

Purolator Armored, Inc. and Local 299, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Case 7-CA-17895

29 February 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS
ZIMMERMAN AND HUNTER

On 24 June 1981 Administrative Law Judge Norman Zankel issued the attached decision.¹ The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

Thereafter, by Order dated 4 February 1982 the National Labor Relations Board remanded this proceeding to the judge for further findings by him with respect to credibility of witnesses and the weight of the evidence as a whole with regard to a consideration of the applicability of *Textile Workers v. Darlington Mfg. Co.*, 380 U.S. 263 (1965), to the closing at issue in this case. On 25 March 1982, the judge issued the attached supplemental decision on remand in this proceeding. Thereafter the Respondent filed exceptions to this supplemental decision and a supporting brief, and the General Counsel filed an answering brief.

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

The Board has considered the decision and supplemental decision on remand in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,² and conclusions³ and to adopt the recommended Order as modified.

¹ On 6 July 1981 the judge issued an addendum to the decision in which he concluded that the Supreme Court's decision in *First National Corp.*, 452 U.S. 666 (1981), did not affect his finding that the Respondent had unlawfully refused to bargain.

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

³ In his initial decision herein, the judge concluded that the Respondent, inter alia, violated Sec. 8(a)(3) of the Act by closing its coin change service. The judge relied on the *Wright Line* analysis in reaching that conclusion. See *Wright Line*, 251 NLRB 1083 (1980). In his supplemental decision on remand the judge also concluded that under *Darlington*, supra, the Respondent violated Sec. 8(a)(3) by closing the coin change service. In so deciding, the judge stated that his findings based on *Darlington* were not intended to supplant his findings in his initial decision based on *Wright Line*. The judge determined that the two analyses of the case stood independent of each other, and either view of the case was valid. We do not agree. Thus, to be a violation under *Darlington*, a partial closing must not only be discriminatory, but must be motivated by a desire to chill unionism of an employer's other employees, and it must be reasonably foreseeable that the closing will have that chilling effect. However, we agree with the judge's conclusion that the Respondent's partial closing here violated the Act under the standards set forth in *Dar-*

The judge found, inter alia, that the Respondent violated Section 8(a)(3) and (1) of the Act by closing its coin change service. We agree with this finding. In order to remedy this violation, the judge recommended that the Respondent be ordered to "immediately reopen and reinstitute" its coin change service, and that the Respondent offer full and immediate reinstatement to all employees who were laid off as a result of the closing. Although he found that the Respondent had suffered long and extensive financial losses in the operation of its coin change service, the judge nonetheless concluded that a status quo ante remedy should be ordered, that is, that the Respondent should be required to reopen its coin change service. We do not agree.

The evidence that the Respondent's coin change service operation was financially distressed is convincing. By April 1980,⁴ the time of the events herein, the Respondent was expending an average of about \$21,000 on its coin change service, but realizing only an average of about \$2100 of revenue from that operation. Projected over a year's basis, the Respondent's net loss from its coin change service would approximate over \$200,000. Furthermore, a study done by the Respondent in March noted that the commitment of \$500,000 to the coin change service as a standing cash balance meant that the Respondent was losing \$100,000 per year that it would earn had that balance been invested at the prevailing prime interest rate.

Despite these established facts, the judge determined that the Respondent should be ordered to reopen its coin change service. The judge reasoned that reinstatement of the coin change service would not require the Respondent to acquire new space or equipment. Additionally, the judge noted that the Respondent had tolerated the economic losses suffered at its Detroit location for some time prior

lington. In so doing, however, we do not rely on the judge's finding that the Respondent's cost-benefit study was a subterfuge.

In addition, on 6 July 1981, the judge issued an addendum to his initial decision. In the addendum, the judge determined that the Supreme Court's recent opinion in *First National Corp.*, supra, was inapplicable to the instant case. We find it unnecessary to pass on this issue because, assuming arguendo that the Respondent had a duty to bargain, we would find, contrary to the judge, that the Respondent did not violate Sec. 8(a)(5) concerning the closing of its coin change service. By letter dated 5 June 1980 the Respondent notified Union Business Agent George Langkil of the Respondent's decision to discontinue providing change service and to lay off employees in the coin department as of 20 June 1980. In response, the Union, by letter dated 6 June 1980, acknowledged the forthcoming closing and requested only that the Respondent employ those who would be laid off, prior to employing "outside parttime help." Based on the foregoing, we find that the Union had sufficient notice of the Respondent's decision to close its coin change service, but failed to exercise its right to request bargaining on the issue. Therefore, we conclude that the Respondent did not violate Sec. 8(a)(5) by failing to bargain. *Citizens National Bank of Willmar*, 245 NLRB 389, 390 (1979).

⁴ All dates hereinafter are in 1980 unless otherwise indicated. The coin change service under consideration here was initiated in April 1979.

to the advent of the Union. In sum, the judge concluded that the Respondent failed to demonstrate mitigating circumstances which would warrant the continued closing of its operations.

Contrary to the judge, we do not believe that, in the circumstances of this case, the Respondent should be *required* to reopen its closed operations. We find that such an order here would likely be unduly burdensome and is unnecessary to effectuate the policies of the Act. Instead of requiring the Respondent to reopen a financially unprofitable operation, we conclude that the Respondent's unfair labor practices will be sufficiently remedied by a full make-whole order covering the employees of the closed operation.⁵

AMENDED REMEDY

We shall order the Respondent to make whole all employees employed in the coin change service who were terminated as a result of the Respondent's discriminatory decision to close that operation. We shall require the Respondent to offer reinstatement to each of the discriminatees by either (1) reinstating its coin change service operation and offering reinstatement to each of the discriminatees to his or her former position or, if such position no longer exists, to a substantially equivalent position, without prejudice to his or her seniority or other rights and privileges previously enjoyed; or (2) offering reinstatement to each discriminatee to any position in its existing operations which he or she is capable of filling, giving preference to the discriminatees in order of seniority; and in the event of the unavailability of jobs sufficient to permit immediate reinstatement of all the discriminatees, place those for whom jobs are not now available on a preferential hiring list for any future vacancies which may occur in jobs the said discriminatees are capable of filling. In addition, we shall order the Respondent to make the discriminatees whole by paying each of them a sum of money equal to the amount that would have been earned as wages from the date of termination to the date the discriminatee either secures equivalent employment or the Respondent makes an offer of reinstatement, computed in accordance with the Board's usual formula set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest thereon computed in the manner set forth in *Florida Steel Corp.*, 231 NLRB 615 (1977).⁶

⁵ See, e.g., *Great Chinese American Sewing Co.*, 227 NLRB 1670 (1977). Contrary to the judge, we do not believe that *Great Chinese American Sewing* is distinguishable because there respondent would have been required to expend funds in acquiring new equipment. The Board explicitly held that it would not "force the reestablishment of an unprofitable operation." *Id.*

⁶ See, generally, *Isis Plumbing Co.*, 138 NLRB 716 (1962).

ORDER

The National Labor Relations Board orders that the Respondent, Purolator Armored, Inc., Detroit, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating employees, threatening them with economic reprisal, promising them benefits, implying their union activity is under surveillance, or engaging in any other conduct in violation of Section 8(a)(1) of the Act.

(b) Discriminating against its employees because they engage in union activities.

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

2. Take the following affirmative action which it is found will effectuate the policies of the Act.

(a) Offer backpay and reinstatement to all persons employed in the coin change service, and make them whole for any losses suffered by reason of the discrimination against them in the manner set forth in the section of this Decision and Order entitled "Amended Remedy."

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

(c) Post at its Detroit, Michigan facility copies of the attached notice marked "Appendix."⁷ Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

Inasmuch as the former coin room employees presently are dispersed and do not report to a central location for work, and it is likely some delay well may attend implementation of the "Amended Remedy" herein, provisions shall be made to assure that all affected employees are aware of the notice at the earliest date. *Amshu Associates*, 218 NLRB

⁷ If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

831, 836-837 (1975). Accordingly, the "Appendix" shall be prepared by the Regional Director in sufficient numbers to permit mailing to each unit employee. Such notices shall be forwarded by the Regional Director to the Respondent. Within 5 days of receipt thereof, the Employer shall mail a copy of the notice to each of its former Detroit coin room employees. Upon completion of such mailing, the Employer shall forthwith submit to the Regional Director a list of the names and addresses of the employees to whom the notices were mailed, together with a certification signed by an authorized employer representative that the Employer has completed the mailing in accordance with the terms of this Order.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the allegation in complaint paragraph 10(e) is dismissed.

APPENDIX

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

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT question you concerning your activities on behalf of Local 299, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or any other labor organization.

WE WILL NOT threaten that we will take reprisals against you for engaging in union activities.

WE WILL NOT promise you any benefits in order to induce you to refrain from engaging in union activities.

WE WILL NOT say anything to you which indicates your union activities are under surveillance.

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

WE WILL offer full and immediate reinstatement to each of the employees who worked in our closed coin change service by either (1) reinstating our coin change service operation and offering reinstatement to each of the discriminatees to his or her former position or, if such position no longer exists, to a substantially equivalent position, without prejudice to his or her seniority or other rights and privileges previously enjoyed; or (2) offering reinstatement to each discriminatee to any position in its existing operations which he or she is capable of filling, giving preference to discriminatees in order of seniority, and in the event of the unavailability of jobs sufficient to permit immediate reinstatement of all the discriminatees, place those for whom jobs are not now available on a preferential hiring list for any future vacancies which may occur in jobs the said discriminatees are capable of filling.

WE WILL make whole the discriminatees mentioned above by paying each of them a sum of money equal to the amount that would have been earned as wages from the date of termination to the date the discriminatee either secures equivalent employment or we make an offer of reinstatement, together with interest thereon.

PUROLATOR ARMORED, INC.

DECISION

STATEMENT OF THE CASE

NORMAN ZANKEL, Administrative Law Judge: This case was heard before me on March 11 and 12 and April 21, 1981, at Detroit, Michigan.

Upon an original charge filed on June 17, 1980¹ by the Union, the Regional Director for Region 7 the National Labor Relations Board (the Board) issued a complaint and notice of hearing on July 24.

In essence, the complaint alleges the Employer violated Section 8(a)(1) of the National Labor Relations Act, as amended (the Act), by unlawfully interrogating its employees, issuing threats of economic reprisal, making promises of benefit, impliedly indicating union activity of employees was under surveillance and engaging in other miscellaneous acts of interference, restraint, and coercion. Also, it is alleged the Employer discriminated against employees in violation of Section 8(a)(3) and (1) of the Act by closing down its Detroit coin room operation on or about June 21 and laying off the employees who worked there. Finally, the complaint alleges the Employer unlawfully refused to bargain collectively with the Union by unilaterally closing the Detroit coin room on or about June 21 without discussion with the Union as collective-bargaining representative of those coin room employees.

¹ All dates hereinafter are 1980 unless otherwise stated.

The Employer's timely answer to the complaint admitted certain matters but denied the substantive allegations and that it committed any unfair labor practices.

Additionally, the Employer interposed certain affirmative defenses. Those defenses consist of (1) a claim that no bargaining obligation exists herein because the coin room unit includes guards and the Union admits non-guard employees to membership; (2) in any event, the Employer fulfilled any bargaining obligation which may have existed by complying with the Union's requests that the Employer follow certain procedures in effecting the layoff of the coin room employees; and (3) the layoffs were economically motivated.

All parties appeared at the trial. Each was represented by counsel and was afforded full opportunity to be heard, to introduce and to meet material evidence, and to examine and cross-examine witnesses, to present oral argument, and to file briefs. I have carefully considered the contents of the briefs on June 2, 1981, filed by counsel for the General Counsel and the Employer's counsel.

Upon consideration of the entire record and the briefs and my observation of the witnesses and their demeanor, I make the following

FINDINGS AND CONCLUSIONS

I. JURISDICTION

Based on the admissions contained in the Employer's answer, there is no issue as to jurisdiction or labor-organization status.

The Employer is a Texas corporation with an office and place of business in Detroit, Michigan. Although the Employer maintains other installations in other States, only the Employer's Detroit, Michigan operation is involved in this case. The Employer's business consists of providing armored car and related services.

During the calendar year immediately preceding issuance of the complaint, a representative period, the Employer's gross revenues exceeded \$500,000. In the same period of time, the Employer performed services valued in excess of \$50,000, which services were performed in and for various enterprises located in States other than Michigan.

Upon the foregoing, I find the Employer is an Employer engaged in commerce within the meaning of Section 2(2), (6), and (7) and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background and Scenario of Events

The recitation of facts below is a composite of relevant unrefuted oral testimony, supporting documents, and other undisputed evidence. Wherever material conflicts exist they are resolved. Not every bit of evidence is discussed. Nonetheless, I have considered all of it together with all arguments of counsel. Omitted matter is considered irrelevant or superfluous.

The Employer provides armored car and related services to numerous customers requiring transportation and safeguarding of funds and valuables. As noted, the in-

stant case relates only to the Employer's Detroit, Michigan terminal.

The classifications of employees at the Detroit terminal are messengers, vault persons, check cashiers, coin room employees, mechanics, and clerical employees. Drivers, messengers, vault personnel, and supervisors customarily carry firearms.²

Since at least October 1977, the Union has been the recognized and contractual collective-bargaining representative of the Employer's Detroit drivers and messengers. Additionally, since approximately July 16, 1979, the Union has been the recognized and contractual collective-bargaining representative of the mechanics at the Detroit terminal.

Prior to April 1979, the Employer used its armored cars to provide its customers with a change service. Messengers on each of approximately 30 trucks at the terminal were dispatched with a coinbox containing several thousand dollars from which they provided change to customers. The Employer found this operation financially unsound. Thus, the operation was discontinued.

In April 1979, the Employer replaced the former change service operation by establishing its coin room. The money previously used on the armored cars was consolidated in the coin room. Under this new system, change bags prepared in the coin room in response to customer orders were given to the drivers for delivery during their regular rounds.

Several new employees were hired to fill positions in the new coin room department. The coin room operation was more efficient than the former method of providing change to customers. Orders were filled for customers in a more controlled, businesslike manner. Each day the coin room employees balanced the "banks" from which they made change. Individual orders were sewn into bags so they could not be tampered with. Customers could place regular orders or increase their orders. For the first time, customers were charged for this service. Before the coin room opened, messengers merely sold whatever change they had on hand.

However, even from its inception, the coin room was financially unprofitable to the Employer. Various witnesses testified on the Employer's behalf to show this. Thus, A. Young, terminal manager at Detroit, wrote as early as June 22, 1979, after 2 months of operation of the coin room:

The new procedure for the change order department [coin room] was not designed to necessarily be revenue producing; but in my opinion it should at least be self-supporting. After a brief study of the operation, it appears that we are still losing in that department. The main reason being the large number of people on the staff (labor costs).

D. Vacca, assistant terminal manager, reported in January or February 1980 that certain improvements in

² Only one coin room employee, Elias, testified he carried a firearm. As will be demonstrated below, the status of coin room employees, as guards, is in dispute.

service could be made. His report was not submitted into evidence.

In March 1980, T. J. Loyal, division vice president for the Employer's southeast division, conducted an inspection of the Detroit coin room operation. He was then considering opening a coin and currency operation at the Employer's Washington, D.C. terminal. Loyal concluded that the Detroit coin room operation was a "serious loser financially." Loyal observed that the commitment of \$500,000 to the coin room as a standing cash balance deprived the Employer of interest of approximately \$100,000 per year that it might be earning by investing at the then prevailing prime interest rate of 20 percent.

On April 23 and 24, D. Cichalski, the Employer's assistant comptroller, visited the Detroit terminal. The purpose of this visit was "to overlook the operations of the coin room and to obtain an understanding of the operation."

Cichalski submitted his report on May 21. In that memorandum, Cichalski stated the purpose of his April visit to the Detroit terminal was: "To study the operation and accounting for the several bank accounts that are used for customer change funds, check cashing and change services."

Problems which Cichalski studied include the comingling of funds in the three operating accounts. The report suggests ways of acquiring new customers for the service, changes in the method of charging customers, and installation of different accounting methods.

Cichalski's report contains, inter alia, a recommendation to conduct a cost-benefit study of Detroit's coin room operation. His report does not directly allude to consideration of terminating the coin room operation.

Cichalski's above-stated recommendation received quick response. On May 27, W. Tulko, vice president of finance and the Employer's chief financial officer, directed that a cost-benefit study be completed as soon as possible.

Accordingly, a cost-benefit study was immediately undertaken. It revealed the Detroit coin room operation was losing money. Thus, the study shows the average monthly revenue of the coin room was \$2,114, while average monthly expenses were \$21,400. The coin room was experiencing a monthly net loss from operations of \$19,286.

Meanwhile, in March 1980, the Union began an organizational campaign among the coin room employees. They had been unrepresented for collective-bargaining purposes since the coin room opened in April 1979. Thus, then Union Business Agent G. Langkil asked union steward F. Smith to canvass the coin room employees on the question of union membership. Smith discussed the matter with employee M. Longas who, in turn, discussed unionization with many of the coin room employees. Longas gave them authorization cards to sign. The Union's campaign was in progress in March and early April.

On April 29, the Union filed a petition for a certification election with the Board. The petition was docketed as Case 7-RC-15907. A copy of the petition was sent to the Employer on April 30 by the Board. The petition requested an election among the employees in a unit con-

sisting of all regular full-time and part-time coin room personnel at the Detroit location.

G. Rudich, the Employer's vice president of personnel and industrial relations, testified he learned of the Union's representational interest in "late April, early May" through a phone call from R. E. Dyer, the Employer's divisional vice president for the Detroit location. Dyer told Rudich he had received a copy of the petition with a letter from Langkil. From the foregoing, I find the Employer knew of the Union's campaign approximately 3 weeks before ordering the cost-benefit study based on Cichalski's report.

On May 16, the Employer signed a Stipulation for Certification Upon Consent Election.³

The stipulation contains the following unit description:

All full-time and regular part-time coin personnel in the coin room employed . . . [at the Detroit Terminal] . . . but excluding office personnel, clerical employees, guards and supervisors as defined in the Act; and all other employees.

In addition the stipulation contains a provision, as follows:

If a majority of valid ballots are cast for the incumbent union, they will be taken to have indicated the employees' desire to be included in the existing vaultmen, messengers, and drivers unit currently represented by . . . [the Union]. . . . If a majority of valid ballots are cast against representation, they will be taken to have indicated the employees' desire to remain unrepresented. In any event, a *certification of results of election will be issued*. [Emphasis added.]

It was agreed an election among the above-described unit employees would be conducted by the Board on May 29.

Meanwhile, several conversations regarding the Union ensued between management representatives and coin room employees. On or about May 8, employee C. Donovan was asked by Vacca what she (Donovan) had heard about the Union. During this conversation, Vacca asked Donovan to talk to the other employees regarding the union activity.⁴ This last statement was made in the context of Vacca advising Donovan that management officials recently held a meeting to consider Donovan's work progress and noted several positions opening for her advancement.

In early May, employee Longas was also asked by Vacca if he knew anything about the Union or who was involved.⁵

³ Langkil signed an identical stipulation on May 13.

⁴ Vacca was not asked to refute Donovan's account. He testified merely he had no recollection of directly asking Donovan how she felt about the Union. I credit Donovan's forthright narration.

⁵ Based on Longas' uncontradicted testimony, Vacca, who appeared as an Employer witness, was not asked to refute this conversation.

On or about May 15, J. Larsen, coin room supervisor, asked Longas whether he knew anything about the union activities.⁶

There is no evidence the Union conducted an overt preelection campaign. The Employer, through Rudich, instructed the Detroit management officials, in Rudich's words, "to run a low-key campaign, no coercion, leave the people alone, no literature, just—really just doing nothing and go about their general business."

However, in apparent disregard of this directive, Vacca distributed campaign literature at work to the coin room employees.⁷

On May 28, the Employer held a meeting for the coin room employees. Most of them attended. The Employer claims the meeting was delayed half an hour in order that union steward Smith and Langkil could be present. Smith did not recall whether he had been invited, but doubted it because of his work schedule. Smith had no knowledge of any invitation to Langkil, who did not testify.⁸

Dyer presided over the May 28 meeting. Other supervisory officials present were: J. Larsen, operations supervisor; A. R. Young, operations manager; D. Delpier, coin room supervisor; and Vacca. My findings of what transpired during this meeting are derived from a composite of the testimony of employees Donovan, L. Bradley, and Elias who testified on behalf of the General Counsel. Each of them presented spontaneous, candid, and comprehensive versions of what occurred. In material respects, their testimony is mutually corroborative. To the extent inconsistencies exist, they are minor. In contrast, the Employer officials who testified relative to the events of the May 28 meeting did so in generalization and self-serving denials. In some respects (as noted throughout my narration of facts and as will be more fully explicated in the discussion of the specific 8(a)(1) allegations below) they were not even asked to deny the explicit testimony of these General Counsel witnesses.

Dyer opened the May 28 meeting by telling the employees that he had been instructed not to threaten or promise them anything but he could predict that if the Union were voted in the Company would be required to reevaluate the situation in the coin room.⁹ Dyer opined such reassessment would be followed by a cost increase to customers, which would cause a loss of customers and would result in the employees losing their jobs. In this regard, Dyer said:

⁶ Larsen, who testified on behalf of the Employer, was not asked to deny this part of Longas' testimony.

⁷ I reject the General Counsel's contention Rudich's testimony should be discredited because the existence and distribution of the antiunion literature contradicts his earlier testimonial claim that the Employer did not campaign. Nonetheless, I find the Employer did distribute such literature on or about May 27, based on Elias' and Donovan's testimony. In particular, Elias' rebuttal testimony to that effect stands uncontradicted by Vacca.

⁸ Langkil was no longer business agent at the time of trial.

⁹ This statement provides another basis for crediting the General Counsel's witnesses, because it logically and reasonably flows from the Employer's various financial and operational analyses then pending and previously made.

... let me promise you, no I can't use promise. . . . I think I can promise this to you. Let me promise you this, that if in fact we do have a union here and costs go up we will transfer those costs to the customers, and if in fact we do that we will have to make adjustments elsewhere. Let me assure you this is where we will make the adjustments that you will bear the brunt of the new expenditures, and that if we lose customers that this is the place where those results will be felt. I feel safe I can promise you that.

Dyer also told the employees there was no need for a third party to intervene in their problems, and, depending on how the election went, it would be a good idea to talk to the employees individually to see how things were going and deal with any problems. Dyer also told employees they could check around and make certain that, compared with employees doing comparable work, they were properly paid.

Dyer also spoke of a dental and retirement plan. Elias asked for clarification. Dyer responded those benefits were not actually in effect for the employees but they were being considered. Dyer noted that other Employer facilities did not have a unionized coin room. Employee Bradley observed that the Chicago facility did have a unionized coin room. Young acknowledged that fact, but said Chicago's coin room was operating at a loss. Then, Dyer said that Detroit also was losing money. Young confirmed this.

Vacca commented the coin room operation was not intended to make money; it was a service-oriented program. Young then said it would not be to the advantage of part-time employees to vote for the Union because they would be paying union dues but would not be entitled to representation by the same union collecting them.

Dyer concluded the meeting with a statement that the employees who would vote yes for the Union could stay home the next day, the election day, but those who would vote no could come to work.

On May 29, before the election, Donovan was asked separately by both Larsen and Vacca if she (Donovan) knew how employees McDonald and Greason would vote. Donovan told Larsen and Vacca she thought those two employees would vote no.

Also on May 29, the election was conducted between 1:30 and 2:15 p.m., as scheduled. Of the 14 eligible voters, 13 cast ballots in favor of representation by the Union and one voted against it.

Larsen announced the results to the employees. He expressed surprise at the outcome. Larsen then went to his desk where he was joined by Longas who had been the Union's principal distributor of authorization cards and solicitor of signatures. Larsen told Longas he could not believe he (Longas) did "it," that he had the most to lose. Elias entered the conversation. Larsen repeated Longas had the most to lose since he had been there the longest time, made the most money, did not have a high school education, and would find it very difficult to get a job somewhere else.

Some time between May 27 and June 5, the cost-benefit study ordered (as noted above) on May 27 by Vice

President Tulko had been completed. The undated study shows coin room revenues of approximately \$1600, compared with approximately \$21,400 expenses.¹⁰

On June 5, Dyer wrote Langkil:

The Detroit-area economic condition and its adverse effect on our business has forced Purolator to take a close look at the operating costs required to provide various service to our customers.

After a detailed cost analysis of our operation, we conclude that we must discontinue providing change service to our customers.

Effective June 20, 1980, we must therefore indefinitely lay off approximately 12 employees in our coin department. We will do this in reverse order of seniority.

On June 6, the Board's Regional Director issued a "Certification of Results of Election" which indicated the Union "may bargain for the . . . (coin room employees) . . . as part of the group of employees which it (the Union) currently represents."

Also on June 6, Young held a meeting among the coin room employees. An invitation to attend the meeting had been extended to union steward Smith and Business Agent Langkil. Neither attended.

There is no substantial dispute concerning what occurred during the June 6 meeting. Young told the assembled employees that the coin room would be shut down effective June 20. He said that eventually the Employer would offer part-time employment to the employees according to their seniority. He denied the advent of the Union had anything to do with the coin room closing. Some employees attempted to suggest alternatives to make the coin room profitable. However, Young would not discuss them. Instead, Young informed the employees that there could be a need for the continuation of the services of two employees on a part-time basis, and that these offers would be made by seniority. In addition, Young advised the employees that, if qualified, they would be offered positions on the Employer's trucks.¹¹

Some time between June 6 and 20, Larsen told Longas and Elias that the Employer was planning to open a non-union coin room in its Flint, Michigan terminal. Larsen admitted that he, indeed, may have "joked" about such a thing.¹²

Both Elias and Longas testified that they were told by Larsen that it was their own fault that the coin room was closed and that it was closed because they had voted for the Union.¹³

¹⁰ Dyer explained the expenses would be greater if interest from lost investment potential were added.

¹¹ The State of Michigan imposes certain requirements upon armored vehicle personnel. This was the qualification to which Young referred.

¹² This finding is based on the mutually corroborative testimony of Longas and Elias, and Larsen's admission that he may have jocularly referred to a nonunion operation.

¹³ Elias testified extensively regarding the conversation from which this conclusion is drawn. He fully narrated the colloquy between him and Larsen. Larsen's account of the conversation was generalized. Moreover, he was not asked to refute the particulars of the conversation. Larsen only was asked whether he told any employee the coin room was being closed because of any activity "relating to Teamsters 299." Larsen's self-serving reply was "no, I did not." I credit Elias.

As noted, Langkil did not attend the June 6 employee meeting. However, by letter dated June 6, Langkil responded to Dyer's June 5 letter. Thus, Langkil wrote:

In response to your letter of June 6, 1980 it is my understanding that because of the Bargaining Unit that was included in your operation of . . . Detroit, Michigan, you are putting into effect a layoff as of June 20, 1980.

Therefore, I am requesting you to use all union members that were organized into your operation before calling any outside part-time help.

Any questions or information regarding this letter you may have. Please feel free to contact me at Local Union No. 299.

The Employer, in an undated letter addressed "Dear Customer," advised them of the impending coin room closing. In salient part, the letter, signed by Dyer, states:

After careful analysis, we discovered that our change service operation costs significantly more than we can afford. This is caused by today's high cost of money *complicated by a recent vote of our coin room employees to become Teamster members.* [Emphasis added.]

On or about June 17, Vacca asked Donovan to tell him who instigated the union.¹⁴

On the same date, Vacca told Donovan that he (Vacca) wished she had talked sense to the other employees before the election, and that if the Union had not been voted in and even if the coin room would have closed, she (Donovan) probably would have a job "someplace in the Company."¹⁵

Bradley testified D. Delpier told her (Donovan), on June 20, that if the Union had not been voted in the employees would still have their jobs.¹⁶

Longas' conversation of the same import with Larsen occurred on or about June 20, 2 weeks after that of Elias. Longas was sure and specific concerning what was said by Larsen. Larsen was not asked to refute the particulars of Longas' version. Larsen answered, "No, I didn't," when asked whether he told Longas he was losing his job because he joined the Union. I cannot credit this generalized denial in the face of the more specific account provided by Longas.

Finally, I find the testimony in this regard presented by Elias and Longas to be inherently consistent.

¹⁴ This finding is based on Donovan's credible and uncontradicted testimony.

¹⁵ Vacca simply unequivocally denied making this statement. However, I find he did so, based on Donovan's generally more impressive demeanor and the credited testimony of employee Bradley who, as noted in the text immediately following, testified supervisor D. Delpier made a comment to the same effect 3 days later. Additionally, I find it plausible Vacca made this statement to Donovan because, as noted hereinabove, Vacca had asked Donovan (on or about May 8) to speak to the other employees regarding the union activity.

¹⁶ During direct examination as an Employer witness, Delpier unequivocally denied he made such a statement. However, Bradley's positive recollection of the conversation, coupled with Delpier's equivocation when questioned by the bench that he did not remember *any* conversation with Bradley, persuade me Bradley is the more credible of these two witnesses. See, also, discussion of Larsen's comment of similar import to Elias and Longas (complaint par. 10-k) and Vacca's similar remark to Elias on July 3 (complaint par. 10-1).

There was no contact between the Union and the Employer between Langkil's June 6 letter to Dyer and June 17. On June 17, the Union filed the charge in the present case. Notice of this charge was received by the Employer on June 18.

On June 20, Dyer wrote Langkil. This letter contains the names and layoff dates proposed for each of the 14 coin room employees. Ten were to be laid off on June 20 and four on June 27.

Dyer's June 20 letter claimed 13 of the employees had been offered part-time employment in the coin room following his or her layoff.¹⁷ Also, Dyer's letter claimed that, if qualified, each laid-off employee had been offered part-time driver positions.

Dyer's June 20 letter ended with an invitation for Langkil to meet with Rudich in Detroit on June 30 "for the purpose of negotiating a coin room contract for those eligible persons remaining on the job."

On or about July 3, Vacca told Elias that the coin room was closed because the employees had joined the Union. Vacca then said that the Employer could not afford to have the coin room go out on strike and take the entire terminal with them.¹⁸

Some time during the week ending July 7, Supervisor D. Delpier spoke to Elias, apparently regarding the Union. Elias' uncontradicted account, in salient part, follows: "Dwayne [Delpier] asked me who started this s-t and I said I couldn't tell him. He [Delpier] says c'mon just out of curiosity tell me who started it."¹⁹ Dyer received no response from the Union to his June 20 offer for Langkil to meet with Rudich for negotiations on June 30. Thus, on June 30 Rudich phoned Langkil, but received no response. Accordingly, on June 30 Rudich dispatched a telegram to Langkil. The telegram, in relevant part, states "please be once again advised that I am ready to meet with you at your convenience to discuss the coin room situation and to negotiate an addendum to the . . . [collective-bargaining agreement]." Rudich received no response from Langkil.

Ultimately, Rudich made contact with James Morisette who had replaced Langkil as the Union's business agent. They arranged to meet.

Rudich and Morisette met on July 7 or 11 and August 4. During each of these sessions, Morisette requested reinstatement and backpay for the laid-off coin room employees.²⁰

By letter dated September 9, Rudich wrote Morisette. Rudich outlined his version of what occurred between the parties regarding the coin room since June 5. The letter concluded with a renewed request that the Union

"immediately commence good faith bargaining with the Company in accordance with a concentrated schedule of meetings to discuss the Coin Room closing. To advance the discussions, the Company proposes payment of two weeks' pay to each of the affected employees."

Thereafter, negotiations were conducted for a renewal of the drivers', messengers', and mechanics' collective-bargaining agreement. Those negotiations culminated in a new collective-bargaining agreement dated October 2, 1980, effective to October 1, 1983. This new agreement incorporates the coin room employees into the recognition clause and provides for customary terms and conditions of employment, including wages, for coin room personnel.

B. Analysis

1. Interference, restraint, and coercion

In paragraph 10 of the complaint, numerous activities of the Employer are alleged as violations of Section 8(a)(1) of the Act. They will be discussed separately, according to categories of unlawful interrogation, threats of reprisal, promises of benefits, implied surveillance, and miscellaneous activity.

The Board's test for 8(a)(1) conduct is whether it reasonably tends to interfere with, restrain and coerce employees in the exercise of their statutory rights. *Keystone Pretzel Bakery*, 242 NLRB 492 (1979); *Hanes Hosiery*, 219 NLRB 338 (1975).

Credibility of the respective witnesses is a key element in my resolution of the 8(a)(1) allegations. The recitation of the scenario of events, supra, contains my credibility resolutions as to some of the alleged 8(a)(1) conduct. That discussion will not be reiterated but, where appropriate, reference will be made to it.

The ultimate choice in making findings of fact based on credibility is based on my observation of witness demeanor, unrefuted testimony, the weight of the respective evidence, established or admitted facts, inherent probabilities and reasonable inferences which may be drawn from the record as a whole. *Northridge Knitting Mills*, 223 NLRB 230 (1976); *V & W Castings*, 231 NLRB 912, 913 (1977); *Gold Standard Enterprises*, 234 NLRB 618 (1978).

(a) Interrogation

In complaint paragraph 10(c) it is alleged that Vacca and Larsen interrogated an employee concerning her knowledge of union activity and how employees would vote.

I have found hereinabove that the subject conversation occurred on May 8 as described by Donovan. The Employer intimated, but did not prove, that Vacca was in Chicago on the date. Donovan remained unshaken during cross-examination even when confronted with the possibility Vacca might testify (which he did not do) that he was out of state on the day Donovan claimed Vacca spoke with her. Vacca was not asked to deny whether he asked who instigated the Union or how anyone would vote. Moreover, he was not asked whether he spoke to Donovan regarding McDonald or Greason. Instead,

¹⁷ It apparently was not feasible to totally end all coin room service.

¹⁸ Vacca unequivocally denied making these statements, but was not asked to deny that he had any conversation with Elias on this date. I credit Elias' comprehensive, relaxed, and forthright account of this conversation. Moreover, as already noted, it is consistent with testimony of other witnesses who ascribed similar remarks to Larsen.

¹⁹ This apparent interrogation is not alleged as a violation of Sec. 8(a)(1).

²⁰ I consider the various testimony regarding what else transpired at these meetings irrelevant, in the absence of a theory that the Employer engaged in surface bargaining. I reject the Employer's arguments that conduct is probative evidence of its good faith. Indeed, much of that evidence is recriminatory, seeking to impute bad faith to the Union.

when Vacca testified, he was asked whether he questioned Donovan regarding how she felt about the Union. Even to this question, Vacca equivocated, "I don't know if I asked her [Donovan] what she felt about Teamsters 299. I don't remember ever asking her that directly."²¹

In view of Donovan's general demeanor, her direct and sure testimony, Vacca's admitted vague recollection and his failure to address part of the allegation, I credit Donovan. Similarly, I credit Donovan's specific testimony regarding Larsen who did not make any attempt to refute it.

It is legion that interrogation of employees which requires them to reveal or betray their union sentiments or those of other employees is unlawful under Section 8(a)(1). It is clear that the questions posed to Donovan by Vacca and Larsen on May 29 have such an effect. Accordingly, I find merit to the allegations contained in complaint paragraph 10(c).

Complaint paragraph 10(j) alleges that Vacca unlawfully interrogated an employee as to who instigated the union's campaign. This allegation is based on Donovan's testimony, described supra that on June 17 Vacca asked her "who had instigated the Union." Donovan testified that this remark followed Vacca's comment that he was shocked to see the employees had voted yes. As previously observed, Vacca was not specifically asked to refute this part of Donovan's testimony.

With Vacca, as with all other employer witnesses who did not seek to rebut testimony which implicated them in alleged unlawful activity but who appeared as witnesses on other matters, I have inferred that their testimony would have been adverse to the Employer. *Interstate Circuit v. U.S.*, 306 U.S. 208, 225-226 (1939); *Teamsters Local 959 (Northland Maintenance)*, 248 NLRB 693, 698 (1980); *Monahan Ford Corp.*, 173 NLRB 204 (1968). Accordingly, Donovan's testimony demonstrates that Vacca interrogated her concerning who instigated the Union. Such interrogation is violative of Section 8(a)(1). *Sentry Investigation Corp.*, 249 NLRB 926, 930. I find merit to the allegations of complaint paragraph 10(j).

In complaint paragraph 10(m) it is alleged that on or about May 15 and 20 Vacca unlawfully interrogated employees concerning the Union. This allegation is based on Donovan's testimony that, on May 8, Vacca asked her whether she heard anything about the Union activity and asked Donovan to talk to the other employees regarding it. Also, this allegation is based on Longas' testimony that in early May, Vacca asked him if he knew anything about the Union or in Longas' words, Vacca asked "if I knew of anybody that was involved in general."

As previously noted, as to Donovan, Vacca was merely asked whether he had asked Donovan how she felt about the Union. Vacca was not asked to refute the comprehensive pertinent ingredients of Donovan's testimony.

Vacca did not at all address this part of Longas' testimony.

Inasmuch as I have found Donovan and Longas independently credible witnesses and their testimony regard-

ing this allegation remains virtually uncontradicted, I have credited their versions. Such interrogation is inherently coercive, in violation of Section 8(a)(1). *Permanent Label Co.*, 248 NLRB 119, 129 (1980); *Durango Boot*, 247 NLRB 361, 363 (1980). Thus, I find merit to the allegation in complaint paragraph 10(n).

Complaint paragraph 10(n) alleges that on or about May 15, Larsen unlawfully interrogated an employee. This allegation is based on Longas' testimony that, on the subject date, Larsen asked him who had initiated the Union and whether Longas knew anything about the Union.

Although he appeared as a witness for the Employer, Larsen was not questioned about this aspect of Longas' testimony. Accordingly, I find merit to this allegation.

(b) *Threats of reprisal*

In complaint paragraph 10(a) it is alleged that on or about May 28, Dyer threatened employees that the coin room would be closed if they selected the Union as their representative. This allegation is based on Dyer's remarks during the May 28 meeting. In salient part, I have found that Dyer told the employees if the Union were voted in, the employees would have to "bear the brunt" of new expenditures and loss of customers, that if the Union were selected by the employees the Employer would reevaluate its costs in the coin room and that would be "the place where those results will be felt"²² and a loss of customers would result in employees losing their jobs.

As to these remarks, Dyer was simply asked "did you threaten employees that you would shut down the plant operation if the Union was voted in?" Dyer responded, "I did not." I conclude Dyer's self-serving denial is insufficient to overcome the credible accounts presented by the General Counsel's witnesses who testified on this subject. In particular, Elias, Bradley, Longas, and Donovan presented precise accounts of what Dyer is alleged to have said on May 28. I consider it incumbent upon Dyer to have had his testimonial direction addressed to those specifics which involved more than the bare question posed to him regarding closing of the coin room.

Based on the credited testimony, I conclude Dyer made the comments attributed to him. I have considered Rudich's testimony, which I have credited, that he instructed the Detroit management officials to conduct a low-profile campaign. This suggests the Employer understood it must remain scrupulously aloof. Nonetheless, there is overwhelming credible evidence that a variety of Detroit officials misconstrued or misunderstood the full scope of Rudich's directive. In general, I find that the actual words spoken by various Employer representatives were more accurately portrayed by the General Counsel's witnesses than by those implicated in them. Considering the import of Dyer's words leads me to con-

²¹ Larsen was not questioned concerning this alleged interrogation.

²² Dyer also said "that is not to say all the employees would be laid off, but there is no way of telling." I conclude the effect of his suggestion that selection of the Union would result in layoffs is not diminished by Dyer's comment "there is no way of telling." The seed of coercion had been sewn. His exculpatory phrase is inadequate to comprise a disavowal of the earlier-expressed unlawful words.

clude he, at least impliedly, issued a proscribed threat to close the coin room operation. (*Russell Stover Candies*, 221 NLRB 441, 442, 443 (1975)).²³

Upon all the foregoing, I conclude there is merit to the allegations in complaint paragraph 10(a).

In complaint paragraph 10(e) it is alleged that on or about June 6 Supervisor D. Delpier threatened employees with loss of employment because of the Union.

This allegation is based on Longas' testimony, not heretofore described, that the day before the coin room closing was announced Delpier told Longas that the employees put Dyer's back up against the wall by joining the Union and the Employer had no choice but to close it down.

As to this allegation, I find Delpier's account more reliable and plausible than Longas'. On this issue, Longas was rather vague in his description of the conversation. Delpier was more comprehensive and certain. Thus, Delpier first unequivocally denied he made any such statement to Longas. When questioned from the bench, Delpier candidly admitted he had a conversation about the closing with Longas. However, Delpier claimed they actually had two such discussions on the same day. Delpier claimed that the first time he spoke with Longas it was Longas, not he, who speculated the closing was union-related. According to Delpier, the first discussion occurred before Delpier even knew of the decision to close.

Delpier said that he confirmed the coin room would be closed with superior management. He and Longas then had their second conversation. Delpier testified he learned that the closing was due to the Employer's financial losses in the coin room.

Given Longas' extent of pronoun sympathies, it is not unlikely he would accuse the Employer of closing the coin room because of the Union. This probability, coupled with Longas' vague account of his conversation with Delpier, requires careful scrutiny of the testimony of these opposing witnesses.

Delpier was firm in his denial that he made the alleged unlawful statement. Moreover, I find Delpier candid. Thus, he was implicated by Bradley (in connection with complaint allegation 10(i)) in another alleged unlawful conversation. Bradley's testimony stands uncontradicted because Delpier frankly testified, though harmful to the Employer, he did not recall whether he had the conversation ascribed to him by Bradley.

Moreover, I found Delpier consistent and spontaneous in his description of the subject conversation with Longas.

Upon the foregoing I find it plausible that the conversations occurred as described by Delpier.²⁴

²³ In *Russell Stover*, there was an effort to cure the illegality by denying the formation of a union-caused plant closure. As noted in the immediately preceding footnote, Dyer sought to do likewise. However, as in *Russell Stover*, I conclude Dyer's effort is ineffective.

²⁴ To the extent this conclusion is inconsistent with my earlier findings Longas is generally credible, such division of credibility resolution is permissible. A trier of fact is not required to believe the entirety of a witnesses' testimony. *Maximum Precision Metal Products*, 236 NLRB 1417 (1978).

Upon all the foregoing, I find the General Counsel has not sustained his burden of proof that the Employer violated Section 8(a)(1) of the Act as alleged in complaint paragraph 10(e).

Complaint paragraph 10(f) alleges that "in or about the week of June 9" the Employer distributed a letter to its customers which contained an indication that selection of a collective-bargaining representative was a reason the coin room was being closed.²⁵ This allegation is based on the Employer's "Dear Customer" letter, described hereinabove, together with attendant testimony.

As earlier described, the Employer stated, in the subject letter, that the financial condition of the coin room operation was "complicated" by the employees' Union vote.

Donovan testified that on June 6 Larsen delivered the subject letter to Longas. Longas read it and asked Larsen if he could have a copy. Larsen agreed and "proceeded to run off some copies" which were delivered at least to Donovan and Longas.

Bradley testified that "around June 10"²⁶ Larsen asked her if she could get along without the books containing customer names and addresses. According to Bradley, Larsen said he needed the books to send the subject letter to the customers. Bradley recalled Larsen, shortly thereafter, had a copy of the letter in his hand and Donovan asked him if she (Donovan) could have a copy. Bradley testified, Larsen agreed.

The Employer did not seek to adduce evidence to explain the letter or rebut any of the General Counsel's testimony on this subject matter. Larsen's delivery of Dyer's letter which connected, albeit in part, the coin room closing to the union activity constitutes publication of that remark to at least some of the employees. Nonetheless, the Employer arguably could claim, but it did not, that Dyer's written comment was not coercive because the layoffs had already been announced. I conclude this timing does not affect what I perceive to be the inherently coercive character of Dyer's written statement in the letter.

The Board was confronted with an analogous situation in *Joint Board of the Electrical Industry*, 238 NLRB 1398, 1410-11 (1978). There, the Board left undisturbed an administrative law judge's finding that Section 8(a)(1) had been violated when the director of a dental clinic remarked "you fellows joined the Teamsters . . . now you go get jobs as truckdrivers." This comment was made to a dentist employed at the clinic, *after* the clinic had been closed for assertedly economic reasons during a representational campaign.

It may be argued that the *Joint Industry* case is distinguishable. There, the alleged unlawful statement had been made before the employees actually voted. However, I consider this distinction irrelevant. It simply serves

²⁵ This allegation is framed as a conclusion. Though the General Counsel's theory of this violation was not explicated in the brief submitted, I shall deal with the letters' potential as a threat of economic reprisal.

²⁶ I place little significance on the disparity of dates stated by Donovan and Bradley, or for that matter, any other witnesses. More important is the fact that each of them substantially corroborated one another with respect to the material and substantive aspects of their testimony.

to underscore the concept that the employees of the clinic would be deterred from future exercise of their statutory rights. The distinction, nonetheless, does not detract from another reasonable conclusion which may be derived from the alleged unlawful statement; namely, that the employees who see or hear it would be led to believe they lost their jobs because of their union activity. I conclude the subject statement in Dyer's "Dear Customer" is susceptible of this latter interpretation. Inasmuch as the layoffs herein had not yet been effectuated at the time the "Dear Customer" letter was published to the employees by Larsen, I find the subject statement constitutes an implied threat that the impending coin room closure was due to the employees' selection of the Union as their bargaining representative.²⁷

Upon all the foregoing, I find there is merit to the allegation contained in complaint paragraph 10(f).

Complaint paragraph 10(g) alleges that in mid-June Larsen informed an employee that the Employer was considering reopening its coin room operation elsewhere as a nonunion facility. As indicated hereinabove, Elias and Longas testified that some time after the announcement to close was made Larsen told them the Employer was considering opening a nonunion operation in Flint, Michigan. As noted, supra, Larsen admitted that he "may have joked about a nonunion operation." Interestingly, it was Vacca, not Larsen, who was asked specifically to rebut Elias' and Longas' testimony on this issue.

The conclusory allegation was not addressed in the parties' briefs.

I conclude Larsen's reference to opening a nonunion coin room is violative of Section 8(a)(1). This remark of Larsen must be considered in connection with the surrounding circumstances. I have already found the Employer engaged in 8(a)(1) violations before Larsen is alleged to have made his nonunion statement. Particularly, the "Dear Customer" letter reflects that union activity and financial stress were the causes of the decision to close the coin room. For Larsen to say there might be a nonunion coin room operation elsewhere,²⁸ I conclude, clearly signals to the employees that their exercise of statutory rights to engage in union activity might dictate the Employer's future conduct. It strongly suggests to the employees that the Detroit coin room operation would or could remain open if they were to forbear in the exercise of their statutory rights. In short, I conclude Larsen's remark displays a predisposition to avoid dealing with the Union as representative of the coin room employees. As such, it reasonably tends to interfere with, restrain, and coerce the employees in the free exercise of the rights guaranteed them in Section 7 of the Act. Accordingly, I find the allegation in complaint paragraph 10(g) has merit.

Complaint paragraph 10(k) alleges Larsen attributed the closing of the coin room to the selection of the Union as bargaining representative. Elias and Longas

presented testimony relating to this allegation. Their testimony and Larsen's response (not heretofore described) follows.

Elias testified that "after" the June 6 meeting he, Longas, and Larsen had a discussion concerning the layoff announcement.²⁹ According to Elias, Larsen said "it was your own fault for joining the Union." Longas asked, "do you mean that if we hadn't have joined that we could still have our jobs?" Larsen responded, "that's right." Longas then said, "What you are saying is that if we had voted no for the Union then there [sic] wouldn't be laying us all off." Larsen replied, "Well, they wouldn't have closed the operation down, I can tell you that. They probably would have just laid some people off, probably the part-timers."

Longas' testimony, though in summary form, corroborated Elias'. Thus, Longas testified Larsen said the employer really did not want to close down the coin room; the reason it was closed was because the employees joined the Union; and that if the employees had not joined, should the Employer have decided to cut back, Longas at least still would have a job.

I credit Elias and Longas. In addition to the reasons set forth for this credibility resolution in footnote 13, supra, I have considered the consistent, spontaneous and apparently unrehearsed corroboration of Elias by Longas. Supervisory statements which attribute layoffs to the employees' union activity are violative of Section 8(a)(1). *Hall of Mississippi*, 249 NLRB 775, 780-781 (1980). I find merit to the allegations in complaint paragraph 10(k).

Complaint paragraph 10(1) alleges Vacca, also, attributed the coin room closing to the employees' selection of the Union. I have already found that Vacca told Elias the coin room was closed because the employees had joined the Union. (See fn. 18, supra, and accompanying text.) Elias' specific narration, which I adopt, of this event follows.

Elias made some suggestions as to how the Employer could keep the coin room open. Vacca passed them off saying, "the reason they [the Employer] are closing down is because you joined the Union and that the reason behind that is that there is no way that the Company could afford for you to go out on strike now and take the whole terminal with you; they would lose too many customers and too much money. Right now you are just too much trouble."³⁰ Inasmuch as my findings as to this allegation clearly show Vacca blamed the coin room closing to the advent of the Union, I find his statement constitutes a violation of Section 8(a)(1). *Hall of Mississippi*, supra.

(c) Promises of benefit

In complaint paragraph 10(b) it is alleged that Dyer promised employees individual discussion concerning

²⁷ Whether deemed an implied threat, or some other form of coercion, restraint, or interference, I conclude the subject statement reasonably tends to have the necessary proscribed effect.

²⁸ The record reflects the Employer already had a small facility in Flint. This fact lends an air of plausibility to Elias' and Longas' testimony on this subject.

²⁹ Longas placed this conversation on June 20.

³⁰ The specific question to which Vacca answered his unequivocal denial was "did you ever say to any employees that if the coin room—if they hadn't voted for the Union the coin room would still be functional?" It is noteworthy that Vacca was not asked to deny either that he had a July 3 conversation with Elias or the particulars of Elias' account.

work problems and to remedy them if the Union were rejected.

In testimony not heretofore described, Donovan claimed Dyer told the employees during the May 28 meeting that "we" could talk on a one-to-one basis after the vote (the next day) if the vote were in favor of the Company.

Bradley testified that during the same meeting Dyer said, "I will promise you that if you vote no tomorrow that we will meet individually and discuss all of our problems."

Elias, in more general terms, testified "depending on how the election went it would be a good idea to speak to us on an individual basis to see how things were for us in the Company and where we are going."

To refute this testimony, Dyer was asked the single conclusory question, "did you promise to remedy employee problems conditional on their rejection of the Union?" Dyer responded, "No."

I have already found Dyer digressed from the instructions as to how the Employer should conduct its preelection campaign. The totality of Dyer's activity during the May 28 meeting (see discussion of complaint paragraph 10(a)) fairly may be characterized as antiunion. Thus, Dyer instilled a fear of possible job loss. Also, he suggested that only those employees who would vote against the Union need report to work the following day on which the election had been scheduled. In this atmosphere and, given my earlier observation that Elias, Bradley, and Donovan presented precise and credible accounts of what Dyer said on May 28, I find the employees' accounts of what Dyer said on May 28 as to the instant allegation more reliable than Dyer's self-serving denial.

Offers to negotiate directly with employees in order to cause them to withdraw their support from a union violates Section 8(a)(1). *Raley's Inc.*, 236 NLRB 971, 972 (1978). I conclude Dyer's statement that the Employer would individually speak with the employees concerning their problems is tantamount to solicitation of employee grievances. Moreover, Dyer explicitly conditioned such discussion upon rejection of the Union.

The essence of the underlying allegation is not the solicitation of grievances itself. Rather, it is the inference created by such solicitation that the Employer is promising to correct those grievances. *Uarco Incorporated*, 216 NLRB 1 (1974); *Reliance Electric Co.*, 191 NLRB 44, 46 (1971). This inference is rebuttable. However, the instant record is devoid of any evidence adduced for the purpose of such refutation. No history has been presented to show the Employer at any earlier time engaged in a program of individual discussion with employees. In this context, I conclude there exists "a compelling inference that . . . (the Employer was) . . . implicitly promising to correct" (*Reliance Electric*, 191 NLRB at 46) the employees' problems if they would not elect the Union as their bargaining representative.

Upon the foregoing, I find complaint paragraph 10(b) has merit.

Complaint paragraph 10(d) alleges that on May 29 Larsen implied surveillance and possible retaliation against employees for their union activities.

This two-pronged allegation is based on Larsen's conversation with Elias and Longas at the time Larsen announced the election results. As to the implied surveillance, Longas, Donovan, and Elias credibly testified that, after Larsen announced the vote's outcome, Larsen exclaimed he was surprised and did not believe "it." I consider Larsen's remark is a predictable expression of shock or dismay by a management official when confronted with the overwhelming vote in favor of unionization. However, Larsen said more. He said to Longas, "you have more to lose than anybody, why would you be involved in this?" (Emphasis added.) As previously noted Longas had been the principal union activist. It is noted this comment of Larsen was made approximately 1 week before the decision to close the coin room and lay off employees was announced.

The timing of Larsen's remark, together with the absence of evidence to show that Longas' union activities were notorious, persuades me Larsen's words reasonably are susceptible of meaning that the Employer, by some manner of surveillance, became aware of Longas' activities.

As to the alleged implication of retaliation, Larsen told Longas he would find it difficult to get another job some place else. I find this remark comprises a threat of the possibility of discharge as a result of unionization. *Meehan Truck Sales, Inc.*, 201 NLRB 780, 783-784. Accordingly, I find there is merit to the allegation of complaint paragraph 10(d).

(d) *Miscellaneous*

Complaint paragraph 10(h) alleges that on June 17 Vacca indicated to employees they would still have jobs even if the coin room closed. As earlier described, Donovan testified that Vacca told her he wished she had talked sense to the employees. Actually, Vacca said "now that the Union had been voted in . . . there was nothing he could do." This remark was followed by Vacca saying that Donovan "probably would have found a job some place in the company" if the coin room had to be closed.

I conclude this statement of Vacca clearly imparts the meaning that Donovan's imminent layoff was directly attributable to the union activity and the result of the representation election. Such statements violate Section 8(a)(1). Accordingly, I find merit to complaint paragraph 10(h).

In complaint paragraph 10(i) it is alleged that on or about June 17 Supervisor D. Delpier told employees if they had not voted for the Union the coin room would not have closed. As earlier indicated, Bradley claimed that Delpier made this comment to her on June 20. In addition to making the statement already described, Donovan testified that Delpier told her that the Employer "would have just cut back."

Delpier claimed he could not recall having any conversation with Bradley. I have found Delpier generally credible (see my analysis of complaint par. 10(e)). Thus, whether Delpier's lack of recollection of a conversation with Bradley is laid to a desire to be perfectly honest, to protect himself from providing testimony adverse to the

Employer,³¹ or in reality, to having no present recall of this conversation, this part of Bradley's testimony stands uncontroverted.

Once again Bradley's credited testimony reflects the Employer, through D. Delpier, tied the layoffs to the employees' union activity, as alleged in complaint paragraph 10(i). I find this remark violative of Section 8(a)(1).

Complaint paragraph 10(o) alleges that on or about May 15 Vacca told an employee to persuade other employees not to vote for the Union.

Donovan testified that on or about May 8 Vacca "asked me if I had the opportunity, if I would talk to other employees regarding the Union activity." As noted, Vacca made this comment when discussing Donovan's work evaluation which, Vacca said, placed Donovan in a promotional position.

An employer lawfully may request employees to vote against union representation. However, Section 8(a)(1) is violated when an employer enlists a rank-and-file employee to ask other employees to do the same. *Montgomery Ward & Co.*, 226 NLRB 184, 201 (1976); *Unarco Industries*, 197 NLRB 489, 500 (1972).

I acknowledge that the quoted words used by Vacca do not correspond, in haec verba, with the subject complaint allegation. Thus, the allegation is that Vacca expressly solicited an employee to persuade other employees not to vote for the Union. As related by Donovan, Vacca requested her simply to speak with other employees "regarding the union activity."

What meaning should be ascribed to Vacca's words? The answer is derived by recourse to extrinsic circumstances. Thus, the certification petition was filed on April 29. Rudich acknowledged that, in "late April, early May," he knew the petition had been filed. The Union signed the Stipulation for Election on May 13. I have found that Vacca interrogated Donovan on May 8 regarding what she heard about the union activity. I now find the subject request to talk to other employees was part of that other discourse between Vacca and Donovan.

The scenario depicted in the immediately preceding paragraph gives meaning to Vacca's request of Donovan. Moreover, the record as a whole demonstrates the Employer's repeated efforts, through various supervisors, to learn of the union activities and to discourage them. In this context, I conclude Vacca's request of Donovan can be interpreted as an appeal to Donovan to "talk down" the Union. I so find. Accordingly, I find merit to complaint paragraph 10(o).³²

2. Discrimination

The General Counsel contends the coin room closing was motivated by antiunion considerations. Also, it is claimed the evidence shows the decision to close was contrary to and defied sound business considerations.

³¹ Delpier was still employed by the Employer at the time of the hearing.

³² If my analysis of Vacca's request is imprudent, then, in any event, I find that it amounts to an enlistment of Donovan in Vacca's unlawful interrogation. In either view, the remark violates Sec. 8(a)(1).

The Employer claims the closing was solely motivated and, indeed, "mandated," by the severity of the financial losses. Moreover, the Employer contends its closing was fully consistent with its past business practices. Finally, the Employer argues there exists no probative evidence to prove it harbored animus toward the Union.

There is no dispute the coin room was closed. On June 5, Dyer wrote Langkil advising of the decision and expected layoffs. The next day, Young announced the closing during the meeting with the employees.³³

The coin room employees were laid off according to the following schedule contained in Dyer's June 20 letter to Langkil:³⁴

L. Bradley—6/20
 Donald Delpier³⁵ 6/20
 D. Elias—6/27
 E. Greason—6/20
 K. Kopp—6/20
 G. Longas—6/20
 M. Longas—6/27
 S. Lyght—6/20
 P. Person—6/20
 R. Serra—6/20
 M. Shannon—6/20
 M. Thompson—6/27
 B. McDonald—6/27

To date, none of the laid-off employees has been reinstated.

Contrary to the General Counsel's claim that this is a "pretext" case, I consider it presents dual-motive considerations. As seen below, I credit the Employer's virtually uncontested evidence showing the magnitude of its coin room financial losses. Yet, the substantial 8(a)(1) violations which I have found committed provide a basis for finding the presence of union animus motivating the close and layoffs.³⁶ Thus, the Board in *Wright Line*, 251 NLRB 1083 (1980), declared that in dual-motive cases the General Counsel must first prove the existence of a prima facie case showing the alleged discrimination was motivated by antiunion considerations. Thereafter, the burden of proof shifts to a respondent to demonstrate that it would have taken the action alleged as discriminatory, even in the absence of the employees' protected activity. See also *Herman Brothers*, 252 NLRB 848 (1981).

Application of the Board's standards persuades me that the General Counsel has proved the necessary prima facie case and the Employer has not sustained its requisite burden of proof regarding the 8(a)(3) allegations.

³³ There is no testimonial or documentary evidence showing when the decision to close was made or by whom.

³⁴ Although the letter indicates a layoff date of June 27 for Elias and M. Longas, they remained as part-time employees until July 5.

³⁵ Not to be confused with coin room Supervisor Duane Delpier.

³⁶ In any event the Board recently had indicated the test to be applied to dual-motive cases may apply, as well, to "pretext" cases. *Limestone Apparel Corp.*, 255 NLRB 722 (1981). See also *Castle Instant Maintenance/Maid*, 256 NLRB 130 (1981).

(a) *The prima facie case*

The following summary of evidence has led me to conclude and find that the Employer harbored antiunion motives in deciding to close the coin room and lay off the employees working there.

1. Vacca unlawfully interrogated Longas in early May.
2. On May 8, Vacca asked Donovan to dissuade other employees from union activities.
3. On May 15, Larsen unlawfully interrogated Longas.
4. On May 28, Dyer threatened to close the coin room.
5. Dyer impliedly promised to correct employee grievances.
6. On May 29, Larsen interrogated Donovan.
7. On May 29, Larsen implied surveillance of union activities and possible retaliation against employees.
8. In early June, Dyer attributed the closing to the advent of the Union in his "Dear Customer" letter.
9. On June 17, Vacca told Donovan she probably still would have her job but for the Union.
10. On June 17, Vacca unlawfully interrogated Donovan.
11. On June 20, Larsen told Elias and Longas the coin room closing was due to the Union.
12. In mid-June, Larsen indicated a predisposition to remain nonunion by referring to the possibility of opening a coin room in Flint.
13. On June 20, Delpier told Bradley the coin room was closing because of the Union.
14. On July 13, Vacca told Elias the closing was due to the Union and "right now 'you' [referring to Elias or other employees] are too much trouble."³⁷

In assessing the Employer's motive for closing and layoffs, I have also considered the following factors (not alleged as unfair labor practices) which, I find, support the General Counsel's prima facie case:

1. Dyer's suggestion on May 28 that those who would vote for the Union could stay home and those who would vote against the Union could come to work on election day.
2. On June 20, when Donovan was receiving her final paycheck, Larsen told her there would be no negotiations for a closed room.³⁸ I conclude this comment comprises some probative evidence of union hostility. No logical reason existed for Larsen to have said such a thing. Such a comment is viewed as an indicator of the depth of the Employer's union antipathy.
3. Dyer implied the Employer would grant benefits to the coin room employees in order to dissuade them from voting for the Union. Thus, during the May 28 meeting, Dyer told the employees that retirement and dental plans were under consideration. In the total context of Dyer's comments during that meeting, it is reasonable that Dyer's reference to these fringe benefits readily could be interpreted by the employees as dependent upon how they would vote. Arguably, Dyer's statement is protect-

ed under the Act's free speech provision (Sec. 8(c)). Nonetheless, I conclude the generally coercive atmosphere created by Dyer at the May 28 meeting vitiates such a contention.

The timing of the announcement of the closure is significant. *Le Roy Fantasies*, 256 NLRB 211, 219 (1981). The General Counsel contends the Employer's action was precipitous. The Employer asserts it was the natural consequence of the results of the cost-benefit study ordered on May 27. I agree with the General Counsel.

Initially, it is noted that the cost-benefit study is undated. There is no positive evidence to show the date on which the decision to close was made. The May 27 memorandum ordering the cost-benefit study contains no direct reference to the possibility the coin room would have to be closed. This omission suggests, in the context which follows, that the closing was considered only after the election outcome became known and it was certain the Union had been elected.

Although the cost-benefit study was ordered by Tulko before the election, this fact is not significant. More persuasive are the extensive 8(a)(1) violations which began in early May. I conclude those 8(a)(1) violations show the Employer's concern that the election might be unfavorable to the Employer. Thus, it is plausible that the Employer, already faced with a dire economic situation in the coin room, would have been concerned that unionization would only serve to increase those already excessive costs. Cichalski's report simply provided the impetus for ordering the study.

In effect the study was a subterfuge. The Employer was aware of the financial losses as early as June 1979, when Terminal Manager Young, in illuminating terms, expressed the notion that the coin room had not been designed to make money. His statement reveals the Employer's intention that the coin room operation had been conceived as a service organization. Indeed, Vacca confirmed this concept to the employees almost a year later during the May 28 meeting.

All later reports depicted the abysmal nature of the coin room's financial status. Despite this, it is significant that there is no suggestion to consider closing contained in Vacca's early 1980 report. He apparently only recommended certain improvements in coin room service. Thus, the certainty of the vote in favor of union representation looms as the solitary intervening factor causing alteration of the Employer's concept of the coin room operation. Dyer's reference to the union vote in his "Dear Customer" letter confirms this observation.

Further evidence relates to timing. Thus, as has been reported, supra, some employees attempted to suggest alternatives to closing. Those efforts were not considered.

Also, Dyer admitted the decision to close was made without first consulting customers regarding their possible absorption of costs by a rate increase. I consider this omission some, but not conclusive, evidence that the real reason for the decision to close was to eliminate the Union as a factor in the coin room operation. It is not for me to transgress upon managerial judgment. Nonetheless, the manner in which the Employer acted apparently conflicts with sound business practices. As such,

³⁷ Evidence of animus toward unions made after the alleged discrimination occurred appropriately may be considered as bearing on the motivational issue. *Jenks Cartage Co.*, 219 NLRB 368, 369 (1975).

³⁸ This evidence was not heretofore described. It is based on Donovan's uncontradicted testimony.

those actions may be considered in an evaluation of the issue of motivation.

I conclude the record as a whole, which includes the various elements above, overwhelmingly demonstrates the General Counsel sustained the burden of proving the requisite prima facie case.

(b) *The Employer's economic defense*

As indicated, the Employer's claim the evidence shows the coin room was financially distressed is virtually uncontradicted. Thus, I credit the combination of oral testimony concerning financial matters and the corresponding documentary evidence. Together, they show that, since its inception, the coin room was losing money.

By April 1980, the average monthly revenue in the coin room was \$2,114 and average monthly expenses were \$21,114. The monthly net loss based on these figures, if extended on an annual basis, would result in a loss of \$231,432. Additionally, it was estimated the Employer lost approximately \$100,000 from its inability to invest the coin room's standing capital of \$500,000.

In addition to the evidence showing the coin room's financial status, the Employer adduced considerable evidence, likewise uncontradicted and which I credit, as to its history of closing unprofitable operations. Thus:

1. Its coin room in Baltimore, Maryland, was closed in July 1978 because it was experiencing a monthly loss of \$500.
2. Its Knoxville, Tennessee terminal was closed in the latter part of 1970 for financial reasons.
3. Its Dallas, Texas consolidated room was shut down in June 1980 because it was losing \$500 a month.
4. The coin room in New Orleans, Louisiana was closed in April 1979 because it became unprofitable.
5. Its terminal at Lake Charles, Louisiana was closed in April 1979 for financial reasons.³⁹

I find the evidence of past practice of little probative value. The record shows that there are important distinguishing characteristics between some of the closed terminals and Detroit. Thus, the evidence reveals that closing of the Baltimore, New Orleans, and Lake Charles terminals were attended by some factor such as loss of major customer or a need to consolidate the closed operation with similar operations at another of the Employer's facilities. There is no evidence that such a justification was present in the case at bar.

Upon the foregoing,⁴⁰ I find the proffered defense to the closing and layoffs unpersuasive and the Employer has not sustained its burden of overcoming the General Counsel's prima facie case.

Accordingly, I find that the June 20 closing of the Detroit coin room and layoff of the employees working there was discriminatory and in violation of Section 8(a)(3) and (1) of the Act, as alleged.

³⁹ I have discounted the fact that the Tulsa, Oklahoma Ground Armored Car Service was ended in late 1980 because this date is subsequent to the alleged closing under consideration.

⁴⁰ In evaluation of the economic defense, I have also considered the element of how long the coin room's losses had been tolerated before the Employer acted upon them. This discussion is contained, *supra*, within the motivation discussion.

3. Refusal to bargain

The Union was not invited to participate in the decision to close the coin room and lay off the employees. The Employer contends it had no obligation to bargain with the Union over those matters because (1) the unit is inappropriate and (2) the Act bars the Union from certification because the Union admits, or is affiliated with an organization which admits, to membership employees other than guards.

Further, if an obligation to bargain exists herein, the Employer contends it has been fulfilled by having provided the Union with Dyer's June 5 letter advising of the decision to curtail the coin room operations and to lay off the employees. As further evidence of compliance with its duty to bargain, the Employer points to the fact it acceded to the Union's request to offer the part-time work first to the laid-off employees.

The General Counsel contends all the elements imposing a duty to bargain exist herein and that the record sustains the contention the Employer breached that duty.

I turn now to the elements of prima facie case refusal to bargain.

A. *The Unit-Appropriateness*

The unit description, claimed appropriate by the General Counsel, appears, *supra*, in section IIA. There is no disparity between the Stipulation for Election and the Certification of Election Results.

At the hearing, the Employer sought to adduce evidence, in the midst of The General Counsel's case-in-chief, in support of the Employer's claim the unit is inappropriate. The General Counsel objected.

During discussion of the objection, the Employer's counsel conceded the evidence he was attempting to offer was neither newly discovered nor unavailable to the Employer during the pendency of the representation case proceedings. Thus, I sustained the General Counsel's objection. The General Counsel then continued the case-in-chief, and rested.

At the April 22 session of the hearing, the General Counsel announced no objection would be interposed to such evidence if adduced as part of the Employer's defense. I invited the Employer to offer such evidence.

I stated I was concerned that the record then contained minimal evidence relative to the guard issue.⁴¹ In doing so, I announced my conclusion the record already established a prima facie showing that the unit, on its face, is appropriate.

I did not explicate my reasons for this conclusion. No party requested such explanation. My determination was, in fact, based on the record evidence developed during presentation of the General Counsel's case, which shows the coin room employees work in quarters separate from other employees at the Detroit facility, under apparently different supervision, and perform work different from the other employees. Moreover, no evidence there was employee interchange had been adduced. Accordingly, I concluded there existed sufficient record evidence of ho-

⁴¹ The Employer predicated its claim of inappropriateness upon its contention guards and nonguards are comingled in the coin room.

mogeneity among the coin room employees to establish at least presumptive appropriateness.

Additionally, I had concluded the unit, as articulated in the election stipulation, was appropriate inasmuch as that description contains all applicable statutory exclusions, including guards. Thus, by announcing my tentative conclusion, the Employer was afforded an opportunity to present contravening evidence.

The Employer requested a recess to consider my invitation and its tactics regarding this matter. Thereafter, the Employer offered considerable defense evidence, comparatively little of which was addressed to this particular issue. That evidence consists of Vacca's testimony that he carried no weapon but that Elias always carried a firearm. Elias confirmed he bore a weapon. Larsen carried a firearm at the time when he earlier had served as immediate supervisor of the coin room.

Based on this evidence adduced by the Employer, I find the record contains direct evidence of only one non-supervisory employee having been armed. On the other hand, there is an abundance of credible and uncontradicted testimony of witnesses who testified their duties in the coin room consisted principally of counting money, filling customer orders for change, and reconciling accounts. Also, Elias and Bradley credibly testified they were told by management officials they were tellers.

To be a "guard" within the meaning of the Act, an employee must enforce against employees and other persons rules to protect the property of his employer's premises (*Petroleum Chemicals*, 121 NLRB 630) or the property of others (*American District Telegraph Co.*, 160 NLRB 1130 (1966)).

I conclude that Elias' possession of a firearm is insufficient to conclude the entire coin room unit consists of guards.⁴² This fact would merely require Elias' exclusion from an otherwise appropriate unit. *Capital Transit Co.*, 105 NLRB 582, 587 (1953).

Section 9(b)(3) precludes the Board from certifying a labor organization "as the representative of the employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards."

The General Counsel conceded the Board cannot certify the Teamsters as the representative of the employees in the coin room if they are guards or if the coin room employees are not guards, and the driver unit is a guard unit. Certification as to the first postulation is improper because the Teamsters is a union which admits nonguards to membership; and equally inappropriate in the second postulation because the combination of guards and nonguards into a single bargaining unit is proscribed. *Amoco Oil Co.*, 221 NLRB 1104 (1975); *A. D. T. Co.*, 112 NLRB 80 (1955).⁴³

⁴² The reason Elias carried a firearm was not developed.

⁴³ In view of my conclusion, *infra*, that the Employer is estopped from challenging the appropriateness of the unit, I find it unnecessary to resolve the issue whether inclusion of the coin room employees (whom I deem nonguards) with the existing drivers, messengers, and mechanics unit (claimed by the Employer to be guards) is appropriate.

Despite the foregoing, it is well established that the Board may certify the arithmetical results of a representation election involving a union which admits nonguards to membership. *William J. Burns International Detective Agency*, 138 NLRB 449, 452 (1962). Precisely that is what was done herein. No certification of representative was issued. Instead, the Regional Director merely certified the results of the election.

Thereafter, the Employer engaged in conduct which I find is tantamount to an acknowledgement of the Union's majority status. Thus, the evidence shows:

(1) Dyer acknowledged the Union's representational interests and status when he sent his June 5 letter advising of the decision to close; (2) oral invitations were issued to Langkil and union steward Smith to attend the June 6 employee meeting; (3) the laid-off employees were offered part-time work after the coin room closed pursuant to the Union's request; (4) the Employer actually engaged in collective bargaining with the Union and consummated the 1980-83 contract on behalf of the coin room employees.

I conclude the factors enumerated above are inconsistent with the Employer's present claim no duty to bargain exists.

There are other factors which militate in favor of application of estoppel principles against the Employer. Thus, the Employer signed the Stipulation for Election. Such a stipulation has been held to bind the parties. *Bogner of America, Inc.*, 236 NLRB 822, 823 fn. 9 (1978). By that act, the Employer agreed to the unit description. Furthermore, the addendum to the stipulation provides an affirmative employee vote will result in joinder of the coin room employees with the then existing unit. Thus, I conclude the Employer also signified agreement to the propriety and breadth of the unit. Thereby, I conclude, the Employer also acknowledged the Union's majority status. The Employer's manner of participation in the stipulation, I conclude, effectively indicated its agreement that the coin room employees are not guards, especially because the unit description in the stipulation itself expressly excluded guards.

Next, the voting list furnished by the Employer contains the names of all 14 coin room employees including Elias'. Each voted without challenge.

Finally, in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding. *Pittsburgh Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941). Board's Rules and Regulations Sections 102.67(f) and 102.69(c).

During the aforementioned argument on the General Counsel's objection to the introduction of evidence regarding the unit, the Employer's counsel cited *Burns Electronic Security Services v. NLRB*, 624 F.2d 403 (2d Cir. 1980) as authority for litigating this issue before me. I stated, at the hearing, my analysis of that decision did not comport with the Employer's conclusions. That opinion is now reaffirmed.

Burns contains material distinctions from the case at bar. A hearing had been conducted on the representation petition. The parties litigated that issue. Based on the representation case record, the regional director issued a decision and direction of election. The disputed employees were included in the unit in which an election was directed. The Board denied *Burns*' request for review. An election was conducted. A certification of the petitioner issued.

Burns refused to bargain, claiming the unit was inappropriate, as it contained guards. At a hearing before an administrative law judge, *Burns* attempted to litigate the guard issue. The judge ruled only evidence previously unavailable on that issue at the representation hearing could be presented. Nonetheless, the functions of the disputed employees were, in fact, litigated before the administrative law judge because he had before him an allegation that *Burns* unilaterally altered their working conditions.

In his decision, the administrative law judge expressly refused to consider the validity of the unit determination. On exceptions, the Board adopted the relevant rulings of the administrative law judge.

On the Board's petition for enforcement, the circuit court found that there existed unusual circumstances which warranted remand. Thus, the court concluded the representation record was incomplete—that the record before the administrative law judge contained considerably more evidence regarding the disputed employees than was present in the representation case record. Accordingly, the court remanded the unfair labor practice case stating the Board's reliance upon the rule against relitigation of representation case issues in an unfair labor practice proceeding,⁴⁴ where the functions of those employees actually were relitigated in the unfair labor practice upon the subject matter of the refusal to bargain, required a less mechanical application of the Board's relitigation proscription.

The instant refusal-to-bargain issue emanates from a certification of results of election conducted by *agreement*. No hearing on the underlying petition was held. Thus, it cannot be claimed the unusual circumstances, present in *Burns*, exist herein.

Most important, the Employer herein was provided the opportunity to litigate the guard issue before me. As noted, only sparse evidence was adduced. Thus, it cannot be said that unusual circumstances similar to *Burns* (e.g., the deficient representation case record in *Burns*) exist herein.

Finally, in *Burns*, the employer's actions reflect it had a doubt of the appropriateness of the unit which it pursued at all stages of the representation and unfair labor practice cases. Herein, Purolator's challenge to the appropriateness of the unit was initiated after it had agreed to its appropriateness, participated in an election pursuant to that agreement, and took action consistent with the Union's majority status. It was not until the Employer had to defend the instant case that it first interjected its attack upon the unit.

The foregoing are, in my opinion, relevant and critical distinctions from *Burns*.

I perceive nothing within the court's opinion in *Burns* which negates or criticizes the Board's rule against relitigation. Indeed, the court expressly observed that the rule is designed to protect the integrity of the administrative process.

Upon all the foregoing, I conclude the result in *Burns* must be confined to the peculiar facts of that case and are inapplicable herein. Thus, the record as a whole persuades me the Employer should be estopped from challenging the appropriateness of the unit in the instant proceedings. Accordingly, I find the General Counsel's burden of establishing this element of a refusal to bargain violation has been sustained.

B. Request to Bargain

A request to bargain is prerequisite to establishing a violation of Section 8(a)(5). An employer should not be placed under a duty to bargain until put on notice that a labor organization seeks to do so.

Certain circumstances, however, render a bargaining demand a futile gesture. *National Car Rental System*, 252 NLRB 159 (1980) *Marysville Travelodge*, 233 NLRB 527, 532, 533 (1977).

It is true herein the Union did not literally request bargaining over the decision to close. However, I conclude circumstances exist herein which excuse that act. Those circumstances are derived from the considerable Employer conduct which I have found violative of Section 8(a)(1), combined with the preemptive conduct of June 5 and 6.

I perceive Dyer's June 5 letter as having advised Langkil of a *fait accompli*. Dyer, on June 5, unequivocally advised the Union that the Employer "must discontinue providing change service" and that the employees would be laid off on June 20. The next day, the Employer continued this unrelenting position. Young announced the same thing to the employees.

I consider these actions preemptive because the speed by which the oral announcement to employees followed the written notice to the Union reflects the Employer's disregard for the Union's representational rights. Had the Employer sincerely intended to provide the Union with a chance to request bargaining, it is reasonable to presume more time should have elapsed between dispatch of Dyer's June 5 letter and the announcement made at the June 6 meeting.

Upon the foregoing, I find the evidence excuses this requirement of an 8(a)(5) violation.

C. The Majority

The Union's majority is clear. Indeed, the Employer does not seriously contest its existence. The tally of ballots and certification of election results supports this *prima facie* element.

Moreover, the Employer, at all times, acted pursuant to such majority status. Those actions also support this proposition. *MRA Associates*, 245 NLRB 676 (1979).

⁴⁴ See, e.g., *S. Praver & Co.*, 232 NLRB 495 (1977).

D. *The Refusal to Bargain*

As noted, the Employer claims if it had been obliged to bargain with the Union, that duty was satisfied.

The Employer asserts it provided the Union with "ample opportunity" to bargain. In this connection, the Employer relies on the 2-week period between its announcement and actual closing. The Employer contends it complied with the Union's June 6 request to offer the expected part-time jobs to the laid-off coin room employees before hiring new employees. In effect, the Employer claims the Union waived the right to bargain over any other matter related to the closing because, as the evidence shows, the Union "did not ask . . . (the Employer) . . . to reconsider" its decision to close.

I reject the Employer's arguments for two reasons. First, as found, the Employer virtually preempted the Union from effective bargaining or even requesting it. Second, the record contains evidence of the Employer's bad faith in dealing with the Union regarding the closure and layoff. Thus, the Board has held there exists an obligation to apprise the employees' bargaining representative of its intentions to take action affecting the unit employees. In *Walter Pape, Inc.*, 205 NLRB 719, 720 (1973), the Board observed:

At the very least, Respondent should have advised the Union that the termination of the routes was under active consideration and was imminent. Respondent's failure to do so demonstrates that Respondent . . . [had . . . an intention of keeping the Union] "on a string". . . .

I conclude the cost-benefit survey ordered on May 27 some evidence that the Employer was considering a major alteration in the unit employees' employment status. There is no evidence that the Union was provided any information whatever regarding the institution of the cost-benefit study. Also, there is no evidence to show the Union had been advised the survey had been completed or that the Employer was using its results to deliberate the closing of the coin room. Instead, the first knowledge of these events was presented to the Union by the announcement the decision to close had been made.

In the above context, I cannot subscribe to the Employer's protestations that the record reflects it bargained in good faith. All the Employer's evidence and arguments in that connection are illusory.⁴⁵ Thus, I conclude the evidence sustains the General Counsel's claim that the Employer refused to bargain.

The Employer argues, also, no obligation to bargain existed because its curtailment of coin room operations involved such a substantial withdrawal of capital as satisfies the Board's criteria in *General Motors Corp.*, 191 NLRB 951 (1971), review denied sub nom. 470 F.2d 422 (D.C. Cir. 1972).

I conclude the evidence does not support the Employer's reliance on *General Motors*. First, I perceive no *with-*

⁴⁵ I find the evidence of the bargaining activity after the closing (including the negotiations which resulted in the 1980-83 contract) of little probative value on the good-faith issue. Those activities postdate the time I deem critical to a fair evaluation of the material issue.

drawal of capital, herein, as contemplated by *General Motors*. Instead, what the employer did in the instant case was to "shift" its capital to take advantage of investment possibilities. Second, the extent the scope of enterprise was changed in *General Motors* is far different from that herein. Thus, in *General Motors*, the employer removed itself from the particular business in question. Herein, the coin room activity continued, albeit on a considerably reduced basis using the part-time employees. Moreover, I consider the inclusion of coin room employees in the 1980-83 agreement suggests the possibility a coin room could sometime once again become an operational entity of the instant Employer. Third, the financial and operational mystique present in *General Motors*, which made it difficult for the union there to provide meaningful bargaining input, has not been shown to exist herein. Indeed, the record reflects the contrary. Some employees tried to suggest alternatives to closing but were rebuked. Accordingly, I conclude the instant evidence does not sufficiently support a contention that nothing could have been achieved through collective bargaining.

Even if incorrect in my analysis of *General Motors*, I have found the closing and layoffs herein to have evolved from the Employer's antiunion motivation. Thus, I reject the concept, promoted by the Employer, that its actions were motivated by labor cost problems. In this context, I find *General Motors* inapposite.

On all the foregoing discussion concerning the 8(a)(5) allegations, I find the General Counsel has proved the Employer has refused to bargain, as alleged.

On the basis of the above findings of fact and on the entire record in the case, I make the following

CONCLUSIONS OF LAW

1. The Employer is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. The Employer unlawfully interfered with, restrained, and coerced its employees as alleged in complaint paragraphs 10(a) through (d) and 10(f) through (o), all in violation of Section 8(a)(1) of the Act.
4. The Employer discriminated against its employees by closing its Detroit, Michigan coin room on June 20, 1980, and by laying off its coin room employees.
5. The Employer is estopped from challenging the appropriateness of the bargaining unit alleged in paragraph 8 of the complaint.
6. All full-time and part-time coin room personnel of the Employer's Detroit, Michigan coin room, but excluding office personnel, clerical employees, guards and supervisors as defined in the act, and all other employees constitute a unit appropriate for purposes of collective-bargaining within the meaning of Section 9(b) of the Act.
7. The Employer refused to bargain with the Union concerning the decision to close the Detroit, Michigan coin room operation on June 20, 1980, as alleged in com-

plaint paragraphs 13 and 16, in violation of Section 8(a)(5) and (1) of the Act.

8. The Employer did not unlawfully threaten employees with loss of employment as alleged in complaint paragraph 10(e).

9. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.⁴⁶

THE REMEDY

Having found the Employer violated Section 8(a)(1), (3), and (5) of the Act, I shall recommend it cease and desist from engaging in such conduct in the future and affirmatively take such action as will dissipate the effects of its unfair labor practices.

I have found each of the coin room employees had been discriminatorily laid off. To remedy that discrimination, the Order shall require the Employer to offer full and immediate reinstatement to each of the 14 employees to his or her former or substantially equivalent position of employment, without prejudice to his or her seniority or other rights, benefits, and privileges; and to make each of them whole for any loss of earnings each may have suffered as a result of his or her discriminatory layoff by payment of a sum equal to that which each would have earned, absent the discrimination, to the date of the Employer's offer of reinstatement made to each. Loss of earnings shall be computed as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as set forth in *Isis Plumbing Co.*, 138 NLRB 716 (1962), and *Florida Steel Corp.*, 231 NLRB 651 (1977).

The General Counsel has requested the Order contain a provision for restoration of the status quo ante. Specifically, the General Counsel contends the evidence warrants a requirement that the Employer be ordered to reinstate its Detroit coin room operation. The Employer opposes, contending implementation of such an order would be unduly burdensome, unreasonable, and is punitive.

In *R & H Masonry Supply*, 238 NLRB 1044 fn. 3 (1978), the Board stated:

We continue to adhere to the well-established principles that, in cases involving discriminatory conduct, the restoration of the *status quo ante* is the proper remedy unless the wrongdoer can demonstrate that the normal remedy would endanger its continued viability. See *N.C. Coastal Motor Lines, Inc.*, 219 NLRB 1009 (1975), enf'd. 542 F.2d 637 (C.A. 4, 1976); *Townhouse T.V. & Appliance*, 231 NLRB 716 (1974), enforcement denied 531 F.2d 826 (C.A. 7 1976).⁴⁷

The Board entered a status quo ante remedy where an employer discriminatorily shut down a department and the record showed that employer began evaluating the

department's operation by an economic standard for the first time after the advent of the union. *Frito-Lay*, 232 NLRB 753, 754 (1977), rev'd. 585 F.2d 62 (3d Cir. 1978).

As the Employer argues, such a remedy is not always appropriate. Thus, in *Production Molded Plastics*, 227 NLRB 776 (1977), no such remedy was ordered. However, I find the *Production Molded* case materially distinguishable from the instant matter. In *Production Molded*, the Board explicitly found the General Counsel failed to establish an 8(a)(3) violation. 227 NLRB at 777. Accordingly, the Board commented: "The Board . . . is reluctant to order the resumption of operations, especially where, as here, the closing is for nondiscriminatory reasons." Though the Board considered that to require *Production Molded* to reopen its closed operations would be "unduly burdensome," it did so because the decision to close was economically motivated.

The Employer has cited *National Family Opinion*, 246 NLRB 521 (1979).

There, the Board found a department closing discriminatorily motivated. Nonetheless, the status quo ante remedy was not awarded because to do so would have imposed an undue burden on the employer. The employer would have been required to transfer another department and/or construct or lease additional space to accommodate the reopened operation and to purchase new operating equipment.

Similarly, a restoration order was denied in *Great Chinese American Sewing Co.*, 227 NLRB 1670 (1977), because an order would have been unduly burdensome because of the necessity to purchase new equipment.

I find the *National Family* and *Great Chinese* cases inapplicable. I have found that the instant Employer, indeed, sustained the financial losses it claimed. However, that is all that is shown herein. No evidence was adduced to show that reopening the coin room would require acquisition of new space and/or equipment. In view of the fact the Employer long endured the financial losses from the Detroit coin room operations, I find no basis for applying the principles of *National Family*, *Great Chinese*, or *Production Molded*.

Additionally, there is no claim, nor evidence to suggest, that reopening the coin room would imperil the Employer's corporate existence or endanger any part of the existing operations at the Detroit facility. Indeed, the fact that the Chicago coin room is also losing money reflects no such claim is tenable.

Herein, as in *Frito-Lay*, supra, there is impressive evidence that the Employer shifted its analysis of the Detroit coin room operations from one of service orientation to financial only after it became aware of the employees' union activity. All studies and reports before the advent of the Union were conducted with an eye to service improvement. Although references to the Detroit coin room's poor financial operations are contained in those reports, there is no evidence to show the Employer became concerned with those losses to consider closing the operation until notified the Union's representation petition had been filed. Moreover, the Employer countenanced the coin room financial losses for over a year before attempting to do anything about them.

⁴⁶ At hearing, I reserved ruling on the Employer's motion to dismiss all complaint allegations. In view of the foregoing conclusions of law, the motions to dismiss are hereby denied as to all allegations found meritorious. The motion is granted, however, only to the extent I have found no violation pertaining to allegations of complaint par. 10(e).

⁴⁷ The Third Circuit, in *Townhouse*, found this remedy so financially burdensome as to be punitive.

Upon the foregoing, I conclude the record as a whole does not demonstrate the existence of such mitigating circumstances to warrant denial of the traditional Board remedy applied to discriminatory closings. Accordingly, the Order shall require the Employer to resume its coin room operations.

In order to remedy the Employer's refusal to bargain, the Order shall require the Employer to bargain, upon request, with the Union concerning the decision to close its Detroit coin room operation.

Finally, I conclude the Employer's unfair labor practices reflect a total disregard for the employee's Section 7 rights. The Employer's entire course of conduct resulted in loss of employment for all 14 employees in the coin room, have the tendency to create a lingering effect of interference, restraint, and coercion upon them, and destroyed the results of their free selection of a collective-bargaining representative. I conclude this scenario demonstrates the Employer's conduct was so egregious as to warrant a broad proscriptive order. *Le Roy Fantasies*, 256 NLRB 211 fn. 3 (1981). Accordingly, the Order shall require the Employer to refrain from, in any other manner, interfering with, restraining, and coercing its employees in the exercise of their Section 7 rights.

[Recommended Order omitted from publication.]

SUPPLEMENTAL DECISION ON REMAND

STATEMENT OF THE CASE

I. INTRODUCTION

NORMAN ZANKEL, Administrative Law Judge: By Order dated February 4, 1982 (not published in Board volumes), the matter herein was remanded to me by the Board to prepare and issue a decision supplementing an original decision issued by me on June 24, 1981 (hereinafter referred to as JD). Specifically, the Board directed me to make further findings "with respect to the credibility of witnesses and the weight of the evidence as a whole with regard to a consideration of the applicability of" *Textile Workers v. Darlington Mfg. Co.*, 380 U.S. 263 (1965), to the issues in the present proceeding.

I have considered the entire record herein, including the official transcript, the exhibits, the parties' briefs to me, the contents of my original decision (JD), together with the Employer's exceptions to my decision, its brief in support of the exceptions, and the General Counsel's answering brief to the exceptions.

The remand order did not direct the taking of further evidence. No party has requested the record to be reopened or that further briefs be filed. I have concluded that the Employer's brief on exceptions and the General Counsel's reply to it adequately present the parties' respective positions and arguments pertinent to the *Darlington* issue.

Accordingly, upon the entire record as described above, I make the following supplemental findings and conclusions.

II. CREDIBILITY

The factual findings relative to the background and sequence of events of the instant case are based on a com-

bination of factors. As recited in section IIA (JD) those factors include oral testimony not rebutted, and supporting documents.

Also, in resolving the various allegations of alleged 8(a)(1) conduct in JD section IIB-1 (a)-(d), I noted that resolution of witness credibility was essential to my ultimate findings on the merits.

Wherever material conflicts existed relative both to the factual scenario and the independent 8(a)(1) allegations, those conflicts explicitly were resolved in my original decision. Moreover, the JD contains the basis for each such resolution.

For example, I found as a fact that "Vacca asked Donovan to talk to the other employees regarding the union activity." (JD at 1273). In footnote 4, JD, I explained I credited Donovan based on the forthright character of her narration, the fact Vacca had not been asked to refute Donovan's account and Vacca did not reflect the precision of Donovan's account.

For brevity's sake, the remainder of my numerous earlier credibility resolutions appear in my original decision, as follows [omitted from publication].

I hereby reaffirm each and every credibility resolution presented by the above citations to my original decision and incorporate each by reference as though reiterated in this supplemental decision.

Similarly, I adopt and reaffirm each earlier factual finding which had been based on such credibility resolutions.

I find no need to make new or further credibility resolutions herein in order to consider the *Darlington* issue.

III. FURTHER FINDINGS OF FACT

In my original decision, I concluded that the credited evidence shows the Detroit coin room closing was motivated by discriminatory considerations. Certain specific findings and conclusions are especially germane to consideration of *Darlington's* applicability to the case at bar. I consider the following earlier findings are among the operative elements in evaluating whether or not to apply *Darlington* principles:

A. *The substantial 8(a)(1) conduct.* In JD, B, 2, (a), 14 separate examples of unlawful conduct are enumerated. Additionally, *ibid.*, three other items appear as further basis of my finding that the closing was motivated by union hostility.

Each of those conclusions and elements has been reviewed. I perceive no reason to alter any of those conclusions, or the factual findings which comprise their basis.

B. *The coin room operations.* Notwithstanding the foregoing reaffirmation of my earlier factual findings, I conclude there is another fact, not heretofore found, which bears upon the applicability of *Darlington*. Specifically, I now find that the operations conducted in the Detroit coin room consisted of two principal functions. One such function was the so-called change service. The other function was check cashing.

Further, I now find, as a matter of fact, that what has been called a closing of the coin room actually involved

only the elimination of the change service. In fact, the check-cashing work continued to exist beyond June 20.

Inasmuch as the *Darlington* principles apply to partial closings, these differing coin room activities are significant. Based on the undisputed evidence, I conclude that the coin room "closing" was a partial closing within the intentment of *Darlington*.

The elimination of the change service, while concurrently continuing check cashing is a patent partial closing.

If, however, it is concluded that those distinctions are not as significant as I have concluded, then termination of the change service operation may be, at least, viewed as a departmental closing. Thus, the Employer conducted other operations at the Detroit terminal in furtherance of its armored car services. The activities of the Employer's messengers, drivers, vault personnel, check cashing, and clerical employees remained unchanged after the change service was eliminated. Indeed, numerically speaking, the employees laid off in June were only a small number of the total employee complement at the Detroit facility. Clearly, then, elimination of only the change service without altering the other work performed at that facility readily can be seen as a partial closing. I so find.

C. *The decision to close.* A final issue exists relative to the remand directive to make factual findings. In its brief on exceptions (Exceptions br., fn. 3) to my decision, the Employer implies the existence of some sinister significance to my failure to make a finding that Loyal, in March, observed (regarding the coin room) that there was a need for the Employer to "increase [its] rates to the customers by astronomical sums or . . . close the operation down."

Indeed, Loyal did present the above-quoted testimony to me, Loyal used the quoted words in addition to, and contemporaneous with, his testimony, which I quoted among the factual findings in my original decision (JD, sec. II, A), to the effect he believed the coin room to be a "serious financial loser."

Upon review, I conclude it is appropriate to find, as I now do, both quoted statements actually were made. I credit Loyal's testimony in this connection. Nonetheless, these findings do not alter the character or probative value of either statement. Thus, I reaffirm my earlier placed reliance only upon "the serious financial loser" comment. That remark was included in my original decision to support my finding that the Employer had been suffering economic losses, as it contended.

Loyal's allusion to closing the operation, however, relates to a different part of the Employer's defense. Specifically, the Employer asserts Loyal's latter observation shows the Employer's consideration of coin room closing predated the Union's advent. I find Loyal's remarks of little probative value upon such issue. Two reasons exist for this conclusion. First, it is undisputed that Loyal's remarks were made after his personal study of the Detroit coin room operation. That study was conducted by Loyal in connection with the Employer's contemplated opening of a coin room at its Washington, D.C. terminal. *Loyal had not been commissioned to make recommendations regarding the Detroit operation.*

Second, the record reflects no action regarding the Detroit coin room had been taken upon, or contemplated, due to either of Loyal's March statements. There is nothing in the May 27 order to conduct a cost-benefit study at the Detroit operations which reflects that study was ordered because of any concern over Loyal's March observations.

I have previously found, and now reaffirm, that it was Cichalski's May 21 report upon which the cost-benefit study was ordered. Moreover, I now find there is no evidence which connects Loyal's investigation of the Detroit coin room operations to Cichalski's activities. Indeed, Cichalski's stated purpose, quoted in my original decision (JD, sec. II, A) tends to negate the existence of any such link. Thus, Cichalski reported his purpose was "to study the operation and accounting for the several bank accounts. . . ." As found in the original decision, Cichalski's "report does not directly allude to consideration of terminating the coin room operation." (JD, sec. II, A.)

In the above circumstances, I conclude (1) it was unnecessary to describe Loyal's "close the operation" statement in the original decision; and (2) the Employer's implied assertion that Cichalski's study emanated from, was connected to, or formed a pattern with, Loyal's observation is illusory. Accordingly, I reaffirm my earlier findings ". . . that the closing was considered only after the election outcome became known and it was certain the Union had been elected" (JD, p. 29, 11. 35-36) and that the fact the cost-benefit study had been ordered before the election is not as persuasive as the presence of the considerable 8(a)(1) activity which began in early May (JD, sec. B, 2, (a)).

To summarize, I have herein made the following additional findings of fact and conclusions relevant to the *Darlington* issue, not expressly contained in my original decision:

- (1) The earlier findings of the substantial 8(a)(1) conduct may be used to assess the employer's motivation under *Darlington*;
- (2) Functionally, the Employer terminated (or closed) only its change service operation in the coin room. The checkcashing operation continued.
- (3) All other operations of the Employer's armored car services provided by, and at, the Detroit terminal continued to exist after the cessation of the change service.
- (4) The facts described immediately above in paragraphs (2) and (3) reflect the "closing" was partial within the meaning of *Darlington*.
- (5) In March, Loyal opined the customer rates for coin room services needed to be increased or the operation closed down, but this comment does not appear to be any part of the underlying cost-benefit analysis which purportedly resulted in the alleged unlawful "coin room" closing.

IV. ANALYSIS

Counsel for the General Counsel contend that "strictly speaking" *Darlington* does not apply "because the coin room layoff was not the sort of partial closing involving multiple plants which the *Darlington* Court analyzed."

Also, the General Counsel claim *Darlington* does not apply because not all the coin room employees were laid off. Alternatively, the General Counsel argues that the evidence herein supports a finding of an 8(a)(3) violation, even under *Darlington*, because the record demonstrates the foreseeability of a chilling effect on the employees' organizational rights.

The Employer contends my original finding of an 8(a)(3) violation "cannot withstand the *Darlington* test." The Employer's position is predicated upon the belief no probative evidence of an intent to chill unionism is present in the instant case.

Under *Darlington*, a partial closing is discriminatory when two elements are present. Those elements are: (1) a purpose on the employer's part to chill unionism in any of the remaining parts of his business; and (2) the employer must reasonably have foreseen that the closing would have such a chilling effect. (380 U.S. at 275)

Direct evidence of a chilling effect required by *Darlington* is rarely available. To ascertain whether such an effect is present, the Board may rely on "fair inferences arising from the totality of the evidence considered in the light of then-existing circumstances." (See the Board's decision on remand from the Supreme Court, *Darlington Mfg. Co.*, 165 NLRB 1074, 1083 (1967). See also *Milo Express*, 212 NLRB 313, 314 (1974)).

I am mindful of the Supreme Court's caveat (380 U.S. at 276) that it does not suffice to establish the unfair labor practice charged here to argue that "the . . . closing necessarily had an adverse impact upon unionization . . ." (among other parts of the employer's business). [Emphasis supplied.] However, as long as there are facts present upon which to base a fair inference that a partial closing was motivated by an intention to chill unionism, no "affirmative evidence of an actual, 'chilling effect' on remaining employees" is required. (*George Lithograph Co.*, 204 NLRB 431 (1973)).

I conclude the credited and probative evidence in this case satisfies the Supreme Court's two requisite elements of the *Darlington*-type violation.

A. *The "chilling effect."* As in *Darlington* (165 NLRB 1074), the preelection period of the instant case was punctuated by numerous and substantial incidents of conduct found by me coercive in violation of Section 8(a)(1) of the Act.

As in *Darlington*, it has been found that the alleged unlawful closing was not seriously contemplated until the Union's election victory.

In the instant circumstances, I find these facts lead logically to the presence of the unlawful chilling effect. This is the teaching of the *Darlington* case.

The task of assessing the Employer's motivation is difficult and delicate. In making my conclusions, I have considered the evidence and the fair inferences which emanate from it which the Employer asserts negates the existence of the proscribed chilling purpose. Specifically, I have considered the following:

(1) The invitation to the union representatives to attend the May 28 meeting with employees. The Employer urges that this election-eve invitation demonstrates its cooperative spirit regarding the Union and its affection for that labor organization. I have found, how-

ever, that the content and character of that meeting dispels such conclusions. It was at that meeting that the employees were threatened with economic reprisal.

(2) The parties negotiated and signed a collective-bargaining agreement after the June termination of the change service. The Employer emphasizes this factor to demonstrate its benign attitude toward unionization and the Union. Although this is some evidence of the Employer's intent, I do not consider it persuasive.

I perceive the critical question to be whether the Employer's activities occurring herein make it realistically predictable that the remaining employees would fear closing or other cogent restraint upon the exercise of their Section 7 rights.

In *George Lithograph*, supra, the closed operation was located in the same building where other employees, represented by a union, also worked. In considering whether or not a chilling effect existed, the Board observed (204 NLRB at 432) "the fact that Respondent's remaining employees are currently represented by other labor organizations does not negate a finding that the Respondent's action in closing . . . was aimed at chilling the exercise of Section 7 rights by the remaining employees. . . ." The Board noted "it is clear . . . that no employee would feel free to exercise the right to replace an incumbent union where the employer has already closed down part of its business operations because of well publicized hostility to one Union and equally publicized preference for another."

The situation in the case at bar is analogous to *George Lithograph*. Indeed, the posture of the parties herein gives rise to an even greater probability that the unlawful message conveyed by the various 8(a)(1) conduct would impede the employees' allegiance to the Union. As noted, the Board, in *George Lithograph*, observed that the partial closure there created an effective deterrent to the employees' right to replace their incumbent collective-bargaining representative. I find the instant Employer's partial closing no less effective in the clearly predictable result; namely, impairment of freedom to continue their representation by the Union herein.

(3) The argument that the Employer's consideration of the subject partial closing predated the Union's advent. I have already rejected that argument as based on pure speculation during the evaluation of the Employer's defense to this litigation. (See Findings of Fact, sec. III, C, supra.)

Upon the foregoing, I find the presence of a chilling purpose in the Employer's termination of the change service herein. Ending that operation, in the instant circumstances, comprised a highly sophisticated, but impressive, signal that the Employer does not look favorably upon current efforts to support the Union. I conclude it is entirely logical that the probable effect of the change service termination, immediately after a union victory and in the context of the substantial 8(a)(1) conduct, upon the employees remaining at the Detroit facility, would be to chill their exercise of union adherence and activity.

B. *Proscribed consequences were foreseeable.* In *Bruce Duncan Co.*, 233 NLRB 1243 (1977), the Board set forth

some of the factors used to determine the reasonably foreseeable effect of partial closings. They were, inter alia:

- (1) Contemporaneous union activity at the employer's remaining facility.
- (2) Geographic proximity of other facilities to the closed operations.
- (3) Likelihood that employees will learn of the circumstances surrounding the Employer's unlawful conduct.

The instant case contains elements which meet each criterion above. First, contemporaneous union activity existed at the Detroit facility among the employees who remained at work after the termination of the change service. Indeed, the Union and the Employer were on the threshold of negotiating a new collective-bargaining agreement. There is no evidence of organizational activity at the Employer's Detroit (or for that matter any other) facility. Nonetheless, it is unrealistically restrictive to conclude the "contemporaneous union activity" factor excludes all activities except those within an organizational framework.

The second and third criteria are readily demonstrated. There can be no greater geographic proximity than herein. The closed operation was located at the precise Detroit facility where those employees who remained continued to work.

Also, it is beyond cavil that the Employer's unlawful messages would have reached the remaining employees. It is true there is no evidence that any of the substantial 8(a)(1) conduct was directly made known to the noncoin room employees. However, in this connection it is important that the union making efforts to represent the coin room employees is the very same labor organization already representing the employees who remained after the change service terminated. This fact virtually assures that the Employer's activity found unlawful herein would not escape the attention of those remaining employees.

I generally conclude the Employer's 8(a)(1) conduct effectively admonished the employees that unionization, especially in the instant backdrop of severe economic losses, would inevitably place unreasonable economic demands upon the Employer, thereby leaving it no choice but to close down other operations burdened with the combination of union demands and existing financial losses. The Employer's message was strong, unequivocal, and clear. The probability of communication of this message to the remaining employees is enhanced by the fact the closed operation functioned under the same managerial structure in Detroit as the operations which continued to function after the subject partial closure.

Upon the foregoing, I conclude the totality of evidence supports the inference that the closing had the reasonably foreseeable consequence of chilling unionism.

In sum, I conclude the *Darlington* principles are applicable to the case at bar, and that the record as a whole, viewed in that light, does not require alteration of my earlier conclusion in this proceeding that the termination

of the coin change service was discriminatory in violation of Section 8(a)(3) and (1) of the Act.¹

Upon the basis of the foregoing factual findings and conclusions on remand, and upon the entire record in the case I make the following:

AMENDED AND ADDITIONAL CONCLUSIONS OF LAW

1. Amend original JD, section III, Conclusion of Law 4, so as to delete it and substitute the following new Conclusion of Law 4 (a) and (b):

"4(a) The principles of *Textile Workers v. Darlington Manufacturing Company*, supra, are applicable to the instant proceeding.

"(b) The Employer discriminated against its employees by terminating the coin change service of its coin room at its Detroit, Michigan facility on June 20, 1980, and by laying off the change service employees, all in violation of Section 8(a)(3) and (1) of the Act."

2. In all other respects, each of the other Conclusions of Law contained in my original decision are hereby reaffirmed.

THE REMEDY

All discussion contained in section IV, entitled "The Remedy" of my original decision is hereby incorporated herein by reference.

With respect to my conclusion that the Employer should be required to resume the terminated operations (JD, sec. IV), I have considered the Employer's contentions and supporting evidence that its cessation of change service in Detroit was consistent with past practice at other locations and some of such similar activity was either a total closing or tantamount to a partial closing. Also considered is the claim, and supporting evidence, which shows the closed Detroit operations had logged financial losses of great magnitude almost from their inception.

The Employer's arguments opposing a resumption of operations are only superficially appealing. If, as herein, facts exist to show that the Employer was continuing operations at the same location where the closure occurred, and at other facilities, it is appropriate (and not inequitable, burdensome or punitive) that the remedy require a return to the status quo ante (*George Lithograph*, supra at 432; cf. *Rio Piedras Mfg. Corp.*, 236 NLRB 1198, 1200 fn. 1 (1978)) to fully rectify the Employer's discriminatory conduct.

In recommending the status quo ante portion of the remedy I have been mindful of the credited evidence as to the extreme financial losses. As indicated in my original decision, I have weighed such evidence against the surrounding circumstances which include, inter alia, the potent and substantial 8(a)(1) violations, the chilling

¹ The discriminatory findings herein, based on *Darlington*, are not intended to supplant the discriminatory findings in my original decision based on a *Wright Line* analysis. The rationale underlying each analysis, I conclude, is valid and independent of the other. The *Wright Line* theory is, in my view, an alternative theory of violation to *Darlington*. As will be set forth, infra, I conclude that the remedy should remain the same under either theory in the circumstances herein.

effect upon unionism of the Employer's conduct and the evidence tending to show that the closing in question was a direct response to the May 29 election results.

Moreover, a factor not previously mentioned in this regard is relevant to this aspect of remedy. Paradoxically, the Employer has claimed it exhibited its good faith and absence of unlawful motivation as shown by the fact it agreed to collective-bargaining terms covering coin room employees after the closing (R. Exh. 12, effective 10/2/80-10/1/83). This contention tends to belie the Employer's protestations that it would suffer an undue and unconscionable hardship to resume the terminated operations. Implicitly, the Employer itself appears to have left open the way toward resumption of the closed functions by having negotiated for, and agreed to, terms and conditions of employment for the future incumbents

of the terminated positions (R. Exh. 12, art. I. sec. 1; art. II and art. 20). The collective-bargaining agreement makes no distinction between the check cashing and coin change services. Thus, I presume the contractual references to coin room personnel are sufficiently broad to support my conclusion.

Upon the contents of the remedy discussion in my original decision, and the remedy discussion in the supplemental decision, I reiterate my conclusion that, in all the circumstances of the instant case, the Employer should be required, pursuant to *Darlington* and its progeny, to resume the operations found herein to have been discontinued in violation of Section S(a)(3) and (1) of the Act.

[Recommended Order omitted from publication.]