that he had no documentation in support of this claim.

Baker testified that while he tried to steer the committee from policy and procedural issues, he did not successfully limit discussions to only manufacturing concerns. He acknowledged that while he made it clear that employees on the committee were not to solicit from employees, they were free to bring any concerns from other employees. Safety concerns were brought up as well as a pay issue concerning training for welders. He maintained that he told committee members that wages would not be discussed in the meetings. Respondent submitted summaries of questions and responses resulting from CIP meetings on September 26, October 8 and 22, and November 5, 2002. Topics include the need for repair and replacement of various equipment, cleanliness concerns for the plant and the parking lot, and certain safety procedures during the manufacturing process as well as reported problems and recommendations on the manufacturing process.

III. FACTUAL AND LEGAL CONCLUSIONS

A. Whether Respondent Threatened Employees with Stricter Enforcement of Plant Rules

Employees Field, Stacey, and Wilson testified that during a preelection meeting with employees, General Manager Baker told employees that if there was a Union, Respondent would not be as lenient and Respondent would have to enforce the breaktimes more strictly. Prior to the election, Baker held small group meetings with employees and allowed employees to ask questions. Baker admits that in response to a question, there had been discussion during the small group meetings about the differences between a union shop and nonunion shop. Baker admitted that he told employees that based upon his past experience in a union environment, a union environment is more structured and regimented as far as breaktimes and not nearly as relaxed as Respondent's facility. Baker did not specifically deny that he told employees that Respondent would have to more strictly enforce breaktimes or lunchtimes if there was a union, however, he testified that he "didn't believe" that he had ever said that.

The Board dealt with similar circumstances in its recent decision in *Mid-Mountain Foods, Inc*., 332 NLRB 229 (2000), enfd. 269 F.3d 1075 (D.C. Cir. 2001). In *Mid-Mountain*, employees alleged that an employer's director of operations and human resources told employees during a preelection meeting that if the employees voted for the union, the employer would enforce the work rules and the rules would be followed to the letter. In defense, the employer representative acknowledged that during the meetings, he had shown employees copies of collective-bargaining agreements concerning other employers. One of the collective-bargaining agreements had a work rule restricting employees from leaving their work area without supervisory approval. The employer contended that these rules were used during the meeting merely as examples of what was happening in these contracts. The Board affirmed the administrative law judge in finding that the employer intended to inform its employees that unionized employees at the other facility worked under stricter work rules than they did. In this instance, Baker admits that he told employees that a union environment is more structured and regimented as far as breaktimes and not nearly as relaxed as Respondent's facility. As in *Mid-Mountain*, supra, Baker's statement evidences his intent to inform employees that if they were unionized they would have to work under stricter work rules. I credit the testimony of Fields, Wilson, and Stacey that Baker threatened employees with stricter enforcement of plant rules if the employees voted for the Union. These employees' credibility is further bolstered by Baker's admission that he told employees that a union environment is more structured and regimented as far as breaktimes and not nearly as relaxed as Respondent's facility. Respondent submits that Baker's comments were legitimate persuasion permitted by Section 8(c) and is not an unlawful threat, citing *UARCO, Inc.*, 286 NLRB 55, 58 (1987), and *Pembrook Management, Inc*., 296 NLRB 1226, 1227 (1989). In *UARCO, Inc.*, however, the employer characterized bargaining as "horse trading" in which the employees could gain, lose, or break even. It was found that the employer merely informed the employees during preelection meetings that benefits could be gained as well as lost in negotiations and did not constitute threats. In *Pembrook Management, Inc*., supra, the Board found no violation when the employer told employees that if unionized, they would have to deal with the employer indirectly, through their chosen representative. The Board found that the employer had merely imparted a fact of industrial life and was not coercive. I find the facts of both cases distinguishable from the statement and the message communicated by Baker to employees.

Employees Ruley and Wilson testified that in separate conversations, Supervisor Self told them that if the Union were voted in, Respondent would more strictly enforce employee breaks. Self denies these statements. Self also asserted that because Ruley was one of the main union organizers, he saw no need to talk with him about the Union. On the basis of their demeanor and their total testimony, I find Ruley and Wilson to be more credible witnesses than Self. Further, it is reasonable that Self simply reiterated the message that Baker gave to employees during his small group meetings.

Accordingly, I find that Respondent threatened employees with stricter enforcement of plant rules if they selected the Union in violation of Section 8(a)(1) of the Act.

B. Whether Respondent Threatened Employees with Plant Closure, Plant Relocation, and Layoff if they Chose the Union as their Collective-Bargaining Representative

The General Counsel alleges that in preelection speeches to employees, CEO Badgley threatened employees with plant closure and Plant Manager Michael Baker threatened plant closure and layoff if the employees selected the Union as their bargaining representative. The General Counsel further alleges that in individual conversations with employee Bobby Wilson, Supervisor Charlie Self threatened plant closure and plant relocation if the employees selected the Union as their bargaining representative.

Employee Bobby Wilson testified concerning two conversations that he had with Self during the campaign period. In both conversations, Self told Wilson about Respondent's plant in Greenville, Tennessee, that was not being used to full capacity. Self opined that Respondent could close down the Ooltewah plant and move the work to the Greenville plant. Self denied that he ever had any conversation with Wilson about the closure of the Ooltewah plant or about Respondent's plant in Greenville, Tennessee. I have considered the overall testimony of Self and Wilson, including their demeanor, and I find Wilson to be the more credible witness. Crediting Wilson, I find Self's threats of plant closure and relocation violative of Section 8(a)(1).

Employee Chad Hicks testified that during a small group meeting with employees, Baker talked about two companies that had gone through financial difficulty while bargaining for a union contract. Hicks recalled that Baker mentioned the possibility of plant closure due to the Union's "drying the Company out of money." Hicks recalled that Baker mentioned that the possibility of layoff depends upon the Union and whether the Union forced Respondent to layoff employees. While Baker testified concerning his small group meetings with employees, he did not specifically address the alleged threats of plant closure and layoff or deny the alleged statement. The fact that testimony is not denied, does not guarantee that it must be credited. See *MDI Commercial Services*, 325 NLRB 53, 58 (1997). I note, however, that Respondent does not allege that Baker spoke to employees from a prepared text and Baker acknowledged that some of his statements were in response to employee questions. In its brief, Respondent argues that the statements that are alleged to have been made by Baker are a lawful form of free speech permitted by Section 8(c) of the Act.

In its 1969 decision, the Supreme Court outlined the parameters of an employer's lawful prediction of the effect of unionization on his company. The Court explained:

> [A]n 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." He may even make a prediction as to the precise effects he believes unionization will have on his company. In such a case, however, the prediction must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probably consequences beyond his control or to convey a management decision already arrived at to close the plant in case of unionization. See *Textile Workers v. Darlington Mfg. Co.*, 380 U.S. 263, 274, n. 20 (1965). If there is any implication that an employer may or may not take action solely on his own initiative for reasons unrelated to economic necessities and known only to him, such statement is no longer a reasonable prediction based on available facts but a threat of retaliation based on misrepresentation and coercion, and as such without the protection of the First Amendment.[4]

[4] *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 619 (1969).

Citing *NLRB v. River Togs, Inc.*, 382 F.2d 198, 202 (2d Cir. 1967), the court went on to state that "an employer is free only to tell 'what he reasonably believes will be the likely economic consequences of unionization that are outside his control,' and not 'threats of economic reprisal to be taken solely on his own volition'" In the April 10 speech, Badgley shared with employees his belief that nonunion competitors will use a union election to create uncertainty and concern in the market in order to take sales away from Respondent. He also added that while he was not predicting a strike if the Union won, he was concerned that a strike would seriously harm their relationship with their customers and their business. It could be argued that both predictions are based upon events outside the Respondent's control and, thus, within the *Gissel* standard for lawful comment. I note, however, that this portion of the speech is preceded by Badgley's discussion about the bankruptcy of specific unionized companies and his explanation that the union had not had a positive affect on their ability to successfully compete. Woven between his discussion of bankrupt unionized employers and the prediction that Respondent's nonunionized competitors would take sales away from Respondent, Badgley included a reference to Respondent's previous decision to move certain manufacturing processes to the Ooltewah plant. Badgley explained that had the Respondent left the work to outside contractors, Respondent would have saved money. Badgley contended that rather than laying off employees, Respondent had chosen to move the work to the Ooltewah facility. Badgley specifically stated:

> We did not have to do this, but we did it to keep people working at the Ooltewah facility. We thought it was better that we do this rather than have people out of work and receiving unemployment which amounted to less than half of what they would have earned working here.

In *Iplli, Inc.*, 321 NLRB 463 (1996), the Board affirmed the administrative law judge in finding that an employer overstepped the bounds of permissible speech and threatened employees with reprisals within the meaning of *NLRB v. Gissel Packing Co.*, supra. In a speech to employees, the owner of the company told employees that the company would have a hard time surviving as a union company if he had to bid against nonunion contractors because his labor rate would be almost double their rate. The judge found that the employer's predictions about being unable to compete was premised upon his expressed assertion that if the union successfully organized his employees, this would automatically result in a doubling of his labor costs. The judge determined that such predictions were not based on a demonstrable underlying premise that unionization would necessarily result in substantially higher labor costs. In *Crown Cork & Seal Co.*, 308 NLRB 445 fn. 3 (1992), the employer based its predictions of layoffs and job loss on its lack of competitiveness with sister plants if the union won the election. In adopting the judge's finding of a violation, the Board emphasized the employer's failure to substantiate its claims with any objective supporting evidence, such as wage scales, benefits, and total costs and efficiency of the plants where the union's contract was not in effect.

In the instant case, Badgley offers no explanation as to how its nonunion competitors will take sales away from Respondent and his prediction does not appear to be based upon any demonstrable underlying premise. Further, Badgley clearly communicated to employees that employees had not been laid off in the past because of Respondent's choice to have certain work processes performed by Ooltewah employees rather than by outside contractors. The message was clear that prevention of future layoff was within the control of Respondent and was linked to Respondent's choice of using bargaining unit employees or outside contractors to perform certain work.

In contrast to the complaint allegation, employee Shrader denied that Badgley ever threatened plant closure during his meeting with employees. I find Shrader to be a credible witness and credit his testimony that no specific threat of plant closure was made during this speech.[5] Shrader also testified that while he could not recall the exact words, Badgley told employees that while Respondent had previously tried to avoid a layoff, there would be one if the Union came in. Clearly, this was the message communicated to employees by Badgley. It is reasonable that employees understood that Respondent could choose to use outside contractors for certain work and a layoff could result. The Board has found that when an employer equates unionization with dire consequences, without reference to collective bargaining or to the give-and-take of the bargaining process, it violates the Act. *Overnight Transportation Co*., 296 NLRB 669, 670 (1989), enfd. 938 F.2d 815 (7th Cir. 1991), I find that the overall effect of Badgley's speech, including the less than subtle threat of layoff, reasonably equated unionization with dire consequences and violated Section 8(a)(1) of the Act. Additionally, the threat of layoff is further enhanced by Baker's undenied threat that the Union may cause a layoff.

I do not find that there is sufficient evidence that Baker threatened employees with plant closure if they selected the Union as their collective-bargaining representative. When asked by the Union's counsel for Baker's exact words, Hicks testified:

> That it wouldn't be smart to have a Union and the possibility of plant closures if there is a Union due to costing the Company money—more money than anything else.

Hicks' testimony about the threat of plant closure was vague and too abbreviated to constitute sufficient evidence of a threat.

Accordingly, I find that Respondent, acting through Charlie Self, threatened employees with closure and relocation if the Union won the election and acting through Michael Baker and Jeff Badgley,[6] threatened employees with layoff if the Union won the election.

C. Whether Respondent Threatened to Decrease or Eliminate Overtime Options if the Employees Chose the Union as their Collective-Bargaining Representative

There is no dispute that Driscoll held a meeting with employees prior to the Good Friday holiday, soliciting employees to work the holiday. Because employees were needed to work the holiday, the overtime policy was modified to allow employees the option of receiving comp time and taking their holiday at another time. Driscoll admits that after the meeting, he spoke with a smaller group of five or six employees. Driscoll admits that during this conversation he told employees that if there was a union, Respondent's ability to come down just before an event and modify policy to make things work would be harder or not happen. Respondent asserts that such conversation is similar to that in *Trash Removers, Inc*., 257 NLRB 945, 951 (1981), where employees were told that past favored treatment would have to stop under a union contract; or, as in *Beverly Enterprises, Inc*., 322 NLRB 334, 344 (1996), if a union came, in, the company would have to go by the book. I note however, that in *Trash Removers, Inc*., supra, the employer also explained to employees that if the union came in, there would have to be bargaining and negotiations with the union about any and all conditions of employment. In *Beverly Enterprises, Inc.*, supra, the employer representative not only told employees that she would have to go by the book if the union were voted in, she wouldn't be able to treat the nurses individually anymore and there would be a union representative at their meetings. Just as a threat to enforce plant rules more strictly is violative of the Act, so is an employer's threat to enforce its overtime policy more strictly. There is no evidence that either Driscoll or any other supervisor present during the discussion explained to employees why the overtime policy could not be changed or altered at the last minute if the Union represented the employees. There was no discussion about the bargaining process with respect to changing overtime policies. Accordingly, I find Driscoll's statement to employees constituted a threat to more strictly enforce overtime policies and options if the employees chose the Union as their collective-bargaining representative and thus is violative of 8(a)(1) of the Act.

D. Whether Respondent Prohibited Employees from Protected Activity During Nonworking Time in Nonworking Areas

Both employee Jeff Stacey and Warehouse Manager Denny Powers confirmed that there was no rule prohibiting employees from congregating in the parking lot before or after their scheduled shift. On the day prior to the election, approximately 20 employees gathered in the parking lot outside the plant. They circled through the parking lot carrying union signs and chanting their support for the Union. It is undisputed that during the

[5] I find no basis to credit Shrader's testimony that Badgley told employees that if they didn't like their job, they could go somewhere else and find another job since there were plenty of jobs in Chattanooga. While I have found that Badgley communicated a threat of layoff, there is nothing in Badgley's prepared text that in any way resembles this statement.

[6] While the complaint alleges that Self and Baker threatened employees with layoff, there is no allegation that Badgley did so. The Board, however, may find a violation that is not alleged in the complaint if it is fully and fairly litigated and not prejudicial to the respondent. *Bayton Sun*, 255 NLRB 154 fn. 1 (1981). Inasmuch as the complaint includes an allegation that Respondent threatened employees with layoff and an allegation running specifically to the speech given by Badgley on April 10, I find that the matter has been fully litigated. Accordingly, I recommend that the Board find Badgleys' threat of layoff as unlawful despite the General Counsel's failure to specifically include Badgley as an agent for this alleged threat.

course of the employees' rally, Human Resources Director Beckley came out of the building and into the parking lot. Employees Shrader and Stacey recalled that Beckley told the employees that they would have to leave the property. While Beckley admitted that he told the union representative to leave the premises, he acknowledged only that he told the employees that they were disturbing the work force. The record reflects, however, that after Beckley came out to the parking lot, the rally ended and employees left the parking lot.

In its 1974 decision in *Bulova Watch Co.*,[7] the Board found that an employer violated Section 8(a)(1) of the Act by restricting employees access to outside areas of the plant shortly before their working shifts. In that case, there was no record evidence that the employer had published or disseminated to its employees any no-access rule concerning off-duty employees. In its later decision in *Tri-County Medical Center*, 222 NLRB 1089 (1976), the Board again dealt with an employer's interference with employees' access to an outside parking lot when there was no evidence that the employer had published or disseminated to its employees any no-access rule concerning off-duty employees. The Board explained that a no-access rule is valid "only if it (1) limits access solely with respect to the interior of the plant and other working areas; (2) is clearly disseminated to all employees; and (3) applies to off-duty employees seeking access to the plant for any purpose and not just to those employees engaging in union activity." The Board went on to find that except where justified by business reasons, a rule which denies off-duty employees entry to parking lots, gates, and other outside nonworking areas will be found invalid. The Board has continued to find that off-duty employees have the right under Section 7 of the Act to solicit for the union during non-work time in nonwork areas. *Golub Corp.*, 338 NLRB 515 (2002).

Section 7 of the Act grants employees the right to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection. Section 8(a)(1) of the Act makes it an unfair labor practice to interfere, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7. Respondent asserts however, that the employees' rally in the parking lot disrupted the employees who were working second shift. Respondent submits that employees' activities can lose Section 7 protection if carried out in a disruptive manner. Citing *Farah Mfg. Co.*, 202 NLRB 666 (1973), Respondent argues that since the employee conduct had "demonstrably disturbing effects on plant business or operations" and because it disturbed employees who were at work, an employer can ask the demonstrating employees to leave the property. In *Farah Mfg. Co.*, supra, an employee was standing in a hallway at the employer's facility giving a speech to an estimated 100 employees. Although he was cautioned to lower his voice by a supervisor, he continued to speak in a loud voice and was subsequently discharged for insubordination. The Board noted that there was no contention or evidence that the employee's loud tone was "creating a problem in any area of proper management concern" and found that the employer unlawfully interfered with and restrained her in exercise of his Section 7 rights. Respondent argues that in the instant case, the demonstrating employees' yelling and chanting drew working employees to the bay door to observe the demonstration. It is undisputed that a group of employees were gathered at the bay doors observing other employees chanting and marching through the parking lot. While Respondent may argue that the demonstration had demonstrably disturbing effects on the plant business or operation, Respondent quickly dealt with the non-working employees. When Powers saw the employees assembled at the bay door, he immediately called and reported the situation to Beckley. Beckley testified that even before he went to the parking lot to investigate the matter, he told Powers to get the employees back to work. Accordingly, Respondent has failed to show an adequate business justification for instituting this rule on the day before the election.

Respondent urges the undersigned to take judicial notice of the fact that the polls opened at 12:30 p.m. and closed at 4 p.m. on April 11, 2002. Respondent contends that the demonstration took place after the beginning of second shift, i.e., after 2:30 p.m. on the afternoon of April 10, well inside the 24-hour period envisioned by *Peerless Plywood Co*., 107 NLRB 424, 429 (1954).[8] Respondent argues that the fact that the communication was by employees rather than a paid union representative makes no difference. Respondent contends that the message was communicated by employees with the Union's blessing and guidance and exposed employees working in the plant to the pervasive character of the message. Respondent maintains that it is the partisan content of the message which places it within the *Peerless Plywood* proscription. It is argued that if Respondent had done nothing about the demonstration, it could have been found to have arguably condoned such conduct and thereby waived its right to object. Thus, Respondent argues that it had a right to preserve a possible objection by asking the employees and Adams to leave its property.

In its decision in *Peerless Plywood Co*., supra, the Board established the rule that all employers and unions alike are prohibited from making election speeches on company time to mass assemblies of employees within 24 hours before the scheduled time for conducting an election. The Board further explained that the rule would not interfere with the rights of unions or employers to circulate campaign literature on or off the premises at any time prior to an election. Additionally, the rule does not prohibit employers or unions from making campaign speeches on or off company premises during the 24-hour period if employee attendance is voluntary and on the employee's own time. In a recent case, the Board addressed a factual situation in which an employee and paid union organizer for the union engaged in loudly yelling out her views as she walked through the hallway just prior to the starting time for a Board-conducted election. Walking toward the polling area, the employee did not direct her complaints about the employer to any specific individual, but rather directed them to the air in general. In the polling area, she continued to voice her complaints that she was being harassed by the employer and

[7] 208 NLRB 798 (1974).

[8] In *Peerless Plywood Co*., supra, the Board set forth a rule prohibiting captive audience campaign speeches by either a company or a union during the 24-hour period preceding the start of an NLRB-conducted election.

was in close proximity to approximate 20 employees waiting in line to vote. The employer argued that the employee's loud sustained complaints uttered in the presence of eligible voters constituted a "campaign speech" encompassed by the rule set forth in *Peerless Plywood*. The Board affirmed the hearing officer's finding that the remarks did not constitute a "speech" to a mass assembly of employees as envisioned by the Board in *Peerless Plywood*. *Midway Hospital Center*, 330 NLRB 1420 (2000). I note that the Respondent presented no evidence that Beckley or any other company official raised this concern about a violation of *Peerless Plywood* with the employees while ejecting them from the parking lot. I don't find the employees' parking lot demonstration to constitute any violation of the *Peerless Plywood* prohibition nor do I find Respondent's alleged concern about a violation sufficient to excuse Respondent's interference with the employees' Section 7 rights. I, therefore, find that Respondent prohibited employees from engaging in protected activities during nonworking time in nonworking areas and that Respondent unlawfully denied off-duty employees[9] access to Respondent's premises to engage in protected activities in violation of Section 8(a)(1) of the Act.

E. Whether Respondent Interrogated its Employees in Violation of Section 8(a)(1)

The General Counsel alleges only one occurrence of interrogation during the campaign period. Employee Wilton Shrader testified that a few days before the election, Supervisor Charlie Self asked him what he thought that a union could do for him. At the time of the conversation, Shrader was wearing a unions sticker on his welding helmet. Self allegedly began the conversation by inquiring about the sticker. Shrader explained that the Union was the next thing to the Teamsters, believing that Self had at one time signed a Teamsters union card.

Interrogation of employees is not illegal per se. Section 8(a)(1) of the Act prohibits employers only from activity which in some manner tends to restrain, coerce, or interfere with employee rights. To fall within the scope of 8(a)(1), either the words themselves or the content in which they are used must suggest an element of coercion or interference. *Rossmore House*, 269 NLRB 1176, 1177–1178 (1984). The Board has found that an appropriate analysis of whether an unlawful interrogation has occurred must consider the circumstances surrounding the alleged interrogation, such as the background of the relationship, the nature of the information sought, the identity of the questioner, and the place and method of interrogation. *La Gloria Oil & Gas Co.*, 337 NLRB 1120, 1123 (2002), *Sunnyvale Medical Clinic*, 277 NLRB 1217, 1218 (1985). Clearly, Shrader was an open and active union supporter. He alleges that the conversation with Self began with Self's reference to the union sticker on his helmet. Accordingly, while I credit the testimony of Shrader concerning this alleged interrogation, I find that Self's questioning of Schrader did not constitute an unlawful interrogation in violation of Section 8(a)(1).

F. Whether Respondent Violated 8(a)(1) by its Maintenance of a Rule Prohibiting Union-Sponsored Materials on the Swap and Shop Bulletin Board

In *Honeywell, Inc*., 262 NLRB 1402 (1982), enfd. 722 F.2d 406 (8th Cir. 1983), the Board summarized the prevailing legal principles applicable to bulletin board postings, as follows:

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

While the Board has continued to hold that once an employer has furnished to employees space to post items of interest, it may not impose content-based restrictions that discriminate between posting of Section 7 matters and other postings, it has recognized that this principle is not inflexible. See *Vons Grocery Co*., 320 NLRB 53 (1995). The Board has also noted that restrictions may be permissible when the posting creates a battleground between competing factions of employees that would require the employer to police the bulletin board to ensure fairness in space allocation between the factions. See *Arkansas-Best Freight System*, 257 NLRB 420, 423 (1981), enfd. 673 F.2d 288 (8th Cir. 1982). The Board has also found that when the employer maintains a rule regarding permissible posting on company bulletin boards and enforces it strictly and not discriminatorily, the rule may stand and no violation occurs. *Whirlpool Corp.*, 337 NLRB 726 (2002).

Beckley testified that the Respondent prohibits all matters on the company bulletin board with the exception of specific items for sale or items pertaining to employees needing or providing transportation to work. Beckley explained that the area surrounding the plant includes three separate States. Beckley contends that if Respondent allowed all postings including political postings, Respondent would be required to provide 5 or 10 boards to handle the flow for all the different candidates in Alabama, Tennessee, and Georgia. He also explained that if Respondent allowed all other items of interest other than transportation or the sale of specific items, it would just add controversy to the plant. Beckley added that there is nothing controversial about "selling your Bronco or asking for a ride to work."

While an employer may not discriminate against employees' protected activity in the use of company bulletin board, the Board continues to find that employees have no statutory right to use an employer's equipment or media. *Mid-Mountain*

[9] While the General Counsel only alleges in the complaint that employees were denied access to the Respondent's premises to engage in union activities, the General Counsel put on evidence that Union Organizer Adams was also expelled from the property by Beckley. Inasmuch as the Act confers rights only on employees and not on unions or their nonemployee organizers, Respondent's expulsion of Adams from its property was not violative of the Act. *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992).

Foods, Inc., 332 NLRB 229 (2000). In this case, there is no evidence that the bulletin board in issue has ever been used for matters other than employees' transportation or for the sale of specific items. See *Fixtures Mfg. Corp.*, 332 NLRB 565 (2000). While Respondent's restrictions in the posting of bulletin board materials effectively excludes union notices and other Section 7 concerns, the restriction also excludes subjects that include personal or political issues. Finding no evidence that the rule has not been strictly enforced or enforced discriminatorily, I find no violation.

G. Whether Respondent has Dominated and Interfered with the Formation and Administration of a labor Organization in violation of Section 8(a)(1) and (2) of the Act

The General Counsel submits that the continuous improvement committee, formed by the Respondent in April 2002, functioned as a labor organization within the meaning of Section 2(5) of the Act. The General Counsel further asserts that by forming the committee, Respondent has rendered unlawful assistance and support to, a labor organization in violation of Section 8(a)(1) and (2) of the Act.

The Board has held that a group constitutes a labor organization if it involves "(1) employee participation, (2) a purpose to deal with employers, (3) concerning itself with conditions of employment or other statutory subjects, and (4) if an 'employer representation committee or plan' is involved, evidence that the committee is in some way representing the employees." *Electromation, Inc.*, 309 NLRB 990, 996 (1992), enfd. 35 F.3d 1148 (7th Cir. 1994). In the instant case, the evidence reflects that the CIP involved employees and addressed conditions of employment. Thus, the question remains as to whether the CIP represented employees and whether it "dealt with" the Respondent.

1. Whether the CIP represented employees

Respondent argues that the purpose of the CIP was to foster discussion and gather ideas to improve performance of the Ooltewah operations. Baker acknowledged that in selecting employees to participate in the CIP, he chose employees from each area of the plant to share concerns and problems. He maintained that a plantwide meeting would have been too disruptive. He also explained that he found the previous round table employee group ineffective because the employee participants served only for short periods. He selected employees for the CIP who would be permanent members and he included some of the employees who supported the Union. Baker's establishment of permanent committee members is distinguished from *NLRB v. Streamway Div. of Scott & Fetzer Co*., 691 F.2d 188, 290, 294–295 (6th Cir. 1982), where the court noted that "continuous rotation of Committee members" for 3-month terms suggested that members acted as individuals rather than as representatives.

Employee Dennie Ray Sullivan recalled that during the first CIP meeting, employees voiced that changes were needed in the drug testing and the attendance policies. Sullivan not only individually reported the substance of the CIP meetings to his coworkers, but his supervisor also allowed him to speak to employees during the weekly departmental safety meetings about what had occurred during the CIP meetings. He recalled that some of the employees had asked him to bring up certain insurance issues during the CIP meetings. He left the committee, however, before he was able to bring up the issue. Despite Respondent's assertions that the committee members were not employee representatives, the evidence reflects that they functioned as such, albeit perhaps only in a modest or limited capacity.

2. Whether the CIP engaged in "dealing with" Respondent

The Supreme Court has long held that Congress intended the phrase "dealing with" to include a much broader range of employer-employee interaction than would normally fall within the traditional concept of collective bargaining. *Cabot Carbon*, 360 U.S. 203, 213–214 (1959). The Board has subsequently developed a fairly precise definition of the term, holding that "dealing with" ordinarily involves a pattern or practice in which a group of employees, over time, makes proposals to management, management responds to these proposals by acceptance or rejection by work or deed, and compromise is not required. If the evidence establishes such a pattern or practice, or that the group exists for a purpose of following such a pattern or practice, the element of dealing is present. If there are only isolated instances in which the group makes ad hoc proposals to management followed by a management response of acceptance or rejection by word or deed, the element of dealing is missing. *E. I. du Pont & Co*., 311 NLRB 893, 894 (1993). In the d*u Pont & Co.* decision, the Board noted that "bargaining" connotes a process by which two parties must seek to compromise their differences and arrive at an agreement. By contrast, the Board found that the concept of "dealing" does not require that the two sides seek to compromise their differences. The Board also noted that a "brainstorming" group is not ordinarily engaged in dealing nor is a committee that exists for the purpose of sharing information with the employer. That is, if the committee makes no proposals to the employer, and the employer simply gathers the information and does what it wishes with such information, the element of dealing is missing, and the committee would not be a labor organization.

When the CIP began meeting in April, the first few meetings included discussions of the attendance policy and the random drug testing policy. Within approximately 2 weeks of the first meeting in which these topics were discussed, Respondent announced changes in both the attendance policy and the discontinuance of random drug testing. While Respondent contends that both of these changes had been under consideration prior to initiation of the CIP meetings, Respondent presented no documentary evidence in support of such prior consideration or discussions by management. Respondent submitted into evidence summaries of topics for the CIP meetings on September 26, October 8 and 22, and November 5, 2002. I note that all of these meetings occurred after the Union's amended charge on June 12, 2002, which included the formation of the CIP as a violation of 8(a)(2). The summaries reflect that the majority of topics relate to improving the work process and replacement of equipment. Included among the items relating to the work process, however, are also such topics as the recommendation for repair of potholes in the parking lot, the need for installation of Plexiglas on top of forklifts, and complaints concerning the

cleanliness of the restrooms and the volume level of the intercom system in one of the departments. In each instance, the notes reflect that action was taken to correct the problem or to act on the recommendation. While it is apparent that since the filing of the charge, the committee has dealt more with work process improvement topics, the committee continues to make recommendations concerning matters which affect conditions of employment. Thus, the CIP appears to "deal with" the employer within the parameters of *Cabot Carbon*, supra.[10]

3. Whether Respondent dominated the CIP

Section 8(a)(2) of the Act provides that:

> It shall be an unfair labor practice for an employer (2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it; Provided, that subject to rules and regulations made and established by the Board pursuant to section 6, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss or time or pay.

In *Electromation, Inc*., supra, the Board noted that although the Act does not define the specific acts which may constitute domination, "a labor organization that is the creation of management, whose structure and function are essentially determined by management . . . and whose continued existence depends upon the fiat of management, that is one whose formation or administration has been dominated under Section 8(a)(2)." Having found that the CIP involved employees who acted in a representational capacity and who "dealt" with Respondent in addressing conditions of employment, I find the CIP to be a labor organization within the meaning of *Electromation, Inc*., supra at 996. There is no dispute that Respondent conceived of the ideal of the CIP, established, and brought about its creation, and chose the employee representatives to the committee. The CIP met on Respondent time, in locations provided by the Respondent and used materials supplied by Respondent. There is no evidence that the committee has any independent existence outside the will of Respondent. Accordingly, I find that Respondent initiated and formed and thereafter sponsored, assisted, and dominated the CIP in violation of 8(a)(2) and (1) of the Act. *Ona Corp.*, 285 NLRB 400, 407 (1987).

IV. OBJECTIONS TO THE ELECTION

I have found that the Respondent has violated Section 8(a)(1) of the act in the following manner: threatening to more strictly enforce plant rules (Objection 8); threatening plant closure (Objection 16); threatening plant relocation (Objection 17); threatening layoff (Objection 18); threatening to enforce its overtime policy more strictly (Objection 3); and prohibiting employees from union activity during nonworking time and in nonworking areas (Objection 11).

[10] There was no evidence submitted by any party concerning the kinds of matters discussed and dealt with by the former round table employee group. There being no such evidence, I have no basis to speculate or to conclude that the CIP continued in the same format and process of the prior employee group.

A. Objections Involving Supervisor Self

All of the above objections occurred within the critical period. The Board's usual policy is to direct a new election whenever an unfair labor practice occurs during the critical period since "conduct violative of Section 8(a)(1) is, a fortiori, conduct which interferes with the exercise of a free and untrammeled choice in an election."[11] The only exception to this policy is "where the misconduct is de minimis "such that it is impossible to conclude "that the election outcome has been affected."[12] As I have found, the evidence reflects that Supervisor Charlie Self threatened employees with stricter enforcement of plant rules, plant closure, plant relocation, and layoff if the employees selected the Union as their bargaining representative. These threats are alleged to have occurred at the employees' workstations and there is no evidence of dissemination. Considering the isolated nature of the misconduct and the number of employees affected out of the 281 voters, I don't find that Self's 8(a)(1) conduct could have affected the results of the election. Accordingly, I recommend that Objections 8, 16, 17, and 18 be overruled only as they relate to Self's conduct. Having found no merit to the allegation that Self engaged in interrogating employees on or about March 28, 2002, I recommend that Objection 35 be overruled.

B. Remaining Objections

Objections 16 and 18 allege that Respondent threatened employees with plant closure and with layoff during the critical period. As discussed above, the evidence reflects that Respondent, acting through Jeff Badgley and Michael Baker during preelection meetings with employees, threatened employees with layoff if they selected the Union as their collective-bargaining representative. It is recognized that threats of plant closure and layoff are the most flagrant forms of interference with Section 7 rights and are more likely to destroy election conditions for a longer period of time than other unfair labor practices because they tend to reinforce employees' fears that they will lose employment if union activity persists. *Koons Ford of Annapolis*, 282 NLRB 406, 508 (1986), enfd. mem. 833 F.2d 310 (4th Cir. 1987), cert. denied 485 U.S. 1021 (1988). The severity of the threats are even greater when made by individuals at the top of the management hierarchy, *Midland-Ross Corp. v. NLRB*, 617 F.2d 977, 978 (3d Cir. 1980), cert. denied 449 U.S. 871 (1980). Inasmuch as the implied threat of layoff by Badgley and Baker were made to assembled employees and would have reasonably been disseminated through the work force, I find such threats to be conduct sufficient to affect the results of the election. Accordingly, I recommend that the merit be found to Objection 18. Having found no evidence that Respondent threatened employees with plant closure other than in the isolated comments of Supervisor Self as discussed above, I recommend that Objection 16 be overruled.

Respondent's threats to more strictly enforce the plant rules and the prohibition of employees' soliciting during nonworking

[11] *Clark Equipment Co*., 278 NLRB 498, 505 (1986), quoting *Dal-Tex Optical Co*., 137 NLRB 1782, 1786 (1962).

[12] *Sea Breeze Health Care Center*, 331 NLRB 1131, 1146 (2000).

time in a nonworking area affected more than a few employees. Under the circumstances, Respondent's unlawful conduct in these actions cannot be said to be isolated, remote, or otherwise de minimis. I recommend that merit be found to Objections 8 and 11.

While I have found that Respondent threatened to enforce its overtime policy more strictly, the evidence reflects that such threat was made to no more than five or six employees and there is no evidence that it was disseminated to any other employees. Due to the isolated nature of the comment, it does not appear that such conduct was sufficient to affect the results of the election. Accordingly, I recommend that Objection 3 be overruled.

C. Summary of Findings and Recommendations Regarding Objections

With respect to the allegations raised in Objections 3, 16, 17, and 35, I find that the Union has not established that the Employer has engaged in objectionable conduct. I find however, that the Union has established that the Employer did engage in certain objectionable conduct alleged in Objections 8, 11, and 18. Therefore, I recommend that the Board set aside the election of April 11, 2002, and direct that a new election be conducted.

CONCLUSIONS OF LAW

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

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent violated Section 8(a)(1) of the Act by engaging in the following conduct:

(a) Threatening employees with more strict enforcement of plant rules, plant closure, plant relocation, layoff, and more strict enforcement of its overtime policy if they selected the Union as their bargaining representative.

(b) Prohibiting employees from engaging in protected activity during nonworking time in nonworking areas.

4. By dominating, interfering with the formation and administration of, and rendering unlawful assistance and support to the continuous improvement committee, Respondent has been and is violating Section 8(a)(1) and (2) of the Act.

5. The foregoing unfair labor practices constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

6. The conduct described in paragraphs 3(a) and (b) above, also constitute objectionable conduct affecting the results of the representation election held on April 11, 2002, in Case 10–RC–15274.

7. Respondent has not engaged in any unfair labor practice not specifically found herein.

REMEDY

Having found that the Respondent has violated Section 8(a)(1) and (2) of the Act I recommend that it be required to cease and desist there from and from any other like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights under Section 7 of the Act. I shall also recommend the posting of an appropriate notice, attached as an "Appendix."

I further recommend that the Respondent be ordered to withdraw all recognition from and to completely disestablish the CIP, and refrain from recognizing it, or any successor thereto, as a representative of any of the Respondent's employees for the purpose of dealing with the Respondent concerning terms and conditions of employment.

Further, having found that certain of the Union's election objections are meritorious and that the Respondent's objectionable conduct is sufficient to warrant setting aside the election, I shall recommend that the results of the previous election be set aside and that the representation case be remanded to the Regional Director for the purpose of conducting a rerun election.

The Union requests a number of extraordinary remedies, which it deems essential to properly remedy Respondent's conduct. In addition to the Board's traditional cease-and-desist, affirmative, and posting remedy provisions, the union requests that the "special notice and access remedies" as found in *Fieldcrest Cannon*, 318 NLRB 470 (1995), be included in the remedy. The Union also requests the award of organizing expenses for conducting a second campaign. Having considered the entire record evidence, I do not find that Respondent's unfair labor practices are so numerous, pervasive, and outrageous that special notice and access remedies are necessary to dissipate fully the coercive effects of the unfair labor practices found. Ordinarily, organizational expenses, like attorney's fees are awarded by the Board only where the Respondent has engaged in frivolous litigation. *Wellman Industries*, 248 NLRB 325 (1980). The only exceptions have been in such cases such as *J. P. Stevens, Inc*., 244 NLRB 407 (1979), where there has been a long history of flagrant disregard of prior Board and court Orders. I do not find that the violations here are of the conduct and frequency of the violations that approaches the record of *J. P. Stevens,* supra, which would warrant such a remedy. Accordingly, the Union's request for such a broad remedy is denied.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[13]

ORDER

The Respondent, Miller Towing Equipment, Inc., Ooltewah, Tennessee, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with more strict enforcement of plant rules if they select the Union as their bargaining representative.

(b) Threatening employees with plant closure if they select the Union as their bargaining representative.

(c) Threatening employees with plant relocation if they select the Union as their bargaining representative.

(d) Threatening employees with layoff if they select the Union as their bargaining representative.

(e) Threatening employees with more strict enforcement of its overtime policy if they select the Union as their collective-bargaining representative.

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

(f) Prohibiting employees from engaging in protected activity on nonwork time in nonwork areas.

(g) Forming, administering, and rendering unlawful assistance to the continuous improvement committee or any other labor organization.

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

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

(a) Immediately withdraw all recognition from and completely disestablish the continuous improvement committee, and refrain from recognizing the continuous improvement committee, or any successor thereof as representative of any of its employees for the purpose of dealing with Respondent concerning terms and conditions of employment.

(b) Within 14 days after service by the Region, post at its facility in Ooltewah, Tennessee, copies of the attached notice marked "Appendix."[14] Copies of the notice, on forms provided by the Regional Director for Region 10, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 1, 2002.

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

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

IT IS FURTHER ORDERED that the election conducted in Case 10–RC–15274 on April 11, 2002, be set aside and that a new election be held at such time and under such circumstances as the Regional Director shall deem appropriate.

[14] 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."