

**Ohio New and Rebuilt Parts, Inc. and/or Mel's Battery, Inc. and Truck Drivers, Warehousemen & Helpers Union Local No. 908, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.** Cases 8-CA-15128-2, 8-CA-15559, and 8-RC-12562

25 August 1983

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS  
ZIMMERMAN AND HUNTER

On 8 February 1983 Administrative Law Judge Donald R. Holley issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and the General Counsel filed an answering brief to the exceptions.

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

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,<sup>1</sup> and conclusions<sup>2</sup> of the Administrative Law Judge, as modified herein.<sup>3</sup>

The Administrative Law Judge found that Respondent repeatedly violated Section 8(a)(1) of the Act during 1981 as follows: (1) Assistant Manager James Halter threatened to discharge employee Robert Vantilburg if he discussed his safety complaint with an inspector from the Occupational Safety and Health Administration in April; (2) after the union organizing campaign began in July, owner Melvin Booher, on 12 August, threatened

the employees at its Wapakoneta, Ohio, facility, with discharge and plant closure if they selected the Union to represent them; (3) in July, Respondent discriminatorily implemented a more stringent attendance policy; (4) Booher coercively interrogated employee Vantilburg concerning his union activities in early September 1981; (5) during a meeting he conducted with five employees on 9 September (9 days before a scheduled union election), Booher threatened to fire those persons who supported the Union; threatened to discontinue Respondent's practice of giving pay advances because employees had sought union representation; and interrogated an unnamed employee concerning his union sentiments; (6) on 17 September, Booher threatened all the employees at Respondent's Wapakoneta, Ohio, facility that he would fire the union adherents there if the Union won the election the following day; (7) later on 17 September, Booher interrogated employee Teddy Cross concerning his union activities; (8) on the election date, 18 September, Vice President Donald Miller threatened Cross with bodily harm if he did not vote against union representation; and (9) Respondent, at separate times following the election, suspended employee Steven Leugers and discharged employee Vantilburg for their protected concerted activities in refusing to perform certain work they considered unsafe.

The Administrative Law Judge also found that Respondent violated Section 8(a)(3) of the Act when it discharged employee Daniel Cable, the most vocal union activist, 4 days after the 18 September election was held. Based on these various unfair labor practices, the Administrative Law Judge further found that a bargaining order was appropriate under the standards set out in *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969). We affirm all but one of the violations that the Administrative Law Judge found and, for the reasons that follow, we agree that a bargaining order should issue here.

We find merit in Respondent's exception to the Administrative Law Judge's conclusion that Booher unlawfully threatened the Wapakoneta employees with possible plant closure during a meeting on 12 August. In finding the violation, the Administrative Law Judge relied on the testimony of employee Leugers who testified that Booher told the employees "something like he'd go out of business, because if the Union came in . . . he'd have to raise his prices, to be able to pay higher wages, or whatever, and . . . [that] he's got the lowest parts in town, and if he'd have to raise them, he said he'd lose a lot of business." Vice President Miller testified, by contrast, that Booher had not threatened to close the plant during that meeting.

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

<sup>2</sup> In the absence of exceptions thereto, Chairman Dotson and Member Hunter adopt, *pro forma*, the Administrative Law Judge's findings that Respondent violated Sec. 8(a)(1) of the Act by threatening to discharge employee Robert Vantilburg if he discussed his safety complaint with an inspector from the Occupational Safety and Health Administration, and thereafter by discharging Vantilburg and suspending employee Steven Leugers because, in separate instances, they refused to perform certain work they considered unsafe. The panel further notes that Leugers' warning violated Sec. 8(a)(1) of the Act, not Sec. 8(a)(3) as the Administrative Law Judge found. Member Hunter notes that he does not rely on the above findings of violations in adopting, *infra*, the Administrative Law Judge's recommendation that a bargaining order is warranted in this case.

<sup>3</sup> In par. 1(h) of his recommended Order, the Administrative Law Judge uses the narrow cease-and-desist language, "in any like or related manner." We have considered this case in light of the standards set forth in *Hickmott Foods, Inc.*, 242 NLRB 1357 (1979), and have concluded that a broad remedial order is appropriate. Accordingly, we shall modify the recommended Order and use the broad injunctive language, "in any other manner."

When he appeared as a witness, Booher did not attempt to describe the 12 August meeting. However, he generally denied telling employees that he was going to close the plant.

The Administrative Law Judge concluded that he was "compelled to accept" Leugers' version of the incident since Booher and Miller had not denied Leugers' other testimony that Booher had discussed the impact of unionization on Respondent's operations. The Administrative Law Judge then found that Respondent violated Section 8(a)(1) of the Act when "Booher sought to convince employees that their selection of the Union as their bargaining agent would compel him to raise his prices, lose business, and possibly have to close the plant." As noted, we reverse this finding of an 8(a)(1) violation in Booher's remarks.

The question of the propriety of Booher's statements to employees about plant closure must be decided in light of the principles set out in *NLRB v. Gissel Packing Co.*, *supra*. There, the Supreme Court established certain standards for determining whether an employer's statements about the effects of unionization are permissible. The Court stated, in pertinent part, that:

. . . an employer is free to communicate to employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a "threat of reprisal or force or promise of benefit."<sup>4</sup>

In applying the Court's standard here, we emphasize that Leugers began his testimony about the 12 August meeting by stating that Booher had told the employees "something like . . . ." Clearly, Leugers was uncertain as to the exact nature of Booher's remarks. Further, Leugers' testimony then shifted so much that it is unclear whether Booher really linked the Union to higher prices that would possibly force him to close the facility. We therefore conclude that the vague statements that Leugers imprecisely attributed to Booher do not support a finding that Respondent threatened it would close the plant if employees selected the Union to represent them. The point of this discussion with the employees was that Respondent could not afford to increase wages and might "lose a lot of business" if forced to grant such raises. Indeed, upon reviewing the record, Booher's position is confirmed by his testimony that, even in the absence of the Union, he had considered closing the plant because of adverse economic circumstances. We note that no party has questioned his comments about Respondent's financial status.

<sup>4</sup> 395 U.S. at 618.

Under these circumstances, we find that Leugers' testimony is too ambiguous to warrant a finding that employees were illegally threatened with possible plant closure. Accordingly, we shall dismiss that portion of the complaint which alleges that this statement of Booher violated Section 8(a)(1) of the Act.<sup>5</sup>

Although we have reversed the Administrative Law Judge in this one respect, we agree with his conclusion that a bargaining order is an appropriate remedy in this proceeding. However, we wish to indicate at some length our reasons for finding that this remedy is warranted by the circumstances here.

In determining whether the violations Respondent has engaged in warrant the issuance of a bargaining order, we apply the test set out in *Gissel*, *supra*, where the Court described two types of situations where such orders are appropriate: (1) "exceptional" cases marked by "outrageous" and "pervasive" unfair labor practices; and (2) "less extraordinary" cases marked by "less pervasive" practices.<sup>6</sup> Thus, the Court approved the Board's use of a bargaining order in "less extraordinary" cases where the employer's unlawful conduct has a "tendency to undermine [the Union's] majority strength and impede the election processes."<sup>7</sup> The Court indicated that when the unfair labor practices are less flagrant and the union at one time had majority support among the unit employees, the Board may consider

. . . the extensiveness of an employer's unfair labor practices in terms of their past effect on election conditions and the likelihood of their recurrence in the future. If the Board finds that the possibility of erasing the effects of past practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order, then such an order should issue.<sup>8</sup>

In considering Respondent's conduct in this case, the Administrative Law Judge found, and we agree, that the unfair labor practices Respondent committed fall into the second category delineated by the Court in *Gissel*.

<sup>5</sup> Cf. *B. F. Goodrich Footwear Co.*, 201 NLRB 353 (1973).

Member Zimmerman does not join in reversing the Administrative Law Judge's finding with regard to Booher's statement. Inasmuch as a finding of a violation is cumulative in this regard, he finds it unnecessary to pass on this issue.

<sup>6</sup> *Gissel*, *supra* at 613-614.

<sup>7</sup> *Id.* at 614.

<sup>8</sup> *Id.* at 614-615.

Here, as found by the Administrative Law Judge, Respondent conducted an antiunion campaign in which it repeatedly engaged in coercive interrogation of its employees, threatened unit employees with discharge on three separate occasions, implemented a more stringent attendance policy, threatened to discontinue its practice of giving pay advances, and threatened an employee with physical harm if he did not vote against union representation. Some of these unfair labor practices occurred during the final hours before the election. Even after the election was held, resulting in a tie vote, Respondent displayed its continuing hostility toward its employees and its willingness and ability to retaliate against them for the organizing campaign that they had initiated. Thus, Respondent discharged the most vocal union adherent, employee Daniel Cable, because of his involvement in such activities.

These violations were committed by Respondent's highest level supervisors, including its owner, vice president, and assistant manager. The positions these persons held clearly served to reinforce and increase in the minds of employees the seriousness of the threats that were conveyed. Furthermore, the repetitious nature of the violations Respondent engaged in, e.g., the repeated threats of discharge and coercive interrogations, suggests that they were part of a general campaign to destroy employee support for the Union.

It also is highly significant that many of these violations were of an extremely serious nature. In this case, Respondent's owner twice told a gathering of the Wapakoneta employees, who comprised over three-fourths of the entire unit, that he would discharge them if they supported the Union. The widespread exposure of the unit employees to these threats clearly magnified the coercive impact they conveyed. More importantly, Respondent's subsequent unlawful discharge of Wapakoneta employee and union activist Cable—conduct the Board and the courts have long classified as misconduct going "to the very heart of the Act"<sup>9</sup>—demonstrated to the employees that Booher had meant what he said about discharging those who supported the Union. Further, the attendance policy that Respondent implemented is a blatant example of an employer's penalizing employees for their union activities. Respondent again wielded its economic power for antiunion purposes when it threatened to discontinue the practice of giving employees pay advances. Finally, Miller's threat of bodily harm to an employee shows that Respondent would resort to extraordinary means to attempt to dissipate the Union's

support. By engaging in the unfair labor practices set out here, Respondent thus has made it painfully clear to employees that the penalties for supporting the Union would be severe.

Respondent contends that, despite its 8(a)(1) and (3) violations here, a bargaining order is inappropriate because, *inter alia*, "the necessary contacts have been made . . . to offer immediate and full reinstatement to . . . Cable." However, assuming *arguendo* that such a reinstatement should be considered by the Board in determining the appropriate remedy, Respondent has offered no proof other than its assertion in its brief that Cable has, in fact, been offered reinstatement. Since the record is devoid of evidence that Cable was reinstated before the hearing was held in this case, we can only assume, if Cable has been reinstated, that Respondent has taken such action only after the Administrative Law Judge found against its interest and recommended that it be ordered to reinstate the discriminatee. Moreover, Respondent has not indicated whether or not Cable has received his lost backpay or whether the employees are on notice that Respondent has recanted its unlawful conduct toward Cable. Accordingly, we find that Respondent's purported reinstatement of Cable has not been shown sufficient to eliminate the effects of its original unfair labor practice in discharging him.

In sum, based on the violations found herein, we conclude that the lingering effects of Respondent's past conduct render uncertain the possibility that the imposition of the conventional reinstatement and backpay orders and the posting of notices to remedy the unfair labor practices would permit a fair election to be conducted. In these circumstances, we conclude that the Union's designation as the collective-bargaining representative by a majority of the employees having signed authorization cards provides a more reliable test of employee representation desires than would an election. Accordingly, we adopt the Administrative Law Judge's recommended Order, as modified below, requiring Respondent to bargain with the Union as the duly designated representative of a majority of its employees in the unit found appropriate for purposes of collective bargaining, effective 12 August 1981, the date that Respondent embarked on its unlawful course of conduct.<sup>10</sup> We therefore shall set aside the election held in Case 8-RC-12562; order that the petition therein be dismissed; and issue a bargaining order.

<sup>9</sup> See, e.g., *NLRB v. Entwistle Mfg. Co.*, 120 F.2d 523, 536 (4th Cir. 1941).

<sup>10</sup> *Peaker Run Coal Co.*, 228 NLRB 93, 97 (1977).

## AMENDED CONCLUSIONS OF LAW

1. Substitute the following for Conclusion of Law 5:

"5. By interrogating employees concerning their union activities; by threatening to discontinue employee benefits, including pay advances, because employees join or support the Union; by implementing a more stringent attendance policy because employees seek union representation; by threatening to discharge employees in retaliation for their supporting the Union; and by disciplining or threatening to discipline employees for engaging in protected concerted activities, Respondent has violated Section 8(a)(1) of the Act."

2. Insert the following as Conclusion of Law 6 and renumber the present Conclusion of Law 6 accordingly:

"6. By discharging employee Daniel Cable because he engaged in union activities, Respondent has violated Section 8(a)(3) of the Act."

## ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Ohio New and Rebuilt Parts, Inc. and/or Mel's Battery, Inc., Wapakoneta and Lima, Ohio, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Delete paragraph 1(b) and reletter all subsequent paragraphs accordingly.

2. Substitute the following for present paragraph 1(h) and reletter as paragraph 1(g):

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

3. Substitute the following for paragraph 2(c):

"(c) Expunge from its files any reference to the discipline handed out to employees Daniel Cable, Steven Leugers, and Robert Vantilburg, and notify these employees in writing that this has been done and that evidence of this unlawful conduct will not be used as a basis for future personnel actions against them."

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

IT IS FURTHER ORDERED that the complaint be, and it hereby is, dismissed insofar as it alleges unfair labor practices not found herein.

IT IS FURTHER ORDERED that the election in Case 8-RC-12562 be, and the same hereby is, set

aside, and that the petition in Case 8-RC-12562 be, and it hereby is, dismissed.

## APPENDIX

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

WE WILL NOT interrogate employees regarding their union activities or sentiments.

WE WILL NOT threaten to discontinue employees' benefits, including pay advances, because employees join or support the Union.

WE WILL NOT promulgate and institute a more stringent attendance policy because employees attempt to seek union representation.

WE WILL NOT inform employees that their receipt of previous financial assistance obligates them to abandon their support of the Union.

WE WILL NOT discharge or threaten to discharge employees because they join or support Truck Drivers, Warehousemen & Helpers Union Local 908, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or any other labor organization.

WE WILL NOT attempt to discourage employees from protesting what they reasonably consider to be unsafe working conditions by threatening to terminate them if they file complaints with OSHA or by disciplining them for refusing to perform work which they reasonably feel is unsafe.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, recognize and bargain with Truck Drivers, Warehousemen & Helpers Union Local 908, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, as the exclusive representative of all employees in the appropriate bargaining unit, and, if an understanding is reached, embody same in a signed document if asked to do so. The appropriate unit is:

All full-time and regular part-time production and maintenance employees, truckdrivers and counter sales employees employed by the Employer at its 100 Keller Dr., Wapakoneta, Ohio, and its 459 North Main St., Lima, Ohio, facilities, excluding all office

clerical employees, professional employees, guards and supervisors as defined in the Act.

WE WILL offer Robert Vantilburg and Daniel Cable immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions without prejudice to their seniority or any other rights or privileges previously enjoyed, and WE WILL make them whole for any loss of pay they may have suffered due to the discrimination practiced against them, with interest.

WE WILL expunge from our files any reference to the discipline handed out to employees Daniel Cable, Steven Leugers, and Robert Vantilburg and WE WILL notify these employees in writing that this has been done and that evidence of this unlawful conduct will not be used as a basis for future personnel actions against them.

OHIO NEW AND REBUILT PARTS,  
INC. AND/OR MEL'S BATTERY, INC.

DECISION

STATEMENT OF THE CASE<sup>1</sup>

DONALD R. HOLLEY, Administrative Law Judge: Upon an original charge and amended charges filed by Truck Drivers, Warehousemen and Helpers Union, Local 908, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (herein called the Union), in Case 8-CA-15128-2, the Regional Director for Region 8 of the National Labor Relations Board (herein called the Board) issued a complaint on November 27, 1981, which alleged that Ohio New and Rebuilt Parts, Inc., and/or Mel's Battery, Inc. (herein called Respondent), had engaged in, and was engaging in, conduct which violates Section 8(a)(1) and (3) of the Act. Thereafter, on February 8, 1982, the Region issued an amendment to complaint and order consolidating cases, consolidating objections filed by the Union in Case 8-RC-12562 with the above-designated unfair labor practices for hearing. Respondent, having filed timely answer denying that it had engaged in the unfair labor practices alleged in the original complaint, filed a motion to strike the original and amended complaint on February 4, 1982, and said motion was denied by Associate Chief Administrative Law Judge John M. Dyer on March 1, 1982. Subsequently, the Union filed the charge in Case 8-CA-15559 on March 1, 1982, and on April 2, 1982, the Region issued an order consolidating cases, amended consolidated complaint and notice of consolidated hearing, which, *inter alia*, realleged the matter set forth in previous complaints and additionally alleged that Respondent had engaged in conduct which violates Section 8(a)(5) of the Act. The matter was heard in Lima, Ohio, on April 19, 10, 21, and 22, 1982. All parties appeared and were afforded full opportunity to par-

<sup>1</sup> All dates are 1981 unless otherwise indicated.

ticipate.<sup>2</sup> Subsequent to the close of the hearing, counsel for the General Counsel and counsel for Respondent filed briefs which have been carefully considered.

Upon the entire record, including my observation of the witnesses when they gave testimony, I make the following:

FINDINGS OF FACT

I. JURISDICTION

The record reveals that Ohio New and Rebuilt Parts, Inc., and Mel's Battery, Inc., both Ohio corporations, constitute an integrated enterprise which is engaged in battery processing and salvage and the remanufacture of auto parts at locations in Wapakoneta and Lima, Ohio. The enterprise annually receives goods and materials valued at in excess of \$50,000 directly from points located outside the State of Ohio. Respondent stipulated in Case 8-RC-12562 that the appropriate collective-bargaining unit includes employees employed at both its Wapakoneta and Lima facilities, and that the labor policies of both corporations are determined by the same individuals. Finally, Respondent agrees that the above-named corporations are jointly liable for any remedial order which may issue in this case.

Upon the facts set forth above, I find that Ohio New and Rebuilt Parts, Inc., and Mel's Battery, Inc., constitute a single employer which is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. STATUS OF LABOR ORGANIZATION

It is admitted, and I find, that Truck Drivers, Warehousemen and Helpers Union, Local No. 908, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background

Respondent utilizes some 36-38 employees in its battery salvage and rebuilt automobile parts operation. At some earlier time, the entire operation was located in Lima, Ohio, but Melvin Booher, sole owner of the business, indicated during his testimony that, when the city of Lima attempted to compel Respondent to erect a fence around the Lima location, he chose to build on property he owned in Wapakoneta, Ohio, rather than erect the fence at an estimated cost of \$20,000. At the time of the hearing some five to six employees remained at the Lima facility. Respondent stipulated during the hearing that its employees are supervised by Melvin

<sup>2</sup> At the outset of the hearing, the General Counsel amended the consolidated complaint by changing Melvin Booher's title from president to consultant (par. 6) and by deleting the allegation that Respondent had failed and refused to reinstate Steven Leugers to his former or substantially equivalent position of employment (par. 11(a)). Respondent amended its answer to admit pars. 1, 4, 5, and 6 (with exception of the allegation that James Halter, assistant manager, is and has been its agent and a supervisor).

Booher, owner and consultant, and Donald Miller, vice president of Respondent. Such individuals are admittedly assisted at the Wapakoneta facility by one James Halter, whose title is assistant manager.<sup>3</sup>

On July 6, 1981, a group of employees employed at Respondent's Wapakoneta facility decided they desired union representation. Later that day, employees Steven Leugers and Steven Stauffer contacted the Union and arranged to meet Business Representative George Brodie at his home. When Brodie met with the employees he informed them how they should go about organizing the plant and gave each of them a number of blank union authorization cards. Thereafter, the Union met with interested Respondent employees in a park in Wapakoneta and at other locations on July 7 and 8, and, by the close of the day on July 8, 19 of Respondent's employees had signed authorization cards.<sup>4</sup>

Union Business Representative Brodie testified that on Saturday morning, July 9, he visited Respondent's Wapakoneta facility and after ascertaining that James Halter was in charge "Told Mr. Halter that a majority of employees at the Wapakoneta and the Lima plant had authorized Teamsters Local 908 to represent them in wages, conditions of employment, and working conditions, and I wanted him to sit down and bargain in good faith over a contract for those employees." According to Brodie, Halter told him he did not have the authority to recognize the Union, and, when Brodie asked him if he would pass the message on, Halter indicated he would. Employee Stauffer indicated during his testimony that he overheard Brodie's conversation with Halter. He claims he heard Brodie say he represented a majority of the Company's employees and was requesting recognition, and that Halter replied he could not recognize the Union and Brodie would have to talk with Miller and Booher. Additionally, Stauffer recalled that Brodie informed Halter that the rights of the employees were being violated and he indicated he intended to press charges if the conduct continued. Halter claimed during his testimony that Brodie said nothing about representing employees or requesting recognition on July 9. He claims Brodie merely informed him he felt the employees' rights were being violated and stated he would take Booher to court so fast it would make his head swim if the violations continued. Halter was a most unimpressive witness. I credit, in main, the account of the conversation given by Brodie and Stauffer.<sup>5</sup>

<sup>3</sup> It is admitted, and I find, that Melvin Booher and Donald Miller are, and have been at all times material, agents of Respondent and supervisors within the meaning of Sec. 2(11) and (13) of the Act. James Halter's status, which is discussed, *infra*, is in dispute.

<sup>4</sup> See G.C. Exhs. 7, 11-17, 24-29, and 32-36. Signing were: Leugers, Stauffer, Bob Vantilburg, Daniel Cable, Gene King, Jeff Mabry, Paul Rhodes, Aaron Spielman, Harry Vantilburg, William Hindenlang, Paul Shade, Timothy Scott, Don Guess, Ron Sutton, Ronald Bigham, Tom Boedecker, Richard Koch, Carl Williams, and Robert Archer.

<sup>5</sup> As of July 9, no employees at Respondent's Lima facility had signed authorization cards. The record reveals five Lima employees were included in the unit subsequently stipulated to constitute the appropriate bargaining unit. I conclude Brodie sought to tailor his testimony to fit the needs of what he conceived to be the General Counsel's burden of proof by claiming he told Halter he represented Lima as well as Wapakoneta employees on July 9. In all other respects, I credit Brodie's testimony.

The Union filed its petition for an election in Case 8-RC-12562 on July 13, 1981. Thereafter the Union and Respondent executed a Stipulation For Certification Upon Consent Election on August 10, 1981.<sup>6</sup> The appropriate collective-bargaining unit was described as:

All full-time and regular part-time production and maintenance employees, truckdrivers, and counter sales employees employed by the Employer at its 100 Keller Dr., Wapakoneta, Ohio and its 459 North Main St., Lima, Ohio facilities, excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

The election was held on September 18, 1981, and the revised tally of ballots, issued on December 30, 1981, reveals that the Union received 15 votes and that 15 votes were cast against the Union.<sup>7</sup> Objections to the election filed by the Union on September 25, 1981, which have been consolidated with the unfair labor practice cases for hearing are treated, *infra*.

#### B. The Alleged 8(a)(1) Conduct

The consolidated complaint issued on April 2, 1982,<sup>8</sup> alleges at paragraphs 7 and 10(a) through (1) that Respondent violated Section 8(a)(1) in numerous respects during the period April 17, 1981, through September 18, 1981. Such allegations and the evidence which relates to them are discussed below.

##### 1. Alleged threat to fire an employee if he talked to OSHA inspector

Paragraph 7 of the complaint alleges that James Halter on April 17, 1981, unlawfully threatened an employee with discharge if he spoke with an inspector of the Occupational Safety and Health Administration (herein called OSHA). The General Counsel sought to prove the allegation through the testimony of employee Robert Vantilburg.

Vantilburg testified that, on an unspecified date prior to August 17, he filed a complaint with OSHA against Respondent and that subsequently an OSHA inspector appeared at the Wapakoneta facility on April 17. Vantilburg claims that, before the inspector reached his part of the plant, James Halter told him if he spoke with the inspector he would lose his job. During his testimony, Halter failed to refute Vantilburg's assertion directly. Instead, he testified that no employee had ever been fired or reprimanded by Respondent for making a report to OSHA concerning equipment. Vantilburg was by far the more impressive witness, and I credit his testimony rather than that of Halter.

Although I find that Halter threatened Vantilburg as alleged on April 17, Respondent claims I should refrain from finding that it violated the Act through Halter's conduct as the record fails to reveal he was an agent of Respondent or a supervisor as alleged in the complaint. I find the contention to be without merit.

<sup>6</sup> See G.C. Exh. 3.

<sup>7</sup> See G.C. Exh. 6.

<sup>8</sup> Hereinafter called the complaint.

The record reveals that Halter, whose title is assistant manager, shares an office with Respondent's safety director and wears a white shirt with his title written on it.<sup>9</sup> He is admittedly in complete charge of the Wapakoneta facility each Saturday and on other occasions when Miller is absent. The record reveals that during the time involved in this case: He threatened to fire two employees (R. Vantilburg and Hemmert); he sent an employee home for refusing to unload molten lead (Leugers); he issued written disciplinary notices to employees (R. Vantilburg and Dan Cable); he assigned work to employees; he decided when to entrust the maintenance man with money to be used to purchase parts and equipment from local suppliers; and he participated with Miller and Booher in meetings at which Respondent's position on unionization was delivered. As the record fails to reveal that Halter was required to consult with Miller or Booher before he engaged in the activities set forth above, I infer that no such consultation was required and that he is permitted to exercise independent judgment in such matters. In the circumstances, it is clear he possesses several of the indicia of a statutory supervisor. Accordingly, I find he is a supervisor within the meaning of Section 2(11) of the Act as alleged.

In sum, I find that Respondent, through Halter's conduct, violated Section 8(a)(1) of the Act on April 17, 1981, by threatening to fire employee Vantilburg if he talked to the OSHA inspector.<sup>10</sup>

## 2. The August 12 meeting

Paragraph 10(b) of the complaint alleges that on August 12 Respondent's owner, Booher, violated Section 8(a)(1) by threatening employees with discharge, reduction in wages, and plant closure because of their union activities, and paragraph 10(c) alleges that on the same date Booher unlawfully polled employees concerning their union sympathies and/or desires. The General Counsel sought to prove the allegations through the testimony of employees Robert Vantilburg, Dan Hammert, and Steven Leugers.

The record reveals that Respondent's owner, Booher, and his son-in-law, Miller, met with Respondent's Wapakoneta employees in the lunchroom of that facility on August 12 to inform them that Booher and Miller were to attend an electric car conference at some out-of-town location and that James Halter would be in charge of the facility in their absence. The witnesses who described the meeting uniformly testified that, at the conclusion of the meeting, Booher informed the employees that Halter had been instructed to simply close the facility and go home and watch television if the employees created problems for him. At that point, Booher informed the employees he would buy them a steak dinner if they cooperated with Halter and he asked for a show of hands of those who would work with Halter.

While the General Counsel's witnesses agree that the general tenor of the August 12 meeting was as described above, they claim Booher made several remarks about

the organizing situation during the meeting. Leugers, who described the meeting most completely, claims that Booher stated that the Union was a non-Christian organization and he could not let it come into his plant; that he could not have anyone working against him and would know after the election who was for and against him; that he would get rid of his wife if she were against him; and that he said something like he would go out of business if the Union came in as he had the lowest prices in town and if he had to raise them he would lose a lot of business. Vantilburg's recollection of the non-Christian remarks differed somewhat. He testified that, at some point during the meeting, Booher informed them he was a Christian and did not want the Union in his plant. Vantilburg claims that Booher asked if the Union ever talked to them about Christ, and that he (Vantilburg) asked at that point how Booher knew the Union was non-Christian. Vantilburg asserts that Booher then asked him if he ever read the Bible and stated that he would rather burn at the cross than have the Union come in. Employee Hemmert merely testified Booher told the employees he and Miller were going to an electric car meeting; informed them Halter would be in charge; asked for a show of hands to see who was going to cooperate with Halter; and informed them he did not want any non-Christian organization in there.

When he appeared as a witness, Booher made no attempt to describe the August 12 meeting. He did testify, however, that he did not tell employees that he was going to close the plant. Miller did describe the August 12 meeting in some detail during his testimony. His version of the discussion regarding Halter being placed in charge while he and Booher attended an electric car meeting paralleled that given by the employees. With respect to the non-Christian matter, Miller admitted that Booher informed the employees he did not want the Union in his place because it was non-Christian. Like Booher, Miller denied that the employees were told at the meeting that Respondent would close the business if the Union came in.

While the General Counsel claims that Booher polled the Wapakoneta employees to ascertain their union sentiments on August 12, it is clear that he polled them to ascertain whether they would cooperate with Halter while he and Miller attended an electric car function. Accordingly, I recommend that paragraph 10(c) of the complaint be dismissed. Noting that both Miller and Booher failed to deny Leuger's testimony to the effect that Booher would not have anyone who was against him in the plant and that he would know who was against him after the election, I find that Booher made the comments attributed to him and through them Respondent threatened to discharge employees for supporting the Union, thereby violating Section 8(a)(1) of the Act as alleged. Similarly, as Respondent's witnesses Booher and Miller failed to deny that Booher discussed the effect of unionization upon the business on August 12, I am compelled to accept employee Leugers' assertion that Booher sought to convince the employees that their selection of the Union as their bargaining agent would compel him to raise his prices, lose business, and

<sup>9</sup> Production and maintenance employees wear blue shirts.

<sup>10</sup> See *Krispy Kreme Doughnut*, 245 NLRB 1053 (1979); *Alleluia Cushion*, 221 NLRB 999 (1975); and *GVR, Inc.*, 201 NLRB 147 (1973).

possibly have to close the plant. Such predictions are violative of Section 8(a)(1) of the Act, and I so find.<sup>11</sup> See *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617-620 (1969); *Crown Cork & Seal Co.*, 255 NLRB 14 (1981).

### 3. Alleged interrogation by Halter

Paragraph 10(d) of the complaint alleges that during the week of August 16 Halter interrogated an employee about his union activities, sympathies, and desires. The General Counsel sought to prove the allegation through the testimony of employee Dan Hemmert.

Hemmert testified that on a Saturday in mid-August when Halter was in charge of the Wapakoneta plant he went to Miller's office and asked Halter if he could go home as he was sick. While he was in the office, he claims Halter asked him what he thought the Union could do for him and whether he was going company or whether he was going to vote for the Union. Hemmert further indicated that Halter thereafter asked him every other day or so which way he was going to go.

When he appeared as a witness, Halter was not asked whether he conversed with Hemmert in Miller's office in mid-August. He admitted during his testimony that he joked with people about the Union but denied that he ever asked any employee how he was going to vote between the Company and the Union. In this respect, he claimed he had been instructed by Miller not to ask such questions.

Obviously, the conflict between Hemmert and Halter's testimony requires a credibility resolution. As indicated, *supra*, I found Halter to be an unimpressive witness. On the other hand, Hemmert testified in a forthright manner, and I am convinced he attempted to tell the truth when testifying. I credit Hemmert's testimony and find that Respondent, through Halter, unlawfully interrogated an employee concerning his union activities and/or sentiments as alleged. Such conduct violates Section 8(a)(1) of the Act, and I so find.

### 4. Alleged interrogation by Booher

Paragraph 10(g) of the complaint alleges that Booher unlawfully interrogated an employee in Respondent's restroom on September 3. The General Counsel sought to prove the allegation through the testimony of Robert Vantilburg.

Vantilburg testified that, on September 3 while he was in the restroom at the Wapakoneta facility, Booher came up to him, shook his hand, and asked him how he was going to vote. Vantilburg claims he replied that he could not tell him, that he was going to a union meeting that night, and he was going to ask them the same questions he (Booher) asked us in all his meetings. At that point, Vantilburg states, Booher walked out.

When he appeared as a witness, Booher neither admitted nor denied that he had a discussion with Vantilburg in the restroom. He merely stated he did not ask Robert Vantilburg whether he would vote for the Company or the Union.

Patently, the conflict in the testimony of Vantilburg and Booher necessitates a credibility resolution. I credit the employee as he testified in a straightforward manner and appeared to attempt to tell the truth, while Booher refrained from denying much of the improper conduct attributed to him and simply generally denied that he had engaged in other wrongful acts. Having credited Vantilburg, I find, as alleged, that Respondent, through Booher's acts, violated Section 8(a)(1) of the Act by interrogating Vantilburg concerning his union sentiments on September 3, 1981.

### 5. The alleged misconduct during the September 8 meetings

The record reveals that Respondent conducted a series of meetings with groups of four to five employees at the Wapakoneta facility on September 8. According to Respondent witness Miller, Halter merely read a series of questions from flip charts during the meetings and Miller read the answers from a prepared text which was placed in evidence as Respondent's Exhibit 10. The General Counsel contends that Booher attended some of the meetings under discussion and that Respondent's management representatives engaged in unlawful conduct during the meetings. The General Counsel sought to prove his contentions through the testimony of employees Robert Vantilburg, Daniel Cable, Dan Hemmert, and Steven Leugers.

Employee Cable testified that he attended a meeting at the Wapakoneta facility at which the Union was discussed in early September. He indicated Respondent was represented at the meeting by Booher, Miller, and Halter, and that employees Robert Vantilburg, Harry Vantilburg, Scott Fisher, and a newly hired employee from Colorado also attended. Cable indicated that, after the employees were asked to sit still and be quiet, Booher read questions and Halter displayed cards which were about 2 feet by 2 feet and which had the answers to the questions on them. Cable claims that, after listening to the management representatives for some time, he asked if they would get quiet for a while and if "we would get our turn." Cable testified he then informed the group that he had been in three unions himself and he had never been treated as they said he would be treated. Asked whether Booher made any comments about the Union or the election during the meeting, Cable indicated Booher told them that he would not have people working there that were against him, and that the people who were for a union were against him; that he did not want anybody coming in there and telling him what to do; and that, while he had done some favors for employees like giving them pay advances, he would not be able to do that anymore because it would look like he was bribing or doing special favors for people. Additionally, Cable claims that, at some point in the meeting, Booher asked the new employee from Colorado if he had ever been in a union. According to Cable, the employee replied he had been in the Teamsters Union while working in Colorado. After informing the group that he wanted to see the Union in there to represent him, Cable, at his 4

<sup>11</sup> No evidence was offered to prove that Respondent threatened to reduce wages during the meeting, and I recommend that the applicable allegation be dismissed.

p.m. quitting time, informed the group he did not want to hear any more and left.<sup>12</sup>

Vantilburg's version of the meeting on September 8 was that Halter read questions from charts and Miller read the answers. Vantilburg's recollection was that Booher asked the new man from Colorado if he would vote for the Union rather than whether he had ever been in a union. He claims that, at some point in the meeting, Booher asked for a show of hands of who was for the Company. According to Vantilburg, Cable walked out of the meeting after Miller had asked him if the Union had any written guarantees that they could do anything for the employees and Cable had replied the Union could not write out guarantees. Vantilburg testified he asked Booher during the meeting why Halter had received a raise while the other employees had not.<sup>13</sup>

Hemmert's description of the September 8 meeting was brief. He indicated that management representatives read from cards what the Union could and could not do for employees, and attributed several comments to Booher. The first was that Booher informed them that if they got the Union in there they would drop the minimum wage, and the second was that he said that they would hire other people to replace them if the Union got in and they went on strike.

Leugers' description of the September 8 meeting was quite terse. He testified that Miller read from big pieces of cardboard and the only thing he could remember was that he was told that they could be replaced if they went out on strike.

When Respondent presented its defense, Booher was not asked whether he made any of the statements at the September 8 meetings which were attributed to him by Cable, Vantilburg, Hemmert, or Leugers. Similarly, Halter merely testified that he read the questions at the meetings and that Miller read the answers.

Miller indicated during his testimony that the September 8 meetings were conducted with Halter reading questions from cards and with him following by viewing Respondent's Exhibit 10, which contains the questions and answers used, and reading the answers to the questions.<sup>14</sup> Miller testified that Respondent's Exhibit 10 is exactly what was said to employees at the September 8 meetings and nothing else was said. Asked if he asked employees how they were going to vote or whether he asked them any direct questions in attempt to cause them to respond by indicating their attitudes toward the Union, Miller answered no.

While counsel for the General Counsel urges me to find that Respondent raised matters not covered by Respondent's Exhibit 10 at the meeting attended by employees Cable and Vantilburg and also at the meeting(s) attended by employees Hemmert and Leugers, I am not convinced that Respondent departed from its prepared text at the meeting(s) attended by the last named employees. Leugers candidly admitted that the only thing he

<sup>12</sup> The record reveals Cable was not invited to attend further meetings.

<sup>13</sup> After the meeting, Vantilburg claims Booher called him a liar once over the Halter raise situation.

<sup>14</sup> Miller indicated he placed the ink corrections and/or additions on the exhibit. With respect to the "Bargaining starts at O" addition on p. 5, Miller testified he told the employees that zero meant minimum wage.

could recall about the meeting he attended was that employees were told they could be replaced if they went on strike. I have no doubt that Leugers heard all the matters set forth in the above-mentioned exhibit, and note that at page 4 the document mentions the rehire of strikers. Similarly, Hemmert's assertion that Booher threatened during the meeting he attended to "drop the minimum wage" before the Union got in makes absolutely no sense, and his claim that rehire rights of strikers were not mentioned during the meetings is unconvincing as Respondent's Exhibit 10 does make mention of rehire rights. In sum, I am convinced, and find, that, when describing the September 8 meeting(s) they attended, Hemmert and Leugers simply stated the conclusions they reached upon hearing management representatives read the material contained in the prepared flip charge presentation under discussion.

With respect to the meeting attended by Cable and Vantilburg, I am persuaded, particularly by the testimony given by Cable, which was delivered in a forthright and forceful manner, that Booher made the remarks attributed to him by Cable. Noting that the subject matter described by Cable was not contained in Respondent's Exhibit 10 and the significant fact that Booher failed to deny the remarks attributed to him, I find Miller's assertion that neither he nor anyone else departed from the prepared material at the meeting under discussion to be unconvincing.<sup>15</sup>

Having credited the account of the September 8 meeting given by Cable, I find that Respondent, through Booher's conduct at the meeting, violated Section 8(a)(1) by: (1) threatening to fire employees who were for the Union; (2) threatening to discontinue the practice of giving pay advances because employees had sought union representation; and (3) interrogating an employee to ascertain his union sentiments.

#### 6. The alleged threat of loss of employment if employees engaged in a strike

In addition to contending that Booher misrepresented the legal rights of striking employees by making comments not contained in the prepared speech he read at the September 8 meetings, the General Counsel contends that Respondent violated Section 8(a)(1) by reading the following question and answer to employees during the September 8 meetings.<sup>16</sup>

Question 8: If the union calls a strike, can we lose our jobs?

Answer: YES. Under the law, if the union makes you strike to try to force the company to agree to the *union's economic demands*, this company is free to replace the strikers. This means that after the

<sup>15</sup> While I gained the impression that Vantilburg sought to tell the truth to the best of his recollection, I do not credit his assertion that Booher asked for a show of hands of who was for the Company during the meeting, or his assertion that Booher asked the man from Colorado how he was going to vote. With regard to the raise of hands, I suspect Vantilburg confused the "electric car" meeting with the September 8 meeting, and I feel Cable's version of Booher's conversation with the man from Colorado is more reliable.

<sup>16</sup> Resp. Exh. 10, p. 4.

strike is over, you may no longer have a job. The law does not force the company to rehire you, unless an opening occurs for which you are qualified and you are next in line on the rehire list, which could be a long time, if ever.

In the General Counsel's view, Respondent violated the Act by reading the above question and answer to employees because it misrepresented the law.

While the Board and the courts have found that an employee violates Section 8(a)(1) of the Act by telling employees that if they engage in an economic strike they can be permanently replaced, the instant Respondent qualified its statement by indicating the law requires that strikers be rehired if "an opening occurs for which you are qualified and you are next in line on the rehire list."

While the above-quoted statement, which was read to employees on September 8, fails to fully advise Respondent's employees of the rights enjoyed by economic strikers as delineated in *Laidlaw Corp.* 171 NLRB 1366 (1968), the statement explaining the law was merely incomplete rather than false. I find that Respondent did not grossly misrepresent the law by making the statement under consideration and recommend that the applicable paragraph of the complaint be dismissed.

#### 7. The September 17 meeting

The record reveals that Respondent held a meeting with its Wapakoneta employees on September 17, the day before the election. It is undisputed that the meeting, which was held in the warehouse, commenced shortly after 10 a.m. Miller testified it ended at approximately 10:20 a.m. Reliable record evidence reveals that Respondent's owner, Booher, read a prepared speech placed in the record as Respondent's Exhibit 8 during the meeting. When he appeared as a witness, Booher gave no testimony concerning the meeting, save his assertion that he never threatened to close the plant at any time. Miller indicated during his testimony, however, that he had read Booher's speech three to four times prior to the meeting and he testified Booher's remarks at the meeting were limited to the text of the prepared document. The General Counsel sought, through the testimony of employees Cable, R. Vantilburg, Teddy Cross, and Hemmert, to show that Booher departed from the prepared text and engaged in unlawful conduct during the meeting.

Employee Cable indicated during his testimony that all of Respondent's Wapakoneta employees and management officials attended the September 17 meeting. He recalled that Booher acted as Respondent's spokesman, and that before he started to read a speech he commented that he was sick as he had an ear infection or cold. Asked what Booher discussed after mentioning his illness, Cable asserted that Booher told them that he would not have the Union in there telling him what to do; and that anyone who was for the Union, he would not have him at all. Asked what else he could remember, Cable testified he just read the speech about the Union and he wanted us all to vote "No." Asked if Booher made any statements about closing the shop, Cable claimed he said he would close the shop if he had to.

Robert Vantilburg's description of the September 17 meeting was quite brief. He, like Cable, indicated that Booher started the meeting by talking about his illness. He claims Booher then asked for a show of hands of who all were with him, and thereafter said something about going to Dayton with employee Cross.

Hemmert's recollection was that Booher told employees at the September 17 meeting that, if the Union were to get in there, he would shut the doors down, and he had a bunch of daughters and a few sons-in-law that he would bring in there to replace them. According to Hemmert, Booher went on to say he "didn't want no non-christian organization" running his business, and, at some undescribed point, he said that, if the Union were to get in there, he would immediately drop everybody's benefits and their wages would drop to the minimum. Asked whether Booher asked the people attending any questions, Hemmert replied: "Yeah, how many were going union—and he hoped that everybody would stick with the Company." When counsel for the General Counsel then asked: Did he ask for a response in any way, from you? Hemmert stated: "Not really."<sup>17</sup> Asked if Booher made any statements about what would happen to him if he did not vote for the Company, Hemmert replied: "You'd be looking for another job." When counsel for the General Counsel then asked if Booher made such a statement, Hemmert replied: "Yeah, well, he didn't want anybody that wasn't for the Company working for him." According to Hemmert, he looked at his watch and the clock in the lunchroom and noted the meeting ended at 10:45 a.m. He did not recall whether Booher had anything in his hand during the meeting.

Teddy Cross, a truckdriver employed by Respondent, was the last General Counsel witness to describe the September 17 meeting. Cross testified he attended four meetings, and he indicated he could not recall much about the first three meetings. He recalled that Booher indicated at the meeting under discussion that he wanted to see everybody vote "NO." He then indicated that more was said, but he did not remember what it was all about. Thereafter, in response to leading questions, he recalled that Booher made reference to starting a zero-to-zero on wages, and that Booher indicated there were no guarantees and if the Union got in he did not have to sign a contract. Asked if strikes were discussed, he claimed Booher said he could hire people off the street to come in and do the work; employees would have no paycheck coming in; and he would not have to hire employees back until he wanted to. Asked if employees were asked to raise their hands, he stated they were asked to raise their hands to see how many were for the Union and how many were against the Union at one meeting. He claims the meeting started at 10 a.m. and ended at 10:50 a.m.<sup>18</sup>

<sup>17</sup> During cross-examination Hemmert testified he was not asked directly which way he was going to vote at any meeting.

<sup>18</sup> Cross claims he left for Dayton as soon as the meeting was over and logged the time as 10:50 a.m. in his logbook. The logbook was not produced.

Counsel for the General Counsel contends in his brief that I should find upon review of the testimony of employees Cable, Vantilburg, Hemmert, and Cross that during the September 17 meeting Booher: (1) threatened to fire prounion employees if the Union got in; (2) polled employees to ascertain their union sentiments; (3) threatened plant closure if the Union got in; and (4) threatened to eliminate employee benefits and reduce them to the minimum wage if the Union got in. While I agree with his assertion that the record strongly suggests that Booher departed from his prepared text on September 17,<sup>19</sup> careful consideration of the testimony offered by the General Counsel fails to convince me that Booher engaged in most of the conduct attributed to him during the September 17 meeting.

With respect to Cable's assertion that Booher told employees at the September 17 meeting that he would not have the Union in there telling him what to do; and that "anybody that was for the Union, that he wouldn't have them at all," I note that the remarks described would not appear to constitute a conclusion Cable may have reached upon hearing the prepared speech read by Booher during the meeting. Since Booher failed to deny that he made the remarks attributed to him by Cable, and I am persuaded that Cable sought to truthfully relate what he recalled of the meeting, I find, as alleged, that Respondent, through Booher, threatened during the September 17 speech to fire employees who were for the Union if the Union got in. By engaging in such conduct, Respondent violated Section 8(a)(1) of the Act as alleged.

Turning to the contention that Respondent polled its employees to ascertain which way they would vote, I note that Vantilburg's claim that Booher asked for a show of hands of those who were with him is contradicted by the testimony of Hemmert and that Cross indicated during his testimony that the show of hands may have been requested at another meeting. In the circumstances, I find that the General Counsel has offered insufficient probative evidence to show that Respondent unlawfully polled its employees during the September 17 meeting.

With respect to Booher's alleged threat to close the plant and replace the employees with his daughters and their husbands, I note that the September 17 prepared speech contains considerable discussion of the possibility of a strike and the actions Respondent could or might take if a strike occurred. While I have no doubt that Hemmert attempted to give his best recollection of what was said at the September 17 meeting, he clearly voiced the conclusions he reached upon hearing the speech and I am persuaded that Booher's comments concerning possible Respondent actions in event of a strike caused Hemmert to conclude Booher was threatening to close the plant and replace employees with his relatives. Absent corroboration of his testimony, I am unwilling to find that Booher, who denied ever threatening to close the plant, uttered the threat under discussion during the September 17 meeting.

<sup>19</sup> In the absence of a specific denial, I credit Cable's assertion that Booher commenced the meeting by telling employees he was ill, as Cable's testimony was corroborated by Vantilburg.

Similarly, Cross' unsupported claim that Booher threatened during the speech to eliminate employee benefits and reduce employees to the minimum wage if the Union got in appears to be a conclusion reached by Cross upon hearing that portion of the prepared speech dealing with Respondent's bargaining obligations and intentions in event its employees selected the Union as their bargaining representative. As Cross' assertion was not corroborated by the other employees and it appears likely that he was stating his conclusions rather than what Booher actually said, I find that the General Counsel has offered insufficient evidence to prove that Respondent threatened plant closure if the Union got in on September 17.

#### 8. Booher and Miller's September 17 and 18 discussions with driver Cross

It is undisputed that, immediately after conducting the September 17 meeting with employees, Booher went to Dayton, Ohio, with Cross in the Company's truck. Cross claims that, during the trip to Dayton, Booher asked him how he felt about the Union; if he had talked to any people on the CB about it, and if so how they felt; how he was going to vote; and if he would wear a procompany sticker that said "Go with the flow—vote no."

While Booher admitted that he discussed the Union with Cross for perhaps 5 minutes during the ride to Dayton, he claimed that Cross initiated the discussion by telling him: "You know, Mel, you and I have been friends too long that I don't have to wear one of those badges." According to Booher, there was little other discussion of the Union. He denied he asked Cross during the trip whether he was going to vote for the Union or the Company.

In addition to attributing the above-described remarks to Booher, employee Cross testified that before he voted on September 18 Miller told him, "Think of two things: your car and your house. If you don't vote no, I'll break your arm." Miller admitted when he appeared as a witness that Respondent had either made loans to or arranged for Cross to obtain loans for his car and his house. He admitted he told Cross before he voted to remember two things, a house and a car, but denied he told him he would break his arm if he did not vote no.

Obviously the conflicting testimony set forth above poses a situation in which the credibility of the witnesses must be determined.

With respect to the Cross-Booher conversation, I note initially that, while Booher has an interest in the outcome of this case, Cross is a somewhat disinterested party as he has not worked for Respondent since September 1981. While the testimony given by this employee regarding the September 17 meeting consisted primarily of the conclusions he reached upon hearing Booher read a prepared speech, his description of occurrences during the trip to Dayton with Booher was delivered in straightforward manner without hesitation. On the other hand, when Booher referred to the conversation he failed to state his best recollection of the conversation and chose, instead, to merely assert that Cross started the conversation and to generally deny that he asked Cross

how he was going to vote in the election. Cross was the more impressive witness, and I credit his assertion that Booher, who had just concluded a speech by stating he was "personally asking you [the employees] to vote *no* tomorrow," asked him on the ride to Dayton how he intended to vote in the election.

With respect to Booher's claim that the employees, rather than himself, initiated the conversation concerning the procompany button, I am inclined to accept Booher's testimony because the record reveals that Miller had offered Cross such a button at some unspecified time and it would seem logical to assume that Cross would initiate such a conversation as he apparently was not wearing such a button on September 17. In sum, for the reasons stated, I find that Respondent, through Booher, violated Section 8(a)(1) by interrogating an employee concerning his union sentiments on September 17, 1981. I further find that the General Counsel has failed to offer sufficient probative evidence to prove that Cross was asked by Booher to wear a procompany button on the same date.

While I have concluded there was an element of truth in Booher's denial that he engaged in the conduct attributed to him during the ride to Dayton, I have no difficulty in deciding that Cross is to be credited rather than Miller. Throughout the trial, I gained the impression that Miller was tailoring his testimony to meet the needs of Respondent's defenses. I find, as alleged, that Miller sought to interfere with, coerce, and restrain Cross in the exercise of his Section 7 rights on September 18, 1981, by uttering to Cross the remark attributed to him by the employee. Such conduct violates Section 8(a)(1) of the Act as alleged.

#### 9. The attendance policy

Paragraph 10(a) of the complaint alleges that Respondent violated Section 8(a)(1) by adopting a more stringent attendance policy on July 20, 1981.

Miller indicated during his testimony that although Respondent sought to deter employee absenteeism prior to July 20 by giving employees a bonus of \$1 per hour if they worked the scheduled hours during a given week, Respondent had no written attendance policy. Indeed, the record reveals that employees could, prior to July 20, be absent for extended periods of time and suffer no consequence. Illustrative is the fact that the record reveals that employee Charles Hogan had some 23 days of unexcused absence between January 1, 1981, and May 9, 1981, but was not terminated until the latter date. Similarly, the record reveals that several of the alleged discriminatees in the instant case (R. Vantilburg and D. Cable) missed work on numerous occasions, failing even to call in, prior to July 20 without suffering any consequences.<sup>20</sup>

It is undisputed that Respondent promulgated and implemented a new attendance policy on July 20 by distributing the following document to its employees and posting a copy on its bulletin board.

In order to assure good attendance and equity in application of discipline, the following guidelines are being established.

Whenever you are absent, you are expected to call in and notify the Company. You must notify the Company as to why you will be off and when you are expected to return.

Three consecutive days without a call in will be considered a voluntary quit.

An employee who misses 3 days of work (except on the advice of a doctor) in a 6 month period will be given an oral warning to improve his attendance.

After the 4th missed work day (or occurrence) he will be given a written warning, in an effort to improve his attendance.

After the 5th occurrence, the employee will be given a disciplinary suspension of 3 days.

If after this, there is a 6th occurrence, the employee will be terminated for excessive absenteeism.

The Company insists upon good attendance in order to get the work done that is to be done. Also, when an employee misses work his fellow employees have to work hard to take up the slack.

During his testimony, Miller sought to clarify and further define the attendance policy followed by Respondent from July 20 forward. He explained the meaning of the word "occurrence" used in the written document given to employees by indicating that, basically, an occurrence was an unexcused absence.<sup>21</sup> Asked whether any excuse other than a doctor's excuse caused Respondent to treat employee absences as unexcused, Miller indicated that such determinations were made on an *ad hoc* basis. In this vein, he testified that death in the family would cause him to treat an absence as excused, and he admitted that, on one occasion when an employee spent 5 days in jail without calling in or subsequently presenting a written excuse, he treated the absence as excused. On the other hand, Miller indicated that if an employee left work sick but returned to work without a doctor's excuse, his absence would be treated as an unexcused absence.<sup>22</sup> Finally, Miller indicated that Respondent altered its recordkeeping upon adopting its new attendance policy as it commenced on July 20 to maintain attendance cards for each employee rather than simply note the fact of or reason for employee absences on their timecards.

In sum, the record reveals that Respondent had no set attendance policy prior to July 20 and that employees could absent themselves from work without calling in or offering an excuse for their absence upon their return

<sup>21</sup> If an employee was absent for one-half day and the absence was deemed unexcused, he was credited with one-half occurrence.

<sup>22</sup> Miller testified certain situations permitted employees to request and receive leaves of absence and that, if such leave was granted, the absences did not count as occurrences. In this regard, he indicated that Robert and Harry Vantilburg were granted a leave of absence during the week preceding Robert's termination as their father had been hospitalized with a serious illness.

<sup>20</sup> See Resp. Exhs. 1 and 2.

and suffer no consequences until they had been absent so frequently that even the most lenient of employers would have terminated them. On July 20, 11 days after the Union demanded recognition, and 1 week after the Union filed its petition in Case 8-RC-12562, the attendance policy under discussion was implemented. Under the new policy, employees were required to call in if they were to be absent and they were required to submit a doctor's excuse if their absence was to be deemed to be excused. Under the new policy, six unexcused absences within a 6-month period subjected the employees to discharge.

In agreement with counsel for the General Counsel, I find that the facts summarized above warrant an inference that Respondent promulgated and adopted its attendance policy on July 20 because its employees were seeking union representation.

During the trial Respondent, through the testimony of Miller, claimed that it had hired a new safety director at some unstated time prior to July 20 and that he was hired, in part, because Respondent desired to promulgate an attendance policy and a safety policy. Respondent did not, however, adduce any testimony which would reveal that the new safety director promulgated the attendance policy under discussion prior to the commencement of the union organizational campaign, and it offered no reason for selecting July 20 as the date for implementation of the policy.

In sum, I find that the General Counsel has proved, *prima facie*, that Respondent implemented a more stringent attendance policy for discriminatory reason on July 20, 1981. I further find that Respondent has failed to rebut the General Counsel's *prima facie* showing of violation. Accordingly, I find that by promulgating and implementing the policy under discussion on July 20, 1981, Respondent violated Section 8(a)(1) of the Act as alleged.<sup>23</sup>

### C. The Alleged 8(a)(3) Violations

#### 1. The August 11 suspension and reprimand of Steven Leugers

Paragraph 11 of the complaint alleges that Respondent suspended and reprimanded employee Steven Leugers on August 11, 1981, because he made complaints concerning unsafe working conditions and/or in order to discourage employees from engaging in concerted activities for the purpose of collective bargaining or other mutual aid and protection.

<sup>23</sup> The record reveals that Respondent, after being investigated by OSHA as a result of employee complaints, promulgated and implemented a "Progressive Disciplinary Program" on July 27, 1981, to "insure proper compliance with Company Safety Regulations and O.S.H.A. requirements." Although such action was not alleged as a violation in the complaint, counsel for the General Counsel urges me to find that Respondent violated Sec. 8(a)(3) and (1) of the Act by promulgating and implementing the policy. As the General Counsel failed to amend the complaint to allege that the action under discussion was unlawful, Respondent made no attempt to explain why the action was taken on July 27. In the circumstances, I conclude the issue was not fully litigated at the trial and refrain from finding the violation. Assuming, *arguendo*, the issue was fully litigated, I conclude no violation of the Act has been established. See *Atlas Corp.*, 256 NLRB 91 (1981).

The facts concerning the situation Leugers found himself in on August 11 are not in dispute. Leugers indicated during his testimony that his work tasks at Respondent's Wapakoneta plant included changing batteries, loading lead into a smelter which melted the lead, and pouring lead from the smelter into castings called pigs. With respect to the last described task, Leugers indicated the hot molten lead in the smelter reaches approximately 800 degrees and, to accomplish pouring of the lead into pigs which are positioned on a rotating platform, the pourer puts on asbestos gloves to protect his hands when he reaches into the top of the smelter to operate the valve that permits the lead to escape. According to Leugers, he notified Halter on August 10 that the available asbestos gloves had no more asbestos on the fingers and the employee asked if any new asbestos gloves were available. After Halter answered that gloves were on order but had not been received, Leugers put on two pair of the available gloves which afforded cloth protection only for the fingers and poured the lead from the smelter.

On the afternoon of August 11, while he was putting water into batteries and wiring them so they could be charged the following day, Halter approached Leugers, who had helped load the smelter with lead that day, and told him to pour the lead into the pigs. Leugers informed Halter he would not pour the lead because the Company had not provided him with proper safety equipment, and added that he was willing to perform any other work that Halter wanted to assign to him. Halter instructed the employee to go home if he would not pour the lead. Leugers indicated during his testimony that he had not completed watering and wiring the batteries which were to be changed the following day when he was sent home about 2 p.m.

When he reported for work on August 12, Leugers was given a letter of reprimand signed by Miller which stated:<sup>24</sup>

This is to advise you that your performance of yesterday, where you were grossly insubordinate and refused to perform reasonable duties cannot be tolerated.

This is your final warning that should there be a re-occurrence of this behavior it may lead to further disciplinary action, up to and including discharge.

Citing *Keystone-Seneca Wire Cloth Co.*, 244 NLRB 398 (1979), and *Thermofil, Inc.*, 244 NLRB 1056 (1979), the General Counsel argues that the facts in the instant case parallel those in the cited cases, and, accordingly, I should conclude that Respondent violated the Act when it temporarily suspended and subsequently reprimanded Leugers. I agree.

In the cited cases, the employees involved refused to operate machines because they personally felt that they might be injured. Neither employee discussed his intention to refuse to operate his machine with other employees prior to his refusal to perform, but in each instance

<sup>24</sup> See G.C. Exh. 38.

the facts revealed that the employees were pursuing a matter of concern to other employees who were not shown to have disavowed the action of the protesting employee. Here, the record reveals that Leugers refused to pour lead because he felt his fingers might get burned. While he did not discuss his intention to refuse to pour the lead with his fellow employees, the record reveals that several employees other than Leugers regularly accomplished the necessary pouring of lead from the smelter, and those employees were not shown to have disavowed Leugers' refusal-to-pour action. Under the rationale expressed in the above-named cases, Leugers engaged in protected concerted activity when he refused to pour lead on August 11. In the circumstances described, I find that by sending Leugers home at 2 p.m. on August 11 and by issuing a written reprimand to him on August 12, Respondent violated Section 8(a)(3) of the Act as alleged.

## 2. The discharge of Daniel Cable

Paragraph 12 of the complaint alleges that Respondent discharged Dan Cable on September 22, 1981, because he had joined, supported, or assisted the Union and/or engaged in protected concerted activities and/or in order to discourage employees from engaging in union or other protected concerted activities.

Cable was hired by Respondent in mid-May 1981. While employed, he worked as a laborer in the battery cutting room. His job involved scrapping old batteries.

During the union campaign, Cable signed an authorization card on July 7, and, on July 7 and 8, he distributed cards to other employees. Some six other employees signed cards given them by Cable.

As noted, *supra*, Cable made his union sentiments known to Booher, Halter, and Miller at the small group meeting he attended on September 8. It is clear, and I find, that Respondent was fully aware of the fact that he favored representation of the employees by the Union.

Respondent claims that Cable was lawfully discharged pursuant to the attendance policy it promulgated and adopted on July 20. The General Counsel contends that the discharge was unlawful because: (1) it resulted as a consequence of an unlawfully implemented attendance policy; (2) that Cable was the victim of disparate treatment; and (3) that the reason assigned was shown to be pretextual because Respondent did not, in dealing with Cable, follow the attendance policy implemented on July 20.

With respect to the claim that Cable was subjected to disparate treatment, the General Counsel points, in particular, to the attendance records of employees Tom Boedecker (G.C. Exh. 41), Miller's testimony revealing the absenteeism of employee Carl Williams, the attendance record of Richard Koch (G.C. Exh. 40), and the attendance record of employee Ron Bigham (G.C. Exh. 42).

Boedecker's attendance record reveals he was charged with 13 days of unexcused absences during the period July 20 through August 8. In addition, although Respondent ceased to record the employee's unexcused absences after August 8, Miller indicated during his testimony that Boedecker did not report for work or call in

during the 30 days preceding his termination for absenteeism on September 8, 1981. Asked why he did not terminate Boedecker after he had accumulated six unexcused absences, Miller testified he wanted to wait until the employee came back to work and he had heard his excuse for being absent.

Respondent had no attendance record for Carl Williams but produced the employee's timecards which revealed he had unexcused absences on August 9 and 29, and September 9, 19, 25, and 26. While Williams submitted no doctor's excuse for his absence on August 9, Miller testified he decided to treat the absence as excused because Williams subsequently presented a doctor's excuse indicating his absences from August 10 through August 17 were caused by a sacroiliac condition.

Inspection of Koch's attendance record reveals that at one time eight "X" marks denoting unexcused absences were placed on the card. Thereafter the letters "EO" (excused other) were placed over the X mark for the date August 22 and a circle or zero was placed over the X mark for the date October 4. Miller failed to indicate when discussing the Koch attendance record why the August 22 absence was excused, but he testified the zero was placed in the square for October 4 because Koch was actually present that day and was erroneously charged with an unexcused absence. According to Miller, Koch was also erroneously charged with an unexcused absence on October 14 after the employee quit on October 13.

Bigham's attendance record reveals that he was charged with 13 days of unexcused absence during the period July 20 through October 1.<sup>25</sup> At some subsequent time, three of the full-day absences (August 10, 11, and 25) and a one-half day absence (August 24) were remarked excused s/s (self sickness). Additionally, Bigham's absence during the period September 14 through September 18, three of which had previously been marked as unexcused, were marked excused with the letter LA (leave of absence). Miller indicated he excused Bigham's 5 days of absence on September 14, 15, 16, 17, and 18 because he learned the employee was in jail during that period.

Employee Cable's attendance record was placed in the record as General Counsel's Exhibit 45. It reveals that Cable was charged with unexcused absences on August 10, 15, and 24 and September 12 and 20. Additionally, he was charged with one-half day of unexcused absence on September 1. During his testimony, Miller indicated that the Cable attendance record was inaccurate and failed to reveal the full extent of Cable's unexcused absences. Thus, through Miller, Respondent placed a compilation of Cable's attendance in the record as Respondent's Exhibit 2. Inspection of the document coupled with Miller's testimony produces the following: The exhibit reflects that Cable had unexcused absences on September 8 and 19, but Miller testified such entries are incorrect because September 8 was a holiday and Cable actually worked on September 19 until all employees clocked out to

<sup>25</sup> He was charged with one-half day unexcused absences on August 24 and September 25.

attend a company picnic. Continuing, Miller testified Cable was charged with an unexcused absence on August 10 because he went home sick and failed to bring in a doctor's excuse the next day; that he was charged with an unexcused absence on August 15 when he called in and reported he had car trouble; that he was charged with one-half day of unexcused absence on August 22 because he was 30 minutes late and left at 10:30 a.m. because he was mad because he lost his attendance bonus; he had an unexcused absence on August 24 because he did not show up or call in; he had an unexcused absence on September 12 because he did not show up or call in; he had an unexcused absence on September 14 because he came in with a doctor's excuse indicating his girlfriend had been treated and Miller would not accept his claim that he had to take his live-in girlfriend for treatment. Respondent's exhibit in question is somewhat ambiguous as it indicates Cable subsequently brought in a doctor's excuse for his September 14 absence and it indicates he was absent on September 21 but brought in a doctor's excuse for that absence on September 22.

On September 15, Cable was given a letter which stated, *inter alia*:<sup>26</sup> In lieu of suspension, this is your final warning that any absenteeism *with or without a Doctor's excuse* or early departures will result in your immediate dismissal. [Emphasis supplied.]

On September 22, the alleged discriminatee appeared for work with a doctor's excuse for the September 21 absence. Miller refused to accept the excuse and terminated the employee.

In *Wright Line*, 251 NLRB 1083, 1089 (1980), the Board set forth the causation test to be used in all cases alleging violation of Section 8(a)(3), stating:

First, we shall require that General Counsel make a *prima facie* showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision. Once this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct.

Summarized, the record in this case reveals: that Respondent, through Booher, exhibited marked union animus during meetings with employees on August 12 and September 8 by, *inter alia*, indicating he would know the identity of union supporters after the election and he would fire them; that employee Cable interrupted management's presentation at the September 8 small group meeting he attended by telling management officials that he favored union representation and by telling the other employees that, while belonging to three unions, he had never been treated as management predicted they would be treated if they selected the Union as their bargaining agent; that Respondent unlawfully implemented a new attendance policy shortly after the Union petitioned for an election, and the policy indicated that work missed "on the advice of a doctor" would be treated as an excused absence; that an election was held on September

18, a Friday, and challenges were determinative of the results; that Cable was warned on September 15 that if he missed any further work "with or without a Doctor's excuse" he would be immediately terminated; that after implementation of the July 20 attendance policy Respondent treated absences of employees other than Cable, including absences caused by sickness, as excused absences although no doctor's or other written excuse was tendered to management; and that on September 21, 3 days after the election was held, Cable, who then had been charged with less than six previous absences from July 20 to that date, was absent and, on September 22, Respondent refused to accept the doctor's excuse he offered to justify the absence and terminated the employee. Patently, the facts summarized above are sufficient to support the inference that Cable's union activity was a "motivating factor" in Respondent's decision to terminate him. Respondent sought to defend its decision to terminate Cable by placing a compilation of his absences in the record to show that it had actually been quite lenient with Cable as he had a bad absenteeism record from his date of hire—May 14, 1981—until the date of his discharge on September 22. While the document, Respondent's Exhibit 2, does, in fact, reveal that Cable did not show up for work and failed to call in on several occasions prior to July 20, 1981, that evidence is not germane because Respondent notified its employees on July 20 that their prior absences would not be counted against them when the new attendance policy was implemented. With respect to the period extending from July 20 to September 22, the compilation, as corrected by Miller during his testimony, fails to reveal that Cable had six unexcused absences within a 6-month period at the time he was terminated if the September 21 absence was deemed to be excused rather than unexcused. As Respondent failed to give a persuasive reason for its decision to alter its policy so as to treat Cable's absences subsequent to September 15 as unexcused even if he justified the absence(s) by presenting a doctor's excuse for them, I am compelled to conclude it took such action because it desired to terminate him because of his union activities and sentiments.

In sum, I find that Respondent has failed to demonstrate that it would have terminated Dan Cable on September 22, 1981, even in the absence of his protected conduct. I find, as alleged, that by discharging Cable on September 22, 1981, Respondent violated Section 8(a)(3) and (1) of the Act.

### 3. The discharge of Robert Vantilburg

Paragraph 13 of the complaint alleges that Respondent terminated employee Robert Vantilburg on October 8, 1981, because he had joined, assisted, or supported the Union and/or because he had engaged in concerted activities for the purposes of collective bargaining or other mutual aid or protection. It is undisputed that Vantilburg was discharged on October 8 when he refused to operate a saw which cuts off the tops of batteries. The facts surrounding Vantilburg's refusal to operate the saw are in dispute.

<sup>26</sup> See G.C. Exh. 21.

The record reveals Vantilburg was hired by Respondent on November 4, 1980. He worked throughout his employment in Respondent's battery cutting room where the tops were sawed off of batteries and the lead was removed. According to Vantilburg, four men were usually involved in the sawing operation; one takes batteries off of a skid and puts them on rollers upside down to drain the battery acid; the saw man then passes the battery through the saw cutting off the battery posts and top; a third man slides the batteries down over rollers; and a fourth man removes the batteries from the rollers and stacks them.

Vantilburg first manifested his concern over the safety of the battery saw at some unstated time shortly prior to April 17, 1981, by calling OSHA and filing a complaint with that office. Thereafter, on April 17, OSHA compliance officer Ron Huffman appeared at the Wapakoneta plant to conduct an inspection. As noted, *supra*, Halter then threatened to fire Vantilburg if he spoke with Huffman during the inspection. Despite the threat, Vantilburg showed him the battery saw and demonstrated how acid, lead, and plastic chips came out of both ends of the saw when batteries were passed through it.

On May 15, 1981, Vantilburg received a letter from Glen L. Butler, area director for OSHA, advising him, *inter alia*, "The battery cutter saw was inspected and found to be in violation. The rollers had been repaired prior to the Compliance officer's arrival at the plant."<sup>27</sup> Enclosed with the letter were copies of the alleged violations found by the compliance officer. With respect to the battery saw, the following alleged violation was noted:

29 CFR 1910.212(a)(1): Machine guarding was not provided to protect operator(s) and other employees from hazard(s) created by flying chips:

At the battery cutting saw in the cutting room at the north end of the building. Lead and plastic chips were flying out of the saw at both ends of the apparatus. Employees were exposed to flying chips penetrating the sides of the face shield.

The citation listing the described alleged violation indicated that the alleged battery saw violation was to be remedied by May 4, 1981.

After the April OSHA inspection, Vantilburg asked that he be taken off the saw because he had gotten acid in his eyes on several occasions even though he wore appropriate safety gear which included a face shield, armguards, an apron, and boots.<sup>28</sup> He claims his request was granted and that thereafter Russell Metzger and Don King alternated operating the saw. Vantilburg further indicated that Halter asked him to run the saw in mid-August and approximately 1 week before the September 18 election. He refused on both occasions and claims Halter told him he would get someone else.<sup>29</sup>

<sup>27</sup> See G.C. Exh. 46.

<sup>28</sup> Vantilburg testified without contradiction that he went to the doctor three times after getting battery acid in his eyes and that he missed several days' work after such mishaps.

<sup>29</sup> Halter denied that Vantilburg ever told him he refused to operate the saw, and he testified there was never a 2-month period during which

During the union organization campaign, Vantilburg signed an authorization card. As noted, *supra*, he attended the same group meeting employee Cable attended on September 8 at which cards were used to explain the disadvantages of belonging to the Union. At or about the time of the September 8 meeting, Booher interrogated Vantilburg concerning his union sentiments, and, as indicated, *supra*, Vantilburg informed Booher he intended to go to a union meeting that night to ask them the same questions management had asked at the meeting.

At some point not described with any certainty by the witnesses who testified at the hearing, an extra rubber flap was added to both ends of the battery cutting saw to reduce the amount of lead, plastic, and acid which came from the saw when it was in operation. It is undisputed, however, that even with the added rubber flaps lead, plastic, and acid continued to be thrown by the saw, particularly on those occasions when all the battery acid had not been emptied out of the batteries.

During the week preceding his discharge, Vantilburg and his brother Harry requested and were granted leaves of absence for Monday through Thursday because their father was in the hospital. Miller testified without contradiction that, while they had promised they would return to work on Friday, neither reported on Friday or Saturday. On Monday morning, October 8, some 10 minutes before Robert Vantilburg refused to operate the battery cutting saw, Miller claims he agreed to extend both employees' leaves of absence to cover Friday and Saturday.

At approximately 7 a.m. on Monday, October 8, Miller appeared in the doorway to the cutting room and told Robert Vantilburg he wanted him to operate the battery cutting saw. What happened thereafter is in dispute. Vantilburg claims he told Miller he did not want to because it was unsafe; that lead and acid and plastic chips still flew out of it. According to Vantilburg, Miller then informed him: "When you are working for me you will do anything I tell you to do." Vantilburg claims he then informed Miller he would do anything back there except for running the saw and that he specifically told him he would load rollers, beat lead out of batteries, or anything back there. At that point, Vantilburg claims Miller told him to go home.

Miller's version of the incident which led to Vantilburg's termination is that he told Vantilburg he wanted him to operate the saw, and Vantilburg replied he was not going to run the saw, have Russell Metzger do it. Miller claims Vantilburg said nothing about the saw not working right; said nothing about acid in his eyes; and gave no reason for refusing to operate the saw.<sup>30</sup> Miller testified that he would have caused the flaps on the saw to be repaired or he would have issued safety goggles to Vantilburg if he had indicated he did not want to operate the saw because he felt it was unsafe.

Vantilburg did not operate the saw. I credit Vantilburg who was by far the more impressive witness.

<sup>30</sup> Respondent sought to corroborate Miller's testimony through employee Metzger. Metzger was a very confused witness and his testimony is not reliable. In any event, he indicated he did not hear all of the conversation between Miller and Vantilburg on the occasion in question.

I credit Vantilburg's version of the conversation which led to his discharge. In addition to the fact that Miller was an evasive witness, I note that when Leugers refused to pour lead from the smelter because suitable asbestos gloves were not available, Miller issued him a warning the next working day which indicated Miller's feeling that the employee had engaged in insubordinate conduct. I conclude he reacted in like fashion when Vantilburg told him he would not operate the saw because it was unsafe.

The General Counsel claims the record reveals that Robert Vantilburg was discharged because he was a known union advocate, and because he engaged in protected concerted activity by refusing to operate the battery cutting saw on October 8. I conclude that he has failed to establish, *prima facie*, that Vantilburg was fired because of his union activities. In this connection, I note that Respondent placed a compilation which allegedly revealed Vantilburg's attendance record in evidence as Respondent's Exhibit 1. That exhibit reveals that Vantilburg experienced numerous absences from work which would have been deemed unexcused if the same criteria applied to Cable's absences were applied to Vantilburg's absences. Had Respondent desired to discharge Vantilburg because of his union activities, I am convinced Miller would have treated Vantilburg's absence on the Friday and Saturday preceding October 8 as unexcused, thus enabling Respondent to claim he was discharged because of absenteeisms. In my view, the sole issue in the Vantilburg situation is whether he was engaged in protected concerted activity when he refused to operate the battery cutting saw on October 8.

In agreement with counsel for the General Counsel, I conclude that the record reveals that Vantilburg engaged in protected concerted activity when he refused to operate the battery saw on October 8. Thus, it is undisputed that subsequent to the time that the OSHA compliance officer determined that the cutting saw was operated in violation of OSHA standards because it emitted lead and plastic chips, the saw continued to emit acid, bits of lead, and pieces of plastic.<sup>31</sup> In the circumstances, Vantilburg's belief that the saw was unsafe was a reasonable belief. While Vantilburg, an experienced saw operator, was not shown to have discussed his intention to refuse to operate the saw with his fellow employees, the record clearly reveals that other employees operated the saw most of the time. Consequently, Vantilburg's refusal to operate the saw benefited and was of concern to other employees, who were not shown to have disavowed his action. In my view, the situation described is comparable to the situations of the employees who refused to operate machines in *Thermofil, Inc., supra*, and *Keystone-Seneca Wire Cloth Co., supra*.

In sum, for the reasons stated, I find that by terminating Robert Vantilburg because he engaged in protected concerted activity by refusing to operate the battery cutting saw on October 8, 1981, Respondent violated Section 8(a)(1) of the Act.

<sup>31</sup> All the employee witnesses who gave testimony, including Hemmert, Stauffeur, and Respondent witness Metzger indicated as much during their testimony.

#### D. The Request for a Bargaining Order

The complaint alleges that on July 9, 1981, the Union, which then represented a majority of the employees in an appropriate bargaining unit, demanded that Respondent recognize it as the collective-bargaining representative for such employees and that Respondent unlawfully refused to accede to the request, thereby violated Section 8(a)(5) of the Act.

At the outset of the hearing, the parties agreed by stipulation that the appropriate bargaining unit is:<sup>32</sup>

All full-time and regular part-time production and maintenance employees, truckdrivers and counter sales employees employed by the Employer at its 100 Keller Dr., Wapakoneta, Ohio and its 459 North Main St., Lima, Ohio facilities, excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

As noted, *supra*, the Union did not, as of July 9, 1981, possess any authorization cards which had been executed by employees employed at Respondent's Lima facility. Moreover, I have indicated I do not credit Union Representative Brodie's assertion that he told Respondent's assistant manager Halter on July 9 that the bargaining unit he represented was composed of the employees employed at both the Lima and the Wapakoneta facilities. Accordingly, I find that the Union did not request recognition as the bargaining agent of employees in the bargaining unit which was stipulated to be appropriate on July 9 as alleged.

With further regard to the complaint allegations relating to the Union's representative status on July 9, I note that the only evidence offered to reveal the names and number of employees in the above-described bargaining unit at any given time is a document entitled "Agreement on Voting Eligibility" dated August 10, 1981, which was placed in the record as the General Counsel's Exhibit 4. That document reveals that as of August 10 30 named eligible voters were employed at the Wapakoneta facility and that 5 named eligible voters were then employed at the Lima facility.

In sum, as the record fails to reveal that the Union requested recognition in an appropriate bargaining unit on July 9, and it also fails to reveal the names of employees in the unit stipulated to be appropriate on July 9, it is obvious that Respondent in this case cannot be found to have violated Section 8(a)(5) by refusing to recognize the Union as the collective-bargaining representative of its employees on July 9, 1981.

Under present Board law, the findings set forth above are not dispositive of the bargaining order issue in this case. As noted by the Board in *Peaker Run Coal Co.*, 228 NLRB 93, 93-94 (1977), the Supreme Court in *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969), approved the Board's use of bargaining orders to remedy an employer's independent 8(a)(1), (2), or (3) violations which undermine a union's majority status and fatally impede the holding of a fair election. In *Gissel*, the Court described

<sup>32</sup> See G.C. Exh. 3.

two types of situations in which such orders are appropriate. The first involves those unfair labor practices which are so outrageous and pervasive that traditional remedies cannot erase their coercive effect, with the result that a fair election is rendered impossible. The second involves less extraordinary cases marked by less pervasive unfair labor practices which nonetheless still have the tendency to undermine majority strength and impede the election process. In my view, the unfair labor practices committed by the Respondent were not so outrageous and pervasive as to fall within the first category described in *Gissel*. Remaining then is the need to determine whether the practices were such that a bargaining order should issue upon the second theory described.

In the second situation described in *Gissel*, the Board will issue a bargaining order to remedy 8(a)(1), (2), and (3) violations if the union represents a majority of employee's employees at some point in time and the Board finds "that the possibility of erasing the effects of past practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order."

With respect to the Union's majority status, the record reveals that the 19 employees named *supra* signed union authorization cards on or before July 9, 1981. Subsequently, the following employees signed cards on the dates indicated: Teddy-Cross—7/18/81; Dan Hemmert—7/17/81; Lewis Brooks—7/23/81; and Bruce Lloyd—7/13/81.<sup>33</sup> Thus the record reveals that 23 of the 35 employees stipulated to be bargaining unit employees who were eligible to vote executed authorization cards. While Respondent contends that the cards of 3 employees—Robert Vantilburg, Teddy Cross, and Dan Hemmert—cannot be counted because the employees were told the sole purpose of the card was to obtain an election, 20 of the cards are not challenged.<sup>34</sup> It is clear, and I find, that as of July 23, 1981, the Union represented a clear majority of the employees in the appropriate bargaining unit.

Summarized, the record in this case has caused me to find that Respondent embarked upon an unlawful course of conduct intended to cause its employees to abandon the Union on August 12 when its owner threatened to fire union adherents and predicted that their selection of the Union as their representative would cause him to raise prices and go out of business. Thereafter, Respondent officials unlawfully interrogated employees concern-

ing their union sentiments, informed them it was going to discontinue the practice of giving pay advances, unlawfully adopted a more stringent attendance policy, sought to intimidate an employee by insinuating he would receive no further financial aid if he failed to vote for the Company, and generally sought to convince employees that they would gain nothing if the Union became their bargaining agent. Last, but not least, Respondent temporarily suspended and reprimanded an employee for lawfully protesting safety conditions; terminated a second employee because he refused to perform what he justifiably considered to be dangerous work; and, subsequent to the election, discharged the most outspoken union adherent because he had openly supported the Union.

In sum, the record clearly reveals that the Union represented a majority of Respondent's employees in an appropriate bargaining unit on July 23, 1981, and that thereafter Respondent engaged in the above-described unfair labor practices with the intention of dissipating the Union's majority status. As observed by counsel for the General Counsel in his brief, the Board has found that threats of plant closure and the discharge of employees for engaging in union activity are actions which invariably create a lasting effect upon employees. In my view, each of the unfair labor practices committed by Respondent had a tendency to undermine the Union and impede the election process. Noting that Respondent's coercive conduct continued until the eve of the election, and that it terminated the most outspoken advocate after the election, I conclude that the possibility of erasing the effects of past practices and ensuring a fair election by the use of traditional remedies is indeed slight in the instant situation.

In sum, having considered all the relevant facts concerning Respondent's unfair labor practices, I conclude that they were sufficiently serious and pervasive in character to preclude the holding of a fair election and that, on balance, the sentiment of Respondent's employees expressed through their signatures on cards would be better protected by issuance of a bargaining order.

#### E. Case 8-RC-12562

I have found that Respondent violated Section 8(a)(1) of the Act during the critical period during the critical period by, *inter alia*: interrogating its employees regarding their union activities and sentiments; threatening plant closure if the employees selected the Union as their bargaining agent; and threatening to fire employees for engaging in union activities. As these findings reasonably tend to substantiate the matters alleged in Objections 2 and 3, the latter are sustained.

Objection 1 alleges that on August 12, 1981, and on other occasions during the organizational campaign, the Employer inflamed employees by stating the Petitioner was anti-Christian and a good Christian would not vote for the Petitioner. While the record does reveal that Respondent's owner, Booher, characterized the Union as a non-Christian organization on August 12 and on other occasions, the record further reveals that employee Vantilburg questioned the characterization at the August 12 meeting and that the Union via a leaflet described in the

<sup>33</sup> See G.C. Exhs. 10, 23, 30, and 31, respectively.

<sup>34</sup> While Vantilburg, Hammert, and Cross testified they were told that by signing the card they would get an election, or (Cross) that they (the Union) would try to get an election, each of the employees testified he read the card presented to him before he signed it. The pertinent language appearing on the cards is:

#### AUTHORIZATION FOR REPRESENTATION

I hereby authorize the Truck Drivers, Warehousemen and Helpers Union, Local No. 908, through its Officers and Agents, to represent me in rates of Pay, Hours of Labor, and other conditions of Employment, including election by the National Labor Relations Board. I find that the cards signed by the employees named are valid cards which may be counted as valid authorizations.

Report on Objections and Challenged Ballots, placed in the record as General Counsel's Exhibit 5, rebutted Booher's remarks. In my view, it is unlikely that either Booher's remarks or the Union's leaflet had any measurable effect upon the outcome of the election. I recommend that Objection 1 be overruled. Having found that Objections 2 and 3 should be sustained, I further recommend that the election conducted on September 18, 1981, be set aside.

#### CONCLUSIONS OF LAW

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

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

3. The following employees of Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time production and maintenance employees, truckdrivers and counter sales employees employed by the Employer at its 100 Keller Dr., Wapakoneta, Ohio and its 459 North Main St., Lima, Ohio facilities, excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

4. Since on and after July 23, 1982, the Union has represented a majority of the employees in the bargaining unit described above.

5. By engaging in the unlawful acts described in section III, above, Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act.

6. The above-described unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

#### THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, it shall be recommended that it be ordered to cease and desist therefrom and to take certain affirmative action necessary to effectuate the policies of the Act.

Having found that Respondent unlawfully terminated employees Robert Vantilburg and Daniel Cable, it will be recommended that Respondent offer to said employees immediate and full reinstatement to their former or substantially equivalent positions of employment, without prejudice to their seniority or other rights and privileges, and to make them whole for any loss of earnings suffered by reason of the unlawful discrimination against them by payment to them of backpay equal to that which they, individually, would have earned from Respondent from the date of their unlawful terminations to the date of Respondent's offer of unconditional reinstatement, less any net earnings during such period, with the backpay and interest thereon computed in the manner prescribed in *F.*

*W. Woolworth Co.*, 90 NLRB 289 (1950), and *Florida Steel Corp.*, 231 NLRB 651 (1977).<sup>35</sup>

Having found that issuance of a bargaining order is appropriate and necessary for the reasons set forth above, it shall be recommended that Respondent be ordered to recognize and bargain in good faith with the Union as the exclusive representative of the employees in the appropriate bargaining unit described in Conclusion of Law 3, and, if an understanding is reached, to embody such understanding in a signed agreement.

Respondent will be required to recognize and bargain, upon request, with the Union as of August 12, 1981, the date it unlawfully threatened plant closure and thereby embarked on its unlawful course of conduct which prevented the determination of the Union's majority status by a fair election. See *Trading Port, Inc.*, 219 NLRB 298 (1975), and *Peaker Run Coal Co.*, *supra*.

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

#### ORDER<sup>36</sup>

The Respondent, Ohio New and Rebuilt Parts, Inc., and/or Mel's Battery, Inc., Wapakoneta and Lima, Ohio, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Interrogating employees regarding their union activities or sentiments.

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

(c) Threatening to discontinue employee benefits, including pay advances, because employees join or support the Union.

(d) Promulgating and instituting a more stringent attendance policy because employees attempt to seek union representation.

(e) Informing employees that their receipt of previous financial assistance obligates them to abandon their support of the Union.

(f) Discharging or threatening to discharge employees because they join or support Truck Drivers, Warehousemen and Helpers Union, Local 908, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or any other labor organization.

(g) Attempting to discourage employees for protesting what they reasonably consider to be unsafe working conditions by threatening to terminate them if they file complaints with OSHA or terminating them for refusing to perform work which they reasonably feel is unsafe.

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

<sup>35</sup> See, generally, *Isis Plumbing Co.*, 138 NLRB 716 (1962).

<sup>36</sup> In the event no exceptions are filed as provided in Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

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

(a) Upon request, recognize and bargain with Truck Drivers, Warehousemen and Helpers Union, Local No. 908, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, as the exclusive representative of all employees in the appropriate bargaining unit, and, if an understanding is reached, embody same in a signed document if asked to do so. The appropriate unit is:

All full-time and regular part-time production and maintenance employees, truckdrivers and counter sales employees employed by the employer at its 100 Keller Dr., Wapakoneta, Ohio and its 459 North Main St., Lima, Ohio facilities, excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

(b) Offer Robert Vantilburg and Daniel Cable immediate and full reinstatement to their former or substantial equivalent positions of employment without prejudice to their seniority or other rights and privileges, and make them whole for any loss of pay they may have suffered as a result of their unlawful termination in the manner set forth in the section of this Decision entitled "The Remedy."

(c) Expunge from its records any reference to the unlawful reprimand given to Steven Leugers when he refused to pour lead on August 11, 1981.

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

(e) Post at its Wapakoneta and Lima, Ohio, facilities copies of the attached notice marked "Appendix A."<sup>37</sup> Copies of said notices, on forms provided by the Regional Director for Region 8, after being duly signed by the Respondent's authorized representative, shall be posted by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

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

<sup>37</sup> In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."