Crown Bolt, Inc. *and* Wholesale Delivery Drivers, Salespersons, Industrial and Allied Workers, Local 848, International Brotherhood of Teamsters, AFL–CIO. Cases 21–CA–33846, 21–CA–33850, 21–CA–33915, and 21–RC–20192

November 29, 2004

DECISION, ORDER, AND DIRECTION OF SECOND ELECTION

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN, SCHAUMBER, WALSH, AND MEISBURG

On December 29, 2000, Administrative Law Judge Lana H. Parke issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions as modified below and to adopt the recommended Order.[2]

A unit of employees at one of the Respondent's facilities voted against union representation by a 34-vote margin. During the critical period prior to the election, Respondent's production manager told employee Gilbert Astorga that at the end of the year when the lease was up Respondent's owner would move the facility if employees voted for union representation. We agree with the judge's finding that this remark constituted a threat and violated Section 8(a)(1). Astorga related the threat to two others, but the record fails to reveal whether those two told anyone else. Applying *Springs Industries*, 332 NLRB 40 (2000), the judge presumed that the threat had been widely disseminated and recommended that the election be set aside. For the reasons explained below, we will overrule *Springs Industries*, but prospectively only. Accordingly, we will set the election aside and direct a second election.

Background

The Respondent manufactures hardware fixtures at its Cerritos, California facility. Responding to employee overtures, Teamsters Local 848 (the Union) launched an organizing campaign at the Cerritos plant in January or February 2000.[3] In late February or early March, the Union petitioned for an election in a unit of production and warehouse employees at the Cerritos facility. The election was held on April 13. After challenges were resolved, a revised tally of ballots issued showing that the unit employees had voted against representation by the Union by a margin of 182 to 148. The Union timely filed 13 objections, 8 of which it later withdrew,[4] and also filed 3 unfair labor practice charges. After an investigation, the General Counsel issued a consolidated complaint alleging several 8(a)(3) and independent 8(a)(1) violations. Among the latter, the complaint alleged that in March, the Respondent, by Rudy Garcia, threatened an employee that the Cerritos plant would close if the employees selected the Union as their representative. A few weeks before the hearing in this matter, the Board issued its decision in *Springs Industries*, supra, in which it held that all plant-closure threats are presumed disseminated throughout the plant absent evidence to the contrary.

In her decision, the judge dismissed every unfair labor practice allegation except one: Garcia's alleged plant-closure threat.[5] In finding that this threat was made, she credited Astorga's testimony that about a month before the election, Garcia, a production manager, told Astorga that the lease was up at the end of the year, and that if the employees voted union the Respondent's owner would close the plant and go somewhere else. The judge also found that Astorga related Garcia's threat to two individuals: employee Leonard Arias, who was no longer employed by the Respondent at the time of the hearing, and Union Organizer Manny Valenzuela. There is no record evidence that Arias or Valenzuela told anyone else about the threat; there is also no evidence that they did not. Based on this record, and applying *Springs Industries*, the judge found that the Respondent had failed to rebut the presumption that Garcia's threat had been disseminated among employees sufficiently widely to set the election aside. Accordingly, she recommended sustaining Objections 2 and 4, which correspond to the 8(a)(1) plant-closure threat violation, and setting aside the election.

Discussion

The Respondent urges us to overrule *Springs Industries* and to reinstate the evidentiary requirement of *Kokomo Tube Co.*, 280 NLRB 357 (1986), where the Board found a threat of plant closure made to a single employee insufficient to overturn an election in the ab-

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

[2] We shall substitute a new notice in accordance with our decision in *Ishikawa Gasket America, Inc.,* 337 NLRB 175 (2001).

[3] All dates are 2000 unless otherwise indicated.

[4] A few days before the hearing, the Union notified the judge that it was withdrawing Objections 1, 3, 5, 6, 8, 10, and 12. Earlier, the Union withdrew Objection 7 with the Regional Director's approval. Accordingly, we correct the judge's inadvertently mistaken statement, in fn. 23 of her decision, that the Union never filed an Objection 7.

[5] The judge also recommended overruling Objections 9, 11, and 13. Absent exceptions, we adopt pro forma the judge's recommendation.

sence of evidence of dissemination. In other words, consistent with the Board's fundamental allocation of evidentiary burdens in representation cases, *Kokomo Tube* imposed on the objecting union the burden of proving dissemination of a threat. *Springs Industries* relieved the objecting union of this burden by expressly overruling *Kokomo Tube* and holding that a plant-closure threat is presumed disseminated among employees sufficiently widely to set aside an election absent evidence to the contrary. In sum, *Springs Industries* shifted the burden from the objecting party, requiring the employer to prove that the threat was not disseminated or not disseminated sufficiently to have impacted the election results.

According to *Springs Industries*, presuming dissemination "of at least the most serious threats, such as threats of plant closure," represents the Board's "traditional practice." In support of this proposition, the Board cited *General Stencils, Inc.*, 195 NLRB 1109 (1972), enf. denied 472 F.2d 170 (2d Cir. 1972). In *General Stencils*, the employer's general manager threatened an employee with plant closure. Based in significant part on this threat, a Board majority granted a remedial bargaining order. In doing so, the Board presumed dissemination of the threat, stating that "[a] threat of such serious consequences for all employees for selecting the Union will, all but inevitably, be discussed among employees," and that "while there may exist a situation in which a serious threat may, in fact, remain isolated, the burden of proving such an unlikely event rests with the Employer." Id. at 1110. *Springs Industries* echoes *General Stencils*, stating that because a plant-closure threat is "arguably the most serious of all the 'hallmark' violations" of Section 8(a)(1) and "necessarily carries with it serious consequences for all employees in the event of a union election victory," it "will, all but inevitably, be discussed among employees." 332 NLRB at 40. The Board acknowledged that its precedent on this issue "has not been entirely uniform," comparing *Coach & Equipment Sales Corp.*, 228 NLRB 440 (1977) (presuming dissemination of a plant-closure threat), with *Kokomo Tube*, supra (declining to presume dissemination of a plant-closure threat). 332 NLRB at 40–41. However, it denied that *Kokomo Tube* had overruled *General Stencils* or *Coach & Equipment Sales*, pointing out that *Kokomo Tube* did not even discuss those decisions. Id. at 41 fn. 7.

We agree with the *Springs Industries* majority that a threat of plant closure is a grave matter. We also acknowledge that *Kokomo Tube* created uncertainty by declining to presume dissemination of a plant-closure threat without expressly overruling *General Stencils* or *Coach & Equipment Sales* and without the kind of analysis provided by former Chairman Miller in his dissent in *General Stencils*, supra, and former Member Hurtgen in his dissent in *Springs Industries*, supra. Nevertheless, for the reasons more fully set forth below, we agree with the Respondent, former Chairman Miller and Member Hurtgen that *Kokomo Tube* represents the better evidentiary rule in requiring the party that seeks to rely on dissemination throughout the plant to show it. We return to that rule by our decision today.[6]

First, the *Springs Industries* presumption is contrary to the general rule that the burden of proof should rest on the party who "seeks to change the present state of affairs and who therefore naturally should be expected to bear the risk of failure of proof or persuasion." John William Strong, ed., *McCormick on Evidence* § 337 (4th ed. 1992). This basic rule has been emphasized in representation cases. Because "[t]here is a strong presumption that ballots cast under specific NLRB procedural safeguards reflect the true desires of the employees," *NLRB v. Hood Furniture Mfg. Co.*, 941 F.2d 325, 328 (5th Cir. 1991), "the burden of proof on parties seeking to have a Board-supervised election set aside is a 'heavy one,'" *Kux Mfg. Co. v. NLRB*, 890 F.2d 804, 806 (6th Cir. 1989) (quoting *Harlan #4 Coal Co. v. NLRB*, 490 F.2d 117, 120 (6th Cir. 1974)). By shifting the burden of proof from the objecting party to the party seeking to uphold the results of a Board-supervised election, *Springs Industries* runs counter to the burden-allocation norm.

Second, the rationale for the *Springs Industries* presumption invites a broader undermining of the burden-allocation principle the Board follows. The majority in *Springs Industries* appealed to the Board's "traditional practice," as exemplified by *General Stencils*. However, the Board majority in *General Stencils* relied on decisions that extend the dissemination presumption beyond plant-closure threats, and even beyond threats altogether: *Standard Knitting Mills, Inc.*, 172 NLRB 1122 (1968) (presuming dissemination of threats of plant closure and loss of benefits); *Garland Corp.*, 162 NLRB 1570 (1967) (presuming dissemination of interrogations and threats of loss of benefits), enf. denied 396 F.2d 707 (1st Cir. 1968); *W.T. Grant Co.*, 168 NLRB 93 (1967) (presuming dissemination of a variety of coercive statements, none of which were threats); *Darby Cadillac,* 169 NLRB 315 (1968) (presuming dissemination of promises of benefits). The *Springs Industries* majority also relied on a

[6] The dissent's introduction suggests that our action today overrules an unbroken line of precedent dating from the 1950s. Obviously, that is not so. The requirement in *Kokomo Tube* that an objecting party bear the burden of proving dissemination of a threat was no mere single case aberration. In fact, *Kokomo Tube* was the law from 1986 until overruled by *Springs Industries* in 2000, *and* it was consistent with the overall allocation of evidentiary burdens that has been in effect since the Board began conducting representation elections.

belief that it is "virtually inevitable" that plant-closure threats will be a topic of conversation among employees. We discuss the merits of that belief below. The point here is that it is not at all clear what would constrain the Board from deciding that other kinds of coercive statements are also likely to "make the rounds," justifying presuming their dissemination as well sufficient to set the election aside. Further, if the dissemination presumption were allowed to stand, there is no apparent basis for declining to extend it to other kinds of coercive statements, undermining the general rule that places a heavy burden of proof on the party seeking to set aside the results of a Board-supervised election.[7]

Third, the presumption is unnecessary. Presumptions of fact are often created "to assist in certain circumstances where direct proof of a matter is for one reason or another rendered difficult." *Panduit Corp. v. All States Plastic Mfg. Co.*, 744 F.2d 1564, 1581 (Fed. Cir. 1984), implicitly overruled on other grounds by *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424, 432 (1985). According to *Springs Industries*, however, dissemination of any plant-closure threat sufficient to set an election aside is all but inevitable, so direct proof of that fact should be easy. As then-Member Hurtgen pointed out in his partial dissent in *Springs Industries*, *if* dissemination of these threats is all but inevitable, then it would reasonably be expected that some employees could testify to dissemination. Similarly, former Chairman Miller, dissenting in *General Stencils*, observed: "A chain of dissemination is a relatively easy matter to establish through testimony of employees who participated in the transmission." 195 NLRB at 1114. The Second Circuit firmly agreed with the Chairman. In denying enforcement of the Board's order in *General Stencils*, it referred to the General Counsel's burden of proving dissemination as "exceedingly slight" and one of which he should not be relieved. *NLRB v. General Stencils, Inc.*, 472 F.2d 170, 173 (2d Cir. 1972).

Fourth, as easy as it is for a party asserting the coercive effects of an employer's threat to prove its dissemination throughout the plant, it is correspondingly difficult for an employer to rebut the *Springs Industries* dissemination presumption. To do so, the employer must establish "through record evidence either that the employees threatened did not tell other employees about the threat, or that those employees whom they told did not in turn tell any other employees about the threat." *Springs Industries*, supra at 40 fn. 4.[8] Thus, to find out whether it has a nondissemination defense, and to prepare that defense in advance of the hearing, the employer needs to know the identity of the employees allegedly threatened. However, in many instances the employer will not have that information in advance of the hearing; and even if the employer does know that much, it could not compel its employees to name those told of the threat, and it is unlikely that employees will volunteer such information.[9]

These obstacles, present in any R case, are exacerbated in a consolidated C and R case, where Board procedures make it even more difficult for the employer to obtain the information it needs to prepare a nondissemination defense. In communicating with charged parties, Board agents are specifically instructed to "avoid providing details that would likely disclose the identity" of witnesses. NLRB Casehandling Manual (Part One) Investigation § 10054.4. Moreover, the employer has no advance access to witness statements because such statements remain confidential until after the witness has testified at the hearing. Id. § 10060.5. Neither may an employee alleged to be the object of 8(a)(1) conduct (such as threats) be named in the complaint. NLRB Casehandling Manual (Part One) Formal Proceedings § 10264.2.

Finally, the Supreme Court has cautioned the Board that our presumptions of fact "must rest on a sound factual connection between the proved and inferred facts." *NLRB v. Baptist Hospital, Inc.*, 442 U.S. 773, 787 (1979) (citing *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 804–805 (1945)). The Court described this connection in *NLRB v. Curtin Matheson Scientific, Inc.,* 494 U.S. 775 (1990), as one in which "proof of one fact renders the existence of another fact 'so probable that it is sensible and timesaving to assume the truth of [the inferred] fact . . . until the adversary disproves it.'" Id. at 788–789 (quoting E. Cleary, ed., *McCormick on Evidence* § 343, at 969 (3d ed. 1984)). As mentioned, our dissenting colleagues rely on the assumption that dissemination of a plant-closure threat is not only probable, it is "all but inevitable." The dissent must concede that there is no empirical evidence supporting such an inevitability with-

[7] Our dissenting colleagues do just that. They would not only affirm *Springs Industries*, but extend it. They say that "any threat or promise sufficiently coercive as to make it a likely topic of workplace conversation should be presumed disseminated." We say it is far better to have evidence of dissemination before invalidating a Board election.

[8] We do not necessarily agree with former Chairman Miller's observation in *General Stencils*, supra at 1114, that the employer must secure "the denial of most or all of the employees in the affected group." We believe that the burden is as we have stated it above, and that this burden is substantial.

[9] Unlike our colleagues, we do not find that an employer's ability to interview supervisors and sift through the plant for cooperative employees and to compel testimony of other less cooperative employees justifies shifting the traditional burden of proof. Our colleagues also say that the employer can lawfully interrogate supervisors and employees as to dissemination. We agree as to the former, but under extant Board law the lawfulness of interrogating employees will depend on the circumstances.

out regard to the circumstances, much less evidence sufficient to support a probability that the dissemination is always sufficient to set aside an election. While common intuition suggests that a clear and unequivocal threat of plant closure is more likely than not to be disseminated, we cannot turn a blind eye to the reality that the probability of the dissemination of a threat of plant-closure and the extent of its dissemination may be reduced by the circumstances, including the manner in which the threat is conveyed, to whom, by whom and under what circumstances, and the size and makeup of the unit. Words that convey a threat of plant closure to one person may not necessarily carry the same meaning to another. Words spoken by a plant owner or hospital chief executive officer in a formal meeting have a different level of seriousness than different words used during casual conversation by a low-level plant supervisor.

The issue we address here concerns the kind of proof that the Board should require from an objecting party before invalidating a vote cast by employees in a Board-conducted representation election. Our dissenting colleagues do not dispute that the objecting party generally bears the burden of proof in this respect. By acknowledging that an employer can rebut the presumption of dissemination they would impose, they concede that, however commonsensical dissemination may seem to be, there are occasions when a threat of plant closure is not objectionable because there is no dissemination sufficient to set aside an election. They also do not contend that the objecting party lacks access to evidence of dissemination.[10]

Instead, the dissent claims that the Board should adhere to the *Springs Industries* presumption because it is a traditional evidentiary practice and it is a more practical one from the standpoint of administrative efficiency. As previously stated, we regard the overall allocation of burdens of proof in objections cases as the controlling, and more venerable, evidentiary practice. Furthermore, we question the view that requiring an employer to prove nondissemination achieves any administrative efficiency. In any event, where the serious matter of determining the validity of employee choice on a question concerning representation is involved, we find the dissent's reasons insufficient to justify substituting a presumption for actual evidence of dissemination.

Accordingly, for the foregoing reasons, we will overrule *Springs Industries*, *General Stencils*, *Coach & Equipment Sales*, and all other decisions in which the Board has presumed dissemination of plant-closure threats or other kinds of coercive statements, to the extent that those decisions so presume. Where proof of dissemination of coercive statements, including threats of plant closure, is required, the objecting party will have the burden of proving it and its impact on the election by direct and circumstantial evidence. Again, we adhere to the view that a threat of plant closure in retaliation for or to thwart protected activity is a very severe threat and highly coercive of employees' rights. However, the severity of a threat is one factor, among several, to be considered in deciding whether to set aside an election. See *Caron International*, 246 NLRB 1120 (1979) (noting the factors the Board considers in resolving the question whether misconduct affected the results of an election; factors include the number of violations, their severity, the extent of dissemination, and the size of the unit). In our view, the increased severity of a threat should not shift away from the objecting party the burden to prove dissemination and the extent thereof. However, the evidence supporting the factors other than dissemination (the number of violations, severity of violations, and the size of the unit) may be such as to affect the extent of the dissemination evidence required before an election should be set aside.

It remains to decide whether to apply the rule we announce today retroactively to all pending cases, including this one. "The Board's usual practice is to apply all new policies and standards to all pending cases in whatever stage." *Levitz Furniture Co. of the Pacific*, 333 NLRB 717, 729 (2001) (internal quotations omitted). Moreover, in representation cases, the Board has recognized a presumption in favor of applying new rules retroactively. *Randell Warehouse of Arizona, Inc.*, 330 NLRB 914 fn. 1 (2000); *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). That presumption is overcome, however, where retroactivity will have ill effects that outweigh "the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles." *Levitz*, supra (internal quotations omitted).

Here, we find that retroactivity would have ill effects that outweigh other concerns. At this late date, remanding for proof of dissemination of Garcia's threat would be an exercise in futility. Unlike documentary evidence, which persists through time, the evidence of threat dis-

[10] The dissent reasons that the objecting party would encounter difficulty in securing the testimony of employee witnesses against their employer. This argument proves too much or too little. On the one hand, employees would seemingly be as reluctant, if not more so, to testify about the threat itself than about its dissemination. Surely, the dissent is not suggesting that we rely on this reluctance to shift the burden of proof entirely to the employer to refute a bare allegation of an objectionable threat. On the other hand, absent any evidence of employer intimidation of witnesses or interference in the hearing process, there is no basis for finding that employees are so fearful of reprisal that they will not tell the truth about what they said or heard.

semination resides in people's memories—and memories fade, and people move on. Arias, one of the two individuals Astorga told about the threat, has long since left the Respondent's employ. He may be difficult or even impossible to locate. In addition, more than 4 years have elapsed since the hearing in this matter. Even assuming that Arias could be located, neither he nor Union Agent Valenzuela could reasonably be expected to recall, with reliable specificity, whether they related the threat, and to whom. Similar obstacles to eliciting reliable proof of dissemination could be expected in other pending cases. Thus, fairness to the objecting union favors limiting our new rule to prospective application.

In light of these considerations, we will apply the rule we announce today prospectively only. In all pending cases involving plant-closure threats, we will continue to apply *Springs Industries* and rebuttably presume that the threat was widely disseminated. Applying that presumption here, we find that the Respondent failed to rebut the presumption: although Astorga related Garcia's threat only to Arias and Valenzuela, the Respondent did not establish that those two individuals did not relate the threat to others. Thus, we adopt the judge's recommendation that Objections 2 and 4 be sustained, and we affirm her conclusion that the election must be set aside.[11]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Crown Bolt, Inc., Cerritos, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

IT IS FURTHER ORDERED that the election in Case 21–RC–20192 is set aside, and the case is remanded to the Regional Director for Region 21 to conduct a second election at a time and place to be determined by her.

[Direction of Second Election omitted from publication.]

MEMBERS LIEBMAN AND WALSH, dissenting in part.

Since the 1950s, at least, the Board rightly has recognized that when an employer threatens to close a plant if the union wins a representation election, the threat very likely will make the rounds of the workplace.[1] It is, after all, an extraordinarily powerful message, for it implies the end of every employee's job. Today, the majority jettisons the Board's established practice, overruling *Springs Industries* and reinstating an evidentiary requirement that, in fact, represented an unexplained departure from precedent. We cannot agree with a holding so at odds with long-recognized realities.[2]

The Board has said that dissemination of plant-closure threats is "all but inevitabl[e]." *General Stencils,* supra; *Springs Industries,* supra. It has characterized the supposition that such threats would not be discussed as "totally unrealistic," *Continental Investment Co.*, 236 NLRB 237 (1978), and "the ultimate in naiveté," *C & T Mfg. Co.*, 233 NLRB 1430 (1977). The accuracy of these statements cannot be seriously questioned.[3] Accordingly, as the Board stated in *Springs Industries*, presuming dissemination of at least the most serious threats represents the Board's "traditional practice."[4] Going against that

[11] In setting aside the election, the judge, applying Board precedent, found that it is not virtually impossible to conclude that Garcia's threat affected the results of the election. In the absence of exceptions, we do not pass on the judge's finding or the precedent upon which it was based.

[1] See, e.g., *Springs Industries*, 332 NLRB 40 (2000); *Petaluma Hospital,* 271 NLRB 412 fn. 1 (1984); *Coach & Equipment Sales Corp.*, 228 NLRB 440 (1977); *General Stencils, Inc.*, 195 NLRB 1109, 1110 (1972), enf. denied 472 F.2d 170 (2d Cir. 1972); *Standard Knitting Mills, Inc.*, 172 NLRB 1122 (1968); *Plum Creek Logging Co.,* 113 NLRB 800, 813 (1955).

[2] We do agree with our colleagues that the Respondent violated Sec. 8(a)(1) of the Act by threatening to close its Cerritos, California plant if its employees at that plant voted in favor of union representation. We also agree that the election results, tainted by this threat, must be set aside.

[3] Indeed, the Board's commonsense practice of rebuttably presuming that a threat of plant closure will be disseminated among employees is entirely consistent with another well-accepted analogous principle: that of the "lore of the shop." The Board can assume that certain unfair labor practices, such as threats of plant closure, "live on in the lore of the shop and continue to repress employee sentiment long after most, or even all, original participants have departed. The Board is not compelled to infer that past practices have attenuated, especially practices striking directly at the heart of the security of the employees, such as threats to close the plant . . . . [T]he Board could find that regardless of turnover the taint of the practices would continue." *Bandag, Inc. v. NLRB*, 583 F.2d 765, 772 (5th Cir. 1978); see also *Aldworth Co.,* 338 NLRB 137, 152 (2002), enfd. 363 F.3d 437 (D.C. Cir. 2004); *Garvey Marine, Inc. v. NLRB*, 245 F.3d 819, 828 (D.C. Cir. 2001); *NLRB v. Q-1 Motor Express, Inc.*, 25 F.3d 473, 481–482 (7th Cir. 1994), cert. denied 513 U.S. 1080 (1995); *Piggly Wiggly v. NLRB*, 705 F.2d 1537, 1543 (11th Cir. 1983). If the Board can reasonably assume that plant closing threats will be repeated to new employees for months or years *after* an election, it can, a fortiori, assume that they will be disseminated throughout the bargaining unit *during* the election campaign.

[4] See, e.g., *Mid-South Drywall Co.*, 339 NLRB 480, 481 (2003); *Jonbil, Inc.*, 332 NLRB 652, 668 (2000); *Springs Industries*, 332 NLRB 40 (2000); *Spring City Knitting Co.*, 285 NLRB 426, 448 (1987); *Sears Roebuck de Puerto Rico, Inc.*, 284 NLRB 258, 263 (1987); *Times Wire & Cable Co.*, 280 NLRB 19, 38 (1986); *Stop N' Go Inc.*, 279 NLRB 344, 354 (1986); *Petaluma Hospital*, 271 NLRB 412 fn. 1 (1984); *Pace Oldsmobile, Inc.*, 265 NLRB 1527, 1529 (1982), enf. denied 739 F.2d 108 (2d Cir. 1984); *Gordonsville Industries, Inc.*, 252 NLRB 563, 603 (1980), enfd. mem. 673 F.2d 550 (D.C. Cir. 1982); *Coca-Cola Bottling Co.*, 250 NLRB 1341, 1343 (1980); *Northern Telecom, Inc.*, 250 NLRB 564, 565 (1980); *Ste-Mel Signs, Inc.*, 246 NLRB 1110 (1979); *Hitchiner Mfg. Co.*, 243 NLRB 927, 928 fn. 4 (1979), enfd. 634 F.2d 1110 (8th Cir. 1980); *C & T Mfg. Co.*, 233 NLRB 1430 (1977); *Petersburg Mfg. Co.*, 233 NLRB 1236, 1237 (1977); *Coach &*

traditional practice, the majority invokes *Kokomo Tube*.[5] In fact, as the majority is compelled to admit, the *Kokomo Tube* Board failed even to acknowledge that it was departing from precedent, let alone to explain why it was doing so. In truth, the Board's failure to presume threat dissemination in *Kokomo Tube* was simply an aberration.[6]

The majority reasons that the union should bear the burden of proving dissemination because the burden of proof on election objections generally rests on the objecting party. However, burdens of proof are often allocated based on "the judicial estimate of the probabilities of the situation," with the burden being placed on "the party who contends that the more unusual event has occurred." John William Strong, ed., *McCormick on Evidence* § 337 (4th ed. 1992). "[Courts] ask: 'what will be the probable state of facts in most cases?' so that the burden of showing an idiosyncratic course of events can be placed on the party asserting the unusual." Charles Alan Wright & Kenneth W. Graham Jr., 21 *Federal Practice & Procedure: Evidence* § 5122, at 557 (1977). Thus, historically, the Board has rightly placed on the employer the burden to prove what would be a highly idiosyncratic fact—namely, that contrary to every likelihood, employees did not talk with each other about their employer's plant-closure threat.

We disagree with former Chairman Miller's dissenting view in *General Stencils*, supra at 1114, that "[n]ondissemination is virtually impossible to prove except by the denial of most or all of the employees in the affected group." That seriously overstates the employer's burden under the Board's traditional rule. As our colleagues acknowledge, the employer's task is simply to establish "either that the employees threatened did not tell other employees about the threat, or that those employees whom they told did not in turn tell any other employees about the threat." *Springs Industries*, supra at 40 fn. 4. If an employer finds itself having to put most or all unit employees on the stand, then obviously it does not have a nondissemination defense. The majority also says that the burden of proving dissemination is an easy matter. This ignores the reality that employees are often reluctant, even afraid, to testify against their employer, complicating the burden on the objecting party.[7] Furthermore, since nondissemination is rare, the more practical rule from the standpoint of administrative efficiency is to presume the common event of dissemination and to require proof only of the rare one.[8]

The majority acknowledges that "a clear and unequivocal threat of plant closure is more likely than not to be disseminated," but contends that a variety of circumstances sufficiently diminish that likelihood to make proof of dissemination the better rule. We disagree with our colleagues' assessment of the impact of these circumstantial variations. A threat of plant closure is so explosive, implying such serious and wide-ranging consequences for the lives of employees and their families, that it will almost certainly be talked about no matter where the threatener stands in the corporate hierarchy or how casually he or she drops it into the conversation. Regardless of the varying circumstances our colleagues cite, dissemination of a plant-closure threat is "so probable that it is sensible and timesaving to assume the truth" of that fact "until the [employer] disproves it." *NLRB v. Curtin Matheson Scientific, Inc.,* 494 U.S. 775, 788–789 (1990) (internal quotations omitted). In the rare event that such a threat is not taken seriously or disregarded entirely, it should be easy for the employer to show that it was not disseminated.

Our colleagues are troubled by the prospect that other coercive employer statements besides plant-closure threats might be presumed disseminated under the ra-

Equipment Sales Corp., 228 NLRB 440 (1977); *Viele & Sons, Inc.*, 227 NLRB 1940, 1949 fn. 22 (1977); *The Meat Cleaver*, 200 NLRB 960, 965 (1972), enfd. sub nom. *NLRB v. Asher*, 492 F.2d 1189 (9th Cir. 1974); *General Stencils, Inc.*, 195 NLRB 1109, 1110 (1972), enf. denied 472 F.2d 170 (2d Cir. 1972); *Stoutco, Inc.*, 180 NLRB 178 (1969); *Standard Knitting Mills, Inc.*, 172 NLRB 1122 (1968); *Plum Creek Logging Co.*, 113 NLRB 800, 813 (1955).

[5] *Kokomo Tube Co.*, 280 NLRB 357 (1986).

[6] The majority disagrees with our characterization of *Kokomo Tube*, asserting that the objecting party's burden of proving dissemination of a threat "was no mere single case aberration" because *Kokomo Tube* was the law from 1986 to 2000. In those 14 years, however, *Kokomo Tube* was *never* applied by the Board to require an objecting party to prove dissemination of a threat of plant closure. We stand by our characterization.

[7] The majority says that our argument in this regard "proves too much" because "employees would seemingly be as reluctant, if not more so, to testify about the threat itself than about its dissemination." To establish a violation, however, requires only one brave employee willing to testify to the threat itself. Under the majority's new rule, by contrast, it could take many similarly brave employees to overturn the results of an election tainted by that threat. The majority also says our argument "proves too little" because, absent evidence of intimidation or other interference, employees will not be so fearful of reprisal that they will not tell the truth. Our concern, however, is more about getting them on the stand in the first place. The majority fails to appreciate the dilemma that its new rule imposes on the objecting union. If the union forgoes the dissemination testimony of reluctant employees, it risks losing the chance of a rerun election altogether. But if it compels their testimony, it may get another election—but then it likely will have incurred the hostility of employee witnesses who will vote in that election.

[8] Without explanation, the majority questions whether the *Springs Industries* presumption achieves efficiencies. The majority also seeks to make a virtue of inefficiency by championing the "more venerable" principle that places the burden of proof on the objecting party. We also adhere to that principle, but it does not compel the Board to require proof of what is practically a foregone conclusion.

tionale of *Springs Industries*. The Board has already demonstrated, however, that it has no intention of applying *Springs Industries* without regard to the nature of the particular employer statement. See *Bon Appetit Management Co.*, 334 NLRB 1042, 1044 fn. 12 (2001) (declining to presume dissemination of threat to one employee to reduce her wages). On the other hand, we see no reason to impose any a priori limitations on the application of the *Springs Industries* presumption in other contexts. Any threat or promise sufficiently coercive as to make it a likely topic of workplace conversation should be presumed disseminated, absent proof to the contrary by the party asserting the improbable fact of nondissemination. While plant-closure threats obviously fall into this category, there is no reason to assume that only such statements possess the requisite degree of coerciveness; and the Board has not so assumed. To the contrary, it has in other cases presumed dissemination of coercive employer statements in cases that did not include threats of plant closure.[9]

Finally, the Respondent contends that it is unfair to require employers to prove nondissemination because the necessary evidence is too difficult to obtain. Before abandoning the Board's traditional presumption on this issue, however, our colleagues should ask whether the problem they purport to solve really exists. Neither the Respondent nor the majority cites a single case in which an employer has criticized the dissemination presumption as unfair or inappropriate. In truth, our colleagues exaggerate the employer's evidentiary difficulties. The complaint typically will, and the objections may, disclose the identity of the employer's agent responsible for the threat. In any event, the Act places no constraints on an employer's interrogation of its supervisors to find out who said what, and to whom. Thus informed, in order to prepare a nondissemination defense, the employer may lawfully question its employees, subject to certain limitations and safeguards.[10] To the extent employees decline to be interviewed, the employer may subpoena their attendance at the hearing; and if additional employees are identified at the hearing as having heard the threat, the employer could ask the judge for a continuance and subpoena those individuals as well. As a matter of due process, the employer would be entitled to a full opportunity to establish the facts necessary to its defense. The Respondent does not contend that it pursued the foregoing measures and found them unavailing. Instead, it advances a bare assertion of unfairness, unsupported by any evidence. Thus, we reject the Respondent's assertion that the rule of *Springs Industries* is somehow unfair to this Respondent or to employers generally. For the reasons explained above, we would adhere to that rule.

[9] See, e.g., *Vinyl-Fab Industries,* 265 NLRB 1097, 1098 fn. 7 (1982) (threats of layoff, discharge, and more onerous working conditions); *Continental Investment Co.*, 236 NLRB 237 (1978) (threat to discharge an entire work force); *Warehouse Market, Inc.*, 216 NLRB 216, 217 (1975) (threats of reprisal, interrogations, promises of benefits).

[10] See *Johnnie's Poultry Co.*, 146 NLRB 770, 775 (1964), enf. denied 344 F.2d 617 (8th Cir. 1965).

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 any 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 our employees that we may close our facility if they select Wholesale Delivery Drivers, Salespersons, Industrial and Allied Workers, Local 848, International Brotherhood of Teamsters, AFL–CIO, as their collective-bargaining representative.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights set forth above.

CROWN BOLT, INC.

Ann Weinman, Atty., for the General Counsel.
Jamie L. Johnson, Atty. (*Brobeck, Phleger & Harrison LLP),* of Los Angeles, California, for the Respondent.
Manny Valenzuela, Wholesale Delivery Drivers, Salespersons, Industrial and Allied Workers, Local 848 International Brotherhood of Teamsters, AFL–CIO, of El Monte, California, for the Charging Party.

DECISION

STATEMENT OF THE CASE

LANA H. PARKE, Administrative Law Judge. This consolidated case was tried in Los Angeles, California, on September 26 and 28, 2000,[1] pursuant to a report on objections in Case 21–RC–20192, order directing hearing, order consolidating cases and notice of hearing and order consolidating cases, consolidated complaint and notice of hearing, issued by the Regional Director for Region 21 of the National Labor Relations

[1] All dates are in 2000 unless otherwise indicated.

Board (Region 21) on July 10 and July 27, respectively. The consolidated complaint is based on charges in Cases 21–CA–33846, 21–CA–33850, and 21–CA–33915, filed by Wholesale Delivery Drivers, Salespersons, Industrial and Allied Workers, Local 848, International Brotherhood of Teamsters, AFL–CIO (the Union) against Crown Bolt, Inc. (Respondent).

The consolidated complaint alleges that Respondent violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act) by denying employee Manuel Leon (Leon) a regularly scheduled wage increase, imposing more onerous work conditions on employees Jose Martinez (Martinez) and Leon by prohibiting them from speaking with their coworkers, imposing more onerous work conditions on employees Gilbert Astorga (Astorga) and Martinez by prohibiting their continued use of Respondent's computers and prohibiting contact between them. The consolidated complaint further alleges that the Respondent undertook these actions because employees Leon, Martinez, and Astorga had engaged in union and other protected concerted activities and to discourage employees from engaging in such activities.

The consolidated complaint also contains allegations that Respondent violated Section 8(a)(1) of the Act by granting an employee a wage increase so as to dissuade support for the Union, threatening an employee with facility closure if the Union was selected as the employees' representative, and offering an employee a management position so as to dissuade support for the Union, and thereby interfered with, restrained, and coerced employees in the exercise of their Section 7 rights.

Respondent filed its answer on July 10. Respondent denies that any of its actions or its supervisors' statements to employees was unlawful under the Act.

On April 20, the Union filed objections to an election conducted April 13, among employees in a stipulated unit of production and warehouse employees. The objections allege that Respondent engaged in certain conduct during the critical laboratory period, which interfered with the election. By letter dated September 22, served on all parties, the Union, through its counsel, Lourdes M. Garcia, withdrew Objections 1, 3, 5, 6, 8, 10, and 12. At the commencement of the hearing, the General Counsel moved to amend the complaint to conform with Respondent's description of position and title of individuals alleged to be supervisors and agents of Respondent in paragraph 5 of the consolidated complaint, which motion was granted without objection.[2]

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a corporation, engages in the manufacture, sale, and distribution of hardware fixtures at its facility in Cerritos, California, where it annually sells and ships goods valued in excess of $50,000 directly to points outside the State of California. 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. LABOR ORGANIZATION

At all relevant times the Union has been, and is now, a labor organization within the meaning of Section 2(5) of the act.

III. ALLEGED UNFAIR LABOR PRACTICES

A. Background

Respondent installed a new computer system for its operations in 1999 with the object of becoming Y2K compliant. Implementation commenced in November 1999. The accounting/finance department was the first to receive the new computer process. The system for the manufacturing and distribution department wasn't addressed until after the first of the year. Some computers, notably those in the production area were designed for multiple use. Respondent experienced significant and widespread malfunctioning of its computer system. J. D. Edwards, the software firm contracted to set up the system, conducted reviews and tests of the system. The consultants reported to Mark Pelley (Pelley), executive vice president of Respondent, that individuals without computer identification and/or passwords were operating the computers, and there was no way to trace errors or system breakdowns. The consultants recommended tightening security to ensure that only authorized employees use the system. Respondent therefore notified all employees without assigned passwords that they could not use the computers.[3]

B. The Union Campaign

Manny Valenzuela (Valenzuela), head organizer of the Union, received telephone calls in January or February from employees of Respondent. Valenzuela thereafter formed committees among the interested employees, provided authorization cards for signature, passed out handbills, union buttons, T-shirts, and pro-union stickers in the parking lot of the Respondent. Principal supporters of the Union were Francisco Montoya (Montoya), Martinez, Astorga, Leon, Miguel Phillips, Veronica _____, and Vanessa _____,[4] all of whom were active in passing out literature and union items and in informing employees of meeting times and places.

[2] The admitted supervisors of Respondent and their titles are as follows:

Gerardo Ponce (Ponce)—Supervisor
Renso Valdez (Valdez)—Director of Warehouse Operations
Rudy Garcia (Garcia)—Manager
Ray Taccolini (Taccolini)—CEO

[3] The testimony of Pelley in this regard was uncontradicted. Where not otherwise noted, the findings herein are based on the pleadings, the stipulations of counsel, and/or unchallenged credible evidence.

[4] Valenzuela could not recall the last names of these employees and the record does not reflect them.

Respondent campaigned against the Union holding meetings with employees and passing out literature.[5] In about the beginning of February, Respondent held a meeting with its managers and supervisors and instructed them as to appropriate conduct during a union campaign. Each was given a written statement setting out the company's commitment to maintain its nonunion status and its intention to oppose any attempt at unionization. The statement contained a list of "Do's" and "Do Not's," which supervisors were directed to follow.[6] In late February or early March, the Union petitioned Region 21 for an election in a unit of the Respondent's employees. A Stipulated Election Agreement between the Union and the Respondent was approved on March 16, 2000, and an election was conducted on April 13, 2000, resulting in a revised tally of ballots showing, inter alia, 148 votes cast for and 182 votes cast against the Union. Thereafter, the Union timely filed objections to the election.[7]

C. Alleged Violations of the Act

The General Counsel's unfair labor practice allegations fall into two broad categories: (1) violations of Section 8(a)(3) and (1) of the Act by denial of a wage increase to employee Leon; imposition of more onerous work conditions on employees Martinez and Leon by prohibiting talking to coworkers; imposition of more onerous work conditions on employees Astorga and Martinez by prohibiting computer use and contact between them. (2) violations of Section 8(a)(1) of the Act by grant of a wage increase; threat of company closure; offer of promotion.

1. Events respecting Manuel Leon

Consolidated complaint paragraph 6 (a) alleges that Respondent denied employee Leon his regularly scheduled wage increase in violation of Sections 8(a)(3) and (1)

Leon was employed by Respondent for 8 years, and had transferred to the Cerritos facility at about the beginning of January where he continued his job as a production packer. He worked there until about the end of May when he suffered a job injury, which is currently the subject of a workers compensation claim. Leon had not returned to work as of the hearing date.

Leon actively supported the union campaign. It is undisputed that Respondent knew of his prounion activities.

Leon testified regarding the denial of a wage increase as follows:

> Leon received yearly performance reviews during his employment with Respondent. In about February, he had a conversation with Valdez. Valdez asked him what he "thought about all this," referring to the union campaign. Leon answered that the Union was there for a reason, and then asked when he would have his review. About 2 weeks later, Valdez, having obtained Leon's Buena Park and Cerritos reviews, met with Leon. Also present was Henry Magallon (Magallon), shipping supervisor. Valdez gave Leon a written review showing a low review score and no wage increase. Leon told Valdez that he didn't expect anything else because he was "for the Union." Valdez said the review had nothing to do with the Union. Valdez told Leon that in 30 days he would be reviewed again on his performance and that he might get a raise at that time. This was not the first time Leon had been denied a raise by Respondent. In a prior year, he had been refused a raise at his annual review because he had been missing too much work. Leon believed that Rich Gauger (Gauger), supervisor at Respondent's Buena Park facility where Leon had spent the major part of the preceding year, was biased against him because the supervisor believed that if an employee was not killing himself, he wasn't working hard enough.[8]

Valdez testified regarding the denial of a wage increase to Leon as follows:

> Employees' work performances are reviewed yearly by their supervisors. The supervisor gives each employee a numerical rating on a review form, which is turned in to Valdez who makes the final determination. Employees receive no wage increase unless the numerical total equates to a "meets all expectations" rating. If the appraisal does not result in a wage increase, Valdez talks to the supervisor involved. If there is no basis to change the appraisal, the employee is placed on a 90-day review. Regarding the appraisal of Leon, Valdez received reviews from Gauger and Ponce. As neither of the reviews reached the "meets all expectations" rating, Valdez talked to Ponce who said that Leon did not make enough production.

On April 6,[9] Valdez met with Leon. Magallon was present. Valdez showed Leon the reviews and told Leon that he would be reviewed again in 90 days. Leon was not, however, reviewed again because of his intervening work injury and subse-

[5] The parties stipulated that Respondent engaged in a campaign against the Union. There is no allegation that any of Respondent's antiunion campaign activities in employee meetings violated the Act.

[6] The list of "Do's" advised supervisors to answer questions with straightforward information, to state Respondent's position on unionization, to listen to volunteered information, to tell employees that signing a union card is the first step to joining a union, to respond immediately to any potentially violent situation, and to inform the human resources manager of any union activities or rumors thereof. The list of "Do Not's" directed supervisors not to spy on union activities, or create that impression, not to threaten reprisal, retaliation, or force, not to promise incentives, not to allege that current benefits would be taken away, not to discuss complaints or petitions with groups of employees, not to start or sign an antiunion petition, not to treat union sympathizers unequally, not to ask employees how they intended to vote, not to encourage employees to withdraw their authorization cards, or to prohibit wearing of union insignia.

[7] The Charging Party stated at the hearing that the unfair labor practice allegations and evidence adduced to support them constitute the basis of the objections. The Union did not introduce independent evidence.

[8] Leon did not relate Gauger's alleged bias to union or concerted protected activities, and there is no allegation that the work performance review by Gauger violates the Act.

[9] Valdez and Leon are at wide variance on dates, and the General Counsel argues that the discrepancy should count against Valdez' credibility. However, if accurate recollection of dates were a touchstone for honesty, very little testimony could be credited. Here, both parties appear to be in error about the date of the meeting, but fortunately it is not a crucial fact.

quent leave of absence. Leon's union activity formed no basis for the performance rating given to him or the decision not to give him a raise increase.

The credible evidence regarding denial of a wage increase to Leon reveals, essentially, that Leon received performance ratings that did not entitle him to a wage increase under Respondent's policy.[10] The question is whether the ratings were devalued because of Leon's union activities. I find they were not. Although Leon was a prominent union supporter, there is no evidence that he was more prominent than the other named supporters or that Respondent had in any way targeted him for retribution. Although Valdez had asked Leon what he thought of the union campaign, the question does not constitute a violation of Section 8(a)(1) of the Act or signify particular animosity toward Leon. The Board has held that interrogation of employees is not unlawful per se[11] and advises that "an employer may engage in a dialogue with employees—that does not threaten or otherwise coerce—about the . . . issues raised in a campaign." *Sea Breeze Health Care Center,* 331 NLRB 1131 (2000). Here, Valdez sought no specific information about Leon's or any other employee's union activity and expressed no disapprobation or offense. As Leon was an open union supporter, Valdez could not have been trying to determine his sentiments. In the circumstances, the question was a noncoercive, casual interchange. The General Counsel has not presented any evidence that Leon's performance ratings were invalid or illegally prompted. Indeed, Leon, himself, provided a possible motivation for the lower rating when he said that his prior supervisor thought employees who were not "killing" themselves were not working hard enough. Such a reason for the rating does not relate to protected activities, is not unlawful, and, therefore, cannot form the basis for a violation of the Act. The General Counsel also has not presented any evidence that Leon's performance ratings were disparately imposed. As the Board has pointed out, "an essential ingredient of a disparate treatment finding is that other employees in similar circumstances were treated more leniently than the alleged discriminate." *NACCO Materials Handling Group,* 331 NLRB 1245 (2000), citing *Thorgren Tool & Molding*, 312 NLRB 628 fn. 4 (1993). In the absence of any evidence showing disparate treatment, or that the wage increase was wrongfully withheld, or that coercive statements surrounded its denial, there is no 8(a)(3) violation.[12] Therefore, I find that the General Counsel failed to meet his burden of proof to show that Respondent violated Section 8(a)(3) and (1) of the Act by withholding a wage increase from Leon.

1. Events respecting imposition of more onerous work conditions

(a) Consolidated complaint paragraph 6 (b) alleges that Respondent imposed more onerous work conditions on employees Jose Martinez (Martinez) and Leon by prohibiting them from speaking with their coworkers in violations of Section 8(a)(3) and (1)

Leon testified regarding this allegation as follows:

> During his employment with Respondent, and prior to the union campaign, Leon has had personal conversations with employees during worktime without prohibition. In March, Leon was engaged in conversation with other employees during worktime. Garcia told him he needed to be quiet. Leon told Garcia that everybody was talking. Garcia said that Leon, however, was talking too much. Perez also spoke to Leon about talking, saying, "You're doing a lot of talking; I've never seen you do this much talking and you are really doing a lot of talking." Leon accused Perez of singling him out. Perez said, "I'm not singling you out. Don't talk about Union stuff on Crown Bolt's time."[13]

Leon said he was sure people would be disciplined if they were just standing and talking, but would not be if they were working while talking as long as the work got done, and as long as employees did not turn from their work or use conversational gestures. He stated that he was doing a little more talking than he had in the past, but everyone at work was talking, and he did not see management speaking about it to anyone but him. He said that in the past employees had been told not to talk too much and to get back to work. Leon was not disciplined for excess talking.

Martinez testified regarding this allegation as follows:

> Seventy-five to 80 percent of employees in the receiving area where Martinez worked prior to the election were union supporters. Martinez' work as a receiving clerk required him to go "pretty often" into the production area, about 10 to 20 times a day. Two weeks prior to the election, Martinez talked to a female employee in the production area. Both were on the clock at the time. The conversation was personal and lasted about 5 minutes or less. Garcia said to him, "You don't belong here; why don't you to go over there [indicating the receiving area] where the rest of the union members are at." Prior to that conversation, Martinez had not had personal conversations with other employees while on the clock.

Garcia testified regarding this allegation as follows:

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[10] I find Leon to be mistaken in recalling that Valdez said he would be reviewed in 30 days. Under cross-examination, Leon admitted that the period stated might have been 90 days, although he later changed his testimony to say he was positive Valdez had said 30 days. All other credible evidence including the testimony of Becky Gray, the human resources manager and that of Montoya who was told he would be reviewed again in 3 months, supports a finding that 90 days was the established waiting period for another review.

[11] *Emery Worldwide*, 309 NLRB 185 (1992).

[12] Evidence regarding alleged imposition of more onerous work conditions is set forth infra. It does not establish coercive conduct by Respondent toward Leon. Leon also testified that sometime in February, Taccolini came to him, grabbed him "aggressively" and said, "I want you to have one of these [a company flyer about the Union]." There was no further explication as to what Leon meant by "aggressively." There is no allegation in the complaint regarding Taccolini's conduct, and although Leon appears to have resented it, there is insufficient evidence to support any finding that it was coercive, constituted animosity toward Leon's union activities, or was intended to convey any threat.

[13] Perez was unavailable and did not testify.

In March, at about 5 a.m., he saw Martinez talking to several employees for about 5 to 7 minutes. None was working as they talked. Garcia asked Martinez if he was on the clock, as the company rule was no talking during worktime. Garcia said he was not strict about the rule, but that 5–7 minutes of talking was going too far. Garcia denied saying anything about Martinez returning to the union side, but only instructed Martinez that he was on the clock, and he should go to work. Garcia denied ever telling Leon not to talk to employees.

I credit Martinez' testimony that he was directed to return to the "union" area. He testified in a forthright and detailed manner in cross-examination as well as direct, and admitted adverse facts (e.g., the personal nature and length of his conversation) without minimization. As to the talking itself, both Leon and Martinez admitted they had been talking during actual work hours. Leon admitted that he was sure people would be disciplined for talking that interfered with work and agreed that he was doing "a little more" talking than formerly. Martinez admitted having a personal conversation with another employee lasting about 5 minutes. Both were told not to talk during work time. Additionally, Leon was told not to talk "on Crown Bolt's time," and Martinez was directed to return to the "Union employees."

While a prohibition of talking about union-related matters on company time is overly broad as it could reasonably be construed as including nonworking time spent at an employer's premises[14] in the circumstances of this case, the statement to Leon is not coercive. Respondent has a legitimate business interest in controlling talking among employees while they are actually working. There is no evidence that Respondent went beyond its legitimate interest in telling Leon and Martinez to restrict their talking. It is clear that employees were unrestrained by Respondent in their exercise of concerted, protected activities while at the company and while not actually working. They were free to pass out flyers, promotional T-shirts, and buttons and talk to employees during breaks or while immediately outside the facility or in the parking lot and to wear union promotional tee shirts and buttons at all times.[15]

The direction to Martinez to return to the "union" area, while revealing animosity toward the Union, was also not coercive. It was known that the receiving department was a hub of union activity, and Martinez was open in his union adherence. He was not threatened or disciplined in connection with his being told to return to his area or disadvantaged in any way. There is no evidence that other employees exclusively occupied in personal conversations during actual worktime as were Leon and Martinez were treated differently. Thus, there is no evidence of disparate treatment, and an essential ingredient of an 8(a)(3) finding is missing. See *NACCO Materials Handling Group,* supra. Therefore, I find that the General Counsel failed to meet his burden of proof that Respondent violated Section 8(a)(3) and (1) of the Act by imposing more onerous work conditions on employees Martinez and Leon by prohibiting them from speaking with their co-workers.

(b) Consolidated complaint paragraph 6 (c) alleges that Respondent imposed more onerous work conditions on employees Astorga and Martinez by prohibiting their continued use of computers and prohibiting contact between them

Astorga testified regarding this allegation. He has been an employee of Respondent for 2-1/2 years and a receiving associate for 2 of those years. He was aware that sometime before Christmas 1999, Respondent installed a new computer system. In early 2000, he participated in the union campaign by handbilling, talking to employees, and passing out T-shirts and buttons. About a month prior to the election, Taccolini came to where Astorga was looking up product numbers on the computer in the receiving area with Jose Martinez. Taccolini said that things were getting pretty hectic outside. When Astorga and Martinez looked at him, Taccolini said, "Oh! Am I harassing you?" Astorga understood Taccolini to be referring to a flyer handed out by the Union that morning advising employees not to let Taccolini harass them. Taccolini told the supervisor to "get these two union guys off the computer . . . get them whatever they need, but I don't want nobody on the computer anymore."[16] The employees were later told that they would have to go through supervisors for information formerly obtained directly from the computer. Prior to that time, Astorga had had unlimited access to computer information. Astorga was aware there was a new computer system at work. He was not given any training on the new system. Following Taccolini's directive, Astorga went to specified individuals[17] when he needed information from the computer. Astorga did not use the computer until sometime in May or June when he was given a limited use password permitting computer access to parts information. At that time, except for workers specifically assigned to do computer work, only Astorga was permitted use of the computer. Two other receiving employees more senior than he were not given passwords.

Martinez testified regarding the allegation of prohibited computer use. As a receiving clerk, he used the computer to locate items for about 5 hours every day. Other employees using the computer as much as Martinez were Holmes, Astorga, and Leonard Arias, order pullers. It was not necessary to use a password as the computer was set up so that anyone could use it. During the union campaign, Martinez passed out flyers and talked to fellow employees about the Union. He and other employees wore pins reading "Vote Yes" daily during the month before the election. Sometime prior to the election, Astorga was showing Martinez a different way to use the computer when Taccolini spoke to them, saying things were "getting pretty hectic outside."

[14] *Litton Microwave Cooking Products*, 300 NLRB 324 (1990).

[15] Leon, Martinez, Montoya, and Astorga testified to the breadth of their activities on behalf of the Union. The latter two employees were not cautioned about talking.

[16] Astorga's testimony of this conversation varied slightly as he recounted it in direct and cross-examinations, but no more than is expected in the retelling of a conversation. In essentials, his testimony was consistent.

[17] Greg Holmes (Holmes), warehouse clerk;Frank Rena, supervisor in the receiving department; or Ed Roy (Roy), receiving supervisor first shift.

When Martinez questioned, "What?" in surprise, Taccolini said, "Oh, am I harassing you?"

Taccolini then spoke to Roy, saying, "Do not let those Union guys use the computer." According to Martinez, only he and Astorga were prevented from using the computer.[18] The restriction made his job harder as he had to go through Roy or Gomez to obtain computer-generated information. As of the hearing, he was still unable to use the computer.

Taccolini testified that because of significant problems with the installation of Respondent's new computer system, he told Roy in early 2000 that certain people should not use the computer at that time because of lack of training. He said nothing about the restriction applying only to union supporters but directed that only those with training and passwords should be on the computer. He visited every department and told employees of the restrictions. When asked if there were any particular problems with the employees in the receiving department, Taccolini said he couldn't say, that he just wanted to keep everyone out who was untrained because it was a volatile system.

Roy testified that he was aware the new computer system was subject to freezing and shutting off because of problems with it, including too many people being on the system. Only Holmes who helped with paperwork, Eric Hartung, acting receiver, and Roy were authorized users. Several employees, including Astorga, made unauthorized use of the computer. As instructed, Roy told employees that computer use would be limited only to those employees with pass codes, that if employees needed access, they were to ask designated workers, and if no one was available, they were to move to another order and then come back. He was present when Taccolini saw two employees using the computer. Astorga was one of them, but Roy could not recall the other. Taccolini said that he did not want "those people" on the computer. He did not say "Union people." Following this incident, Roy reminded all employees that only authorized people were to use the computer.

I credit the testimony of Astorga and Martinez regarding Taccolini's statements during this conversation. I have found both Astorga and Martinez to be truthful witnesses. Further, Taccolini testified only generally about his instructions to employees on computer use and did not specifically address the alleged conversation. Although Roy tacitly denied Taccolini's use of the word "union" in describing the employees who were not to use the computer, I cannot fully credit his testimony. His recall of the event was demonstrably weak as he could recall only Astorga as being one of the employees restricted by Taccolini and could not recall the other at all. Roy did recall Taccolini saying he did not want "those people" on the computer, which is a more definite specification than Taccolini testified to. Therefore, I accept Astorga and Martinez' testimony that Taccolini, in fact, directed that those "union" employees were not to use the computer.

Although I have accepted that Taccolini, in this instance, couched his restriction on computer use as a restraint on "Union" employees, I conclude Respondent did not violate Section 8(a)(3) and (1) of the Act by restricting employees' computer use, including that of Astorga and Martinez. The statements by Taccolini regarding getting the "Union" guys off the computers shows that Respondent was motivated, at least in part, by a consideration of the union partisanship among employees. The General Counsel has thus established that protected conduct formed a motivating factor in Respondent's restriction, so as to shift the burden to Respondent to prove that it would have taken the same action even without the protected activity. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). I find that Respondent has met that burden. Although Respondent was admittedly opposed to the Union, and although there were instances of strongly expressed supervisory animosity toward it, Respondent's explanations for restricting computer use companywide were both reasonable and uncontroverted. Respondent provided evidence that it had installed a new computer system, that there were systemic problems with it, and that unrestricted computer use was curtailed while the problems were corrected. Although all of this evidence was presented through supervisors of Respondent, there was acknowledgement from employee witnesses that they were aware of computer problems, and there is no evidence of disparate treatment. The evidence as a whole indicates that all employees without computer passwords, whether union supporters or not, were restricted from computer use. Therefore, it is reasonable to conclude that although consideration of the union activities of its employees may have heightened Respondent's interest in curtailing uncontrolled computer use, it would have imposed the same limitations in the absence of any union activity.[19] Therefore, I find that General Counsel's allegation that Respondent violated Section 8(a)(3) and (1) of the Act by imposing more onerous work conditions on employees Astorga and Martinez by prohibiting their computer use and prohibiting contact between them fails.

3. Events respecting the grant of a wage increase to an employee consolidated complaint paragraph 7 alleges that Respondent granted an employee a wage increase to dissuade his union support

Montoya, an open union supporter who had been employed for more than 5 years with Respondent, testified that wage increases were dependent on performance reviews that were given employees on a yearly basis. In about the first part of February, Ponce and Perez met with Montoya in the cafeteria. Perez told Montoya that he would not receive a raise because he did not know how to run the machines, but he would be reviewed again in 3 months. Montoya objected saying he knew the machines and appealed to Ponce, his direct supervisor, for verification, which was given. Nevertheless, Perez said Montoya would have to wait for 3 months. In early April, Ponce spoke to Montoya in the presence of other employees while they worked. Ponce said the employees should not vote for the Union because it was not good and it would not help

[18] Under cross-examination, Martinez agreed that all computer use by receiving associates was limited at that time. This minor discrepancy in testimony appears inadvertent and does not alter my determination as to Martinez' credibility.

[19] There was no evidence presented to support the allegation of prohibiting contact between employees Astorga and Martinez.

them. Montoya responded that such was a personal decision for each employee. On March 8, without further discussion or review, Valdez notified Montoya that he would receive a 35-cent raise.

Valdez testified that as director of production he makes wage recommendations for production workers after review of a supervisor's rating. Montoya's performance rating was completed by supervisor, Perez, and reviewed by Valdez in March. The rating of 57 did not meet the "all expectations" criterion for a raise. Valdez testified that if an appraisal did not justify a raise, his procedure was to talk to the employee's supervisor.

Although Valdez did not recall discussing Montoya's work with his supervisor, it appears from Montoya's testimony that his direct supervisor supported Montoya's assertion of competency on the machines. There is no evidence of any threat or promise made to Montoya because of his union adherence. The statement by Ponce that the Union was not good and would not help does not rise to a coercive level. See *NACCO Materials Handling Group, Inc*., 331 NLRB 1245 (2000). It was Ponce who interceded on Montoya's behalf in the evaluation discussion during the same period Montoya was an active union supporter, and there is no evidence of any change in Montoya's union attitude to justify the reward of a raise if such were intended. In the absence of any extrinsic evidence of the raise being calculated to dissuade union adherence or to reward abandonment of union support or to signal a departure from company procedures, it is reasonable to infer that the raise was based on Ponce's commendation rather than on any wish to discourage Montoya's expressed support for the Union. Therefore, I find that the General Counsel failed to meet its burden of proof that Respondent granted an employee a wage increase to dissuade his support for the Union.

4. Events regarding threat of plant closure

Consolidated complaint paragraph 8 alleges that Respondent threatened an employee with plant closure if employees selected the Union as their representative

Regarding this allegation, Astorga testified that about a month before the election, Garcia spoke to Astorga as he worked in the warehouse. Garcia told Astorga that Respondent's owner would close if the employees voted union, that the lease was up at the end of the year, and the owner would close and move. Garcia said the Union was no good. Astorga did not tell any employee of the conversation except Arias, who is no longer with the Respondent. He also told the union representative, Valenzuela.

Garcia unequivocally denied making any such statement and pointed out that he worked a different shift than Astorga and was, therefore, not present at the Company when Astorga was working.

I accept Astorga's testimony. As set forth above, I found him to be careful in his testimony. He is still employed by Respondent and is apparently considered an able and trustworthy employee as, following the election, he was given a computer password and access. As a current employee, testimony adverse to his employer is given against self-interest, a factor not to be regarded lightly. Moreover, he evinced no animosity toward either the company or Garcia, and his manner and demeanor were convincing. I do not find Garcia's working a different shift to create an impossibility of his having had any communication with Astorga. Although an explanation has not been proffered by General Counsel as to how it transpired that such a conversation occurred between two individuals who worked different shifts, no evidence was submitted to establish that neither Garcia nor Astorga was ever present at the company except during his own shift. Further, no evidence was presented to controvert the statement attributed by Astorga to Garcia that the facility lease was up at the end of the year, a piece of information presumably within the particular purview of management. Under all the circumstances, after a careful examination of the testimony, and upon consideration of the manner and demeanor of the witnesses, I find Astorga's testimony to be credible.

The Board and the courts view the threat of plant closure as particularly coercive as it goes to the heart of the employment relationship and employee job security. *NLRB v. Gissel Packing Co.,* 395 U.S. 575, 588 (1969). Even if the statement made is a friendly, off-the-cuff remark, an objective standard of determining coerciveness is to be utilized. *President Riverboat,* 329 NLRB 77 (2000). Here, there was none of the qualifying statements relative to negotiations with the Union or predictions based on "objective facts" showing "demonstrably probable consequences beyond [the] control" of the Respondent that might have rendered the statement permissible under *Gissel*, id. at 616–620. Moreover, the threat of plant closure here was made in the course of Respondent's waging a vigorous, albeit primarily lawful, campaign against the Union, and demonstrating animosity by Taccolini's designation of employees to be restricted from computer use as "union" employees, and Garcia's direction to Martinez to return the "union" area. The severity of Respondent's misconduct is further compounded by the fact that this violation was committed by Garcia who, as manager of Respondent, occupies a position of significant authority. This could only serve to strengthen and amplify in the minds of employees the seriousness of the threat. *Electro-Voice, Inc*., 320 NLRB 1094 (1996). When viewed in context of Respondent's antiunion campaign and expressed animosity, the threat could reasonably be expected to carry compellingly coercive weight.

As stated in *Spring Industries,* 332 NLRB 40, 40 (2000), the Board's practice is to presume dissemination of threats as serious as those of plant closure, "absent evidence to the contrary." Here, Astorga testified that he told one employee and the union representative of the threat. Even though he told only two people,[20] under the reasoning of *Springs Industries,* id, "the threat of plant closure . . . necessarily carries with it serious consequences for all employees . . . [and] . . . will, all but inevitably, be discussed among employees." The presumption applies unless rebutted.[21] The burden of proving that the threat of plant

[20] The fact that Valenzuela was one of the individuals Astorga told of the threat does not lessen the probability of dissemination. Indeed, as the union representative, Valenzuela is just as likely as an employee to discuss the threat with employees.

[21] The Board stated:

> The presumption that a threat of plant closure by an employer to one or more employees will be widely disseminated among the

closure remained undisseminated and thus isolated rests with the employer. *Springs Industries,* supra at fn. 6. Respondent has not met that burden. Therefore, I conclude that, by Garcia's statement that Respondent would close if the employees voted for the Union, Respondent violated Section 8(a)(1) of the Act.

5. Events regarding an offer of benefit

Paragraph 9 of the complaint alleges that Respondent offered an employee a management position so as to dissuade union support

Leon testified that about 2 weeks before the election, Taccolini came to him at his workstation. According to Leon, Taccolini told him that he had seen him of Friday with the Teamsters, and that he looked really sharp. Taccolini asked Leon why he was doing this [supporting the Union]. Leon responded that a lot of things were not right and told Taccolini of a number of work issues such as favoritism. Leon then testified "he told me, Manuel, what are you talking about. He said, I offered you a management position 3 years ago. And then, I said what. No, you didn't. And he said yes, I did. And it's still there. And I just shook my head. And so, we went on with our discussion. And I told him about some discrimination that I felt was happening at the company . . . He walked away . . . And then, he turned back around toward me again. And he told me that discrimination is going to take you to your grave." According to Leon, Taccolini had not offered him any management job in prior years.

Taccolini testified that 4 or 5 years ago, he observed Leon working the carousels. Taccolini told him he was doing a good job, and that he could be considered for management. According to Taccolini, Leon responded that he was really not interested, that he was happy with what he was doing.

As to the instant allegation, Taccolini testified that he engaged in a "little conversation" with Leon while Leon was working. As he walked away, Leon asked him, "So, When are you going to stop all the discrimination around here?"

Taccolini said, "Manuel, we have women, men, blacks, Hispanics, Asians, in our management, lead positions. Manuel, you are going to take that discrimination thing to your grave with you. It will never fly around here. Look at all of our management."

Taccolini also testified that he referred to a past conversation with Leon, saying, "Manny, if you recall, I even offered you four or five years ago a management position at Crown Bolt." According to Taccolini, in the April conversation, he made no offer to promote Leon and did not make any statement that any promotional opportunity was still open.[22]

I credit the account of Taccolini over that of Leon. Leon's testimony, overall, was occasionally vague, sometimes vacillatory, and marked by a quality of hostility toward Respondent, none of which impressed me as to his candor. Moreover, to be credible, an account of an oral exchange should demonstrate congruity and plausibility. Those qualities are missing from Leon's version. It strains credulity to accept that Taccolini should make a promotional offer to an employee who had recently received a less-than-stellar performance review. The exchange as related by Taccolini, however, carries verisimilitude in both content and motivation. Therefore, I find that the General Counsel failed to prove that any employee was offered a management position to dissuade his support for the Union.

IV. OBJECTIONS TO CONDUCT AFFECTING RESULTS OF ELECTION

The Union filed the petition in Case 21–RC–20192 on March 2, 2000. The election was conducted by Region 21 on April 13, 2000. Following a resolution of challenged ballots, a revised tally of ballots issued showing that the Union received 148 votes and 182 votes were cast against the Union. The Union filed Objections 1–13.[23] The Regional Director issued a report on objections, order directing hearing, order consolidating cases, and notice of hearing, finding some of the conduct alleged in the Union's objections violated the Act, and that the issues therein constituted a single, overall controversy and should be considered jointly with the unfair labor practices alleged herein. Accordingly Case 21–RC–20192 was consolidated with the instant unfair labor practice case.

Prior to the hearing, the Union withdrew Objections 1, 3, 5, 6, 8, 10, and 12, leaving extant Objections 2, 4, 9, 11, and 13. At the hearing, the Union stated that the evidence relied on as support for its objections was contained in the evidence presented by General Counsel in the unfair labor practice case.

In its Objection 2, the Union alleged that Respondent threatened plant closure in an effort to discourage support for the Union. As set forth above regarding the unfair labor practice allegations, I find that Respondent did, in fact, threaten plant closure. The threat occurred during the critical period. That period started when the Union filed the petition in Case 21–RC–20192 on March 2, and ended when the election was held on April 13. The credited testimony of Gilbert Astorga revealed that Rudy Garcia, a supervisor, threatened employee, Astorga, about 1 month before the election. The threat constitutes objectionable conduct as well as a violation of Section 8(a)(1) of the Act.

In its Objection 4, the Union alleged that the Employer harassed, coerced, and threatened union supporters in retaliation for their support of the union. As set forth above regarding the unfair labor practice allegations, aside from the credited evidence of threat of plant closure, there is no evidence of harassment, coercion, or threats of union supporters. However, inso-

employees is a rebuttable presumption. The employer may rebut the presumption by establishing through record evidence either that the employees threatened did not tell other employees about the threat, or that those employees whom he told did not in turn tell any other employees about the threat. [*Spring Industries,* supra at fn. 4.]

[22] Taccolini testified that Leon contacted Respondent's human resources department concerning the exchange. Taccolini provided the Human Resources Department a written statement concerning what had transpired. Respondent offered the statement in evidence as a prior consistent statement. The General Counsel objected. Inasmuch as the Federal Rules of Evidence, Sec. 801.4.2 permits admission of prior consistent statements only where there is an express or implied charge of recent fabrication, or improper influence or motive, none of which exists here, the offer was denied.

[23] Through apparently inadvertent omission, there is no Objection 7.

far as this objection relates to the threat of plant closure, the evidence supports it.

In its Objection 9, the Union alleged that during the critical period, Respondent imposed more onerous working conditions on union supporters in retaliation for their union support. As set forth above, the record evidence does not support the allegations or any finding of objectionable conduct as to Objection 9.

In its Objection 11, the Union alleged that Respondent made promises of benefits to discourage union support. The record evidence does not support the allegations or any finding of objectionable conduct as to Objection 11.

In its Objection 13, the Union alleged that Respondent impersonated NLRB agents and held antiunion meetings with employees in an effort to discourage union support. Although evidence was adduced that Respondent held meetings with small groups of employees as part of its antiunion campaign, there is no allegation in the complaint that such conduct was violative of the Act, and no significant evidence was presented as to what occurred in the meetings. Therefore, the record evidence does not support the allegations or any finding of objectionable conduct as to Objection 13.

An employer's preelection communications to employees must not contain any threat of reprisal. *NLRB v. Gissel Packing Co*., 395 U.S. 575 (1969). See also *Dominion Engineered Textiles, Inc*., 314 NLRB 571 (1994). The usual remedy for violations of Section 8(a)(1) during an election campaign is to order a second election because such conduct interferes with the "laboratory conditions" of the first election. *Dal-Tex Optical Co*., 137 NLRB 1782 (1962). The only exception to this policy is where the conduct is so minimal or isolated that it is "virtually impossible to conclude that [it] could have affected the results of the election." *Super Thrift Markets, Inc.*, 233 NLRB 409 (1977). While General Counsel and the Union have failed to prove the majority of their allegations, the allegation that has been proven is too substantial and the voting margin too close to permit other than a significant remedy. A warning of plant closure, the dissemination of which is presumed, is a particularly opprobrious threat. My findings herein require the conclusion that the election should be set aside because of Respondent's objectionable conduct.

I recommend that Case 21–RC–20192 be remanded to the Regional Director for appropriate action.

CONCLUSIONS OF LAW

1. By threatening employees with plant closure if employees selected the above-named labor organization as their collective-bargaining agent in violation of Section 8(a)(1) of the Act, Crown Bolt, Inc. has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

2. The General Counsel has failed to prove its allegations in paragraphs 6(a), (b), (c), and (d), 7, 9, and 10 of the Act.

3. The Union's Objections 2 and 4 are sustained.

4. The Union's Objections 9, 11, and 13 are overruled.

5. The unfair labor practices and campaign misconduct of Respondent described above, affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

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

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[24]

ORDER

The Respondent, Crown Bolt, Inc., Cerritos, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening its employees that it may close its facility if the employees select the Union as their collective-bargaining representative.

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

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

(a) Within 14 days after service by the Region, post at its facility in Cerritos, California, copies of the attached notice marked "Appendix."[25] Copies of the notice, on forms provided by the Regional Director for Region 21, after being signed by Respondent's authorized representative, shall be posted by 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 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, Respondent has gone out of business or closed the facility involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Respondent at any time since April 1, 2000.

(b) 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.

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

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[24] 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.

[25] 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."