

J. D. Hinkle & Sons, Inc. t/a Mountaineer Petroleum and Teamsters, Chauffeurs and Helpers Local Union No. 175 a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO. Case 6-CA-20959

February 25, 1991

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
DEVANEY AND OVIATT

On June 7, 1989, Administrative Law Judge Donald R. Holley issued the attached decision. The General Counsel and the Respondent filed exceptions and supporting briefs, 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 the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions and to adopt the recommended Order as modified.²

1. The judge credited testimony of employees Randall Alderman and James Warner that, in speaking with them about the Union's organizational campaign, the Respondent's president, James Hinkle, told them either that he was "not going to have a third party running [his] company" (Alderman's testimony) or that he was not "going to have a third party come in" (Warner's testimony). The judge did not credit Alderman's testimony that during this conversation Hinkle also said he would not negotiate a contract with the Union and that he would shut the Company down if it "went union." The judge found a violation on the basis of Hinkle's remark about either the Union's

"running" his company or its "coming in." In so doing, the judge in essence relied on Board cases finding it a violation of Section 8(a)(1) of the Act for an employer to state in effect that it will not accept or deal with a union even if the employees select it as their representative because such a statement represents a threat that the employees' efforts to seek union representation are necessarily futile.³

We do not find that Hinkle's statement, which may not have gone beyond a statement that Hinkle would not permit a union to run his company, rises to the level of a threat that the employer will not recognize a union if the employees choose one. Since the statement was made in the course of a conversation that—because of the judge's discrediting much of the rest of Alderman's testimony—was devoid of any immediate context that might have given it a more threatening character, we find that the General Counsel has not proved, by a preponderance of evidence, that Hinkle made any comment exceeding the bounds of a lawful expression of opinion within the scope of Section 8(c) of the Act. We therefore conclude that this statement did not violate Section 8(a)(1) of the Act, and we amend the recommended Order accordingly.⁴

2. The judge rejected the General Counsel's request for an order directing the Respondent to reinstitute long-haul operations because of the Respondent's showing that reinstatement of operations would endanger its continued viability. Instead, the judge's recommended Order gives the Respondent the option of either reinstating operations or offering reinstatement to each of the discriminatees to any position in its existing operations which he is capable of filling and, in the event no such position exists, placing that discriminatee on a preferential hiring list for any future vacancy he is capable of filling. After the judge's decision issued, the Board held in *Lear Siegler, Inc.*, 295

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

In summarizing his 8(a)(3) findings in the final paragraph of sec. III.D.4.b, of his decision, the judge inadvertently fails to include the name of long-haul driver James Schoolcraft among the employees whose layoff in April 1988 violated Sec. 8(a)(3) of the Act. (Schoolcraft's name is correctly included in the remedy, Order, and notice.) In the seventh paragraph of the same section of the decision, the judge inadvertently states that the Respondent has undergone two financial reorganizations since 1976, rather than since 1986. In the penultimate paragraph of sec. III.F, the judge also inadvertently states the Respondent's representation of its net worth to be minus \$7000, rather than minus \$7 million. These errors do not affect our decision.

²The General Counsel has requested that the Board clarify the portion of the judge's recommended Order relating to the Respondent's obligations for backpay. We find nothing in the recommended Order suggesting, as the General Counsel contends, that the Respondent's backpay liability is tolled by placement of the names of discriminatees on a preferential hiring list. Rather, the Order provides that backpay accrues "from the date of termination to the date the discriminatee either secures equivalent employment or the Respondent makes an offer of reinstatement." We adopt the recommended Order.

³ See, e.g., *Cannon Industries*, 291 NLRB 632, 637 (1988) (employer "not going to let those boys have any union in the company"); *Dorothy Shamrock Coal Co.*, 279 NLRB 1298, 1310 (1986), enfd. 833 F.2d 1263, 1265-1268 (7th Cir. 1987) (employer was "not union, it never had been, and never would be"); *Palby Lingerie*, 252 NLRB 176, 180 (1980) ("not going to negotiate with the union"); *Westinghouse Electric Corp.*, 240 NLRB 905, 916 (1979), enfd. 612 F.2d 1072 (8th Cir. 1979) (would "not tolerate" a union at the plant); *M.B.D. Co.*, 193 NLRB 494, 501 (1971) (employer would "never sign a contract").

⁴ In *Granite City Journal*, 262 NLRB 1153 (1982), and *Magnolia Manor Nursing Home*, 260 NLRB 377 (1982), the Board found violations of Sec. 8(a)(1) on the basis of arguably similar statements, but we do not find those cases controlling here. In *Granite City*, the employer's publisher, in the course of "an antiunion diatribe" told an employee not only that he would not "permit" a union to "tell him how to run" his newspaper, but also that he would "not permit a union to organize the newspaper." 262 NLRB at 1155. In *Magnolia Manor*, the employer told employees that the union "was not going to tell him what to pay employees or how he should run the nursing home," at a time when he was unlawfully ignoring his obligation, as a successor employer, to recognize and bargain with the union. 260 NLRB at 384.

Member Devaney is satisfied that the judge concluded that Hinkle said to the employees that "he was not going to have a third party running his company" and, notwithstanding the unlawful interrogation involved in that conversation, Member Devaney does not think the credited testimony established that the Respondent threatened the futility of union representation. Accordingly, he joins in the dismissal of this allegation.

NLRB 857 (1989), that it will decline to order re-institution of operations not only in situations where that remedy threatens a respondent's continued viability, but also where the respondent has shown that restoration of the status quo ante would be unduly burdensome. We agree with the judge that a restoration requirement is inappropriate, but we do so because that requirement would be unduly burdensome in the circumstances of this case. We do modify that portion of the judge's recommended remedy and Order to reflect the option that the Respondent may offer reinstatement to each discriminatee in a substantially equivalent position in its existing operation, or if no substantial equivalent exists, to those positions that do exist, in descending order of equivalence (i.e., the job next in line in equivalence to the position from which the discriminatee was terminated first; then the job next approximating equivalence, etc.). In the event that the Respondent complies with the Order by offering less than substantially equivalent employment to any discriminatee, the Respondent shall be directed to place that discriminatee on a preferential promotion list for any future vacancy in jobs substantially equivalent to the job from which he was unlawfully terminated.⁵ We do not, however, intend by this Order to cut off the backpay period for any employee who has obtained employment elsewhere that is not substantially equivalent if that employee has not received a reinstatement offer from the Respondent consistent with this Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, J. D. Hinkle & Sons, Inc. t/a Mountaineer Petroleum, Buckhannon, West Virginia, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Delete paragraph 1(a).

2. Substitute the following for paragraph 2(b).

“(b) Offer Randall Alderman, James Warner, James Jenkins, George Winemiller, James Schoolcraft, Henry Frame, and Joseph Snyder reinstatement by either (1) reinstating its long-haul operations and offering reinstatement to each of the discriminatees to his former position or, if such position no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges; or (2) offering reinstatement to each discriminatee to a substantially

⁵ Member Devaney does not agree that the Respondent may satisfy its reinstatement obligation to the discriminatees by offering them reinstatement to positions that are less than substantially equivalent to their former jobs. The Board has traditionally ordered that, where the former jobs of discriminatees are no longer available, the employer must offer reinstatement to substantially equivalent positions. In Member Devaney's view, the circumstances of this case, including the Respondent's cessation of its long-haul trucking operations and the Board's decision not to require restoration of those operations, with which Member Devaney agrees, do not warrant a deviation from the Board's well-established remedial standard.

equivalent position in its existing operation or, if no substantial equivalent exists, to those positions that do exist in descending order of equivalence, without prejudice to his seniority or other rights and privileges; and in the event the Respondent complies with this Order by offering less than substantially equivalent employment to any discriminatee, place that discriminatee on a preferential promotion list for any future vacancy in jobs substantially equivalent to the job from which he was unlawfully terminated.”

3. Substitute the following for paragraph 2(e).

“(e) Post at its Buckhannon, Sutton, and White Sulphur Springs, West Virginia facilities copies of the attached notice marked ‘Appendix’¹⁷ and mail a copy of this notice to the last known address of all employees employed April 23, 1988, to May 13, 1988, in the appropriate bargaining units represented by Teamsters, Chauffeurs, and Helpers Local Union No. 175, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO. Copies of the notice, on forms provided by the Regional Director for Region 6, after being signed by the Respondent's authorized representative, shall be mailed and posted by the Respondent immediately on receipt and be maintained for 60 consecutive days thereafter 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.”

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

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 interrogate employees concerning their union activities and sentiments.

WE WILL NOT interrogate employees concerning how they voted in a Board election.

WE WILL NOT threaten employees with loss of employment if they vote the Union in.

WE WILL NOT tell known union adherents they are being transferred to night shift because such action might cause them to quit.

WE WILL NOT tell employees they received fewer loads because they are union.

WE WILL NOT threaten to close our long-haul operations if our employees chose to be represented by the Union.

WE WILL NOT discourage membership in, or activities on behalf of, Teamsters, Chauffeurs and Helpers Local Union No. 175, International Brotherhood of Teamsters, Warehousemen and Helpers of America, AFL-CIO, or any other labor organization, by reducing the hours of work of employees through subcontracting, transferring employees to the night shift, terminating employees and closing business operations, or otherwise discriminating against employees in any manner in respect to their tenure of employment or any term or condition of employment in violation of Section 8(a)(1) and (3) of the Act.

WE WILL NOT fail and refuse to give the Union appropriate advance notice of our intention to subcontract long-haul unit work and fail to afford the Union an opportunity to bargain over decisions to subcontract unit work and the effect of such decisions on employees.

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

WE WILL make whole Randall Alderman, James Warner, James Jenkins, and George Winemiller for losses they sustained when their hours of work were reduced through subcontracting during the period April 11, 1988, to May 13, 1988, with backpay and interest.

WE WILL offer Randall Alderman, James Warner, James Jenkins, George Winemiller, James Schoolcraft, Henry Frame, and Joseph Snyder reinstatement by either (1) reinstating our long-haul operations and offering reinstatement to each of the discriminatees to his former position or, if such position no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges previously enjoyed; or (2) offering reinstatement to each discriminatee in a substantially equivalent position in our existing operation or, if no substantial equivalent exists, to those positions that do exist in descending order of equivalence, 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, WE WILL place those for whom jobs are not now available on a preferential hiring list for any further vacancies which may occur in jobs the said discriminatees are capable of filling, and making such discriminatees whole for losses suffered as a result of the discrimina-

tion against them with backpay and interest. In the event that we are required to offer less than substantially equivalent employment to any discriminatee, WE WILL place that discriminatee on a preferential promotion list for any future vacancy in jobs substantially equivalent to the job from which the discriminatee was unlawfully terminated.

WE WILL notify Teamsters, Chauffeurs and Helpers Local Union No. 175, when legally required, of any decisions to subcontract bargaining unit work and afford it, on request, adequate opportunity to bargain concerning such decisions and their effect on bargaining unit employees. The appropriate bargaining units are:

All full-time and regular part-time long-haul drivers employed by the Employer at its Buckhannon, Sutton, and White Sulphur Springs, West Virginia, facilities; excluding office clerical employees and guards, professional employees and supervisors as defined in the Act.

All full-time and regular part-time short-haul drivers and mechanics employed by the Employer at its Buckhannon, Sutton, and White Sulphur Springs, West Virginia, facilities; excluding office clerical employees and guards, professional employees and supervisors as defined in the Act.

J. D. HINKLE & SONS, INC. T/A MOUNTAINEER PETROLEUM

Charles H. Saul, Esq. and *Robin F. Wiegand, Esq.*, for the General Counsel.

Fred F. Holroyd, Esq. (Holroyd & Yost), of Charleston, West Virginia, for the Respondent.

DECISION

STATEMENT OF THE CASE

DONALD R. HOLLEY, Administrative Law Judge. On a charge filed by the above-named Union on May 9, 1988,¹ the Acting Regional Director for Region 6 of the National Labor Relations Board issued a complaint on June 23 which alleges that J. D. Hinkle & Sons, Inc. t/a Mountaineer Petroleum (the Respondent) engaged in stated conduct which violates Section 8(a)(1), (3), and (5) of the National Labor Relations Act. Respondent filed timely answer denying that it had engaged in the unfair labor practices alleged in the complaint.

The case was heard in Buckhannon, West Virginia, on September 6 and 7, 1988. All parties appeared and were afforded full opportunity to participate. On the entire record,² including consideration of the posthearing briefs filed by the parties, and from my observation of the demeanor of the witnesses who appeared to give testimony, I make the following

¹ All dates are 1988 unless otherwise indicated.

² General Counsel's motion to correct transcript, which is unopposed, is granted.

FINDINGS OF FACT

I. JURISDICTION

Respondent, a West Virginia corporation, with its principal office and place of business located in Buckhannon, West Virginia, is engaged in the nonretail transportation and sale of petroleum products. During the 12-month period ending April 30, 1988, it purchased and received at its West Virginia facilities products, goods, and materials valued in excess of \$50,000 from points outside the State of West Virginia. It is admitted, and I find, that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. STATUS OF LABOR ORGANIZATION

It is admitted, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background

Respondent is a family corporation owned by members of the Hinkle family. James Douglas Hinkle III, is the president of the corporation and his brother, John, is vice president. The business consists of two divisions—(1) Mountaineer Petroleum, a wholesale gasoline and middle distillate reseller; and (2) West Virginia Split Rail, which manufactures and sells split-rail fence, stockade fence, and landscape ties.

Mountaineer Petroleum has operating plants in three West Virginia cities, i.e., Buckhannon, Sutton, and White Sulphur Springs. Such plants sell and deliver gasoline, diesel fuel, and home heating oil to customers in their local areas. Until mid-May 1988, the petroleum products were obtained from various oil companies at various locations and were transported to the operating plants and to certain customers by so-called long-haul drivers who drove tractors and tank type trailers. Straight trucks were used by Respondent to accomplish local deliveries.

In the summer of 1986, Respondent's petroleum division experienced financial difficulties which compelled it to initiate a financial reorganization outside of bankruptcy. James Hinkle III (Hinkle), testified that Respondent's primary creditors at the time were state and Federal taxing authorities, which were owed \$5.5 million and Chrysler Capital, which as owed some \$4 million. Hinkle testified Respondent was compelled to reorganize a second time in the fall of 1987 because insufficient funds precluded it from continuing to follow the 1986 plan.

When the 1987 reorganization occurred, Respondent successfully caused its long-haul drivers to take a wage cut which dropped them from 22 cents per mile to 18 cents per mile and eliminated drop costs and waiting and/or delay time moneys. At or about the same time, Respondent contracted out all its Maryland business to enable it to bring a \$100,000 bond deposit back into the business, and it contracted out transportation of product from terminals located in Fairfax and Roanoke, Virginia. Additionally, Hinkle testified that, during the fall of 1987, Respondent contracted out all the hauling of products manufactured by the split-rail division, and it conducted negotiations with Leaseway Transportation concerning feasibility of having that firm haul petroleum

products out of terminals located in Charleston (West Virginia), Catlettsburg (Kentucky), Hunnington (West Virginia), Congo (West Virginia), Neville Island (Pennsylvania), and Marietta (Ohio).

Hinkle testified that he met with the long-haul drivers in late November 1987, and informed drivers that some drop charges and/or delay charges would be reinstated in December. He further indicated another meeting was held with long-haul drivers in January 1988, and additional drop charges and/or delay charges were reinstated at that time. Hinkle testified without contradiction that the drivers were informed in January that when split-rail customers started sending in their remuneration in late March or early April, he would look at increasing their pay; that in the meantime, they would be attempting to come up with an equitable pay plan they could both live with.

B. The Organization Campaign

Long-haul driver James Jenkins, who was employed at Respondent's Sutton facility, called the Union on February 1, 1988, and discussed representation of Respondent's truck-drivers with Teamsters Local 175 Business Agent David Atkins. A meeting date of February 7 was scheduled at the time. Respondent employed about 10 long-haul drivers, who operated two or three tractor-trailers out of Buckhannon, two rigs out of Sutton, and one out of White Sulphur Springs. In addition, Respondent employed approximately six short-haul drivers and three mechanics, including mechanics Joe Snyder and Henry Frame, who worked at Respondent's Buckhannon facility. By February 13, the seven long-haul drivers named as alleged discriminatees in the instant case had all signed union authorization cards.³ The record fails to reveal the names of employees in the short-haul unit who signed union authorization cards.

On February 24, the Union filed a petition in Case 6-RC-9980 requesting a unit of

All full-time and regular part-time long haul drivers employed by the Employer at its Buckhannon, Sutton and White Sulphur Springs, West Virginia, facilities; excluding office clerical employees and guards, professional employees and supervisors as defined in the Act.

Thereafter, the Union filed the petition in Case 6-RC-9991 seeking a unit of

All full-time and regular part-time short haul drivers and mechanics employed by the Employer at its Buckhannon, Sutton and White Sulphur Springs, West Virginia, facilities; excluding office clerical employees and guards, professional employees and supervisors as defined in the Act.⁴

Elections were held in the above-described representation cases on April 11 and the Union received a majority of the votes cast in both units. The Union prevailed in the long-haul

³They are Randall Alderman, James Warner, Donnie Nottingham, George Winemiller, James Jenkins, Kenneth Kelley, and James Schoolcraft.

⁴It is admitted, and I find, that the above-described bargaining units constitute appropriate units for the purpose of collective bargaining within the meaning of Sec. 9(b) of the Act.

unit with a vote of 6 to 0, with 2 challenged ballots.⁵ In the short-haul unit, the Union prevailed by a vote of 6 to 3. Randall Alderman was the Union's observer at the Buckhannon polling place, and James Jenkins was the Union's observer at the Sutton polling place. The Union was certified as the exclusive collective-bargaining agent of employees in the units on April 21, 1988.

C. *The Alleged 8(a)(1) Violations*⁶

The complaint alleges, and General Counsel contends, that Respondent engaged in numerous independent violations of Section 8(a)(1) of the Act during the election campaign and thereafter. The claim is that Respondent Supervisors Hinkle, Robert Ayres, George (Pete) Rowan, and Ronald Baker all engaged in violative conduct at stated times. The supervisory status of the individuals named is not in dispute. A summary of the evidence offered in support and in opposition to the allegations is set forth below.

1. Conduct attributed to Hinkle

a. *Hinkle-Alderman/Warner conversation*

Randall Alderman, a long-haul driver who worked at the Buckhannon facility, testified that, at some point in March, he and James Warner, also a long-haul driver stationed in Buckhannon, were called into Bob Ayres' office where Hinkle met with them. According to Alderman, after telling them they had really got his attention, he told them he was not going to have a third party running his company; he was not going to negotiate any contracts with anybody or put anything on paper because he was the boss and he decided what the pay was; and that he would shut down if they went union. Additionally, Alderman testified Hinkle asked them why they went to the Union during the conversation. His recollection was that Warner told him they did it because of the way their pay had been cut back and forth and they never knew what they would be making.

Alderman recalled that Hinkle indicated during the discussion that he had learned that they could stop the whole election process if they would rescind the cards they had sent in.

Warner's version of the above-described meeting was brief. He testified Hinkle walked into the office and stated he had made a bad mistake by cutting their wages down; that Hinkle asked them to forget about the Union; and that Hinkle said he wasn't going to have a third party come in. According to Warner, when Hinkle made his "third party" comment, he asked Hinkle if he would give them a contract himself. He recalled Hinkle said he could not do that.

Hinkle was not asked to state his version of the above-described conversation. During his testimony, he indicated he probably told all his employees that he did not want a third party intervening in his business. He denied, however, that he told any employee he would close down if the Union was voted in. Additionally, he denied that he told any employee

that he would not negotiate with the Union or refuse to sign a contract with it.

Hinkle's failure to give his version of the above-described conversation causes me to credit, in main, Alderman's version of the conversation. As Hinkle indicated during his testimony that he was not fully aware of what he could legally say at the time of the meeting under discussion, I doubt that he used the proper semantics when telling the employees he did not want a third party intervening in his operations. Instead, I credit the employees, who both claimed he said he was not going to have the Union or a third party coming into the business. Noting that Warner indicated the contract discussion involved an attempt by the employees to cause Hinkle to enter an individual contract with them defining their wages, I conclude that Alderman's claim that Hinkle told them during the conversation that he would not negotiate with the Union or sign a contract with it if it were voted in is unreliable. I do not credit the assertion. Similarly, noting that Hinkle denied that he threatened any employee, and specifically Alderman, with plant closure, I do not credit his claim, which was not corroborated by Warner, that Hinkle threatened plant closure during the meeting.

In sum, I find that, during the March meeting under discussion, Hinkle told the employees he was not going to have a third party running his company; he asked them why they had gone to the Union; and he solicited them to rescind their union authorization cards. As the record fails to reveal that employees Alderman and Warner were known union advocates at the time of the conversation, and Hinkle clearly expressed his opposition to the Union during the meeting, I find that by interrogating the employees concerning the reason they had gone to the Union, he violated Section 8(a)(1) as alleged. I further find that by telling them he was not going to have a third party running his company, he, in effect, informed them it would be futile for them to obtain union representation. I find such conduct could reasonably be said to interfere with, coerce, and restrain employees in the exercise of their Section 7 rights, and it therefore was violative of Section 8(a)(1) as alleged. Finally, while General Counsel contends Hinkle violated Section 8(a)(1) by giving unsolicited advice to employees as to the mechanics of revocation, I note the record fails to reveal he offered them assistance and it fails to reveal he thereafter attempted to elicit information as to whether employees availed themselves of such advice. In the circumstances described, Hinkle's conduct did not violate Section 8(a)(1) of the Act. *Aircraft Hydro-Farming*, 221 NLRB 581, 583 (1975).

b. *Hinkle-Jenkins March 3 discussion*

James Jenkins, employed as a long-haul driver at Respondent's Sutton plant, testified that on March 3 the manager of the Sutton facility, Wilma Sutton, told him Hinkle was on the phone and wanted to speak with him. Asked to state his recollection of the conversation, he replied Hinkle told him:

That we had got his attention and that he would like—he said he had to watch what he says, that he doesn't want to say certain things. And that he didn't want a third party intervention into his business and he would like to save the law fees by us voting it out, so he asked us to vote against it.

⁵Employee Donnie Nottingham was one of the drivers who voted under challenge. As challenges were not determinative, his ballot envelope would not have been opened.

⁶Par. 28 of the complaint fails to allege that the conduct of James Hinkle III set forth in par. 7, violates Sec. 8(a)(1) of the Act. It was fully understood at the time of the hearing that General Counsel contended such conduct violated Sec. 8(a)(1) and the issues were fully litigated. I treat the omission as a clerical error.

When he was asked whether anything else was said, he replied, "He'd close the doors before he'd accept the Union." During cross-examination, Jenkins admitted the closure threat was not in the affidavit he gave the Board. He then admitted Hinkle did not make the statement quoted above.

Jenkins indicated he served as the Union's observer at the Sutton polling during the April 11 election. After the polls were closed at that location he went to the office where he conversed with Hinkle. The employee testified without contradiction that Hinkle asked him how he had voted and that he replied he had voted for the Union. Hinkle then asked him how he thought the tractors and trailers and the little trucks would go. He responded 100 percent on tractor-trailers and about 50-50 on the little trucks.

Hinkle did not seek to refute Jenkins' version of the telephone conversation. I find, however, that the remarks made by Hinkle were lawful. Similarly, Hinkle did not deny that he asked Jenkins immediately after the polls closed at Sutton how he voted and how he thought the tractors and trailers and little trucks would go. While it is likely that Hinkle was being facetious when he asked Jenkins how he voted, the Board places great emphasis on the sanctity of the secret-ballot election process. Thus, while Jenkins' union sentiments were undoubtedly known by Hinkle as the employee served as the Union's observer at the Sutton polling place, the employee could have reasonably assumed Hinkle was seeking to ascertain how he voted because he intended to engage in retaliatory acts against him. As the interrogation under discussion occurred in the context described and secret-ballot elections would no longer be secret if employers were entitled to ask employees how they voted in a given election, I find, as alleged, that by asking Jenkins how he voted in the election, Respondent, through Hinkle's conduct, violated Section 8(a)(1) of the Act as alleged. Noting that Hinkle did not seek to cause Jenkins to indicate how individual employees voted when he asked his estimate of the way the tractor-trailer unit and the short-haul unit voted, I find that type of interrogation did not violate Section 8(a)(1) of the Act.

c. Hinkle-Winemiller conversation

George Winemiller, a long-haul driver employed in Sutton, testified that Jenkins and Wilma Sutton, Respondent's manager at the Sutton plant, told him to call Hinkle about a half-hour after Jenkins conversed with him. While Winemiller repeatedly indicated he could not recall the entire conversation or the order in which comments were made, he testified that Hinkle told him that we had his attention in a big way; he would not have a third party running his company; that he would not negotiate with the Union and that the ball was in our court and it was our turn to move. He claims he told Hinkle at some point that they were willing to listen and Hinkle said his hands were tied and he did not say any more.

As indicated above, Hinkle spoke with employee Jenkins one-half hour before he spoke with Winemiller. Significantly, during the Jenkins' conversation, he commented he had to watch what he said, and he thereafter made comments which were entirely lawful. Winemiller's testimony was conclusory in nature and he admitted he could not recall precisely what was said by Hinkle. Noting that Hinkle denied telling any employee he would not negotiate with the Union, and noting his claim that he phrased the third party intervention in his business comment in the form recalled by Jenkins,

I refrain from finding he made comments to Winemiller which violated Section 8(a)(1) of the Act.

d. Hinkle-Schoolcraft conversation

Schoolcraft, a long-haul driver employed at White Sulphur Springs, testified he was instructed to telephone Hinkle while he was on the road on April 2. He testified that after customary greetings, Hinkle "asked my feelings about the Union" indicating he personally was antiunion. The employee claims he told Hinkle they each had their individual likes and he felt if it would benefit him and his family he would have to vote for representation through the Union. When he was asked if anything else was said, he indicated Hinkle remarked that he did not like to consider the possibility of someone else interfering with his business.

Hinkle acknowledged during his testimony that he had left word at a terminal that Schoolcraft was to telephone him, but he placed the incident as occurring in March rather than on April 2. He claimed he asked the employee if there had been union solicitation in White Sulphur Springs because he did not know at that time which terminals the Union was attempting to organize. He claimed Schoolcraft told him during the conversation that he was not aware of a union solicitation.

Review of the record causes me to conclude that the above-described conversation probably occurred in March, as contended by Hinkle, rather than on April 2. Noting that Hinkle did not deny indicating that he opposed the Union during the conversation, and the fact that Schoolcraft's union sentiments were admittedly unknown to Hinkle at the time of the conversation, I find that by interrogating the employee concerning his feelings about the Union, Respondent, through Hinkle's conduct, violated Section 8(a)(1) of the Act as alleged. *Rossmore House*, 269 NLRB 1176 (1984).

e. Hinkle-Nottingham March 23 conversation

Donnie Nottingham was hired as a long-haul driver at Respondent's Sutton location in December 1987. At some unstated time in late February 1988, Nottingham underwent emergency surgery which was to disable him for about a month. While he was off work, the truck he had been driving was wrecked. On March 23, he visited Respondent's Buckhannon facility and spoke with Hinkle in the outer office. He testified the conversation was as follows:

Well, I asked him when I was going to get to go back to work because the doctor was going to release me, and he said that I was laid off and had been for about a month and I asked him why, and he said, well, he wasn't going to put another truck back at Sutton because of the way the drivers were acting and the trucks being wrecked and whatever.

Hinkle did not refute Nottingham's testimony concerning their March conversation when he appeared as a witness. He did indicate during his testimony that the White General tractor driven by Nottingham during his period of employment was located at Elkins Truck Service's lot with a mechanics lien placed against it at the time of the hearing.

While General Counsel contends Hinkle violated Section 8(a)(1) by referring to "the way the drivers were acting" during his discussion with Nottingham, the entire comment

attributed to Hinkle reveals he was indicating his displeasure with the number of trucks being wrecked rather than with the union activities of employees. I find the statement is ambiguous and refrain from finding it violated Section 8(a)(1) as alleged.

f. Hinkle-Alderman April 12 conversation

Alderman, who served as the Union's observer in the April 11 election at the Buckhannon polling location, testified that Hinkle pulled in beside him while he was standing in front of the Buckhannon truck shop on April 12 and "told us that he realized we voted the way we felt we had to vote, and there were no hard feelings, but he said it's over, I'll shut it down." Alderman did not indicate who, if anyone, was with him or in the immediate vicinity at the time.

When he appeared as a witness, Hinkle admitted he stated to Alderman the day after the election that "there was no hard feelings, that the election was over." He denied that he told Alderman he was going to shut the business down.

I credit the employee's version of the above-described incident. Hinkle claimed during his testimony that he had decided to contract out the long-haul work as his fleet depleted prior to the election, and he claimed the process was not accelerated because the employees turned to the Union. I do not credit that testimony. Record evidence discussed in detail, *infra*, reveals retaliatory action was taken against long-haul drivers subsequent to the election, and Respondent contracted out more hauling without regard for the effect such action had on its drivers. Careful consideration of the record causes me to conclude Hinkle decided to contract out the long-haul operation when Respondent lost the election, and Alderman's claim that Hinkle announced his intentions on April 12 fits the facts.⁷

Having credited Alderman, I find, as alleged, that Respondent unlawfully threatened to close its long-haul operations on April 12, 1988, because employees had selected the Union as their bargaining agent. Such conduct violates Section 8(a)(1) of the Act as alleged.

2. Conduct attributed to Ayres

Employee Alderman testified that in late March, after Hinkle informed him he was going to give long-haul drivers a raise, Ayres told him they were considering \$8 or \$8.50 an hour, a safety bonus of \$25 every quarter, and an allowance for boots and clothing.

Alderman testified that several days after the election, Supervisor Ayres was acting as the dispatcher and when he picked up his bills, he was given only one load. He claims he asked Ayres why he only had one load and Ayres said, "You're Union now, you can live on one load . . . the contractors are taking care of the rest of it."

When he appeared as a witness, Ayres denied he made the above-quoted statement. While he admitted Alderman complained about not having as many loads as he had before, he failed to indicate his response.

Ayres' failure to supply his version of either of the above-described conversations he had with Alderman causes me to

credit the employees' version of the conversations. While Ayres' comments concerning the amount of raise to be given are alleged to constitute violation of Section 8(a)(1), the legality of the raise conferred on long-haul drivers is treated, *infra*. Having credited Alderman's claim that Ayres told him he was being given fewer loads because he had joined the Union, I find, as alleged, that Respondent, through Ayres' conduct, violated Section 8(a)(1) of the Act as alleged.

3. Conduct attributed to Rowan

The record reveals Pete Rowan was a long-haul driver until he was made a maintenance supervisor on January 1. In an attempt to retain a close relationship with long-haul drivers, he signed a union card on February 13.

In late February, Rowan hired one Henry Frame as a mechanic. The employee was to work in a shop located in Buckhannon. When called as a witness by General Counsel, Frame testified that when he was interviewed for the job by Rowan, the latter told him the Union was organizing the operation "and said that, you know, if the Union was ever voted in that, they'd just have to shut it down." During cross-examination, Frame altered his testimony and stated Rowan's interview comment was "[H]e told me, you know, that things were pretty shaky, and if the Union was voted in that he'd be out of a job and we would be too. Now, that's exactly what he stated to me."

Employee Alderman testified he conversed briefly with Rowan on April 15. The day before, Ayres had informed Alderman and Warner that they were to share Warner's truck and Warner had elected to drive during the day shift because he was the senior employee. Alderman, who had driven on the day shift for about 4 years prior to the reassignment, complained to Rowan on April 15. The employee testified he asked the supervisor why they took his truck and put him and Warner on the same truck. He claims Rowan answered, "[W]ell, maybe they thought you'd quit if they put you on nights."

When Rowan appeared as a witness, he denied the above-described statements attributed to him by both Frame and Alderman. With respect to the Frame interview, he claimed he merely told the employee they might both lose their jobs because of the financial condition of the Company. With respect to the Alderman incident, he acknowledged that the employee asked him why he had been put on nights, but claimed his response was that other than the truck problem, he did not really know for sure. He claimed Alderman responded by asking him if they were trying to get rid of him by doubling up on night shifts.

I credit employees Alderman and Frame, and I find that Respondent, through Rowan's conduct, violated Section 8(a)(1) of the Act by telling Alderman he was placed on the night shift because they thought he might quit if transferred, and by telling employee Frame they might both lose their jobs if the Union was voted in.

4. Conduct attributed to Baker

Ronald Baker is the manager of Respondent's Sutton facility. On April 22, employees Schoolcraft and Baker were making deliveries with the straight truck and/or short-haul truck in the Sutton area. Schoolcraft testified that during the course of the day, Baker asked his feelings on the Union,

⁷ While I refrained from crediting Alderman's assertion that plant closure was threatened during the March meeting in Ayres' office, I did so, in large part, because Warner failed to corroborate that crucial testimony. Moreover, the circumstances were different at that juncture of the organization campaign.

and he replied he felt it was benefiting himself and his family and that was the reason he voted for the Union. The employee claims Baker, in turn, stated he felt it was going to be to their disadvantage.

Baker was not called as a witness to rebut Schoolcraft's testimony.

The complaint alleges that Baker, by telling Schoolcraft that he felt their selection of the Union would work to their disadvantage, violated Section 8(a)(1). In the absence of further evidence which would indicate how selection of the Union would work to the employee's disadvantage, I find the comment to be a vague statement which does not rise to the level of a threat. I recommend the allegation be dismissed.

D. The Alleged 8(a)(3) Violations

The complaint alleges that Respondent violated Section 8(a)(3) of the Act during the months of April and May 1988 by: increasing the rates of pay and other benefits of employees on or about April 4 (par. 12); reducing the hours of Jenkins, Warner, Winemiller, and Kelley since April 11 by using subcontractors to perform their work (par. 13); transferring Alderman to the night shift on April 14 (par. 14); and by laying off and/or terminating nine named employees during the period extending from March 1 to May 13, 1988, after subcontracting out their work (par. 15). The allegations are discussed individually below.

1. The wage and/or benefit increases

The facts which reveal fluctuations in the rate of pay and benefits received by Respondent's long-haul drivers during the period September 1987 to mid-May 1988, were provided by Hinkle and are, in main, undisputed.

As indicated, *supra*, Respondent found it necessary to engage in a second restructuring of its finances in the summer of 1987 because an earlier restructuring plan implemented during the summer of 1986 was not working.

In September 1987, Respondent was paying its long-haul drivers 22 cents per mile and certain unspecified additional amounts in the form of drop and/or delivery charges and delay charges. Hinkle met with the drivers at some unstated time during the indicated month and informed them their pay was to be reduced to 18 cents per mile, and the payments for drops and delays were to be eliminated.

In November 1987, Hinkle met again with long-haul drivers, indicating that in December the drop payments would be reinstated. At that time, he informed them "we would do something at the first of April [1988] when the pay from the fence sales came in."

Hinkle testified he next met with the long-haul drivers to discuss their pay in January 1988. At that time, he claims delay or drop charges were improved, but he was unable to give specific information. He indicated that the drivers were again informed that Respondent's collection of fence moneys would be in at the end of March and they would then have some funds available to look at increasing their pay at the time; that in the meantime they would be looking to come up with an equitable pay plan they could each live with.

After the January meeting, Hinkle and Ayres, then Respondent's computer systems manager, analyzed the drivers' pay over the preceding 6 months, looking at the loads they were delivering, the delay time they had, and different methods of payment that would be more equitable. They ultimately

developed a plan which was based on 42 cents a loaded mile,⁸ or \$7 an hour, provided the driver had been employed for 4 years or more.

Hinkle admitted that individual meetings were held with the long-haul drivers during March to discuss the pay program with each driver to see which option each desired. While Hinkle was admittedly aware the Union had petitioned for an election before the March meetings were held, he explained his reason for deciding to implement the wage improvements effective March 27, 1988, stating:

That was the dilemma that I was in. I was not fully aware of the law situation, other than I know that we had began negotiations and/or discussions with our employees for pay increases to be in effect the first of April. And those were as—you know, go back as far as November which our first meeting after the pay reduction. And to maintain the employees, to keep the employees, I felt that we had to go ahead and put the pay into effect, which we did on March the 27th, because we had promised that we would look at it and do it at the end [sic] of April.

The Board considered the validity of wage increases during the pendency of representation petitions in *Honolulu Sporting Goods Co.*, 239 NLRB 1277 (1979), and observed (at 1280):

The validity of wage increases or other benefits during the pendency of representation petitions turns upon whether they are granted "for the purpose of inducing employees to vote against the union." And a lawful purpose is not established by the fact that the employer who took such action did not expressly relate the granted wage increases to the organizational campaign. For, as the Supreme Court observed in *NLRB v. Exchange Parts Co.*, *supra* at 410, "the absence of conditions or threats pertaining to the particular benefits conferred" is not "of controlling significance." Under settled Board policy, a grant or promise of benefits during the critical preelection period will be considered unlawful unless the employer comes forward with an explanation, other than the pending election, for the timing of such action. [Citations omitted.]

Here, Respondent's explanation for the timing of the wage increase conferred on March 27 is that it promised employees in November and again in January that it would look at their wage situation when the money from fence sales came in. While, as observed by General Counsel, it is clear that Respondent did not announce, prior to the time the petitions were filed on February 22, that employees would be given an option of an hourly rate or mileage computed by loaded mile, I conclude the employees were led to believe in November and again in January that the earnings they lost in September 1987 would be restored to them in late March or early April 1988. Significantly, the record reveals the wage increase announced on March 27 was applicable to long-haul drivers only. Thus, it appears that the wages of short-haul drivers remained unaltered during the entire period discussed.

⁸ Drivers had previously been paid for all miles driven, rather than just miles driven with a load.

In the absence of evidence which would reveal the short-haul drivers also received a wage increase during the pendency of the petition involving their bargaining unit, Respondent's asserted reason for announcing the increase for long-haul drivers at the time the announcement was made appears to be reasonable. I find the facts adduced fail to establish the violation alleged in the complaint.

2. The alleged unlawful reduction of hours worked by long-haul drivers because their work was contracted out

General Counsel contends that subsequent to April 11 Respondent unlawfully reduced the amount of hours worked by employees Kenneth Kelley, Randall Alderman, James Warner, James Jenkins, and George Winemiller. The treatment experienced by each employee is discussed below.

a. *Kennith Kelley*

Kelley was hired as a long-haul driver at Respondent's Buckhannon facility in July 1979. In early February 1988, his driver's license was suspended for 1 month the day after Kelley's license was suspended, the new driver assigned to drive the truck he had been driving wrecked it.

On February 13, 1988, Kelley signed a union authorization card. On April 11, he attempted to vote in the election held in the long-haul driver unit. His vote was challenged and as the remaining drivers voted unanimously for representation, the challenged ballots would not have been opened.

At the end of his license suspension period, Kelley asked Gary Moore and, subsequently, Hinkle if he could return to work. Moore informed him his truck had been wrecked and indicated Respondent would have to check with their insurance company before they put him back on. A short time later, when he inquired again, he claims Hinkle told him "the way things were if I could find something else better I'd be better off."⁹ Kelley was not recalled to work thereafter.

While General Counsel proved that Kelley engaged in union activity, the record fails to reveal that Respondent was aware the employee engaged in such activity. Moreover, the record strongly suggests Kelley was not reinstated by Respondent because his truck had been wrecked and his reinstatement would possibly create insurance problems for Respondent. I find General Counsel failed to establish, prima facie, that Respondent violated Section 8(a)(3) of the act by refusing to utilize Kelley as a driver subsequent to the time his driver's license was suspended.

b. *Randall Alderman*

Randall Alderman was employed by Respondent as a long-haul driver in May 1984. He worked at the Buckhannon facility. The record reveals Alderman signed a union authorization card on February 13, and Hinkle asked him prior to the April 11 election why he had gone to the Union. Noting the employee participated in the long-haul unit election as a union observer and that the drivers voted unanimously for representation, it is clear, and I find, that Respondent was aware of his union sentiments.

Alderman testified he worked 12 to 16 hours a day in early 1988. He indicated Ayres, then Respondent's dis-

patcher, told him on April 13 that he and Jim Warner would both be driving the same truck. The plan was that Warner, the senior driver, would drive the day shift and Alderman would drive the night shift. The employee testified that on occasion he was given only one load a day to haul after April 11, and the number of hours he worked subsequent to the election, varied from 6 to 12. As found, supra, when he questioned Ayres about being given only one load, Ayres told him now that he belonged to the Union he could get along on one load; that the contractors are taking care of the rest of it. He claimed nothing was wrong with the truck he had been driving prior to the election; that it was simply parked at the Buckhannon facility.

Respondent made no attempt to refute Alderman's claim that he was given fewer loads and worked fewer hours after the election. While Hinkle testified the truck Alderman was taken off of on April 13 had an oil leak when it was returned after extensive repairs, his testimony was not corroborated in any manner. As Alderman actually operated the vehicle, I credit his claim that nothing was wrong with it on April 13.

In sum, the record reveals that Alderman was a known union advocate and certain comments made by Respondent's supervisory officials reveal Respondent intended to punish him for his participation in protected activities. Thus, Ayres told him he was being given fewer loads subsequent to the election because he was represented by the Union and could get along on fewer loads. Similarly, Maintenance Supervisor Rowan told him he had been transferred to the night shift because they thought he might quit. The above, coupled with the admission in Respondent's answer that the hours of work of employees named in paragraph 13 of the complaint were reduced "through subcontracting" cause me to find that General Counsel established, prima facie, that the employee's participation in protected activities was a "motivating factor" in Respondent's decision to reduce his hours of work.

Through Hinkle's testimony, Respondent established that during February and early March 1988, the Buckhannon, Sutton, and/or White Sulphur Springs long-haul drivers wrecked three of Respondent's tractors. Additionally, the record reveals the motor went on a fourth truck. According to Hinkle, Chrysler Capital, which had financed two of the trucks kept the insurance money which was paid after two of the accidents because Respondent was seriously in arrears in their truck payments. The record reveals that Respondent was able to pay for engine repair to the truck which had a blown engine, but the repair was not entirely successful and the truck was not fit for long-haul operations. Hinkle testified that two of the wrecked tractors were never returned to service; that one remained unrepaired at the Buckhannon facility at the time of the hearing, and a second tractor was repaired but was held by an Elkins, West Virginia repair facility by virtue of a mechanics lien. According to Hinkle, the third wrecked tractor was returned to Respondent around the time of the election, but it was withdrawn from service because it had an oil leak.¹⁰

Undisputed record evidence reveals that, as the above-described tractors were disabled, Respondent accomplished petroleum hauling by causing its remaining units and drivers to haul more product, and by engaging contractors to haul what

⁹ Hinkle's recollection was that he indicated that it would probably be better if he looked elsewhere for a job because of the insurance problems.

¹⁰ As noted, supra, I credit Alderman's claim that the truck did not have an oil leak when it was taken away from him.

Respondent was unable to haul. According to Hinkle, three units were operable at the time of the election. Subsequently, in mid-April, the crank shaft in a red Mack, which was being used at the Sutton facility, broke and Hinkle testified Respondent did not have the cash to accomplish repair of that tractor, which was estimated at \$10,000. Although the record reveals Ayres was acting temporarily as Respondent's dispatcher at the time of the election and thereafter, he failed to indicate when he appeared as a witness why he underutilized Respondent's equipment and drivers by dispatching hauling they would have normally accomplished to contractors.

The above-indicated facts reveal that Respondent was compelled to contract out the hauling of petroleum products, which it could not accomplish with its own equipment and drivers at the three locations immediately involved in this proceeding, from February 1988 forward. However, Respondent failed to establish that it would have contracted out work normally performed by its equipment and drivers during the period extending from April 11 to May 13 in the absence of the long-haulers' selection of the Union as their bargaining agent.

Accordingly, I find that by reducing Alderman's hours of work subsequent to April 11, 1988, Respondent violated Section 8(a)(1) and (3) of the Act as alleged.

c. James Warner

Warner began working for Respondent in October 1983. He, like Alderman, was a long-haul driver who worked out of the Buckhannon terminal. The employee testified that before the April 11 election he worked 18–20 hours a day, 6 days a week. He signed a union authorization card on February 16, and, together with Alderman was later asked by Hinkle why he had gone to the Union. Any doubt that Respondent was aware of his union advocacy was removed when he participated in the election held in the long-haul unit and the drivers voted unanimously for union representation.

Warner testified that prior to the election, Wordford Oil was the only outside company which hauled petroleum products to the Buckhannon facility. He indicated P & L Enterprise (sic) started to haul to the Buckhannon facility after the election and he worked only 5 days a week and worked shorter hours.

Other than claiming that Warner and Alderman were doubled up on the same truck after the election because Alderman's regular truck had an oil leak, Respondent offered no reason for working Warner 5 days a week rather than 6 days and for working him fewer hours after the election.

In sum, the record reveals Warner was a known union advocate who had been unlawfully interrogated by Respondent's president Hinkle at the outset of the union campaign. It further reveals that his hours of work were reduced as a result of Respondent's decision to cause employee Alderman to double up with him on the truck he was regularly assigned to drive on or about April 13. The above, coupled with Respondent's demonstrated antiunion animus and its admission in its answer that the employees named in paragraph 13 of the complaint received fewer hours of work after April 11, 1988, because of subcontracting, cause me to conclude that General Counsel established, prima facie, that Warner's participation in protected activities was a "motivating factor" in

Respondent's decision to reduce the employee's hours of work by subcontracting work he normally performed and by causing employee Alderman to double up with him on the truck he was regularly assigned to drive.

As noted, supra, the only reason Respondent gave for assigning Alderman to share the truck normally assigned exclusively to Warner was its claim that Alderman's truck had an oil leak. I have rejected that claim. Consequently, I find that Respondent has failed to prove that it would have doubled Alderman and Warner up on the same truck or subcontracted work they normally performed in the absence of Warner and Alderman's participation in protected conduct. Accordingly, I find, as alleged, that by reducing Warner's hours of work subsequent to April 11, 1988, Respondent violated Section 8(a)(1) and (3) of the Act.

d. James Jenkins

Jenkins was hired by a firm named Super Petroleum around 1974. Respondent acquired Super about 5 years later and Jenkins has been a long-haul driver at Respondent since then. In April 1988, Jenkins was earning \$7 per hour. He worked out of the Sutton plant.

The record reveals Jenkins was the employee who originally contacted the Union. He credibly testified he attended union meetings, signed a union authorization card during February, and acted as the Union's observer at the polling place in Sutton. He testified without contradiction that Hinkle asked him after the polling place was closed in Sutton how he voted, and how he thought the tractor-trailers and the little trucks went. He admitted to Hinkle that he had voted for the Union, and indicated he thought the long-haul drivers voted 100 percent for the Union, while the persons in the little truck unit probably voted 50 percent. It is clear, and I find, that Jenkins engaged in union activity and Respondent was aware of his advocacy.

Jenkins testified he worked 5–6 days a week and 12–15 hours a day prior to April 11. He claimed he was given only about half as much work subsequent to the election; that the amount of work performed by outside contractors increased measurably.

Respondent did not seek to rebut Jenkins' claim that he was given only half as much work after the election as he had received before the election. Moreover, it failed to contest Jenkins' claim that outside contractors hauled more product into the Sutton facility than they had hauled to that facility prior to the election.

In sum, the record reveals Respondent caused a reduction in the number of days and hours worked by Jenkins subsequent to the April 11 election without supplying the employees with a reason for its action. It further reveals that Respondent exhibited marked antiunion animus and that one employee—Alderman was getting fewer loads because he was union. Moreover, Respondent admits that such reduction in the number of hours worked by employees named in paragraph 13 of the complaint was due to subcontracting. I find that by adducing the above facts, General Counsel established, prima facie, that Jenkins' participation in union activities was a "motivating factor" in Respondent's decision to reduce his hours of work through subcontracting.

The record is barren of any evidence which would reveal that Respondent had a business related reason for subcontracting subsequent to April 11, 1988 work which had

previously been performed by long-haul unit employees. Accordingly, I find that Respondent has failed to prove that it would have contracted out work previously performed by Jenkins absent his participation in union activities. I find, as alleged, that by reducing his hours of work through subcontracting subsequent to April 11, 1988, Respondent violated Section 8(a)(1) and (3) of the Act as alleged.

e. George Winemiller

George Winemiller was hired by Respondent as a long-haul driver at its Sutton facility on March 1, 1984. He signed a union authorization card on February 8, and voted in the long-haul unit election held on April 11. Respondent was necessarily aware of his union sentiments as the long-haul drivers vote for representation by the Union was unanimous.

Winemiller testified he was on the day shift prior to the election, and he claims he worked 12–14 hours each day. He testified that, after the election, his hours of work were cut in half. Winemiller indicated that while outside contractors only hauled product to Sutton 3 or 4 days a month prior to the election, there was a big increase in the amount they hauled to Sutton after the election. Respondent did not seek to rebut Winemiller's testimony regarding the amount of work he was given before and after the election, nor did it dispute his claims that outside contractors hauled more product to Sutton after the election.

In sum, the record reveals Respondent reduced the number of hours Winemiller worked each day after the election by approximately 50 percent. At the same time, it increased the amount of work performed at the Sutton facility by outside contractors. It gave the employee no reason for its action and its answer admits it reduced the hours of work of the employees and in paragraph 13 of the complaint through subcontractors subsequent to April 11, 1988. Such facts, considered in conjunction with the antiunion animus exhibited by Respondent and its postelection treatment of Alderman and Warner, cause me to infer Respondent took the action described because the long-haul drivers selected the Union as their bargaining agent. Accordingly, I find General Counsel established, prima facie, that Winemiller's participation in union activities was a "motivating factor" in Respondent's decision to reduce his hours of work through subcontracting subsequent to April 11, 1988.

The record fails to reveal that Respondent reduced the hours of work and/or contracted out work performed by Winemiller subsequent to April 11, 1988, for valid business reasons. Consequently, I find it has failed to prove that it would have contracted out work regularly performed by Winemiller prior to April 11, 1988, in the absence of the employee's participation in protected activities. Accordingly, I find, as alleged, that by reducing Winemiller's hours of work through subcontracting subsequent to April 11, 1988, Respondent violated Section 8(a)(1) and (3) of the Act.

3. Alderman's transfer to the night shift

The facts which reveal the extent of Alderman's union activities, Respondent's response to those activities, and the circumstances under which he was transferred to the night shift are set forth, supra. I find those facts reveal that Respondent violated Section 8(a)(1) and (3), as alleged, by placing the employee on the truck normally driven by em-

ployee Warner, thus requiring him to drive during night-time hours.

4. The layoffs of nine employees

Paragraph 15 of the complaint alleges that as a result of subcontracting Respondent laid off nine named employees during the period March 1, 1988, through May 13, 1988. Respondent admits the allegation in its answer. As will be indicated, infra, seven of the nine employees named in paragraph 15 of the complaint were laid off as a direct result of Respondent's decision to contract out the work of petroleum hauling. The record reveals, however, that employees Donnie Nottingham and Kenneth Kelley were terminated for other reasons. Consequently, their terminations are treated individually below.

a. The Nottingham termination and Kelley termination

Nottingham was a long-haul driver at Respondent's Sutton facility. He experienced emergency surgery in early February. While he was recuperating, another driver wrecked the truck he normally drove. Nottingham signed a union authorization card on February 7 and met with union representative Randy Atkins on that date.

On March 23, Nottingham informed Hinkle he was being released by the doctor to return to work. He testified, without contradiction, that Hinkle told him he had been laid off for about a month. When the employee asked why, Hinkle stated he was not going to put another truck back at Sutton "because of the way the drivers were acting and the trucks were being wrecked and whatever." Nottingham had not been recalled or rehired as of the time the hearing was held in the instant case. The record fails to reveal that Respondent was aware that Nottingham had engaged in union activity at the time of the above-described conversation. It further reveals that during the month of February 1988 Respondent's drivers either totaled or seriously wrecked and damaged three of Respondent's seven operating trucks.

In sum, General Counsel failed to prove that Respondent was aware of Nottingham's participation in union activities at the time it refused to reemploy him on March 23, 1988. While General Counsel contends Hinkle was referring to the union activities of Respondent's employees when he told Nottingham why he was not going to replace the truck Nottingham had been driving, it seems absolutely clear to me that he was expressing dissatisfaction over the fact that Nottingham's truck and two others had been wrecked while Nottingham was off. In the circumstances, and in the absence of evidence which would reveal company knowledge of Nottingham's limited union activities, I find General Counsel has failed to establish, prima facie, that the employee's participation in protected conduct was a "motivating factor" in Respondent's decision to refuse him reemployment on March 23, 1988.

The facts which reveal the circumstances under which employee Kenneth Kelley was terminated are fully set forth, supra. Those facts reveal the employee was terminated in March rather than on May 13, 1988, as alleged in the complaint. As indicated, supra, I find General Counsel failed to prove, prima facie, that Kelley was terminated in violation of Section 8(a)(3) of the Act.

b. The termination of short-haul unit mechanics and long-haul unit drivers

Employee Henry Frame, a mechanic, and Joseph Snyder, a mechanic's helper, who both worked at Respondent's shop located in Buckhannon, were terminated, allegedly for lack of work, on April 23 and May 6, 1988, respectively. Although the Union was selected as the bargaining representative of employees in the short-haul unit in which Frame and Snyder were employed, the record fails to reveal that either employee engaged in union activities or that Respondent knew or suspected they had engaged in union activities. As noted, *supra*, however, the complaint alleges, and Respondent's answer admits, that Frame and Snyder were laid off and/or terminated "through and as a result of subcontracting."

In mid-April, shortly after the April 11 election, the crankshaft in the tractor normally driven by long-haul driver James Schoolcraft broke. Thereafter, Schoolcraft was engaged by Ronald Baker, the manager of Respondent's White Sulphur Springs facility to operate a short-haul truck in the White Sulphur Springs area on April 20 and 22. Hinkle testified that the repair cost of the truck normally driven by Schoolcraft was estimated to be \$10,000, and Respondent elected not to repair it because it did not have the necessary cash. Schoolcraft was notified on April 29, 1988, that he was laid off.

Long-haul drivers Randall Alderman, James Jenkins, James Warner, and George Winemiller were all laid off on May 13, 1988. Effective May 15, Respondent contracted all of the long-haul work to firms which used their own trucks and employees.

The complaint alleges, and General Counsel contends, that the above-named mechanics and drivers were all terminated because Respondent decided to contract out all of its long-haul work because the long-haul unit employees selected the Union as their bargaining agent on April 11, 1988, and the Union was certified as the exclusive bargaining agent of such employees on or about April 21, 1988. As noted, *supra*, Respondent was necessarily aware of the pronoun sentiments of the named long-haul drivers as they unanimously voted for union representation in the April 11 election.

During his appearance as a witness, Hinkle admitted he did not want the Union to succeed in its effort to represent Respondent's employees because he felt union representation would be detrimental to Respondent financially. While Hinkle claimed Respondent did not wage an antiunion campaign during the organization drive, the record belies his assertion. Thus, the record reveals that after the Union filed its petitions for election, Respondent unlawfully interrogated employees concerning their union activities, threatened that employees would lose their jobs if they voted for the Union, threatened plant closure if the employees selected the Union as their bargaining agent, and implied that selection of the Union as their bargaining agent would be an exercise in futility. Moreover, after the employees in both bargaining units opted for union representation, Respondent retaliated against its employees by causing two employees to double up on one truck, transferring an employee from the day shift to the night shift in an attempt to cause him to quit, told an employee he was receiving less loads because he was now union, and contracted out work previously accomplished by its own equipment and drivers, thereby reducing the number

of days and hours long-haul drivers worked. The record further reveals that from February 1988 forth, Respondent has used three and, on occasion, four long-haul trucks to accomplish long hauling to the facilities involved in the instant proceeding. The evidence which I credit reveals that at least three such vehicles were operable as of April 28, the date Respondent's counsel advised the Union it intended to contract out the long-haul work effective May 15. Finally, General Counsel established through Hinkle's testimony that Respondent's avowed reason for granting long-haul drivers raises on or about March 27 was its desire to retain its good drivers.

The antiunion animus exhibited by Respondent, the unlawful conduct it engaged in during the organization campaign, including threats of closure of long-haul operation by its president and other supervisors, that evidence which reveals Respondent was equipped to continue its long-haul business in May, and the timing of the contracting out of the long-haul work cause me to infer that the long-haul driver's selection of the Union as their bargaining agent was a "motivating factor" in Respondent's decision to contract out the long-haul work. Accordingly, I find General Counsel established, *prima facie*, the 8(a)(3) violation alleged in paragraph 15 of the complaint.

Respondent defends the decision to contract out the long-haul of petroleum products and its implementation of that decision by claiming the record reveals an economic justification and necessity for that action. Its contention is supported to a measurable extent by record evidence. Thus, as indicated in the "Background" portion of this decision, Respondent has been in a precarious financial condition since mid-1986. As revealed there, it has undergone two financial reorganizations since 1976, has contracted out significant portions of its petroleum hauling business, and has explored the feasibility of further contracting out such hauling. The record further reveals the drivers at the facilities involved in this proceeding have nearly decimated the seven or eight trucks used at such facilities by wrecking three of them, and mechanically disabling two others. With further respect to the equipment, Hinkle credibly testified the lack of capital, the retention of insurance moneys by Chrysler Capital which financed two trucks, and Respondent's poor credit standing has hampered Respondent in its ability to repair the wrecked and disabled vehicles. Finally, Hinkle testified that Respondent was in arrears with the lending institutions which had financed Respondent's vehicles, and he claimed it was in no position to meet balloon payments due at or near the time he decided to contract out the long-haul work.

Discussion and Analysis

Respondent's attempt to explain its conduct in terms of economic necessity is unconvincing. In the first place, I note that the defense was presented solely through the testimonial evidence given by Hinkle, and no significant documentary evidence was offered to substantiate his testimony. His assertions may be entirely true. On the other hand, he may have grossly exaggerated Respondent's economic problems.¹¹ Secondly, the record reveals Respondent was apparently able to

¹¹ See, for example, a memo dated June 1, 1988 (G.C. Exh. 19), sent by Respondent to "Dear Friends and Business Associates" which indicates Respondent's financial condition was improving.

supply the three facilities involved in this proceeding with the needed volume of petroleum products during that portion of 1988 which preceded the election with only minimal use of outside contracts. While it is clear that an increased amount of hauling was dispatched to outside contractors immediately after the April 11 election, Respondent offered no reason for dispatching additional work to such contractors. Indeed, comments made by Ayres, the dispatcher, and by Rowan to employee Alderman convince me that additional hauling was assigned to contractors after the election because Respondent desired to punish the long-haul drivers for voting for union representation. Although Hinkle testified Respondent was not financially able to make past due payments on the vehicles used at the three involved facilities, no evidence was offered which would reveal repossession of any given vehicle was imminent at the time the long-haul work was contracted out. In situations such as the one involved here, a decision to contract out work rather than perform it "in house" would normally be supported by the cost involved when the work was performed both ways. Other than causing Hinkle to testify in conclusionary fashion that Respondent's experience subsequent to the contracting out revealed Respondent could get the petroleum products transported at lesser costs by using the contractors, no evidence was offered which would reveal any cost analysis was conducted before the work under discussion was contracted out. Indeed, when Hinkle was asked to indicate the "before" and "after" hauling costs, he stated he had put a pencil to it but did not have the results produced at the time of the hearing. In the absence of supporting documentary evidence, Hinkle's verbal claims are entitled to diminished weight. If contractors could transport the petroleum products from the pickup points to Respondent's facilities at lesser costs than Respondent incurred when it utilized its own employees and trucks, one wonders why Respondent used the latter method from 1978 until the Union was certified as the bargaining representative of the long-haul drivers at almost precisely the same time Respondent contracted out their work.

In sum, while Respondent was certainly experiencing financial difficulties at the time it contracted out the long-haul work, I am not convinced by reliable concrete evidence that it would have contracted out the work in the absence of the long-haul drivers' selection of the Union as their bargaining agent. I am convinced the work would not have been contracted out if the Union had lost the election, and I infer, after review of the entire record, that the Union's success in the long-haul unit election triggered the decision to contract out the work performed by those unit employees. Accordingly, I find, as alleged, that by terminating the employment of James Jenkins, Randall Alderman, James Warner, and George Winemiller on May 13, 1988, Respondent violated Section 8(a)(1) and (3) of the Act.¹² Additionally, I find that the decision to contract out the long-haul work caused Respondent to terminate the employment of Henry Frame and Joseph Snyder on April 23 and May 6, 1988, respectively,

¹² Respondent suggests that under *Textile Workers Union v. Darlington Mfg. Co.*, 380 U.S. 263 (1965), plant closure is permissible absent a showing that the purpose and effect of the closure was to chill unionism at any of the employer's remaining plants. However, the Supreme Court excepted from the reach of its decision, situations analogous to the instant case "were a department is closed for antiunion reasons, but the work is continued by independent contractors." *Id.* at 272-273 fn. 16.

because their services were not needed after such work was contracted out. Having found Respondent unlawfully contracted out the long-haul work, I find it violated Section 8(a)(1) and (3) of the Act when it terminated Frame and Snyder. See *Dillingham Marine & Mfg. Co. v. NLRB*, 610 F.2d 319, 321 (5th Cir. 1980).

E. *The Alleged 8(a)(5) Violations*

Paragraph 21 alleges that Respondent engaged in a refusal to bargain with the Union since April 28, 1988. Paragraphs 22 through 25 allege it violated Section 8(a)(5) by: unilaterally increasing the subcontracting of long-haul work since April 11; unilaterally reducing the hours of work of long-haul drivers since April 11 through subcontracting; unilaterally eliminating the work of short-haul mechanics through subcontracting; and eliminating long-haul unit work by subcontracting on or about May 13, 1988. While Respondent denied paragraphs 21 through 25 of the complaint in its answer, it admitted paragraph 13 which alleges:

Since on or about April 11, 1988, through subcontracting, Respondent reduced the hours of work of its employees Randall Alderman, James Jenkins, George Winemiller and Kenny Kelley.

The facts relating to the allegations are set forth below.

Hinkle's testimony and the record reveal that prior to the time the elections were held at Respondent's facilities on April 11, Respondent sought to increase the size of its long-haul staff, and increased the pay of its existing tractor-trailer drivers in an attempt to retain good employees. Thus, the record reveals that in March Respondent placed an advertisement in the *Braxton Democrat*, a local weekly paper, seeking tractor-trailer drivers for work in the Sutton area. As revealed, *supra*, Hinkle indicated during his testimony that even though Respondent was engaged in a financial organization effort in late March 1988, he felt compelled to increase the remuneration received by long-haul drivers on March 27 to enable Respondent to maintain good employees.

Hinkle freely admitted during his testimony that he did not want his facilities unionized because he felt unionization would adversely impact on the financial condition of the Company. When unionization became a reality on April 11, he indicated Respondent had altered its plans for the long-haul petroleum operation by telling employee Alderman he had no hard feelings over the election but intended to shut down the long-haul operation.

As noted *supra*, Respondent admits in its answer that it, through subcontracting, reduced the hours of work of named long-haul drivers after April 11. The record reveals that the outside contractors who were given long-haul work or received increased loads were Tom Wilt Trucking, P & L Enterprises, Fleet, Eastern, John Black, and Woodford Oil.

In addition to the fact that increased subcontracting of the long-haul work reduced the hours of long-haul drivers as discussed, *supra*, the record reveals that decreased use of Respondent's long-haul equipment caused it to terminate shop employees Henry Frame and Joseph Snyder on April 23 and May 6, 1988.¹³

¹³ While Frame testified Maintenance Supervisor Rowan told him when he was terminated that Respondent intended to subcontract out its maintenance

Continued

Despite the fact that the record reveals Respondent commenced to sublet work previously performed by its long-haul unit drivers immediately after the April 11 elections were held, no notice of its intention to subcontract such work was given to the Union until an exchange of correspondence between David Atkins, the Union's business agent, and Fred Holroyd, Respondent's attorney, occurred in late April and early May. Thus, by letter dated April 28, 1988, Atkins notified Respondent the Union had been certified by the Board, and it requested bargaining. He indicated he was available the week of May 16 and the week of May 23. On the same date, Holroyd sent the Union a letter advising he represented Respondent. The second paragraph of the letter states:

This is to further advise that the employer intends to terminate that portion of its business involving the long haul tractor trailer drivers and expand its existing contract with Eastern Motor Freight, Leaseway Transportation, Highway Express and Tom Wilt to cover their operation. If you wish to discuss this proposed action or its effects on your members, please so advise me before May 5, 1988 as it is our plan to effect this action on May 15, 1988.

The Union responded to Holroyd's April 28 letter on May 4. The body of the letter states:

We received your letter dated April 28, 1988 on May 2, 1988. I requested the start of bargaining in my letter of April 28, 1988 to J. D Hinkle (copy enclosed) regarding long haul drivers. It is Local 175's position that your proposed elimination of the work of these drivers is a violation of the Labor Act and constitutes bad faith of J. D. Hinkle & Sons.

I still await a response for negotiations and am still willing to meet with you at any time.

By letter dated May 6, Holroyd replied to the Union's May 4 letter stating:

Unless otherwise notified I shall interpret your letter of May 4 to mean that you decline to enter into discussions about the proposal to eliminate the long haul routes or its affect on the employees you represent.

I will be happy to meet with you at a mutually agreeable time during the periods you suggest. I do request that you furnish us with a complete set of proposals so we can study them prior to the first meeting.

By letter dated May 10, the Union answered Holroyd's May 6 letter stating:

Pursuant to your letter dated May 6, 1988 and received in this office on May 9, 1988, please be advised Local 175 is willing to bargain on all issues in your letter. However, I feel the proposed action to terminate the long haul tractor trailer drivers on May 15, 1988 does not allow sufficient time to bargain in good faith.

I am requesting a copy of all existing contracts with Eastern Motor Freight, Leaseway Transportation, Highway Express and Tom Wilt.

I will furnish your office with a complete set of proposals prior to our first meeting. I am free to begin negotiations the week of May 16th through May 20th, 1988 and May 23rd through May 27th, 1988. Looking forward to meeting with you, I am.

Business Agent Atkins testified he did not seek to telephone Holroyd prior to May 15 in an attempt to arrange a meeting at which Respondent's decision to contract out the long-haul work or the effects of that decision on unit employees could be discussed.

It is undisputed that Respondent has not, to the date of the hearing here, furnished the Union with the Eastern, Leaseway, Highway Express, and Tom Wilt contracts requested by the Union's May 10 letter. Respondent failed to indicate its reason for failing to furnish such requested information during the course of the hearing. It is undisputed that Respondent terminated its long-haul operations on May 13 when the remaining long-haul drivers were terminated.

The record reveals the parties first met on July 6, and that they held four meetings. Atkins testified that the Union's proposals furnished to Respondent contained no provisions or proposals which related to the Respondent's decision to contract out the long-haul work and no proposals were offered concerning the effect of such action on the Respondent's employees.

Atkins testified that at the August 2 negotiating session (the third session), while work rules were being discussed, Holroyd stated Respondent did not have any more over-the-road operations—that was an issue that the courts would decide. It is undisputed that, prior to the meeting in question, Respondent had been notified that a district court hearing had been scheduled.¹⁴

Atkins testified that the Union made bargaining proposals during the four bargaining sessions, the Respondent advanced counterproposals, the parties had discussed the proposals, and no agreements were reached.

The record reveals Respondent obtained advantageous hauling rates after subcontracting the long-haul transportation of petroleum products by leasing a number of its petroleum trailers to smaller independent operators such as Tom Wilt Trucking and P & L Enterprises. The trailers were leased for nominal amounts such as \$10 or \$20 per month, with the lessee assuming the obligation to insure and maintain them. The record reveals Respondent continues to control the movement of petroleum products as its dispatcher contacts the carriers as they are needed to inform them where they are to obtain product and where they are to deliver it.

Discussion and Conclusions

General Counsel contends that the Supreme Court's decision in *Fibreboard Corp. v. NLRB*, 379 U.S. 203, 224 (1964), establishes that the instant Respondent was legally obligated to give the Union adequate advance notice of its decision to subcontract the long-haul work of its employees and it was legally obligated to bargain over the decision to contract out as well as the effects of that decision on the employees. It argues Respondent failed to fulfill such legal obligations.

work, the record fails to reveal any subcontracting of maintenance work actually occurred.

¹⁴General Counsel indicated during the instant case that 10(j) proceedings had been instituted against Respondent.

While Respondent notified the Union of its decision to contract out the long-haul work on April 28, it contends it was not legally required to bargain over the decision to contract the work because the work was contracted out purely for economic reasons, and the Supreme Court held in *First National Maintenance Corp. v. NLRB*, 425 U.S. 666 (1981), that, when an employer decides to shut down part of its business purely for economic reasons, the decision itself is not a part of Section 8(d)'s "terms and conditions of employment." Respondent further contends it gave the Union appropriate notice of its intention to shut down and contract out the long-haul operation, and the Union waived its right to bargain concerning the intended action because it failed to ask Respondent to meet with it to discuss contracting out the work, and it failed during the four negotiating sessions which were held to request bargaining over the effects of Respondent's decisions.

Respondent's reliance on *First National Maintenance Corp.*, supra, is misplaced. A similar claim was made in *Colateral Control Corp.*, 288 NLRB 308 (1988), and the Board held *Fibreboard Corp. v. NLRB*, to be controlling, stating:

The issue presented here is whether, in order to establish the mandatory bargaining status of an employer's decision to subcontract unit work, the General Counsel must sustain a burden of showing that the decision turned on labor costs were "all that is involved is the substitution of one group of works for another to perform the same task in the same plant under the ultimate control of the same employer." We conclude, under the Supreme Court's decision in *Fibreboard Corp. v. NLRB*, supra, as reaffirmed and explained in *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981), that she does not. In the Board's decision interpreting *First National Maintenance Corp.—Otis Elevator Co.*, 269 NLRB 891 (1984)—the plurality stated that, in evaluating the nature of a management decision, "the appellation of the decision is not important. *Fibreboard* 'subcontracting' must be bargained not because the decision turns upon the label, but because in fact the decision turns upon a reduction of labor costs." 269 NLRB at 893. . . . we find nothing in any of the opinions expressed in *Otis Elevator* that would disturb the principles of the Supreme Court's decision in *Fibreboard*.

In the instant situation, as in *Fibreboard Corp.*, employees in the bargaining unit were replaced with those of an independent contractor to do the same work under similar conditions of employment. The decision to contract out the work did not turn on a change in the basic direction or nature of the enterprise as the contractors continued to be dispatched by Respondent to petroleum pickup points, and the petroleum products were thereafter delivered to the Respondent's facilities involved here. Moreover, as the Respondent's avowed object was to accomplish the work at lesser costs, and Hinkle admittedly opposed the Union because he felt unionization of his operator would increase his costs, the decision was particularly amenable to resolution within the collective-bargaining framework. In the circumstances described, I find Respondent was required to bargain with the Union concerning the decision to contract out the work as well as the

effects of that decision on unit employees. See *NLRB v. Eltec Corp.*, 870 F.2d 1112 (6th Cir. 1989).

I next turn to Respondent's claim that by merely protesting, but failing to seek to negotiate concerning the long-haul contracting out issue, the Union waived its right to require bargaining concerning the decision to contract out and the effects of that decision on unit employees.

In *Kentron of Hawaii*, 214 NLRB 834, 835 (1974), the Board indicated:

[W]here an employer notifies a union of proposed changes in terms and conditions of employment, it is incumbent upon the Union to act with due diligence in requesting bargaining.

In any given situation, all the facts and attendant circumstances must be considered to determine whether a union acted with due diligence. The simple act of protesting does not, standing alone, establish that a union acted with due diligence if the facts reveal the employer remains ready to bargain. *Kentron of Hawaii*, supra; *Medicenter, Mid-South Hospital*, 221 NLRB 670 (1975).

In the instant case, the record reveals Respondent used outside contractors to transport petroleum products from the oil companies to its facilities and customers on only those occasions when it could not accomplish the necessary transportation of product with its own equipment and employees prior to April 11, 1988. On the stated date, it altered its practice by commencing to sublet to contractors work which would have normally been accomplished "in house." After such subcontracting reduced the hours of work of its own long-haul drivers to a significant extent, it, on April 28, notified the Union it intended to contract out all long-haul transportation work. In the meantime, it had unilaterally reduced the hours of work of long-haul drivers, and it had laid off mechanic Frame without giving the Union advance notice and an opportunity to bargain concerning its decision to contract out long-haul work and the effect of that decision on unit employees.

The facts reveal the Union initially responded to Respondent's tardy notice that it would contract out the long-haul work by protesting that the proposed action would violate the Labor Act. On receipt of that message, the Respondent indicated it viewed the Union's action as an indication that it did not desire bargaining over the decision or its effect on employees. The Union did not acquiesce. Instead, it replied it needed more time, and it requested any contracts Respondent had with named contractors. Thereafter, Respondent made no attempt to supply the information requested, and it failed to respond to the Union's request for more time. Instead, it implemented its decision on May 13 rather than May 15 by terminating all its long-haul drivers. As a consequence, when the parties finally met on July 6, the contracting out of the long-haul work was a "fait accompli." As noted, supra, Respondent failed to establish that time was of the essence in contracting out the work involved.

In the circumstances described, I am unwilling to find that the Union waived its right to bargain concerning Respondent's decision to contract out long-haul work or the effect of that decision on unit employees. I conclude the record facts warrant an inference that the actual decision to contract out the work under discussion was made at or near the time

the election results became known rather than at the end of April as contended by Hinkle during his testimony. By the time the Union was informed of Respondent's intentions, much of the long-haul work had already been contracted out, and, in its May 10 letter to Holroyd, the Union clearly indicated it wished to negotiate concerning subcontracting the work. Significantly, Respondent simply ignored the request for information contained in the May 10 letter, and proceeded to implement its decision on May 13, rather than on May 15, without attempting to accommodate the Union in any respect. The Union cannot be faulted for failing to raise the matter when negotiations were eventually held almost 2 months after the decision was implemented as it was clearly faced with a "fait accompli" at that time.

In sum, the facts set forth above cause me to conclude that by initially subcontracting a portion of the long-haul work normally accomplished with its own equipment and employees, without first notifying the Union and consulting with it, thereby reducing the hours such employees worked and producing a situation where mechanics Frame and Snyder were expendable, Respondent violated Section 8(a)(1) and (5) of the Act as alleged. Moreover, once notice of its decision to close its long-haul operation completely had been given, it engaged in further violation of Section 8(a)(1) and (5) by failing to afford the Union an adequate opportunity to bargain concerning the decision to close and its effect on unit employees.

While paragraph 21 of the complaint alleges that "Since on or about April 28, 1988, Respondent has failed and refused to meet and bargain with the Union as the exclusive collective-bargaining representative of both the Long Haul Unit and the Short Haul Unit," no evidence was offered to support the general refusal to bargain allegation. As noted, supra, the parties participated in four bargaining sessions commencing July 6, 1988, and proposals and counter-proposals were made and discussed but no agreement was reached. In the circumstances described, I recommend that paragraph 21 of the complaint be dismissed.

F. *The Burden of Resuming Long-Haul Operations*

Hinkle testified that Respondent divested itself of ownership of all but one of the trucks used in its long-haul operations shortly after contracting out the long-haul work in mid-May. He indicated so-called voluntary repossessions were arranged with a company named Jimco and with P & L Enterprises. Jimco obtained a blue General Tractor by agreeing to assume Respondent's indebtedness to the lender, and P & L Enterprises obtained the red Mack, which had a broken crankshaft after agreeing to repair it and making past due and future payments. Additionally, Hinkle testified Jimco started making payments on the orange General and was, at the time of the hearing, attempting to negotiate a deal with Duetche Credit for that truck. In addition to the tractor Jimco was seeking to obtain through dealings with Duetche, he indicated Duetche was seeking to repossess a tractor located in a repair shop in Elkins, West Virginia, which was being held by the shop pursuant to a mechanic's lien.

While Hinkle claimed Respondent no longer owned or had access to the tractors previously used in its long-haul operation at the time of the hearing, he indicated it still owned the tank trailers which had been used in the long-haul operation. The record reveals that most of the trailers have been

leased to the contractors who are currently hauling petroleum products to the three facilities involved in this proceeding. In order to obtain a favorable haulage rate from the contractors, Respondent leased the trailers to them for a nominal sum—\$20 a month being representative—with agreement the lessees would keep the trailer insured and maintain them.

Hinkle testified Respondent was continuing to experience financial difficulties at the time of the hearing. He claimed the net worth of the corporation at that time was a minus \$7 million. He claimed Respondent is financially unable to resume its long-haul operations because it has no working capital with which to buy or lease equipment and it cannot borrow funds. He indicated tractor insurance costs approximately \$7000 per year per unit and license fees for each unit amount to about \$1500 per unit and that Respondent did not have the necessary money and could not borrow it. In addition, he claimed he would be unable to maintain tractors because Respondent's credit standing with parts suppliers is poor and it was obtaining parts on a C.O.D. basis before the long-haul operation was contracted out.

While General Counsel sought to show that Hinkle and his brother owned a Chapter S corporation named Mountaineer Marts, which Hinkle indicated had experienced a profit of some \$10,000 during its last fiscal year, Hinkle claimed Respondent could not borrow money through the Mart's Corporation because he and his brother John would have to guarantee any loans, and the banks they dealt with would not lend them further moneys because of the financial condition of Respondent. Finally, Hinkle claimed the independent carriers currently used by Respondent to accomplish long-haul petroleum hauling charged Respondent \$1.65 to \$1.80 per loaded mile and that Respondent is better off financially contracting out the long-haul functions.

In *Service Merchandise Co.*, 278 NLRB 185, 188 (1986), the Board indicated its intention to continue to adhere to the well-established principle 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.

In the instant case, Respondent claims it does not have the operating capital or the credit standing required for the purchase of tractors which would be needed if restoration of the status quo ante of the long-haul operation is ordered. As indicated, it further claims it does not have, and cannot borrow, the startup costs incurred with new tractors even if it could obtain them as those costs approximately \$7000 for taxes and \$1500 for insurance. Finally, it claims it had a minus \$7000 net worth at the time of the hearing, and that it would not have the operating capital to maintain tractors if it could obtain them.

The facts outlined above causes me to conclude that Respondent has demonstrated that a status quo ante remedy would endanger its continued viability. Accordingly, I hereinafter recommend an alternative remedy.

CONCLUSIONS OF LAW

1. Respondent 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. By telling employees it would be futile for them to obtain union representation, interrogating employees concerning

their union activities and sentiments, interrogating an employee concerning how he voted in a Board election, threatening an employee with loss of employment if the Union was voted in, telling a known union adherent he was transferred to the night shift because such action might cause him to quit, telling an employee he was receiving fewer loads because he was union, and threatening to close its long-haul operation because employees engaged in union activity, Respondent violated Section 8(a)(1) of the Act.

4. By reducing the hours worked by long-haul drivers after April 11, 1988, through the use of outside contractors; by contracting out its long-haul operations and terminating its long-haul drivers and mechanics; and by transferring an employee to night shift, all with an object of retaliating against employees because they selected the Union as their bargaining agent, Respondent violated Section 8(a)(1) and (3) of the Act.

5. By subcontracting out long-haul bargaining unit work without notice to or consultation with the Union and by failing, once it reached a decision to contract out all of its long-haul work, to afford the Union an opportunity to bargain over the decision and its effect on employees, Respondent violated Section 8(a)(1) and (5) of the Act.

6. The Union is the exclusive collective-bargaining representative of employees in the following appropriate units:

All full-time and regular part-time long haul drivers employed by the Employer at its Buckhannon, Sutton and White Sulphur Springs, West Virginia, facilities; excluding office clerical employees and guards, professional employees and supervisors as defined in the Act.

All full-time and regular part-time short haul drivers and mechanics employed by the Employer at its Buckhannon, Sutton and White Sulphur Springs, West Virginia, facilities; excluding office clerical employees and guards, professional employees and supervisors as defined in the Act.

7. Respondent has not engaged in any violations of the Act not expressly found here.

THE REMEDY

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

Having found Respondent unlawfully reduced, through subcontracting, the hours worked by employees Randall Alderman, James Warner, James Jenkins, and George Winemiller during the period April 11 to May 13, 1988, and having found Respondent unlawfully closed its long-haul operations and terminated employees Randall Alderman, James Warner, James Jenkins, George Winemiller, James Schoolcraft, Henry Frame, and Joseph Snyder, I shall recommend that Respondent be required to make whole the employees whose hours of work were reduced through subcontracting, and I shall recommend that Respondent be required to offer reinstatement to each of the discriminatees terminated by either (1) reinstating its long-haul operations and offering reinstatement to each of the discriminatees to his former position or, if such position no longer exists, to a substantially equivalent position, without prejudice to his senior-

ity or other rights and privileges previously enjoyed or (2) offering reinstatement to each discriminatee in any position in its existing operations which he 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 discriminatees are capable of filling. In addition, I 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). Interest on backpay due will be computed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987), except that interest accruing before January 1, 1987, shall be computed under *Florida Steel Corp.*, 231 NLRB 651 (1977).¹⁵

Having found that Respondent violated Section 8(a)(5) of the Act by subcontracting out long-haul bargaining unit work, without notice to or consultation with the Union, and by failing, once it reached a decision to contract out all of its long-haul work, to afford the Union an opportunity to bargain over the decision and its effects on employees, I shall recommend that Respondent be ordered to give the Union appropriate advance notice of any decision to contract out long-haul bargaining unit work, and that it be ordered to bargain in good faith concerning any such decisions and the effect of same on bargaining unit employees.

On these findings of fact and conclusions of law and on the record as a whole, I make the following recommended¹⁶

ORDER

The Respondent, J. D. Hinkle & Sons, Inc. t/a Mountaineer Petroleum, Buckhannon, West Virginia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Telling employees it would be futile for them to obtain union representation.

(b) Interrogating employees concerning their union activities and sentiments.

(c) Interrogating employees concerning how they voted in a Board election.

(d) Threatening employees with loss of employment if they vote the Union in.

(e) Telling known union adherents they are being transferred to the night shift because such action might cause them to quit.

(f) Telling employees they received fewer loads because they are union.

(g) Threatening to close its long-haul operations if its employees chose to be represented by the Union.

(h) Discouraging membership in, or activities on behalf of Teamsters, Chauffeurs and Helpers Local Union No. 175, or

¹⁵ See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

¹⁶ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

any other labor organization by reducing the hours of work of employees through subcontracting, transferring employees to the night shift, terminating employees and closing business operations, or otherwise discriminating against employees in any manner in respect to their tenure of employment or any term or condition of employment in violation of Section 8(a)(1) and (3) of the Act.

(i) Failing and refusing to give the Union appropriate advance notice of its intention to subcontract long-haul unit work and failing to afford the Union an opportunity to bargain over decisions to subcontract unit work and the effect of such decisions on employees.

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

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

(a) Make whole Randall Alderman, James Warner, James Jenkins, and George Winemiller for losses they sustained when their hours of work were reduced through subcontracting during the period April 11 to May 13, 1988, in the manner set forth in the remedy section of the decision.

(b) Offer Randall Alderman, James Warner, James Jenkins, George Winemiller, James Schoolcraft, Henry Frame, and Joseph Snyder reinstatement by either (1) reinstating its long-haul operations and offering reinstatement to each of the discriminatees to his former position or, if such position no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges previously enjoyed or (2) offering reinstatement to each discriminatee in any position in its existing operation which he 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 discriminatees are capable of filling, and making such discriminatees whole for losses suffered as a result of the discrimination against them in the manner indicated in the remedy section of the decision.

(c) Notify Teamsters, Chauffeurs and Helpers Local Union No. 175, International Brotherhood of Teamsters, Chauffeurs,

Warehousemen and Helpers of America, AFL-CIO, when legally required, of any decisions to subcontract bargaining unit work and afford it, on request, adequate opportunity to bargain concerning such decisions and their effect on bargaining unit employees. The appropriate bargaining units are:

All full-time and regular part-time long haul drivers employed by the Employer at its Buckhannon, Sutton and White Sulphur Springs, West Virginia, facilities; excluding office clerical employees and guards, professional employees and supervisors as defined in the Act. All full-time and regular part-time short haul drivers and mechanics employed by the Employer at its Buckhannon, Sutton and White Sulphur Springs, West Virginia, facilities; excluding office clerical employees and guards, professional employees and supervisors as defined in the Act.

(d) 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.

(e) Post at its Buckhannon, Sutton, and White Sulphur Springs, West Virginia facilities copies of the attached notice marked "Appendix."¹⁷ Copies of the notice on forms provided by the Regional Director for Region 6, after being signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

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

¹⁷If 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."