

International Brotherhood of Teamsters, Local No. 507, AFL-CIO¹ and George R. Klein News Company. Cases 8-CB-6094, 8-CB-6098, and 8-CB-6123

January 23, 1992

DECISION AND ORDER

BY MEMBERS DEVANEY, OVIATT, AND
RAUDABAUGH

On December 29, 1989, Administrative Law Judge Robert G. Romano issued the attached decision. The Respondent and General Counsel filed exceptions and supporting briefs, and the Employer filed a brief answering the Respondent's exceptions.

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

The Board has considered the decision and record in light of the exceptions and briefs and has decided to affirm the judge's rulings,² findings,³ and conclusions and to adopt the recommended Order only to the extent consistent with this Decision and Order.

I. BACKGROUND

The judge found that International Brotherhood of Teamsters, Local 507, AFL-CIO (the Respondent) did not violate Section 8(b)(1)(B) when it threatened the Employer's owner, George Klein, on Good Friday, April 17, 1987,⁴ or when its agents followed the car of the Employer's general manager, Fitzpatrick, on June 22. Although the judge concluded that the threat to Klein and harassment of Fitzpatrick were coercive

¹ The name of the Respondent has been changed to reflect the new official name of the International Union.

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

³ We correct the following errors or misstatements by the judge: (1) in sec. II.B.2, final paragraph, "Dabry" is corrected to read "Gabre"; (2) in sec. II.B.4, par. 14, the citation to *Council's Center for Problems of Living* is amended to read, 289 NLRB 1122 (1988), enf. denied 897 F.2d 1238 (2d Cir. 1990); (3) in sec. II.B.5, par. 7, the cite to *Schaeff Namco, Inc.* is corrected to read 280 NLRB 1317, 1319-1320 (1986); and (4) in the section entitled "Final analysis, conclusions and findings," par. 23, where the judge discusses *Allou Distributors*, 201 NLRB 47 (1973), we note that the Board reversed the judge and found that the union's assault of a supervisor violated Sec. 8(b)(1)(A).

None of these misstatements or errors affect the outcome of this case. With regard to the Second Circuit's refusal to enforce the Board's decision in *Council's Center for Problems of Living*, we note that there is no exception to the judge's treatment of that decision.

⁴ All dates are in 1987 unless noted.

within the meaning of Section 8(b)(1)(B),⁵ and further found that Klein and Fitzpatrick were 8(b)(1)(B) representatives, the judge determined that neither Klein nor Fitzpatrick was performing covered functions at the time of the challenged union conduct. Further, the judge found that the April 17 threat was directed at Klein's performance of unit work on that date, rather than at Klein's exercise of 8(b)(1)(B) duties. On these bases, and relying particularly on *Florida Power Co. v. Electrical Workers IBEW Local 641*, 417 U.S. 790, 805 (1974), the judge concluded that neither the April 17 threat nor the June 22 harassment violated Section 8(b)(1)(B).

The General Counsel excepts, contending that the judge's interpretation of Section 8(b)(1)(B) is overly restrictive. The General Counsel asserts that 8(b)(1)(B) representatives need not be engaged in covered functions precisely when the coercion occurs for the Act to be violated. The General Counsel additionally argues that the judge erroneously viewed the events of April 17 and June 22 in a vacuum. Thus, the General Counsel observes that the Respondent's threat to Klein was not merely directed at his performance or assignment of unit work on Good Friday, April 17, when most unit employees did not report to work because of the Respondent's contention that it remained a paid holiday. The threat necessarily intertwined the parties' underlying contract dispute over that very point. Similarly, the General Counsel contends that tailing General Manager Fitzpatrick on June 22 was not a discrete act, but occurred during the same period that the Respondent was contacting the Employer's customers and encouraging them to cease doing business with the Employer. In these circumstances, and since the April 17 and June 22 incidents coerced the Employer's only two 8(b)(1)(B) representatives—neither of whom were members of the Respondent—the General Counsel asserts that Section 8(b)(1)(B) was violated.

For the following reasons, we find merit in the General Counsel's exceptions and conclude that the Respondent violated Section 8(b)(1)(B) by threatening Klein on April 17. Although we agree with the judge's conclusion as to the June 22 incident, that the Respondent did not violate Section 8(b)(1)(B), we do not adopt the judge's analysis.

II. FACTS

A. Overview

The relevant facts are as follows. The Employer, George R. Klein News Company, distributes newspapers, magazines, and other publications. Its president and sole owner, George Klein, and its vice president and general manager, Brian Fitzpatrick, represent the

⁵ The judge found that the April 17 threat coerced Fitzpatrick as well as Klein. No exception was taken to this finding.

Employer in collective bargaining and grievance processing. Neither Klein nor Fitzpatrick is a member of the Respondent.

The Respondent long has represented the Employer's warehouse and clerical employees under successive collective-bargaining agreements. The most recent, negotiated agreement was effective from May 1, 1983, through May 1, 1986. Under this agreement, inter alia, the Respondent's business representatives had access to the Employer's facility to determine whether the contract was being observed, and supervisors were prohibited from performing unit work unless they were members of the Respondent.⁶

In February 1986, the Respondent timely served notice that it wished to modify the contract. From at least September 1986 through January 1987, the parties bargained for a new contract. No agreement was reached.

On January 17, 1987, the Employer presented the Respondent with its final contract offer. This final offer provided, inter alia, that five existing paid employee holidays would be eliminated. No further bargaining occurred. On March 12, the Employer's owner, Klein, wrote to the Respondent, declaring impasse, and stating that he would implement the Employer's final offer the following day. The Respondent protested Klein's action, arguing that the termination provision of the 1983-1986 contract had not been revoked and that, therefore, the contract remained in effect. The Respondent pursued its contract claim by filing unfair labor practice charges against the Employer which were dismissed.⁷ In addition, shortly after March 13, several of the Respondent's business agents, including John Cika, confronted Klein. Cika told Klein that if the Employer did not sign the Union's contract, someone would get hurt.⁸

B. April 17 Incident

One of the holidays eliminated under the Employer's final offer was Good Friday, which fell on April 17 in 1987. Prior to April 17, Klein notified the unit employees that the Employer had implemented its final contract offer, abolishing Good Friday as a holiday. Klein instructed employees to report to work on April 17 or lose that day's pay. The Respondent continued to insist that the 1983-1986 contract remained in effect. It urged unit employees to disregard Klein's instructions and not to work on Good Friday.

⁶The applicable contract provisions are detailed in sec. II,A,3, of the judge's decision.

⁷A full discussion and analysis of the Respondent's contract argument is set forth in sec. II,B,5, of the judge's decision. We adopt the judge's findings and analysis that the parties bargained to impasse for a successor to the 1983-1986 contract, after which the Employer lawfully instituted its final offer on March 13.

⁸This threat was not alleged to violate the Act.

Klein anticipated that unit employees might not report to work and arranged for certain managers, supervisors, and other nonunit employees to be available. At 7 a.m. on April 17, only 2 of approximately 43 unit employees reported for work. Klein directed the stand-by nonunit employees to assist unit personnel. Klein also performed unit work, while General Manager Fitzpatrick roved about the plant.

Shortly after work commenced, two to four of the Respondent's business agents entered the Employer's facility. This number quickly grew to 9 or 10 agents.⁹ Initially, the business agents clustered around the two working unit employees and told them that they should not be at work. The agents then dispersed and loudly told individual nonunit employees that they were not union employees, that they should not be performing unit work, and that they should stop. In order to avoid a confrontation, Fitzpatrick instructed the employees to stop work. Business Agent Cika then told Klein that it was a union shop, and that the Employer did not have a right to do this. When Klein did not respond, the 6 foot 6 inch, 250 pound Cika told him, "I might end up in jail for 40 years, but you're going to end up in the hospital if this continues."¹⁰ Klein stopped working and waited for the police, who had been summoned. After the police arrived, the business agents gradually left the Employer's facility. Work resumed at 9 or 9:30 a.m.

At least two nonunit employees overheard Cika's threat to Klein. The judge additionally found that Fitzpatrick and at least some unit employees certainly must have heard or learned of the threat.¹¹

C. June 22 Incident

On June 22, General Manager Fitzpatrick observed Business Agents Vorell and Letner in the Employer's parking lot, slouched down in one of the Respondent's cars. A third unidentified individual was also in the car. As Fitzpatrick drove out of the parking lot, he waved at the Respondent's agents. The business agents pulled out behind Fitzpatrick and tailed him to his home, approximately 14 miles. The Respondent's agents pulled over when Fitzpatrick stopped for gas.¹² When Fitzpatrick arrived home, the business agents parked outside his house for several minutes before leaving.

⁹The judge found that the "visit" by this unusually large number of business agents was lawful. For purposes of this Decision and Order, we find it unnecessary to pass on this finding.

¹⁰The judge credited Klein's testimony and drew an adverse inference based on Cika's failure to testify.

¹¹No exceptions were taken to this finding.

¹²At the gas station, Fitzpatrick called the Employer's warehouse manager to report that he was being followed, in case anything happened.

III. ANALYSIS

A. Overview

Section 8(b)(1)(B)¹³ does not proscribe all restraint and coercion of an employer in the selection of its collective-bargaining or grievance representatives. The proscribed conduct must take one of two forms. It may be applied directly against the employer to force the employer to select or replace an 8(b)(1)(B) representative or indirectly against the employer's 8(b)(1)(B) representative in order to "adversely affect" the manner in which the representative performs the covered functions of collective bargaining, grievance processing, or related activities—like contract interpretation.¹⁴ *Florida Power Co. v. Electrical Workers IBEW Local 641*, 417 U.S. 790, 805 (1974).

An "adverse effect" will not be found in every instance where a union coerces an employer's 8(b)(1)(B) representative. Only where the union's conduct may "adversely affect the supervisor's conduct in performing the duties of, and acting in his capacity as, grievance adjuster or collective bargainer on behalf of the employer," will a violation be found. *Id.* at 804–805.¹⁵

¹³ Sec. 8(b)(1)(B) states:

It shall be an unfair labor practice for a labor organization or its agents—
to restrain or coerce . . . an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances. . . .

¹⁴ The Board long has held that contract interpretation is an 8(b)(1)(B) duty. In *Typographical Union No. 18 (Northwest Publications)*, 172 NLRB 2173 (1968), the Board found an 8(b)(1)(B) violation when a union coerced an employer by disciplining its supervisors for the manner in which they interpreted the applicable collective-bargaining agreement. Similarly, in *Operating Engineers (Stone & Webster)*, 295 NLRB 223, 224 (1989), the Board upheld its earlier determination that a union violated Sec. 8(b)(1)(B) by disciplining a supervisor in order to control the manner in which he "exercised his supervisory authority with respect to the administration of the contract." See also *Teamsters Local No. 856 (Industrial Employers)*, 195 NLRB 967 (1972).

¹⁵ In explicating the *Florida Power Co.* test, the Supreme Court stated in *NLRB v. Electrical Workers IBEW Local 340 (Royal Electric)*, 481 U.S. 573 (1987), that

[D]iscipline of a supervisor-member is prohibited under § 8(b)(1)(B) only when that member is engaged in § 8(b)(1)(B) activities—that is, collective bargaining, grievance adjustment, or some other closely related activity (e.g., contract interpretation, as in *Oakland Mailers*). [481 U.S. at 586. Emphasis added.]

We do not interpret the language in *Royal Electric* or, indeed, in *Florida Power Co.*, supra, as requiring that the 8(b)(1)(B) representative be engaged in covered functions precisely when the proscribed conduct occurs for a violation to be found. It is sufficient if the challenged union conduct is directed at, or in response to, an employer representative's exercise of 8(b)(1)(B) responsibilities. For example, a union violates the Act where it fines a supervisor because that supervisor previously crossed a picket line to perform, inter alia, covered functions. *Operating Engineers Local 101 (St. Louis Bridge)*, 297 NLRB 485 (1989). Similarly, Sec. 8(b)(1)(B) is violated if a union disciplines a supervisor in retaliation for an earlier interpretation of the collective-bargaining agreement. *Operating Engineers (Stone & Webster)*, supra. Further, a violation will be found if the

[Emphasis added.] Thus, only where the representative is coerced for performing covered functions is it presumed that the union's conduct will adversely affect the representative's future performance of 8(b)(1)(B) duties. *American Broadcasting Cos. v. Writers Guild*, 437 U.S. 411, 430 (1978).

B. April 17 Incident

Initially, we agree with the judge that Klein possessed 8(b)(1)(B) responsibilities and that Cika's threat to Klein was coercive within the meaning of Section 8(b)(1)(B).¹⁶ Contrary to the judge, however, we find that Klein's performance and assignment of unit work on April 17, at which Cika's threat was directed, involved contract interpretation and therefore constituted an 8(b)(1)(B) activity. Cf. *Florida Power Co.*, supra. Rather, under all the circumstances, we conclude that Cika's threat was in retaliation for Klein's exercise of 8(b)(1)(B) responsibilities.

The Employer maintained in negotiations that the 1983–1986 contract had expired, that a bargaining impasse had been reached, and that its final contract offer lawfully had been implemented. By directing employees to report to work on Good Friday, and by ultimately performing and assigning unit work to others that day, Klein was enforcing the Employer's final offer eliminating Good Friday as an employee holiday.

The Respondent had consistently, and strenuously, objected to the Employer's position. It had filed unfair labor practice charges against the Employer, significantly increased its visits to the Employer's facility, and threatened Klein that someone would be injured if the Union's contract were not signed. The Union also repeatedly had advised employees not to work on April 17, Good Friday, claiming that it remained an employee holiday. When some unit employees nonetheless reported to work on April 17, the Respondent's business agents further championed the Respondent's position by telling those employees that they should not be there. In this context, when Cika threatened to

effect of the union sanctions is to prevent supervisors from performing any future work including their 8(b)(1)(B) duties. *Sheet Metal Workers Local Union 68 (DeMoss Co.)*, 298 NLRB 1000 (1990).

To read *Royal Electric* otherwise—and limit 8(b)(1)(B)'s application to union conduct occurring contemporaneous with a supervisor's performance of covered duties—would eviscerate the statute and permit unions to evade liability by strategically timing coercive conduct. Clearly, that was not the Supreme Court's intent.

Member Devaney did not participate in *Sheet Metal Workers Local 68 (DeMoss Co.)*, above, and does not pass on the Board's decision there or the proposition for which it is cited in the preceding paragraph.

¹⁶ No exceptions were taken to the judge's conclusion that Klein's status as the sole owner of the Employer did not take outside the scope of Sec. 8(b)(1)(B) Cika's threat to Klein, which did not directly concern selection of employer representatives. We also find it unnecessary to pass on the judge's apparent acceptance of the theory that Cika's threat to Klein could violate Sec. 8(b)(1)(B) based on the threat's coercive effect on Fitzpatrick.

injure Klein if he did not stop performing unit work or assigning the work outside the unit, Cika was advancing the Respondent's stance that the contract remained in effect and that, therefore, the unit employees were entitled to a day off from work under the contract's Good Friday holiday and the Employer was violating the contract by having nonunit employees perform unit work on that day. Further, Cika's threat was a challenge to the Employer's position that the termination provision of the contract had been properly invoked, so that after the parties bargained to impasse over a new contract the Employer had properly implemented its final offer, which eliminated the Good Friday holiday.

In these circumstances, and particularly as Klein's assignment and performance of unit work was inextricably intertwined with the Employer's interpretation of the contract, we find that the Respondent violated Section 8(b)(1)(B) when its agents threatened Klein on April 17. *Typographical Union No. 18 (Northwest Publications)*, 172 NLRB 2173 (1968); *Operating Engineers (Stone & Webster)*, 295 NLRB 223 (1989).¹⁷

C. June 22 Incident

We agree that Respondent's harassment of Fitzpatrick, by following his car on June 22, did not violate Section 8(b)(1)(A) because it did not occur in the presence of employees nor was it likely to come to the attention of employees. With respect to the 8(b)(1)(B) allegation, we agree with the judge that Fitzpatrick is an 8(b)(1)(B) representative who regularly engages in collective bargaining and grievance processing. We also agree that the Respondent coerced Fitzpatrick when its agents followed his car on June 22. Although we additionally adopt the judge's finding that the June 22 incident did not violate Section 8(b)(1)(B), we do so because there is not a sufficient nexus between the Respondent's coercive conduct and Fitzpatrick's performance of covered functions.

Unlike Cika's April 17 threat, which clearly was linked to the parties' contractual dispute, the June 22 incident occurred in isolation. It arose more than 2 months after the Respondent's April 17 8(b)(1)(B) violation, and there is no evidence connecting it to the

¹⁷ Contrary to the judge, we do not find that the April 17 threat is governed by the Supreme Court's holding in *Florida Power Co.*, supra. In *Florida Power Co.*, the union disciplined its supervisors because they performed struck work, not because of any 8(b)(1)(B) activity in which they engaged. Here, however, Cika's threat to injure nonmember Klein for assigning and performing unit work necessarily encompassed the parties' ongoing dispute over whether the 1983-1986 contract survived, and whether Good Friday remained an employee holiday. Thus, the Respondent's position that Klein was performing work of unit employees whose absence was in observance of a (disputed) contractual holiday, not an economic strike, distinguishes the present case from *Florida Power Co.*

parties' contract dispute.¹⁸ Nor does the record demonstrate that, by following Fitzpatrick's car, the Respondent's agents were challenging his performance of covered duties.

In these circumstances, we find that the June 22 incident did not restrain or coerce the Employer in the selection of its 8(b)(1)(B) representatives.¹⁹

ORDER

The National Labor Relations Board orders that the Respondent, International Brotherhood of Teamsters, Local No. 507, AFL-CIO, Cleveland, Ohio, its officers, agents, and representatives, shall take forth the action in the Order as modified.

1. Insert the following as paragraph 1(c) and reletter the subsequent paragraph.

“(c) Restraining or coercing the Employer in the selection of representatives for collective bargaining, grievance adjustment, or related activities by threatening Klein News President George R. Klein that Klein would end up in the hospital if he and other individuals do not desist from performing work ordinarily performed by employees represented by the Respondent, in violation of Section 8(b)(1)(B).”

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

¹⁸ The General Counsel argues in his brief that the June 22 incident did not arise in a vacuum, but occurred while the Respondent was visiting each of the Employer's clients and encouraging them to cease doing business with the Respondent. The judge found, however, that evidence of these visits and the resultant unfair labor practice charges which the Employer filed against the Respondent were not relevant to this proceeding. No exceptions were taken to the finding. Accordingly, we reject the General Counsel's argument.

¹⁹ Member Raudabaugh would find that the harassment of June 22 violated Sec. 8(b)(1)(B). The collective-bargaining contract interpretation dispute that gave rise to the 8(b)(1)(B) violations of April 17 continued to exist on June 22. The Respondent's harassment of 8(b)(1)(B) representative Fitzpatrick was related to that dispute. Hence, Member Raudabaugh would find that the harassment was unlawful under Sec. 8(b)(1)(B).

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 restrain or coerce employee-members by threatening President George R. Klein in their presence that Klein would end up in the hospital if he and other nonunit employees did not stop performing work ordinarily performed by employees represented by

International Brotherhood of Teamsters, Local No. 507, AFL–CIO.

WE WILL NOT restrain or coerce employee-members by threatening them with possible physical harm if they crossed the Union’s picket line.

WE WILL NOT restrain or coerce any employer in the selection of representatives for the purposes of collective bargaining, grievance processing, or related activities by threatening President George R. Klein that Klein would end up in the hospital if he and other nonunit employees did not stop performing work ordinarily performed by employees represented by International Brotherhood of Teamsters, Local No. 507, AFL–CIO.

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

INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, LOCAL NO. 507, AFL–CIO

Paul C. Lund, Esq., for the General Counsel.

Keith R. Wolgamuth, Esq. and *Thomas McCormack, Esq.* (*Motta, McCormack & Wolgamuth Co., PA*), of Cleveland, Ohio, for the Respondent Union.

Lee J. Hutton, Esq. (*Duvin, Cahn & Barnard*), of Cleveland, Ohio, for the Charging Party Employer.

DECISION

STATEMENT OF THE CASE

ROBERT G. ROMANO, Administrative Law Judge. The above cases were tried in Cleveland, Ohio, on May 24 and 25, 1988. George R. Klein News Company (Klein News or Charging Party) filed the original charge in Case 8–CB–6094 against International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local No. 507 (Local 507 or Respondent Union) on May 1, 1987.¹ Klein News filed the original charge in Case 8–CB–6098 against Local 507 on May 8. An initial consolidated complaint thereon issued on June 16. Klein News filed the original charge in Case 8–CB–6123 against Local 507 on June 26. Thereafter, amended consolidated complaint (complaint) issued in the above consolidated cases on July 31, alleging certain violations of Section 8(b)(1)(A) and (B).

More specifically, the complaint alleges that on or about April 17, by the conduct of its business agent, John J. Cika, Respondent Local No. 507, at Klein News’ facility in Cleveland, Ohio, in the presence of employees, threatened Klein News President George R. Klein (Klein) with violence if Klein and certain other individuals did not desist from performing work ordinarily performed by employees represented by the Respondent, in violation of Section 8(b)(1)(A) and (B) of the Act.

The complaint further alleges that on or about May 6, by the conduct of its business agent, Terry Freeman, Respondent Local No. 507, at Klein News’ facility in Cleveland, Ohio, in the presence of employees, threatened employees with vio-

lence if they crossed a picket line to be established by Respondent Union at Klein News’ facility, in violation of Section 8(b)(1)(A) of the Act.

The complaint further alleges that on or about June 22, by the conduct of Business Agents George Vorrell and John Letner, Respondent Local 507 threatened and coerced Vice President and General Manager Brian Fitzpatrick by following in their vehicle Fitzpatrick in his vehicle from Klein News facility in Cleveland, Ohio, to Fitzpatrick’s home, and by then parking their vehicle outside Fitzpatrick’s residence, in violation of Section 8(b)(1)(A) and (B) of the Act.

By answer to complaint filed on August 20, Respondent Union denies that it has in any manner violated the Act.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, Respondent Union, and the Charging Party on or about July 19, I make the following

FINDINGS OF FACT

I. JURISDICTION

Klein News, an Ohio corporation, has an office and place of business in Cleveland, Ohio, where it has been, and is engaged in the distribution of magazines, newspapers and books. Annually, Klein News purchases and receives at its Cleveland Ohio facility products, goods, and materials valued in excess of \$50,000 directly from points located outside the State of Ohio. The complaint alleges, Respondent Union admits in answer, and I find that Klein News is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act; and I further find that Respondent Local 507 is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

1. The history of collective bargaining

Klein News has had a bargaining relationship with the Teamsters for some 30 years, and since a certain local union merger, apparently the last 20 with Local 507. Local 507 represents a unit of the Employer’s warehouse and office clerical employees, excluding supervisors and certain secretaries. In material times there were approximately 31–32 warehouse employees and 11 office clerical employees in the unit. (Teamsters Local 473 represents the Employer’s drivers.) Klein News and Local 507 have been signatory to a series of collective-bargaining agreements. The most recent had duration on its face from May 1, 1983, through May 1, 1986. The parties are in dispute whether it expired.

2. The parties’ representatives

a. *Local 507*

Harold Friedman is president of Local 507. In material times Local 507 employed approximately 15–18 business agents, including in so far as named in the complaint allegations herein, John Cika, Terry Freeman, George Vorrell and John Letner. However, only Business Agent Freeman (and Robert A. Sweet) have testified as witnesses for Respondent Local 507 in this proceeding.

¹ All dates are in 1987 unless otherwise indicated.

b. *Klein News*

George R. Klein (Klein) is president, a member of the board of directors, and (sole) owner of all shares of (common) stock of Klein News. Klein has responsibility for the overall management of Klein News, as well as several other companies. However, about 25–35 percent of the time Klein is not present at Klein News. During such times, Brian Fitzpatrick is in charge.

Klein News has employed Fitzpatrick for 13 years, the last 10 years as its vice president and general manager. Fitzpatrick is a member of the board of directors. While he owns certain shares of stock in Klein News, neither Fitzpatrick nor any member of his family has an ownership interest in the company. (Fitzpatrick, in addition to receiving a weekly salary, participates in a profitsharing plan in a percentage amount second only to President Klein.) Fitzpatrick's responsibility is to oversee all the operations of Klein News, including labor negotiations and grievance handling. Klein has corroborated that Fitzpatrick actively participates in the formulation of company policy, and in its response to grievances.

3. Relevant contract provisions

a. *Union rights and liability*

(1) Hiring hall, conditions of employment

Pursuant to article II, the Union operates a hiring hall under which terms and practices (essentially) the Employer may hire whomever it wishes, but the new hire reports to the hall for referral out to the job; and after the 31st day of employment the employee essentially becomes a member in the Union, and continues membership in good standing as a condition of employment.

(a) *Re unit work performance*

Article II—Conditions of Employment, section 6, in pertinent part thus specifically provides:

The Union shall be the only source of applicants for the furnishing of the type of labor covered by this Agreement, but the employer shall retain the right to refer applicants for employment to the Union hiring hall, and any applicant referred by the Employer shall be given preference over all other applicants.

Article XI—Status of Supervisor Employees provides relatedly:

No Shop Superintendent, Assistant or supervisory Employee shall be permitted to do any work regularly performed by members of the Union, unless said Shop Superintendent, Assistant or Supervisory Employee is a member of the Union.

The Company was also contractually prohibited in article XIII—Union Jurisdiction, “from using the employees of another Employer to perform any bargaining unit work.”

(2) Cooperation (visitation)

Article VIII—Cooperation provides:

The accredited Business Representatives of the Union shall be permitted to enter the Employer's premises during all working hours, for the purpose of ascertaining whether this Agreement is being properly observed, without unduly interfering with the work.

(3) Grievance, arbitration, and related no-strike provisions

The Union's no-strike undertaking under the contract terms is related to grievance-arbitration resolution. Thus, article XIV, Grievance Committee and Arbitration Board, provides in pertinent parts:

1. If any controversy or difference shall arise between the Union and the Employer, or between any employees and the Employer, with respect to the interpretation or effect of this Agreement with regard to the rights, obligations, or liabilities of the parties hereunder or otherwise, such controversy or difference, in order to be considered a grievance under this Agreement, must be submitted in writing by a Local Union member with the shop steward or at the Local Union office within seven (7) days of the date on which said grievance, dispute, controversy, or the like occurred. Once a grievance is timely filed in accordance with this Paragraph, the grievance shall be processed as follows:

4. It is agreed that during such proceedings there shall be no lockouts, strikes, or stoppage of work. Furthermore, the costs of arbitration shall be shared equally by the Union and the Employer.

(4) Liability of the Union

Article XV, Liability of Union for Unauthorized Conduct, provides severally: in section 1 that the Union is not to be held liable for conduct of its agents unless authorized by the Union; but that any employee who participates “in any unlawful strike, slowdown or other stoppage of work is subject to immediate discharge without recourse to the grievance procedure.” Section 2 provides that if a business agent has caused the strike, etc., the Union will within 24 hours post an appropriate notice disavowing the strike, etc., as unauthorized, and call upon its members to resume work. Section 4 then provides that, “It shall not be a violation of this contract if any employee or employees refuse to go through a picket line authorized by Teamsters Joint Council No. 41.”

b. *Contract duration*

Article XXII, Duration, Modification and Termination, provides:

This agreement shall be and remain in full force and effect from May 1, 1983 until May 1, 1986 inclusive, and thereafter from year to year; provided that this Agreement will terminate at the expiration of the initial term or any renewal term if either party gives written notice to the other of its desire for termination at least sixty (60) days before such expiration date; and provided that if this Agreement is not so terminated and neither party gives written notice to the other of its desire to change or modify this Agreement at least sixty (60) days before any such expiration date, then this Agreement shall re-

main in full force and effect after such expiration date until a new Agreement (the terms of which shall be retroactive to such expiration date) has been negotiated and signed or until either party gives the other seven (7) days' written notice of termination, and provided further that no termination of this Agreement shall affect the duration of the obligations of the parties concerning payment for employee health and welfare benefits, pensions, dues and assessments.

4. The status of negotiations; an impasse, and company implementation of its last offer of certain economic terms for a new agreement

By letter of February 28, 1986, Teamsters Local 507 served notice on the Employer of proposed modification of the agreement between them, along with sending an appropriate notice to the Federal Mediation and Conciliation Service (FMCS). Neither party subsequently served a *notice of termination of the agreement* on the other, or FMCS. The record is unclear as to negotiations conducted prior to September 1986. In September, Klein and Fitzpatrick became actively involved, along with Attorney Duvin, in the negotiations with Friedman for a new contract. Fitzpatrick has testified that he attended the five to six such negotiation meetings held between September 1986 and January 1987.

By letter dated October 24, 1986, Fitzpatrick wrote Friedman, thanking Friedman for a recent candid meeting between Friedman, Klein, and Fitzpatrick, but noting that appreciable difference remained between the Union and the Employer for terms of a new contract. In general, the Employer asserted that its labor costs were much higher than its competitors; and, it sought relief in several areas of direct payroll costs; time off; pension; and health and welfare—for its (asserted) survival. By letter dated January 27, Fitzpatrick presented the Employer's final offer for a discussion it proposed be held that week between the Union and employees, and Klein, Fitzpatrick, and Duvin. The meeting was not held. Indeed, there were no additional negotiation meetings with the Union in the times material herein. (The last actual negotiation meeting was held with FMCS seemingly in the late fall.)

Fitzpatrick testified that prior to January 1987 usually two business agents would visit Klein News once a month, briefly; and 25 that after negotiations broke down, 2–3 business agents began to visit Klein News daily, sometimes more often; and they would visit longer in the afternoon. Fitzpatrick related that all the business agents visited in that manner. Fitzpatrick also recalled that in the period of January–March there were some work stoppages in that the business agents would have meetings with the employees in the basement when employees were supposed to be working. The work stoppages were more likely in March. The Employer registered formal written complaint thereon by Fitzpatrick letter of March 28 to Friedman; and the work stoppages ceased thereafter.

By letter dated March 12, 1987, Klein had in the interim written Friedman, specifically declaring an impasse, and notifying the Union that the Employer would (and it subsequently did) implement its final offer (of January 27) on March 13. Inter alia, the Employer implemented a reduction of five holidays, including, in so far as material herein, Good Friday. In 1987, Good Friday occurred on April 17.

Local 507 contended that by its terms the old contract had remained in effect; and it filed charges (apparently) contending that an impasse had not been reached and that the Employer had thus acted unilaterally. However, the Union's charges were dismissed following an initial determination that an impasse had been reached; and, that Klein News' implementation of its final offer was not unlawful. The General Counsel subsequently denied the Union's further appeal. Respondent Union nonetheless continued to contend at hearing that the prior contract is still in effect.

The Union would explain its (essentially) conceded increased presence at Klein News, in terms of a union reaction to certain conduct of the the Employer, designed to weaken the Union, *infra*. On cross-examination Fitzpatrick recalled that he was present at a meeting of Klein and unit employees previously held on March 12. Fitzpatrick denied that the Company said at this meeting (or in a later meeting held on April 15 or on April 17) that the employees could take withdrawal cards from the Union until this problem was over, and then join the Union again; or, that the employees could withdraw from the Union and continue to work for Klein News at the same wages and benefits. (No evidence is offered to support any company offer to employees to forego last offer reductions if the employees withdrew from the Union.)

Initially Fitzpatrick also didn't recall if there was a discussion of a strike; or, a company offer to provide employees with police or other escort through a picket line if established. On other occasion, Fitzpatrick acknowledged that the Company may have suggested that in the event of a strike, if anyone wished to cross the picket line, that the Company would try to provide safe egress and exit (*sic*). But then Fitzpatrick didn't recall when it was said; and, he didn't remember if it was said before April 17. Fitzpatrick's testimony in this area was not very convincing.

Klein has more candidly revealed that he had held separate meetings with groups of bargaining unit employees on March 12, *i.e.*, with a warehouse group (and then with an office clerical group (and with the department supervisor present, respectively). Moreover, Klein recalled Fitzpatrick was also present. Klein explained to the employees what the Company's position at that time was, namely, that they had reached impasse; and that the Company was going to implement its last offer (effective the next day). Inter alia, Klein told the employees that they (the Employer) did not include Good Friday as a holiday; and, in a discussion at this meeting (or in a similar meeting on April 15, if not at both), Klein told the employees that if they didn't show (for work), the only thing that would happen would be that they would lose a day's pay.

Klein denied that in this meeting that he had also told employees that in the event of a strike or picket line the employee-members could get temporary withdrawal cards from the Union, and later rejoin (the Union) after the strike. The Union established however, on cross-examination of Klein, that Klein had probably done so. Thus, the Union established, that in a prior Klein affidavit given on June 12, Klein had said, "I explained that if the employees wanted to work during the strike they could get temporary withdrawal cards during the strike. They could work during the strike and rejoin (the Union) after the strike."

Klein denied that the above statement was made to employees in the meeting held on March 12, but then he could not recall when he had specifically made the statement. Klein confirmed that he had another meeting with employees on April 15, but then he also recalled that he had made the above statement even before that, seemingly on April 5.

The Union has also established that in a prior affidavit, Klein had testified: “I *again* reviewed that if there was a picket line on Friday they could get temporary withdrawal cards and come to work” (emphasis supplied). Klein also therein stated, “I said that once all this was settled they could reapply for membership. I pointed out that if the Union would not accept them back as members, they could still work at Klein News Company—or at the Company.”

Whether at the meeting of March 12, or April 15, or sometime in between (April 5), or, as appears more likely, on more than one such occasion, I conclude and find that Klein made the above statements he has acknowledged he made in his prior affidavit, (at least) prior to April 17; and that he more likely did so first, shortly after, if not at the time of Klein’s mid-March initial announcement of the Employer’s intended implementation of its last offer to the Union for the new contract.

Klein otherwise relates that when he announced to employees the impasse (presumably first) on March 12, a number of the employees then had related questions, e.g., what their position would be if a (union) picket line were put up; and, some employees asked what they would do if they wanted to work. Klein relates that one of the employees’ concerns was about being fined if they crossed a picket line, which led to the statements he made to employees.

According to Klein, they (the Employer) had gone to counsel and found out that the people (unit employees, each and all union members) could get temporary withdrawal cards from the Union, and re-up (rejoin) once the contract was settled; and, that they (the employees) would not be fined during that period of time. Klein asserts that when they were asked that question (later by employees), they responded with that answer. (The Union urges that was the Company’s approach to its members.) On inquiry, Klein did not know the name of any employee who had asked the question; and, Klein didn’t recall if it was asked of him. No corroboration of a related employee inquiry to Klein (or Fitzpatrick) is offered. Klein more candidly acknowledged that it was their intent all along to have whatever protection they could get at the picket line to escort any employees across the picket line who wanted to come to work.

The Employer was undoubtedly concerned about the number of employees who would be reporting for work on April 17. However, I also have no doubt on this record that the Employer was concerned as well about the prospect of the Union’s establishment of a picket line at the Employer’s facility even earlier, viz, with the Employer’s first implementation of its last offer was made effective March 13. However, the Union at that time took the position that the terms of the contract were still in effect; and, it thereafter urged *unsuccessfully* in prior charge filed with the General Counsel that the Employer’s implementation violated Section 8(a)(5) of the Act.

B. The Evidence

1. The incidents on April 17 (Good Friday)

The complaint alleges that by the conduct of its Business Agent John J. Cika on April 17, at Klein News’ facility in Cleveland, Ohio, in threatening President Klein with violence in the presence of employees, if Klein and certain other individuals did not desist from performing work ordinarily performed by employees in the bargaining unit represented by the Union, Respondent Local 507 has thereby engaged in conduct in violation of both Section 8(b)(1)(A) and (B) of the Act.

Fitzpatrick relates that the Union had urged employees not to report for work on Good Friday, April 17; to observe the holiday; and that the Union said employees would be paid sometime later. The Employer otherwise acknowledges that it in contrast sought to encourage the employees to come in. Of some 42–43 unit employees, only 3 unit (2 warehouse and 1 office clerical) employees came in to work on April 17. (Actually only two warehouse unit employees came in at 7 a.m., the start of the regular warehouse unit employee workday.)

Fitzpatrick testified that the Employer’s products are perishable in the sense they contain dated sales/advertising in radio, TV, and newspaper publications. Accordingly, Klein arranged for certain nonbargaining unit individuals, viz, managers (including himself), secretaries and clerks to be available on April 17, to perform as necessary (along with the bargaining unit employees that showed up at 7 a.m.) the normal unit shipping work scheduled for that day.

The Employer’s plant is quite long. Within the plant there is a shipping line containing a conveyor belt that runs north and south, and stretches 180–190 feet in length. Warehouse employees normally work on one side and at either end of the line. At the designated front end of the line there is a T station where the shipping invoice is first put on the line, and where small draw titles are picked. In that regard, Klein relates that there are usually about 140 individual magazine titles for picking (selection) to fill orders. There are normally 9–10 pick stations, which are manned by 9–10 pickers who pick the designated number of magazines in accordance with the invoice/order. Two or three employees work at the end of the line. One ties the bundles (with a plastic strap machine), and one marks the bundles. The bundles are then placed in interbodies (carts) that are rolled into the back of trucks for loading. There is also one employee regularly assigned to run a tow motor to replenish stock, and otherwise to work the line.

Fitzpatrick relates that on April 17 the work started at 7 a.m. Klein was on the shipping line; and Fitzpatrick was roving around the plant, seeing that the drivers, who were making a delivery that day, got out. The work scheduled to be performed by unit employees that day was to pick and bundle product for a driver delivery on the following Monday. Klein confirmed that when only two warehouse employees showed up at the 7 a.m. starting time, Klein had the back up staff, namely himself, several managers, some secretaries, RDA clerks, and the two unit employees who had shown up for work, start the unit work. Materially, Klein was at pick station 2, and notably two nonbargaining unit employees (Marilyn Schmitt and Margaret O’Malley) were nearby. Fitzpatrick recalled that early that morning he was by the

strapping machine at the end of the line. The controls for stopping the line are located in that area.

Fitzpatrick recounts that shortly after 7 a.m., a couple of business agents came in; and, shortly after that, a larger group of business agents arrived. Fitzpatrick recalled that at this time there were seven to eight business agents present. According to Fitzpatrick, in a loud voice they (the business agents) told everybody to stop working. He recounts that the business agents went up and down the shipping line telling the people, in no uncertain terms, not to touch anything. Fitzpatrick recalled specifically that they had said, "Stop the line. This is bargaining unit work. You're not supposed to touch anything here. Everybody stop working."

Klein confirms that when it was obvious at 7 a.m. that the unit employees were (in general) not coming in, they put the staff group on the tie line to assemble the bundles for the preparation of the orders to be delivered the following Monday to meet the publisher sales dates. Klein recalled that shortly thereafter 8–12 business agents came into the plant. He also recalled that the business agents came from various locations, including from a door to the employees' parking lot, that had been supposedly secured by a combination lock. The business agents also came in from the front door. Klein testified that he had never seen that many business agents in the plant before (at one time).

Klein testified that the business agents were rather loud and boisterous. Klein recalled that at first the business agents had clustered around the two warehouse unit employees (Terry Musiack and Rick Wisniewski), who had come in to work. Most first went to Musiack, a union member who regularly operated the tow motor, and otherwise works the line; and then they went to Wisniewski, who works the tie line. Klein could not hear what the business agents said to Musiack and to Wisniewski. However, the General Counsel's witness, O'Malley, testified credibly that she heard the business agents tell Musiack that he should not be there.

The business agents then went to the far end of the line, Klein recalls that there was a lot of shouting and yelling. Klein heard the business agents say in a loud voice, severally: "that this was all bargaining unit work; that we didn't have Union cards; that we had no right to be doing that work; and, we shouldn't be doing the work." Klein relates that as the business agents would leave each pick station, the employee would back away from what they were doing on the line, and stop working.

Fitzpatrick's recollection, however, was that both he and Klein had told the people to stop working because they didn't want to see any violent (sic, in context violence). Klein has testified that he did not first tell the employees to stop work. However, Klein acknowledged that Fitzpatrick told Klein that he did, when the business agents had started down the line, confronting the employees and yelling at them that they didn't belong to the Union, and to stop doing the unit work.

Fitzpatrick testified relatedly that when he saw that their (the union business agents') intentions were to stop anybody from working, and, as they also gave Fitzpatrick the impression that they would do whatever they had to do to stop the people from working, Fitzpatrick told the people not to work, because he didn't want to see anybody get hurt. Fitzpatrick recalled that the people stayed at their workstations, but they did not work.

Klein testified that the business agents (eventually) worked back down the line to him. Some 8–12 business agents hovered around. At that time Business Agent John Cika had a 20-second direct conversation with Klein. Klein testified that Cika came up to Klein, nose to nose. Cika said, "This is a Union shop. You guys don't have any right to do this." Klein ignored Cika's remarks. Klein testified relatedly, that he didn't want to provoke anything. According to Klein, Cika then said, "*I might end up in jail for 40 years, but you're going to end up in the hospital if this continues.*" Klein relates that Cika, is a very big guy; and, without contest, Klein has described Cika as 6 feet 6 inches, 250–260 pounds. Klein otherwise testified that Cika had (earlier) been screaming and yelling. Klein did not answer. However, Klein also quit assembling the orders he had been working on. Klein then stood around with the others for some 7 minutes, until the police arrived.

Terry Freeman testified that the Teamsters have employed him for 15 years, and Local 507, for the last 12 years. Freeman related generally that Local 507 has some 500 companies (or shops) being serviced at various stages of collective bargaining by 18–20 business agents. The shop units represented vary in size from a 1-man unit, to 20–30 man units, to units of 400–600 employees. In general, every such shop is set up for a visit by a business agent(s) at least once in a 2-week period; and some, more often, depending on what is going on. Freeman testified relatedly that the Klein News unit of 43 employees was not considered a small unit.

According to Freeman, each business agent runs a route daily. No business agent is assigned to a particular company; and each business agent is effectively made responsible for all companies. Business agents receive rotating assignments (scheduled by President Friedman) in three books, which are set up geographically.

On a normal day, anywhere from one to three (but as many as four) business agents go out together on their assigned routes. Business agents regularly drive union vehicles, which are all dark blue Chevrolet Caprices. In running the routes, a business agent may have the same partner for 1, 3, or 5 (consecutive) days, though a business agent may also have occasion to switch an assignment. The number of stops (companies visited) that the business agent(s) may make on a given route varies, from apparently as high as 20, to something less, depending on such factors as the number of the employers in a route area, involved distances, unit sizes, and, the number of business agents assigned to go out on the route. However, Freeman also testified that a business agent does *not* do the same route the next day.

Freeman relates in general that the responsibility of a business agent on the given stop, is to ensure that any existing contract is being lived up to; to make sure that members are doing the unit work; to check on any outstanding monies due employees, the Union, or certain Funds; and, to answer any employee-member questions, with occasion to particularly do so at contract negotiation time. Freeman testified otherwise that normally the business agents try to talk to everyone in the shop; and, on a regular basis, they do talk to 95–100 percent of the unit employee members.

In regard specifically to Klein News, and in contrast with the Employer, Freeman testified that Local 507 visited Klein News on a regular basis that could have been every week. However, Freeman also readily acknowledged that from De-

ember 1986 through June 1987 Freeman had visited Klein News more often. In general, Freeman testified that many contracts are negotiated after the purported expiration date of the contract; and, that at contract negotiation time there are many more questions from the unit employee/members who want to know what is happening on the new contract, and who have questions in regard to any prospective raise in wages and/or new benefits. In that regard, and unlike most shops, Freeman testified that Klein News regularly engaged its employees in conversations about the negotiations, which raised a lot of member questions, and which occasioned a lot of phone calls to the Union.

Freeman specifically relates, e.g., that members told Freeman that after he had visited and left Klein News' facility, the Company had then rounded the employees up in the basement, and told the employees that the Company had a problem being competitive in the area; and, that it felt they should give certain things back to the Company. Freeman also relates that some (members) had difficulty with that, because the distributor competition for Klein News, was not visible in the area.

Freeman recounts also that employees told him that the Company kept saying to them that it was going to protect the employees; and the Company then told the employees, that if they (employees) wanted to cross a picket line, or, if they wanted to get out of the Union, they would be fully protected; and, that the employees should come and get out of the Union; and the employee-members asked him what it all meant. Freeman testified in summary that it sort of created an uneasiness among the members.

Freeman testified that he thought the members had also said that Klein had told them, that Klein could bring in replacements; but, Freeman then didn't initially recall what his response had been. However, the General Counsel then established that in a prior affidavit, Freeman had there not only recorded that the employees had told Freeman that Klein had told them that Klein would bring in replacements, but that Freeman's response to the employees was, "I told them that this had been done in the past by other companies many years ago and I indicated what problems had arisen many years ago at other companies when they brought in strike replacements." (The affidavit does not recount the nature of the problems referenced.)

At hearing Freeman vaguely recalled a question about strike breakers. It is Freeman's related testimony that he told the employees that strike breakers had started many years ago; "that companies used to hire people to come and club you [employees] over the head" to make the employees break up their strike and cross the line; and, that he told the employees, "You tell them that companies have tried that in the past."

Freeman also testified (generally) that President Friedman is present for negotiations, along with whatever business agent(s) is (are) available for negotiations. With regard to negotiations conducted with Klein News, Freeman did *not* participate in any of the negotiations. However, Freeman recalled that he was given a brief update, and he did read some related correspondence in regard to breaks that the Union felt it had earlier given to the Employer.

Freeman also testified that the past practice of Klein News (and many other companies) was to keep the contract in force in accordance with certain terms found in all their con-

tracts, until a new contract is negotiated. However, the Employer then established on cross-examination of Freeman, that though Freeman was aware that there was talk of a March implementation, Freeman was not aware of terms that were actually implemented by the Employer. Moreover, although Freeman recounted that every year some 20-30 contracts are reached after the so-called expiration date, and he remained adamant that the Klein News-Union contract was still in effect, Freeman also acknowledged that he didn't know of any (company) that had implemented a *last offer* to the Union, other than Klein.

Fitzpatrick testified that he recognized some of the business agents that were there on April 17, naming: John Cika and John Irby; (at various times) Jack Herskowitz and Bill Geravicious; and also Terry Freeman, though Fitzpatrick didn't think that Freeman was there at the beginning. Klein testified that he was not as familiar with the business agents' names, because he doesn't deal with them a lot; and, that he sort of knows their faces. However, Klein testified that he knew it was Cika who had spoken to him in the above-related manner that day.

Klein explained that after he had implemented (on March 13) the last contract offer, Cika had come in with a bunch of other business agents. On that occasion Cika told Klein, that if we didn't quit fooling around and if "we didn't sign their (Union's proposed) contract and get this thing settled, that somebody was going to get hurt." Klein testified that after that visit he looked at house organs (publishings) and found out it was John Cika. The complaint does not allege this earlier remark as being independently violative of the Act.

Klein testified that the two nonunit employees working on the line near Klein on April 17 had also heard Cika's threatening remark to Klein that day. Klein News has employed Marilyn Schmitt for 13 years, presently as RDA manager, but at the time of the incident on Good Friday, as a(n unrepresented) distribution analyst under Product Planning Manager Sherri Natoli. An analyst reviews distributions by title, retailer, and sales reports; and, the analyst adds/decreases (product) where necessary. Schmitt had not performed any bargaining unit work before.

Schmitt testified that there was talk that the people (unit employees) were not going to come in and that "we [Schmitt and other nonbargaining unit employees] would work for them." Schmitt recalled that on the day before, thus April 16, Natoli had notified Schmitt that they would be doing the bargaining unit work in the shipping room. Schmitt confirmed that on April 17 at 7 a.m. they began working the line because union personnel were not there.

Schmitt recalled about 7-10 business agents came in shortly after that; and, that they said to stop working because it was a union shop; "we were doing union work; and he [sic] wanted us to stop." Schmitt specifically confirms that she was about 15 feet away from Klein when Cika came up to Klein, and had a conversation with Klein. Schmitt testified she didn't hear the conversation up until she heard Cika say, "*I may go to jail, but you're going to end up in the hospital.*"

Klein News has employed Margaret Mary O'Malley for 10 years. O'Malley is presently employed as an assistant to the product planning manager, and on April 17, as a(n unrepresented) marketing secretary. O'Malley had been previously

employed in a bargaining unit position and was then represented by Local 507 from 1978–1982.

O'Malley recalls that it was on April 15, that her supervisor, Ron Clark, had requested O'Malley to come to work on April 17 at 7 a.m. dressed to work in the warehouse. At 7 a.m. she went to the warehouse to see if anybody from the Union (unit employees) had come to work. O'Malley corroborates Klein, that when nobody showed but two (unit) employees, they promptly assumed the positions on the shipping line and began working. O'Malley's recollection is that about 7:15 a.m., nine business agents entered and walked by the shipping line. They first went to the other end of the line where they surrounded Musiack. O'Malley heard them say to Musiack, "You should not be here."

O'Malley also recalled that the business agents then came over to the end of the line, where they split up, and they then came up the line. O'Malley confirms that they told the employees there to stop working. A business agent named Al, one of two who were in front O'Malley, told her to "Stop working." She stopped working. O'Malley relates that most of the employees, after stopping their work, travelled up the line to hear what was said. In any event, O'Malley has asserted that she did, and as she approached the female employee working in back of Klein, O'Malley heard Cika yell at that employee to stop working.

While 10 feet away O'Malley also heard Cika speak to Klein. O'Malley heard Cika say to Klein, "This is a Union shop; this is Union labor, you should not be here working." Significantly, O'Malley corroborates Klein and Schmitt, that she heard Cika also say to Klein, "*I may very well be going to jail, but you're going to the hospital.*" O'Malley recalled that a few minutes later, Brian (Fitzpatrick) came into their area; and a few minutes after that they heard that the police were on the way.

Fitzpatrick went to his office, and he called the offices of the Employer's attorneys, reaching Attorney Lee Hutton. Fitzpatrick told Hutton that Klein News had been visited by a large number of business agents; and, we had stopped work. Fitzpatrick asked for Hutton's assistance. Hutton promptly called the Cleveland police. Klein confirmed that he heard that the attorney and the police had been called; and, that at that point, he felt the best thing was for everybody to just sort of stand (around) and wait and see what happened; but not provoke any incident with any of the business agents.

After Schmitt heard that the police were called, Schmitt went upstairs to the office, where she worked for the remainder of the day. O'Malley confirmed that a number went upstairs to see if they could help out with the work being done there. However, O'Malley relates that after they were upstairs about 10 minutes, word came that the police had arrived and they were needed downstairs. O'Malley recalls that they were later told to resume their spaces (pick stations) on the line; and that they began work again at about 9:30 or 9:45 a.m.

Fitzpatrick recalled that the police had arrived in about 5–10 minutes. Fitzpatrick confirmed the police negotiated (sic) with the business agents, which continued for an extended period of time. Fitzpatrick testified that he wasn't a party to any of the discussions between the police and the business agents; and he had no discussion with the Union while the police were there.

Fitzpatrick testified that the business agents began to drift out. Though Fitzpatrick recalled that some new business agents had arrived in the interim, he relates the overall number began shrinking. This went on for about an hour until an agreement was reached, and everybody was able to resume work around 9 a.m. Fitzpatrick recalled the most business agents present at one time as 11–12; and that the last couple of business agents left shortly before 10 a.m..

Klein relates that a police lieutenant arrived and quickly took charge. Attorney Hutton also arrived; and he initially spoke with the police. According to Klein the police lieutenant immediately started talking to Cika. Indeed, Klein recalled that the police lieutenant climbed up on a skid to look Cika eye to eye. The lieutenant then asked Cika to get out of the building, saying, that he had no right to be doing what he was doing. On other occasion, Klein recalled that the police lieutenant told Cika to get his guys out of there. Klein relates that Cika kept telling the police lieutenant he should call his superiors who would tell the lieutenant that he (Cika) had every right to do what he was doing; and on other occasion that Cika said, he had every right to be there; and he wasn't going to leave. Klein relates that this went on for 3–4 minutes.

Klein corroborates both that the business agents began to dribble out, and that more business agents (and more police) had also arrived. According to Klein's recollection the business agents were there in force until about 9:15 a.m. Klein confirmed that all the business agents had left by 9:45–10 a.m.; and, Klein recalled that once the business agents had left, they started up the line, and completed the orders in the rest of that day.

Freeman confirms that he was at the plant on April 17. Freeman readily acknowledged that he didn't arrive at 7 a.m.; and otherwise asserted that he was not sure what time he got there. It is very clear of record however that by the time Freeman had arrived, the above complaint incidents of April 17 had already occurred. Freeman thus testified that when he arrived it seemed like there were 15 policemen already present. Freeman recalled them all standing against the wall at the time. Freeman also recalled that on arrival he had seen Attorney Hutton, and spoke to him. Finally, Freeman related that he didn't see many of the business agents there when he arrived, perhaps two to three. It is clear that Freeman was one of the last business agents to arrive.

In agreement with the General Counsel and the Charging Party I conclude and find that by the time Freeman arrived at the Klein News facility on April 17, the material incidents of that day had already occurred, and that Freeman's accounts do not substantially contradict them.

Freeman otherwise testified that he personally talked to the police lieutenant, who asked Freeman how long he was going to be at the Company. Freeman replied he didn't know, he was going to talk to the members; and it would be until he finished talking to the members that he would be there. The police lieutenant told Freeman he would be there also. Freeman acknowledged that the police were still there when he left. Freeman testified that at no time did the police try to make him leave; and, no company officer, or employee told him to leave.

In that regard Freeman testified that he believed the contract gave him the right to be there; that he was there to enforce the contract; and, that the Union had never agreed to

waive the contract and allow nonbargaining unit employees to do the bargaining unit work on Good Friday. Klein has essentially countered that with Good Friday no longer a contractual holiday (by virtue of a now determined lawful implementation following impasse) the unit work was there for the bargaining unit employees to perform on April 17, if they were there to perform it; and, if not (lawful) arrangements had been made with others to perform the work timely.

In rather revealing related testimony, Freeman otherwise testified that whenever you have problems at a shop, it is (put) on everybody's route. It is thus especially notable additionally that Klein News' facility is located close to the union hall, i.e., within six blocks. Freeman conceded that the Klein News facility was visited daily, and sometimes more than once. Indeed Business Agent Robert A. Sweet has acknowledged that President Friedman had held a related meeting with all of the business agents; and that Friedman had specifically told all the business agents that whoever was in the area was to stop in, and make sure that everything was alright.

Local 507 has employed Sweet as a business agent for 4 years. On other occasion Sweet reaffirmed that the instruction he had received from Friedman was, if Sweet was in the area he was to stop by Klein News to see what was going on, and make sure everything is alright. Sweet denied that the purpose was to put pressure on union members.

Sweet had arrived at Klein News facility on April 17 earlier than Freeman. Indeed, Sweet was one of the first business agents to arrive there. Thus, Sweet initially related that when he arrived there were just four business agents there, naming himself and his partner that day, George Vorrell, and Cika, and Cika's partner that day, whom Sweet could not recall. As noted earlier, Klein has described Cika as being 6 feet 6 inches and 260 pounds. Sweet described himself as being 6 feet 2 inches and 250 lbs, and Vorrell as being about 6 feet 1-2 inches and 230 lbs. Sweet acknowledged that he also saw one to two Local 507 members in training there; and, in the end, he conceded that there were at least 8 business agents (of 16-18 business agents employed at that time) present, during the period that he was there.

Sweet testified that prior to arriving he did not know how many unit employees were going to be there. Nonetheless, after observing that there were but two, Sweet has asserted that all the business agents were there to answer questions and find out whether everything was alright for the (two) unit employees, with whom he spoke.

Sweet states that he spoke with each of the two unit employees for 5-10 minutes, just asking them how they were doing, and if everything was alright. Sweet has denied that he heard any business agent tell any employee, or individual, "You're not supposed to be working." In that regard, Sweet recounts that Sweet just said, "Well, its a holiday, you're supposed to be getting holiday pay." Be that as it may, I credit O'Malley's account that she heard union business agents tell (at least) unit employee Musiack, that he should not be here. I further find that business agents loudly told the others present to stop the work on the line.

Sweet recalled that he observed Cika talk directly to Klein; and that they talked face to face, 1-2 inches apart, for 2-5 minutes. Sweet related that he was 20 feet away, and that he had an unobstructed view of them. Sweet asserts that he was not close enough to hear the conversation. Sweet also

related: that he didn't recall any unit employees near Klein; that there were some people out on the line, but the closest was (also) 20-30 feet away. On cross-examination Sweet said that at the time he was just standing around, watching them talk, though Sweet asserts that they weren't talking loud enough for him to hear the conversation.

Sweet has otherwise acknowledged that at some point he had gone to the restroom. According to Sweet when he returned, a police officer asked Sweet to leave. Sweet replied that they had every right in the world to be there. Sweet told the officer that he didn't have to leave; that he came there to talk with their members; and, that the contract states that they can come in at any time and talk with their members. Sweet recalled that he then took the police officer over to the employees' bulletin board where a copy of the contract was posted. Sweet showed it (art. VIII, supra) to the officer; and the officer then said, "All right. Fine. I can't force you to leave the premises now." Sweet relates that he stayed 30-45 minutes.

Klein stated (relatedly) that the Company's position was that as long as there was a bargaining unit employee working, a business agent had a right under the (expired) contract to come in and talk to an employee; but (Klein felt) 10-14 business agents there was not right. However, they had no way to physically stop them. On cross-examination Klein testified that he didn't know whether the Union had a right to have a business agent visit the plant from the "expired contract," or from the Company's implemented offer (or otherwise). Klein viewed that as a legal question.

Klein affirmed that he did *not* ask the business agents to leave until the police arrived. Klein explained, they were trying not to provoke any type of violence; and, we wanted to freeze everything, and wait till the police arrived, who would deal with the situation.

According to Fitzpatrick, at least two business agents have visited Klein News daily. There were days when Klein News had three visits by business agents. The business agents would remain for 1/2 to 1 hour per visit. Visitation in this manner continued through April and most of May. In June it started to fall off. After June, they would visit two to three times a week; and, then they tapered off in the winter to one to two a week, as it is presently. The complaint does not allege that the *continued* visitations were unlawful.

Freeman acknowledged that the unit employees of Klein News worked Good Friday in 1988. Freeman then asserted that he didn't know if employees (in 1988) were either paid the prior contract's double-time rate, or had filed a grievance on it. I find Freeman's assertions in this area particularly unconvincing, noting the same as incongruous with Freeman's earlier assertion that the prior presence of multiple business agents at Klein News on April 17 was with purpose to keep the business agents informed, and not to threaten or intimidate the working employees or the Employer. On this record it is clear, and I find, that the unit employees worked Good Friday in 1988; did not receive the old contract's double rate; and, that no grievance was filed thereon.

2. The alleged threats on May 6

The complaint alleges that on or about May 6, by the conduct of its business agent, Terry Freeman, Respondent Local 507, at Klein News' facility in Cleveland, Ohio, in the presence of employees, threatened employees with violence if

they crossed a picket line established by Respondent Union at Klein News' facility, in violation of Section 8(b)(1)(A) of the Act.

Klein News has employed Mary Denzine for 22 years. Denzine has been a member of the Teamsters Union for 22 years. Denzine was on vacation in March, but she was aware that the Union and the Company were trying to negotiate a contract; that it had been a year and they had not settled anything; and that the employees were concerned. Denzine did not work on April 17. Subpoenaed and called as a witness by the General Counsel, Denzine testified as to a certain conversation she had with, and one she heard between Business Agent Terry Freeman and other employees on May 6.

Denzine recalled that on May 6, unit employee Jenny Rosnick was next to Denzine. On that occasion Freeman told them that they would be on strike soon, and they should give their money. Both Denzine and Rosnick told Freeman that they did not want to be on strike. About 10 minutes later, at breaktime, Denzine (but not Rosnick) went to the back and sat down near unit employees Dave Gabry and Rick Wisniewski. Denzine heard a conversation between Gabry and Freeman who was also there.

Gabry started the conversation with Freeman. Gabry asked, if we went on strike, if the Company could bring in outside help, and if we would be allowed to cross the picket line. According to Denzine, Freeman said, "*No, that we wouldn't be allowed to do that and if we did, someone would get hurt.*" On cross-examination Denzine testified that Freeman told them "we wouldn't be allowed to come in"; and they (the Employer) wouldn't be allowed to bring any outside help in. Denzine recalled that Gabry then asked if there would be police protection. Freeman said, "Yes, there would or could be, *but it would not be available at all times, and somebody could get hurt when they weren't around.*" Denzine added that Freeman also said, that "there would be a lot of people out there. They have a big union. There would be a lot of people, around 300. *No one would know who hurt them if somebody got hurt. No one would know who did it to them.*" Denzine testified that these statements of Freeman scared her a lot, and Denzine told her supervisor at the time.

Freeman has testified that he didn't remember a specific conversation with Denzine, Gabry, or Wisniewski, though Freeman generally remembered that he had talked to everyone, practically about everything under the gun.

At hearing Freeman testified that he did not recall: (a) telling any employee at Klein News that in the event of a strike, the Company would not be permitted to bring in replacements; (b) saying if there was a strike, that there would be a couple of hundred people outside; or (c) that if anything happened there'd be too many people around for anyone to know, and that people would never be able to prove who hurt them; (d) that the police couldn't always be there, and the people who tried to work during a strike would get hurt when no one was looking; or (e) that any employees that crossed the picket line would end up in the hospital.

In a prior affidavit (introduced by the General Counsel) Freeman had earlier specifically *denied*: ever telling any employee that they would get hurt; threatening any employee with reprisal if they crossed a picket line; or, telling any employees at any time that if they crossed a picket line they would end up in a hospital. With regard to Denzine's relation

that she had listened to such a conversation between Freeman and Gabry, Freeman responded that there are hundreds of times that he never knows that an employee has listened into a conversation, and gotten it all screwed up.

Preliminary analysis

Apart from an indicated change in the degree of definiteness in Freeman's nonrecall testimony at hearing, e.g., as compared with his outright denials in prior affidavit, I do not otherwise find Freeman's (essentially) urged simple discount of Denzine's testimony on this incident very convincing. Freeman offers implicit explanation that without his awareness, employee-member Denzine has simply this and/or misunderstood something that Freeman had said to another employee. If it were but one statement that Denzine had attributed to Freeman which Freeman would thus have sought to explain that Denzine had misunderstood, that would be one thing. But here, Denzine has attributed several related statements with common theme running through them on a matter of direct interest to her. Moreover, Denzine is a long-term member of the Union; and, in keeping with Union's position urged upon her, she did not report for work on April 17. In the end, I am more convinced that Denzine did not make up the statements she has attributed to Freeman. Rather, I find that Denzine's account appears the more credible, under all of the circumstances, and I credit it.

Accordingly, I find that on May 6, at the Employer's plant, after Freeman had first informed Denzine and another employee that they would be on strike soon, and that they should save their money, both the unit employees then told Freeman that they did not want to be on strike; and, that only about 10 minutes later, during break, Denzine heard employee-member Gabry ask Freeman, if the Company could bring in outside help, and if the employees would be allowed to cross the picket line, if there was a strike. I further conclude and find on credited evidence above that in responding thereto, Freeman had told Gabry, but in the presence of other unit employee-members, including Denzine, that in the event of a strike: (a) that the Company would not be allowed to bring any outside help in; and (b) that the employees would not be allowed to cross the picket line. Freeman then said, severally: (c) that if they did, someone would get hurt; (d) that they (the Teamsters) have a big Union, and there would be a lot of people out there, around 300; (e) that there would or could be police protection, but it wouldn't be available at all times, and somebody could get hurt; and, if someone got hurt, no one would know who did it to them.

3. The union car-following incident of June 22

The complaint alleges that on June 22, Union Business Agents George Vorell and John Letner, in their union vehicle, followed Vice President and General Manager Fitzpatrick in his vehicle (after regular workhours), from Klein News facility in Cleveland, Ohio, to Fitzpatrick's home; and that they had then parked their union vehicle outside the residence of Fitzpatrick. The complaint alleges that by such conduct Respondent Local 507 has threatened and coerced Fitzpatrick and the Employer's employees in violation of *both* Section 8(b)(1)(A) and (B) of the Act.

On June 22, Business Agents George Vorell and John Letner visited the Employer's facility. They left the facility

at 4:30 p.m. Production and maintenance and warehouse employees leave at 3:30 p.m. Office clerical employees (in the unit) leave at 4:30 p.m. Fitzpatrick left the facility that day at 5:10 p.m.

On leaving the plant Fitzpatrick recognized a business agent's car parked unusually on the other side of the Employer's 80-foot by 100-foot parking lot, rather than (as usual) out on the street. Fitzpatrick drove over to the Union's car. At this time Fitzpatrick observed three individuals slouched down in the car, with only the top of their heads visible, and just their eyes, showing. He recognized two business agents, viz, Vorrell who was in the driver's seat, and Letner who was in the front passenger side. Fitzpatrick did not recognize the third person in the car, who has otherwise remained unidentified of record.

Fitzpatrick had known Vorrell for 10 years, though his dealings with Vorrell have been limited to about four to five (grievances) in all, and at the grievance rate occurrence of about once every other year. Fitzpatrick however relatedly testified that several years earlier he had been in the office of the Employer's attorney, Bob Duvin, on an occasion when Duvin had received a call about Vorrell being involved in an act of violence with a manager at a chemical plant. At that time, Duvin told Fitzpatrick that Vorrell had broken the jaw of either a general manager or a manager at the chemical plant, and that legal action was being taken against Vorrell. Duvin explained to Fitzpatrick that the call was from someone asking Duvin to see if he could get the company not to prosecute. Fitzpatrick also understood that Vorrell was later convicted.

The General Counsel established relatedly that on June 23, 1983, Vorrell had plead no contest to a charge of (simple) assault on October 12, 1982; and, that Vorrell was at some time thereafter found guilty of a misdemeanor. Fitzpatrick acknowledged that it (Vorrell's misdemeanor assault of a different the employer's manager, several years earlier) hadn't affected Fitzpatrick's dealings with Vorrell after that.

Respondent established that on June 22, Fitzpatrick had waved to the (slouched) business agents, but Fitzpatrick added that he didn't expect them then to follow him. Fitzpatrick recounts that after waving to the business agents, Fitzpatrick drove up to the street to exit the parking lot. Fitzpatrick next observed the business agents' car driven by Vorrell had pulled up behind him abruptly, or suddenly.

It will be recalled that the Union's business office is only six blocks from the Employer's facility. Fitzpatrick proceeded south on 30th Street. They (the business agents) followed closely behind him. Fitzpatrick also observed them still driving in the slouched position, which he thought peculiar. Fitzpatrick next turned west on Prospect Street. Vorrell did too. After driving for 2 miles, Fitzpatrick entered the "Interbelt" (a three-lane, one-way highway). Vorrell's car did too, initially merging two cars behind Fitzpatrick's car.

Fitzpatrick next observed Vorrell drive the "Interbelt's" berm (a shoulder lane available for disabled vehicles), and practically cut off the car that was immediately in back of Fitzpatrick's vehicle in taking up a position immediately behind Fitzpatrick. Fitzpatrick drove the "Interbelt," exiting on Interstate 90 west, driving in all for 10 miles, and with the business agents' car remaining immediately behind him.

Fitzpatrick next exited Route 90, at Hillard Avenue and Rocky River. The Union's vehicle did too. Fitzpatrick

stopped at a gas station for gas. Vorrell pulled the Union's car into the side of the gas station, and waited. Fitzpatrick observed that all the occupants of the business agents' car were still slouched down. At that point, Fitzpatrick phoned Tom Lisy, the Employer's warehouse manager, to report that he was being followed (just) in case anything happened. Fitzpatrick explained on cross-examination that he had called Lisy at that point so that at least Lisy would know who was following him, and who might be responsible, if anything happened to Fitzpatrick.

Fitzpatrick did not consider driving to the police. At the time, he felt the safest course was to stay on heavily travelled roads and go directly home. When Fitzpatrick left the gas station, he was immediately again followed by the business agents' car. Fitzpatrick then drove the additional 2 miles, driving south on Wooster to Center Ridge, west on Center Ridge to Horseshoe, where Fitzpatrick lived. Vorrell's car followed. Fitzpatrick pulled into his own driveway; and he then went into his house.

Fitzpatrick next observed the business agents' car drive by two houses further, pull into that drive(way), turn around, and come back and park in front of Fitzpatrick's house, where it remained for several minutes before leaving. Fitzpatrick testified that no business agent had ever visited his home before.

On cross-examination, Fitzpatrick denied that he had ever suddenly applied his breaks, or pretended to apply his breaks with the business agents' car behind him. Fitzpatrick testified that he had deliberately driven under the speed limit. There was no evidence of a high speed chase.

Neither Vorrell nor Letner has testified. Nor did Respondent present any other witness on this incident. I credit Fitzpatrick's account of the June 22 car-following incident in its entirety. Moreover, I conclude and find that by the conduct of Vorrell and Letner in following Fitzpatrick from the plant to Fitzpatrick's home in the above manner, Respondent Union has engaged in conduct constituting clear union harassment of Fitzpatrick on this occasion. Fitzpatrick has acknowledged that he has since handled grievances with the Union, but not with Vorrell or Letner.

On cross-examination Fitzpatrick acknowledged in general that for 10 years he has handled grievances for the Employer; that he has had some disagreements with the Union, and he has argued over the grievances; and that during that period, no one had attempted to physically hurt him. However, Fitzpatrick then asserted that since the June (car-following) incident, Vorrell had threatened him.

Fitzpatrick explained that at an employees' Christmas party held last December, Fitzpatrick had initiated a physical contact of Vorrell, in that he touched Vorrell's shoulder. The occasion was in an effort to keep Vorrell from either entering or remaining at the party. At this time the Company was having a Christmas luncheon for its warehouse employees, when a group of uninvited business agents came into the luncheon area. Fitzpatrick promptly asked them to leave.

Thus, Fitzpatrick relates, inter alia, that as Vorrell had walked by, Fitzpatrick touched Vorrell on the shoulder and said, "George, please don't come in." According to Fitzpatrick, Vorrell said on that occasion, "You touch me again, I'll do [sic]"; some—don't touch me again, that type of thing. Fitzpatrick then added that Vorell had said, "I'll

knock your head off, or I'll kill [sic]"; or "Don't lay a hand on me, or don't touch me."

In short, Fitzpatrick has testified disjointedly as to what Vorrell actually said at the time, though Fitzpatrick kept on with an effort to do so, clearly in an attempt to impart, by continued proffer of example, a sense that Vorrell's conduct on that occasion had threatened Fitzpatrick. However, the evidence offered by Fitzpatrick as to what Vorrell actually said, albeit undenied, in this instance (I find) is simply too distended in its variances for credit beyond the general sense credibly conveyed by Fitzpatrick, that Vorrell had told Fitzpatrick on that occasion, in a manner that Fitzpatrick probably viewed as ominous, that Fitzpatrick was not to touch Vorrell again.

While in any event deemed unnecessary to any of the findings on unfair labor practices made hereinafter, I conclude and find from Fitzpatrick's undenied account as above credited, that at a subsequent Company Christmas luncheon held for employees and to which Vorrell was not invited, Vorrell had overreacted to a nonbelligerent physical contact by Fitzpatrick on the occasion of Fitzpatrick asking Vorrell to leave, by telling Fitzpatrick in a (at least) warning manner that Fitzpatrick was not to touch Vorrell again. However, even if this matter is one to be considered fully litigated, I am not persuaded by the credible evidence offered, and I consequently do not find that Vorrell did so in a manner or under circumstances such as to warrant further conclusion, that Vorrell's conduct on that occasion was independently violative of the Act.

Neither is the Vorrell Christmas luncheon incident of a nature deemed helpful in the resolution of the alleged unfair labor practices that had occurred 6 or more months earlier; and particularly so in the light of the above independent finding already made that Union had harassed Fitzpatrick by the conduct of Vorrell and Letner in more material time on June 22.

There then remains but to consider the procedural questions of (a) the restricted evidentiary use of other more timely but settled alleged union 8(b)(4)(B) (boycott) activity; and (b) in contrast therewith, the Union's permitted use of certain contract contentions and evidence it has sought to offer in support of its defense of the conduct of its business agents alleged to constitute the unfair labor practices herein. The Union's evidence was previously advanced and urged in support of dismissed prior union-related charges, viz, that the contract had extended by its terms; that the Employer's implementation of last offer terms for a new contract was itself unlawful; and, that the Union's conduct on April 17, in visiting the plant floor was itself contractually based and with lawful purpose to enforce governing contract terms providing for the performance of unit work by unit workers.

4. The prior boycott charges; related settlement agreement; and the restricted use of alleged boycott evidence

Fitzpatrick testified that in early June, thus after the April and May alleged threats, and before the June 22 union call following incident, the business agents also began to regularly visit all the retailers (customers) of Klein News. Fitzpatrick thus relates that the Employer's customers would call Klein News and report that they were visited by people

who had identified themselves as business agents of Teamsters Local 507.

Fitzpatrick testified that Klein News' customers told him, variously, that they: (a) were told to stop doing business with Klein News; (b) were given the names of some other magazine wholesalers; (c) were told that Klein News had a labor dispute, and they should not do business with Klein News; and, (d) were told that Klein News would be going on strike. Fitzpatrick summarized different business agents had apparently told the Employer's retailers different stories.

From early June through early July, Fitzpatrick became aware of 40-50 such incidents, including some involving the Employer's major chain accounts, viz, Revco Drug Stores, Inc., representing 50 stores, and Heinen's, Inc., with 11-12 stores. By the end of June, Klein News learned that Teamsters Local 507 had the Company's customer list; and, the business agents had visited virtually every customer, and visited some, two-three times.

The General Counsel also established that Klein News filed a related charge in Case 8-CC-1340 alleging Respondent Union had violated Sections 8(b)(4)(i) and (ii)(B). This charge was later informally settled, with provision made for an appropriate union notice to members that was posted on August 18. Although the settlement agreement was one unilaterally entered and approved, no claim or evidence is presented otherwise that the Employer had ever sought formally to contest the settlement agreement as inadequate.

The settlement agreement contains a union nonadmission clause in term as follows: "(Execution of this Settlement Agreement does not constitute an admission that the charged Party has violated the Act.)" The settlement agreement also purported to reserve the right in the General Counsel to use the charge's boycott evidence in support of the instant 8(b)(1)(A) and (B) complaint allegations brought before the Board.

The settlement agreement by its terms is specifically limited to 8-CC-1340; and it otherwise provided:

Counsel for the General Counsel specifically reserves the right to introduce evidence regarding the allegations which are the subject of this agreement in support of alleged violations of the Act which are not the subject of this settlement agreement and which may be subsequently litigated. However, Counsel for the General Counsel shall not seek further remedy of the settled allegations.

The General Counsel has urged the "CC" (boycott) evidence is relevant to show the pressure that Respondent Union had exerted on the Company on a wide front. The Employer relatedly urged the receipt of the boycott evidence to show that the Union had engaged in an ongoing series of threatening conduct *and that the Union did not comply with the law* over an extended period of time from April 17 through June.

The General Counsel did not contend that the Respondent Union had subsequently breached the terms of the settlement agreement in any particular; nor did he seek to have the prior settlement agreement set aside on that or any other account. The settlement agreement entered on the alleged 8(b)(4)(B) boycott activity occurred well after the unfair labor practices alleged in this complaint. The reservations that the General Counsel made in the settlement agreement itself did not di-

minish the efficacy of the nonadmission clause as an agreed term and condition of that settlement.

At hearing I ruled accordingly, that the General Counsel's prior acceptance of the settlement agreement, absent breach (or some other enabling reason), had effectively precluded any present determination in this proceeding that the Respondent Union had actually violated Section 8(b)(4)(i) or (ii)(B) of the Act, as had been previously charged and was now settled. The related charge and settlement agreement were ruled admissible to establish that the Employer had received reports of what it perceived were ongoing unlawful boycott pressures being placed upon its retail customers; had timely pursued them through the filing of the above 8(b)(4)(i) and (ii) charges; and to establish the nature of the charge's settlement disposition.

However, at hearing I declined to allow the General Counsel (or the Employer) to additionally litigate in this proceeding (any of) the alleged specific "CC" charge violations that had been settled in the above manner. In that regard, I specifically ruled that an effect of the prior settlement agreement entered on the charge was that no alleged violation of Section 8(b)(4)(i) or (ii)(B) of the Act could properly be brought before me for a present unfair labor practice determination thereof. I relatedly ruled that Respondent Union did not have to defend *herein* any assertion being made of its prior violation of Section 8(b)(4)(i) or (ii)(B).

The ruling made at hearing thus effectively was that only evidence of the reports received by Fitzpatrick (e.g., as might bear on his state of mind, and/or serve in partial explanation of his own subsequent actions), as well as the evidence of the charge the Employer had filed, and its disposition, were (limitedly) relevant and admissible. Moreover, since the now settled charge appeared to have covered (at least) all presettlement incidents of the alleged *unlawful* union inducement, restraint or coercion of secondary employees, and, any unlawful union *threats*, restraint or coercion of secondary employers (with alleged union objective to have them cease doing business with the Employer), no related finding(s) of such union conduct violating the law (unfair labor practice findings) were properly to be made in this proceeding. It appeared to follow that evidence of the Union's commission of any such alleged unfair labor practices was properly to be excluded from extensive litigation in this proceeding.

Preliminary Analysis of the Issue of Restricted Use of Settlement Agreement Evidence

The notion that a settlement agreement disposes of even only matters encompassed by the terms of the settlement agreement was one early rejected by the Board, *Hollywood Roosevelt Co.*, 235 NLRB 1397 (1978). In that very regard, "The Board has consistently held that a settlement agreement disposes of all issues involving presettlement conduct of the parties, unless prior violations of the Act were either unknown to the General Counsel and not readily discoverable by investigation, or specifically reserved from the settlement agreement by the mutual understanding of the parties." *Cambridge Taxi Co.*, 260 NLRB 931 (1982); *Universal Blanchers, Inc.*, 275 NLRB 1544, 1545 (1985).

The settlement agreement has the effect of barring a determination of *prior* unfair labor practices whether a charge on a given matter encompassed by the settlement agreement is being *raised* pre or postsettlement, or, by the same or dif-

ferent charging party, cf., *Cambridge Taxi Co.*, supra; *E.S.I. Meats*, 270 NLRB 1430, 1431 (1984); *Laminite Plastics Mfg.*, 238 NLRB 1234 (1978); and *Hatfield Trucking Service*, 270 NLRB 136 (1984). Collaterally, any specific charge (and/or issues) being reserved from the coverage of a settlement agreement for a future Board resolution, must be established clearly by affirmative evidence, *Cambridge Taxi Co.*, supra. (The specific limitation of the settlement agreement to Case 8-CC-1340 would appear sufficient for that purpose, but not exempt unfair labor practices encompassed in that case.)

Moreover, a settlement agreement will not be set aside unless a respondent fails to comply with the terms of the agreement, or the respondent commits other unfair labor practices subsequent to the signing of the agreement, or, it has committed presettlement misconduct of which the Regional Director was without fault unaware at the time the Regional Director approved the agreement. *Council's Center for Problems of Living*, 289 NLRB 1122, 1141 fn. 44 (1988). No such claim is raised, nor to be found supported by the evidence presented in this record.

In entering a settlement agreement with a respondent charged with commission of certain alleged unfair labor practices, the General Counsel may nonetheless *reserve* the right to introduce, and then subsequently introduce available evidence bearing on or supportive of the settled charges *if* also materially supportive of other alleged unfair labor practice(s) contained in a charge and/or complaint reserved for the Board's resolution.

Thus, if evidence of a settled matter may be shown to have an independent probative value (tendency to prove) some necessary or material element of another matter, e.g., Respondent's motivation in regard to an open matter, the urged evidence may be received if shown useful to shed a material light on certain of the alleged unlawful conduct that has not been settled by the parties, *id.* at 1142. However, some substantive probative value must itself readily appear, be convincingly shown, or be otherwise preserved of record to show such (as by a timely offer of proof).

The Board will even then not make a finding of a respondent's actual commission of any unfair labor practice (previously settled) on the evidence when shown relevant for submission, *Superior Sanitation, Inc.*, 234 NLRB 454, 467 (1978); and *Metropolitan Allous Corp.*, 233 NLRB 966 (1977). Seemingly solely excepted is the unique case presentment where the parties reasonably understood the Board would be required to address and determine a previously settled unfair labor practice matter, i.e., on the very issue of whether the settled incident constituted an (unlawful) unfair labor practice, in order to effectively resolve some other unfair labor practice allegation that the parties to the settlement agreement had clearly agreed and/or understood was to be reserved for the Board's later determination.

Thus, the Board has had occasion to address the issue of an alleged discriminatory discharge allegation, though one previously settled, when it was required to do so in order to determine a related and reserved issue of whether the nature of an ensuing strike was, on that account, an unfair labor practice strike, or not, cf., *Council's Center for Problems of Living*, supra at 1142. Seemingly the parties, at the time of the settlement therein, had fully understood that the nature of the strike remained in issue between them; and they had thus

reasonably intended and/or in effect agreed that the discharge matter, though settled, would be further addressed and determined by the Board, but only to the extent of resolving the remaining issue of the nature of the alleged unfair labor practice strike (and its effects) that had been clearly reserved to the Board.

As the issue is presented herein, any incidents (evidence) of union business agents' alleged inducement and encouragement of secondary employees, and/or of the business agents' alleged threats, coercion, and restraint of secondary employers, with the Union's asserted purpose being to accomplish alleged illegal 8(b)(4)(B) cease doing business objectives (the only boycott activity charged as involved), are clearly each and all to be viewed on this record as alleged unfair labor practices covered by the settlement agreement in Case 8-CC-1340. No boycott activity alleged thereunder is independently shown *necessary* to be addressed for the resolution of any of the distinctly different alleged 8(b)(1)(A) and (B) threats, or acts of restraint and coercion that are presented by the complaint in this proceeding. Under the above-cited authority, and contrary to the urging of the Employer in that regard, clearly no instance of the alleged *unlawful* boycott activity, previously settled, is now warranted to be independently determined as unlawful in this proceeding, e.g., as in violation of Section 8(b)(4)(i) and (ii)(B) of the Act.

The remaining question of whether there is any material use to be made of the above boycott evidence on the matters raised in complaint in this proceeding appears to be, whether evidence of the (settled) union activity alleged to be in violation of Section 8(b)(4)(i) and (ii)(B) may also appear in some *other* evidentiary sense to be probative of any material issue herein; i.e., to in effect have a reasonable tendency to prove some element of the specific allegations of unfair labor practice advanced herein.

Since the instant allegations are all clearly of a different and independent nature from the alleged unlawful 8(b)(4)(i) and (ii)(B) boycott activity, in that the instant complaint allegations assert that the Union has unlawfully coerced and restrained Klein News management and employees by certain union business agents' threats of physical harm, and their conduct in also following Fitzpatrick home, in violation of Section 8(b)(1)(A) and (B), I think not. At least not other than would appear under all the circumstances to be too remote to provide any real, or substantive probative value in establishing the instantly alleged unfair labor practice threats and coercion.

The General Counsel does not establish how the Union's motivation, such as might be evidenced by any alleged cease doing business boycott objective and activity (if established) would be then additionally relevant to any instant issue of motivation, assuming (without presently deciding) union motivation may be material to the 8(b)(1)(A) and/or (B) allegations herein. (On the issue of the relevancy of subjective intent, provocation, or actual effect, see and compare *Boilermakers Local 686 (Boilertube)*, 267 NLRB 1056, 1057 (1983).) Nor has the General Counsel or the Employer shown directly (or by offer of proof), how any such evidence might otherwise serve to shed some material light on any of the complaint allegations, i.e., beyond the generalized urging that the Union may have violated the act within a general category of illegal threats. The latter could only be established and determined by revisit(s) of the specific instance(s)

of alleged illegal boycott threat(s), involving the very determinations that were specifically and voluntarily foregone by the earlier entry of the settlement agreement thereon.

The argument advanced thus appeared to be (only) the general one that evidence that would establish that 8(b)(4)(B) (cease doing business) boycott pressures (threats) existed on a wide front, or scale, would also tend to prove that Respondent Union had engaged more directly in still other, specifically alleged different threats of physical harm to, or other coercive conduct directed at the (primary) Employer's management and its employees in violation of Section 8(b)(1)(A) and (B). Since I view the urging as to wide spread boycott (cease doing business) threats as evidencing a difference in degree of occurrence, but not as imparting a probative value that is itself supportive of occurrence of a wholly different type threat, for all of the above-stated reasons, I remain unpersuaded by the argument advanced.

Assuming (without finding) merit to alleged boycott incidents, any such threats do not appear to tend to prove any specific material fact, or any specific element of proof that is material to the complaint's particularized and different union threats of physical harm to employees, or Klein, or other acts of union coercion of the Employer's management official(s). E.g., neither the General Counsel nor the Employer has contended that the Respondent Union's business agents had specifically threatened any secondary employees and/or secondary employers with any physical harm, or, that the Union's business agents had engaged in any similar conduct of following any of the secondary employers' management officials home. Indeed, Fitzpatrick, in testifying on the nature of the above reports that he had received from his retail customers certainly didn't indicate that was the case; and, in some respects, Fitzpatrick has indicated receipt of (at least) some report(s) of what would appear on surface as but lawful union business agent notice of existence of a union dispute with the primary Employer.

In any event, short of a present (in my view) improper determination of specifically alleged and *settled* secondary boycott threats, the conduct of the union business agents in approaching the Employer's retailers (customers) does little to advance proof that certain of the Union's business agents had made the instant independent threats of physical harm, and/or engaged in the other alleged coercive conduct towards the Employer's management and employees in violation of 8(b)(1)(A) and (B).

In light of the above authorities, and under all the above circumstances, I remain of the view that any probative value to be found in the alleged boycott evidence (threats) is slight, and/or remains on its face too remote in probative value to aid in resolution of the materially different issues of alleged threats of physical harm, or other coercive 8(b)(1)(A) and (B) acts that are presented herein. Accordingly, the evidentiary rulings that have essentially restricted the General Counsel and the Employer from general, and/or specific litigation of the boycott threats without some more specific, or definitive showing of materiality, are reaffirmed.

5. Union's permitted use of certain dismissed charge contentions in defense of its business agents' conduct

In contrast with the above settlement agreement evidence restrictions imposed on the General Counsel (and the Employer), I permitted the Union, as the Respondent herein, to

effectively renew in its defense of the unfair labor practices alleged in the instant complaint, Union's prior contentions advanced before the General Counsel (essentially) that the terms of its contract with the Employer had renewed and continued. Cf., *General Teamsters Local 43*, 289 NLRB 924, 925 (1988). This is so though the base for the Union's argument clearly rested on a matter that had been previously addressed in a prior charge that the Union had brought, and which the General Counsel, after investigation and due consideration, had determined was without merit. The Union's charge had alleged (essentially) that in violation of Section 8(a)(5) and (1) of the Act, the Employer, by its implementation of its last contract offer, had itself unlawfully unilaterally changed certain of the terms and conditions of the contract that Union contrarily contended had already been renewed by certain terms of the parties' prior contract.

The Union's initial course of conduct was consistent with that view. At the indicated expiration date of the agreement the Union did not immediately strike or picket. Neither did it do so with the Employer's implementation of the terms of the Employer's asserted final offer, effective March 13. Rather, the Union questioned the Employer's implementation of last offer terms as itself unlawful conduct. Accordingly, I conclude and find that in material times the Union had evidenced a consistent view that the terms of the prior contract were extended by the terms of the agreement, in light of neither parties' declaration of a termination of the agreement; the Union's timely notice given to the Employer of the Union's intent (only) to negotiate modifications in the prior agreement; and the overall terms of the duration clause otherwise.

At hearing the General Counsel conceded the Union's contrarily held position, that (despite union request to negotiate certain modifications) contract terms had renewed, was not a position unreasonably held. However, the General Counsel concluded that very matter, ultimately, contrarily in the dismissal of the Union's charge alleging that there had been (on that account) an unlawful unilateral action in the Employer's implementation of the terms of its last offer. Thus, in union charge dismissal and denied appeal, the General Counsel had necessarily concluded that the Union had not sustained its required burden of establishing an automatic renewal extension of the parties' contract terms, either as based on the explicit terms of the contract's duration clause; or on the basis of the Union's urged interpretation of the related terms.

The Union has continued to urge in its defense presented at hearing that the contract terms had renewed, though in brief it seemingly has moderated that at the time it had believed that the contract terms had been renewed by the terms of the contract and (seemingly) in any event, was privileged to so contend. General Counsel (rightly) does not appear to contest Respondent Union's right to continue to seek to raise as a defense to instant complaint allegations, e.g., as in keeping with the Board's adjudicatory responsibility, a union position earlier rejected by the General Counsel, see, e.g., *Hotel & Restaurant Employees Local 274 (Warwick Caterers)*, 269 NLRB 482, 483 (1984).

However, the General Counsel's position thereon (as expressed in brief) is that the parties' previous contract had expired by its terms; and (alternatively), that article XXII, the "Duration, Modification and Termination" clause, rather than automatically effecting a renewal of the contract, is in

fact on that point confusing and possibly self-contradictory. In agreement with the General Counsel's latter position, I find that the terms of the prior agreement appear too unclear and/or ambiguous to support the position urged by Union; and, I further conclude and find that the Union did not meet its burden of establishing that the contract's expiring terms were renewed, for reasons to be discussed next.

It is elementary that parties to a contract may provide in their contract that at a mutually agreed time under their existing contract, either party will have the right to declare a termination of their agreement (as, e.g., is frequently made effective upon the expiration of the term of duration provided by the contract); or, alternatively provide that either party may otherwise timely declare only a present intent to seek a modification of certain terms of the contract. The parties' understanding on the latter may be stated, or be deemed necessarily implicit (as, e.g., from a resulting *mutual* agreement to change the contract), that either party is thereafter free to negotiate any desired modification of the terms of the contract. In making provision for negotiation of any desired modification of contract terms, the parties may also provide for a termination of the agreement, or not. Within statutory constraints, the parties are free to make their own bargain.

The Supreme Court has held the (60-day) statutory notice requirements of Section 8(d) are applicable to both fixed-term and reopener contractual provisions, *NLRB v. Lion Oil Co.*, 352 U.S. 282 (1957). The Board has observed in that regard,

[T]he Court construed the term "expiration date" in Sections 8(d)(1) and 8(d)(4) as applying both to the date set for expiration of a fixed-term contract and to the date on which a clause providing for reopening is invoked. [*Lion Oil*, 352 U.S. at 290.]

Where the parties have already agreed to terms under which there is to be effectively no termination or modification of the terms of the contract (as, e.g., may be the case if special arrangements are made for the negotiation of third-year wage terms), then the above statutory notice may not be required, cf. *Schaeff Namco, Inc.*, 280 NLRB 1317, 1319-1320 (1986). Here, in any event, the Union had provided any required statutory notice.

Statutory notice requirements aside, the parties (and they alone) have great freedom in establishing what will be the terms of their agreement, *H. K. Porter Co.*, 397 U.S. 99 (1970). This may be inclusive of making any special arrangements desired in regard to: length of contract; reopener provisions; length of the period for the negotiation of a new agreement; and any strike limitation, and/or related rights and restrictions on party cancellation and/or termination of an existing agreement, see, e.g., *EPE, Inc.*, 273 NLRB 1375 (1985). For some other examples of the combinations of contractual arrangements that may be made, see, e.g., party restriction of the area for reopener negotiations, even with exercise of right to strike (there with appropriate 8(d) notice), *Hydrologics, Inc.*, 293 NLRB 1060, 1061 fn. 11 (1989); *Speedrack, Inc.*, 293 NLRB 1054, 1055, 1056 (1989). See relatedly the compared cases cited in footnote 12; and (as is deemed particularly noteworthy here), cf. *KCW Furniture Co.*, 247 NLRB 541 (1980), enf'd. 634 F.2d 436 (9th Cir. 1980), as to which the Board has later observed:

“[T]he contract provided that mere invocation of the reopener provision was not intended either to terminate the contract or to forestall its automatic renewal. Under those circumstances, the Board found that the employer violated Sec. 8(a)(5) when, acting as if the contract provisions had terminated, the employer unilaterally implemented its final offer after impasse in the reopener negotiations and after the automatic renewal date had passed.” [*Speedrack, Inc.*, supra at 1057 fn. 12.]

Absent some specific limitation in the contract, bargaining on reopened subject(s) is viewed to proceed in the same natural course as the parties’ bargaining may take when there is no contract in effect. This may include an employer’s economic decision to unilaterally implement its last offer terms, upon reaching good-faith impasse; or, a union’s election to seek economic enforcement of its position through an attempt at an initiation of effective strike action. *Hydrologics, Inc.*, 293 NLRB 129 (1989).

It would appear to follow from all the above that there would be nothing unlawful in the parties’ prior entrance of contractual arrangements to accomplish an intended contractual relationship of general nature being here urged by the Union. Thus there would have been nothing inherently unlawful for the parties in their existing contract to have previously agreed, as the Union has (essentially) urged they did herein, that all existing terms of their prior contract would, absent a party’s explicit declaration of termination, and even with a declared desire by a party to negotiate modifications, in the interim, continue in effect as contract terms; and renew under certain circumstances. They might have arranged to do that with, or without (as here) an additional prior agreement that, either: any modifications desired to be negotiated would be made retroactive, and be for the agreed period of the new contract when negotiated; or, have made simultaneous provision that upon the parties being unable to reach an agreement on mutually desired modifications, that either party might then terminate the entire agreement upon giving the other party some agreed additional (e.g., seven) written days notice of termination, if lawful notice (as herein) were given under the circumstances.

Nonetheless, if such was the Union’s contractual intention here, I conclude and find in the end in essential agreement with the General Counsel, that the Union simply did not effectively provide for such clearly enough in the terms it agreed to in its prior contract with the Employer. In *KCW Furniture*, supra, e.g., the parties explicitly agreed that the reopener provided there could *not* be construed as a termination, or as forestalling an automatic renewal of the agreement. In contrast, here there is no such explicit declaration; and I conclude and find otherwise that the contract duration clause’s (second) proviso is left too ambiguous to effect an intended contract term extension (consideration of defeasibility aside). The fact that under the first proviso the parties have *not* declared their specific intent to terminate the agreement at best only creates an ambiguity as to their (unstated) intentment on an agreement termination in the instance of a party’s declaration of intent to modify the agreement. The ambiguity is but enhanced by the fact that the parties had also previously specially agreed that certain benefits would continue unaffected by contract termination. (In regard to continuation of similar benefits as terms and conditions of

employment otherwise generally, see *Beitler-McKee Optical Co.*, 287 NLRB 1311, 1312 (1988), and compare *Ironworkers Local 455 (Precision Fabricators)*, 291 NLRB 385, 387 fn. 1 (1988).)

Under the instant duration clause second proviso, at least one party (the Union) had timely declared its intent to modify contract terms. The existing contract terms (I find) do not clearly evidence a prior agreement of the parties in that circumstance that contract terms were to continue in the (defeasible) interim while the parties attempted to negotiate mutually desired modifications; or, would simply automatically renew, if the desired changes were not successfully negotiated by a certain time. If anything, the special (limited) contractual arrangements made for certain benefits to continue despite a termination and/or modification would appear to more indicate the contrary. In any event, the Board will not alter agreements which do not violate the Act, *Hydrologics, Inc.*, 293 NLRB 1060 (1989). Neither is the Board to impose upon the parties, a contract term not agreed to by the parties, *H. K. Porter Co.*, supra, 397 U.S. 99 (1970).

As the Employer’s bargaining obligation is otherwise to be considered, an employer’s obligation to comply and give effect to the terms and conditions of employment embodied in a collective-bargaining agreement continues after the agreement expires, until the employer has fulfilled, or been relieved of its duty to bargain about changing the existing terms and conditions of employment, as, e.g., where the parties have bargained to impasse, and the changes thereafter made are consistent with any bargaining proposal previously advanced by the employer (as here); or, where (clearly inapplicable here), the union had effectively waived its right to bargain on the subject matter subsequently changed. Cf., *Beitler-McKee Optical Co.*, 287 NLRB 1311 (1988).

Where a contract is to be viewed expired by virtue of the effect of its terms, and there is no contract any longer in effect, all an employer is then required to do is to give notice of its planned changes, and afford a reasonable opportunity to the union for good-faith bargaining thereon. *Gibbs & Cox, Inc.*, 292 NLRB 757 (1989). Where the parties thereafter reach a good-faith impasse in the negotiations, an employer then does not violate Section 8(a)(3) and (5) by a subsequent implementation of changes that are actually consistent (as here) with those last proposed to the union, *Taft Broadcasting Co.*, 163 NLRB 475 (1967), enf. sub. nom. *Television Artists AFTRA v. NLRB*, 395 F.2d 622 (D.C. Cir. 1968).

In the light of the above precedent, and on the basis of the evidence presentment on the Employer-Union bargaining history leading to the Employer’s January last offer, and considering the Union’s own effective silence thereon during a subsequent material period of some 2 (or more) months, I further conclude and find that the Employer’s subsequent March 13 implementation of its last offer terms was with an appearance of following a good-faith impasse, even with a full consideration being given also to the Union’s contentions on certain related discussions that Klein had contemporaneously held directly with employees, cf. *El San Juan Hotel*, 289 NLRB 1453, 1454 fn. 5 (1988). The Employer has in effect (I find) substantiated that it lawfully implemented its last offer after impasse; and, the Union’s evidence offered does not show the contrary.

The evidence offered in support of Union's proffered concern about the nature of Klein's discussions with employees prior to implementation, does not warrant a different conclusion. In general, an employer's attempt to deal directly with its employees rather than with their designated bargaining representatives concerning terms and conditions of employment is unlawful, and violative of Section 8(a)(5), *Krolicki Wholesale Meats*, 270 NLRB 941, 944 (1984), *enfd.* 763 F.2d 215 (6th Cir. 1985); *Medo Photosupply Corp. v. NLRB*, 321 U.S. 678, 683-684 (1944). However, the statements made by Klein herein, came essentially at the time of the Employer's declaration of an impasse lawfully arrived at in prior good-faith bargaining, and shortly before implementation of the Employer's last offer terms. Indeed, with the Union's election not to meet directly with the Employer during the prior 2 months, at least in so far as material to holiday work assignment changes that were clearly negotiated to point of impasse and implementation, Klein's notice to the employees of the holiday changes appear here to be at once both reasonable in imparting effectively an Employer's advance notice to employees that there would be a regular work assignment for unit employees on the upcoming Good Friday, April 17; and, as being also with design more for effecting the employees' eventual acceptance thereof by the statement of the Employer's intended moderated enforcement.

In any event, the Employer's implementation of the terms of its last offer to the Union, *inter alia*, thereafter deleting Good Friday as a paid holiday, is not herein shown by the Union to be in violation of the Act. It follows that thereafter, Good Friday was no longer a paid holiday, but a regularly scheduled day of work. It also follows that Union's basic contention thereon that because the terms of the prior contract had continued, Good Friday as a paid holiday had continued, and the unit employees were entitled to take Good Friday off as a holiday (or be paid double time in accordance with the contract for working that holiday), however reasonable held, is not established.

In that regard, employees cannot pick and choose the work they will do, or when they will do it, *cf. Paperworkers Local 5 (International Paper)*, 294 NLRB 1168, 1170-1171 *fn.* 14 (1989). Klein's discussions and announced projection of only a loss of a regular day's pay to any employee absent on the (now) regularly scheduled workday of Good Friday, April 17, would appear to reflect a significantly moderated disciplinary approach, more importing the Employer's design to obtain unit employees' eventual acceptance of the terms of the Employer's lawfully implemented last offer, rather than being instance, as urged by the Union, of an attempt on the Employer's part to deal directly with the unit employees to the wrongful exclusion of, or to undermine the majority status of their long-established collective-bargaining representative. On the other hand, although not raised as an unfair labor practice by the complaint herein, Klein's advisements otherwise, *viz.*, that employees might leave the Union to avoid fines, and rejoin the Union later after the dispute was all over, was conduct reasonably capable of generating just such a suspicion in the Union.

Thus, this is not to say, in light of their rights of plant visitation, that the union business agents had acted unreasonably in commencing to effect a closer watch on the developments in the plant, as they might affect the employees' terms and

conditions of employment overall. Neither is it to question the Union's more frequent exercise of their contractually based, privileged attempts to seek to keep the employees that they represented, appropriately and fully informed of the Union's position in the negotiations that was being reasonably contrarily held in these matters. Thus the Union in general justifies its more frequent plant visitation, and communication with all the unit employees that the Union represented. *Id.* at 1168 *fn.* 4. (I need not however extend such consideration to, and do not otherwise pass upon the Union's more questionable indicated earlier holding of meetings with employees during established worktime. I do note it occurred for only a limited time, and not after the Employer registered formal complaint thereon with the Union.)

Whether advanced as a term of a continued contract, or argued alternatively as a term that was unaddressed in the modification negotiations, and thus urged as unaffected by the Employer's lawful implementation of its last offer, the Union has also argued that the Company had thereafter improperly assigned the unit work to nonbargaining unit personnel, in that article XI of the contract continued to forbid the nonmember supervisory employees, and (so the Union argues) other nonunit individuals to do any unit work.

The Union's related argument is, that when the business agents entered the Employer's plant on April 17, they were not only there by continued contractual right, but they were there lawfully to enforce contract terms. The Employer as much as has conceded Union visitation was not a contractual term it had previously sought to renegotiate. Indeed, in regard to the business agents' presence at the plant on April 17, at hearing Klein relatedly testified that *except for the threats*, he probably would not have even filed a charge on the presence of all the business agents in the plant that day, if they were there (only) to observe what was going on.

The prior contract did make general provision for business agents access to the plant *to enforce the contract*, without any apparent restriction on the number that might elect to do so on any given day; and that provision and/or practice continued unaffected by the Employer's implementation of its last offer terms. Indeed, apart from Klein's unsupported arguments based on urged implicit reasonable intendments, the only prior contractual restriction explicitly stated did not regulate the number of visiting business agents, nor state any requirement that the Union had to obtain the Employer's permission for entry, but was (solely) that the business agents' visitations would be accomplished, "without unduly interfering with the work."

Where a contract allows for a business agent's plant access for business without restriction, and thus (in effect) access for all legitimate union business purposes, the Union is engaged in a related legitimate business purpose when it is there to observe if existing terms and conditions of employment (however based) are being adhered to; when it attempts to speak to unit employees in the workplace, without undue work interference; and, even when it informs an employee-member personally that (lawful) union charges have been filed against the member for conduct that is perceived as engaged in contrary to the Union, *cf. Gilliam Candy Co.*, 282 NLRB 624, 625 (1987).

Under the terms of the Union's plant visitation right here, the Union had long enjoyed a right of plant access that encompassed a right to observation of the Employer's adher-

ence to applicable terms and conditions of unit employment, whether it be of terms of an existing unexpired contract; or (as I find herein), not only the unchanged terms of an expired contract (viz, to the extent the same remained unaffected by the implemented last offer changes), but also for a union observance of the nature and scope of the implementation of the last offer terms themselves. The Union's right of visitation extended as well to observations of employment conditions that would serve as basis for any grievances it might elect to file on positions it (even erroneously) might hold in good faith. The Union was not there for a legitimate business purpose within the meaning of Section 8(b)(1)(A) however, if it was there to seek to unlawfully interfere with a performance of lawfully scheduled unit work by any one, either physically or by threats or other coercion of unit employees.

The provision on the Union's right of visitation was not a term that was addressed in the Employer's last offer. Even with an expiration of the contract that visitation right would continue, itself not subject to an Employer's unilateral change, without a negotiation thereon with the Union. Thus, even with the Employer's effective implementation of its last offer, the Union (I find) had retained the right of access to the plant for purpose of its own observations for a lawful enforcement of any then (perceived) applicable terms and conditions of employment, with (only) the above restriction still applying, viz, that the visiting business agents would not unduly interfere with the work.

Not only did the Union continue a contractually based entitlement of visitation at the Employer's facility, there was no evidence that there had been any prior restriction in practice thereunder on the number of business agents that could visit the plant. While the business agents upon arrival on April 17 would promptly have determined very few (two to three) unit employees were present to perform the work, the business agents did not know that before they arrived there. The only evidence of record on the point is that the Union did not know ahead of time how many of the 43 unit employees would be present that morning.

As for the number arriving, given the general instruction of the Union's president to the business agents, and the additional circumstances of the proximity of the Union's hall to the Employer's premises, the initial presence of anywhere from 4 to 7-8, or even eventually as many as (I find) 9-10 business agents there on April 17, was not in itself inherently unlawful. (Klein's reference to as many as 12, or 14, being present at one time is deemed somewhat exaggerated, and not credited.) It is a matter of what they did there.

In regard to the number of business agents present at one time, it is established not only that the business agents regularly traveled as many as four (4) to a car, and that the Union's hall was but a short distance from the Employer's plant, but also that the Union had instructed its business agents generally to check on the Employer's employees. In those circumstances, it is deemed to be especially significant that the Union's business agents did not have to secure permission of the Employer before exercising their right of access.

In that regard, in the circumstances of this case, the Employer's urged reliance in brief on the holding of *Retail Wholesale Union District 65 (B. Brown Associates)*, 157 NLRB 615 (1966), which involved wholly disparate facts, is

simply misplaced. Thus, the *Brown Associates* case not only clearly did not present an underlying union right of access (as is evident here) based on an explicit prior contractual union right of plant entry, *Brown Associates* otherwise essentially involved a union's plan for initial organization that had occasioned (repeated) forced and coercive trespass entry into several (different) the employers' plant premises; accomplished with larger numbers of agents; with the union's appearance always unannounced, and the union uninvited; and with union presence there without permission of the involved the employer, indeed obtained in some instances only by the union's agent(s) overriding attempts of some employers to bar the access of the union to its plant property; involved conduct continued in the face of the employers' repeated requests made to the union agents to leave; and finally, with the union's attempted organizational approach to employees otherwise often accomplished on the plant floor in various degree of threatening and coercive manner. *Brown Associates* is deemed wholly inapposite on its facts.

The complaint does not allege that the business agents' conduct on April 17, other than Cika's threat to Klein, was in violation of Section 8(b)(1)(A), though the conduct of the business agents upon arrival that day in speaking to unit and nonunit employees was fully litigated and is described by the General Counsel and/or the Employer in brief as unlawful conduct.

The Union's defense on the alleged Cika threat builds on the base of its contentions that the *initial* presence of four to eight business agents in the plant that morning was lawful. Because the Union's business agents had then observed that unit work was being done (essentially) by nonunit individuals, the Union additionally contends the business agents did not violate Section 8(b)(1)(A) when they told the two to three unit employees present and working that they should not be there; or, when they told other individuals (essentially) to stop doing the unit's work.

As noted, I have previously found that the Union's business agents were initially lawfully present at the plant on April 17. Even assuming that the business agents had initially arrived in a group of four, I find the group almost immediately grew in number to 7-8, though it only later became as many as 9 or 10. I now additionally find that the business agents on arriving were privileged to communicate the Union's position to the (two) unit employees who were initially present, and whom the Union represented, that they should not be there, cf., *Taxi Drivers Union*, 174 NLRB 1, 2-3 (1969). Contrary to the apparent general circumstances in the Employer's other case urging in brief, there was no evidence of any specific threat being made directly to any unit, or nonunit employee that morning, other than Cika's threat to Owner Klein.

The Union's second line of defense for its business agents' conduct on April 17 rests on other contract provisions, which are urged herein as left unchanged by the parties' negotiations, and which are essentially thus contended to provide as before that unit work would be done only by unit employees. The Union's argument fails wholly of persuasion, at least in so far as the Union advanced it as applying to prohibit nonunit employees' performance of work scheduled on Good Friday in the circumstances of this case.

There was no specific agreement shown negotiated to that effect. Indeed, there was no evidence presented that the

clause relied upon had heretofore precluded unit work being done by others if the unit employees elected not to do the unit work when lawfully scheduled (as here), without contract justification. Rather, the Employer had lawfully bargained to impasse on certain holiday changes; and it had then lawfully implemented the change on Good Friday. It had notified the unit employees of the change, and that they would lose a day's pay if absent. Contrary to union urging, the Employer did not by the latter additionally forego getting the work done by others if the unit employees, without any contractual justification, did not show up to perform the work that the Employer had lawfully scheduled for them.

Thus the controlling fact that seems to me to be inescapable is that the unit employees who had been lawfully scheduled to perform the work, *without any contract justification* therefor, did not appear to perform the assigned work as scheduled. See and compare *Paperworkers Local 5 (International Paper Co.)*, 294 NLRB 1168, 1169–1170 (1989). It was only when the absent unit employees had wrongfully failed to meet the established (newly implemented) employment condition in effect calling for work that day, that Klein performed, and had then directed other nonunit personnel to perform the unit's work. Klein, as the Employer, was entitled to proceed on the basis of a right to get the work done on time (even) by use of other prearranged means, because the unit employees who were regularly scheduled to perform the work, had, without actual contract justification, elected not to appear to perform the work for their Employer as scheduled.

The employees who did not appear to perform their assigned work on Good Friday, being without contractual foundation to claim an *excused* holiday absence (and thus with an arguable concurrent implied right to perform the unit work later), have engaged in conduct that in effect may be more properly likened to a partial strike by the unit employees, *id.* at 1170. The Employer's disposition to preannounce a lesser discipline (only a loss of day's pay) for a unit employee's absence, does not serve to obfuscate the fact that the employees in the above-determined circumstances had effectively in concert withheld their labor from the Employer for that workday, whether they had done so concertedly in support of the Union's (erroneous) position on the contract (that Good Friday holiday terms were still in effect), or otherwise (in a concerted attempt to impose by economic force the Union's urged position in that matter upon the Employer). The Employer in turn (in either event) was privileged to take all reasonable steps necessary to ensure that the lawfully scheduled work that day would be done on time, if not by the unit employees, then by others, as it might be able to arrange.

Accordingly, I further find as collateral to the Employer's lawful schedule change of Good Friday, April 17, from a previously paid holiday, to a regular workday, that though the Union was thereafter entitled to have unit work initially performed as scheduled by unit employees, it was not entitled, in the absence of bargaining unit employees' willingness to report and perform the work when lawfully scheduled that day, to then have the work scheduled on Good Friday not performed by anyone.

Although it is unnecessary to the resolution of the issue of Cika's threat herein, I do observe that it is clear on this record that some of the business agents present that morning were not fully informed as to the circumstances leading to

the Employer's implementation of its last offer contract terms. In any event (I find), all the business agents herein were in error in advancing the basic underlying contractual position that Respondent Union had then maintained, namely, that the contract had renewed, and that accordingly Friday, April 17, was a paid holiday for the unit employees that they represented, and, that consequently the unit employees were privileged not to come to work that day, with pay.

Resultingly, I further find that the conduct of the business agents that morning, in telling others not to do the work, had the effect, whether intended or not, of interfering with a lawful performance of the scheduled work that day by nonunit employees. The question whether such constituted work interference such as to forfeit the Union's continued right of access to the plant floor is one thing; and any consideration of it constituting an unfair labor practice is still another.

With these factual determinations made on the status of the contract and the pertinent existing terms and conditions of employment, the framework for the final resolution of the complaint's 8(b)(1)(A) and (B) allegations is in place; and the same may now be finally evaluated and resolved.

Final Analysis, Conclusions, and Findings

The 8(b)(1)(A) allegations

The governing 8(b)(1)(A) precedent may be briefly stated. In general, Section 8(b)(1)(A) was "a grant of power to the Board limited to authority to proceed against union tactics involving violence, intimidation, and reprisal or threats thereof." *NLRB v. Teamsters Local 639*, 362 U.S. 274, 290 (1960). Section 8(b)(1) (A) makes it an unfair labor practice for a union or its agents to restrain or coerce employees in the exercise of rights guaranteed them in Section 7 of the Act. Included within Section 7 is the right of statutory employees to refrain from union activity; and no less importantly so when the employees may elect to exercise their right at time of an expired contract.

The Board has consistently ruled that a union's threatening employees with bodily harm for exercising their Section 7 right to refrain from participating in a strike (or withdrawing therefrom) is violative of Section 8(b)(1)(A) of the Act. Thus, where a union threatens and/or inflicts bodily harm and/or property damage in preventing or attempting to prevent employees from entering or leaving their work premises, it violates Section 8(b) (1) (A). Cf. *Lumberworkers Local 3171 (Louisiana-Pacific)*, 274 NLRB 809, 814 fns. 11 and 12 (1985).

It is also conduct violative of Section 8(b)(1)(A) for a union to restrain and coerce unit employees in an effort to compel them to accept a union's unilateral change of practices under an existing contract that would amount to a unilateral change in terms and conditions of employment, *Paperworkers Local 5*, supra, 294 NLRB 1169. See also the impropriety of a union's threat to strike where a contract has already renewed, *Electrical Workers IBEW Local 3 (Burroughs Corp.)*, 281 NLRB 1099 fn. 2 (1986), enf. 828 F.2d 936 (2d Cir. 1987).

It would thus readily appear to be similarly violative of Section 8(b)(1)(A) for the Union to restrain and coerce unit employees in the exercise of their right to refrain from supporting the Union, as is being (essentially) urged here, to compel them to *not* accept a lawful implementation of the

Employer's last offer terms; though it would *not* be a unit employee's correlative right under the Act to act contrary to the provisions of an existing lawful contract (or otherwise established working conditions). In short, it depends on what the business agents said to the employees, and the overall circumstances under which they said it.

It has been long settled that the incidence of union restraint and coercion directed against supervisors and managerial personnel under circumstances where the conduct became, or was sure to become known to the Company's striking or nonstriking employees also constitutes union restraint and coercion of employees in the exercise of their statutory rights within the meaning of Section 8(b)(1)(A) of the Act, *Mine Workers District 20 (Herbert Construction)*, 192 NLRB 565, 566 (1971). Accord: *Teamsters Local 115 (Oakwood Chair)*, 277 NLRB 694, 698 (1985).

The underlying rationale "is that employees may reasonably regard such threats as a reliable indication of what would befall them if they refrain from supporting the Union as is their right under Section 7." *Taxi Drivers Union*, supra, 174 NLRB at 3. But where an incident involves a union vice president's infliction of damage to an employer's property, in the presence of a security guard, but it is *not* witnessed by any unit employee (or does not occur under circumstances where it is likely to come to the attention of any unit employees), and there are thus no employees present whose Section 7 rights might be affected, the Board has held that the Union does not violate Section 8(b)(1)(A) of the Act by its agent's commission of such an act, *Lumberworkers Local 3171 (Louisiana-Pacific)*, 274 NLRB 809, 813, 815 (1985).

Freeman's initial response to employee-member Gabry's inquiry at breaktime on May 6 was to the effect that in the event of a strike, the Company would not be allowed to bring in any outside help; and, that employees would not be allowed to cross the Union's picket line. It readily follows from the above precedent, that, in the above context, by Union Business Agent Freeman's additional statements made directly to employee-member Gabry, in the presence of employee-member Denzine (and others) at breaktime, that if they (employees) did (cross the picket line), someone would get hurt; that the Teamsters have a big union, and there would be a lot of people out there, around 300; and that (though) there would or could be police protection, it wouldn't be available at all times, and somebody could get hurt; and that if someone got hurt, no one would know who did it to them, Union Business Agent Freeman has thereby effectively threatened employees with the possibility of physical harm if they were to cross the Union's picket line. By such conduct, Respondent Union has restrained and coerced employees in the exercise of their right to refrain from the Union and other protected concerted activity, in violation of Section 8(b)(1)(A) of the Act. Cf. *Operating Engineers Local 295-295C*, 282 NLRB 273, 275 (1986); *Painters Local 558 (Forman Ford)*, 279 NLRB 150 (1986); *Teamsters Local 810 (Kate's Art)*, 268 NLRB 1378, 1379 (1984); and *General Teamsters Local 959*, 248 NLRB 743, 745 (1980).

The visitation of the business agents earlier at the plant on April 17, I have found, was pursuant to established prior contract term and practice that had remained unchanged by the parties' negotiation. Though there in unusual number, the business agents even on arrival in such numbers were initially present under a colorable claim of right to visit the

Employer's plant for legitimate union business reasons. I need not resolve whether the business reason privilege of that presence specifically extended to the union business agents' advancement of (even erroneous) contract positions that nonunit employees were then improperly performing bargaining unit work, since that conduct is not alleged to be the unfair labor practice in this matter. See and compare *Paperworkers Local 5*, supra, 294 NLRB at 1169-1170. I do note that Section 8(b)(1)(A) speaks of union acts of restraint and coercion of employees, in the exercise of their Section 7 rights, and not noncoercive union interference therewith.

In regard to the alleged Cika threat of physical harm to Klein on April 17, however, what Respondent Union and its business agents were clearly not privileged to do was to seek to enforce the Union's positions (held in good-faith error, or otherwise) upon employees by any unlawful threat or coercion. Klein's testimony, substantially corroborated as it is by the testimony of witnesses Schmitt and O'Malley (I find), is the more creditworthy, especially when close analysis of both Sweet's and Freeman's urged countertestimony has revealed that the same did not really confront, let alone appear to be of nature to prevail over the generally consistent, corroborative, and I thus find more credible testimony of General Counsel's witnesses clearly establishing a Cika threat.

Moreover, despite those circumstances, Respondent Union has neither called Cika as a witness to testify on this incidence, nor has the Union shown any reason why it did not do so. The General Counsel and the Employer have urged that an adverse inference should be drawn that Cika's testimony would not have been favorable to or would not have supported the Union's contention (essentially) that Cika had not spoken to Klein in the above threatening fashion. I agree; and I shall draw the appropriate adverse inference. *Martin Luther King, Sr. Nursing Center*, 231 NLRB 15 fn. 1 (1977); *Publishers Printing Co.*, 233 NLRB 1070, 1071 fn. 1 (1977), enf. 625 F.2d 746 (6th Cir. 1980); and cf. *Goodyear Tire & Rubber Co.*, 190 NLRB 84, 86 fn. 3 (1971).

Thus, I conclude and find that after Respondent's business agents had first (permissibly) told two represented unit employees on April 17 that they should not be there, proceeding (at best) in contractual error, the business agents spread out and individually told all the nonunit individuals (including certain of the Employer's supervisors), whom they observed doing unit work, that they were not union employees, should not be doing (essentially) the unit's work, and they should stop doing the unit's work.

Materially, I further find that Union Business Agent John Cika had then directly confronted Klein as owner, and told Klein, personally, that Klein News was a union shop; that Klein didn't have the right to do this; and with the central meaning in overall context, in my view, shown clearly enough to be, that, as a union shop, Klein did not have the right to do the unit work himself, nor to have the unit's work done by supervisors of Klein News, nor to have it done by any other nonunit employees, as he was then doing. I further conclude and find that upon Cika's failure (once again) to elicit any, let alone a favorable Klein response to Cika's assertions, Cika had this time publicly threatened Klein with physical harm by saying, "I might end up in jail for 40 years, but you're going to end up in the hospital if this continues."

This statement was a clear and substantial threat of physical harm made openly to president Klein on the Employer's production floor, in the presence of at least two *nonunit* employees who have substantially corroborated that the threat was made as Klein has recalled it. Moreover, the threat was made after a decidedly unusual, but (I have found) not unlawful number of business agents had visited the plant and just passed through the assembled mixed work force; and, inter alia, had previously (a) told the two represented unit employees that they should not be there, and (b) loudly, and erroneously directed that the other nonunit work force (including some managers and supervisors) then performing unit work, should immediately stop doing so. That the Cika threat to Klein under those circumstances would escape the attention of others assembled and presently doing the work at the time of the business agents' arrival and with the union business agents' above immediate and broad response to their doing the work, seems to me to be inherently unlikely.

Cika's threat to President Klein is alleged to have violated both Section 8(b)(1)(A) and 8(b)(1)(B). Cika's threat as made to President Klein in the above circumstances (I presently find) violated Section 8(b)(1)(A). This is so because I readily conclude under all of the circumstances shown above that it is assuredly likely that it came to the immediate attention of (at least) the two *unit* employees present, who have not testified to the contrary (indeed, who have not testified herein at all); and because the Cika threat to inflict physical harm to Klein was of such a substantial nature as to clearly coerce and restrain employees (on their becoming aware of the threat) in the exercise of their Section 7 right to refrain from conduct in support of the Union.

Moreover, I am also persuaded, and I further conclude and find, that Cika's threat to Klein was of such nature and made under such open and unusual circumstances on the plant floor as to be also very likely to have later come to the attention of still other unit employees, who were not present there that day.

Neither Cika's likely developed frustration with Klein, nor Klein's readily discernible perseverance in getting the unit work done on the (newly) implemented workday schedule, ameliorates the coercive effect of Cika's clear threat of physical harm to Klein, nor do those circumstances obscure the threat's reasonably apparent tendency to also coerce those employees who became aware of it. For all of the above reasons, I conclude and find Cika's threat to Klein has coerced and restrained employees in violation of Section 8(b)(1)(A). See and compare *Steelworkers Local 1397*, 240 NLRB 848, 849 (1979); and *Laborers Local 496 (Newport News of Ohio)*, 258 NLRB 1105 fn. 2 (1981); and see *Viele & Sons*, 227 NLRB 1940, 1941, 1944 (1977).

While wholly unnecessary to the above findings of Respondent Union's violation of Section 8(b)(1)(A), but as further background to certain related alleged union violations of Section 8(b)(1)(B), *infra*, and as urged by the General Counsel, I further find that on or shortly after March 13, thus about a month earlier, Cika had told Klein (to no avail, and without eliciting any apparent Klein response at the time), that if Klein News didn't sign the Union's (proposed) contract, somebody would get hurt. There is no evidence presented that any employee ever became aware of this initial threat to Klein, nor was it alleged as violative of the Act.

I specifically do not find that the Union has thereby violated Section 8(b)(1)(A).

In regard to the June 22 incident, in as much as the record does not reveal that the Vorrell and Letner car-following incident, though constituting a clear union harassment of Fitzpatrick, had occurred in the presence of any employee; nor was it shown to have come, or appear likely to have come to the attention of any unit employee, I am not persuaded to conclude on the evidence presented, that the Union has violated Section 8(b)(1)(A) by Vorrell's and Letner's unwarranted harassment of Fitzpatrick in following Fitzpatrick home that day.

The General Counsel has argued to the contrary on the basis of the holding of *Broadway Hospital*, 244 NLRB 341, 345-346 (1979), and *Allou Distributors*, 201 NLRB 47 (1973), that it is not necessary to be shown that employees have witnessed every act of intimidation, as the employees might be expected to become aware of the incident. The incidents relied upon by the General Counsel in the above cases took place either during a strike, or following an employer sponsored decertification petition. The cases appear even otherwise to be significantly distinguishable.

In *Broadway Hospital*, in strike circumstances, two union agents coerced and restrained employees by following one management representative immediately after that supervisor had dropped off certain employees for work at 3:30 p.m.; and where, inter alia, on the next day at 11:30 p.m., the same management representative car, on leaving, was then blocked by pickets and a business agent. It was concluded that the union's following of the supervisor's car the day before, after the supervisor had dropped off employees for work, was coercive, *and*, that it had occurred in circumstances that would have reasonably come to the attention of employees.

The record in *Broadway Hospital* additionally established that instances of picket line misconduct had occurred on still other occasions, inter alia at 7 p.m., and that a union business agent had yelled at the (same) supervisor as she was leaving at 7 p.m. and that on another occasion two business agents had also followed a company attorney (who had left the hospital at 7 p.m.) for a substantial distance and period.)

In *Allou Distributors*, notably in a background of an employer-sponsored decertification petition, six business agents initially came on an employer's plant premises under authority of an enabling clause in a current contract. The Board affirmed the administrative law judge's finding, however, that the number and conduct of the union's business agents under the circumstances present there, was such as to be designedly intimidating and violative of the Act. To be sure, there, as here, the union agents claimed a contractual right to be present. In *Allou Distributors*, however, unlike here, the employer specifically requested that the business agents leave, which they did not do.

Moreover, the union agents in *Allou Distributors* did more than just tell employees to stop work. Although the business agents had threatened to inflict physical violence on supervisory employees, in the presence of employees (if the decertification petition were not revoked), unlike here, the business agents' conduct there also included direct threats to employees that the employees, or their family, would suffer bodily injury, or other harm, 201 NLRB at 54. It is noted in passing that the administrative law judge did not find a violation of 8(b)(1)(A) where employees were not shown to

be aware of the union's assault on a certain supervisor, id. at 55.

Here, in contrast with the union business agents' following of cars in *Broadway Hospital* strike circumstances, the Vorell-Letner car incident occurred well after unit employee workhours. No evidence is presented that a strike was ongoing at the time. Fitzpatrick does not assert that he informed any unit employees of the incident. Fitzpatrick's sole report of the incident was to a warehouse supervisor, undertaken as a precautionary measure to cover an exigency that never occurred. Fitzpatrick was not hospitalized; and he otherwise had suffered no visible injury, such as might have reasonably later come to the attention of employees on that account, cf., *Furniture Workers Local 140 (Brooklyn Spring Corp.)*, 113 NLRB 815, 821-822 (1955).

Moreover, Fitzpatrick did not report this incident to the police; and there was no followup (other than by the instant charge) that would arguably have created a likelihood of some notoriety. Indeed, as noted no evidence is presented that this incident even ever came to the actual attention of any employee; nor is any evidence presented as to any special circumstances or considerations under which the incident is to be deemed otherwise likely to have come to the attention of employees, other than apparently the fact that it occurred, and is presently litigated.

The car-following incident itself is reasonably shown to have been one triggered when Fitzpatrick drove over to a recognized union business agent's car which was unusually parked on the Employer's parking lot, well after (unit) working hours; and it occurred only after Fitzpatrick had waved at the business agent occupants, who at the time had presented appearance to Fitzpatrick of attempting to conceal their presence on the Employer's lot. Nonetheless, the business agents' election to follow Fitzpatrick, and their act of following Fitzpatrick's car all the way home, in the manner they did on June 22, was unquestionably conduct that constituted a clear union harassment of Fitzpatrick.

There is no pattern of union business agent car-following in strike circumstances, nor circumstantial indication that employees had become aware of any specific such incident, as in *Broadway Hospital*, supra. Rather, the circumstances of the instant conduct of Business Agents Vorell and Letner appear more to be likened to the above union assault of a supervisor that does not occur in the presence of employees, nor appear reasonably to have come to their attention, *Allou Distributors*, supra; or to the instance of a union vice president's clear infliction of damage upon an employer's property in the presence of a security guard in *Lumberworkers Local 3171*, supra, but which otherwise occurred in circumstances that were deemed not to have come to the attention of any employee, and where accordingly, the related 8(b)(1)(A) complaint allegation(s) was (were) earlier dismissed. Any appropriate remedy for civil tort to person or property is for other forum. Thus, I remain unpersuaded by the General Counsel's and the Employer's arguments that an 8(b) (1) (A) violation has been made out in the Vorrell-Letner car-following incident of June 22.

Accordingly, I shall recommend that the complaint allegation that Respondent Union violated Section 8(b)(1)(A) by the conduct of its business agents, Vorrell and Letner, in following Fitzpatrick home on June 22 be dismissed.

The 8(b)(1)(B) allegations

The complaint (essentially) alleges, and the General Counsel contends that Respondent Union has violated Section 8(b)(1)(B) of the Act: (a) by its business agent's, Cika, threat to Klein on April 17, to inflict physical harm upon President Klein, if (as I have found), despite being a union shop, Klein and certain other individuals, viz, supervisors and other nonunit employees, continued do the unit's work; and, (b) also by the conduct of its business agents, Vorrell and Letner, later on June 22, in following in their car, Vice President and General Manager Fitzpatrick, from the Employer's plant to Fitzpatrick's home: but not allegedly otherwise, as by any of the determined interim 8(b)(1)(A) threats of Business Agent Freeman on May 6.

Section 8(b)(1)(B) of the Act provides:

It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce . . . (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances.

The Board early held that Section 8(b)(1)(B) of the Act proscribed a union's restraint or coercion of an employer in the direct selection of the employer's representative for the purposes of collective bargaining or adjustment of grievances, in a number of circumstances presenting that issue.

Indeed the Supreme Court observed in that very regard that the Board had for decades interpreted and applied Section 8(b)(1)(B) as making it unlawful for a union to apply direct pressure on an employer: to require it to dismiss its representatives because they were hostile to the union; to force an employer into, or out of a multiemployer bargaining unit; to compel an employer to select representatives from the ranks of union members; or to otherwise seek to directly affect the employer's choice of its representative for the purpose of collective bargaining or the adjustment of grievances in the course of administering an existing contract, cf. *Florida Power & Light Co. v. IBEW*, 417 U.S. 790, 799 (1974) (and see the cases cited thereat); *American Broadcasting Cos. v. Writers Guild*, 437 U.S. 411, 423 (1978); and *NLRB v. Electrical Workers Local 340 (Royal Electric)*, 481 U.S. 573 (1987). The Union has relied on each of these cases in its defense.

In *Florida Power*, supra, 417 U.S. at 813, the Supreme Court held that unions do not violate Section 8(b)(1)(B) of the Act when they discipline their supervisor-members for crossing the union's picket line and performing rank-and-file struck work. The Union basically contends that only certain limited acts of union restraint and coercion are proscribed by Section 8(b)(1)(B), and it relies on the Court's additional statement made in connection with the Court's creation of an "adverse effect" test, id. at 804:

No where in the legislative history is there to be found any implication that Congress sought to extend protection to the employer from union restraint or coercion when engaged in any activity other than the selection of its representatives for the purposes of collective bargaining and grievance adjustment. The conclusion is thus inescapable that a union's discipline of one of its

members who is a supervisory employee can constitute a violation of 8(b)(1)(B) only when that discipline may adversely affect the supervisor's conduct in performing the duties of, and acting in his capacity as, grievance adjuster or collective bargainer on behalf of the employer.

In *Florida Power* the Court had also observed the Board's earlier holding in *San Francisco-Oakland Mailers' Union No. 18 (Northwest Publications)*, 172 NLRB 2173 (1968), wherein, despite the absence of union pressure or coercion aimed at securing the replacement of certain foremen, the Board had held that the union had violated Section 8(b)(1)(B) by seeking to influence the manner in which the foremen interpreted the contract. On other occasions the Court explicated that in *Oakland-Mailers*, "the union had disciplined its supervisor-members for an alleged misinterpretation or misapplication of the collective-bargaining agreement, and the Board had reasoned that the natural and foreseeable effect of such discipline was that in interpreting the agreement in the future, the supervisor would be reluctant to take a position adverse to that of the union." (Emphasis supplied.) *Id.* at 801.

The Court in *Florida Power* then said of the Board's holding in *Oakland-Mailers*, *supra* at 805:

We may assume without deciding that the Board's Oakland Mailers decision fell within the outer limits of this test, but its decisions in the present case clearly do not. For it is certain that these supervisors were not engaged in collective bargaining or grievance adjustment, or in any activities related thereto, when they crossed union picket lines during an economic strike to engage in rank-and-file struck work.

In *American Broadcasting*, *supra*, 437 U.S. at 426–429, 434, the Court upheld the Board's subsequent application of the above "adverse effect" test, and the Board's related finding that the union had violated Section 8(b)(1)(B) when the union disciplined its supervisor-members for crossing its picket line during a strike and performing only supervisory functions, which did not include a performance of bargaining unit work, but did include performance of certain 8(b)(1)(B) duties, specifically grievance adjustment. The decision rested on a carryover effect, one concluded as illegally operative whenever the discipline might be shown to have adversely affected the supervisor's conduct in his capacity as grievance adjuster or collective bargainer. *Id.* at 429. (Cf. also *NLRB v. Electrical Workers*, *supra* at 574.)

In *American Broadcasting*, the Court said relatedly, *id.* at 430:

[W]e are of the view that the Board correctly understood FP&L to mean that in ruling upon a 8(b)(1)(B) charge growing out of union discipline of a supervisory member who elects to work during a strike, it may—indeed, it must—inquire whether the sanction may adversely affect the supervisor's performance of his collective-bargaining or grievance-adjustment tasks and thereby coerce or restrain the employer contrary to § 8(b)(1)(B).

In *Electrical Workers Local 340*, *supra*, after a review of the Court's prior holdings in both *Florida Power & Light*, *supra* at 574, and *American Broadcasting*, *supra*, including revisit of the Board's prior expanded holding in *Oakland Mailers*, *supra*, that included an employer-representative's ongoing interpretation of a contract on behalf of the employer as a related activity of collective bargaining, the Court then said relatedly:

[W]e conclude that discipline of a supervisor-member is prohibited under 8(b)(1)(B) only when that member is engaged in 8(b)(1)(B) activities—that is, collective bargaining, grievance adjustment, or some other closely related activity (e.g., contract interpretation, as in *Oakland Mailers*).

As compared with the threat and harassment incidents that are presented herein as violative of Section 8(b)(1)(B), many of the cases that the parties have advanced for consideration thereon (including the three Supreme Court cases above), address 8(b)(1)(B) coercion question as it arises from underlying circumstances where a union has imposed disciplinary sanctions upon a supervisor member. In that regard, however, it was observed in *American Broadcasting*, *supra*, 437 U.S. at 429, that:

The opinion in FP&L expressly refrained from questioning Oakland Mailers or the proposition that an employer could be coerced or restrained within the meaning of 8(b)(1)(B) not only by picketing or other direct actions aimed at him, but also by debilitating discipline imposed on his collective bargaining or grievance adjustment representative. [Emphasis supplied.]

In general, the Union has observed correctly from the several Supreme Court holdings in *Florida Power & Light*, *supra*, *American Broadcasting*, *supra*, and *Electrical Workers Local 340*, *supra*, and the Court's review therein of prior Board holdings, that: it is now well established that the scope of the Union's proscribed restraint and coercion of the Employer in Section 8(b)(1)(B) is limited; and thus, not every union restraint and coercion of the Employer is to be deemed proscribed by Section 8(b)(1)(B).

In summary thereof then, *Electrical Workers Local 340*, *supra*, most recently would appear to teach and/or reaffirm, pertinently: It is the Employer, not the supervisor (be the supervisor a union member or not), who is protected from the Union's coercion by the statutory scheme. The Employer is protected by Section 8(b)(1)(B) whether the parties have a contract or not. However, the Employer is protected in Section 8(b)(1)(B) from union coercion, only in the Employer's selection of its representatives "for the purposes of collective bargaining or the adjustment of grievances," but not as to their performance of any other (unrelated) exercise of supervisory or management functions for the Employer, because Congress did not design Section 8(b)(1)(B) (vis a vis other applicable sections of the Act), to guarantee the Employer the individual loyalty of its 8(b)(1)(B) representatives.

Section 8(b)(1)(B) not only prevents the Union from exerting any direct pressure upon the Employer in his selection of covered representatives, but the Board has held that Section 8(b)(1)(B) would protect (the Employer) as well from the Union's placement of indirect pressure on the Employer's

selection via (discipline) pressure imposed on the Employer's selected representatives, and of nature designed to compel them to take pronoun positions in interpreting a collective-bargaining agreement (in the future), because the Employer then, "would have to replace its foremen or face de facto nonrepresentation by them."

Thus, the Board has previously held in *Oakland Mailers*, supra, and held so (at least) with subsequent review of, without the Court's apparent disapproval thereof, that Section 8(b)(1)(B)'s covered duties, "of collective bargaining or the adjustment of grievances" extends to "closely related activities"; and further, that the Employer's selected representatives' interpretation of the contract when exercised on behalf of their employer, is an activity so closely related to collective bargaining, as to be reasonably included therein.

Assuming, as discussed and found infra, that the above Board and court holdings in 8(b)(1)(B) union discipline cases do provide (at least) some broad guidance for the resolution of the Section 8(b)(1)(B) threat and/or coercion cases presented herein, then, as is seemingly being argued therefrom, coercion emanating from a union threat, as well as from union discipline of a supervisor (-member) can constitute a violation of Section 8(b)(1)(B), "only when that discipline (or seemingly threat) may adversely affect the supervisor's conduct in performing the duties of, and acting in his capacity as grievance adjuster or collective bargainer on behalf of the employer."

The Union's threat must also affect a supervisor who actually performs covered 8(b)(1)(B) duties and/or functions, because Section 8(b)(1)(B) prohibits union coercion in the form of union discipline (and thus of union threat) of only those supervisory (members) who actually perform the above-covered 8(b)(1)(B) duties and/or functions, thus coercing the Employer in regard thereto. Question arises whether an adverse effect on future 8(b)(1)(B) activities from a threat (as in the case from union discipline) would exist only when the Employer's representative is threatened (disciplined) for behavior that occurs while the Employer's representative is engaged in 8(b)(1)(B) duties, "—that is, collective bargaining or grievance adjustment, or . . . any activities related thereto."

A Union's threat made to supervisors because they have performed struck unit work, as is the case in a union's discipline of supervisor-members for crossing a picket line for that reason, would seemingly appear not to be violative of Section 8(b)(1)(B) because the Court has already held in *Florida Power & Light*, supra, that a union's discipline of supervisor-members was not a violation of Section 8(b)(1)(B) because the supervisor-members were clearly not engaged in covered collective bargaining, or adjustment of grievances, or any activity related thereto for their employer, when they crossed the the Union's picket line during an economic strike and performed rank-and-file struck work for their employer, for which they were disciplined.

The Board must make an eventual finding that the Union's sanction (threat) may adversely affect the representative's performance of 8(b)(1)(B) covered duties before the 8(b)(1)(B) violation can be sustained. It is a familiar principle that it is the responsibility of the administrative law judge to apply Board precedent which the Supreme Court or the Board has not overruled. Of course, it ultimately remains the burden of the General Counsel to sustain the proof of the

unfair labor practice alleged in the complaint, by a preponderance of all the relevant evidence, *International Computaprint Corp.*, 261 NLRB 1106, 1107 (1982).

Klein and Fitzpatrick are both management representatives. Each has been directly involved in the recent past as management representatives engaged in the functions of collective bargaining and the adjustment of grievances for Klein News. There is no evidence presented, however, that Klein or Fitzpatrick was either a member of the Union, or disciplined by the Union as such in times material herein.

Nonetheless, the General Counsel contends that a finding of an 8(b)(1)(B) violation on the Cika threat to Klein is supported herein, on the basis of the Board's (earlier) holding in *Teamsters Local 856*, 195 NLRB 967, 971 (1972). In *Teamsters Local 856*, the Board has affirmed findings of the administrative law judge who had determined that a (multi-employer association) management representative, who had been assaulted and battered by a union business agent at a picket line site of a member-employer of the association, was functioning as a representative of that the Employer when he had advised a driver (immediately before the union business agent's assault) in regard to the question of the driver crossing the union's picket line, to do what the driver thought was right.

It was specifically found therein that the conduct of the management representative had definitely related to a matter of contract application and potential grievance; and, the Board affirmed the finding that the violence perpetrated by the union's business agent upon the management representative (Briggs) had violated Section 8(b)(1)(B) of the Act.

Of the effect of violence, or threats of violence, in *Teamsters Local 856*, supra, the administrative law judge had also said, with seeming approval of the Board, in later adopted findings, that:

Where the necessary result of violence or threats in a labor dispute would limit the ability of a management representative or supervisor to perform his bargaining or grievance functions, it would accordingly appear to be covered by the rationale of the fine cases, and, therefore, also constitute a violation of section 8(b)(1)(B) even though the violence or the threats were not directed towards compelling retention or rejection of a particular bargaining representative or person handling grievances. Herein the violence was directed toward Briggs as a management representative at a time when he was engaged in performing functions as such. Inextricably the violence might stop the truck, but it also necessarily would restrain and coerce Briggs in performing his functions.

There appears some suggestion therein that there may have also been a consideration extended to the possible effect on the general loyalty interests of management representatives, a factor no longer viable as a consideration in these matters, cf. *Florida Power & Light*, supra.

In any event, both the General Counsel and the Employer would appear to additionally rely on rationale such as was later applied in the holding of *Broadway Hospital, Inc.*, 244 NLRB 341, 345-346 (1979). There it was (again) found that a union had violated Section 8(b)(1)(B) by the conduct of its business agent(s), who had, in a provocative and coercive

manner, repeatedly threatened and verbally and vulgarly abused an attorney who was the employer's collective-bargaining negotiator.

The union's business agents had also otherwise engaged in threatening conduct, including committing certain assaults and batteries that were made upon (other) company attorneys who represented the employer. The Employer has contended relatedly that Cika's threat of physical harm made directly to Klein was also of nature specifically designed to adversely affect the Employer's (Klein News's) chosen bargaining representative (Klein) in the performance of his collective-bargaining tasks.

With regard to the Cika threat of physical harm to President and Owner Klein, the Union firstly defends by calling for the dismissal of any business agent threat made to Klein as a violation of Section 8(b)(1)(B), for the same reason that the Board has long heretofore interpreted Section 8(b)(1)(B) as not protecting a supervisor-member from union sanctions (fine), in circumstances where the supervisor-member is also the sole owner of the employing company, *Sheetmetal Workers Local 146 (Arctic Heating & Cooling Co.)*, 203 NLRB 1090 (1973). Accord: *Heat & Frost Insulators Local 19*, 211 NLRB 592, 594-594 (1974); and *Bricklayers Local 1 (Barr Floors, Inc.)*, 209 NLRB 820 (1974).

The Union would have it observed relatedly that in *Bricklayers Local 1*, supra at 822, the Board approved the holding that any attempt to distinguish between an incorporated employer (as, e.g., Klein News here) and a sole stockowner (Klein) must fail. The Union advances further reliance on *Glaziers & Glassworkers Local 1621*, 221 NLRB 509, 512 (1975), where the Board plainly stated (at least) as applicable to alleged coercion arising from a union sanction of a supervisor-member who is the employer:

There is no restraint or coercion against the employer in the selection of his representatives for the prohibited objects where the employer himself is acting as the representative for these purposes. This dichotomy in treatment of union sanctions imposed on an employer's supervisors as opposed to those levied directly against the employer himself may also be explained by the fact that it is difficult to envision circumstances where the employer would be greatly influenced in the performance of his grievance-adjustment or collective-bargaining functions where any decision he makes in those respects directly works to his benefit or detriment depending on how he decides it. [Emphasis in the original.]

The General Counsel would appear to have essentially countered that a different rationale of violation should apply in a case of violence, or the threat of violence. In any event, the General Counsel has in that regard further argued that a threat of extreme physical violence such as is evidenced herein, viz, that if this continued Klein would end up in the hospital, would surely tend to influence Klein in the performance of his undertaken 8(b)(1)(B) collective-bargaining or grievance adjustment functions (or closely related activities) on behalf of the Employer.

The Employer argues relatedly that *Glaziers & Glassworkers Local 1621*, supra, and similar such cases, do not hold that a union can never violate Section 8(b)(1)(B) if the

owner acts as his own negotiator. The Employer contends to the contrary (though without apparently any further citation of supporting authority), that such a union's interference (sic, but coercion and restraint) of an employer is violative of Section 8(b)(1)(B), even where an owner has chosen himself to be the Employer's representative to negotiate with the Union.

The Board's earlier holding in *Heat & Frost Insulators Local 19 (Insulation Industries)*, 211 NLRB 592, 593 (1974), however, if it does not suggest the contrary (at least in union discipline case), it would appear (at least) dispositive of any urging being presently made by the Employer herein that there is any substantial distinction to be made in this matter between Klein News, and Klein as selected bargaining representative of Klein News. Accordingly, I firstly conclude and find here (as was found on the similar facts there), that for the material purpose of any alleged violation of Section 8(b)(1)(B), as sole stock owner, Klein is to be viewed herein as the same legal entity as Klein News, thus as the Employer.

The resolution of the issue then (at least), insofar as Cika's direct threat of physical harm to Klein is asserted to be violative of Section 8(b)(1)(B), would appear to squarely rest on the contention being made for application of a different rationale on the coercion arising in the case of a direct threat of physical harm to an employer, that supports an 8(b)(1)(B) violation. One major consideration then is whether the Cika threat of physical injury to Klein has coerced Klein within the meaning of Section 8(b)(1)(B), although (in other circumstances) the pressure arising from a Union's sanction discipline would clearly not have coerced Klein, as the Employer, under the above Court, and Board precedent.

Business Agent Cika's threat of physical harm to influence Klein (as the Employer) can not be regarded in any acceptable sense as but a permissible appeal of the Union to influence an exercise of Klein's (the Employer's) financial or economic interest that the Employer can be relied upon to evaluate in its own best interests, as in the case of a fine imposed upon a supervisor-member of the Union, who is an employer. In the latter instance a supervisor-member, who is an employer, is deemed essentially able to evaluate where his real financial or economic interest may lie.

In contrast here, the very nature of the Cika threat that Cika would essentially inflict such physical harm upon Klein that Klein would end up in the hospital, if Klein persisted in his present course of action in having nonunit employees, inter alia, Klein himself, and the Employer's managers/supervisors do the unit work, could only serve in the above circumstances to have the economic dispute then existing between the Employer and Union resolved by the debilitating persuasion of a clearly coercive force, effectively preventing any prospect of a Klein-reasoned evaluation of the Employer's economic position as in the case of permitted union discipline of a supervisor-member who is an employer.

Thus, I agree with the General Counsel that the coercive threat in general calls for a different rationale approach in the evaluation of the 8(b)(1)(B) violation; and I conclude and find relatedly that the coercion associated with such a threat of physical harm to Employer Klein is not to be viewed at all the same as the perceived manageable pressure arising from union discipline of a voluntary supervisor-member who is also an employer.

The question then, in so far as Klein 8(b)(1)(B) coercion is concerned, is not whether Klein was coerced by the threat, but rather whether Klein, in arranging for Klein, and the Employer's other supervisors, and others to perform the unit work on April 17, if and when unit employees did not show to perform the assigned unit work, is engaged in covered 8(b)(1)(B) functions under the holdings of *Electrical Workers Local 340*, supra; and/or *Oakland-Mailers*, supra; or whether the circumstances of the economic dispute presented herein, in final analysis, are essentially the same as existed in *Florida Power & Light*, supra, and thus controlled by that holding.

The facts of this case appear in the end thus to present some measure of *Oakland-Mailers* and *Florida Power* tension arising anew from the Employer's (Klein's) basic contract interpretation and Klein's continued related bargaining process leading up to the Employer's April enforcement of the Employer's last offer terms, as a thus indicated covered 8(b)(1)(B) function (viz, contract interpretation and/or collective bargaining), and, *Florida Power & Light's* central determination that a supervisor(-member)'s performance of struck work is not to be regarded as an 8(b)(1)(B) function (albeit here occurring neither during a declared strike, nor behind a union picket line, as in *Florida Power & Light*, supra).

The General Counsel has argued alternatively, that since the Cika threat of physical harm to President Klein was extreme, and had occurred openly on the plant floor, it occurred in circumstances under which it was surely likely to also come to the attention of Vice President and General Manager Fitzpatrick, whom the General Counsel asserts is clearly not the Employer, and as clearly is shown to be a management representative who in material times had possessed and exercised an employer-designated representative status for the purposes of both collective bargaining, and the adjustment of grievances.

Under rationale urged as similar to that heretofore found applicable by the Board in construing certain union threats made to supervisor/managers in the presence of employees as there effecting an 8(b)(1)(A) restraint and coercion of employees in the exercise of their Section 7 rights, the General Counsel contends an 8(b)(1)(B) restraint and coercion of Fitzpatrick is similarly made out by the likely coercive effect on Fitzpatrick of the Union's threat to Klein. The Union in turn has relatedly urged that the degree of Fitzpatrick's own ownership of profitsharing stock in the Employer, which is second only to Klein, is such as should then be viewed to constitute the equivalent of an offset ownership interest in him.

The Employer also contends alternatively, but even more broadly, that since Cika's threat to President Klein would reasonably have been overheard and/or conveyed to all of the Company's managerial staff (at least), certain of which were present on April 17, Cika's threat of physical injury to Klein has restrained and coerced Klein News selection of its representatives (for collective bargaining and adjustment of grievances) in that neither the Employer's owner or any other managerial/supervisory staff member would be thereafter willing to represent the Company in (contract/grievance) dealings with the Union.

There is no persuasive evidence presented that any managers/supervisors other than Klein and Fitzpatrick have actually engaged in 8(b)(1)(B) covered duties. Apart from the

argument(s) being urged by both the General Counsel and the Employer as applying to President and Owner Klein, and to Vice President and General Manager Fitzpatrick, it seems to me that the Employer is here (essentially) advancing as an alternative argument for an urged 8(b)(1)(B) coercion, one that is essentially based on a contended effect the threat would have on the general loyalty of its other managers/supervisors and/or on the employer-perceived limitation of the possibility of their future willingness to serve in some 8(b)(1)(B) representative capacity on a "reservoir doctrine" type rationale.

However, the Board's prior rationale for an application of the referenced "reservoir doctrine" (involving the concept that supervisors not presently possessing covered 8(b)(1)(B) functions no less constitute a pool, or "reservoir" of supervisors available for selection as 8(b)(1)(B) representatives) is one that has been addressed and specifically rejected by the Supreme Court, *NLRB v. Electrical Workers Local 340*, supra, 481 U.S. at 575. The Board has since held, e.g., that a union's discipline of supervisor-members violates Section 8(b)(1)(B) only if those individuals actually perform collective bargaining or grievance adjustment functions, *Paperworkers Local 5*, 294 NLRB 1168 fn. 3 (1989).

The Employer's arguments based on Cika's threat to Klein also producing 8(b)(1)(B) coercion and restraint of supervisors other than Klein and Fitzpatrick, who are not shown of record to participate in collective bargaining, or grievance adjustment, or related functions in the circumstances presented in this case, are thus presently concluded to be without merit.

In so far as the Union would contend that Fitzpatrick is also an employer, in *Glaziers & Glassworkers Local 1621*, supra, 221 NLRB at 513, the Board held that individuals who "either personally, or together with other family members, had more than 25-percent ownership interest in their companies are employers." It follows logically that those who have less than the stated 25-percent interest, are not to be viewed as employers. It would also appear to follow as readily to be concluded therefrom that the Union's related argument that is based on Fitzpatrick's substantial profitsharing stock interest, but which is clearly shown not to be an enterprise ownership interest under the above existing Board precedent, is not the type of ownership in Klein News that is sufficient to constitute Fitzpatrick an employer.

The above Cika threat of physical harm to Klein was such as to reasonably produce a direct and immediate coercive effect on Klein. Moreover, that coercive effect as an 8(b)(1)(B) consideration then would appear to draw arguable additional support in the Supreme Court's observation that, "Direct coercion of an employer's selection of a § 8(b)(1)(B) representative would always be a 8(b)(1)(B) violation whether or not the union has or seeks a bargaining relationship with an employer." *NLRB v. Electrical Workers Local 340*, supra at 576 fn. 13. In my understanding of the above precedents however, showing must still be made that the threat had an effect on Klein, as the Employer, in carrying out a covered 8(b)(1)(B) function, viz, in selecting the Employer's representatives for covered functions, or, as the Employer's selected representative actually engaged in those functions of collective bargaining, grievance adjustment, or closely related activity, such as in contract interpretation.

Fitzpatrick is clearly an employer management representative who had exercised covered functions within the meaning of Section 8(b)(1)(B) in the recent past. I am also persuaded by the General Counsel's arguments and I find that the Cika threat objectively viewed would reasonably have produced the same claimed coercive effect on Fitzpatrick, as it did on Klein. In the case of Fitzpatrick (as well as with Klein) however, a showing must still be made that the Cika threat of physical harm to Klein, had an effect on Fitzpatrick's carrying out a covered 8(b)(1)(B) function of "collective bargaining, grievance adjustment, or some other closely related activity (e.g., contract interpretation, as in *Oakland Mailers*)."

An additional consideration arises in this instance whether the fact that Fitzpatrick was initially not actually engaged in performing a covered function that morning, is as significant in the coercive circumstance of a threat as it is in union discipline cases, where the discipline itself must be shown awarded for the supervisor-member's actual engagement in a covered function.

On April 17, neither Klein nor Fitzpatrick was engaged in the direct selection of an Employer's representative for either purpose of collective bargaining or the adjustment of grievances. Neither was the Union, through the conduct of its business agents that day, reasonably shown to be seeking to directly influence the Employer's choice of representative designations in that regard. The only viable theory of 8(b)(1)(B) violation in this case is thus that of alleged union coercion of an employer-representative's engagement in covered collective bargaining, adjustment of grievances, and/or, in the closely related collective-bargaining activity of *Oakland-Mailers'* contract interpretation.

Initially, Fitzpatrick was not involved during the morning of April 17, in collective bargaining, or adjustment of grievances, or even in doing the unit's work at the time, but rather in getting the drivers' (another unit's) work out that morning. Union discipline of a supervisor-member, who is not an employer, who performs covered functions, but was not engaged in such activities, and was not disciplined for same, would not violate Section 8(b)(1)(B).

The overall question may then be more precisely put, whether a violation of 8(b)(1)(B) is made out on Union Business Agent Cika's threat of violence to Klein, either by virtue of having produced a direct coercive effect on Klein as Employer for a proscribed 8(b)(1)(B) selection of representative object; or, by the threat producing an indirect coercion of the Employer by the threat's coercive effect on Fitzpatrick in the future, since though Fitzpatrick was initially not actually engaged in a covered 8(b)(1)(B) function Fitzpatrick would reasonably be expected to be involved in covered functions in the future and the threat would reasonably have a continuing coercive effect on Fitzpatrick in that sense, if the threat be shown sufficiently related to covered function.

E.g., as general manager, Fitzpatrick would in the future surely be routinely instrumental in carrying out the Employer's newly implemented last offer terms. When the business agents arrived and began to confront the assembled workers with assertions that they should stop doing the unit's work, Fitzpatrick at that point had directed certain nonunit workers to stop doing the unit work. Although in that respect, Fitzpatrick may be viewed to have participated in the same activity as Klein for purposes of an 8(b)(1)(B) threat, he es-

entially was not engaged in a covered function at the time. The former consideration of reasonable reach of the threat's coercion to future enforcement activity is deemed the more substantial consideration.

In that regard, a threat of physical harm (particularly of type presented here) may be viewed to have an ongoing effect for a reasonable period. In my view, such a threat need not occur at the time the 8(b)(1)(B) representative is functioning as such, to have a coercive effect on that function, but rather it is enough if, as here with Fitzpatrick, the 8(b)(1)(B) representative has performed covered functions in the recent past and reasonably appears likely to be called on to do so in the near future; provided, however, that the threat is shown in the first instance as directly related to an exercise of a covered function. In regard to the evaluation of the nature of that activity as actually constituting an 8(b)(1)(B) covered function, Fitzpatrick would appear to stand in no better position than Klein, who was that morning more directly involved.

In one sense Klein may be firstly viewed as inextricably involved in a continued pursuit of Klein's (the Employer's) initial and underlying basic contract-interpretation position (a position held contrary to the Union's interpretation thereof), viz, that the prior contract had not renewed by its terms; and secondly, that Klein (the Employer) was continuously engaged thereafter in pursuit of his (the Employer's) collective-bargaining position based thereon that had previously encompassed the Employer's bargaining lawfully to impasse on its last offered terms for a new contract; a previously announced the employer implementation of those terms; and, presently, essentially an employer enforcement of that collective-bargaining position on April 17.

On the other hand the similarity between Klein and other supervisors' performance of unit work (in the absence of unit employees), which I have concluded and found was essentially struck unit work that morning, albeit Klein and managers/supervisors did not cross a picket line to perform it, is deemed very akin to the circumstances considered in *Florida Power & Light*, in which no violation of Section 8(b)(1)(B) was found, because the supervisors in performing the rank-and-file struck work there, were found not to be engaged in collective bargaining, grievance adjustment, or any closely related activity. It appears that it was not the circumstance that a supervisor was a member of the union that caused the performance of rank-and-file work by supervisors to be viewed as not covered 8(b)(1)(B) function. Rather it was the different nature of the rank-and-file work being performed by the supervisor in economic dispute circumstances that was in my view the paramount consideration, in the Court's view in *Florida Power & Light*, that covered 8(b)(1)(B) function was not there involved. Although the dispute's origin in the collective-bargaining process was present there, it was not the controlling factor.

Thus, in another view, the Employer and the Union, here as there, were involved in essentially an economic dispute, one which, if not as visibly ongoing, or accompanied by an actual or declared strike, is no less identifiable as essentially reflecting an ongoing economic contract dispute, with employees concertedly withholding their labor from scheduled work activity; and thus, in my view, a case presentment to be deemed very much akin in nature to that presented in *Florida Power & Light*, supra.

Cika's threat was not directed at affecting the selection, or election of Klein as a negotiator for the Employer. Although the issue is otherwise deemed close, I conclude and find that the instant case circumstances essentially describe supervisory performance of rank-and-file work on an occasion of unit employees withholding labor in context of an ongoing economic dispute, and thus essentially depicts a contract economic dispute of the type addressed in, and, in my view, controlled by the holding of *Florida Power & Light*, supra, argued by the Union.

Accordingly, I shall recommend that the complaint allegation that by Cika's threat of physical harm to Klein, Respondent Union has violated Section 8(b)(1)(B), be dismissed on the basis that neither Klein nor Fitzpatrick at the time were engaged in covered 8(b)(1)(B) functions.

The complaint also alleged that Respondent Union violated Section 8(b)(1)(B) by the conduct of Business Agents Vorrell and Letner following Fitzpatrick home on June 22. Fitzpatrick was not involved in any function of his selected 8(b)(1)(B) representative status at that time.

Thus Fitzpatrick was not engaged in the evening of June 22 in collective bargaining, adjustment of grievances, or any closely related matter. Neither was he involved on that occasion in an act in support, or in pursuit of any apparent interpretation of the prior contract. I thus agree with the Union's contention that essentially Section 8(b)(1)(B), as explicated by the Supreme Court and the Board above, simply doesn't extend a protective coverage to the Employer from the coercive conduct of Business Agents Vorrell and Letner complained of herein.

As it is the burden of the General Counsel to establish the commission of the unfair labor practice by a preponderance of all the relevant evidence, and the evidence presented doesn't establish that Respondent Union has violated Section 8(b)(1)(B) by the conduct of its business agents, Vorrell and Letner, following Vice President and General Manager Fitzpatrick all the way home on June 22, I shall recommend that this allegation also be dismissed.

CONCLUSIONS OF LAW

1. International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local No. 507 (Respondent Local 507) is a labor organization within the meaning of Section 2(5) of the Act.

2. George R. Klein News Company (Klein News) is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

3. By the conduct of its business agent, John J. Cika, at Klein News' facility in Cleveland, Ohio, in threatening Klein News President and Owner George R. Klein, in the presence of employees, that Klein was going to end up in the hospital if Klein and certain other individuals did not desist from performing work ordinarily performed by the employees represented by the Respondent Union, Respondent Local 507 has thereby engaged in conduct in violation of Section 8(b)(1)(A) of the Act.

4. By Union Business Agent Terry Freeman's statements made to employees at breaktime in Klein News' facility at Cleveland Ohio, that if they (employees) did cross the Respondent Union's picket line someone would get hurt; that the Teamsters have a big union, and there would be a lot of people out there, around 300; and that (though) there would

or could be police protection, it wouldn't be available at all times, and somebody could get hurt; and that if someone got hurt, no one would know who did it to them, Union Business Agent Freeman has thereby effectively threatened employees with the possibility of physical harm if they were to cross the Union's picket line; and, by such conduct, Respondent to Local 507 has restrained and coerced employees in the exercise of their Section 7 right to refrain from union and other protected concerted activity, in violation of Section 8(b)(1)(A).

5. Respondent Union has not violated the Act other than as found above.

REMEDY

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

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended²

ORDER

The Respondent, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local No. 507, Cleveland, Ohio, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Threatening Klein News President and Owner George R. Klein, in the presence of employees, that Klein is going to end up in the hospital if Klein and certain other individuals do not desist from performing work that is ordinarily performed by the employees represented by the Respondent Local 507, in violation of Section 8(b)(1)(A) of the Act.

(b) Telling employees at breaktime in Klein News' facility at Cleveland Ohio, that if the employees cross Respondent Local 507's picket line, someone would get hurt; that the Teamsters have a big union, and there would be a lot of people out there, around 300 and that (though) there would or could be police protection, it wouldn't be available at all times, and somebody could get hurt; and that if someone got hurt, no one would know who did it to them, thereby effectively threatening employees with the possibility of physical harm if they were to cross the Union's picket line; and, thereby restraining and coercing employees in the exercise of Section 7 right to refrain from Union and other protected concerted activity, in violation of Section 8(b)(1)(A).

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

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

(a) Post at its office and meeting halls in Cleveland, Ohio, copies of the attached notice marked "Appendix."³ Copies

²If 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.

³If 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

of the notice, on forms provided by the Regional Director for Region 8, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to members and employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the no-

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."

tices are not altered, defaced, or covered by any other material.

(b) Sign and return to the Regional Director sufficient copies of the notice for posting at the premises of the Employer, George R. Klein News Company, if willing, at all places where notices to employees are customarily posted.

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

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.