

Jennmar Corporation of Utah, Inc. and United Mine Workers of America. Cases 27-CA-10955 and 27-CA-11007

February 8, 1991

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
CRACRAFT AND DEVANEY

On May 9, 1990, Administrative Law Judge Clifford H. Anderson issued the attached decision. The Respondent filed exceptions and a supporting brief, and the Charging Party and the General Counsel filed answering briefs.

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

The Board has considered the decision¹ and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,² and conclusions as modified and to adopt the recommended Order as modified.

1. The General Counsel alleged, in part, in paragraph 5(a) of the complaint that the Respondent's production foreman Tony Perez threatened employees "that if the Union comes in, wages and benefits would be cut." The judge found merit in this allegation. The Respondent maintains that there was no evidence in the record to support the judge's finding. We agree with the Respondent and find that that aspect of paragraph 5(a) of the complaint is without evidentiary support. We need not pass on the other aspect of paragraph 5(a), i.e., that Perez threatened job loss if the Union came in, because the evidence supports a finding, as the judge found, and as set out at complaint paragraph 5(e), that Perez violated the Act by threatening an employee that "if the Union comes in, we will have a job, but you won't."

2. The Respondent maintains that there is no evidence to support a finding that, on or about May 18, 1989, Perez, as alleged in paragraph 5(e) of the amended complaint, threatened employees with loss of their benefits if the Union came in. The Respondent argues that only statements made by Perez on that date

can be used to support paragraph 5(e) of the amended complaint. The judge found that certain statements made by Perez to Fox on May 24 supported that part of the allegation in paragraph 5(e) of the complaint. Therefore, he concluded that an 8(a)(1) violation had occurred. We agree with the judge's conclusion. Where, as here, the complaint is technically incorrect but the error was not prejudicial to the Respondent and did not prevent it from fully and fairly litigating the case, we shall affirm the judge's unfair labor practice finding. See generally *Power Plant Maintenance Co.*, 286 NLRB 205 (1987).

3. The Respondent has filed exceptions to the judge's finding, based on allegations as alleged in paragraphs 5(g) and (i) of the complaint, that the Respondent violated Section 8(a)(1) by various interrogations. These were interrogations of employee Fox. The judge found that, on May 19, 22, and 24, 1989, the Respondent, acting through Perez, unlawfully interrogated Fox about his union sympathies and that, on May 22, 1989, the Respondent, acting through Pugliese, unlawfully interrogated Fox about his union sympathies. The Respondent claims that Fox was an open union supporter and that none of the interrogations constituted an attempt to restrict Fox's exercise of his Section 7 rights. The General Counsel maintains that Fox's first public display of union support did not occur until the May 22 questioning of Fox by Pugliese. We agree. Thus, Fox was not a known union supporter when Perez questioned him about his union activities on May 19 and when Pugliese started to do so on May 22. Moreover, in the same conversation in which he interrogated him on May 22, Pugliese unlawfully threatened Fox that, if the Union came in, the Respondent would cease production. It was in this context of prior unfair labor practices that Perez thereafter interrogated Fox on May 22. Then, on May 24, when Fox had demonstrated his support for the Union, Respondent through Perez not only interrogated him but also threatened that his benefits would be taken away during negotiations. In all the circumstances, and given the background of other unfair labor practices, we agree with the judge that all the interrogations of Fox violated the Act.³

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Jennmar Corporation of Utah, Inc., Helper, Utah, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

¹The judge's decision properly ruled on the unfair labor practice allegations, objections to an election, and determinative challenged ballots then before him. The parties thereafter filed briefs with the Board addressing various of these issues. Subsequently, the Board approved the Charging Party's request to withdraw its objections; severed the representation case from the unfair labor practice case; and entered an order certifying the results of the election. Hence, we now have before us various exceptions of the Respondent to certain of the judge's unfair labor practice findings. There are no exceptions to his dismissals.

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

³On the basis of the circumstances described above, Chairman Stephens agreed that the interrogations of Fox were coercive even after his display of support for the Union. In particular, he notes that the threats concerning cessation of production and loss of benefits distinguish this case from *Sunnyvale Medical Clinic*, 277 NLRB 1217 (1985).

1. Delete paragraph 1(a) and reletter the subsequent paragraphs.

2. Insert the following as new paragraph 1(e).

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

3. 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.

WE WILL NOT interrogate our employees about their union activities or sympathies.

WE WILL NOT accuse our employees of starting the union organizing drive.

WE WILL NOT threaten our employees with loss of their jobs or benefits if the United Mine Workers of America organizes our facility.

WE WILL NOT threaten to withhold modern equipment from and/or stop expansion of our Helper, Utah facility because of our employees' union activities.

WE WILL NOT threaten to send parts and equipment to other facilities because of the Union or the organizing drive.

WE WILL NOT threaten to stop facility expansion because of the Union or the organizing drive.

WE WILL NOT threaten to turn our Helper, Utah facility into a warehouse with the loss of production jobs if the Union organizes our facility.

WE WILL NOT suggest or imply that employees' jobs could be saved and things get back to normal if they would get their authorization cards back from the Union and stop the election.

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

JENNMAR CORPORATION OF UTAH, INC.

William J. Daly, Esq., for the General Counsel.

Glen H. Mertens, Esq. (Ford & Harrison), of Los Angeles, California, for the Respondent.

Jonathan Wilderman, Esq. (Wilderman & Linnet, P.C.), of Denver, Colorado, for the Charging Party.

DECISION

STATEMENT OF THE CASE

CLIFFORD H. ANDERSON, Administrative Law Judge. I heard this case in trial on November 28, 29, and 30, 1989, at Price, Utah. Briefs were submitted on January 16, 1990. The matter arose as follows.

On May 25, 1989, the United Mine Workers of America (the Union, the Petitioner, or the Charging Party) filed a petition with Region 27 of the National Labor Relations Board docketed as Case 27-RC-6980 seeking to represent certain employees of the Jenmar Corporation of Utah, Inc. (the Employer or Respondent) at its Helper, Utah facility. Pursuant to a Stipulated Election Agreement dated July 6, 1989, an election was held on July 28, 1989. The tally of ballots reflected 14 ballots for the Union, 15 against, and 2 challenged ballots. On August 3, 1989, the Union filed timely objections to the conduct affecting the results of the election. On September 29, 1989, the Regional Director for Region 27 issued a Report on Challenges and Objections directing a hearing on the two challenged ballots and certain potentially objectionable conduct.

On June 26, 1989, the Union filed a charge against Respondent docketed as Case 27-CA-10955. The Regional Director for Region 27 issued a complaint respecting this charge on July 27, 1989. The Union filed a second charge on August 16, 1989, against Respondent docketed as Case 27-CA-11007. On September 28, 1989, the Regional Director for Region 27 issued an order consolidating cases, amended consolidated complaint and notice of hearing consolidating the two unfair labor practices for a common hearing. On September 29, 1989, the unfair labor practice cases and the representation hearing on challenges and objections were consolidated into a common hearing before an administrative law judge.

The consolidated amended complaint alleges that Respondent engaged in certain conduct in violation of Section 8(a)(1) of the National Labor Relations Act (Act) including, inter alia: threats to employees of loss of jobs and benefits, threats of plant closure, dispersion of inventory, cancellation of new expansion plans and delay of introduction of new machinery, interrogations of employees concerning their union activities, and adverse changes in plant rules and benefits during negotiations. The complaint also alleges that Respondent suspended and discharged Eric Fox in violation of Section 8(a)(3) and (1) of the Act.

The potentially objectionable conduct at issue in the consolidated hearing included the allegations of the consolidated complaint occurring between the filing of the petition and the holding of the election and the additional contention that the Employer sent home employee David Hurst on the day of the election in order to discourage employee support for the Union.

The challenged ballots included in the consolidated hearing were those of Fox and Hurst, the validity of which were challenged by Respondent.

Respondent denies the conduct attributed to it as violating Section 8(a)(1) of the Act. It admits the suspension and discharge of Fox but avers these actions were not in violation of the Act. Respondent contends Hurst gave notice of termination and was paid in lieu of working in accordance with Respondent's policies. Thus, Respondent argues that it en-

gaged in no objectionable conduct and that its challenges to the ballots of Fox and Hurst should be sustained and the results of the election certified.

All parties were given full opportunity to participate at the hearing, to introduce relevant evidence, to call, examine, and cross-examine witnesses, to argue orally, and to file posthearing briefs.

On the entire record, including well written and helpful briefs from all parties, and from my observation of the witnesses and their demeanor, I make the following¹

FINDINGS OF FACT

I. JURISDICTION

Respondent is a corporation with an office and place of business in Helper, Utah, where it is engaged in the production of mine roof support system bolts. Respondent, in the course of its Helper operations, annually both sells and ships and purchases and receives goods, services, and materials of a value in excess of \$50,000 directly from and to points and places outside the State of Utah. There is no dispute and I find that Respondent is and has at all times material been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

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

III. ALLEGED UNFAIR LABOR PRACTICES

A. Background

Respondent operates six facilities nationwide with its headquarters in Pittsburgh, Pennsylvania. Its Helper, Utah facility manufactures roof bolts for use in hard rock coal mine roof support systems. Respondent is owned at least in part by the Calandra brothers, one of whom is Frank Calandra. Eugene Stewart is Respondent's Pennsylvania headquarters-based vice president of operations. At the time of the events in question, the general manager of the Helper facility was Doug Gillespie, its assistant general manager was James Pugliese, and its production foreman was Antonio Perez.

In early spring 1989,² the Union began organizing Respondent's production and maintenance employees at Helper. By mid-May Respondent became aware of these activities and commenced a series of employee meetings. On May 25, the Union filed its petition pursuant to which an election was conducted on July 28.

B. Allegations of Violations of Section 8(a)(1) of the Act

The amended complaint as further amended at the trial alleges conduct by three individuals whose supervisory status is not in question: Doug Gillespie, Jim Pugliese, and Antonio Perez. It is appropriate to consider the allegations agent by agent.

¹ As a result of the pleadings and the stipulations of counsel at the trial, there were few disputes of fact regarding collateral matters. Where not otherwise noted, the findings here are based on the pleadings, the stipulations of counsel, or unchallenged credible evidence.

² Dates hereinafter refer to 1989 unless otherwise indicated.

1. Douglas Gillespie—complaint paragraphs 5(b), (c), (f), (j), and (m)

a. Contentions and testimony

(1) The May 18 meeting

Respondent held a series of employee meetings in which the union drive was discussed and Respondent's position and opinions on the value of trade unionism were presented. The first meeting was held on May 18. Doug Gillespie conducted the meeting which was also attended by Respondent's agents: James Pugliese, Sales Manager Tony Korianos, and Tony Perez. Complaint paragraphs 5(b), (c), and (f) allege improper statements by Gillespie at this meeting. More particularly the complaint contends that Gillespie told employees at this meeting that if the Union organized Respondent's Helper facility: (1) employees would no longer be able to enjoy flexible work assignments and would therefore be sent home if no work was assigned to their machines, (2) new machinery would be withheld from the facility because of the union drive, and (3) during negotiations employees' wages and benefits would be considered minimum wages and other minimum benefits as required by law and that "bargaining would begin from that point."

James Valdez, a unit employee, testified that Gillespie told the assembled employees:

[He] told us that if the place went union that they can shut down and turn it into a warehouse and we can lose our jobs. And he says if we did try to go union that—they told us if we did go union, you know, the bargaining would start out at zero. We'd lose all our benefits and he said we could end up with nothing.

Anthony Duto, a unit employee, testified that Gillespie told the employees that during negotiations "your benefits would be zero, and you'd go down to the minimum wage." He also recalled that Gillespie described the expansion of the Helper facility as on hold during the union campaign and "could be jeopardized if you signed a card or—basically signed a card or went union."

David Hurst, a former employee, testified that Gillespie told the employees that "if the union was to come into Jenmar, it would threaten the profitability of the company. If the profitability of the company was threatened, there would be layoffs at the plant in Helper, Utah." Hurst also recalled Gillespie said that if "negotiations were to take place, the company could reduce wages to minimum wage and cut benefits to nothing, except paying unemployment [and] worker's compensation." Finally, Hurst recalled that Gillespie told the employees that, if the Union was in the facility, work could not be guaranteed and, if work was not available in a certain classification, no other work would be assigned and the employee would be sent home.

Gillespie specifically denied the statements attributed to him. Gillespie testified that inflexible job assignments with their potential for causing employees to be sent home for lack of work was discussed only in the context of specific examples of other employers who were organized. Gillespie testified that he was careful to connect predictions of less favorable conditions in various regards at Helper only with the caveat that Helper's circumstances would be "whatever the

contract would be negotiated We don't know, you know, what's gonna happen." Gillespie categorically denied telling employees in this meeting or anytime that the plant would be shut down or turned into a warehouse.

Gillespie testified he told the employees at this meeting or at other meetings:

just because you were union or you voted the union in, that it didn't mean that you automatically got raised. The negotiation could possibly start at minimum wage, minimum benefits. That you could end up with more than you have now, you could end up with less than you have now, or you could end up with the same as you have now.

Gillespie also recalled telling employees, he believed at this first meeting, that the employees could ask the Union for their authorization cards back.

Francis Anthony Rendon, a head machine operator, testified that Gillespie told the employees that "when we started to negotiate, that we would have to start from minimum wage, that our benefit would start from zero, that's basically what he said." Rendon also recalled that Gillespie told the employees that they could "go back and get" any union cards the employees had signed "if we felt uncomfortable."

Shirley Peterson, a unit employee, testified that Gillespie told the employees at the meeting that wages and benefits could "go up and down." She denied that Gillespie said that wages would drop to the legal minimum. Peterson also denied that Gillespie stated that Helper employees would be sent home rather than assigned other work if the Union organized the facility.

Mariano Urrutia, a unit employee, testified that he could recall only that Gillespie told the employees that negotiations could start from the bottom and go up from that point. Floyd Seal, the head mechanic, recalled that Gillespie told employees that negotiations could "go either way" and that there was no guarantee of employees improving their circumstances and that it was also possible that conditions could get worse.

(2) Paragraph 5(j) of the complaint

The complaint alleges that Gillespie told employees on June 5 that, if they were concerned about their jobs, a majority could get their cards back so there would be no election and things could return to normal. James Valdez testified that on or about June 5 he spoke to Gillespie alone at the workplace and asked him about an apparent shortage of material needed to continue work. He testified that Gillespie told him:

As long as this thing is going on, we're not gonna have any supplies coming in. He goes, if we were really concerned about our jobs, he told me we'd get the majority of the guys and go get the union cards that you signed, and make them promise there won't be no election. And the expansion can start, and he said that things can go back to normal, and they won't have to have this election or all this stuff going on.

Valdez' handwritten notes of this conversation do not include the statement respecting parts but does include the attribution that the facility would be closed or turned into a warehouse

if the union campaign did not stop. Gillespie denied making the statements attributed to him.

(3) Paragraph 5(m) of the complaint

The complaint alleges that Gillespie told employees on June 2 that Respondent would not install new machinery at the facility because of the election. Gillespie played a videotape of Respondent's Illinois facility in multiple sessions on June 2 at Respondent's Helper facility. Present at one session were Gillespie, Cliff Holly, maintenance foreman, Floyd Seal, and Tony Perez. Also attending was employee Eric Fox. Fox testified that Gillespie, in discussing the newer machinery at the Illinois plant and Respondent's intentions to install such machinery at Helper, said that "there's been a hold put on all this because of the union, because of what's going on with the union."

Gillespie, Perez, and Seal deny that such a comment was made during any showing of the videotape. Others attending different sessions testified that no similar remarks were made in those sessions.

b. *Argument, analysis, and conclusions*

(1) The May 18 meeting

The parties skillfully argued the credibility of the witnesses and the state of current Board law on the issues in contention. Respondent's main arguments were: (1) that Gillespie was speaking to employees after having been educated as to what was permitted and not permitted under the law and therefore would be unlikely to have made the statements attributed to him, (2) that Gillespie credibly denied the allegations, and (3) that there was corroborating testimony from other witnesses that he did not make the statements alleged.

The General Counsel and the Charging Party advance the statements of the various witnesses supporting the allegations as worthy of belief and cite traditional Board cases supporting the proposition that the statements, if made, were violations of the Act.

I have considered the arguments of the parties and the record as a whole on these issues with due regard for the credibility of the witnesses and the persuasiveness of their demeanor. I am persuaded for the reasons set forth below that the General Counsel has not sustained his burden of proof on these contentions and that, in each case, I find no violation was proved. Accordingly, I will recommend dismissal of the underlying allegations in paragraphs 5(b), (c), and (f) of the complaint.

Meetings of employees attended by significant numbers of employees where agents of management address various aspects of unionization in a manner designed to gain support for management's opposition to the union are always somewhat confused affairs. Remembered statements are generally less precise and versions of what was said vary more widely among witnesses because large lecture-type meetings do not hold the attention of the passive participants as do conversations between a few individuals in which all are interacting. So, too, as the Court has noted, some of the distinctions the cases draw in determining what is permissible or violative of the Act are more nice than obvious. Various subtleties respecting characterization, prediction, etc., are discussed in the cases, which find violations of the Act or permissible statements depending on subtleties in language and nuances

which are difficult for the casual hearer to understand and easy to confuse in recollection. Employees gathered to hear management's views on a subject with which they are not intimately familiar often recall or attribute statements to management agents based on impressions taken from the meeting rather than testifying from a specific verbatim recollection of statements made. Indeed, it is often the case that the management speech so carefully crafted and delivered is designed to and often achieves the goal of allowing, if not encouraging, the formation of employee impressions of unfavorable consequences of unionization which are far more negative than a textual analysis of the specific words of the speech would support.

In the instant case the meeting at issue was the first of many held. Employees and perhaps managers were at their least experienced in dealing with the subject matter of organization and representation. The wide range and frequently contradictory versions of Gillespie's statements made at this meeting by the numerous witnesses who described it support the notion that accurate recollection of his specific statements was difficult and elusive. I do not find that the contradictory versions of events indicate deliberate distortion or fabrication. I specifically decline to find any witness did other than testify as best as possible to what he or she recalled from the meeting. As noted, however, I find the versions to be at such variance that I am unable to credit any single version over Gillespie's credible denials. Accordingly, I find the General Counsel has failed to sustain his burden of proof on any allegation respecting Gillespie's statements at the May 18 meeting.

More particularly, I find the testimony of Gillespie that he did not tell employees they would be sent home if work on their machines ceased, that he did not tell employees that new equipment would be withheld from the facility or that bargaining would start from legal minimums, that he did not tell employees that jobs would be lost or jeopardized if employees signed authorization cards, given the corroboration noted above, prevails over the contrary versions of the General Counsel's witnesses given the very large variation in versions of events and the burden of proof the General Counsel bears on all allegations.

(2) Paragraph 5(j)

The testimony respecting paragraph 5(j) was direct and conflicting. Valdez, supported by handwritten notes he identified as having been prepared soon after the events, attributes statements to Gillespie in a one-on-one conversation which statements Gillespie unambiguously denies making at any time. Nor may there be a dispute, given current Board law, that the remarks made by Gillespie, if Valdez be credited, violate Section 8(a)(1) of the Act.

Respondent points out that Valdez attributes similar statements to Pugliese in his notes, but that those remarks are not alleged as violations of the Act in the complaint. Respondent argues the implausibility of Valdez being threatened in virtually the same words at separate times by two agents of management each of whom "were well aware that such statements were prohibited." The General Counsel advances

the credibility of Valdez as well as the fact that he was an employee at the time of his testimony.

I credit the testimony of Valdez over the denials of Gillespie in this matter and find the violation as alleged. I do so in large part on demeanor. My conviction is not so much that Gillespie was lying in denying making the remarks, rather it is that Valdez did not deliberately falsify either his notes or his testimony on this issue. Men are mortal and perception and memory may play tricks on an honest man. However, when a witness establishes that contemporary or near contemporary notes were made of the specific words used in a conversation, the likelihood of lapses of memory or confusion over events is much diminished. The issue presented in this latter situation is more one of determining if gross fabrication and/or perjury has occurred. Having carefully considered the record as a whole and the demeanor of the two individuals involved, I find that Valdez did not concoct his notes. I therefore find his testimony respecting this meeting as corroborated by his notes is to be credited. In reaching this conclusion I have considered my generally favorable impression of Gillespie and found it must defer to my findings respecting Valdez and his notes. Accordingly, crediting Valdez over Gillespie, I find the General Counsel has sustained his burden of proof with respect to paragraph 5(j) of the Act. More particularly, I find that on or about June 5, Respondent, through its admitted agent Gillespie, threatened employees with loss of employment unless employees abandoned their attempts to organize Respondent's Helper facility.

(3) Paragraph 5(m)

The General Counsel contends that Gillespie, during the presentation of a video of a sister facility, threatened employees with the withholding of new machinery for the period union activities continued. Eric Fox is the sole witness supporting the contention and is challenged by Gillespie and, directly and indirectly, others.

Considering the arguments of the parties, the record as a whole, relevant probabilities, and the demeanor of the witnesses, I credit the denial of Gillespie over the attributions of Fox. On this record I simply do not believe Gillespie would make the statement claimed by Fox at a meeting attended by others without a corroborating recollection being available. Further, Gillespie's denial was convincing and his demeanor during this testimony persuasive. While I do not find that Fox lied about the matter I conclude he simply formed a mistaken impression of statements made. Having failed to sustain the General Counsel's factual contentions, I further find he has failed to sustain his burden of proof on the allegations in paragraph 5(m) of the complaint. I shall therefore dismiss this allegation.

2. James Pugliese—complaint paragraphs 5(h) and (i)

a. *Contentions and testimony*

Eric Fox testified that on the morning of May 22 in the parking lot in front of the main office he had a conversation with Pugliese. Fox testified:

He asked me if I knew what was going on with the union and how I felt about the union, being as I'd been there for about two and a half years at this time. I told him I thought the union could help us out in a lot of ways. There had been a lot of people injured at the plant, myself being one of them.

I just told him I had strong feelings, you know, that I wanted to check out more into it to see what it could do to help us out. At that time he told me he had been working with the union for 18 years on the railroad here in Helper.

He said the union had never done anything for him but cost him a lot of money and eventually cost him his job. Then later on in the conversation he was saying that this stuff at the union was causing a lot of problems such as they might turn the plant into a warehouse. And that this could lead up to him and Mr. Gillespie being truck drivers for the warehouse, and they would only keep two other employees to be fork-lift operators employed at that time.

Pugliese specifically denied ever asking Fox how he felt about the Union, that the plant might become a warehouse because of the Union or that only Pugliese and Gillespie would have jobs in such a setting.

Jim Daniel Valdez, a shear cutter operator, testified that on Monday, May 22, he had a conversation with James Pugliese. Valdez testified:

And [Pugliese] told me he was on the phone twice that day with Calandra. And he told me that Calandra had told him to stop buying supplies as long as this [union thing] is going on, [Calandra] didn't want anything purchased. And he started telling me that the second time [Calandra] called [Calandra] wanted him to shut it down. And he told [Calandra] that they can't do it during the [union organizing] drive. . . . [H]e says Calandra had told him that no union or anyone's gonna tell [Calandra] how to run his business.

Pugliese denied talking to Frank Calandra during the relevant period. He specifically denied telling Valdez about any conversation he had had with Calandra concerning plant closure, about Calandra resisting others running his business or any other aspect of the conversation as recounted by Valdez.

b. Analysis and conclusions

The issues presented by the complaint paragraphs concerning Pugliese are factual rather than legal. No doubt exists under current law that the conduct of Pugliese described by Valdez and Fox in their testimony, if credited, supports the allegations of the complaint and sustains a finding of violations of Section 8(a)(1) of the Act.

Pugliese's denials were not persuasive in my judgment. Based on demeanor, I credit the statements of Fox and Valdez over Pugliese's denials. Accordingly, I sustain the General Counsel's factual contentions. There is no real question that the actions found constitute violations of Section 8(a)(1) of the Act and I so find. Accordingly, I sustain the General Counsel's complaint paragraphs 5(h) and (i).

3. Antonio Perez—complaint paragraphs 5(a), (d), (e), (g), (k), and (l)

a. Contentions and testimony

Valdez, who at the time in question was supervised by Perez, testified that before the first employee meeting in which the Union's organizational drive was discussed,³ he had a conversation with Perez which began by Perez stating "You're one of the ones." When Valdez asked Perez what he meant, Perez said, in Valdez' recollection:

You, I know you. You're one of the ones who's trying to start this union, aren't you?

Valdez responded that he did not "have to tell you anything," whereupon Perez continued:

Well, I know, someone told me you were. If you guys go union, you know they could turn this place into a warehouse. And when they do that, I'll have a job and you won't.

Perez could not recall if he had had conversations with Valdez about the Union before the election but categorically denied making the statements attributed to him by Valdez.

Fox testified that he missed work during the period May 15 through 18 and returned on May 19. While operating his machine that day Perez approached him and asked him if he knew what was "going on" with the Union. Fox answered that he had just returned to work and did not know. Fox also testified that on May 22 while on the way to the breakroom Perez "confronted me . . . how my feelings were toward the union."

On May 24 Perez approached Fox, in Fox's recounting, and asked about his wife's opinions of the Union and her support for the organizing drive. Fox told Perez his wife supported him. Contract negotiations were then discussed. Fox recalled Perez told him that, once the Union was in negotiations, machine operators would only operate their machines and, if the machine did not need to be operated that day, the operator would be sent home. Respondent's practice at that time was to allow operators to perform other tasks when their equipment was not in operation. Fox also testified that Perez asked him if he knew what would happen in negotiations and that Perez stated: "that they would probably take away all our benefits at that point, and start from there."

Perez admitted he asked Fox about his views on the Union and about his wife's opinions although Perez testified he was not able to separate the conversations in his mind's eye. Perez also recalled telling Fox⁴ that he had heard various things including the assertion that "if the place is union" machine operators could be sent home if their machine were not in use.

Anthony Dutro, a production machine operator supervised by Perez, testified that on May 22 he and two other production workers, Johnny Martinez and John McKendrick, had been assigned the task of counting small parts by Perez.

³The first meeting was placed by others as occurring on May 18.

⁴Perez apparently used the gambit of claiming "some other people told me" various facts in his conversation with employees. Thus, Perez testified: And so we start . . . talking [a]bout it and I told him that I heard that whole bunch of people try to get in union. So he [would] think that I don't really know nothing about union.

Dutro recalled Perez asked if the employees knew “why we’re doing this . . .?” Dutro answered that it was usual practice to count parts for inventory. Perez answered, in Dutro’s recollection, that the parts were to be shipped “back east.”⁵ Perez continued:

Then he also pointed over to the new header area where the foundation [of the building expansion] had been poured, and said that construction would be stopped until the union business was over with. At that point he also said that some equipment was being sent back east as well until the union business was over with.

Neither Johnny Martinez nor John McKendrick testified. Perez testified that he told Dutro that the parts being counted were being shipped east. When Dutro asked if the shipments were being made was because of inventory, Perez answered no. Dutro, in Perez’ memory, then said “Oh, because of the union.” Perez responded “Whatever you say” and no more on the subject was spoken. Perez also denied telling Dutro that Respondent was stopping production of bolts because of the Union.

David Hurst testified that on the morning of May 22 he was working with fellow employee Paul Nunez when Perez approached them and said that machinery that had “been intended to come to the Helper plant had been cancelled.” Nunez asked Perez why, in Hurst’s recollection, and Perez simply said “You know why.” Hurst and Perez left the area and were joined by two other employees, Jim Valdez and Shane Pitts, in a discussion of Respondent’s existing health plan and in sharing employee tales of dissatisfaction with the plan. Perez said, in Hurst’s memory, “Maybe things will be better if we have the union, or maybe we won’t have jobs.” Valdez did not address this matter in his testimony. Pitts did not testify.

Perez recalled telling Hurst only that certain machines were going “back there” to be repaired. He also denied ever telling employees they might lose their jobs, if the Union organized the facility.

b. *Analysis and conclusions*

The testimony given by the employees described above was straightforward and convincing. I find no reason to doubt the events as described. I have less confidence in Perez who, while conceding certain conversations with employees, seemed all too ready to deny statements attributed to him based on his hindsight consideration of what he should have done or said on the occasion. I find his credibility in these aspects of the case to be significantly inferior to that of the employees giving the testimony described above. Accordingly, I credit their version of events over the differing version of Perez where such differences occur. I simply find the employees’ descriptions far more persuasive on this record than Perez’ testimony.

The events described by the employees occurred over an approximately 1-week period from May 18 to 24. Perez’ actions include, inter alia:

(1) interrogation of employees about their union activities and the accusation of employees that they were involved with the Union,

(2) statements to employees that, because of the union “business,” parts and equipment were being shipped to other plants and construction had been halted,

(3) threats that, if the facility were to go union, it could be converted to a warehouse with concomitant loss of unit jobs.

These acts and conduct are traditional violations of Section 8(a)(1) of the Act and warrant no extended legal analysis. I so find. Accordingly, I find Respondent through Perez in the period May 18 through 24 violated Section 8(a)(1) of the Act by (1) interrogating employees about their union activities, (2) threatening changes in the plant’s operation because of the union organizing drive including loss of parts and withholding of new equipment, halting of an ongoing building expansion, and conversion of the operation to a warehouse with concomitant loss of jobs.

Perez’ statements to Fox respecting the detrimental effects on machine operators’ hours of a rigid approach to work assignments were linked to the Union successfully organizing Respondent and were discussed apparently in the context of negotiations. There was not however the necessary link in Perez’ remarks between adverse consequences to employees and the Union’s possible position in negotiations respecting machine use to render the statement permissible. On this record the risk to machine operators as described by Perez would come about because of the Union’s success in organization and not from some negotiated change in working conditions. Such a statement is then a threat to adverse consequences linked to union representation and not a prediction of the outcome of negotiations. Such a threat violates Section 8(a)(1) of the Act.

Perez’ statement to Fox that in negotiations Respondent would “probably” take away all employee benefits may well have been an inarticulate explanation of zero sum bargaining. Fox testified that he was sure Perez did not understand what would happen in negotiations. The standard for evaluation of employer-agent statements to employees is objective rather than subjective however. Here, the bald threat of loss of benefits is not saved by the conditional modifier, “probably.” I find the statement, as the others described above, would reasonably be expected to chill employees’ exercise of Section 7 rights in the context of the events as described above. Accordingly, I find the statement also violates Section 8(a)(1) of the Act.

In summary, I have credited the attributing employees over Perez who I have found to be a supervisor and agent of Respondent. I have also found that the conduct described violates Section 8(a)(1) of the Act. The General Counsel has therefore met his burden with respect to these aspects of the complaint. I have therefore found an agent of Respondent engaged in the conduct alleged in paragraphs 5(a), (d), (e), (g), (k), and (l) of the amended complaint. Respondent has therefore in each instance violated Section 8(a)(1) of the Act.

4. Summary of findings respecting paragraph 5 of the complaint

As noted above, I have found the General Counsel has sustained the following subsections of paragraph 5 of the

⁵ “Back east” was apparently a commonly understood reference to Respondent’s other facilities.

amended complaint: 5(a), (d), (e), (g), (h), (i), (j), (k), and (l).

Further, I have found without provable merit and will therefore dismiss the following subsections of paragraph 5 of the amended complaint: 5(b), (c), (f), and (m).

C. Allegations of Violations of Section 8(a)(3) and (1) of the Act

The General Counsel contends that Respondent: (1) suspended employee Eric Fox on or about June 15, (2) discharged Fox on or about July 27, and (3) has at all times thereafter failed and refused to reinstate him. Respondent does not deny the actions described but avers they were taken for benign reasons unrelated to activities protected under the Act.

1. Relevant events

Eric Fox started as a unit employee at Helper in March 1987 and was regarded by Respondent as a good worker. On December 29, 1988, Fox was arrested on felony charges of distribution and sale of a controlled substance at a location away from the workplace. Fox was released on bail soon after his arrest and missed no work.

Fox testified that the following day he spoke with Jim Pugliese telling Pugliese of the charges against him and of his innocence. He recalled that Pugliese told him that he would talk to Gillespie about the turn of events and get back to him. Later in the day, in Fox's recollection, Pugliese told him:

Mr. Gillespie didn't see no problem with it because I was a good worker, and he didn't want to [hear] any more about the incident.

Fox told Pugliese that the local paper would report his arrest and that, since Helper was a small community, management was sure to hear more about it. Pugliese told Fox that "he don't read the paper and he don't listen to no talk around town."

Pugliese testified that Fox had in fact reported to him that he had gotten into "some trouble" and "was going to court," but that Fox never told him the nature of his trouble or the specifics underlying his court appearances. Pugliese testified that, as a matter of personal conviction, unless and until an employee was adjudged guilty of a charge, he was simply not concerned with the matter. Pugliese testified that he regularly reads the local paper but saw no reference to Fox's arrest until the paper reported Fox's subsequent guilty plea in July as described below. Gillespie, too, testified that he had no knowledge of the nature of the charges against Fox until his subsequent guilty plea.

In the following months Fox had various court and legal commitments related to the charges which took him away from work. Without exception Pugliese and/or Gillespie gave Fox permission to take off the necessary time. Fox claimed he explicitly told Gillespie on several occasions that the time off was necessary for preparation of his defense to drug charges against him. Gillespie denied that Fox had so informed him of the charges and further denied receiving any information about the nature of Fox's troubles from Pugliese or any other source.

By early May, Fox, through counsel, was engaged in plea bargaining with the prosecution. It was determined he needed a letter of recommendation from his employer as part of the process. Fox testified he asked Pugliese for such a letter on May 4, 1989, for use in a plea bargain involving a guilty plea to reduce felony charges and a "no jail time" sentence. Pugliese testified that Fox asked for a letter of reference for use in a court proceeding without specification of its purpose as part of a guilty plea and without specification as to the offenses involved. Pugliese and Gillespie discussed the letter which Pugliese prepared and gave to Fox. The May 11, 1989 letter was on Respondent's letterhead signed by Pugliese and addressed to "To Whom It May Concern." The letter set forth Respondent's favorable impressions of Fox's work performance. It does not address nonwork circumstances.

Thereafter Fox took leave returning to work on May 19, 1989. That day he had the conversations with Perez and others described, *supra*, from which Respondent's knowledge of his union sympathies will be inferred. On June 5 Fox entered his guilty plea to the lesser felony charge of attempting to arrange the sale or distribution of a controlled substance. The local newspaper reported this fact in its June 8, 1989 edition. Pugliese read the item and brought it to Gillespie's attention. Fox was at this time on vacation. Gillespie testified he contacted Stewart by telephone to obtain guidance on Respondent's proper course. Gillespie testified that he reached the decision to suspend Fox in his discussion with Stewart and that, at that time, neither he nor Stewart knew, suspected, were concerned with, or discussed Fox's sympathies for the Union. Gillespie also testified that neither Perez nor Pugliese contributed to the determination to suspend Fox. A decision was taken to suspend Fox pending further investigation on his return from vacation. On June 15, 1989, when Fox returned to work from vacation he was so suspended pending further investigation by Respondent of the charges and guilty plea.

Gillespie testified that he began an investigation of the case and made a variety of attempts to contact the knowledgeable law enforcement officials in the relevant jurisdictions. Gillespie was eventually informed that Fox had "spent time in Emery [County, Utah] on a drug related charge. And that he had several other arrests concerning alcohol." Gillespie also was told that further disclosure respecting the matter must await sentencing by the appropriate court.

Fox testified that on June 26, 1989, he met with Stewart and Gillespie at the facility to inquire about the state of the pending investigation. Fox recalled that Stewart in his presence asked Gillespie:

[H]ow things were looking for the vote on the union, and Mr. Gillespie said, "Well, as long as we haven't got too many black sheeps running out here," he says, "it looks like we should have the union defeated." And Mr. Stewart said that—they've never had the union in there, and they didn't need the union in there, and that they'd do whatever they had to do to keep the union out.

Gillespie and Stewart each denied ever making such remarks to Fox.

Gillespie testified his investigation was not concluded until after Fox's sentencing on July 17, 1989. At that time Gilles-

pie learned that Fox had been sentenced to probation including drug counseling and drug testing. Gillespie and Stewart, who at the time was at the Helper facility, agreed that Fox would be offered reinstatement with certain specific conditions and a meeting was arranged with Fox to be held on July 20, 1989.

At the July 20, 1989 meeting⁶ Gillespie and Stewart told Fox that they were willing to reinstate him without backpay with conditions which included: (1) at-will drug testing, (2) immediate termination for failure to pass such a test, and (3) reservation of the right to inform other employees of the specifics of the agreement.

Fox testified that he did not accept or reject Respondent's oral offer but that a decision was reached to reduce the offer to writing and give it to Fox the following morning. Gillespie and Stewart testified that Fox agreed to the terms but that they urged him to review the written terms with his counsel. Stewart and Gillespie contemplated the form would be prepared the following morning, signed by Fox in due course and Fox would be able to return to work the following Monday, July 24. Gillespie and Stewart testified that at the meeting's end the matter seemed happily resolved. That evening at a company baseball game in which Fox

⁶The General Counsel and the Charging Party objected to the introduction of all evidence concerning the meetings and offers exchanged between Fox and Respondent respecting Fox's reinstatement arguing such evidence was inadmissible under Rule 408 of the Federal Rules of Evidence. I overruled the objection and admitted the evidence. I reaffirm that ruling here for the following reasons.

Art. IV of the Federal Rules of Evidence is titled "Relevancy and Its Limits." Rule 408, Compromise and Offers to Compromise, is in that article and states:

Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay or proving an effort to obstruct a criminal investigation or prosecution.

Rule 408 of the Federal Rules of Evidence by its terms is simply a definition of relevancy and does not shelter evidence from general admissibility as do certain other rules such as those in the area of privilege. See, for example, art. 5 of the Federal Rules, Rule 501 and the notes thereto. Evidence of settlement attempts is therefore not generally excludable. While the Rule holds such evidence not admissible to prove the merits of the matter in settlement discussions, where otherwise relevant, such evidence may be admitted without restriction. In this sense evidence of settlement negotiations is limited in its use under Rule 408, but it is not rendered inadmissible for other purposes.

Board cases frequently involve negotiations which are both settlement negotiations and part of the matter in controversy. Thus, for example, recognition and bargaining cases involve post charge or complaint bargaining which may be for the purpose of resolving the unfair labor practice charges and also concluding agreement on a contract. In cases where a failure to offer reinstatement to a discriminatee is alleged, offers to reinstate may be both part of general unfair labor practice settlement efforts and part of Respondent's defense to the failure to offer reinstatement allegation.

In the instant case the ultimate failure of the negotiations which the General Counsel sought to keep out of the record led to the discharge of Fox, a matter alleged by the General Counsel to be a violation of the Act. Evidence of the specifics of the offers in the negotiations was also offered by Respondent in support of its argued lack of animus against Fox and as business justification for the discharge. Thus, the evidence was independently relevant to both the General Counsel's prima facie case and to Respondent's defense. It was therefore not inadmissible under Federal Rule of Evidence 408 and was properly received into evidence and considered in reaching my decision here.

played, the fact that Fox was returning to work was announced to the attending employees.

The proposal was typed up and given to Fox on Friday, July 21, 1989. The proposal tracked the discussion of the day before providing, inter alia, for reinstatement with no backpay, company drug testing and immediate termination for positive testing, and a company right to discuss the terms of the settlement with other employees. Gillespie testified that Fox agreed to return the form that same day. Fox recalled that Gillespie told him that he wanted the signed form as soon as possible.

In the event, Fox had trouble reaching his counsel and his probation officer. When he did reach his probation officer, Fox testified he was told by the probation officer that "he didn't feel he would work under their conditions." Fox contacted Gillespie by phone on the afternoon of July 24 and told Gillespie that he was not going to accept Respondent's proposal but would propose his own terms for their consideration.

On July 26 Fox, Gillespie, and Stewart met. Fox submitted his own settlement. It proposed in part a specific testing procedure with a retest right on Fox's request, a progressive discipline standard for test failures, confidentiality of the terms of the settlement, and a reservation of claims under the then-pending unfair labor practice complaint. Stewart told Fox his proposal was unacceptable. Fox adhered to his view that he would not accept Respondent's written proposal. Fox was then terminated for refusing to sign Respondent's proposal.

Fox testified that that evening, at a company gathering at a local lounge, he spoke to Respondent's counsel, Glen Mertens. Fox initially described this conversation as follows:

I asked if he knew anything that this could be resolved and if he understood why the termination came up at this time. He told me that if I were to write up my own proposal instead of the one the union gave me, and to not show up at this hearing today [i.e. the instant unfair labor practice trial], and to deny all my backpay, that the company would probably reinstate me to my job.

Mertens testified that Fox approached him at the time and location described. Mertens recalled he first reviewed his role as counsel for Respondent, established that Fox was not represented by counsel respecting the termination—neither by the union lawyer nor his criminal lawyer, and then asked Fox what he wanted to talk about. Fox wanted to know if "there was any way he could get his job back." Mertens suggested Fox take another proposal to Respondent. When Fox said his proposal had been rejected, Mertens responded in his recollection:

Well, that doesn't mean you can't submit another proposal. But I'll tell you that there are essential things about the counter-proposal that you submitted that the company people will never agree to. For instance, they are not going to allow you to be tested positive three or four times in a row before they can finally get rid of you .

They are not going to sign a counter proposal such as the one you submitted earlier today, which expressly resolves or purports to resolve that pending unfair labor practice.

Mertens specifically denied telling Fox that as part of a possible settlement he must not participate in the unfair labor practice trial. Mertens also specifically denied telling Fox he would have to waive his claim to backpay. He testified he told Fox “We are not going to settle this unfair labor practice through a written memorandum concerning reinstatement.”⁷ The conversation ended on Mertens’ statement that Fox was free to submit additional proposals and could even apply to be rehired.

2. Argument

The General Counsel and the Charging Party argue that Fox’s version of events should be credited. Thus the moving parties argue that Fox’s testimony that he told both Pugliese and Gillespie on various occasions that he had been arrested on drug charges be credited over their denials. They further argue Fox’s version of subsequent events be credited where it differs from Respondent’s agents’ testimony. Working from that premise they further argue that Respondent’s agents Gillespie and Pugliese well knew of Fox’s drug arrest but were unconcerned until Fox’s union activities were observed after which time Fox was suspended and later discharged. The General Counsel argues it was not Fox’s guilty plea which triggered Respondent’s acts but rather its discovery that Fox was supporting the Union and was therefore a probable union vote in the election.

Respondent emphasizes the objectivity of Gillespie who at the time he testified was no longer employed by Respondent and had accepted other employment. While also supporting the testimony of Pugliese, counsel for Respondent notes that Gillespie and Stewart determined Fox’s fate and that they did so without any consideration of or indeed knowledge of Fox’s union sympathies. Further, Respondent urges that Fox be discredited where his version of events is contradicted by Respondent’s agents.

Beyond credibility issues, Respondent argues that there was an essential lack of animus in the proposals Respondent made to Fox and an inherently obvious basis for its rejection of Fox’s subsequent proposal. Thus, Fox was to be reinstated before the election under Respondent’s proposal preserving Fox’s right to vote. In Respondent’s view, agreement had in essence been reached on July 20 and been happily announced to employees participating with Fox in the evening softball game. Only Fox’s subsequent change of mind after the July 20, 1989 oral agreement prevented him from returning to work and casting an unchallenged ballot in the election. Were Respondent seeking to punish Fox for his union activities or seeking to prevent his suspected prouion vote from being counted, asks Respondent counsel, would Re-

spondent have made a proposal which, if timely accepted, would have restored his employment and preserved his voting eligibility?

3. Analysis and conclusions

a. *Credibility resolutions*

I have earlier in this decision discredited in part the testimony of many of the witnesses to the events here, i.e., Fox, Pugliese, and Gillespie. Having considered the record as a whole and the demeanor of each witness during testimony concerning the events in issue here, I am unable to find that one or more witnesses may simply be uniformly discredited. I shall make certain threshold credibility resolutions however. Initially, based on the demeanor of the witnesses while giving the relevant testimony, I credit Mertens over Fox respecting their posttermination conversation, and Stewart and Gillespie over Fox concerning their June 26 conversation. My determinations, primarily based on demeanor, are reinforced by the persuasiveness of Respondent’s argument that these agents would be unlikely to make the comments attributed to them in the circumstances described by Fox given that charges had been filed with the Board.

I confess to having great difficulty resolving the conflict in testimony over the contentions of Fox that he discussed the nature of his “problem” with Gillespie and Pugliese and that Respondent was therefore well aware that he had been arrested on drug charges and was contemplating a plea bargain which would involve of a plea of guilty—all well before the actual plea. I share the General Counsel’s view that it would certainly be natural for Respondent’s agent to be at least curious respecting the type of judicial proceedings Fox was caught up in. I also agree with Respondent however that Fox may not have wished to widely publicize the fact of his arrest and jailing on drug charges. This latter argument is met to at least some extent however by the fact noted by the General Counsel that Helper and Carbondale County are part of small town America where such matters become widely known and that an employee arrested on such charges in such an area would be well advised to be the first to inform his employer of such events.

Having closely considered the testimony on this issue in light of the record as a whole, the demeanor of the witnesses and the burden of proof the General Counsel bears, I find that the version of events of Gillespie, and where consistent, those of Pugliese and Stewart should be credited over the differing version of Fox. On balance, in my view, this issue resolves itself into an evaluation of the comparative believability of the witnesses. Gillespie’s relative objectivity and superior demeanor as to this aspect of his testimony convince me that his version of events should be credited. Where Fox’s testimony is inconsistent with Gillespie’s as to this aspect of the case, it is discredited. Thus, I find that Gillespie did not know of Fox’s arrest circumstances until learning of his guilty plea and did not consider or discuss Fox’s union activities in his conversation with Stewart in which the decision to suspend Fox was taken.

b. *Analysis and conclusions*

Given the credibility resolutions noted supra, I find that the General Counsel has failed to meet his burden of proof that Fox’s suspension and discharge, or either of them, were in violation of Section 8(a)(3) and (1) of the Act. Having

⁷ Mertens further testified:

But one of the problems that Mr. Stewart and Mr. Gillespie had had with [Fox’s] written proposal, is that not only did it say the unfair labor practice charge will remain open, but it protected his right to receive backpay. When the—what Mr. Stewart and Mr. Gillespie had proposed, is that the suspension without backpay stand as is, at least with respect to the settlement and the suspension issues. If at some point down the road the N.L.R.B. were to decide that he’s entitled to back pay, fine.

But we did not want to have a statement in a written settlement proposal with respect to reinstatement that said, “You have a right or you may have a right to recover backpay down the road.” As far as the company representatives were concerned, they did not think he was entitled to backpay, and they wanted something to that effect put in the settlement agreement, as indeed their original proposal reflects.

credited Gillespie that he did not know of Fox's drug arrest as a drug matter until learning of Fox's guilty plea, and having credited Gillespie and Stewart in their version of the conversation respecting what action to take against Fox after learning of his guilty plea, I find Respondent's suspension of Fox was free of any consideration of his union activities and would have occurred had no union campaign been underway.

Fox's termination was admittedly because he refused to accept Respondent's reinstatement offer. I reject the argument of the General Counsel and the Charging Party that the entire suspension/discharge scenario was a device to cloak Respondent's expedient use of the guilty plea and illegal motive to eliminate a union adherent and prounion vote. I further find, accepting Respondent's argument that it appeared to Respondent that an agreement had been reached on July 20 which would have put Fox back to work and kept him eligible to vote in the election, that Respondent was acting in good faith in its reinstatement negotiations. It may be that Fox's probation officer advised him not to accept Respondent's proposal as written. Respondent however is not precluded from holding a contrary or even an unreasonable view on the issue so long as it did not consider Fox's union activities or sympathies in reaching its decision. On this record, I find no convincing evidence that Respondent violated the Act in this regard.

Accordingly, having credited generally the testimony of Respondent's agents, as set forth in detail above, I find that Respondent did not suspend or terminate Fox because of his union activities. Accordingly, I find that Respondent has not violated Section 8(a)(3) and (1) as alleged in the complaint. I shall, therefore, dismiss the allegations of paragraphs 6 and 7 of the complaint in their entirety.

IV. THE CHALLENGES

Respondent challenged two individuals, Eric Fox and David Hurst. The Regional Director's September 29, 1989 Report on Challenges and Objections, order directing hearing and order of consolidation and notice of hearing, inter alia, directed a hearing be held on each challenge. The two individuals' ballots may be separately addressed.

A. Eric Fox

Eric Fox was alleged in complaint paragraphs 6 and 7 as discriminatorily suspended and later discharged by Respondent. I have found these allegations without merit, supra. A consequence of this finding is that Fox was legally separated from Respondent's employ before the election. This being so, there is no basis for considering Fox an eligible voter on the day of the election. Accordingly, I shall recommend that Respondent's challenge to Fox's ballot be sustained.

B. David Hurst

1. The evidence

David Hurst was without dispute a good employee at Respondent's Helper facility who was within the unit until the events in issue here. He was also a known union supporter whose prounion adorned apparel clearly identified him to all as a likely vote for the Union. Hurst was determined to leave the Helper, Utah area for reasons unrelated to the instant controversy. On Monday, July 24, the Monday before the

Friday, July 28 election, Hurst gave Gillespie notice of his intent to resign effective the end of the Friday, July 28 workday. One week's notice of resignation was required by the terms of Respondent's employee handbook in order for the resigning employee to be paid for unused sick or personal leave days.

In announcing his resignation Hurst met with Gillespie initially. Later Pugliese joined them. Hurst testified that pleasantries were exchanged and Hurst's work complimented. Hurst recalled Gillespie telling him in Pugliese's presence: "the union organizing drive aside, he still felt I was a good worker." Hurst asked for a letter of reference and that his final paycheck be ready before he left the area. He recalled that Gillespie asked him if he intended to work "clear through the week." Hurst answered he would work 40 hours that week. Gillespie responded that he "wanted to know so that he could go ahead and prepare the paycheck and have time enough to get ready."

Gillespie telephoned Stewart that same day and discussed Hurst's resignation. Stewart testified that it was agreed that Hurst would be terminated with pay for the remainder of the workweek. Stewart testified this action was consistent with past practice and was undertaken with respect to all employees who resigned with notice. He testified that it was his personal if unwritten "policy for many years . . . to pay them and discharge them." Stewart supplied examples of similarly treated employees at Helper and other Respondent facilities. Gillespie therefore initiated the process of obtaining Hurst's final papers and preparing a final check which would pay Hurst as if he had worked through Friday, July 28, 1989.

Hurst, unaware of these developments, continued working on Monday, Tuesday, and Wednesday of that week. On Thursday morning, just after the beginning of his shift, Hurst was brought to the office. There he met with Gillespie, Pugliese, and Stewart. Hurst recalled that Gillespie told him "they were giving me two days paid vacation. That they felt my mind was no longer on my work. That when somebody is leaving employment they consider him accident prone and I was—that was pretty much it." Hurst answered he would like to continue working. Stewart told him it was "standard policy" to lay employees off with pay.

Hurst testified:

I repeated again that I would rather stay and finish out the week as we had agreed to prior. Gene Stewart said you have no choice, you better clear out. At that point I asked if I would be allowed to vote at the election the next day. Doug [Gillespie] said, "Yes, we're not trying to take your right to vote away."

. . . .

I don't remember anything else after that. Well yes, I do. I take that back. Gene Stewart began questioning me as to my feelings toward Jenmar and towards the union, asking me wasn't I better off at Jenmar than I had been at my previous employer, the warehouse at Sears here in Price [Utah].

Gillespie and Stewart testified that Hurst asked during this meeting if he could vote the following day and was told that he could, but that his vote would probably be challenged by Respondent. Gillespie and Stewart denied that either mentioned the Union in this conversation.

After this conversation ended Hurst went to the breakroom to get his lunch bucket. There he found the entire unit awaiting the beginning of an employee meeting. Hurst said his goodbyes to his fellows, he was asked to leave as the meeting started and he did so.

Jim Valdez testified that after Hurst left the meeting Gillespie told the assembled employees that Hurst was well known to be a union supporter and that "the Union will walk away from you too." Employee Anthony Dutro recalled that Gillespie said that Hurst was a "UMWA organizer, and they're all going to leave you hanging."⁸

Stewart and Gillespie denied that the statements attributed to Gillespie were made by him at the meeting. Gillespie testified that the employee meeting held that Thursday morning as Hurst left may have included a statement that Hurst was no longer employed by Respondent, but did not include any reference by him or other agents of Respondent that Hurst was a union organizer.

The following day, Friday, July 28, Hurst returned to the jobsite to cast a ballot which was challenged by Respondent and to pick up his final papers. He testified that he spoke with Gillespie who told him that he had been unaware of the company policy of terminating with pay employees who gave notice until Stewart had told him of it in discussing Hurst. Gillespie denied this assertion.

2. Analysis and conclusions

The Charging Party's evidence offered to challenge Stewart's assertion that it was his uniform, if unwritten, policy to "pay off" employees who gave notice is insufficient. The indirect evidence that Respondent was pleased to eliminate the likely pronunion vote of Hurst and to show employees that a pronunion employee was "abandoning" them, even if fully credited, does not overcome Stewart's direct credible testimony of a policy of terminating employees who give notice and his recitation of examples before and after Hurst of that policy being consistently followed. Accordingly, I find that there is insufficient evidence to suggest that Hurst was discharged because of his union sympathies.⁹

Given my finding that Hurst was terminated in accordance with company policy, it follows that his ballot is not valid and should not be opened and counted. This is so for the fundamental reason that he was not an employee at the time of the vote. Cf. Respondent's cited case, *Inacomp America*, 281 NLRB 271 (1986). Accordingly, I shall recommend the challenge to his ballot be sustained.

C. Summary and Recommendation of Certification

I have found above that the challenges to the ballots of Hurst and Fox should be sustained. These challenges having been sustained there are no longer any unresolved challenged ballots and challenges are no longer determinative of the results of the election. I shall, therefore, further recommend

⁸Dutro's Board-prepared affidavit dated August 3, 1989, asserts that Gillespie made no remarks about Hurst in this meeting but that Stewart

spoke and [said] Dave Hurst was the leader of the thing and that Hurst was leaving and walking away from the situation. He said it was like what the UMW did in Marysville, Ohio at the Honda plant.

⁹Indeed, there is a significant question whether such a finding could be made in a challenge resolution where the General Counsel has not alleged such conduct as violative of Sec. 8(a)(3) and (1) of the Act in the consolidated complaint.

that the Board certify that the Union did not receive a majority of valid votes cast in the July 28, 1989 election.

V. THE OBJECTIONS

1. Preliminary matters

The Regional Director's September 29, 1989 Report on Challenges and Objections, order directing hearing and order of consolidation and notice of hearing, *inter alia*, directed a hearing be held on the Charging Party's Objection 2, involving Hurst. The report further noted that complaint paragraphs 5(j), 6(a), 6(b), and 7 addressed conduct occurring after the petition was filed and before the election was conducted and were therefore "matters which, if proven, would be [a] basis for setting aside the election." The report continued:

Accordingly, these matters will be considered as additional objections to the conduct of the election.²

²While the Petitioner does not allege the conduct described in paragraphs 5(j), 6(a), and 6(b) of the Amended Complaint to be objectionable, I note the Board to have long held that I cannot ignore evidence relevant to the conduct of the election simply because the Union may not specifically have mentioned such conduct in its objections. See *American Safety Equipment Corp.*, 234 NLRB 501 (1978), and the cases cited therein.

The Regional Director's report was not appealed by any party. The time for such appeal had passed before the hearing in this matter. At the commencement of the hearing the General Counsel amended his complaint to allege new paragraphs 5(k), (l), and (m). Paragraph 5(m) alleges conduct occurring on June 2, within the objection window period.

Respondent argues on brief that the matters set for hearing in the Director's report not alleged in the Charging Party's objections were "patently untimely and should be summarily dismissed." Respondent argues on brief at 26-27:

Although belated objections may be raised by the Regional Director based on objectionable conduct that is discovered *during the investigation of other objections*, see generally *American Safety Equipment Corp.*, 234 NLRB 501, 501-502 (1978), there is no authority or justification for permitting untimely objections based on conduct that was investigated *prior to* the election and of which the Regional Director was obviously aware during the objection-filing period. In this case, the Regional Director has determined that there was probable merit to the violations alleged in paragraph 5(j) *before* the July 28 election, and hence he should have lodged objections based on that conduct within the time period specified in the Board's own regulations. There is no authority in the Board's regulations for the Regional Director to "sit on" allegedly objectionable conduct for several weeks and then raise unilateral objections at his leisure. [Emphasis in the original.]

In discussing paragraph 5(m) of the complaint on brief, counsel for Respondent makes the following statement at footnote 8, page 41:

No attempt was made by the General Counsel or the Regional Director to raise a belated objection based on the allegations of paragraph 5(m) [of the complaint],

and hence Jenmar assumes that no such objection is pending for adjudication.

Respondent's arguments respecting the untimeliness of the Regional Director's inclusion of the additional conduct not specifically addressed in the objections in the instant hearing miss the mark. No time limits or requirements exist requiring the Regional Director either to issue his report or to include particular conduct within a hearing on objections within a certain period. Nor do latches generally run against the Government. Questions of the timeliness of the Regional Director's handling of objections cases are simply not addressed in the Board's Rules and Regulations or in the case law as Respondent suggests. Accordingly, I find no merit to Respondent's argument that the Regional Director's report improperly joined untimely matters in the hearing.¹⁰

Paragraph 5(m) of the complaint was added at the hearing well after the Regional Director had issued his report. Insofar as the paragraph alleges conduct which occurred in the period after the filing of the petition and before the election, it raises a potential challenge to the "laboratory conditions" which the Board is obligated to provide voters that they may exercise their voting franchise in a free and informed manner. The Board has noted that it will "remain vigilant in ensuring that all the conditions surrounding the election process" are proper. This is so irrespective of the specific language of the objections. See *American Safety Equipment Corp.*, 234 NLRB 501 (1978).

I find this strong statement of policy and intention is equally binding on Regional Directors and hearing officers and administrative law judges hearing objections cases. When evidence of conduct destructive of laboratory conditions is properly placed in evidence during consideration of the merits of the objections, that other conduct may and, indeed, must, under the stricture of reversible error, be considered and ruled upon in ruling on the objections. This being so, paragraph 5(m) of the complaint, even though not mentioned by the Regional Director in directing the hearing on objections, will be considered as if it has been timely included in the Charging Party's objections.

2. Merits of the objections

a. *The Charging Party's objections*

The sole remaining objection in issue after the Regional Director's report was Objection 2:

On July 27, 1989, the Employer sent employee Dave Hurst home from work early and refused to allow him to work on Friday, July 28, 1989, because of his activity protected by the Act and to discourage other employees from supporting the Union.

I have found, *supra*, that Hurst was not sent home improperly and that his discharge with pay was consistent with Respondent's policy and not because of his union activities. It follows therefore that the objection lacks provable merit and must fail. I shall, therefore, recommend that the Charging

¹⁰ Respondent's argument attacking the Report on Objections may also be viewed as an indirect attempt to achieve an out-of-time appeal of the Regional Director's report.

Party's Objection 2, the only remaining objection, be dismissed.

b. *Other conduct*

(1) Complaint paragraphs found to be without merit

The complaint paragraphs relevant here are paragraphs 5(m), 6, and 7. I have elsewhere found the General Counsel had not met his burden of proof with respect to each of these complaint paragraphs. The Charging Party's burden respecting its objections is the same as that of the General Counsel in the unfair labor practice case. Therefore, my ruling on the conduct alleged as objectionable is no different than my ruling on the complaint. Accordingly, I find these allegations are not sustained as objectionable conduct for purposes of setting the election aside.

(2) Complaint paragraphs found meritorious

As described above, I found that paragraph 5(j) of the complaint was sustained as a violation of Section 8(a)(1) of the Act by the General Counsel. That paragraph alleged misconduct by General Manager Gillespie on June 5—a date within the period between the filing of the representation petition and the election. I credit Valdez who testified that Gillespie told him on that date:

As long as this thing is going on, we're not gonna have any supplies coming in. He goes, if we were really concerned about our jobs, he told me we'd get the majority of the guys and go get the union cards that you signed, and make them promise there won't be no election. And the expansion can start, and he said that things can be back to normal start, and he said that things can go back to normal, and they won't have to have this election or all this stuff going on.

Gillespie's statement contains a threat that supplies would be withheld because of the union campaign, suggests jobs may be in jeopardy, implies the expansion then underway at Helper was frozen because of the employees' union activities and solicits employee efforts to avoid an election. This conduct is undisputably objectionable. This is particularly so in light of the violations found before the petition was filed which place the June conduct in a more sensitive context. The information imparted by Gillespie was sure to be repeated to other employees and thus reinforced the statements made earlier by Perez and Pugliese found violative above.

Given all the above, I find the laboratory conditions required by the Board were destroyed by Respondent's conduct and the election should be set aside and a new election directed. I shall so recommend.

c. *Summary and conclusion*

I have found that Respondent's challenges are meritorious and that the challenges be sustained and the results of the election certified. I have further found that the other conduct litigated in the unfair labor practice aspects of the instant consolidated matter in paragraphs 5(m), 6, and 7 of the complaint did not establish grounds for setting aside the election.

I have also found that the conduct found violative of paragraph 5(j) of the complaint occurred during the period between the filing of the representation petition and the election

and constitutes a basis for setting aside the election. I shall, therefore, recommend that the Board direct such a new election with the traditional notice of election in such situations described in *Lufkin Rule Co.*, 147 NLRB 341 (1964).

REMEDY

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

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. Respondent violated Section 8(a)(1) of the Act by engaging in the following acts and conduct:

(a) Threatening employees that, if the Union represented Helper employees or negotiated on their behalf, wages and benefits would be cut, employees could lose their jobs, and/or work practices could be changed causing layoffs.

(b) Interrogating employees about their union activities and sympathies and accusing employees of starting the union organizing drive.

(c) Threatening employees that if the Union organizes Respondent's Helper facility, certain management employees would retain employment but employees would be terminated and/or lose their benefits, that the facility would be turned into a warehouse, that parts would be sent to other Jennmar facilities, that the plant expansion would stop, and that new equipment would not be sent to the Helper facility.

(d) Suggesting that employees could preserve their jobs and get back to normal by seeking the return of their authorization cards from the Union and stopping the election.

4. Respondent has not otherwise violated the Act as alleged.

5. The challenges to the ballots of Fox and Hurst are valid.

6. Respondent's agent, Gillespie, destroyed the laboratory conditions necessary to hold a free and fair election through his conduct on June 5 described in the analysis of paragraph 5(j) of the complaint, supra.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹¹

ORDER

Order Respecting Unfair Labor Practices

The Respondent, Jennmar Corporation of Utah, Inc., Helper, Utah, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees that, if the Union represented Helper employees or negotiated on their behalf, wages and benefits would be cut, employees could lose their jobs, and/or work practices could be changed causing layoffs.

(b) Interrogating employees about their union activities and/or sympathies and accusing employees of starting the union organizing drive.

(c) Threatening employees that if the Union organizes Respondent's Helper facility, certain management employees would retain employment but employees would be terminated and/or lose their benefits, that the facility would be turned into a warehouse, that parts would be sent to other Jennmar facilities, that the plant expansion would stop, and that new equipment would not be sent to the Helper facility.

(d) Suggesting that employees could preserve their jobs and get back to normal by seeking the return of their authorization cards from the Union and stopping the election.

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

(a) Post at its Helper, Utah facility copies of the attached notice marked "Appendix."¹² Copies of the notice, on forms provided by the Regional Director for Region 27, in English and such other languages as the Regional Director determines are necessary to fully communicate with employees, after being signed by Respondent's authorized representative, shall be posted 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 the notices are not altered, defaced, or covered by any other material

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

Order Respecting the Representation Case

1. The challenges to the ballots of Eric Fox and David Hurst shall be sustained and the results of the July 28, 1989 election certified.

2. The objections including the conduct included by the Regional Director's report are sustained and a new election shall be directed consistent with the Board's practice in such circumstances.

3. The following language provided in the Board's decision in *Lufkin Rule Co.*, 147 NLRB 341, 342 (1964), shall be included in the notice of election to be issued in this matter.

The election conducted on July 28, 1989 was set aside because the National Labor Relations Board found that certain conduct of the Employer interfered with employees' exercise of a free and reasoned choice. Therefore a new election will be held in accordance with the terms of this notice. All eligible voters should understand that the National Labor Relations Act, as amended, gives them the right to cast their ballots as they see fit, and protects them in the exercise of that right, free from interference by any of the parties.

¹¹ 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.

¹² If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."