Contempora Fabrics, Inc. ***and*** **United Food and Commercial Workers Union, Local 204.** Cases 11–CA–19542, 11–CA–19576, 11–CA–19578, 11–CA–19627, and 11–CA–19668

June 21, 2005

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On August 4, 2003, Administrative Law Judge Margaret G. Brakebusch issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has considered the decision and the record in light of the Respondent's exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions except as noted below, and to adopt the recommended Order as modified and set forth in full below.[2]

This case arises from an organizing campaign at the Respondent's textile facility in Lumberton, North Carolina, during the spring and summer of 2002. The Respondent responded to this campaign through management speeches to employees and other communications from supervisors to employees. For the reasons set out below, we affirm in part and reverse in part the judge's findings.

1. We agree with the judge that the Respondent's vice president, Ronald Roache, in a series of speeches at mandatory employee meetings, unlawfully predicted that unionization would cause the Respondent to lose customers and risk plant closure. The credited testimony of several employees who were present at the meetings shows that Roache made such predictions but failed to provide any objective basis for them. From the totality of these circumstances, Roache's statements violated Section 8(a)(1) of the Act. *Tradewaste Incineration*, 336 NLRB 902, 910 (2001).[3]

2. We reverse the judge's finding that the Respondent, during the Union's preelection campaign, unlawfully solicited grievances from employee Betty Locklear. Locklear testified that Supervisor Chris Roberts "came up to me and asked me did I have any problems or did I have any questions about the Union, and if I did for me to come and talk to him about it." Roberts confirmed that he "may have" told more than one employee that "if they had anything they wanted to talk about [he] would be willing to talk with them."[4] The judge found that although no "problem" was specified, the solicitation was an implicit offer to remedy problems concerning Locklear's terms of employment and consequently violated Section 8(a)(1). We disagree.

Contrary to the judge and our dissenting colleague, we find the evidence insufficient to conclude that Roberts' brief offer to discuss "problems" was directed at eliciting workplace problems and conveyed an implied promise to remedy them. Roberts' casual remark appears to have been no more than a permissible inquiry as to whether Locklear had any uncertainties about union representation, election procedure, or the Respondent's views on the Union.[5] Locklear did not testify regarding any further comments by Roberts during the conversation, nor did she provide any additional context for his statement. Under these circumstances, Roberts' brief statement cannot reasonably be construed as a solicitation of grievances. Thus, we cannot find Roberts' invitation to Locklear unlawful.[6] Accordingly, we shall dismiss this complaint allegation.[7]

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

[2] There are no exceptions to the ALJ's dismissal of complaint allegations that the Respondent unlawfully threatened that unionization would be futile, that employees would lose their jobs and be blacklisted in retaliation for unionizing, and that employee retirement funds would be used to resist the Union. There are also no exceptions to the dismissal of allegations that the Respondent enforced unlawful no-solicitation and no-talking policies; unlawfully restricted employee movement; engaged in unlawful surveillance; unlawfully interrogated employee Johnny Lambert; and unlawfully laid off three union supporters. The Respondent, however, filed an additional brief in support of those findings.

On August 28, 2004, the Board granted the Union's request to sever from this case the representation proceeding in Case 11–RC–6488, involving the Union's objections to the election held on August 8, 2002, and to withdraw its petition.

[3] In joining this finding, Chairman Battista relies only on the statements attributed to Roache by the credited testimony of employee witnesses James Green and Johnny Lambert that "other employees" and "customers" would "not want to do business with the company" if the employees "vote the union in" or "were unionized."

[4] There is no disagreement between the parties that the judge mistakenly attributed Roberts' comments to another supervisor. That mistake has no bearing on whether the alleged solicitation was unlawful.

[5] See *Best Plumbing Supply*, 310 NLRB 143, 148 (1993) (adopting judge's finding that employer's inquiry about "whether something was wrong" was a casual inquiry as to what was troubling the employees and nothing more); *Capitol Cement Division*, 191 NLRB 419, 420–421 (1971) (adopting judge's dismissal of solicitation of grievance allegation regarding statements (including "what was going on" and "how is it going") where such statements were not coercive in the absence of any promise or threat by employer).

[6] In each of the cases cited by our dissenting colleague, the evidence was clearer that the solicitation of employees' "problems" referred to problems concerning terms and conditions of employment.

[7] Chairman Battista concurs with this analysis. Further, in his view, even if problems" referred to terms and conditions of employment,

3. We also reverse the judge's finding that the Respondent violated Section 8(a)(3) by giving Johnny Lambert, a prominent union supporter, an oral warning for allegedly making a threat to another employee. The Respondent's vice president, Gerald Cauthen, testified that shortly before the election he was approached by a female employee, not identified in the Board proceeding, who said that Lambert had told her she "had better not vote no for this union," and that this threat had made her "upset" and "afraid." Based on this complaint, the Respondent gave Lambert an oral warning, which was also "noted" on Lambert's personal work calendar. Both the oral and written versions of the warning stated that Lambert "has the right to support the union but cannot threaten anyone about it. If he continue[s] he will be subject to discipline up to and including discharge."

Contrary to our dissenting colleague, we find that the warning was lawful. The Respondent established that Lambert had a previous history of misconduct, including a domestic violence conviction and threatening another employee. The Respondent also maintained a written policy prohibiting "abusive or threatening language, fighting or unsafe conduct," and had previously disciplined 32 other employees for violating this policy. Under the circumstances, we find that the Respondent legitimately relied on the employee complaint to issue an oral warning to Lambert. The Respondent has therefore established that it acted on its good-faith belief that Lambert made the alleged threat. *NLRB v. Burnup & Sims, Inc.,* 379 U.S. 21, 23 (1964). The General Counsel, in turn, has failed to show that Lambert did not engage in the alleged misconduct. The warning was therefore lawful. Id.

Our colleague says that the comment ("you had better not vote no for this union") was not one that would cause the loss of the Act's protection. We disagree. The comment is an implicit warning that unpleasant consequences would flow from a "no" vote. The warning was accentuated by Lamberts' previous acts of threats and violence.

Although the employee's report to management may have been a subjective response, it gave the Respondent a reasonable basis for believing that a threat had occurred. Under *Burnip & Sims*, the burden was then on the General Counsel to show that no misconduct occurred. That showing was not made.

We also find that the warning was lawful under *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Even though the General Counsel met his initial burden of showing that the warning was motivated in part by antiunion animus,[8] the Respondent met its rebuttal burden under *Wright Line*. The Respondent's discipline of Lambert rested upon a consistently enforced policy against "abusive or threatening language," Lambert had a prior criminal record of assault, and a prior record of assault in the workplace. Further there was a complaint explicitly indicating that Lambert threatened an employee with unspecified consequences concerning her vote in the election. In these circumstances, the Respondent has shown that it would have warned Lambert even in the absence of his union activities. Accordingly, we shall dismiss this complaint allegation.

4. Finally, we reverse the judge's finding that Lambert's warning independently violated Section 8(a)(1) by allegedly threatening additional discipline if he engaged in additional protected activity. The warning undisputedly acknowledged that Lambert "has the right to support the union," with the sole reservation that he "cannot threaten anyone about it." By its terms, the warning of additional discipline was applicable only to additional threats, not to prounion activity of a nonthreatening nature. The warning was therefore not unlawfully coercive under Section 8(a)(1).

ORDER

The National Labor Relations Board orders that the Respondent, Contempora Fabrics, Inc., Lumberton, North Carolina, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with loss of business and plant closure if they 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 Lumberton, North Carolina, copies of the attached notice marked "Appendix."[9] Copies of the notice, on forms provided by the Regional Director for Re-

there was no promise to remedy them. Roberts simply indicated that the employees could talk to him about the problems.

[8] As discussed below, we do not agree with the judge that Lambert's warning restricted or was directed at his "support for the Union," and we therefore do not rely on the warning's text to find unlawful animus. We rather rely for that finding on the unlawful threats made by Vice President Roache during the same timeframe.

[9] 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."

gion 11, after being signed by Company's authorized representative, shall be posted by the Company immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Company to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Company has gone out of business or closed the facility involved in these proceedings, the Company shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Company at any time since early June 2002.

(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 Company has taken to comply.

MEMBER LIEBMAN, dissenting in part.

In reversing the judge's findings that the Respondent unlawfully solicited grievances from one employee and issued an unlawful warning to another, the majority misreads the evidence and deviates from applicable legal standards.[1]

1. The judge credited employee Locklear's testimony that Supervisor Roberts "came up to me and asked me did I have any problems or did I have any questions about the Union, and if I did for me to come and talk to him about it." It is unlawful for an employer to solicit grievances from employees during a union campaign with either an express or implied promise to correct the unsatisfactory conditions without a union. The solicitation is like promising a benefit to employees if the union is defeated. The message is clear: you don't need a union to remedy your complaints.

While Roberts' solicitation was brief, Locklear reasonably could have understood his broad reference to "any problems" as relating to her terms of employment, and his invitation (come and talk to him) as an implicit offer to redress those problems if she declined to support the Union.[2] That Roberts also asked Locklear if she had "any questions about the Union" does not foreclose such an interpretation. On the contrary, Roberts' statements, as a whole, reinforce the impression that his inquiry into "any" problems was prompted by the pending union campaign and solicited grievances. The majority's finding, in effect, that Roberts' inquiry *could not* reasonably be taken to refer to Locklear's terms of employment is untenable.[3] I would therefore find that Roberts made an unlawful solicitation.[4]

2. With respect to the oral warning of employee Lambert, the majority finds the warning lawful in view of Lambert's alleged misconduct. This finding is not justified by the evidence.

The Respondent's vice president, Gerald Cauthen, testified that on July 18, 2002—the day after Lambert spoke up in support of the Union during one of Vice President Ronald Roache's antiunion presentations—a female employee told him that Lambert had told her she "had better not vote no for this union," and that this comment made her feel "upset" and afraid." Later that day, or the next, a decision to give Lambert a warning was made at a meeting of upper management. The following day, one of Lambert's supervisors gave him an oral warning "for threatening someone with the Union." Lambert denied the allegation and asked whom he had unintentionally offended so he could apologize, but he was never told who had complained.

The complainant was not identified at the Board hearing either, and the Respondent did not take down her complaint in writing when she made it, or otherwise investigate the complaint. In defending the warning, the Respondent introduced its written policy against "threatening language," and evidence of a previous incident involving Lambert in 1999 (3 years earlier) and a domestic-violence conviction and a related threat to another employee in 1997 (5 years earlier) for which Lambert had been demoted.

Two analyses of Lambert's warning are potentially applicable here under Section 8(a)(3), one governed by the Supreme Court's decision in *NLRB v. Burnup & Sims Inc.*, 379 U.S. 21 (1964), and the other by the Board's

[1] I agree with the majority that the Respondent's vice president, Ronald Roache, unlawfully threatened employees that unionization would cause the Respondent to lose customers and risk plant closure. I also agree that the warning to Lambert, by its terms, did not threaten further discipline if he engaged in nonthreatening union activity.

[2] E.g., *St. Francis Medical Center*, 340 NLRB 1370, 1381 (2003) ("Apparently you have some problems. What is it that we can do for you?"); *Federated Logistics & Operations*, 340 NLRB 255, 265–266 (2003) (manager asked what problems were in Tampa); *Westwood Health Care Center*, 330 NLRB 935, 940–941 (2000) (manager asked if employee had any "concerns" or "issues" and if so to take them to her).

[3] A statement made by an employer is unlawful if, under the circumstances, it may reasonably tend to coerce employees against exercising their Sec. 7 rights. E.g., *Engelhard Corp.,* 342 NLRB 46, 61 (2004).

[4] In *Butler Shoes New York*, 263 NLRB 1031, 1032–1033 (1982), cited by the majority, the employer did not solicit grievances but reminded employees of an "open door" policy that already existed. In *Capitol Cement Division*, 191 NLRB 419, 420–421 (1971), the statement at issue was found to be a generalized exhortation that employees should rely on the employer rather than on the union to respond to their complaints. *Best Plumbing Supply*, 310 NLRB 143 (1993), appears to be an aberration under the authority cited in fn. 2.

decision in *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Under either approach, I would find that the Respondent unlawfully warned Lambert.

A violation under *Burnup & Sims* must be found because the information on which the Respondent relied to discipline Lambert itself demonstrates that he was engaged in protected concerted activity and that he committed no misconduct that cost him the protection of the Act. Lambert was engaged in union solicitation or advocacy when he supposedly told the complainant—in the context of an active union campaign—that she "had better not vote no for this union." Even assuming that Lambert made the comment as alleged (he was never even asked for his account), the statement "you had better not vote no for this union" is not, standing alone, so egregious, offensive, or extreme, as to lose the Act's protection.[5] Nor has the Respondent specified that Lambert did or said anything else that made the statement, in context, objectively threatening.

Rather, the Respondent chose to rely solely on the complainant's purely subjective reaction of feeling "upset" or "afraid" by Lambert's solicitation. That is not enough. The protected nature of union solicitation is not dependent on the subjective or "idiosyncratic" reaction of the employee "who happens to be on the receiving end of that activity."[6] Union solicitations "do not lose their protection simply because a solicited employee rejects them and feels 'bothered' or 'harassed' or 'abused'" by them.[7] In sustaining the Respondent's defense, the majority neglects this principle.

The majority's invocation of the Respondent's "threatening" language policy is misplaced. On its face, Lambert's supposed comment was not objectively threatening. Moreover, where as here, a complaint directly relates to and implicates an employee's exercise of Section 7 rights, the Respondent's policy cannot trump Board law. "The Board has long held that legitimate managerial concerns to prevent harassment do not justify policies that discourage the free exercise of Section 7 rights by subjecting employees to investigation and possible discipline on the basis of the subjective reactions of others to their protected activity."[8] Disciplining an employee simply because some unnamed coworker at one time claimed she felt "upset" or "afraid" by the employee's union activity has a reasonable tendency to restrain the exercise of Section 7 rights.[9]

A violation also follows from a *Wright Line* analysis, which focuses on the employer's motive.[10] As the majority agrees, the credited evidence establishes that the Respondent acted with antiunion animus. The Respondent was therefore required to show that Lambert would have received the warning even if he had not engaged in union activity. It has not done so.

The Respondent decided to discipline Lambert—right after he spoke up in support of the Union during an antiunion presentation by its vice president—based on a supposed complaint by an unnamed female employee. It did so, indisputably, without seeking Lambert's version of the alleged incident or reducing the complaint against him to writing. The failure to make a reasonable investigation,[11] or to give an employee an opportunity to defend himself before imposing discipline,[12] supports an inference that the employer's true motive was unlawful.

Moreover, the disciplinary incidents the Respondent cited involving Lambert were years in the past, and for one, at least, Lambert had already been demoted. The Respondent's human resource director, Teresa Johnson, acknowledged that Lambert was involved in no other misconduct since those incidents and had, in fact, been restored at least temporarily to his previous position (lead mechanic) prior to the union campaign.

Under the circumstances, it seems clear to me that the Respondent's basis for disciplining Lambert was a pretext for disciplining him for his efforts to convince his coworkers to vote for the Union.

APPENDIX

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

[5] See, e.g., *Consolidated Diesel Co.*, 332 NLRB 1019, 1020 (2000), enfd. 263 F.3d 345 (4th Cir. 2001); *United Parcel Service*, 311 NLRB 974 (1993).

[6] *Patrick Industries*, 318 NLRB 245, 248 (1995). See also *Greenfield Die & Mfg. Corp.,* 327 NLRB 237, 238 (1998).

[7] *Frazier Industrial Co.,* 328 NLRB 717, 718–179 (1999), enfd. 213 F.3d 750 (D.C. Cir. 2000).

[8] *Consolidated Diesel*, 332 NLRB at 1020 and cases cited at fn. 6.

[9] Id.; *Handicabs, Inc. v. NLRB*, 95 F.3d 681, 684–685 (8th Cir. 1996), cert. denied 521 U.S. 1118 (1997).

[10] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

[11] *Washington Nursing Home*, 321 NLRB 366, 375 (1996); *Clinton Food 4 Less*, 288 NLRB 597, 598 (1988).

[12] E.g., *Embassy Vacation Resorts*, 340 NLRB 846, 849 (2003); *Johnson Freightlines*, 323 NLRB 1213, 1222 (1997); *K&M Electronics*, 283 NLRB 279, 291 fn. 45 (1987).

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT threaten you with loss of customers or plant closure if you select the United Food and Commercial Workers Union, Local 204 or any other union as your collective-bargaining representative.

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

CONTEMPORA FABRICS, INC.

Jasper C. Brown, Esq., for the General Counsel.
John S. Burgin, Esq. and *Robert A. Sar, Esq.,* for the Company.
Randall Hadley, International Representative, for the Charging Party/Petitioner.

DECISION

STATEMENT OF THE CASE

MARGARET G. BRAKEBUSCH, Administrative Law Judge. On January 31, 2003, an order consolidating cases, complaint, and notice of hearing issued in Cases 11–CA–19542, 11–CA–19576, 11–CA–19578, 11–CA–19627, and 11–CA–19668 upon charges filed by the United Food and Commercial Workers Union, Local 204, (the Union) alleging that Contempora Fabrics, Inc., (the Company) violated Section 8(a)(1) and (3) of the Act. Specifically, the complaint alleges that during a period between June 11,[1] and August 16, 2002,[2] the Company interrogated employees concerning their union sympathies, promulgated and enforced a no-talking rule, restricted the movement of employees, engaged in surveillance of its employees, prohibited prounion employees from talking about the Union during worktime, while allowing other employees to talk during worktime and in work places, and soliciting grievances from its employees in an effort to discourage employees' support for the Union. The complaint further alleged that the Company threatened employees with loss of business, job loss, discipline, plant closure, denial of employment with future employers, the use of their retirement fund to defend the Company against charges of objectionable conduct related to the union election, as well as the threat of the futility of selecting the Union as their collective-bargaining representative. Finally, the complaint alleges that the Company issued a verbal warning to employee Johnny Ray Lambert and laid off Michelle Clark, Betty Locklear, and Billy McNair because of their activities in support of the Union. The Company filed a timely answer denying the essential allegations in the consolidated complaint.

Case 11–RC–6488 involves a Board-conducted representation election on August 8, 2002, in which 61 votes were cast for the Union and 81 votes cast against the Union, with 8 challenged ballots. The challenged ballots were not sufficient in number to be determinative. On August 13, 2002, the Union filed timely objections to the conduct affecting the results of the election. On February 14, 2003, the Regional Director for Region 11 of the National Labor Relations Board, (the Board) issued a Report on Objections, Order directing hearing, and Order further consolidating cases and notice of hearing in Cases 11–RC–6488, 11–CA–19542, 11–CA–19576, 11–CA–19578, 11–CA–19627, and 11–CA–19668. Specifically, the Regional Director found that pursuant to Section 102.69 of the Board's Rules and Regulations, Series 8, as amended, the Union's objections raised substantial and material issues of fact, including but not limited to, issues of credibility that would best be resolved on the basis of record testimony at a hearing.

The Union's August 13 objections included 21 specific areas of conduct that were alleged to have affected the August 8 election. The Union later withdrew Objections 2, 5, 7, 9, 14, 17, and 18 prior to the close of the hearing in this matter. I heard these consolidated cases in Lumberton, North Carolina, on May 19, 20, 21, and 22, 2003. The General Counsel and the Company filed briefs, which I have considered. On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Company, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Company, a Delaware corporation, is engaged in the manufacture and nonretail sale of knitted textile products at its facility in Lumberton, North Carolina where it annually purchases and receives goods and materials valued in excess of $50,000 directly from points outside the State of North Carolina. Annually, the Company sold and shipped from its Lumberton, North Carolina faculty products valued in excess of $50,000 directly to points outside the State of North Carolina. The Company admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

In its Lumberton, North Carolina facility, the Company operates a circular knit textile facility where it manufactures knitted fabric for use in the clothing industry. The plant facility contains three knitting rooms and two separate warehouse areas for storage. The Company employs approximately 150 production and maintenance employees and the facility operates on a continuous 24-hour basis, with three work shifts, working 6 days per week. First shift is from 8 a.m. to 4 p.m., second shift is from 4 p.m. to midnight, and third shift is from midnight to 8 a.m. The Company maintains an employee stock option plan and is owned 100 percent by the employees.

[1] Complaint par. 8(a) alleged that the Company informed its employees on or about June 11 that they were forbidden to speak about the Union on company time. The General Counsel later withdrew this paragraph at hearing.

[2] All dates are in 2002 unless otherwise stated.

In early April 2002, the Union began its organizing campaign at the Company's facility. Over the course of the campaign, the Union held weekly or biweekly employee meetings at a local park. The Union also visited employees in their homes, met with employees at restaurants, and distributed literature at the facility. Employees Johnny Lambert, Michelle Clark, Betty Locklear, and Billy McNair, along with other employees, hand billed and distributed union literature at the Company's facility. On June 27, the Union filed a petition with the Board to represent certain production and maintenance employees at the Company's Lumberton, North Carolina facility. Pursuant to a Stipulated Election Agreement approved by the Acting Regional Director on July 12, 2002, a secret-ballot election was held on August 8, 2002. The Company and the Union stipulated that the following employees were an appropriate collective-bargaining unit:

> All hourly paid full-time production and maintenance employees, including mechanics, examiners, shipping and receiving employees, the planner, the assistant planner, the converter clerk, the yarn inventory clerk, the shipping clerk, and the technical support clerk employed by the Employer at its Lumberton, North Carolina facility; excluding all other salaried employees, all part-time and temporary employees, technical employees, office clerical employees, guards, professional employees, and supervisors as defined in the Act.

The Company admits that during the Union's campaign period in June, July, and August, the following individuals were supervisors within the meaning of the Act: Plant Manager Danny Church, Vice President Ronald Roache, Assistant Supervisor Gerald Corcelius, Human Resource Director Teresa Johnson, Assistant Supervisor Susan Williamson, Shift Supervisor Chris Roberts, Assistant Supervisor Irving Jones, Assistant Supervisor Jack Ford, and Quality Manager Arland Hill.

B. *Violations Alleged to Occur Before the Election*

1. Ronald Roache's speeches to employees

Beginning on June 3 and continuing until August 6, the Company conducted meetings concerning the Union's organizing campaign with employees on all three shifts. Vice President Ronald Roache conducted the meetings and was accompanied by management personnel for the respective shifts. Roache recalled giving speeches to employees on June 3 and 27, July 8, 18, and July 25, and August 1 and 6 prior to the election. Because the Company operates three shifts over a 24-hour period, Roache presented the same speech to groups of employees on each existing shift. The meetings were held during the respective work shifts for all three shifts and were usually conducted in a conference room with approximately 15 employees in attendance. Employees did not normally attend the meetings with the same group of employees in each scheduled meetings. Human Resources Manager Teresa Johnson testified that she attended every meeting for every shift during this entire period. Roache testified that during his first meeting with employees, he probably read his prepared speech word for word. He explained that as he became more comfortable, he decided that it would make more sense to make eye contact with the employees and he did not read his speeches word for word. The General Counsel alleges in complaint paragraphs 8(b), (c), (j), and (n) that in various meetings with employees, Roache threatened employees with plant closure and loss of business if they selected the Union as their exclusive collective-bargaining representative. The General Counsel also alleges that Roache threatened employees with job loss in the event of a strike and threatened employees that it would be futile for them to select the Union as their exclusive collective-bargaining representative.

(a) Complaint paragraph 8(b) and Objection 19 threat of loss of business

The complaint alleges that on various dates between late June and August 8, Ron Roache threatened its employees with loss of business if they selected the Union as their exclusive bargaining representative.[3] Michelle Clark testified that during a July meeting, Ron Roache told employees that from the way it looked, the Company only had the money to operate for 1-1/2 years more. Clark recalled that Roache added that the Company couldn't get new customers because of the Union. Regina Cummings testified that Roache told employees in a July meeting that the Company's customers could find out that the plant was being unionized and they might not want to do business with the Company. She recalled that he explained that the customers could learn of the organizing because their truckdrivers could observe the hand billing. Diane Hood recalled attending a meeting in July when Roache told employees that if the Union were voted in, the Company could lose customers because customers would not want to do business with a unionized company. James Green recalled that during a meeting approximately 2 weeks before the election, Roache told employees that he was worried about the possibility of plant closure if the employees voted the Union in. Green recalled that Roache explained that other companies would not want to do business with the Company, work would slack off, and there could be layoffs. Betty Locklear testified that Roache told employees in a meeting near to the election date that if the Company loses customers, the plant could possibly close. Johnny Lambert testified that during a meeting on July 9, Roache told employees that if their customers found out that they were unionized, they would not want to do business with the Company.

The Company called Karen Tyner, John McCall, Ruby Humphrey, Norris Bullard, Lois Helen Locklear, Joanna Lambert, Mollie Brooks, and Marilynn Britt to testify concerning their recall of Roache's speeches to employees. Bullard recalled that Roache told employees that if the Company could not get their product out, they could lose customers. McCall testified that in all of his meetings with employees Roache mentioned business conditions. Tyner and Humphrey did not recall any specific references to customers during Roache's speeches, however, they recalled that Roache talked abut how the economy was affecting their work and about the decline in the textile industry. Humphrey recalled only that Roache said that he was unable to get out to find customers because he had to deal with the union issues. Brooks recalled that Roache

[3] Objection 19 alleges that during the critical period the Company threatened employees with loss of business if the Union is voted in.

stated that "conditions were slow" and talked about other companies in the area that had closed. Brooks also recalled that Roache told employees that if the Union came in, customers might leave, however he was planning to "keeping the Company going." Britt recalled that Roache stated that the Company was losing customers because people weren't doing their jobs and he wasn't able to go out to visit customers because he had to stay and "fight against this." Brooks did not recall Roache stating that customers would leave if the Union won the election. Joanna Lambert recalled that Roache told employees that customers would leave the Company if the Union came in. She also recalled that Roache told employees that if they didn't let the Union pass, they would lose customers and everything else. Roache had also added that he hoped that business would be better after "the Union would pass." Both Britt and Lois Helen Locklear denied that Roache ever said that the Company would lose customers if the Union were voted in.

The script for Roache's June 3 meeting with employees includes:

> In the past 4–5 weeks I have been out looking for business 2 days as compared to the previous 4 months of over half my time. We have got to return our focus to our company and its business and do it quickly or we will not make it. Unless we fix our problems and fix them quickly there won't need to be a union election because we will end up closing due to lack of business, quality, etc.

The script from Roaches' June 27 meeting contains the following in reference to one of the Union's handouts:

> I think I also read something about we have contracts with our customers, why not with the employees. These are real live economic conditions going on. There are no contracts with our customers. Every customer can leave us whenever they chose to. If we lose our customers it does not matter how many contracts we have with a union if the doors close. Any additional costs associated with fighting this union will come directly from the Company which affects all of us.

Roache acknowledged that he had also included a statement that he had been in the business a long time and he believed that a union could put the Company at risk.

During the speech on August 6, Roache told employees that his decisions and judgment were focused on getting new customers and keeping the customers that they had and keeping their business in operation. Roache explained that as of that day, the Company only had operating capital to keep their doors open for a little more than a year. He went on to explain that he felt that with the employees help, they could reverse the situation.

Roache denied that he ever told employees that if customers found out that the Company was union they would not want to do business with the Company. Teresa Johnson testified that Roache never stated or implied that the Company would lose customers "simply because the Union came in." She recalled that he did talk with employees about losing customers because of quality problems. She also recalled that he had stated that in the event of an economic strike, the Company could possibly lose customers because of their not getting out the product. Joanna Lambert specifically recalled Roache's telling employees that in the event of a strike, the plant would not run and they wouldn't have any customers. The script for Roache's June 27 meeting with employees includes:

> In the event of a strike, I believe that a number of our customers, if faced with, this would in my opinion seek an alternative supplier. If that were to happen, it is possible that we would never get them back.

(b) Complaint paragraph 8(c) and Objections 12 and 20 threat of job loss in the event of a strike

The complaint alleges that in early August, Roache threatened employees with job loss in the event of a strike.[4] Regina Cummings testified concerning a meeting that she attended with approximately 8 to 10 employees in mid July. Cummings recalled that Roache talked about what would happen if the Union came in and if the plant were to go on strike. She recalled that Roache stated that the employees would lose their health insurance benefits and the employees could lose their jobs and the Company could replace the employees with "somebody else." Employee Diane Hood recalled that during a meeting approximately a week before the election, Roache stated that if there were a strike, the Company would possibly bring in other employees to fill their jobs. On cross-examination, she further remembered that Roache talked about the Company's right to hire permanent replacements for strikers.

Bullard and Britt, testifying for the Company, recalled that Roache spoke about the Company's right to hire employees to replace striking employees. While Britt recalled that Roache told employees that if there were later openings the strikers would have the right to come back, Humphrey did not recall this additional comment. Bullard, Britt, and Humphrey all denied that Roache ever threatened to close the plant in the event of a strike. The text of Roache's August 1 speech to employees includes the following concerning strikes:

> If the strike is over more money, better benefits or other economic items, Contempora has the legal right to hire permanent replacements to fill the positions of all strikers to keep our operation going. Strikers whose positions are filled by permanent replacements have no right to return after the strike is over. The strikers have to sit around and wait for available jobs to open up which could take months or even years.

(c) Complaint paragraph 8(j) threat of futility of selecting the Union

The complaint alleges that in late June, Roache threatened employees that it would be futile for them to select the Union as their collective-bargaining representative. Counsel for the General Counsel presented only one witness to testify concerning this allegation. Employee Johnny Lambert recalled that in June, Roache spoke with the entire first shift in the warehouse.

[4] Objection 12 alleges that during the critical period the Company threatened employees with loss of jobs. Objection 20 alleges that during the critical period the Company threatened employees with loss of health insurance.

He recalled that Supervisors Williamson and Jones were also present. Lambert testified that during the speech, Roache stated that the NLRB has passed a new law and that the Company "did not have to negotiate with the Union and certainly didn't have to negotiate under good faith." Lambert further testified that in a later meeting Roache said that the Company would have to negotiate in good faith with the Union, if the Union won the election. Roache's script for his meeting with employees on July 25 reflects that Roache's primary topic was collective bargaining. Roache discussed not only the language of Section 8(d) of the Act, but also language from Supreme Court and Board decisions concerning bargaining. The script includes the statement that if the Union got in, the Company would meet their obligations to bargain in good faith, however the Company would bargain hard and bargain tough. The Company would say "No" to any and every union demand they disagreed with.

(d) Complaint paragraph 8(n) and Objections 8 and 13 threat of plant closure

The complaint alleges that in early August, Roache threatened employees with plant closure if they selected the Union as their collective-bargaining representative.[5] Cummings did not provide any specific or approximate date, but recalled that Roache told employees in a meeting that the Union could close the plant down if it "came in." While she did not provide a date, Betty Locklear testified that she attended a meeting in which Roache told employees that if the Union came in, the Company could lose business and possibly close. Third shift employee Diane Hood testified: "He said that if the plant did close that there was a possibly that they could lose a whole lot of customers because of the closures, because if the Union did come in that we could lose a whole lot of customers and the customers wouldn't want to do business with them when they're unionized." Hood also confirmed that she could not recall Roache's exact words and acknowledged that often third shift employees fell asleep during the meetings.

Bullard, Britt, and Tyner, called as witnesses for the Company, denied that Roache told employees that the plant would close if the Union were voted in by the employees.

2. Violations alleged with respect to supervisors other than Roache

(a) Complaint paragraph 8(e) promulgation and enforcement of a no-talking rule

The complaint alleges that on various dates in July and August, the Company, acting through Supervisors Anthony Smith,[6] Irving Jones, and Chris Roberts, promulgated and enforced a no-talking rule in order to discourage union activity. Cummings recalled a day in mid to late July, when she spoke with Blanche Lambert, the employee who worked next to her. Cummings recalled that they were discussing a defect in the fabric. During her conversation with Lambert, Supervisor Jones approached her and told her not to let Knitting Manager Anthony Smith catch them talking. Cummings testified that no supervisor had ever made this kind of statement to her before the election. Jones testified that if he sees employees talking and not working, he tells them to go back to work. Cummings and Lambert are both examiners and work about five to six feet apart. Jones did not recall any specific date in July when he had spoken with Lambert and Cummings about talking. He added however, that he usually had to break them up from talking on a daily basis because they "love to talk." He maintained that he continues to do so in 2003.

Employee Howard Jacobs recalled that in late July, he was talking with fellow employee, Kenny Butler in his work area. After Butler walked away from Jacobs, Supervisor Roberts told Jacobs that he couldn't talk with fellow workers. Jacobs testified that Roberts did not explain why he could not. The Company's records reflect that Jacobs received a verbal warning in April 2000 for numerous occasions when he was observed on the knitting floor, talking with employees concerning nonwork related matters. On August 2, 2000, the Company issued a written warning to Jacobs for "leaning on a machine talking to a mechanic." The warning included reference to Jacobs' having received prior warnings for this same conduct on April 11 and June 28, 2000.

Johnny Lambert testified that on August 5, he was returning from the parts department and stopped to talk with his cousin, John Hunt. Supervisor Jones approached him and told him to watch himself and added that Lambert had already been "told on once for talking that morning." Jones had not explained what he meant by that statement. Jones testified that he did not recall this conversation with Lambert.

Michelle Clark testified that during the union campaign, Supervisor Roberts told employees that they could not talk and they were to be at their machines at all times. She could not remember the date when Roberts made this statement. She further testified that she had been talking with another employee when Roberts made the statement to her. On cross-examination, Clark admitted that when she provided a sworn affidavit to the NLRB on September 6, 2002, she had testified that no supervisor had told her that she could not talk in the plant.

(b) Complaint paragraph 8(f) restriction of employee movement

The complaint alleges that on July 25 and August 1, respectively, Roberts and Corcelius restricted the movement of employees in order to discourage union activity in the plant. Employee Jacobs testified that it had been his practice for 20 years to take his uniform to a particular area of the plant and no supervisor had ever restricted him from doing so. On July 25, and before the beginning of Jacobs' shift, Roberts stopped Jacobs as he carried his uniform through the plant. Roberts told him that he could not walk through the plant. Roberts did not recall telling Jacobs that he was not permitted to go through the plant. He explained that if an employee left the plant after their shift and then came back in, it is possible that he would ap-

[5] Objections 8 and 13 have identical wording and allege that during the critical period the Company and through its agents threatened employees with plant closure.

[6] Par. 8(e) specifically alleges that the Company promulgated and enforced a no-talking rule through the actions of Supervisor Anthony Smith in July. The record contains no evidence of Smith's action in this regard.

proach the employee and find out what the employee was doing.

(c) Complaint paragraph 8(g) and Objections 3 and 4 alleged surveillance

The complaint alleges that on various dates in June, July, and August, the Company acting through Supervisors Bridgeman, Corcelius, Roberts, Williamson, and Ford, engaged in surveillance of employees in order to discourage union activity in the plant.[7] Cummings, who worked in the inspection area, testified that before the union campaign, Second-Shift Supervisor Ford had a practice of coming to the inspection work floor early to check the area before his shift. After checking the area, he would leave. Cummings recalled that the week before the election, Ford stayed on the work floor and walked back and forth looking at everyone. She estimated that he was in the inspection area for approximately 30 minutes. Cummings testified that she had never seen Ford do this previously. Ford[8] testified that he usually came into the plant around 3 p.m. prior to the beginning of the 4 p.m. shift. He estimated that it usually took him approximately 45 minutes to review the turnover sheet from first shift, transfer information to a layout sheet, and make rounds to check each individual knitting machine. A part of his preshift preparation involved approximately 15 minutes in the inspection area. He denied that he spent as much as 30 minutes in the inspection area or that he remained in the inspection area, simply watching employees.

Johnny Lambert testified that during the later part of July he saw Supervisors Williamson, Johnson, Hill, Jones, and Bridgeman standing at the end of the work aisles during shift change. Johnson testified that as a part of their duties, supervisors were expected to be on the production floor. She explained that during the union campaign, both she and the other supervisors were out on the floor even more than usual. She explained that the purpose of this additional supervisory presence was to be available to employees and to answer any questions. She denied that supervisors were instructed to stand at the end of the aisles and to watch employees and she observed no supervisors doing so.

(d) Complaint paragraph 8(h) and Objection No. 11 disparate enforcement of the no-talking rule

The complaint alleges that in July and August, Supervisors Williamson, Roberts, and Corcelius prohibited prounion employees from talking about the Union during worktime, while allowing other employees to talk during worktime and in work places.[9] Betty Locklear testified that prior to the election, supervisors walked the production floor more often and told employees to go back to work when they were talking. Specifically, she recalled that on or about August 1 or 3, she was talking with employee and mechanic James Green next to her machine. Green recalled that when Supervisor Roberts approached them, Locklear moved away from him. Locklear also admitted that she was not working when she was talking with Green. Supervisor Roberts told Locklear that Green had too much work to do for her to talk with him. While she testified that he had never before said that to her, she admitted that she was not working at the time that she was talking with Green. She also acknowledged that the Company has previously warned employees for talking rather than working. Roberts testified that while he did not recall the conversation with Locklear and Green, it is possible that he made such a comment. He explained that if he had noticed their being out of their area, talking in the aisle, or engaged in excessive talking, he would have said something like that. The Company submitted Green's attendance calendar for 2002. The calendar reflects that on June 26, Roberts spoke with Green about staying busy until his shift ended. Roberts documented that Green had been noted to quit working and to stand around talking during the last 30 minutes of his scheduled shift. Roberts instructed Green that the last 30 minutes of the shift was as important as the first 30 minutes.

Locklear further testified that in July she saw company supporters Marilyn Britt and Molly Brooks talking together for approximately 20 minutes. Locklear saw Roberts walk past them without saying anything to them. She acknowledged that she did not know what Britt and Brooks were discussing and she did not know if Roberts overheard their conversation. She recalled that it only took a few seconds for Roberts to pass Britt and Brooks. Brooks worked in a job identified as a "creler" and Britt worked as a knitter. Locklear acknowledged that their respective jobs required them to work next to each other and to talk with each other. Roberts testified that he did not remember the incident with Britt and Brooks. He testified that had he seen them talking, he would have treated the incident the same as with Green and Locklear.

Lambert testified that in early August, he observed company supporter Grant Ivy talk with John Hunt for as long as 20 minutes. Lambert observed Supervisor Williamson walk past them without stopping to say anything to them. Lambert testified that during the campaign, he also observed Williamson walk past employees Pat Brooks and Ruby Humphrey, who were talking. Williamson did not stop or say anything to them. Williamson neither recalled seeing Ivy and Hunt talk for as long as 20 minutes nor for any long period during the union campaign. Williamson testified that if she had seen Brooks and Humphrey talking, she would have told them to go back to work.

Lambert recalled that he asked Supervisor Arland Hill why nonunion employees could talk and prounion employees could not. Lambert recalled that Hill responded, "That's a good point." Hill recalled Lambert's comment and his own response. Hill explained that before he could say any more to Lambert, a page interrupted him.

Green recalled that in late July, he was talking with fellow employee Mack Bryant. Supervisor Corcelius approached as they were talking. Green recalled that he and Bryant were not talking about the Union but continued to talk in Corcelius'

[7] Objection 3 alleges that during the critical period, the Company used surveillance through its supervisors\agents whenever the Union was out in front of the plant hand billing. Objection 4 alleges that during the critical period the Company used surveillance at the change of shift.

[8] Ford retired from the Company in March 2003.

[9] Objection 11 alleges that during the critical period the Company allowed "vote no" supporters to solicit employees during working hours and did not allow union supporters the same opportunity.

presence. Green did not allege that he and Bryant were talking about a work related matter. After Corcelius listened to their conversation for what Green described as "awhile," he asked Mack to return to his work area. Corcelius did not recall the incident.

(e) Complaint paragraph 8(k) alleged interrogation

The complaint alleges that in late June, the Company, acting through Anthony Smith, Teresa Johnson, and Arland Hill, interrogated employees regarding their union sympathies and desires. Johnny Lambert recalled an incident in which Anthony Smith approached him in the work area he identified as the "200 floor." Smith asked why he thought that the Company needed a union. Lambert responded, "Because of lies said by Ron Roache." Lambert did not identify the specific date of this conversation nor did he explain what, if anything, was said before or Smith's question and his answer. The General Counsel presented no witnesses concerning interrogation by Teresa Johnson or Arland Hill in late June. While Smith denied asking Lambert why he thought the employees needed a union, he recalled a conversation in which he had spoken with Lambert about the Union. Smith initiated the conversation by telling Lambert that he had some issues that he wanted to discuss with Lambert. Smith recalls that he stated that he had observed the UFCW and that he didn't think that having a union would solve the Company's problems. Smith explained that he had approached Lambert because management heard that there was union activity and he was instructed to talk with employees in one-on-one conversations. Smith explained that he had been given a list of instructions as to what he could and could not say to employees. He stated that he had been told that he could make statements but could not ask questions and he had followed these instructions in talking with Lambert.

(f) Complaint paragraph 8(l) and Objection 16 solicitation of grievances

The complaint alleges that in late July, the Company, acting through Chris Roberts, solicited grievances from its employees and impliedly promised to remedy their grievances in an effort to discourage employee support for the Union.[10] Locklear testified that on an unspecified date in July, Corcelius asked her if she had problems or questions about the Union to come and talk with him. She did not provide any additional information as to what, if anything was said before or after Corcelius making this comment to her.

(g) Complaint paragraph 8(m) threat of loss of future employment

The complaint alleges that in July, the Company, acting through Gerald Corcelius, threatened its employees that they would be denied future employment if they informed a prospective future employer that they previously worked for the Company. Employee Michelle Clarke missed a company meeting with employees in July. When she returned to work, Corcelius spoke with her and with James Hunt. Corcelius stated that if they went anywhere else to get a job and told the prospective employer about the Union at Contempora, they would not be hired. On cross-examination, Clarke recalled Corcelius stating that if they left to work somewhere else, another plant would not hire them because they came from a unionized plant. Corcelius did not recall any conversation in which he had made such a statement to Clarke and Hunt. He explained that he had been instructed as to what was permissible and not permissible to say to an employee during the campaign and he would not have made such a comment.

C. Violations Alleged to have Occurred After the Election

Complaint paragraph 8(i) alleges that the Company, acting through Roache, threatened employees that it would use employee retirement money to defend against charges of objectionable conduct related to the union election.

Roache testified that the Company is owned 100 percent by the employees. Employees have shares that are placed in their account every year and are valued at the end of each fiscal year based upon the actual value of the stock. The value of the stock entails all the assets of the Company, including the value of the building, the machinery, the accounts receivable, and the balance of the bank accounts. Roache testified that there is no formal retirement plan for employees. The value of the stock held by the employees changes from year to year based upon the performance of the Company. When employees leave the Company, they are paid the value of the stock and the stock is redistributed to the remaining employees.

Hood recalled that during a meeting with employees after the election, Roache stated that he was pleased with the results of the election, however, the Union filed charges. Hood recalled Roache's saying that if it took everybody's ESOP money to fight the Union, "that is what he would do." On cross-examination, Hood admitted that she had stated in her sworn statement to the Board on August 17 that she did not remember exactly what Roache said, but he gave her the impression that he would use every bit of the money left from the ESOP to fight the Union. Green recalled that Roache stated that no matter what it took, whether the Company's money or ESOP money, he would fight the Union. Green acknowledged on cross-examination that he could not recall the exact words that Roache used during this meeting. Cummings recalled Roache telling employees that if he had to do so he would fight the Union's "petition" with everything that the Company had, "if it meant using employees' money." Lambert testified that Roache told employees that he would fight the Union's objections if it meant taking the employees' "retirement money into it."

The Company submitted the script for Roache's August 16 meeting with employees in which he discussed the Union's filing objections to the August 8 election. The script includes the following:

> Because the food workers union has decided to file these objections, we will now be forced to spend time, money, and energy addressing these accusations instead of getting back to the work that we need to perform to obtain and keep the customers that we have.

[10] Objection 16 alleges that during the critical period the Company did solicit grievances from employees.

Roache's prepared speech goes on to explain that the Board will conduct an investigation and that the matter might also be set for a hearing with employees subpoenaed to testify. Roache concluded by stating that the Company had an obligation to oppose the objections and they would keep the employees informed of all new developments.

Company witnesses Joanna Lambert, Mollie Brooks, Ruby Humphrey, Norris Bullard, Marilyn Britt, and Karen Tyner all testified that Roache had not mentioned either ESOP or their retirement money during his August 16 meeting. Company employee witness John McCall initially testified that while Roache said that he would do whatever he could to keep the Company running, he did not mention anything about using ESOP money to do so. McCall then testified that Roache told employees that he would do whatever he had to do to keep the Union down and that money would come from ESOP. Upon further questioning from the Company's counsel, McCall then testified that Roache said that he would get the money from "resources" rather than ESOP.

D. Personnel Actions Toward Specific Employees

1. Paragraph 9 and Objection 6 the company's verbal warning to Lambert

Employee Johnny Lambert has been employed as a mechanic at the Company's plant for over 20 years. Lambert visibly and actively engaged in union activity by hand billing the plant on behalf of the Union during the Union's campaign. Lambert testified that he also spoke up in favor of the Union during one of Roache's July 18 meeting with employees.

On July 19, Supervisor Hill approached Lambert and informed him that he was to receive a warning. Shortly thereafter, Lambert was called to a meeting in Hill's office where he met with Supervisors Jones, Williamson, and Hill. Hill informed Lambert that he was there because he had threatened someone about the Union. Hill told him that he had a right to support the Union but he could not threaten anyone with it. Lambert asked for the name of the person he was to have threatened. Lambert maintained that he told the supervisors that he wanted to apologize to the person. Although Hill told him that he would tell him if allowed to do so, neither Hill nor any other supervisor told Lambert who he was to have threatened. Hill told him that if this happened again, he would be subject to discipline and/or termination. The oral warning was reduced to writing and placed on the back of Lambert's attendance calendar, consistent with the Company's normal disciplinary procedure. Lambert denied that he threatened anyone and testified that he was unaware of any employee who had indicated feeling threatened.

The Company asserts that on July 18, a female employee went to the front office to see Human Resources Manager Teresa Johnson. When she was unable to find Johnson, she went to the office of vice president of manufacturing and sales, Gerald Cauthen. Cauthen testified that the woman told him that Johnny Lambert threatened her regarding her vote in the upcoming election. The woman alleged that Lambert told her that she better not vote against the Union in the election. Cauthen recalled that the woman seemed upset and she was adamant that she did not want Lambert to know that she had informed management of his threat to her.

Johnson testified that while she did not talk with the woman on July 18, she did so a "couple of days later." Johnson testified that the woman was upset because an employee from another shift approached her. When asked the identity of the person who approached the woman, Johnson replied:

> Johnny Lambert. Of course it took me a bit or two, with her speaking with me, and she told me that he had told her that she'd better not vote for the Union in this plant.

As Johnson continued to describe the woman's statement to her, she again repeated that Lambert threatened that she "better not vote for a Union in this plant."[11]

Although Johnson stated that she spoke with the unnamed woman a couple of days after July 18, she participated in the decision to discipline Lambert on July 19. The Company asserts that the unnamed woman could not be identified or presented for testimony because she continued to fear Lambert. The record contains no evidence of any statement that was taken from this woman at the time that she reported the alleged threat. The only statement that is alleged to have been given by this unnamed woman was a written statement dated May 20, 2003, the second day of the trial in this proceeding. This statement was not received into evidence as it appeared to be prepared for trial and could not have been relied upon as a basis for Lambert's testimony.

The Company's employee handbook contains a provision that "Abusive or threatening language, fighting or unsafe conduct, will not be allowed on Company premises. An employee will be subject to immediate dismissal." The Company submitted into evidence records to show that the Company has issued 32 other disciplinary actions to employees for threatening or abusive behavior to supervisors and fellow employees.

2. Complaint paragraph 10 and Objection 10 temporary layoff of employees Michelle Clark, Betty Locklear, and Billy McNair

It is undisputed that based upon business conditions, the Company has a practice of conducting temporary layoffs or sending employees home for lack of work. Roberts testified that as third shift supervisor he always follows the Company's policy to take volunteers first for the layoffs. If there are not enough volunteers or if no volunteers, he reviews the employee attendance reports. Based on seniority, he selects employees who have not been laid off recently in order to evenly distribute the temporary layoffs. Roberts testified that if possible, he attempts to let employees know in advance when they will be laid off to keep them from having to come to the plant and then turn around and go home. On some occasions he has not been able to give advance notice and he has sent employees home after they arrived for work.

At the time of the union election, employees Michelle Clark, Betty Locklear, and Billy McNair worked on third shift under Roberts' supervision. Michelle Clark testified that after com-

[11] Although counsel for the Company states in his brief that Johnson testified that the woman described Lambert's threat as, "She'd better not vote against the union in this plant," her actual testimony reflects otherwise. Twice Johnson described Lambert's alleged threat as, "she better not vote for the Union in this plant."

pleting her shift on August 8, Roberts approached her and told her that she would have the following evening off work. After Betty Locklear completed her work shift on the morning of August 8, she clocked out and went to the parking lot. Roberts caught her before leaving and told her that she had the night off. Locklear recalled that she asked Roberts if she had to take the night off and he told her that she did.

Roberts testified that he could not recall whether Clark or Locklear volunteered for the layoff or if he designated them for layoff. He did not recall whether he asked for any volunteers for that evening and acknowledged that it was more than likely that he mandated the August 8 layoff.

Both Locklear and Clarke testified that they wore union buttons to work on the night before their temporary layoff and that they hand billed in front of the plant during the week prior to the election. Although Locklear recalled that McNair had also worn a union button on the night prior to the temporary layoff, McNair did not testify.

The Company submitted records to show that Clarke, Locklear, and McNair have repeatedly been sent home for lack of work over the course of several years. Clark was sent home for lack of work on 16 occasions in 2000, 30 in 2001, and 16 in 2002. Although Locklear was only hired in April 2002, she had been sent home for lack of work on May 28, July 30, August 8, September 9–11, 14, 18, and 21. McNair was sent home for lack of work 14 days in 2000, 10 days in 2001, and 12 days in 2002, including June 5, August 1, 8, 13, and August 15–17, and November 18–22, 2002. The Company additionally submitted records to show that during the week of the union election, six third-shift employees were sent home for lack of work on August 6, three third-shift employees were sent home for lack of work on August 7, and four third-shift employees were sent home for lack of work on August 8. The Company also submitted records to show that 36 first-shift employees, 34 second shift-employees, and 18 third-shift employees were sent home during the week of the election. On the same day that Locklear, McNair, and Clarke were given a temporary layoff, six first-shift employees and four second-shift employees were sent home for lack of work.

III. FACTUAL AND LEGAL CONCLUSIONS

A. Roache's Speeches to Employees

1. Roache's speeches prior to the election

In complaint paragraphs 8(b), (c), (j), and (n), the General Counsel alleges that Roache violated the Act by threatening employees with plant closure and loss of business if they selected the Union as their bargaining representative during his speeches to employees in June, July, and August. The complaint further alleges that in speeches to employees during this same period, Roache threatened employees with job loss in the event of a strike and threatened that it would be futile for employees to select the Union as their collective-bargaining representative.

The General Counsel submitted the testimony of six employees in support of the complaint allegations involving Roache's speeches. The Company presented eight employee witnesses to rebut the complaint allegations. The overall record testimony of these 14 individuals reflects a wide diversity in recall. I have considered their testimony as a whole in conjunction with the Company's alleged texts of the various speeches given.

With respect to complaint paragraph 8(j) and the allegation of Roache's threat of the futility of selecting the Union as bargaining representative, I do not find the record sufficient to support this allegation. Lambert was the only employee who testified in support of this allegation. Lambert initially testified that Roache told employees that the Board had passed a new law and the Company did not have to negotiate with the Union and did not have to negotiate in good faith. Lambert further testified however, that in a later meeting, Roache gave assurances that the Company would have to negotiate in good faith with the Union if the Union won the election. Lambert's testimony is uncorroborated and patently incredible with respect to this allegation. Accordingly, I find no merit to complaint paragraph 8(j).

The General Counsel alleges in complaint paragraph 8(c) that Roache threatened its employees with job loss in the event of a strike. I find no merit to this allegation. The text of Roache's August 1 speech reflects that the majority of the speech was devoted to addressing what happens in the event of a strike. Roache told employees that the Company had the right to hire permanent replacements for striking employees. Company witnesses Britt and Bullard, as well as General Counsel witness Hood, corroborate the written text concerning the hiring of replacements. Additionally, the text reflects that Roache told employees in this same speech that the Company could and would stop payment on strikers' insurance benefits. The employees would have to pay the weekly premium in order to keep the medical benefits in effect during the strike. Thus, it appears that based upon the record testimony and the Company's text of the August 1 speech, Roache lawfully advised employees of the Company's right to hire permanent replacements during a strike and lawfully advised employees of a strike's effect on their insurance benefits. There is no credible evidence that Roache unlawfully threatened employees with job loss in the event of a strike or that the Company unlawfully threatened employees with the loss of health insurance benefits. Accordingly, I find no merit to complaint paragraph 8(c) or union Objections 12 and 20.

The remaining allegations involving Roache's speeches involve the alleged threat of plant closure and the threat of the loss of business if the employees selected the Union as their collective-bargaining representative.

The script for Roache's June 3 speech to employees speaks to the fact that Roache has not been able to solicit business for the previous 4 to 5 months because of the Union's campaign. In a later section, he also mentions, "Unless we fix our problems and fix them quickly there won't need to be a union election, because we will end up closing due to lack of business, quality, etc." During the June 27 speech, Roache told employees that in the event of a strike, a number of their customers would seek another supplier and if that occurred, it would be possible that the Company would never get them back. In the same speech, Roache told employees that customers could leave whenever they chose to do so and if the Company lost customers, it would not matter how many contracts they had with a union if the

doors closed. Roache further stated that he believed that a union could put the Company at risk and added that any additional costs associated with fighting the union would come directly from the Company, which affects "all of us." Thus, it is undisputed that through Roache's speeches, the Company communicated to employees that the Union's campaign was putting the Company at risk and affecting the loss of new business. Further, Roache warned employees that in the event of a strike, the Company would lose customers and the plant could close.

Thus, the admitted text of Roache's speeches on June 3 and 4, and on June 27 and 28, is very similar to the statements recalled by employees. Employees Hood, Green, Cummings, and Johnny Lambert all testified that Roache told employees that the Company's customers would not want to do business with the Company if the Company were unionized. Green and Locklear recalled Roache's prediction of the plant's closing in relation to the loss of customers. Company witness, Joanna Lambert, recalled that Roache told employees that customers would leave if the Union won the election. Company witness Brooks recalled that Roache told employees that customers might leave if the Union came in. She added however, that Roache went on to say that he was planning on "keeping the Company going." Other company employee witnesses recalled Roache's mentioning the effect of the economy and the product quality on their work and customers. Based upon the overall testimony and the text of Roache's speeches, I do not doubt that Roache mentioned a number of factors that could affect the Company's business and any potential plant closure. Crediting the testimony of Cummings, Green, Hood, Betty Locklear, Johnny Lambert, and Joanna Lambert, I find that during his June speeches, Roache communicated to employees that if unionized, the Company would lose customers and risk plant closure. Roache admits that he did not follow his script word-for-word when he spoke with employees on all three shifts. While he may not have communicated the alleged threats to all groups of employees, the evidence supports a finding that in some of the mandatory group meetings with employees, he predicted loss of business and possible closure if the facility became unionized.

It is well settled that an employer's predictions of adverse consequences arising from sources outside its control must have an objective basis in order to avoid a violation of Section 8(a)(1) of the Act. *Long-Airdox Co*., 277 NLRB 1157, 1158 (1985). In its 1969 decision, the Supreme Court outlined the parameters of an employer's prediction of the effect of unionization. *NLRB. v. Gissel Packing Co*., 395 U.S. 575 (1969). Under *Gissel*, when an employer makes a prediction as to what effects unionization may have on its company, such a prediction is lawful where it is "carefully phrased on the basis of objective facts to convey an employer's belief as to demonstrably probably consequences beyond his control or to convey a management decision already arrived at to close the plant in case of unionization." 395 U.S. at 618.

In *Blaser Tool & Mold Co*., 196 NLRB 374 (1972), the Board found that an employer's president stated to employees that its major customer "was free to withdraw its patronage at any time and that he was apprehensive that [the customer] would cease doing business with [the employer] if the employees voted for the Union." In finding the statement to be unlawful, the Board specifically noted that it is "well established that employer predictions of adverse consequences arising from sources outside his control are required to have an objective factual basis in order to be permissible under 8(a)(1)." In a later case, the Board found a violation of the Act when the employer stated that if the union were elected, the employer's sole customer of steel cans would switch to less costly aluminum cans and the employer would be forced to close down. *Crown Cork & Seal Co*., 255 NLRB 14 (1981). The Board determined that the employer failed to show on an objective basis that the customer would stop purchasing the employer's steel cans. In a more recent case, an employer told employees that it was unlikely that the employer's parent company would view the employer as an appropriate location to invest long-term capital and that the employer's customers might not view the Company as a secure long-term option to handle their business. The employer argued that such statement was merely an objective prediction of what its parent corporation and customers would likely do in the event of unionization. *Tradewaste Incineration*, 336 NLRB 902 (2001). Affirmed by the Board, the administrative law judge found the employer's statement as violative of the Act. Specifically, the judge noted the absence of any corroborative documentary evidence to provide an objective factual basis for the prediction that the employer might lose customers if the union was elected. Id at p. 915.

In a recent case, the Board found that an employer's statement was both "carefully phrased" and based upon "objective fact." In speaking with a group of employees, an assistant production supervisor told employees that the employer was losing money and that if the union ever did come in, the store was not making enough money to pay higher wages and that it would be a possibility that everyone would lose their jobs. The majority opinion found that the fact that the supervisor had no knowledge of the employer's financial situation was irrelevant to her prediction as her prediction was simply that the particular store might have to close if wages were excessive. The Board concluded that employees would reasonably view her remark as indicating that any store closure would be economically driven rather than retaliatory. The Board also noted that the supervisor backed up her statement by showing employees a document that illustrated what the store was making per day. See *TVI, Inc.,* 337 NLRB 1039, 1040 (2002). In another recent case also involving an employer's prediction of loss of business and customers, the Board found the predictions as violative of the Act. In *Aldworth Co. Inc*., 338 NLRB 137 (2002), the employer told employees that if the employees selected the union and a contract was negotiated that did not allow the employer to be competitive, a contracting business entity (also alleged as a joint employer) could cancel its contract with the employer and give its business to a competitor who did not have to recognize a union. In finding the employer's statements to be violative of the Act, the Board considered the substance of the employer's three meetings and found common characteristics and a shared context. The Board found that there was a reiteration of a consistent theme, the threat of plant closure and a repeated association between union contracts and loss of jobs.

On the basis of the entire record evidence, I find that the Company, acting through Ronald Roache, told employees that the Company would lose customers and risk plant closure if employees selected the Union as their collective-bargaining representative. While Roache may have presented charts and documentation to show a decline in business, there is no evidence that Roache gave any objective basis for his prediction that the Company would lose customers in the event of unionization. Accordingly, I find merit to complaint paragraphs 8(b) and (n) as well as Objections 13 and 19.

2. Roache's speech after the election

The Company presented the testimony of six employee witnesses who all confirmed that Roache did not mention either ESOP or the employee's retirement money during his speech following the election. The General Counsel witness Cummings initially testified that Roache told employees that he would fight the Union's "petition" with everything the Company had, if it meant using employee's money. She later testified: "He would fight the union with everything that the Company had. if it took it." Cummings testified that because the Company is an employee ownership company, it was her opinion that Roache's statement meant taking some of her money to fight the objection. She acknowledged that whether Roache talked about the Company's money or the employees' money, it meant the same thing to her. She admitted that Roache had not actually said anything about money or pensions in the speech.

Although Hood testified that Roache made the statement that "if it took everyone's ESOP money to fight the Union, that's what he would do," she later admitted she had not recalled Roache's exact words. She admitted that Roache had simply given her the impression that he would use the ESOP money to fight the Union. Although Lambert testified that Roache told employees that he would fight the objections if it meant taking their retirement into it, his testimony was not fully consistent with his earlier Board affidavit. Overall, I do not find Lambert's testimony credible with respect to Roache's postelection speech.

Based upon the overall testimony of all witnesses, the record does not support a finding that Roache threatened employees that he would use employee retirement money to defend the Union's objections. Accordingly, I find no merit to complaint paragraph 8(i).

B. Violations Alleged with Respect to Supervisors Other than Roache

1. Complaint paragraph 8(e) and the alleged no-talking rule

The complaint alleges that through the actions of supervisors Smith, Jones, and Roberts, the Company promulgated and enforced a no-talking rule in order to discourage union activity. No evidence was presented concerning any alleged conduct by Supervisor Smith concerning this complaint allegation. Jones did not deny that he might have told Cummings and Lambert to stop talking on an unspecified day in July. He credibly testified that he usually had to break them up from talking on a daily basis because they "love to talk." I find Jones to be a more credible witness and find Cummings' assertions suspect that no supervisor had ever made this kind of statement to her before the election. I credit Jones' testimony that if he saw employees talking and not working, he told them to get back to work and this was his practice before and after the Union's campaign. In this regard, I find that his alleged statement to Lambert was in keeping with this practice.

Employee Jacobs testified that Roberts told him that he couldn't talk with other employees after he was seen talking with fellow employee Kenny Butler. Jacobs did not allege that his conversation was work related nor did he deny that his talking was in lieu of working. Roberts did not recall the incident involving Jacobs, however, he testified that he will speak with employees if they are out of their work area or engaged in idle talking. The record reflects that prior to the Union's campaign, Jacobs received numerous warnings for talking with other employees about nonwork related matters and not working. The record supports a finding that the alleged comments by Roberts to Jacobs in July were consistent with the Company's treatment of Jacobs even prior to any union activity.

Although Clark testified that Roberts told her that employees couldn't talk and were to watch their machines, admittedly she stated in the earlier Board affidavit that no supervisor specifically told her that she could not talk during her shift. Additionally, Clark's March 3, 2001 performance appraisal reflects that she was counseled about her excessive communication with coworkers. Clarke also recalled another event where she was talking to employees Clare Yarbrough and Glen Wilcox. When Roberts approached the three employees, Clark informed him that her "machine was down" and Roberts simply walked away.

Accordingly, the record does not demonstrate that the Company promulgated and enforced a no-talking rule in order to discourage union activity and I find no merit to complaint paragraph 8(e).

2. Complaint paragraph 8(f) and the alleged restriction of employee movement

While it is alleged that Supervisor Gerald Corcelius restricted the movement of employees on August 1 in order to discourage union activity in the plant, no evidence was presented in support of this allegation. The only testimony in support of this allegation was introduced through employee Jacobs. Jacobs testified that on July 25, Roberts approached him as he carried his uniform to the area where it was to be picked up by the cleaner. Jacobs testified that Roberts told him that he could not walk through the plant anymore, Jacobs admitted that this occurred at a time other than his scheduled shift. While Roberts did not recall telling Jacobs that he was not permitted to walk through the plant, he explained that if an employee came back to the plant after their regular shift, it is possible that he would stop them to inquire what they were doing. Human Resources Manager Johnson testified that the Company maintains a rule that shift employees cannot enter their production area of the plant until the start of their shifts. The rule provides that employees entering the plant more than 15 minutes before the shift starts are to wait in a nonproduction area until time for the shift to start. The Company submitted records to demonstrate that other employees have been disciplined for being on the plant floor during a shift other than their own. One employee

in particular received an informal counseling, a written warning, and ultimately was terminated for "wandering around on the floor." Although Roberts does not specifically deny that he restricted Jacobs' movement in the plant on July 25, I don't find that the evidence supports that Roberts did so to discourage union activity in the plant. The Company, citing *Ichikoh Mfg*., *Inc*., 312 NLRB 1022 (1993), argues that an employer can enforce policies during a union campaign, particularly where it is shown that the Company historically enforced such policies. Accordingly, I do not find that the Company restricted the movement of employees to discourage union activity and I find no merit to complaint paragraph 8(f).

3. Complaint paragraph 8(g), Objections 3 and 4, and the alleged surveillance

The General Counsel witness Cummings testified that during the week before the election, Supervisor Ford spent additional time in the inspection area prior to the beginning of the 4 p.m. shift. On cross-examination, Cummings admitted that as she had only been on first shift for a short time, Ford may have come to work early on other occasions that she would not have been aware of. Johnny Lambert testified that during the later part of July, he saw supervisors standing at the end of the work aisles during shift change. He admitted that he did not see the supervisors approach any employees and that it was only his "opinion" that the supervisors were trying to see who was talking. There was no evidence of any surveillance conducted outside of the Company's facilities and the only alleged incidents of surveillance in the record is the claim that various members of management were on the plant floor and "watched" employees, without saying anything to them. It is well settled that where employees are conducting union activities openly or near company premises, open observation of such activities by an employer is not unlawful. *Roadway Package System, Inc*., 302 NLRB 961 (1991), *Southwire Co*., 277 NLRB 377, 378 (1985). The test for determining whether an employer engages in unlawful surveillance or whether it creates the impression of surveillance is an objective one and involves the determination of whether the employer's conduct, under the circumstances, was such as would tend to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed under Section 7 of the Act. See *Broadway*, 267 NLRB 385, 400 (1983) (citing *United States Steel Corp. v. NLRB*, 682 F.2d 98 (3d Cir. 1982)). The Board has determined that management officials may observe public union activity on company premises without risking a 8(a)(1) violation unless such officials do something "out of the ordinary," *Eddyleon Chocolate Co.*, 301 NLRB 887, 888 (1991), *Metal Industries,* 251 NLRB 1523 (1980). It is only when conspicuous surveillance interferes with the lawful activity, then there may be a violation of Section 8(a)(1). See *Carry Cos. of Illinois*, 311 NLRB 1058 (1993).

Neither the General Counsel nor the Union presented any evidence that supervisors were engaging in any activities inconsistent with their normal responsibilities or in physical locations other than where they were required to perform those responsibilities. There is no evidence that employees were engaging in lawful union activity during these periods of alleged surveillance. It is undisputed that these periods of alleged surveillance occurred in the working area and either during working time or at a time when employees were either beginning or ending their working time. Johnson credibly testified that during the union campaign she and other supervisors were in the production area more than usual. I credit her testimony that supervisors did so in order to be available to employees and to answer any questions. Based upon the evidence as a whole, I do not find that the Company engaged in surveillance as alleged in complaint paragraph 8(g) nor do i find merit to union Objections 3 and 4.

4. Complaint paragraph 8(h) and Objection 11 alleged disparate enforcement of the no-talking rule

In support of this allegation, the General Counsel presented the testimony of employees Locklear, Green, and Johnny Lambert. Locklear testified about an incident when Supervisor Roberts reprimanded her for talking with fellow employee Green. She admitted that she had not been working and acknowledged that the Company has warned employees for talking rather than working. She also testified that she had observed employees Britt and Brooks talking as long as 20 minutes. Although Roberts walked passed them, he had not said anything to them about their talking. Locklear admitted however that Brooks and Britt worked together as a part of their jobs and they had to talk with each other about the machine they were operating. Locklear also admitted that she did not know what Brooks and Britt were discussing when she saw them and she did not know whether Roberts heard what they were talking about. She further admitted that Roberts had only walked by them for a couple of seconds.

Lambert testified that he observed employees Pat Brooks and Ruby Humphrey standing on the plant floor talking. He recalled that Supervisor Williamson walked by them without saying anything to them. On cross-examination, Lambert admitted that Brooks and Humphrey work together and would have reason for talking with each other. He also acknowledged that he did not know whether Williamson actually saw them talking or whether she overheard their conversation.

Green testified that Supervisor Corcelius asked fellow employee Mack Bryant to return to his work area after Corcelius observed Bryant's talking with Green. Although Green did not assert that the conversation was work related, he acknowledged that it had not related to the Union. Admittedly, after Corcelius overheard the content of the conversation, he asked Bryant to return to his work area. Green's overall testimony would indicate that Corcelius broke up the conversation when he determined that it was not work related, and not because it involved the Union.

I credit the testimony of Supervisors Roberts and Williamson who credibly testified that they routinely enforce the Company's policy that prohibits excessive nonwork related talking. The overall record evidence does not support a finding that the Company disparately enforced this policy during the union campaign. Accordingly, I do not find merit to complaint paragraph 8(h) and union Objection 11.

5. Complaint paragraph 8(k) alleged interrogation

The General Counsel alleges that Supervisors Smith, Johnson, and Hill interrogated employees regarding their union sympathies and desires. The record contains no evidence of any alleged interrogation by Hill or Johnson. The only evidence of alleged interrogation involved a conversation between Lambert and Supervisor Smith. Lambert alleges that during a conversation in June, Smith asked him why he thought that the Company needed a union. Lambert provided no additional information as to the exact date of the conversation or what was discussed before or after this alleged interrogation. Smith credibly testified that he talked with Lambert as well as other employees about the Union. Smith explained that he had been instructed that he could make statements about the Union but could not ask questions and that he had followed these instructions with talking with Lambert. It is apparent that prior to the election, supervisors attempted to speak with employees in one-on-one conversations in order to share the Company's views about the Union and to answer any questions that employees might have. The evidence supports that Smith had such a conversation with Lambert. I find it significant that Lambert is the only employee who alleges supervisor interrogation. Interrogation of employees is not unlawful per se. In determining whether or not an interrogation violates Section 8(a)(1) of the Act, the Board looks at whether under all the circumstances the interrogation reasonably tends to interfere with, restrain, or coerce employees in the exercise of the Section 7 rights. The alleged interrogation must be considered in context of all surrounding circumstances. *Emery Worldwide*, 309 NLRB 185 (1992). There is no evidence that Smith's question to Lambert was accompanied by any threat or promise or even an implied threat or promise.

Lambert testified that he actively supported the Union and participated in hand billing in front of the Company's facility. Lambert acknowledged that he responded to Smith by pointing out that employees needed a union because of Roache's lies. The Board has determined that the applicable test for determining whether the questioning of an employee constitutes unlawful interrogation is the totality-of-the-circumstances test. *Rossmore House,* 269 NLRB 1176 (1984). The circumstances of this case are very similar to those considered by the Board in a recent case where the questioning of an employee was not found to be coercive. A low-level supervisor on the plant floor conducted the questioning. The employee, who was an open union supporter, was not called away from his work area. Additionally, the employee did not hesitate to answer truthfully and there was an exchange of views with the supervisor. See *Cardinal Home Products, Inc*., 338 NLRB 1004, 1112 (2003). Accordingly, even if Smith asked the alleged question of Lambert, I do not find such questioning to interfere with, restrain, or coerce an employee in violation of Section 8(a)(1). Accordingly, I find no merit to complaint paragraph 8(k).

6. Complaint paragraph 8(l) and Objection 16 alleged solicitation of grievances

While the complaint alleges that the Company acted through Supervisor Chris Roberts in soliciting employee grievances, no evidence was presented concerning Roberts. Locklear testified however, that on an unspecified day in July, Corcelius asked if she had problems or questions to come and talk with him. In *Traction Wholesale Center Co*., 328 NLRB 1058, 1059 (1999), the Board noted that when an employer undertakes to solicit employee grievances during an organizational campaign, there is a "compelling inference" that the employer is implicitly promising to correct the grievances and thereby influence employees to vote against union representation. Corcelius did not deny that he had made this statement or any similar statement to Locklear. Based upon the testimony of Johnson and other supervisors, it is apparent that supervisors engaged in frequent one-on-one conversations with employees during the campaign period. There being no denial of this allegation, I find that Corcelius solicited Locklear to come to him if she had any problems or questions. Despite the fact that Corcelius and Locklear discussed no specific problem, I nevertheless find that Corcelius' solicitation of problems implies a promise to remedy such problems during this critical period of the union campaign. Accordingly, I find that the Company solicited and impliedly promised to remedy such employee grievances in violation of Section 8(a)(1) of the Act.

7. Complaint paragraph 8(m) alleged threat of future employment with other employers

Clark testified that Corcelius told her and James Hunt that if they left the Company to work elsewhere, they would not be hired because they came from a unionized plant. Hunt did not testify and Corcelius did not recall any conversation in which he had made such a statement. Although Clark's testimony is uncorroborated by Hunt, Corcelius does not specifically deny making this statement. Accordingly, I credit Clark's testimony. I note however, that there is no evidence that Corcelius or any other supervisor threatened to "blackball" or to take action to prevent her future employment with another employer. At best, Corcelius appears to express only an opinion as to what he thinks that another employer may or may not do. I find Cornelius' alleged comment too vague to constitute a threat in violation of Section 8(a)(1) of the Act*.* *Uniontown Hospital Assn*., 277 NLRB 1298, 1310 (1985). Accordingly, I find no merit to complaint paragraph 8(m).

C. Personnel Actions Toward Specific Employees

1. Lambert's July 19 warning

Paragraphs 9 and 11 of the complaint allege that the Company issued a verbal warning to Lambert on July 19 because of his activity in support of the Union. Paragraph 8(d) relates to Lambert's verbal warning and involves the alleged threat to Lambert on July 19 to not talk with other employees about the Union. In his brief, counsel for the Company argues that the Company issued the verbal warning to Lambert based on its good faith belief that he had engaged in misconduct. The Company argues that based on the complaint from the anonymous female employee, management made a decision to issue an oral warning to Lambert. Hill issued the warning to Lambert and informed him that he had a right to support the Union but he could not threaten anyone about it. The Company submitted evidence of Lambert's having been disciplined in 1999 for harassing a fellow employee. The Company also submitted

evidence to show that Lambert had been demoted from lead mechanic in 1997 after a domestic dispute involving an assault on his wife (also an employee of the Company) and a threat to another employee concerning his wife. The Company asserts that it knew of Lambert's previous acts of misconduct toward his wife as well as other employees and based upon this knowledge, it had more than a good-faith belief that Lambert was guilty of misconduct toward the employee who complained of the alleged threat. The Company contends that this female employee's complaint against Lambert was entirely plausible and consistent with his past acts of misconduct. In his brief, counsel for the Company cites a number of cases[12] in which the Board has held that disciplinary action based on an employer's reasonable belief that misconduct has occurred does not violate the Act, even if it is later proven that the employer's belief was mistaken.

Certainly, the Company provided evidence of Lambert's past misconduct concerning his ex-wife and other employees at the Company's facility. Johnson however, acknowledged that there had been no problems with Lambert and his ex-wife since their 1997 domestic dispute. She also admitted that Lambert had been reinstated to the lead mechanic position since the 1997 incident. Thus, there is the issue as to whether the Company issued the verbal warning to Lambert based solely on a good faith belief that he had engaged in misconduct or whether the discipline was based upon a discriminatory motive.

Under Board precedent established in *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1982), cert. denied 455 U.S. 989 (1982), and approved by the Supreme Court in *NLRB v. Transportation Management Corp*., 462 U.S. 393 (1983), the General Counsel bears the initial burden to establish a prima facie showing that (1) the alleged discriminatee engaged in union activity; (2) the employer had knowledge of that activity; and (3) the employer based its discriminatory action upon antiunion animus. Once the General Counsel meets its burden of persuasion, the burden shifts to the respondent to show it would have taken the discriminatory action without consideration of the employee's protected activity. *Bardaville Electric,* 309 NLRB 337 (1992).

The General Counsel has met its burden. The record reflects that Lambert was not only involved in hand billing for the Union but he also spoke up in support of the Union during Roache's July 18 meeting with employees. Thus, the General Counsel has established not only his union activity but also the Company's knowledge of such activity. The very wording of Hill's warning to him on July 19, which is alleged as violative in complaint paragraph 8(d), involves Lambert's support for the Union and sets the boundary for what he can say to other employees about the Union. The Company cannot deny that it gave Lambert the July 19 warning for activity in support of the Union. The Company contends however, that it was the nature of the conduct that was violative of its employee handbook and thus unprotected. I do not find however, that the Company has demonstrated that it would have given Lambert the warning without consideration of his protected activity.

The Company asserts that management made the decision to issue Lambert the warning based upon the complaint made by the female employee. A number of factors support a finding that the warning in issue was discriminatorily motivated. While Johnson asserts that she participated in the decision to issue the warning to Lambert, she did not even speak with the female employee until after the warning was issued. There is no evidence of any other management official other than Cauthen who spoke with the employee prior to Lambert's discipline. While the Company contends that this employee would not present herself as a witness at trial, there is no evidence that any statement was taken from the unidentified employee on or about the time of Lambert's discipline. The only written statement that the Company attempted to submit was one that was written and signed by the anonymous employee on May 20, 2003, the second day of the trial. This document was not received into evidence, as the Company had clearly not relied upon it as a basis for the disciplinary warning.

I also note that while Johnson and Cauthen were the only witnesses who testified that they had spoken with the anonymous employee, their description of her comments were contradictory. Cauthen testified that the woman told him that Lambert had threatened her that she better not vote *against* the Union. Not once, but twice, Johnson testified that the woman told her that Lambert threatened that she better not vote *for* the Union. There is no dispute that the warning was issued to Lambert on the day following his speaking out in Roache's meeting with employees. I do not find that the Company has established through the record evidence that it would have issued a warning to Lambert in the absence of his union activity. Hill's warning to him that he would be disciplined and/or terminated if he again engaged in such conduct is also violative of the Act. Accordingly, I find the Company's discipline of Lambert the threat of further discipline to be violative of Sections 8(a)(3) and (1) respectively.

2. Temporary layoff of Clark, Locklear, and McNair

There is no dispute that the Company routinely sends employees home for a daily or temporary layoff for lack of work. The evidence demonstrates that these same three employees were received temporary layoffs both before and after the week of the union election. On the same night that they were placed on temporary layoff, 10 other employees from first and second shift were also placed on temporary layoff. During the week of the election, 36 first-shift employees, 34 second-shift employees, and 18 third-shift employees were sent home for lack of work. While the General Counsel asserts that all three of these individuals wore union buttons on the night before their layoff, there is no evidence that only employees who had worn buttons were selected for layoff. Supervisor Roberts acknowledged that he normally first seeks volunteers before arbitrarily selecting employees for layoff. Both Locklear and Clark testified that Roberts did not ask them to volunteer nor did they volunteer for the layoff. Roberts credibly testified that he did not recall whether Locklear and Clark volunteered or whether he merely designated them for the layoff. There is however, no

[12] *Pepsi Cola Bottling Co*., 203 NLRB 183 (1973), *General Asbestos & Rubber Division*, 168 NLRB 396 (1967), *Auto Transit, Inc*., 134 NLRB 652 (1961), *San-Serv*, 252 NLRB 1336 (1980).

evidence that Roberts made any mention of their wearing union buttons or that he made any reference to the Union in relation to their temporary layoff. Based upon the record evidence as a whole, I find that the Company has demonstrated that it would have laid off Locklear, Clark, and McNair despite their having worn union buttons.

Accordingly, I find no merit to complaint paragraph 10 and Objection 10.

IV. REPORT AND RECOMMENDATIONS ON OBJECTIONS

Pursuant to a Stipulated Election Agreement executed by the Company and the Union, and approved by the Regional Director for Region 11, an election was held on August 8, 2002. Of approximately 155 eligible voters, 61 votes were cast for the Union and 81 votes were cast against the Union. The challenged ballots were not sufficient in number to affect the results of the election. On August 13, the Union filed timely objections to the conduct affecting the results of the election. Pursuant to Section 102.69 of the Board's Rules and Regulations, the Regional Director for Region 11 determined that the objections should be heard by an administrative law judge and set the matter for hearing. The Union withdrew Objections 2, 5, 7, 9, 14, 17, and 18 before the close of the administrative hearing.

As discussed above, I have found that the Company has violated Section 8(a)(1) of the Act in the following manner: threatening employees with loss of business and plant closure if they selected the Union as their bargaining representative (Objections 8, 13,[13] and 19); soliciting grievances from its employees and impliedly promising to remedy their grievances in an effort to discourage employee support for the Union (Objection 16); and threatening an employee with discipline if he talked to fellow employees about the Union (Objection 6). I have further found that the Company violated Section 8(a)(3) of the Act by issuing a verbal warning to Johnny Lambert on July 19 because of his activities on behalf of the Union.

As also discussed above, I found no merit to union Objections 3, 4, 10, 11, and 12. No specific evidence was presented in support of union Objections 1, 15, and 20.[14]

When an employer commits unfair labor practices during an election campaign, and where the unlawful conduct is such that it interferes with the "laboratory conditions" of the election, the Board will order a second election. *Dal-Tex Optical Co*., 137 NLRB 1782 (1962). The only exception would be where the conduct was de minimis; "such that it is virtually impossible to conclude" that the election was affected. *Super Thrift Markets*, 233 NLRB 409 (1977). In determining whether unfair labor practices occurring within the critical period improperly interfered with the conduct of a fair election, the Board has looked to such factors as "the number of violations, their severity, the extent of dissemination and other relevant factors." *Caron International,* 246 NLRB 1120 (1979).

The Company's solicitation of grievances to one employee in a bargaining unit of 155 employees would certainly appear to be de minimus with respect to affecting the outcome of the August 8 election. Additionally, the verbal warning given to Lambert on July 19 and the associated threat of future discipline would also appear to be de minimis. The unlawful conduct directed to both Lambert and Locklear affected them individually and had no direct significance to or immediate impact on other employees. There is no evidence that these occurrences were disseminated to or known by other employees in the unit. Accordingly, I do not find either of these unfair labor practices to constitute conduct that destroyed the laboratory conditions of the election.

Objections 8, 13, and 19 allege that the Company threatened plant closure and loss of business during the critical period. As discussed above, the evidence reflects that during preelection meetings with employees, Roache threatened employees with the loss of business and possible plant closure if they selected the Union as their bargaining representative. It is recognized that threats of plant closure are the most flagrant forms of interference with Section 7 rights and are more likely to destroy election conditions for a longer period of time than other unfair labor practices because they tend to reinforce employees' fears that they will lose employment if union activity persists. *Koons Ford of Annapolis*, 282 NLRB 506, 508 (1986), enfd. mem. 833 F.2d 310 (4th Cir. 1987), cert. denied 485 U.S. 1021 (1988). The severity of threats is even greater when made by individuals at the top of the management hierarchy. *Midland-Ross Corp. v. NLRB*, 617 F.2d 977, 978 (3d Cir. 1980) cert. denied 449 U.S. 871 (1980). Roche testified that when giving his speeches, he initially began by reading the text of his speeches word-for-word. He admitted however, that as he continued to give the speeches, he wanted to have more eye contact with employees and he did not always follow the exact wording of the prepared text. I also note that the scripts for the speeches given in June contain handwritten additions and marked-out deletions. The scripts differed from those speeches given later in July and August, which contained no identifiable editing or changes. Based upon Roache's testimony and the overall record, it is apparent that there was some variation in the speeches given to employees during these June meetings. While Roache may not have communicated the threat of loss of customers and plant closure to all employees in all meetings, evidence indicates that he did so to employees in some of the meetings. Inasmuch as the implied threats of loss of customers and plant closure were made to assembled employees and would likely have been disseminated through the work force, I find such threats to be conduct sufficient to affect the results of the election. Accordingly, I recommend that merit is found to union Objections 8, 13, and 19.

Based upon my findings above, I therefore recommend that the Board set aside the election of August 8, 2002, and direct that a new election be conducted.

CONCLUSIONS OF LAW

1. The Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

[13] Objections 8 and 13 contain identical wording and appear to be duplicate objections.

[14] Objection 29 is a conclusionary objection alleging, "During the critical period the Company engaged in like and related conduct which destroyed the laboratory conditions for the representation election."

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

(a) Threatening employees with loss of customers and plant closure if they selected the Union as their collective-bargaining representative.

(b) Soliciting grievances from its employees and impliedly promising to remedy their grievances in an effort to discourage employee support for the Union.

(c) Threatening its employees with discipline if the employees talked to fellow employees about the Union.

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

(a) Disciplining Johnny Lambert because of his activities on behalf of the Union.

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

6. The conduct described in paragraph 3(a) above also constitutes objectionable conduct affecting the results of the representation election held on August 8, 2002, in Case 11–RC–6488.

7. The Company has not engaged in any unfair labor practices not specifically found herein.

REMEDY

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

Having found that the Company discriminatorily disciplined Johnny Lambert on July 19, 2002, I shall recommend that the Company remove from its records all references to its unlawful discipline of Lambert, and inform him that this has been done, and that this discipline will not form the basis of any future discipline for him.

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

[Recommended Order omitted from publication.]