

Farris Fashions, Inc. and Amalgamated Clothing and Textile Workers Union, Southwest Regional Joint Board. Cases 26-CA-14258 and 26-RC-7323

September 30, 1993

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
DEVANEY AND RAUDABAUGH

Issues presented for the Board's review in this case are whether the judge correctly found that: (1) the Respondent violated Section 8(a)(1) by threatening employees with plant closure and the loss of jobs, interrogating an employee about her union activities, and by polling employees concerning their antiunion sentiments; (2) the Respondent violated Section 8(a)(3) by laying off employees Kay Vandergriff and Denise Armstrong; and (3) the Respondent's unlawful conduct invalidated the results of an election held on December 14, 1990, and so adversely affected prospects of a fair rerun election in the foreseeable future as to warrant a remedial bargaining order.¹

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,² and conclusions³ and to adopt the recommended Order as modified.⁴

¹ On July 2, 1992, Administrative Law Judge Elbert D. Gadsden issued the attached decision. The General Counsel and the Respondent filed exceptions and supporting briefs. The Charging Party filed cross-exceptions and a supporting brief. The General Counsel, the Respondent, and the Charging Party also filed answering briefs. The Charging Party filed a reply brief to the Respondent's answering brief.

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.

The judge erroneously stated that employee Shirley Davis' credited testimony was uncontroverted in reference to Supervisor Louise Hill's solicitation of employee orders for and distribution of "Vote No" T-shirts. We therefore rely only on the judge's assessment of Davis' demeanor in affirming his credibility finding about her testimony.

³ We make the following corrections to errors in the judge's decision:

1. In par. (c) of the Conclusions of Law, the judge states that the Respondent violated Sec. 8(a)(1) by interrogating employees on three occasions. The judge, however, only discussed and found a single incident of unlawful interrogation (employee Vandergriff).

2. We amend par. (f) of the Conclusions of Law to state that the issuance of a bargaining order is recommended in Case 26-CA-14258 rather than in Case 26-RC-7323.

3. Contrary to a statement in the judge's decision, court reporter Carol Orman neither appeared nor testified at the hearing.

4. Contrary to a statement in the section of the judge's decision entitled "Appropriate Unit—Inclusion—Exclusion" the correct tally of ballots was 202 votes against and 62 votes for unionization.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Farris Fashions, Inc., Brinkley and Hazen, Arkansas, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Insert the following as paragraph 2(b) and reletter the subsequent paragraphs.

"(b) Remove from its files any reference to the unlawful layoffs of Kay Vandergriff and Denise Armstrong, and notify them in writing this has been done and that the layoffs will not be used against them in any way."

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

IT IS FURTHER ORDERED that the election in Case 26-RC-7323 be, and the same is, set aside, and that the petition in Case 26-RC-7323 be dismissed.

⁵ Interest on backpay due pursuant to the judge's remedy shall be computed as set forth in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), not *Florida Steel Corp.*, 231 NLRB 651 (1977). Furthermore, in adopting the judge's recommendation of a broad cease-and-desist order, we rely on the legal standard of *Hickmott Foods*, 242 NLRB 1357 (1979), not *NLRB v. Entwistle Mfg. Co.*, 120 F.2d 532, 536 (4th Cir. 1941).

⁴ We shall order that the election in Case 26-RC-7323 be set aside and that the petition in that case be dismissed. We shall also modify the judge's remedy to include provisions for the expunction from the Respondent's files of references to the unlawful layoffs of employees Kay Vandergriff and Denise Armstrong.

APPENDIX

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

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

Section 7 of the Act gives employees these rights.

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

WE WILL NOT repeatedly threaten employees with plant closure if they select the Union as their bargaining representative.

WE WILL NOT threaten employees with loss of their jobs if they select the Union as their collective-bargaining representative.

WE WILL NOT coercively interrogate employees about their union activities, interest, or sympathies.

WE WILL NOT poll employees concerning their antiunion sentiments by asking them to sign a sheet for or to collect antiunion shirts at a designated place by us.

WE WILL NOT discriminatorily lay off employees because they actively and openly support unionization.

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

All our employees are free to become, or remain, or refuse to become or remain, members of Amalgamated Clothing and Textile Workers Union, Southwest Regional Joint Board, or any other labor organization.

WE WILL, on request, bargain collectively and in good faith with Amalgamated Clothing and Textile Workers Union, Southwest Regional Joint Board, commencing as of November 10, 1990, as the exclusive collective-bargaining representative of the employees in the appropriate unit described below with respect to rates of pay, wages, hours of work, and other terms and conditions of employment:

All production and maintenance employees, warehouse employees, shipping employees and quality control employees employed by us at our Brinkley and Hazen, Arkansas facilities, but excluding all office clerical employees, salespersons, plant clericals, professional employees, technical employees, guards and supervisors as defined in the Act.

WE WILL remove from the files of Kay Vandergriff and Denise Armstrong any reference of their unlawful layoffs, and notify them in writing this has been done and that the layoffs will not be used against them in any way.

WE WILL embody in a signed agreement any understanding reached with the Union on behalf of the afore-described bargaining unit .

WE WILL recall Kay Vandergriff and Denise Armstrong to their former positions or, if those positions are not available, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

FARRIS FASHIONS, INC.

William D. Leavy, Esq., for the General Counsel.

Barry Fredericks, Esq., of Birmingham, Alabama, and *Dan Kennett, Esq.*, of Little Rock, Arkansas, for the Respondent.

Carl Bush, Esq. and *Scott Trotter, Esq.*, of Little Rock, Arkansas, for the Charging Party.

DECISION

STATEMENT OF THE CASE

ELBERT D. GADSDEN, Administrative Law Judge. A charge and an amended charge were filed on January 17 and March 7, 1991, respectively, by Amalgamated Clothing and Textile Workers Union, Southwest Regional Joint Board (the Union or the Charging Party), against Farris Fashions, Inc. (the Respondent). On March 8, 1991, the Regional Director for Region 26 issued a complaint against the Respondent.

In essence, the complaint alleges that during a union organizing campaign, the Respondent interfered with, restrained, and coerced its employees in violation of Section 8(a)(1) of the Act as follows: On 14 occasions during speeches, in meetings or in letters to employees, Respondent threatened employees with plant closure, if they selected the Union as their collective-bargaining representative; threatened employees on two occasions with loss of employment if they selected the Union as their bargaining representative; interrogated employees on three occasions about their union activities, interest, or sympathies; polled employees concerning their antiunion sentiments by asking them if they wanted an antiunion T-shirt; that by laying off employees, Respondent discriminated against the hire or tenure of employment of employees because of their union activities, in violation of Section 8(a)(1) and (3) of the Act; and that because of the afore-described alleged violations, the Charging Party has requested among other remedies, the issuance of a bargaining order.

On March 25, 1991, Respondent filed an answer denying the allegations as set forth in the complaint.

The hearing in the above matter was held before me in DeValles Bluff, Arkansas, on June 3-6 and July 29-31, and in Clarendon, Arkansas, on August 26-28, 1991. Briefs have been received from counsel for the General Counsel, counsel for the Charging Party, and counsel for the Respondent, respectively, which have been carefully considered.

On the entire record in this case, including my observation of the demeanor of the witnesses, and my consideration of the briefs filed by respective counsel, I make the following

FINDINGS OF FACT

I. JURISDICTION

At all times material, Respondent has maintained offices and places of business in Brinkley and Hazen, Arkansas (Respondent's facilities), where it has engaged in the manufacture of clothing.

During the 12-month period ending December 31, 1990, Respondent, in the course and conduct of its business operations described above, sold and shipped from Respondent's facilities products, goods, and materials valued in excess of \$50,000 directly to points outside the State of Arkansas.

During the 12-month period ending December 31, 1990, Respondent, in the course and conduct of its business operations described above, purchased and received at Respondent's facilities products, goods, and materials valued in excess of \$50,000 directly from points outside the State of Arkansas.

The complaint alleges, the answer admits, and I find that Respondent is now, and has been at all times material, an

employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The Union is now, and has been at all times material, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICE

A. Background Information

Respondent is a corporation with facilities in Brinkley and Hazen, Arkansas, where it is engaged in the manufacture of clothing (primarily men's flannel shirts and jogging shorts) for the retail firm of Wal-Mart (principal owner Sam Walton).

Almost immediately after the Union commenced organizing the Respondent's employees, Respondent's principal owner, Farris Burroughs Sr., made a captive audience speech to employees on the validity of Respondent's right to close or remain in business, if the employees selected the Union as their collective-bargaining representative. In support of their position he cited a Supreme Court case as authority for such right. Thereafter, Respondent's principal owner, Farris Burroughs Sr., made or authorized other such captive audience speeches and issued two antiunion letters to employees.

A few supervisors and some antiunion employees made statements or arguments against unionization. The testimony of what Respondent said in the meetings to employees is somewhat conflicting, as well as the testimony of employees versus that of supervisors and a few antiunion employees. Employees testified that Respondent's speeches threatened plant closure, employees' loss of work, and involved interrogation of employees about their union activities, and layoff of employees, while the Respondent denies any unlawful conduct.

A stipulated election agreement was approved by the Regional Director and an election later held on December 14, 1990. The election results were 60 votes for the Union, 202 votes against the Union, and 23 undeterminative challenges. The Union timely filed objections to the conduct allegedly affecting the election results.

The answer admits that the following named persons occupied the positions set opposite their respective names, and that they are now, and have been at all times material, supervisors of Respondent within the meaning of Section 2(11) of the Act, and agents of Respondent within the meaning of Section 2(13) of the Act:

Farris Burroughs Sr.	Owner and Plant Manager
Ella Cook	Assistant Plant Manager
Betty Dilworth	Supervisor
Barbara Brooks	Supervisor
Emma Cook	Supervisor
Louise Hill	Supervisor

The answer denies that the following named persons have been and are now agents of Respondent within the meaning of Section 2(13) of the Act:

Willie Ryland	Mae Covington
Katherine Palmer	John Deen Jr.

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

All production and maintenance employees, warehouse employees, shipping employees and quality control employees employed by Respondent at its Brinkley and Hazen, Arkansas, facilities, but excluding all office clerical employees, salespersons, plant clericals, professional employees, technical employees, guards and supervisors as defined in the Act.¹

B. Employee's Union Organizing Activities and Respondent's Response Thereto

The uncontroverted evidence of record shows that on October 18, 1990, the Union, using members of its staff and voluntary organizers, solicited signatures of Respondent's employees on authorization cards. All signed cards were turned in to Marc Panepinto, the Union's lead organizer, on the date appearing on the card or the day thereafter. A majority of the signed cards were received by Panepinto for the Union by late October 1990.²

Respondent's owner, Burroughs Sr., acknowledged he became aware of the Union's organizing effort in a telephone call on or about October 19-21.

He testified he immediately tried to learn how to give employees the 60-day warning notice of closing his plant under the new law. He contacted Dan Ward, a small dealer in shirt-making equipment, with whom he discussed selling his equipment to learn how much he could get for it. Dan Ward surveyed all of Respondent's equipment by class, age, and category but Respondent did not sell the equipment.

Dan Ward testified and corroborated Burroughs Sr.'s October 24 telephone call for an appraisal of equipment in contemplation of selling the plant's equipment because union organizing activities were in progress at his plant, and he was examining his options. Ward told Respondent it could get most of its money out of the equipment purchased from him. He also said he kept his appraisal report for a month or two after the Union was defeated in the election. Respondent did not ask Ward to sell any of its equipment.

Company Speeches to Employees

Respondent's owner, Burroughs Sr., testified he made company-called meetings speeches on company time to employees shortly after he learned about the union organizing effort in October. Employees who attended the meetings where the speeches were made testified as follows:

Carla Hicks testified that in October or November, Burroughs Sr. told them "if the employees didn't stop messing around with the Union, . . . he would shut the doors"; that "he could afford the rent on the plant and he would turn it into a chicken coop; that if they did not stop messing around with Sam Walton, officer of Wal-Mart, who places orders or contracts with Respondent to make shirts and shorts, that Walton would pull his contract" with Respondent; and "that

¹ The above facts are not in conflict or dispute in the record.

² All dates hereinafter referred to occurred in 1990 unless specified otherwise.

if the Union was voted in he would not bargain with the Union.”

Odessie Miller testified that in early November, Burroughs Sr. told them “that if we kept messing around with the Union people, that he would close his plant down if [sic] the Union came in and turn it into a chicken coop and sell horse manure”; if we “kept messing around with these people, Sam Walton, will not give Respondent anymore contracts if the Union comes in.”

Doris Grayson testified that in early November, Burroughs Sr. told them if the Union was voted in he would close the plant and turn it into a chicken coop and sell manure to farmers.

Shirley Davis testified that on at least four occasions, starting in late October, Burroughs Sr. told them “if the Union came in . . . he could close the plant and he would do that”; that in his October speech, Burroughs Sr. told them the Union could not do anything “for us”; that near the end of the campaign, Burroughs Sr. told them “I am not saying that the company will close and I’m not saying the company will not close”; and in one meeting Burroughs Sr. said, if the Union came in, Sam Walton “wouldn’t do business with a Union company and that would cut our work if we didn’t stop . . . letting the people [Union] in our house.”

Mentry Bankston testified that in late October or early November, he told employees that Sam Walton “would not buy shirts from him if the Union came in because he would have to raise the salaries for employees . . .”; that Walton “wouldn’t buy union goods; that three weeks before the Union election he said if the Union came in he would turn the plant into a chicken coop if he wanted to”; and that “if the Union came in, he would close the doors, that he had the money to close.”

Rosie White testified that prior to November 14, Burroughs Sr. told them “he had the right, if the Union comes in, and he would use that right to shutdown”; that “he could turn it into a chicken coop” and he said something about manure; that he “could and would” shutdown if the Union came in and that Respondent’s customer, Wal-Mart, would not buy Respondent’s products if the Union came in.

Carolyn Adell testified that in early November, Burroughs Sr. told 100 of the employees “if we keep messing with the Union people, he . . . would close the plant down and turn the factory into a chicken coop.”

Kay Vandergriff testified that in October or November, Burroughs Sr. in his first meeting with the employees told them, in an angry manner “if we didn’t quit fooling with the Union, he would close the plant and turn it into a chicken coop and sell chicken manure.”

Lois DeGunion testified that in October, Burroughs Sr. was upset about the references to Walton—Wal-Mart in the Union’s leaflet, and told them if they kept on something and he would close the plant down and turn it into a chicken coop. An employee asked, can we sell the eggs? which was followed by some laughter from the audience.

Kimberly Ishmon testified that in October, Burroughs Sr. asked the employees “where was the Union when there wasn’t no jobs?”; and that if the Union came in he was going to close this place down and make it into a chicken coop.

Denise Armstrong testified that in October, Burroughs Sr., while upset, told them that some workers had got involved

with the Union—that if they didn’t leave this union mess alone, he would turn this place into a chicken coop.

In November, Burroughs Sr. presented to employees, an accountant, a judge, and attorneys. The accountant showed employees what he found Respondent could and could not financially afford. Thereafter, Burroughs Sr. asked the accountant, the judge, and the attorneys, “Can I afford a Union?.” The accountant, judge, and attorneys replied, “No he could not.” Burroughs Sr. stated he would not bargain with the Union.

However, Burroughs Sr. denied he said he would not bargain with the Union, but testified he said he did not have to agree to anything that was not financially feasible for Respondent, and that he “came here with nothing and would leave with nothing.”

Searcy Williams testified also that Burroughs Sr. told them “if you don’t stop messing with this union, you will be out of a job.” I will close the plant down and turn it into a chicken coop and sell chicken manure; that the week of October 22, he told them, “if we embarrass Wal-Mart enough, Wal-Mart would cut off our contract”; that the loss of Wal-Mart’s business would mean the plant would close and employees would be without jobs. Burroughs Sr. denied he said he would close the plant if a union came in.

With respect to the afore-described statements and speeches attributed to Burroughs Sr. denied that he ever told employees during the union campaign that he would close the plant down.

He testified he did tell them on October 19 or 20 that he had the right to close down according to the Supreme Court’s decision in *Textile Workers Union v. Darlington Mfg. Co.*, 380 U.S. 263 (1965), because the union had been telling the employees it was illegal for respondent to close because of the union campaign.

A tape made during a visit by the Union to employees’ homes informed employees it was against the law for an employer to close down the business because of unionization (p. 108, (1) R. Exh. 5). This information appeared on union leaflets.

Burroughs Sr. admitted that as soon as he heard about the union organizing campaign he told employees he was thinking about giving a 60-day notice. However, he said he has since changed his mind. The record, however, does not show that he informed the employees that he had changed his mind about the 60-day notice.

Respondent, Burroughs Sr., acknowledged he did not know about the *Darlington* case until after the union campaign started. He is not an attorney. He told employees he felt like Milliken in the *Darlington* case.

C. Respondent’s Antiunion Letters to Employees

On December 6, Respondent offered letters to employees pertinent parts of which are as follows:

We were just informed this week that another ARROW shirt plant in Jasper, Alabama, will be closed by the end of January. THE EMPLOYEES ARE OR “WERE” REPRESENTED BY THE “ACTWU.” This is just another detail the union has not told you about. The ACTWU will say “it is bad management.” Regardless OF WHAT THE REASON. THE FACT IS, the union can not

stop the company OR PROTECT EMPLOYEES' JOBS if a plant closes.

AT JASPER ALABAMA, OVER 520 EMPLOYEES ARE LOSING THEIR JOBS. WHAT IS THE ACTWU GOING TO DO ABOUT IT?—NOTHING. WHAT DID THE UNION DO FOR EMPLOYEES AT THE OTHER ARROW SHIRT PLANTS THAT CLOSED. LOSING OVER 2000 JOBS—*nothing* and what would the union do for you if our plant closed—*nothing*.

The union has told you that Farris Fashions, Inc. can't close the Company if a union is voted in. I am not saying the Company will close and I am not saying the Company will NOT close. I am saying that the union has lied to you as the United States Supreme Court said in a case involving this same union when a company closed after the union was voted in:

Employer has the absolute right to terminate his entire business for any reason he pleases, including anti-union bias.

You should be aware of the Company's right to close. You have to decide whether you want to take the chance of that happening here.

On December 14, 1990, you will have the opportunity to decide for yourself and I hope you decide to VOTE NO! [G.C. Exh. 6.]

On December 10, Respondent offered its employees another campaign letter which reads, in part, as follows:

TO ALL EMPLOYEES:

The ACTWU union organizers for several weeks now have been going to your home and mailing you information to try and win your vote on Friday. It is now time for me to point out the lies and misleading information that the union has been trying to fool you with.

UNION SAID: "The company cannot close because workers form a union-it is against Federal Law for the company even to threaten to close."

FACT IS: THE SUPREME COURT SAID "EMPLOYER HAS THE ABSOLUTE RIGHT TO TERMINATE HIS ENTIRE BUSINESS FOR ANY REASON HE PLEASES, INCLUDING ANTI-UNION BIAS. . . ." YOUR SUPERVISOR HAS A COPY OF THE CASE LAW.

UNION SAID: "Plants close because of bad management, not because workers form unions."

FACT IS: ALL PLANTS CLOSE BECAUSE OF MANAGEMENT'S DECISION GOOD OR BAD. PLANTS ALSO CLOSE BECAUSE WORKERS FORM UNIONS [G.C. Exh. 7].

D. Intervention of the Mayor of Brinkley

John Deen Jr.: Two years mayor of Brinkley, Arkansas, testified he has known Burroughs Sr. 14 or 15 years. On one occasion in November, he called Burroughs Sr. and told him he understood a union was expected at Respondent's plant and he was concerned about the impact of that on the local community.

On December 8 or 9, Burroughs Sr. invited Deen out to the plants office and told Deen that he had discussed the situation (union drive) with Wal-Mart, his sole customer for whom Respondent manufactures shirts for \$9 per dozen; and that Wal-Mart had told him it was paying Respondent more

than it can buy shirts from foreign markets, but that Wal-Mart is committed to the Buy America Program. Thereupon, Burroughs told Mayor Deen he felt any increase in the cost of his shirts to Wal-Mart (as a result of unionization) would result in a loss of the Wal-Mart contract with Respondent, and possibly force Respondent out of business.

Deen was asked if the following statement of his pretrial affidavit was true:

He [Burroughs] asked me to come out to the plant and visit about his concerns. He told me about the election. And he told me that if the union was voted in, he couldn't see how he could keep the contract with Wal-Mart and he was fearful he would have to close.

Mayor Deen testified that he volunteered to talk with Respondent's employees about his concerns with the local economy and Burroughs Sr. had no objections, however, he was not sure whether Burroughs Sr. asked him to talk to the employees.

Mayor Deen testified that he accepted Burroughs Sr.'s invitation to come to the plant. When he arrived at the plant, he said Burroughs Sr. said let's go out on the floor, and the latter showed him new machinery he had recently purchased for the plant. As they were returning to the office, the mayor told Burroughs Sr. Deen had visited some of Respondent's employees.

Mayor Deen further testified that during the union campaign, at the request of Burroughs Sr., he talked to Respondent's employees as follows:

I told them that we had lost jobs at Van Heusen and also at Howard Industries, and that whenever I talked to them about that, I said, "Now, you guys don't want to lose your jobs. You need your job more than you need anything else." I said "I don't know whether this will transfer into a loss of your job, but at least know all the facts before you go into that vote."

Meeting of Brinkley Board of Directors

Thereafter, on December 11, Mayor Deen testified he called a special meeting of the board of directors of the City of Brinkley, during which meeting he discussed his prior conversations with Burroughs Sr. that if unionization caused Respondent to raise its prices to Wal-Mart, Respondent would be without a contract, causing layoffs and potentially closing the plant.

E. Tape Recording

Motions on Transcription of Tape

During the trial a controversy arose between the parties over obtaining a transcription of one of Respondent's speeches delivered to the employees during the union campaign. Since some parts of the recorded tape are inaudible, the parties agreed for the tape to be transcribed by the reporter transcribing the instant proceeding, whose expertise was not questioned, and is described in the General Counsel's posthearing brief. A copy of that transcription was sent to all parties.

On October 3, 1991, counsel for the General Counsel filed a motion with me for admission of the transcription (G.C. Exhs. 202, 204) into evidence.

On December 3, 1991, counsel for Respondent filed a response to the General Counsel's motion for admission of 202, 204, objecting to the admission of Reporter Rita C. Pigmon's affidavit because Respondent did not have an opportunity to cross-examine Rita C. Pigmon; and that admission would be depriving Respondent of procedural due process, since Respondent contends, another equally qualified reporter (Carol Orman) who did appear and testified in this proceeding, provides an accurate transcription (R. Exh. C).

Counsel for Respondent submitted excerpts from both transcriptions and pointed out certain language discrepancies between the three transcriptions which are set forth in Respondent's motion.

After carefully examining and considering the General Counsel's Exhibits 202, 204 (transcription) along with Respondent's Exhibit C (transcription), and inaudible portions of the tape, I find that most aspects of the substance of both transcriptions constitute protected language under the First Amendment.

However, both transcribers stated that due to inaudible portions of the tape they could not certify their transcriptions for accuracy, but did their best to provide as accurate a transcription as possible. The substance of a great majority of the transcriptions do not present a problem because it does not present any relevant issues. The portions of the transcriptions which present pertinent issues on free speech, are those aspects which present language discrepancies resulting substantially from inaudible portions of the tape; and two transcriptions, one not certified and one certified, presented to Respondent by the General Counsel. Respondent cites the following discrepancies between the two versions presented by the General Counsel, and the one version presented by Respondent's transcriber:

General Counsel's first version, p. 2:

I'm saying that I have the right,

I have the right, recognize that right and to use that right. I don't mean transfer it around. I mean shut it completely down and liquidate the corporation.

General Counsel's second version, p. 7:

I'm saying that I have a right, *and I will properly recognize that right, and use that right. All this business, I don't want it transferred around, I'm going to shut it completely down and liquidate it, throw it away.*

The italicized portion of the second version Respondent contends differs from the first version, and the best transcription that Respondent could make of the same portion is as follows:

I'm saying that I have the right (inaudible) recognized that right and to use that right—close the business down—I don't mean transfer it around, I mean shut it completely down and liquidate the corporation.

Although the Respondent conceives these discrepancies as significantly relevant, I do not. Even a substantial portion of the credited testimony of record established that Burroughs Sr. and other authorized or approved speakers for the Re-

spondent stated in essence and/or emphasized Respondent's position as follows:

It's right, absolute right, and his right to use that right to shut down his plant; that he has the right and will "*properly*," [could have meant "*probably*"] recognize or use that right to close down business. To distinguish Respondent's probable contemplated shut-down from the employer in *Wiljef Transport v. NLRB*, 946 F.2d 1308 (1991), Respondent added: "I don't want it transferred around, I am going to shut it down completely and liquidate it, the corporation, throw it away."

I find that even without the presence of every audible word in the transcribed text of the speech, that the intelligible essence of what was said in the taped speech is clear and essentially consistent with the credited testimony of record. Consequently, General Counsel's Exhibits 202, 204, and Respondent's Exhibit C are admitted in evidence. They are admitted, recognizing the imperfections conceded by both reporters and the minor discrepancies noted by counsel for Respondent, which I have considered in evaluating both transcriptions along with all the evidence of record.

The General Counsel's transcribed tape recording of one of the December 10 meetings shows that Burroughs Sr. spoke after Ryland, and Ryland and Burroughs Sr. made, inter alia, the following statements (G.C. Exhs. 202, 204):

RYLAND: [Reading from paper] The Board by a divided vote found that Darlington had been closed because of the anti-unionism animus of Roger Milliken and that to be in violation of Section 8(a)(3). The Board's determination in Deering-Milliken, as the status of a single employer, the company has the absolute right to close out a part or all of its business, regardless of anti-union motives.

BURROUGHS: What the Supreme Court ruled is that we have the right, we have the absolute authority. . . . This decision went all the way to the Supreme Court and they ruled that an owner has the right under the terms of the qualifications. I meet those qualifications. It's a small corporation. All the stock is owned by me. I own 55 per cent and my [sic] [wife] owns 45 per cent. We don't have to have a Board meeting. And I feel the same way that this man felt. If the majority of the people here vote no confidence in me, I feel the same way he feels. I want everybody to understand, I am not threatening, I'm saying that I have a right, and I will properly recognize that right and use that right. All this business, I don't want it transferred around, I'm going to shut it completely down and liquidate it, and throw it away.

The next question is, am I strong enough financially to do it. The books will be over Wednesday afternoon at 3:30. Ask the man . . . Steve Elledge . . . Y'all can ask him anything you want to ask him, including those questions, "Can the man do it? Can the man do it financially?"

But let me tell you, if the majority of the people do not want me here, then I will consider, consider exercising my option, but I can walk away from here knowing that I did not let the other people down. . . . If I have to do it, I will, 'cause if I have to do something that drastic, I can walk away from here, thinking I did

everything I could for the people who work hard. . . . I'm not worried about a place to live, I don't have to worry about whether the groceries are coming in or whether the kids are [inaudible] . . . I don't have to worry about that.

Let me tell you, those people, some them's bad. I looked at those people and I thought about the old beer joint we started out in. I couldn't face it. I felt that the things would never be the same there. I worked hard over there to get the thing going. I've worked hard. I've saved my money, and I don't have to put up with the crap that the union puts out. . . . Any of you think I'm kidding? Ask the accountant where [inaudible] . . . I started out with nothing [inaudible]. (I'm leaving here with nothing, I'm leaving.)

They ain't [inaudible] nothing. They ain't nothing but insurance peddlers is all they are, insurance peddlers.

Basically what the ruling says was, I have a right to do this. I'm not saying that will but if someone [inaudible] and says "We have no faith in You," what am I supposed to do? . . . [G.C. Exh. 204.]

F. Radio Broadcast

A local radio station in Brinkley, Arkansas, broadcast a news cast which in part announced as follows:

There is a possibility that Brinkley could lose as many as 400 jobs from two local businesses as an apparent direct result of union activities. Mayor John E. Deen called a special meeting of the Brinkley Board of Directors to advise them of the situation at FASCO Brinkley Motor Products and at Farris Fashions. . . . Farris Burroughs, Sr., owner of the company has indicated that he will cease operations if the union is voted in. This company hires approximately 300 in Brinkley and 15 in Hazen. . . . Farris Fashions is the largest single employer in the county and the employees now start at the minimum of \$3.80. . . . The largest purchase of Farris Fashions products is Wal-Mart.

G. Employee Designated Speechmaker of Respondent

On December 10, mechanic Willie Ryland spoke to four or five groups of employees and the substance of what the employees understood he said is described by employee witnesses as follows:

Odessie Miller: After Supervisor Betty Dilworth told employees in her department to go to a meeting, Ryland read portions of a Supreme Court decision, telling employees Burroughs Sr. had "the absolute right, if he so desired, to close the plant if the Union came in"; that Burroughs Sr. was "not playing around, and that he would close it down if the Union came in"; and that Burroughs Sr. was present during Ryland's speech and he asked employees, "what makes you think I would bargain with the Union if they came in and I'm not bargaining with them right now."

Mentry Bankston: Ryland told a group of employees "he knew Burroughs, Sr. very well and that he had the money to do whatever he wanted to do. If he wanted to close the plant, he'd do it."

Carolyn Adell: Supervisor Dilworth sent herself and other employees to the breakroom where Ryland said, "Farris could and would close the plant if the Union was voted in."

Kay Vandergriff: Burroughs Sr. and Supervisors Ella Cook and Betty Dilworth were present when Ryland told employees "Farris had the prerogative to close the plant if the Union came in, and that he would do it if the Union came in." I credit Vandergriff's account that Cook and Dilworth were present and the record does not show that they made any response.

Doris DeGunion: Ryland read from a thing referring to a previous trial in a similar circumstance, where they closed the factory down, and the judge ruled that they could, and Ryland said he felt that Farris would close the factory down if the Union came in.

Denise Armstrong: With Supervisors Ella Cook and Emma Cook present, Ryland told the employees Burroughs Sr. "could not afford the Union" and "he could do better if we leave the Union alone"; and that "Ryland never seen a hog stay in an empty trough." Ella Cook did not deny she was present at the meeting and she did not respond to Ryland's statements.

Searcy Williams: Supervisors Ella Cook and Betty Dilworth were present at a meeting of 30 to 40 laundry department employees when Ryland, told them "Farris was financially able to close the plant down if the Union was voted in, and he would close it if the Union should come in." Neither Supervisors Cook or Dilworth denied they were present at the meeting and neither responded to Ryland's statements.

Even if Ryland testified that Burroughs Sr. was present during three or four meetings with the employees on December 10, when Ryland expressed the opinion if the Union was voted in the plant would close, he further testified that there were three additional meetings after December 10 at which Ryland alone spoke.

H. Speeches to Employees by Supervisors and Other Employees of Respondent

Accounts of these speeches by employee witnesses are as follows:

Odessie Miller: Barbara Brooks spoke to employees in late November during working time. In the presence of Supervisors Ella Cook and Betty Dilworth, "employee Barbara Brooks told employees Burroughs Sr. would close the plant down if the Union came in." Supervisor Betty Dilworth denied Brooks said Burroughs Sr. would close the plant. Brooks talked about the Supreme Court's decision in *Darlington*, 380 U.S. 263. However, it is noted that Dilworth's denial is not corroborated by Supervisor Cook, while Brooks' account is corroborated by employee Shirley Davis.

Shirley Davis: In mid- or late November, after being promoted to supervisor November 12, Barbara Brooks told employees during worktime that Burroughs Sr. "would close the plant down if the Union came in."

Shirley Davis: A month prior to the election employee Barbara Brooks told employees that "the Union . . . didn't have any power they really couldn't do anything for us . . . just all talk."

Carla Hicks: Two days prior to the election, employees Mae Covington and Katherine Palmer convened a meeting with employees on company time, with the prior permission obtained from Burroughs Sr. when Palmer told employees

“if she was Respondent and had made the company prosperous as Burroughs did, she would close it too”; that “she believes that if the Union comes in . . . Farris would close the plant.” Cook made no comment nor did she disavow Palmer’s statement.

Mentry Bankston: About a week before the election, employees Covington and Palmer convened employees in the breakroom on worktime in the presence of Supervisors Ella Cook and Betty Dilworth. Palmer told the employees it was one sided (meaning they did not want any contrary views). Palmer asked employees to change their minds and vote “no” because she felt strongly that Burroughs Sr. would close the plant if the Union came in; that they should listen to Burroughs Sr. and stop campaigning for the Union because she had worked at a unionized plant where the doors closed and she did not want to lose her job; and that some of the current employees did not have any training for anything else, that the only thing they knew how to do was to make shirts. Dilworth nor Cook spoke during the meeting. The record shows that although present, Supervisors Ella Cook and Betty Dilworth made no comment and I credit Bankston’s account because I was persuaded by her demeanor that she was testifying truthfully. Moreover, her account is corroborated by employee Carla Hicks.

Doris Grayson: During a meeting in December, Palmer told employees she had been previously involved in a union and had lost her job on account of the union; and that if the Union is voted in, “Farris would close the plant.” Palmer told employees to think about their family first before they voted for the Union. Palmer denied she said Burroughs Sr. would close the plant and Mae Covington corroborates her account in this regard.

In November, Grayson said Supervisor Dilworth met with employees and told them if the Union comes in Farris had the right to close the plant and that he would close it if the Union was voted in. I do not find that the record shows Supervisor Dilworth denied making the above statement, but presuming she denied it, I nevertheless credit Grayson’s account because I was persuaded by her demeanor that she was telling the truth, and because her account is consistent with the credited accounts of other employee witnesses who were present.³

³Essentially, I credit the testimonial accounts of employees Carla Hicks, Odessie Miller, Doris Grayson, Shirley Davis, Mentry Bankston, Rosie White, Carolyn Adell, Kay Vandergriff, Lois DeGunion, Kimberly Ishmon, Denise Armstrong, and Searcy Williams of the speeches on plant closure and/or loss of employment statements delivered to them at company-called meetings on company time by either owner Burroughs Sr., Supervisors Ella Cook and Betty Dilworth, owner designated employee speaker Willie Ryland, and antiunion speakers Mae Covington and Katherine Palmer, because not only was I persuaded by their demeanor that they were testifying truthfully but also for the following reasons: (1) their testimonial accounts are relevantly consistent or corroborative of one another; (2) their testimonial accounts were partially acknowledged by the Respondent and partially uncontroverted by the Respondent; (3) and all of the afore-named General Counsel’s witnesses are currently employed by Respondent. This being so, their testimony is adverse to the Employer’s interest and is apt to be particularly reliable. *Gold Standard Enterprises*, 234 NLRB 618 (1978). Additionally, I do not credit the testimony of most recently appointed Supervisor Barbara Brooks’ denial that the plant closing and loss of employment statements by herself and management were not delivered to the employ-

Respondent’s Witnesses

Barbara A. Brooks: Employed August 1990–June 1991 in cuff making and made supervisor of quality control in November, testified she participated in the meetings in which Mae Covington and Katherine Palmer spoke. She never heard anybody state that Farris Burroughs Sr. would close the plant if the Union came in, or that employee union supporters could lose their job. She did not hear any supervisor interrogating employees about where they stood on the Union. Instead, Covington and Palmer were saying they did not think the employees needed a union, and they were making a mistake to elect one. While I credit the latter statement by Brooks, I discredit her previous statements for the same reasons I discredited her account in footnote 3, supra.

At the Willie Ryland meeting, Brooks said Ryland read from the *Darlington* case in response to union literature which told employees it was illegal for employers to close business because the employees organized a union. she acknowledged Supervisor Ella Cook was present during the meeting.

Brooks said she was present when Ryland spoke and never heard him say Burroughs Sr. would close the plant or he would fire employees who supported the Union. However, on cross-examination about her affidavit she admitted she heard Burroughs Sr. say something about turning the plant into a chicken coop. Although she testified the statement was made in response to a question by an employee, when shown her affidavit where she previously stated no question was asked by an employee, as to what would happen to the plant if it closed, she said she was towards the back of the crowd and possibly could not hear everything.

Brooks said she was also present at the meeting where Supervisor Betty Dilworth spoke but never heard Dilworth say anything about the plant will close. Again, because Brooks did not hear Dilworth’s remark does not mean the remark was not made. This is especially so since Brooks acknowledged she was in the back of the employees.

Burroughs Sr. testified he never told employees he had decided to close his plant if they went union because he knew it was unlawful to tell them that. He said if the election had gone the other way (the Union had won) he would have taken the \$81,000 loss spent on new machinery and would have gone out of business. The latter statement refers to after the fact (the election) and is self-serving and of no credible value.

Supervisor Dilworth testified she attended the meeting where Barbara Brooks talked and said Brooks did not say anything about the plant closing; but that they did talk about the *Darlington* case. She said she did not attend the meeting where Mae Covington and Palmer spoke and she denied she ever stated, while returning from a meeting, that Burroughs Sr. was going to close down. Although I do not credit

ees, because not only was I not persuaded by her demeanor that she was not testifying truthfully and accurately, but parts of her account are contradicted by statements in her affidavit previously given to the Board. Moreover, she acknowledged that she was in the back of the group of employees in several of the meetings and possibly could not hear all that was said. According to her testimony she continued to say she never heard, rather than what was said, or what was not in fact said. Moreover, Barbara Brooks is no longer in the employ of the Respondent and her account as a former supervisor is probably bias in favor of management.

Dilworth's account of the Brooks meeting, I do credit her denial that, while returning from a meeting, she told an employee Burroughs Sr. was going to close down because the particular employee's statement in this regard is not corroborated by any other employee.

Supervisor Dilworth denied she ever asked employee Kay Vandergriff how was she going to vote but admitted, she asked Vandergriff about her opinion of the Union, after hearing Vandergriff talk about the Union in her presence. However, I find little distinction in Dilworth's explanation. During a discussion about the Union, I find that a supervisor (Dilworth) asking an employee about their opinion of the Union, is essentially sensing out their feelings or position about their probable support for the Union.

Consequently, I credit Vandergriff's testimony, discredit Dilworth's meaningless denial, and find that Dilworth's asking Vandergriff her opinion about the Union during the organizing campaign, without any assurances against reprisals constituted coercive interrogation of employees about their Section 7 rights (union sympathies), in violation of Section 8(a)(1) of the Act.

Conclusions

The uncontroverted evidence of record is clear that Burroughs Sr. testified he started the Respondent's speeches on its right to close the plant pursuant to the Supreme Court's decision in *Darlington*, supra; and that he thereafter delegated authority to mechanic Willie Ryland to finish the speech, and Ryland made the same speech to other groups of Respondent's employees. Burroughs Sr. and mechanic Ryland made the speeches in the presence of all the employees and supervisors in the plant. He also granted supervisors authority to call meetings of employees on company time for them to hear the speeches by himself, Ryland, Supervisors Ella Cook and Betty Dilworth. He granted employees Mae Covington and Katherine Palmer permission to hold meetings on company time for which employees were paid, to talk to employees but their speeches expressed the Company's position as expressed by Burroughs Sr., Willie Ryland, and Supervisors Cook and Dilworth, regarding Respondent's right and probability to close the plant for union organization.

The Board has held in *Dentech Corp.*, 294 NLRB 924 (1989), that a supervisor, employee, or any person has apparent authority to act for the employer, whenever the conduct of the supervisor, employee, or other persons meet the essential conditions of apparent authority under Section 2(13) of the Act, and the employer has adopted the employee's or other person's action within the meaning of the doctrine of ratification. Such essential conditions are met whenever the statements made are consistent with the message being conveyed by management, here: Respondent said it had the right to close, and it will close the plant in the event of union organization, and the employees will be without jobs.

A second essential is full knowledge by the employer of statements and actions by the employees acting on his behalf or with the employers consent. Expanding on this essential the Board stated 294 NLRB at 926:

The Board has held that apparent authority may be inferred when an employee acts with the cooperation of or the presence of supervisors. See e.g., *Advanced Mining Group*, 260 NLRB 486, 503-504 (1982) . . . *Wm.*

Chalson & Co., 252 NLRB 25 (1980) . . . *Hit 'N Run Food Stores*, 231 NLRB 660, 668-669 (1977).

In the instant case, Burroughs Sr. gave both permission and cooperation to employees Ryland, Covington, and Palmer, as well as Mayor Deen to make the Company's position known to employees on plant closing and loss of jobs. *Advanced Mining, Wm. Chalson*, and *Hit 'N Run Food*, supra. Supervisors Ella Cook and Betty Dilworth were present when employees Ryland, Covington, and Palmer spoke to the employees. Neither supervisor disavowed any parts of the speeches by the speakers.

A third essential condition is where the employer fails to disavow the acts of the employee agent, supra:

The Board has held that an employer's failure to disavow and/or discipline an employee for conduct engaged in with company knowledge may warrant an inference of apparent authority. See e.g., *Haynes Industries*, 232 NLRB 1092, 1099-1100 (1977) (Agency status of employee Cox). Similarly, an employer's permitting an employee to use company time for his activities is an indication that the employee acts for the employer. See, i.e., *MGR Equipment Corp.*, 272 NLRB 353, 358-359 (1984) (Agency status of employee Credell); See also *F.W.I.L. Lundy Bros. Restaurant*, 248 NLRB 415, 431 (1980).

Also, in *Dentech Corp.*, supra, the Board held that the employer's participation in certain acts amounted to an "affirmance" of the employees acts and that the employer failed to repudiate the employees acts, amounting to ratification of the Acts. (294 NLRB at 928.)

As counsel for the General Counsel points out:

It is noted that in the meeting in which Ryland, Covington, and Palmer spoke the following factors were involved:

1. The meetings were personally sanctioned by Burroughs, Sr.
2. Supervisors were present.
3. Employees were released by supervisors to attend the meetings. They attended the meetings on working time and they were paid for the time that they were in attendance.
4. On occasions when Burroughs, Sr. spoke to employees, he told employees that he was not there to listen to what they had to say, but rather the employees were to listen to his message. On one occasion, he told an employee to "shut up" and abruptly ended the meeting. When employee Armstrong attempted to speak out, he again terminated the meeting. Thereafter supervisors did not invite Armstrong to attend company campaign speeches. When Armstrong and others questioned why they were not invited to be present, Burroughs, Sr. stated that they were not listening to him but rather, they were attending a union meeting.
5. Although Armstrong let it be known that she had something to say to other employees she was not invited to hold her own meeting on company time.

Conclusions

I therefore conclude and find on the foregoing credited evidence that during a series of 12 to 14 captive audience

speeches to employees by management at company-called meetings on company time, either owner Burroughs Sr. his supervisors, his designated employee speech agent, Willie Ryland, and/or antiunion employee agents Mae Covington and Katherine Palmer, who were granted permission by Burroughs Sr. to meet with employees on company time, where Supervisors Ella Cook and/or Betty Dilworth were sometimes present, told employees: that Respondent had the right, the absolute right, and it might or will recognize or use that right to shut down business completely if the union came in; that if the employees did not stop messing with the union organizers he *Respondent would shut the doors—close the plant and convert it into a chicken coop and sell the chicken manure to farmers; that Wal-Mart would pull its orders or contract with Respondent, either because unionism would force Respondent to increase its prices or because Wal-Mart would not do business with a unionized company; that Respondent would not then have a contract and will have to close down and the employees will be without jobs; and that Respondent had the money to be able to close down in the event of unionization.*

Near the end of the organizing campaign, Respondent (Burroughs Sr.) and his designated spokesperson, Ryland, started to slightly qualify the language of their “plant closing statements and their interpretation of the *Darlington* case,” cited by them as authority for Respondent’s right to close the plant, by saying, Respondent *had the right to close down or stay in business* if the Union won the election; and that Respondent Burroughs Sr. *was not saying it would close down*, if the Union came in. It may be reasonably inferred from this softer modification in language that at this later stage in the union campaign Respondent had probably attempted to make its message less threatening and legal, regarding its statements to employees about plant closure. This however, does not exonerate Respondent from the earlier, bolder and more certain threats of plant closure and employee’s consequent loss of jobs. In any event the subsequently modified statement is equivocal and still designed to make employees apprehensive about plant closure in the event of unionization, and in the context in which it was uttered, I find it was threatening as the earlier bolder and more certain unequivocal statements by Respondent.

I. Respondent’s Offered Legal Justification for Telling Employees About Its Right to Close Plant

At the close of the General Counsel’s case in chief, counsel for Respondent moved to dismiss on the grounds that the plant closing and loss of job statements made by management were “explicitly sanctioned as lawful by the U.S. Supreme in footnote 20 of *Textile Workers Union v. Darlington Mfg. Co.*, 380 U.S. at 274.

In support of its position that Respondent, as an employer, has a right to close its business in the event of unionization, Respondent cites footnote 20 on page 274 of the above-cited *Darlington* decision, contending:

[T]he Court made it clear that employers are not prohibited from “announcing a decision to close already reached by the board of directors or other management authority empowered to make such a decision.” *Id.* at 274 n. 20. The Court recognized “the possibility” that its “holding may result in some deterrent effect on or-

ganizational activities independent of that arising from the closing itself.”

More fully quoted, however, is the fact that footnote 20 explains the Court’s reasoning as follows:

Nothing we have said in this opinion would justify an employer’s interfering with employee organizational activities by threatening to close his plant, as distinguished from announcing a decision to close already reached by the board of directors or other management authority empowered to make such a decision. We recognize that this safeguard does not wholly remove the possibility that our holding may result in some deterrent effect on organizational activities independent of that arising from the closing itself. An employer may be encouraged to make a definitive decision to close on the theory that its mere announcement before a representation election will discourage the employees from voting for the union, and thus his decision may not have to be implemented. Such a possibility is not likely to occur, however, except in a marginal business; a solidly successful employer is not apt to hazard the possibility that the employees will call his bluff by voting to organize. We see no practical way of eliminating this possible consequence of our holding short of allowing the Board to order an employer who chooses so to gamble with his employees not to carry out his announced intention to close. We do not consider the matter of sufficient significance in the overall labor-management relations picture to require or justify a decision different from the one we have made.

It is readily apparent that the above-quoted language of the Court was not its holding in the decision. In fact the Court did not render a definitive decision because it needed additional information to do so. That is why it remanded the case to the court of appeals.

The above-quoted expressions of the Court were simply made in passing, while considering the matter before it, and, such concerns or explanations were not a necessary part of its remand. Thus it is clear that language in footnote 20 is obiter dicta and not a definitive decision on issues before the Court.

However, further considering the quoted language of footnote 20 at page 274, it is particularly noted that the Court made its position clear in the first sentence of the language as follows:

Nothing we have said in this opinion would justify an employer’s interfering with employee organizational activities by *threatening* to close his plant, as distinguished from *announcing a decision to close already reached by the board of directors or other management authority empowered to make such a decision.* [Emphasis added.]

In the instant case the evidence substantiates that Burroughs Sr. was empowered to make such a decision. However, the evidence clearly shows that Burroughs Sr. and other supervisors or agents of his repeatedly threatened plant closure on numerous occasions during the organizing campaign. At no time does the evidence show that Mrs. Burroughs Sr.

or Burroughs Sr. who was the only one empowered to make a definitive decision to close the plant, or, ever did in fact make such a decision. On the contrary, Burroughs Sr., himself testified he did not ever tell the employees he was definitely going to close the plant if it became unionized.

As the court stated in *Wiljef Transport v. NLRB*, 946 F.2d 1308, 1313 (1991), an assessment must be made as to whether the statements by the employer was an accurate, factual, and likely consequences of unionization, or statements designed merely to coerce and deceive the employees; or, as the court of appeals further stated:

If an employer has made a definitive decision to close its plant, and the definitive nature of the "decision" can be demonstrated through objective evidence, it does not matter that the decision is economically unsound or represents free choice made by the employer.

In the instant case, Respondent did not establish by objective evidence an accurate and factual assessment, that unionization would likely or actually cause Respondent to increase its prices for its product and thereby jeopardize its contract with Wal-Mart; or that Wal-Mart would not in fact do business with Respondent if it were unionized. No managerial representative of Wal-Mart appeared and testified to such fact. The character of Respondent's evidence of plant closure was subjective in that owner Burroughs Sr. testified he had said and decided when he went into business that he would close down if it ever became unionized.

Perhaps more significantly, Respondent has failed to demonstrate by objective evidence that it had in fact made a definitive decision to close its plant. It did not present any written plan to liquidate its assets, or any documentary or other objective evidence that it had contacted a real estate agent or prospective buyers, contingent on unionization, in preparation for disposal of a business transaction of such magnitude. At most, Respondent presented the testimony of a longtime business acquaintance, a dealer in the purchase and sale of plant machinery, to visit the plant and appraise some of its equipment for the purpose of learning how much Respondent would realize from the sale of some of its machinery. No written evidence was produced at the trial to substantiate such an appraisal was made or paid for, or precisely what such a sale would realize.

Instead, in the absence of such evidence, the record is replete with numerous subtle and blatant threats of plant closure, of Respondent's right to close, and its financial ability to afford plant closure, in the event of unionization. Such threats were made during company-called meetings by Burroughs Sr., himself, supervisors, designated spokesperson Ryland, and by antiunion employees, with Burroughs Sr.'s approval. Even if such threatening statements were not designed to coerce employees, as I find they in fact were, they fell far short of a free choice that Respondent had already made, or an announced *definitive decision* to close its plant in the event of unionization. *Wiljef Transportation*, supra.

Respondent emphatically argued that its speeches on its right to close were made only in response to literature and union spokespersons telling employees Respondent could not close its plant; that it was illegal for Respondent to close or to threaten to close its plant because the employees select a

union as their bargaining representative. I find that the Union did so inform Respondent's employees.

Respondent cites *Textile Workers Union v. Darlington Mfg. Co.*, 380 U.S. 263, 268, as authority for correctly informing employees of its lawful right to close. In doing so, Respondent relies on the language of the Court:

an employer has the absolute right to terminate his entire business for any reason he pleases . . . including "anti-union motives."

In its argument, Respondent contends it was lawful for it to debate the Union's misrepresentation of the law to its employees, by extracting or highlighting accurate portions of case law to give its employees the correct knowledge of Respondent's right to close its plant in the event of unionization. In further support of its position, Respondent cites *National Micronetics*, 277 NLRB 993 (1985), in which the Board held that an employer's distribution of highlighted copies of a Board decision was neither unlawful nor objectionable.

However, while I find that the Board in *National Micronetics*, and the Court in *Darlington*, made the above-cited statements attributed to them, and that the statements were applicable to the facts before each tribunal, I also find that the Court's statements in *Darlington* are misapplied here. Specifically, in *Darlington*, unlike here, after opposing unionization in many forms including threatening to close its plant in the event of unionization, the employer actually closed its facility after the union won the election. Here, Respondent threatened employees with plant closure in the event of unionization but the Union lost the election by a substantial margin, and Respondent did not close its plant after the election. In fact, at the time of the trial, Respondent was still operating its business and no objective evidence of plant closure was presented by Respondent. Under these circumstances, I find that the language cited in *Darlington* and the rationale urged by Respondent, are inapplicable to the facts in the instant case.

Notwithstanding, whether or not the Union's or the Respondent's stated positions of the law on whether or not plant closure in the event of unionization is correct, the Board has held that it no longer probes "into the truth or falsity of the party's campaign statements," and will not set elections aside on the basis of "misleading campaign statements." This includes misrepresentations of the law, as might have been done by the Respondent and the Union here. *Midland National Life Insurance Co.*, 263 NLRB 127, 133 (1982); *Tri-Cast, Inc.*, 274 NLRB 377, 378 (1985).

Respondent also argues that Respondent had a lawful right to comment on the economic consequences of unionization, and it contends that this is what Respondent did.

However, as the Court stated in *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969), an employer "may predict the precise effects he believes unionization will have on his company, if the prediction is based on objective fact to convey his belief as to demonstrably probable consequences beyond his control or to convey a management decision already arrived at to close the plant in case of unionization."

However, as previously pointed out, the Respondent failed to support his predictions of economic consequences with objective fact to convey his belief as demonstrably probable

consequences beyond his control. To hold otherwise would permit any employer to make such predictions or threat of plant closure on their subjective contentions, as Respondent attempts to do here.

As properly pointed out by counsel for the General Counsel, Respondent's legal argument is not new or novel. Essentially the same argument was advanced in *Wiljef Transportation*, 299 NLRB 710, 714 (1990), and it was found to be without merit by the administrative law judge and Board approval, where the judge properly distinguished *Wiljef* from *Darlington* as follows:

The factual situation in *Darlington* dealt with post-election action taken because of unionization. It did not involve the future, namely a prediction or "a management decision already arrived at to close the plant in case of unionization." [Emphasis added.] *Gissel* at 618. Regarding footnote 20 in *Darlington*, obviously statements which have no actual bearing on the issues involved in the case are obiter dictum. Also, while the Court indicated in the note that certain actions are possible, it did not specifically indicate that such actions necessarily would be lawful. *Darlington* is not on point. After a Union has won the election, and the employer then decides irrevocably to close a plant is one thing. It is quite something else to decide to close before the condition precedent occurs, namely the union winning the election, and then attempt to preclude the condition from occurring by using the decision to close as a club against employees.

Assertedly, Respondent relies on selected portions of the Court's language in *Darlington* at footnote 20 and on the language it quotes in *Gissel* at 618. Such asserted reliance is misplaced, however, to the extent that it involves *obiter dictum* or language in *Gissel* which is taken out of context.

Here, Burroughs Sr. did not close down any major portion of its operation but continued to operate both facilities at Brinkley and Hazen, having invested substantial sums of money in state-of-the-art machinery in an effort to improve efficiency of operations. Moreover, after espousing numerous threats of plant closure prior to the election, since the Union was defeated in the election, Respondent now admits it contemplates no plans to close its plant. It is therefore clear that Respondent utilized its numerous references to plant closure as a preelection "club against employees," as did the employer in *Wiljef*, supra.

I therefore find that Respondent's numerous threats to close its plant if the employees selected the Union as their bargaining representative, interfered with, restrained, and coerced employees in the exercise of their Section 7 rights, in violation of Section 8(a)(1) of the Act.

J. Solicitation Sheet for "Vote No" T-Shirts

About 2 weeks prior to the election, employee Shirley Davis testified that Supervisor Louise Hill brought a sheet of paper to her work area and told anyone who wanted a "Vote No" T-shirt could sign the sheet to get one.

Davis further testified that she did not sign the sheet but she saw other employees signing it, and the next day she saw Supervisor Hill distributing the "Vote No" shirts to employ-

ees. She also heard Supervisor Hill tell the employees they should wear the shirts on election day.

Louise Hill denied she circulated a signature sheet for No Vote T-shirts, or that she distributed the shirts to employees who signed the sheet.⁴ However, she said when Joyce Holloway asked for T-shirts she told Holloway to see Joel Smith. She said she told Donner she could not hand a shirt to her but she could get one out of her bin. She acknowledged she told both Donner and Holloway where to get the shirts in the plant.

Conclusion

Supervisor Hill acknowledged that employee Teresa Donner asked her for one of the T-shirts and she told Donner to get one out of her bin. Hill denied she asked employees if they wished a T-shirt but admitted she told them where to go to get one. Her admission supports the evidence she was involved with a poll of employee antiunion sentiments because employees asked her about the shirts and she told them where the shirts were available for employees who desired to have one. The employees must have had information that Hill knew how they could have obtained a shirt. Consequently, I credit Davis' testimony that Hill announced where employees could obtain the shirts. I further find that by directing employees to her supervisor's bin, to the sign up or to get a shirt, she and Joel Smith were antiunion employee agents of Respondent to distribute the T-shirts to employees who requested them, and that such conduct constituted polling employees about their antiunion position or sympathies for the Union, in violation of Section 8(a)(1) of the Act.

K. The Layoff of Kay Vandergriff

Kay Vandergriff was employed by Respondent in 1987 and 1988 trimming shorts and doing collar work. She was employed again August 30, 1989, doing sleeves, bagging, trimming, and doing shorts. Both functions were rated and paid production jobs. During her most recent employment she closed collars with the use of a sewing machine, a production rated job, sorted, and trimmed.

During the union campaign, Vandergriff signed a union authorization card, attended union meetings, openly distributed pronoun handbills among employees, wore a "Vote Yes" union T-shirt on election day, and permitted her photograph to appear on pronoun leaflets. She testified Burroughs Sr. passed by her when she was distributing pronoun leaflets and handbills to employees on the plants parking lot, which she did on four or five occasions. She said Burroughs Sr. observed her distributing union literature.

Vandergriff further testified that in November Supervisor Betty Dilworth approached her at her work station and asked her "if she was voting union, and she replied 'yes.'" Dilworth denied she asked Vandergriff such a question but I credit Vandergriff's testimony over Dilworth's denial because her account is consistent with the credited evidence of record and I was persuaded by the demeanor of such witness, that Vandergriff was telling the truth and Dilworth's denial was not true.

⁴I was persuaded by the demeanor of Shirley Davis that she was testifying truthfully and since her testimony is uncontroverted I credit her testimony.

When Vandergriff was laid off on Tuesday following the Friday on which the election was held, she said Supervisor Dilworth approached her and two other employees and informed them that they were laid off until Brenda called them back. Respondent retained in its employ two employees with less seniority than Vandergriff.

Denise Armstrong

Employee Denise Armstrong has been in Respondent's employ since September 1989, and initially performed work as a bagger 6 months and thereafter sewing buttons on shirts. She remained in the latter job until January 28, 1991. During the union campaign, Armstrong signed an authorization card and wore a "Vote Yes" T-shirt on election day.

Armstrong testified that during a company-called campaign meeting in late October, she attempted to speak out by saying, "You say that everybody deserves a fair chance" when Burroughs Sr. interrupted her, stopped the meeting, and told everybody to go back to work. When the Union learned that Armstrong and two other employees were being excluded from some company-called meetings, Armstrong told Supervisor Emma Cook that she wanted to see Burroughs Sr. Thereafter, during the third week of November, she and employees Zelma Beasley and Mattie Hall were invited to the office of Burroughs Sr. where the following conversation occurred:

[W]e asked him why we were not included in the meetings. . . . He said the meeting that he held, we would not let him speak, and that he was on his time and we should listen. He said the day that he had the debate, the union people moved across the street and we followed them. He said that he felt that we didn't want to hear what he had to say anyway.

Also, approximately 2 or 3 weeks before the union election, the Union distributed artificial roses bearing a tag which read: "Do you want a brand new day or the same old way?" Armstrong took six roses and placed them around her machine. After she had so arranged the roses, Burroughs Sr. approached her at her machine and asked her "what were the roses for" stating at the same time "that roses . . . doesn't last long."

Armstrong testified she was informed of her layoff on Monday, January 28, 1991. She described her notification as follows:

[I]t was on a Monday. I was laid off before lunch. My supervisor, Emma Cook, approached me at my machine and said, "Denise, you was [sic] laid off for lack of work." She said, "you will be called back" and I asked her . . . why I was laid off and she said that "I was the last one that got hired, lack of seniority, that I would be the first one to go back."

Armstrong further testified that employees hired 6 months before she was laid off, were retained to sew buttons on pockets.

Since Respondent contends neither Vandergriff nor Armstrong were laid off on December 18, 1990, and January 28, 1991, respectively, for union activity, but impliedly, for cause, it is clear that the issue for resolution of the layoffs

calls for an analysis and evaluation under the *Wright Line* doctrine. *Wright Line*, 251 NLRB 1083 (1980).

In *Wright Line* the Board held that in such 8(a)(3) cases, where the Respondent offers evidence of cause for the discharge, the General Counsel must first

make a *prima facie* showing sufficient to support the inference that protected [concerted] conduct was a "motivating factor" in the employer's decision. Once this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the [employees'] protected conduct. [251 NLRB at 1089.]

Additionally, the Supreme Court in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), "viewed the term 'substantial or motivating factor' as interchangeable with the phrase 'played a role.'" In establishing a *prima facie* case, of course, the General Counsel must establish the existence of *protected activity, knowledge of that activity by the employer, and union animus*. Once the General Counsel establishes a *prima facie* case of unlawful conduct, the employer has "an affirmative defense in which the employer must demonstrate by a *preponderance of the evidence* that the same action would have taken place even in the absence of protected conduct." *Roure Bertrand Dupont, Inc.*, 271 NLRB 443 (1984). (Emphasis added.)

Consequently, the first question raised for consideration under *Wright Line* in the instant case, is whether the General Counsel has made a *prima facie* showing sufficient to support the inference that Kay Vandergriff's and Denise Armstrong's protected union activity was a motivating factor in Respondent's decision to lay them off on December 18, 1990, and January 28, 1991, respectively.

Vandergriff

In this regard it is particularly noted that Vandergriff has worked for Respondent approximately 2 years without ever having been given a warning about her work performance. However, she openly supported the Union and owner Burroughs Sr. passed her distributing union literature on the plant's parking lot. Certainly, other members of management (supervisors) must have seen her distributing such literature. In fact a picture of Vandergriff appeared on some of the Union's literature (leaflets) which management must have seen since it admits it saw and read some union literature. Vandergriff wore a union "Vote Yes" T-shirt on election day. Certainly, members of management saw her on that day. Moreover, the credited evidence shows that in November, Supervisor Dilworth approached Vandergriff and asked her if she was voting for the Union. Vandergriff told her, "Yes."

I therefore find on the foregoing credited evidence that Vandergriff was an open supporter of the Union; that Respondent's management had knowledge of her support for the Union; that Respondent's union animus is manifested throughout the campaign by its antiunion conduct and threatening speeches; that the union election was held on Friday, December 14, and Vandergriff was laid off 4 days later, on Tuesday, December 18; and that based on such evidence, and the union animus climate during the union campaign, I find that the General Counsel has made a *prima facie* showing sufficient to support the inference that Vandergriff's pro-

tected union activity was a motivating factor in Respondent's decision to lay her off on December 18, 1990.

The General Counsel having made the required prima facie showing that Vandergriff's union activity was a motivating factor in Respondent's decision to lay her off, the burden now shifts to Respondent to demonstrate that Vandergriff would have been laid off December 18 even in the absence of her protected conduct.

Respondent's Evidence—Vandergriff

At the hearing Supervisor Ella Cook testified that the final trim workers completed work on an order of boys' shorts in December. Vandergriff, who worked on boys' shorts, was then transferred to bagging shirts by size where she made numerous errors. Cook said she then assigned Vandergriff to cutting parts of shorts but some skipped stitches appeared on shorts which were sewer errors and not Vandergriff's. Cook nevertheless said it was a part of Vandergriff's job to watch for skipped stitching, and she admitted she did not warn or question Vandergriff about her failure to reject parts with skipped stitches. She also acknowledged Vandergriff was told she would be called back when she was laid off but has not been called back.

Supervisor Ella Cook testified that Vandergriff's failure to detect skipped stitching might have been due to the fact that she continued to sit down on a standup job that she repeatedly told Vandergriff to stand up to do the job but she would nevertheless find Vandergriff sitting down cutting apart shorts on her lap.

Cook further testified that Respondent does not give written warnings to employees and she contended she did not know whether Vandergriff was or was not a union supporter. When Burroughs Sr. received the complaint from the Board he inquired of her about Vandergriff whom he did not know. Cook said she identified Vandergriff as the employee with "personal odor" about whom other employees had complained continually. The general evidence clearly indicates that Cook knew Vandergriff was engaged in union activity. Vandergriff acknowledged that no supervisor had ever said anything to her which indicated she was laid off because of union activity. It is true the evidence shows that the employees laid off were a mix of employees who engaged in union activity and employees who were not shown to have engaged in union activity.⁵

⁵I credit Kay Vandergriff's testimony that Respondent had knowledge of the fact that she was an open union supporter because the uncontroverted documentary and circumstantial evidence shows that Vandergriff signed a union card, distributed union handbills among employees on the parking lot where owner Burroughs Sr. passed her within visible range, some of the leaflets she distributed bore her photograph, and because she wore a "Vote No" union T-shirt on election day. Although owner Burroughs Sr. and Supervisors Betty Dilworth and Ella Cook may have denied they knew Vandergriff was a union supporter, I discredit their denials because they could not have known Vandergriff was a union supporter under the above-described circumstances, especially when Respondent was waging an enthusiastic campaign against the Union and tried in several ways to learn where each employee stood on the union issue. In this regard, Supervisor Dilworth asked Vandergriff how she felt about the Union—how she was going to vote. Although Dilworth denied she asked Vandergriff such questions, I discredit her denial, and I credit Vandergriff's affirmative account because not only was I persuaded

Conclusions

However, it is especially noted that all of the transfers to other jobs of Vandergriff, took place within a matter of about 2 weeks before her layoff. Vandergriff's job on boys' shorts ended in December 1990, when she was transferred to bagging, and thereafter to cutting shorts parts. The union election was held on December 14, and 4 days later, December 18, Supervisor Ella Cook, one of Respondent's antiunion supervisors for Respondent's antiunion campaign, who was fully aware of Vandergriff's union support and activity, laid off Vandergriff.

Although Supervisor Cook testified at the hearing that she identified Vandergriff to Burroughs Sr. as the employee with "personal odor" about which other employees continually complained, she did not testify that "personal odor" was a consideration in her (Respondent's) decision to reemploy Vandergriff in August 1989, or in Respondent's decision to lay her off December 18, 1990. Cook testified that she simply told Vandergriff when I find something for you to do, I will call you.

Consequently, I find on the foregoing evidence that "personal odor" was not a factor considered by Respondent in laying off Vandergriff, but was only mentioned by Respondent at the trial for the first time. The record also fails to show that Cook or any other person from management ever spoke to Vandergriff about "personal odor."

Additionally, both Supervisors Cook and Dilworth testified Vandergriff was having problems performing bagging and cutting shorts parts. Although Vandergriff had previously performed both jobs, Cook and Dilworth admitted they did not give Vandergriff any warnings about her performance. Nevertheless Dilworth joined Cook in the decision to lay off Vandergriff.

I find it interesting and incredible that although Vandergriff has worked for Respondent for a total of 2 years without ever receiving a warning from Respondent about work performance or "personal odor," suddenly, within a period of the last 2 weeks of work, she became so incompetent to perform other jobs including jobs she had previously performed efficiently. I do not consider it a coincidence that the grave fault with Vandergriff's work performance all occurred within 14 working days before her layoff, and only 4 days after the union election.

Under the above circumstances, I find that the Respondent has failed to demonstrate by a preponderance of the evidence, that Kay Vandergriff would have been laid off even in the absence of her protected union activity. *Wright Line*, supra. Consequently, I find on the foregoing evidence that Vandergriff's protected union activity was a motivating factor in Respondent's decision to lay her off December 18, and was therefore discriminatory and violative of Section 8(a)(1) and (3) of the Act.

Respondent's Evidence—Armstrong

At the hearing, Respondent (Supervisor Emma Cook) testified that Armstrong was selected for layoff because of low production but Armstrong testified without contradiction, that her production on the job of sewing buttons on fronts was

by her demeanor that she was testifying truthfully, but her account is consistent with her actions and all the credited evidence of record.

greater than the production of employees Zelma Beasley and Davonna Waggle. In this regard, Respondent's work records (G.C. Exhs. 200 and 201) indicates Davonna Beasley on the job of sewing buttons on pants and the production of Armstrong on the job of sewing fronts. Zelma Beasley and Davonna are not one in the same person. Armstrong acknowledged that Hall was a higher producer than she.

Burroughs Sr. denied he ever saw roses at Armstrong's machine or that he made such the statement that roses does not last long. He also said he did not see Armstrong wearing a union T-shirt on election day.⁶

Several union supporters like Doris Grayson admitted that several union supporters were not laid off while some non-union supporters were laid off.

Conclusions

I conclude and find on the foregoing credited evidence that Denise Armstrong was an open union supporter and advocate; and that Respondent (Emma Cook and Burroughs Sr.) knew that Denise Armstrong was a strong advocate for the Union. Even when Burroughs approached Armstrong's machine and questioned her about the union roses around her machine, he told her "roses don't last long." In the context of Respondent's intense union animus campaign on company time, it may be reasonably inferred from the latter remark that "roses don't last long," Burroughs Sr. meant jobs or strong union leaders or supporters do not last long. This is a reasonable inference because it is assumed that Armstrong and every adult knows that roses do not last long. The Union won the election on December 14, 1990, and although other union and nonunion supporters were laid off, Respondent (Cook) made sure union advocate Armstrong was included in the layoff on January 28, 1991.

Consequently, I find that the General Counsel has made a prima facie showing sufficient to support the inference that Denise Armstrong's union activity was a motivating factor in Respondent's decision to lay her off on January 28, 1991.

The General Counsel having established such a prima facie showing under *Wright Line*, the burden now shifts to Respondent to demonstrate that the same action would have been taken against Denise Armstrong even in the absence of her protected conduct.

The evidence clearly shows that Denise Armstrong was a strong advocate for the Union, of which fact Respondent was well aware, and that she had never been warned or cautioned about her work performance. I find that Respondent's contention that Armstrong was laid off for lack of work, when other sewing work which Armstrong could and had pre-

⁶I credit the testimony of employee Denise Armstrong that Burroughs Sr. knew she was for the Union because it is essentially uncontroverted, and the evidence is otherwise clear that Respondent (Burroughs Sr.) knew or strongly suspected Armstrong was a union advocate, when he interrupted her question and terminated his company-called meeting; and when he met privately with Armstrong, Beasley, and Hall about excluding them from other company-called meetings. I also credit Armstrong's account in this regard because I was persuaded by her demeanor that she was testifying truthfully. I was persuaded by the demeanor and the antiunion conduct of Supervisors Dilworth and Cook, that they were not testifying truthfully, and were exaggerating unfavorably about Armstrong's work performance. I discredit Burroughs Sr.'s denial of the remark about the roses.

viously performed was available, that Respondent has failed to demonstrate by a preponderance of the evidence that her layoff would have occurred even absent her union activity. *Wright Line*.

Under the above circumstances, I further find that Armstrong's support for the Union, of which fact Respondent (Burroughs Sr. and Cook) was aware, was a motivating factor in Respondent's decision to lay off Denise Armstrong on January 28, 1991; and that its decision to lay her off was therefore discriminatory, and in violation of Section 8(a)(1) and (3) of the Act.

L. Bargaining Order

The General Counsel argues that under the circumstances in this case a bargaining order should issue requiring Respondent to recognize and bargain with the Union. In support of his position he cites *New Life Bakery*, 301 NLRB 421 (1991), where the administrative law judge explained the *Gissel* requirements for a bargaining order as follows:

In *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969), the leading case on remedial bargaining orders, the United States Supreme Court held:

(1) Even in the absence of a demand for recognition, a bargaining order may issue if this is the only available effective remedy for unfair labor practices.

(2) Bargaining orders are clearly warranted in exceptional cases marked by outrageous and pervasive unfair labor practices.

(3) Bargaining orders may be entered to remedy lesser unfair labor practices that nonetheless tend to undermine majority strength and impede the election process. If a union has achieved majority status and the possibility of erasing the effects of the unlawful conduct and of ensuring a fair election through traditional remedies is "slight," a bargaining order may issue.

(4) Minor or less extensive unfair labor practices that have only a minimal effect on election machinery will not support a bargaining order.

As a precondition to a bargaining order, the Board currently requires a showing that the union achieved majority status in an appropriate bargaining unit at some relevant time. *Gourmet Foods*, 270 NLRB 578 (1984).

Authenticity of Authorization Cards

Since the Respondent's counsel interrogated many witnesses about the purpose for which they signed a union card, the General Counsel correctly points out that the cards utilized by the Union in the instant case are single-purpose cards, the significance of which is explained by the administrative law judge in *Bi-Lo*, 303 NLRB 749, 769 (1991), as follows:

In order to qualify for a bargaining order under *Gissel*, the General Counsel must establish that "at one point" (395 U.S. at 614) the Union had acquired a majority of valid signed authorization cards in the unit found appropriate.

The cards used in this campaign were themselves invulnerable to direct attack. They were headed, in capitalized letters, "AUTHORIZATION FOR REPRESENTATION." The printed portion that followed

was worded, "I hereby authorize the United Food and Commercial Workers Local 27, AFL-CIO-CLC, to represent me for the purpose of collective bargaining.

The Supreme Court further stated in *Gissel*, supra at 606-607:

[We] think it sufficient to point out that employees should be bound by the clear language of what they sign unless that language is deliberately and clearly canceled by a union adherent with words calculated to direct the signer to disregard and forget the language above his signature. There is nothing inconsistent in handing an employee a card that says the signer authorizes the union to represent him and then telling him that the card will probably be used first to get an election.

The design of the union authorization cards used for solicitation by the Union in the instant case reads as follows:

AUTHORIZATION FOR REPRESENTATION

I am an employee of _____
and I hereby designate the Amalgamated Clothing and Textile Union ("ACTWU") as my collective-bargaining representative.
Date _____ Employee Signature _____

A dispute arose between the parties over the authenticity of numerous signed cards. However, the following cards and exemplars identified as General Counsel's Exhibits 17(a) through (d) and General Counsel's Exhibits 17 through 38, and 86 through 182 were submitted to Robert Muehlberger, assistant director and a questioned document examiner of the Memphis Office of the Postal Inspection Service. All the above cards were received in evidence without objection.

Additionally, the cards of the following named employees and their solicitor were authenticated through credited witnesses without objection as follows:

Laverne Palmer	(Laverne Palmer)
Ronna Jones	(Angela Fay Clark)
Eulanda Broadway	(Lorene Watkins)
Magnolia Stigall	(Deborah C. Dukes)
Hester Griffin	(Hester Griffin)

The record shows that counsel for the General Counsel offered Ronna Jones' card for admission in evidence without objection, but the record does not indicate it was received. Consequently, counsel for the General Counsel's unopposed motion for its admission is hereby granted, and Ronna Jones' authorization card is received in evidence.

The record shows that *Angela Fay Clark* neglected to complete the signature line on her card. However, she completed other parts of the card in her own handwriting and credibly testified that it was her intention to sign the card but she inadvertently neglected to do so. Clark testified that she read the card before she filled it out. Since I was persuaded by the partially completed card as well as the demeanor of Clark that she was testifying truthfully, that she intended to sign the card but inadvertently neglected to do so, I credit her undisputed testimony and her card is admitted in evidence. *Accurate Dye & Mfg. Corp.*, 242 NLRB 280, 284

(1979); consequently, Clark's card will be counted towards a majority. *I. Taitel & Sons*, 119 NLRB 910, 912 (1957).

Lorene Watkins testified without contradiction that Eulanda Broadway signed her card on October 19, 1990, and the actual date appearing on her card, "11-19-90" is in error. Since the credited evidence clearly indicates without controversy, that this card was submitted during the current organizing campaign and the witness has credibly testified to the inadvertent error of the correct date, this card is therefore considered dated 10-19-90, found authentic, and is received in evidence.

Deborah Dukes' testimony is uncontroverted that Magnolia Stigall signed her card on October 18, 1990. No evidence was offered to the contrary, and since I was persuaded by the demeanor of Dukes that she was testifying truthfully, I credit her testimony, that Dukes' card was signed 10-18-90, that it is authentic, and therefore, it is admitted in evidence.

Dorean Griffin, a volunteer union organizer testified that between October 18 and 21, she and co-organizer Peter Goldberger visited the home and solicited the signature of Hester Green. Although Green's card is not initialed, Griffin testified she presented Green the authorization card which she read with them; that Green completed and signed the card in their presence, and returned it to her. Since Griffin's testimony is not controverted and I was persuaded by her demeanor that she was testifying truthfully, I credit her account, find Green's card authentic, and admitted it in evidence.

Zelma Beasley's card is dated "19-90." However, union organizer Marc Panepinto testified that he visited Beasley at her home on October 19, 1990; that he presented the card to Beasley and he observed her read it, complete the information on it, sign it, and returned it to him. When asked why did she date it "19-90" Panepinto said he believed Beasley meant "October 19, 1990."

Since Beasley's card is otherwise completed and signed in her undisputed handwriting, the union organizing campaign commenced on October 18, 1990, and continued through the first or second week in November, and Beasley did not appear and testify that she did not sign her card October 19, 1990, I credit Panepinto's testimony not only because I was persuaded by his demeanor he was testifying truthfully, but also because his explanation is reasonable under the circumstances and consistent with the documentary and other evidence of the organizing campaign. I find Beasley's card valid and it is admitted in evidence.

I also find *Dolores Amerine's* card valid because I credit Panepinto's uncontradicted account and all other evidence or record supports the validity of Amerine's card.

I find *Vernita Jo Walker's* card valid because I credit card solicitor Jearline Haskins' uncontradicted testimony, supported by all other evidence of record, that Walker's card is valid and therefore admitted in evidence.

I find *Sarah Minor's* card valid because I credit Veronica Beavin's uncontradicted testimony that Minor signed her card on October 29, 1990, and the evidence of record supports this conclusion.

I find *Vera Mae Grayson's* card valid because I credit her uncontradicted account that she signed her card October 1990, and the evidence of record supports her testimony because the organizing campaign was in progress between Oc-

tober 18 and 31, even though the date in October is not indicated.

I find *Lisa Curlett's* card valid because I credit Bobby Jo Carr's uncontradicted testimony that Curlett signed her card on October 19, 1990, and the evidence of record supports Carr's account.

I find *Linda Wooten's* card valid because I credit her uncontradicted testimony that she signed her card on October 20, 1990, the evidence of record supports her account, and no evidence was introduced by Respondent to refute the validity of the authorization card of either Beasley, Amerine, Walker, Minor, Grayson, Curlett, or Wooten. *Accurate Dye & Mfg. Corp.*, supra; *I. Taitel & Sons*, supra.

As of November 3, the names of the employees employed in the appropriate unit appear in Attachment A of General Counsel's brief, which is also attached to this decision, and supported by the evidence of record, except for the following names which are in dispute:

Inclusion or Exclusion

April Burroughs	Doris Buck
Ann Burroughs	Dorothy Holmes
Angie Good	Dierk Nash

Attachment A shows that as of November 3, a total of 163 unit employees had signed cards designating the Union as their bargaining representative (Attachment A). The number of employees employed in the unit as of November 3, not including the names in dispute, totals 307. Thus, the number of cards required for majority status would total 154.

Conclusions

Pursuant to the credited evidence and the above-cited legal authorities, I find no genuine issues arising from the use of single-purpose cards in the instant proceeding. The evidence failed to establish the invalidity of any authorization card as a result of modification in language by the signer, or misrepresentation of the purpose by a union solicitor. The subject and other language on the card appear to be clear and unambiguous, and no witnesses' signature who testified indicated they had any problem understanding the purpose of the card or with their intent to sign it.

Appropriate Unit—Inclusion—Exclusion

Counsel for the General Counsel argues that the employees names in the unit dispute: April Burroughs, Ann Burroughs, Doris Buck, Angie Good, and Dierk Nash, whose inclusion in the unit are in dispute, should not be included in the unit because the evidence has established they should be excluded.

In this regard, Farris Burroughs Jr., son of Farris Burroughs Sr. an engineer and part of management, testified that April and Ann Burroughs, Doris Buck, and Angie Good were all office clerical employees at the time of the eligibility cut-off date. They performed their duties primarily in offices located in the building in Hazen, Arkansas. Consequently, they were physically separated from the production area and production employees at the Brinkley facility, Brinkley, Arkansas. The evidence fails to show that either of these employees had sufficient contact with the production employees at Brinkley who were unquestionably included in the unit.

Under the foregoing uncontroverted circumstances, I find that none of the above-named employees in dispute should be included in the appropriate unit, and they are hereby found not included in the appropriate unit.

Additionally, the uncontroverted evidence of record shows that Dierk Nash was a casual employee who performed driving and loading duties on an on-call basis. The payroll registers of Respondent show that between April 1 and October 1, 1990, Nash worked only 15 hours in July, 31.87 hours in August, and 26.25 hours another week in August. He was a part-time worker who worked only 3 weeks during the 9-month period.

I therefore find on the foregoing credited evidence that Dierk Nash should, and he is, not included in the bargaining unit. Notwithstanding the exclusion of the aforementioned five employees, the evidence has already established that the Union had a clear majority of validly signed authorization cards on November 3 and 7, 1990.

The Union, having made a showing of such a majority only a few weeks before the election on December 14, the ultimate question presented for determination, is whether a bargaining order is appropriate in light of the unfair labor practices committed by the Respondent and the loss of the election by the Union.

The subordinate question presented for determination is whether the established unfair labor practices committed by the Respondent during the organizing campaign of its employees, were of such consequential magnitude as to have interfered with the election processes by dissipating the Union's majority status and precluding the holding of fair election.

The Supreme Court clearly stated in *Gissel*, 395 U.S. 575, that a remedial bargaining order is clearly warranted "in exceptional cases marked by outrageous and pervasive unfair labor practices"; when "lesser unfair labor practices nonetheless tend to undermine majority strength and impede the election process"; or "if a union has achieved majority status and the possibility of erasing the effects of the unlawful conduct and of insuring a fair election through traditional remedies is 'slight,'" a bargaining order may issue. Moreover, the Board currently requires as a condition precedent to a bargaining order, a showing that the Union achieved majority status in an appropriate bargaining unit at some relevant time. *Gourmet Foods*, 270 NLRB 578 (1984).

Applying these authorities to the facts in the instant case, it is first noted that the Union made a majority showing on November 3 and 7, 1990, when a majority of the Respondent's employee work force constituted 158 and the Union had 163 signed cards 5 weeks before the Union's election. The duration of the organizing campaign was 8 weeks. During that brief period, Respondent held approximately 14 antiunion meetings with employees on company time, at which times it repeatedly threatened employees with plant closure if they selected the Union as their bargaining representative; threatened employees on two occasions with loss of jobs; coercively interrogated employees about their union activities or sympathies on two or three occasions; polled employees about their antiunion sentiments by offering employees who so desired, "Vote No" T-shirts to wear on election day; and after the election, discriminatorily laid off the two most known union advocates and supporters, all of which unlawful conduct I find contributed to the Union los-

ing the election by a tally of 62 votes for and 202 votes against unionization.

I therefore further conclude and find that in approximately 14 company-called meetings during which Respondent coerced and restrained employees in the exercise of their protected Section 7 rights by threatening them with plant closure—emphasizing and reemphasizing its right and financial ability to close its plant in the event of unionization, interrogating employees on two or three occasions about their union activities and sympathies, polling employees about their antiunion sentiments, and discriminatorily laying off one of the most well known and outspoken union advocate and supporter only 4 days after the union election, and laying off another such union supporter 5 weeks later, all constituted extensive and pervasive unlawful conduct during the Union's organizing campaign. However, if such unlawful conduct by the Respondent is not in fact deemed extensive and pervasive, I further find that Respondent's unlawful conduct was of such a consequential magnitude as to have interfered with the election processes, dissipating the Union's majority strength and precluding the holding of a fair election. In any event, since the Union made a majority showing at a relevant time (5 weeks before the election), I find that the unlawful unfair labor practices by the Respondent nonetheless tended to undermine the Union's majority strength and impeded the election process. Moreover, since the Union made its majority showing during a relevant time (5 weeks before the election), I further find that erasing the effects of Respondent's unlawful conduct has been rendered impossible, and ensuring a fair election through traditional remedies "slight," a bargaining order in this case is clearly warranted. *Gissel*, supra; *Bi-Lo*, supra.

Accordingly, I recommend that the election in Case 26-RC-7323 be set aside and that the remedial bargaining order requested by the General Counsel and the Charging Party be granted. *Gissel*, supra; *Bi-Lo*, supra. *Auto Stores*, 298 NLRB 875 (1990).

The Board has held that an employer's obligation under a bargaining order remedy "should commence as of the time the employer embarked on a clear course of unlawful conduct or has engaged in sufficient unfair labor practices to undermine the Union's majority status." *Trading Port*, 219 NLRB 298, 310 (1975).

Respondent made its first captive audience speech to employees on October 22, at which time owner Burroughs Sr. threatened to close the plant and convert it into a chicken coop. However, other such speeches were made in late October and early November, along with other unlawful interrogation of employees. The Union obtained majority status by cards on November 3 and 7. Hence, I conclude and find that by November 10, a course of unlawful conduct by Respondent was clearly evident. Consequently, I further find that Respondent's bargaining obligation with the Union should commence on November 10, 1990. *Trading Port*, supra.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES ON COMMERCE

The activities of the Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several

States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondent has engaged in certain unfair labor practice conduct and numerous violations of Section 8(a)(1) and (3) of the Act, I will recommend that it be ordered to cease and desist therefrom and that it take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondent interfered with, restrained, and coerced its employees in violation of Section 8(a)(1) of the Act by threatening employees on numerous occasions with plant closure if they selected the Union as their bargaining representative; threatening employees with loss of jobs on two occasions, if they select the Union as their bargaining representative; interrogating employees on three occasions about their union activities and sympathies; polling employees concerning their antiunion sentiments by asking them to sign a sheet or directing them to a particular person or place where they could obtain an antiunion T-shirt, if they so desired, to wear on election day; discriminatorily laying off two employees because they advocated unionism and supported the union effort, in violation of Section 8(a)(1) and (3) of the Act, the recommended Order will provide that Respondent cease and desist from engaging from such unlawful conduct, and that it make laid-off employees whole for any loss of earnings within the meaning of and in accord with the Board's decision in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *Florida Steel Corp.*, 231 NLRB 651 (1977),⁷ except as specifically modified by the wording of such recommended Order.

Because of the character of the unfair labor practices found, the recommended Order will provide that Respondent cease and desist from or in any other manner interfere with, restrain, or coerce employees in the exercise of their rights guaranteed by Section 7 of the Act. *NLRB v. Entwistle Mfg. Co.*, 120 F.2d 532, 536 (4th Cir. 1941).

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

CONCLUSIONS OF LAW

1. By threatening employees on numerous occasions with plant closure in the event of unionization, Respondent has violated on numerous occasions Section 8(a)(1) of the Act.

2. By threatening employees on two occasions with loss of jobs on in the event of unionization, Respondent has violated Section 8(a)(1) of the Act on two occasions.

3. By interrogating employees on three occasions about their union activities and sympathies, Respondent has violated Section 8(a)(1) of the Act.

4. By polling employees concerning their antiunion sentiments by asking them to sign a sheet or directing them to a place where they could secure antiunion shirts to wear on election day, if they so desired, Respondent has violated Section 8(a)(1) of the Act.

5. By discriminatorily laying off employees Kay Vandergriff and Denise Armstrong because they supported the Union, Respondent has violated Section 8(a)(1) and (3) of the Act.

⁷See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

6. Because the above-described violations of the Act by the Respondent are so pervasive, serious, and substantial in character that the possibility of erasing the effects of these unfair labor practices, and other acts, undermining the Union's majority strength and of conducting a fair rerun election by use of traditional remedies is slight, and the employees' sentiments regarding representation having been expressed through authorization cards, would, on balance, be protected better by issuance of a bargaining order than by traditional remedies alone, the issuance of a bargaining order is recommended in Case 26-RC-7323 on behalf of employees in the unit appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All production and maintenance employees, warehouse employees, shipping employees and quality control employees employed by Respondent at its Brinkley and Hazen, Arkansas facilities, but excluding all office clerical employees, salespersons, plant clericals, professional employees, technical employees, guards and supervisors as defined in the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁸

ORDER

The Respondent, Farris Fashions, Inc., Brinkley and Hazen, Arkansas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with plant closure on numerous occasions in company-called meetings if they select the Union as their bargaining representative.

(b) Threatening employees with loss of jobs if the employees select the Union as their bargaining representative.

(c) Interrogating employees about their union activities and sympathies.

(d) Polling employees concerning their antiunion sentiments by having them sign a sheet or collect at a designated place, antiunion shirts if they so desire, to be worn during the union election.

(e) Discouraging membership in or activities on behalf of Amalgamated Clothing and Textile Workers Union, Southwest Regional Joint Board, or any other labor organization, by laying off or otherwise discriminating against employees in any manner in respect to their tenure of employment or any term or condition of employment, in violation of Section 8(a)(1) and (3) of the Act.

⁸If 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.

(f) In any other manner interfering with, restraining, or coercing employees in the exercise of their rights guaranteed in Section 7 of the Act.

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

(a) Offer to recall to work Kay Vandergriff and Denise Armstrong to their former positions or, if such positions no longer exist or not available, to substantially equivalent positions, without prejudice to their seniority or other rights previously enjoyed, and make them whole for any loss of pay suffered by reason of the discrimination against them, with interest in the manner described in the remedy section of this decision.

(b) On request, bargain collectively with Amalgamated Clothing and Textile Workers Union, Southwest Regional Joint Board commencing as of November 10, 1990, as the exclusive collective-bargaining representative of the employees in the appropriate unit described with respect to rates of pay, wages, hours of work, and other terms and conditions of employment:

All production and maintenance employees, warehouse employees, shipping employees and quality control employees employed by Respondent at its Brinkley and Hazen, Arkansas facilities, but excluding all office clerical employees, salespersons, plant clericals, professional employees, technical employees, guards and supervisors as defined in the Act.

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

(d) Post at Respondent's Brinkley and Hazen, Arkansas facilities copies of the attached notice marked "Appendix."⁹ Copies of the notice, on forms provided by the Regional Director for Region 26, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately on receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

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

⁹If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."