

Oster Specialty Products, a Division of Sunbeam-Oster Corporation and Sheet Metal Workers International Association, Local 483, AFL-CIO. Case 26-CA-15559¹

September 30, 1994

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING
AND COHEN

On February 25, 1994, Administrative Law Judge Robert W. Leiner issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed cross-exceptions and a brief in support of his cross-exceptions and in answer to the Respondent's exceptions,² and the Respondent filed a reply brief.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,³ and conclusions as modified below and to adopt the recommended Order as modified and set forth in full below.

We adopt the judge's findings for the reasons stated by him that the Respondent during the Union's organizational campaign violated Section 8(a)(1) of the Act by threatening and interrogating employees and by surveilling the employees' union activities. The General Counsel filed limited cross-exceptions contending that the judge failed to find two additional 8(a)(1) violations, as alleged, and failed to provide a remedy for two 8(a)(1) violations that he found. We find merit in these exceptions.

The credited evidence established that on May 7, 1993,⁴ Supervisor Stephen Hale approached employee Katherine Templeton and said, "I've been hearing some things about you lately, some bad things about you . . . I've heard you're for the union." We find

that by this statement the Respondent violated Section 8(a)(1) by disparaging an employee because of her support for the Union, as alleged in the complaint.

In late April, Supervisor Campbell Kelsey approached employee Alene Goolsby at her work station and asked her if she had made up her mind yet about the Union. Goolsby replied no, and Kelsey stated, "[W]ell, you better think about your job." On May 7, Goolsby wore a union T-shirt to work and Kelsey approached her and said, "I see you made up your mind." Goolsby replied, "[Y]es, I think its what the employees need," and Kelsey responded, "[W]ell, you better think real hard about your job and real hard about Mexico." We find that by these statements the Respondent made threats of job loss and plant closure in violation of Section 8(a)(1), as alleged in the complaint.

We have modified the judge's recommended Order and notice to provide a remedy for these additional violations of the Act, as well as for the judge's findings that the Respondent unlawfully threatened employees with a loss of wages if they chose the Union as their bargaining representative and promised an employee a benefit if she voted against union representation.

ORDER

The National Labor Relations Board orders that the Respondent, Oster Specialty Products, a Division of Sunbeam-Oster Corporation, McMinnville, Tennessee, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening its employees with job loss, plant closure or plant relocation, or loss of wages because of their activities on behalf of, sympathy for, or membership in Sheet Metal Workers International Association, Local 483, AFL-CIO, or any other labor organization.

(b) Disparaging employees because of their sympathies for the Union, or any other labor organization.

(c) Coercively interrogating employees regarding their union activities, sympathies, or membership in the Union, or any other labor organization.

(d) Threatening employees with discipline or discharge for engaging in union activities.

(e) Maintaining or creating the impression of surveillance of employees' union activities.

(f) Promising employees benefits if they agree to vote against union representation.

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

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

¹By Order dated July 11, 1994, the Board granted the Charging Party's request to withdraw its petition in Case 26-RC-7538 and to sever that case from the instant proceeding. We therefore consider only those portions of the judge's decision concerning the allegations in Case 26-CA-15559.

²The Respondent's motions to reject the General Counsel's cross-exceptions and supporting and answering brief are denied as we find that the documents filed by the General Counsel substantially comport with the Board's Rules and Regulations.

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

⁴All dates herein are in 1993 unless otherwise indicated.

(a) Post at its facility in McMinnville, Tennessee, copies of the attached notice marked "Appendix."⁵ 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 upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

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

⁵ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

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 threaten our employees with job loss, plant closure or plant relocation, or loss of wages because of their activities on behalf of the Sheet Metal Workers International Association, Local 483, AFL-CIO, or any other labor organization.

WE WILL NOT disparage our employees because of their sympathies for the Union, or any other labor organization.

WE WILL NOT coercively interrogate our employees regarding their union activities and sympathies on behalf of the above-named Union, or any other labor organization.

WE WILL NOT threaten our employees with discipline or discharge for engaging in union activities.

WE WILL NOT maintain or create the impression of surveillance of our employees' union activities.

WE WILL NOT promise our employees a benefit if they agree to vote against union representation.

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

OSTER SPECIALTY PRODUCTS, A DIVISION OF SUNBEAM-OSTER CORPORATION

Jane Vandeventer, Esq. and *Rosalind Eddins, Esq.*, for the General Counsel.

William K. Harvey, Esq. and *Ted M. Yeiser Jr., Esq.* (*Jackson, Shields, Yeiser, Cantrell & Harvey*), of Cordova, Tennessee, for the Respondent Employer.

Jack Gregg, International Organizer, Sheet Metal Workers International Union, Local 483, of Morrison, Tennessee, for the Charging Party Union.

DECISION

STATEMENT OF THE CASE

ROBERT W. LEINER, Administrative Law Judge. This consolidated matter was heard in Manchester, Tennessee, on October 25 and 26, 1993, based on General Counsel's complaint and notice of hearing, dated July 2, 1993,¹ as further amended at the hearing, together with certain objections to the election in Case 26-RC-7538 (unalleged conduct) corresponding to parallel allegations of 8(a)(1) violations in the complaint. Procedurally, however, the case, in large part, turned on the propriety of the Regional Director in setting aside his informal settlement agreement with the Respondent in the above-captioned unfair labor practice case.

At the hearing, all parties were represented by counsel, were given full opportunity to call and present witnesses, make and argue motions, and to make final argument. At the close of the hearing, the parties waived final argument and elected to file posthearing briefs. Thereafter, General Counsel and Respondent filed timely briefs which have been duly considered.²

On the basis of the entire record herein,³ including the briefs, and on my most particular observation of the demeanor of the witnesses as they testified, I make the following

FINDINGS OF FACT

I. RESPONDENT AS STATUTORY EMPLOYER

The complaint alleges, Respondent admits, and I find that Respondent, a corporation, with an office and place of business in McMinnville, Tennessee, engaged in the manufacture

¹ The Union's underlying unfair labor practice charge was filed and served on Respondent on April 5, 1993. Its first amended charge was filed and served on July 1, 1993.

² The Union, by an otherwise timely filed document dated December 16, 1993, urges me to set aside the election. Respondent characterizes the Union's communication as an untimely filed "brief." I agree and disregard it. The Union failed both to submit three copies and to make service on the other parties as required by Sec. 102.42 of the Board's Rules and Regulations.

³ I grant Respondent's unopposed motion to correct the official transcript.

and sale of electric clippers and shears, during the 12-month period ending March 31, 1993. In the conduct of its aforesaid business operations, it sold from its McMinnville facility goods valued in excess of \$50,000 shipped directly to points outside the State of Tennessee. In the same period it also purchased and received at the facility goods valued in excess of \$50,000 received from points directly outside the State of Tennessee. Respondent concedes and I find that at all material times it has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE UNION AS STATUTORY LABOR ORGANIZATION

The complaint alleges, Respondent admits, and I find that, at all material times, Sheet Metal Workers International Association, Local 483, AFL-CIO (the Union) has been and is a labor organization within the meaning of Section 2(5) of the Act.⁴

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background

It is undisputed, as the Regional Director's July 2, 1993 Report on Objections (G.C. Exh. 1(g)) demonstrates, that an election petition for certification was filed by the Union on March 24, 1993, in Case 26-RC-7538. Pursuant to a subsequent Stipulated Election Agreement, approved by the Regional Director on April 6, 1993, an election by secret ballot was conducted on May 13 and 14, 1993, in essentially a production and maintenance unit embracing about 550 of Respondent's employees.⁵ The results of the election, disclosed in the tally of ballots served on the parties on May 14, 1993, showed: of approximately 552 eligible voters, with 2 void ballots, 246 votes were cast for and 270 votes were cast against the Union. The 21 challenged ballots were not sufficient to affect the results of the election. A majority of valid votes, therefore, regardless of the challenged ballots, had not been cast in favor of the Union.

On May 20, 1993, the Union filed nine particular objections to the conduct of the election. Following the Regional Director's investigation into the April 5, 1993, unfair labor practice charge and the aforesaid objections, the Union, on June 28, 1993, requested withdrawal of its nine alleged objections and on July 2, 1993, the Regional Director recommended to the Board that the Union's request be approved. The Regional Director, however, relying on "unalleged" objectionable conduct, discovered during the course of his unfair labor practice and objections investigations, discovered other objectionable conduct which now also appears as unfair labor practices in paragraphs 7, 8, 9, 10, and 11 of the complaint. The Regional Director thus found that the above unalleged objectionable conduct, now also contained in the consolidated complaint as unfair labor prac-

tices, raised material and substantial issues which might best be resolved on the basis of record testimony in a consolidated hearing.

Prior, however, to issuance of any complaint, the Union and Respondent signed a settlement agreement on Friday, May 7, 1993, which the Regional Director approved on Monday, May 10, 1993. The settlement agreement provided, inter alia, that Respondent thereafter (1) would not threaten its employees with plant closure and relocation because of their activities on behalf of the Union; (2) would not tell its employees that it would be futile to engage in union activities; (3) would not unlawfully interrogate them concerning their activities and sympathies on behalf of the above Union; (4) would not create an impression of surveillance of the employees' union activities; (5) nor threaten them with discipline or discharge for engaging in union activities, nor (6) in any like or related manner interfere with restrain or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act. Copies of the settlement agreement were posted commencing May 19, 1993.

On July 1, 1993, as above noted, the Union filed its first amended charge and on July 2, 1993, the Regional Director set aside the settlement agreement and issued the complaint herein.

In any event, following the Regional Director's July 2, 1993 Report on Objections, Respondent on July 15, 1993, filed exceptions to the Report on Objections. Respondent objected to the Regional Director's consideration of the "unalleged objectionable conduct," as being outside the scope of the Union's statement of objections; objected to the conclusion that the Respondent's alleged misconduct, considered as "unalleged objectionable conduct," was discovered during the course of the investigation; objected to the conclusion that this "unalleged conduct" raised material and substantial issues to be resolved on the basis of record testimony; and objected to the recommendation that the "unalleged objectionable conduct" be consolidated with parallel complaint allegations in the unfair labor practice case for the purpose of hearing before an administrative law judge.

On July 28, 1993, the Board, acting on Respondent's exceptions to the Regional Director's recommendation in his Report on Objections, with regard to litigation of the "unalleged objections," denied Respondent's exceptions "without prejudice to the employer's right to renew its arguments to the administrative law judge" (G.C. Exh. 1(i)). No such argument was renewed or made to me.

On October 7, 1993, the Regional Director consolidated the "unalleged objectionable conduct" in Case 26-RC-7538 with the complaint allegations in Case 26-CA-15559 for the purpose of resolving the issues raised therein in a hearing before an administrative law judge (G.C. Exh. 1(j)). On October 22, 1993, Respondent, in Case 26-RC-7538, filed a motion directly with the Board appealing, inter alia, the Regional Director's issuance of the order consolidating cases, and the hearing on unalleged objectionable conduct. By letter dated October 22, 1993, the Board, by its Deputy Executive Secretary, rejected Respondent's faxed motion as unacceptable under Board Rule, Section 102.114(d). Respondent did not pursue its objection to consolidation before me.

As above-noted, the Regional Director issued the instant complaint on July 2, 1993. In paragraph 12 thereof, the Re-

⁴The complaint alleges, Respondent admits, and I find that at all material times the following persons have been Respondent's supervisors and agents within the meaning of Sec. 2(11) and (13) of the Act: Jim Thomas, division president; David Smith, plant superintendent; Tommie Yates, manager (manufacturing services); and Dorris Snyder, Steve Hale, and Campbell Kelsey, shift supervisors.

⁵As above noted, the underlying unfair labor practice charge alleging violation of Sec. 8(a)(1) of the Act was filed by the Union against Respondent on April 5, 1993.

gional Director notes that Respondent entered into the informal settlement agreement on May 7 with his approval on May 10, 1993. In paragraph 13 thereof, the Regional Director, alleging that by virtue of alleged conduct commencing May 7, 1993, and, thereafter, Respondent violated the terms of the settlement agreement, then ordered the settlement agreement to be vacated and set aside. Further, as above-noted, there then followed the Regional Director's October 7, 1993 order consolidating the cases.

B. The Procedural Issues

As of May 10, 1993, the settlement agreement settled all prior unfair labor practices.

As a crucial preliminary matter, it is necessary to determine in the first place whether unfair labor practices commencing *after May 10, 1993*, i.e., after the Regional Director signed the settlement agreement, are sufficient to (a) set aside the settlement agreement; or (b) as objectionable conduct, set aside the election; or (c) set aside both.

If these alleged unfair labor practices and parallel objections are not only found, but found to be sufficiently serious to set aside the *settlement agreement*, such a disposition might have an effect on the *election*. They could uncover the matters of alleged objection and 8(a)(1) violations occurring on or before the Regional Director's approval of the settlement agreement (May 10, 1993) and, therefore, could include those unfair labor practices and objections occurring after the filing of the petition (March 24, 1993) and before the election (May 13 and 14, 1993) as a basis for setting aside the election itself, *Ideal Electric*, 134 NLRB 1275 (1961). Quite separately, and for whatever reason, if those post-May 10, 1993, et seq. unfair labor practices are insufficient, in any event, to set aside the settlement agreement, they remain legally sufficient to be considered to set aside the May 13-14 election.

In particular, the General Counsel argues that the dates of the so-called postsettlement unfair labor practices include May 10 through 14 (G.C. Br. 11). Respondent, however, argues on the basis of the settlement agreement, approved as late as May 10, that the only alleged conduct properly to be considered as postsettlement misconduct are the allegations of alleged violations no earlier than May 12 and 14 (R. Br. 20). If they be insufficient to set aside the settlement agreement, Respondent argues that the insufficiency would stand as a bar to set aside the election as well.

For analytical purposes, the conduct of May 12 and 14, as Respondent suggests, will be examined, and thereafter, the problem of whether May 10, and indeed May 7, conduct will be considered, if necessary, to resolve the questions of whether the (a) settlement should be set aside, (b) the election should be set aside, or (c) both be set aside.

The Board's rule is that a settlement agreement will be set aside if its provisions are breached or if postsettlement unfair labor practices are committed. *R. T. Jones Lumber Co.*, 303 NLRB 841, 843 (1991). In determining whether there has been a breach of a settlement agreement or whether postsettlement unfair labor practices are committed sufficient to set aside the agreement, the Board Rule, as Respondent observes (R. Br. 20 et. seq.), is that the analysis cannot apply mechanical or a priori rules, but there must be an exercise of a sound judgment based on all the circumstances of the case, *Deister Concentrator Co.*, 250 NLRB 358, 359 (1980);

and, more important, in order to "properly" set aside a settlement agreement, the subsequent or continuing unfair labor practices must be "substantial," *Porto Mills*, 149 NLRB 1454, 1470 (1964), and not "isolated," *Foodarama, Inc.*, 260 NLRB 298, 299 fn. 2 (1982); *Coopers Union Local 42 (Independent Stave Co.)*, 208 NLRB 175 (1974). As noted in *Farm Fresh, Inc.*, 301 NLRB 907, 935 (1991), the question, in each case, is just what qualifies as "minor and isolated" or indeed "substantial."⁶

C. Allegations of Postsettlement Misconduct, the Settlement Agreement Set Aside

(1) The testimony of *Katherine Templeton*: Templeton, employed by Respondent for 17 years, worked in the blade department under the supervision of Steve Hale (Tr. 61). Templeton, who had shown no pro- or anti-union disposition prior to May 7, 1993, testified concerning four conversations with Supervisor Hale. She placed the first such conversation about a week before the election which would put it either on May 7 or before. As will be noted hereafter, it is unnecessary to decide the precise date of this conversation, although May 7 was the date Respondent bound itself to refrain from repetition of the above-listed unfair labor practices in the settlement agreement or any other of a like or related manner.

In that first conversation, Supervisor Hale told her that he had heard "bad things" about her, having heard that she was for the Union, and then told her that she had too many years to lose; that she had dependents to think about; and that the Respondent's plant could move to Mexico. He told her she needed to make her mind up and she should call her Sunday school teacher (a Respondent employee, Edith Dybal) to see if she could talk some sense into her (Templeton). In response to a leading question from the General Counsel, Templeton recalled that Hale told her that she had "better get your head on straight" (Tr. 67).

A second conversation occurred on May 10 (Tr. 66), the day on which the Regional Director approved the settlement agreement. Supervisor Hale, approaching her from behind her work station, asked her if she had thought about what he had said and then repeated that she had too many years to lose and had too many people depending on her paycheck. He again asked her if she had her head on straight to which she replied in the affirmative (Tr. 67).

In a third conversation, May 12, Supervisor Hale again approached her at her work station, asked her again if she had her head on straight, asked her if she had made up her mind and told her again that she had too many years to lose. Templeton only answered "[Y]es."

The final (fourth) conversation occurred on the second day of the election, May 14. Templeton and a group of nearby employees had not yet voted. Templeton, for the first time, wore a union button on her lapel. Hale approached Templeton at her work station and said that she was "awful

⁶In the above-cited *Farm Fresh, Inc.*, supra, heavily relied on by Respondent (R. Br. 21-22), Respondent misstates the facts and law of that case. Although the judge reinstated the Regional Director's settlement agreement in the face of postsettlement 8(a)(1) and (3) violations, the judge's decision was reversed by the Board. Contrary to Respondent's statement (Br. 22), the settlement agreement was then vacated by the Board, and the case consequently remanded to the judge for the purpose of deciding the merits of presettlement allegations, *Farm Fresh Inc.*, 301 NLRB at 908.

quiet,” and when Templeton agreed, Hale told her that she needed to see “one of these” and handed her a handbill printed on pink paper which urged employees to vote “no” (Tr. 70). Templeton told him that she had already seen the handbill and she threw it in the trash (Tr. 71). This conversation occurred about 11 a.m. (Tr. 69). It apparently was provoked by Hale earlier approaching Templeton at about 9 a.m. when he first saw her wearing a union button. He looked at the button and, as Templeton observed him, looked disappointed (Tr. 72). He then walked off and returned to have the above conversation.

The above four conversations apparently formed the basis of complaint paragraph 10(c) as amended at the hearing.⁷

Discussion and Conclusions; Violation of the
Settlement Agreement; Credibility of Witness
Katherine Templeton

Respondent argues that Katherine Templeton’s testimony is entirely unworthy of belief (R. Br. 7).

Respondent’s first argument is that Templeton testified that coemployee Rhonda Burnett was sitting elbow-to-elbow with her at her work station during the conversations occurring on May 10 and 12. Rhonda Burnett, called as a witness by the General Counsel, denied overhearing any of the conversations on May 7, 10, or 12 (Tr. 262–263). Whereas Templeton testified that Hale had never used the expression “have you got your head on straight” prior to the first time he used it about a week before the election, Rhonda Burnett testified that in the 2-year period she worked under Hale’s supervision, she heard him use that expression (“got your head on straight?”) with Templeton on several occasions during the prior year and that he did not use the expression with anyone else (Tr. 264–265).

Respondent’s second argument for discrediting Templeton’s credibility is that she spoke with the Sunday school teacher whom Hale mentioned and that teacher was not called to corroborate the matter. (R. Br. 7; Tr. 64.)

A third criticism of Templeton’s credibility was that she asserted that she had made notes of her first conversation (May 7) with Hale and that, in response to Respondent’s subpoena for the production of those notes, testified that she was unable to find the notes after searching for them. She said that she must have thrown them away (Tr. 234).

Lastly, Templeton admitted having violated the sequestration rule imposed on witnesses at the hearing. After testifying, she discussed her testimony with persons in the waiting area outside the court room but allegedly was unable to pinpoint which of the witnesses she had discussed the testimony with because she said, she was “nervous” (Tr. 236).

With regard to the first of Respondent’s observations concerning Templeton’s credibility, there is no question that another of the General Counsel’s witnesses, Rhonda Burnett, contradicted Templeton concerning the frequency and dating of Supervisor Hale’s use of the expression “have you got your head on straight?” There is no question that Templeton testified that Hale had not used the expression before the first time he used it on May 7 (Tr. 73), whereas Burnett testified that Hale used the expression for about a year prior to her

giving testimony (i.e., the autumn of 1992) and had used it only with regard to Templeton (Tr. 264–265). I agree with Respondent that this is a direct contradiction and a serious matter concerning Templeton’s credibility. I have reread the Templeton and Burnett testimony concerning especially whether Templeton and Burnett understood the questions put to them. On the basis of my rereading the testimony of these witnesses, I conclude that there was a direct contradiction and that such a contradiction seriously affects Templeton’s credibility and, under other circumstances, would unquestionably tend to undermine her veracity.

The General Counsel urges that May 7 was within the last year from the time that Burnett was testifying and was indeed 6 months before the trial. To the extent the General Counsel argues that Burnett’s testimony is therefore corroborative rather than contradictory of Templeton’s testimony (G.C. Br. 9), I reject any such explanation. The burden was on the General Counsel perhaps in redirect examination, to explain, modify, or otherwise delineate a different meaning to the words actually used. In no case, however, would the General Counsel’s theory support Templeton’s testimony that Hale’s first use was on May 7 (Tr. 73). Burnett’s testimony contradicts Templeton.

With regard to Respondent’s second argument, that the General Counsel did not produce the Sunday school teacher whom Templeton allegedly spoke to at the behest of Supervisor Hale, Respondent’s argument wholly contradicts the facts of record. Contrary to Respondent’s citation of the transcript (Tr. 64), there is no testimony in the record wherein Templeton spoke to the Sunday school teacher. The most the record suggests is that Hale suggested that she speak to the Sunday school teacher.

With regard to the third element of Respondent’s attack on Templeton’s credibility, the failure to produce the notes that she took of the May 7 conversation, I am unable to reach a decision on this point as to whether Templeton made a good-faith effort to find the notes or whether, indeed, she found them and destroyed them. It is possible, however, that she actually destroyed the notes at a prior time. Even if destroyed, the motive for destruction is unclear—whether mere housecleaning or another basis.

With regard to Respondent’s fourth argument, that Templeton disobeyed the sequestration order, the gravamen of the violation is that she talked to *anybody* outside of the room rather than remembering who exactly she spoke to. In the absence, however, of discovering whose testimony might have been tainted, *El Mundo Corp.*, 301 NLRB 351, 352 (1992), it is difficult to measure the extent to which any other witnesses’ testimony might have been tailored. I observe, however that none of the General Counsel’s witnesses testifying after Templeton testified on the subject of Templeton’s testimony except Burnett. But Burnett’s testimony, as Respondent observed, tended to undermine and impeach Templeton’s testimony rather than to support it, even perhaps on the basis of Templeton’s violation of the sequestration rule. See *Seattle Seahawks*, 292 NLRB 899, 906–907 (1989).

In resolving Templeton’s credibility, and notwithstanding the contradiction by Burnett with regard to Supervisor Hale’s use of the expression “got your head on straight?” and the questions raised by her violation of the sequestration rule and the failure to produce her notes admittedly taken, I am con-

⁷At the hearing, the General Counsel, without objection, deleted from par. 10(c) of the complaint an allegation of a similar threat of job loss occurring on April 30, 1993.

strained to observe that Respondent failed to call Hale as a witness to contradict, explain, modify, or otherwise mitigate the substance of Templeton's testimony with regard to the conversations of May 7 to 14, 1993.⁸

The failure to call Supervisor Hale to contradict, explain, and directly undermine Templeton's testimony leads me to draw an adverse inference regarding all the conversations of May 7 to 14. In particular, I infer that Hale, if called, would have testified adversely to Respondent both on the substance of his statements and the meaning of the language, particularly as to whether and when his inquiries, postsettlement, about Templeton having "her head on straight" occurred and whether they were as impliedly ominous as the earlier May 7 and 10 conversations were explicit. *International Automated Machines*, 285 NLRB 1122 (1987).

As I observed Templeton, there was nothing in her demeanor which suggested that she was untruthful. On the other hand, she violated the sequestration order and was contradicted on a material point by a witness (Burnett) called ostensibly to corroborate her testimony. On the question of actual prejudice, I have been unable to discover, nor has Respondent directed my attention, to any element of Templeton's testimony regarding violation of the sequestration order which would lead me to believe that other witnesses were tainted in their testimony or that any further testimony by Templeton was tainted.

While there is no doubt that the contradiction by witness Burnett on the question of how often and when supervisor Hale used the expression "having her head on straight," a material matter, is a significant element in weighing credibility, I do not regard the existence and failure to produce the notes to be quite so significant. There is no doubt, in my mind, that Respondent made a strong indirect case for disbelieving Templeton's testimony (Burnett's testimony; failure to produce the notes; violation of the sequestration order). The countervailing element, however, which I find crucial, is Respondent's failure to directly contradict her testimony by calling Supervisor Hale. That failure demonstrates that Respondent was relying on otherwise formidable *inferences* of Templeton's unreliability.

As I observed Templeton, in short, it is possible that she destroyed her notes innocently; that Burnett was mistaken; and that the violation of the sequestration order was a matter of excitement which, on this record, did no harm and may have aided Respondent (Burnett). Suffice it to say that Respondent has not called my attention to any of Templeton's own testimony which "carries its own death wound"; nor has Respondent, by its failure to call Supervisor Hale, or any other witness to the conversations stretching from May 7 to 14, demonstrated that the testimony of any witness dispositively discredits Templeton because it "carries its own irrefutable truth." *NLRB v. Pittsburgh Steamship Co.*, 337 U.S. 656, 660 (1949). I fully recognize that I am not obliged

⁸The postsettlement conversations of Hale and Templeton of May 12 and 14, 1993, seem to me are made explicable in the context of the language used in their prior conversations of May 7 and 10, 1993. One may discern both motive and the meaning of language from presettlement conversations which throw light on postsettlement conversations. *Park Manor Nursing Home*, 277 NLRB 197, 199 (1985); *Joseph's Landscaping Service*, 154 NLRB 1384 (1965), *enfd. sub nom. Northern California Hod Carriers v. NLRB*, 389 F.2d 721 (9th Cir. 1968).

to credit even uncontradicted testimony. And I violate no confidence in suggesting that, had Hale been called and materially and credibly contradicted Templeton's pronoun testimony, I would have had a dispositive basis for discrediting Templeton's testimony and would have discredited her. On the basis of the existing record, however, I do not discredit Templeton. On this record, Templeton, as a 17-year employee, testified under oath and will not be discredited without Supervisor Hale, in Templeton's presence, swearing that, in substance, Templeton's testimony was false or mistaken.⁹

Having credited Templeton's testimony with regard to her conversations with Hale, I conclude that, on May 12, after the May 10 settlement agreement, when Hale told her that she had too many years to lose and asked her if she had made up her mind (about voting for the Union), he was warning or threatening her with job loss if she voted for the Union. Furthermore, I regard the otherwise ambiguous conversation of May 14, wherein he told her that she was "awful quiet today" and showed her the handbill which said, "[V]ote no—don't bet the farm," to be a reminder that in prior conversations of May 7 and 10, he told her that she had too many years to lose at Respondent and had her job and her children to think about; that the plant could move to Mexico; that she needed to make up her mind about voting for the Union and that she "better get her head on straight." The May 10 and 12 (postsettlement) threats and warnings of job loss and plant moving were all implicit in the May 14 statement: "don't bet the farm" and whether Templeton had her "head on straight." In short, I particularly regard the conversation of May 12 ("head on straight"; make up her mind; too many years to lose) to be a serious 8(a)(1) violation and May 14 ("head on straight?"; "don't bet the farm") to also constitute a violation of Section 8(a)(1) of the Act and that they were Hale's explicit and implicit warnings of job loss in case Templeton voted for the Union.

(2) The testimony of *Margaret Knight*: Knight, employed 16 years by Respondent, worked on the day shift in the blade department, like Katherine Templeton, under Supervisor Hale. She testified that either on Friday, May 7, or Monday, May 10, she was approached at her work station by Supervisor Campbell Kelsey. When she asked him what he wanted, he asked her whether she was going to "pay these people [the Union] to represent [you]." Knight told him that she was for the Union and did not care who knew it (Tr. 212). Supervisor Kelsey then asked her where she was going to work after they closed the plant (Tr. 212–213); whether she was going to work at Wal-Mart. Such a statement is an unlawful threat to close the plant and a threat of job loss, violating Section 8(a)(1) of the Act. She told him that she did not believe they would close the plant because of the Union.

Respondent failed to call Supervisor Kelsey to rebut any of this testimony. Rather, Respondent attacks the relevance of the testimony by adverting to Knight's unsureness as to the day the conversation occurred. Respondent, however, concedes that on its cross-examination of Knight, it occurred to her that the conversation was either on the Friday before,

⁹Templeton, in addition, though pronoun, has no monetary interest in the outcome of the hearing and, as a current employee, is testifying directly in the face of Respondent's contrary interests. See *Georgia Rug Mill Co.*, 131 NLRB 1304, 1305 fn. 2 (1961).

or the Monday preceding, the election, i.e., either May 7 or 10. Respondent's reference (Br. 12) to Knight's pretrial affidavit to the Board, dated June 7, 1993, wherein she could not be more specific about the date except that it was "about a week before the election" (R. Exh. 11), is not inconsistent with her testimony. Nor is it uncommon for a witness' memory to be jogged, perhaps by extraneous events and testimony, as to a particularization about dates.

Furthermore, Respondent attacks her credibility by pointing to an alleged contradiction on whether her conversation with Supervisor Kelsey ended with his comment about closure of the plant or whether there were further remarks. I do not find that Knight's explanation (that she returned to her work after watching Supervisor Kelsey leave when Supervisor Hale approached) amounted to a significant self-contradiction; nor that Kelsey returned thereafter and they talked of other things.

As in the case of Templeton, above, Respondent failed to produce its supervisor, this time Kelsey, to explain, refute, or modify Knight's otherwise credible testimony. I credit Knight and find that the conversation occurred on either May 7 or 10, 1993. Since for purposes of this analysis, I am relying on testimony relating to alleged violations after May 10, 1993, I need not, for present purposes, take into account whether this conversation, if it occurred as early as May 10, would constitute a basis for setting aside the settlement agreement.¹⁰ That it is available for purposes of setting aside the election is quite another matter and will be noted hereafter. In light of Respondent's failure to call Supervisor Campbell Kelsey to refute this alleged conversation, I regard the General Counsel's failure to corroborate the conversation by calling employee Patsy Roller whom Knight telephoned on the night of this conversation to be of little significance. The key element is the failure to call Supervisor Kelsey to refute Knight's testimony. Kelsey's threat of plant closing and loss of Knight's job violates Section 8(a)(1) of the Act.

(3) Testimony of *Patsy Roller*: Roller, employed by Respondent for 21 years, was in the blade department under the supervision of Supervisor Campbell Kelsey, as was Margaret Knight, above. Roller, an open advocate of the Union, wore union insignia for 2 weeks before the election.

Roller testified that she asked Supervisor Kelsey for 2 hours of vacation time for the afternoon of May 14, before she voted in the election. She wished to leave at 1 p.m. rather than at 3 p.m. There is no dispute that Respondent requires a gate pass, completed and signed by the supervisor, before an employee can leave through Respondent's gate. As Respondent notes (R. Br. 16), normally, an employee advises the supervisor, in advance, what time the employee wishes to leave the premises and the supervisor completes the plant pass, signs it, and returns it to the employee prior to the

specified leaving time. Roller had always followed this procedure and always had been granted time off as requested.

In the morning of May 14, at 11 a.m., Supervisor Kelsey brought her the completed plant exit pass for leaving 2 hours early. As he handed her the pass, she asked him: "Why don't you let me leave at 11 A.M.?" Kelsey answered: "You can if you change your vote."

Employee Alene Goolsby, employed for 16 years by Respondent, worked in the blade department, elbow-to-elbow with employee Patsy Roller. She heard Supervisor Kelsey speak to Patsy Roller about leaving earlier and recalled that he told her that she could leave earlier "if you'll change your vote you can" (Tr. 201). Like Roller, Goolsby testified that the conversation occurred about 11 a.m. before lunchtime. She told other employees of this conversation (R. Br. 17-18).

Kelsey was not called to refute, explain, or modify this testimony of Goolsby and Roller.¹¹ Respondent does not argue that Kelsey's offer, whether or not a statutory violation, is not an abridgment of the settlement agreement.

I found Roller to be a credible witness and find that Supervisor Kelsey's offer of further time off if she would change her vote (and vote against the Union), in the presence of employee Goolsby, constitutes a violation of Section 8(a)(1) of the Act. In light of Respondent's failure to produce its supervisor to refute her testimony and in the presence of corroborating witness, I do not credit Respondent's attack on Roller's credibility.

What is left, therefore, with regard to alleged unfair labor practices occurring *after* the May 10 settlement agreement, is the testimony of Templeton and Roller. With regard to Templeton, I have found violations of Section 8(a)(1) of the Act based on the May 12 conversation in which, inter alia, Supervisor Hale told Templeton that she had "too many years to lose" and that this was a warning or threat, recapitulating threats of May 7 and 10, of discharge or loss of job in case the Union came in. I also found the May 14 conversation, whatever ambiguity might appear on its face, to constitute a violation of Section 8(a)(1) of the Act. Hale, having already threatened Templeton on May 12 with loss of her job, was telling her, in tendering the handbill, not to "bet the farm" (i.e., her job security) on the Union and was a repetition and a reminder of his prior conversation that she had "too many years to lose," a threat of job loss.

With regard to employee Roller, there is Supervisor Kelsey's May 14 offer to grant Roller further time off, early on the day of the election, if she would switch her vote and vote no union. This also is a postsettlement violation of Section 8(a)(1) of the Act.

D. The Settlement Agreement of May 10, 1993

The settlement agreement (R. Exhs. 1, 2), as above-noted, was executed by the Respondent and the Union on May 7 and by the Regional Director on May 10, 1993. By its terms (R. Exh. 1) the settlement agreement contains an attached no-

¹⁰I thus avoid answering the question whether, for purposes of setting aside the settlement agreement, Respondent's acts on and after May 7 are relevant. That question is answered by determining whether the Regional Director's May 10 approval of the settlement agreement disposes of Respondent having bound itself to the settlement agreement by its signing on May 7. In other words, is Respondent, despite the Regional Director's necessary May 10 approval, nevertheless bound, nunc pro tunc, commencing May 7? If so, then certainly May 10 unfair labor practices would be relevant in deciding whether to set aside the settlement.

¹¹Nor did Supervisor Kelsey appear in order to refute Goolsby's separate testimony that apparently on Monday, May 10, he threatened a closedown of the plant if the Union came in (Tr. 199-201).

tice for posting and requires that Respondent will “comply with all the terms and provisions of said Notice.”¹²

The notice, with which compliance is mandatory by terms of the settlement agreement, requires Respondent, *inter alia*, to refrain from (a) threatening employees with plant closure and relocation because of their union activities; (b) telling employees that it will be futile to engage in union activities; (c) interrogating employees regarding their union activities and sympathies; (d) creating the impression of surveillance of employee union activity; (e) threatening employees with discipline or discharge for engaging in union activities; and (f) “in any like or related manner” interfering with, restraining, or coercing its employees in the exercise of the employees’ Section 7 rights guaranteed by the Act.

With regard to witness Templeton, Supervisor Hale asked her on May 12 if she had her head on straight, if she had her mind made up, and told her that she had too many years to lose. These statements to Templeton constitute a threat of loss of her job if the Union prevailed, and unlawful interrogation within the meaning of the settlement agreement’s prohibition against future interrogation. These Hale statements are independent violations of Section 8(a)(1) of the Act, violate the settlement agreement, whether in particular or by virtue of the generalized prohibition against acts of a “like or related manner.”

With regard to Patsy Roller, I conclude that while Supervisor Kelsey’s May 14 offer of additional time off if Roller changed her allegiance and voted against the Union is not within any of the specific prohibitions in the settlement agreement, I find that it is arguably within the prohibitions of misconduct “in any like or related manner,” but is certainly an independent violation of Section 8(a)(1) subsequent to the May 10 settlement agreement.

It is well established that an unfair labor practice will not be found based on presettlement conduct unless there has been a failure to comply with the settlement agreement, or subsequent unfair labor practices have been committed. *Nudor Corp.*, 281 NLRB 927 (1986); *Farm Fresh, Inc.*, 301 NLRB 907, 908 (1991). As above-noted, in analyzing the case, I have relied exclusively on evidence regarding violations demonstrated in Respondent’s postsettlement conduct without reference to Respondent’s presettlement actions except insofar as I may have considered presettlement actions by Respondent’s supervisors as background evidence to determine the motive, and indeed the meaning of words, in Respondent’s supervisor’s postsettlement conduct. *YMCA of Pikes Peak Region*, 291 NLRB 998, 1010 (1988), *enfd.* 914 F.2d 1442 (10th Cir. 1990); and see particularly *NLRB v. Shurtenda Steaks*, 397 F.2d 939, 945 (10th Cir. 1968) (employer unfair labor conduct antedating settlement admissible to determine purpose and intent of postsettlement conduct). Again, Respondent’s postsettlement unfair labor practices are not isolated and are substantial. They violate the settlement agreement.

In defense, Respondent raises several arguments. The first is that these postsettlement violations were merely the work of *low-level supervisors*, Campbell Kelsey and Steve Hale.

¹²The fact that Respondent did not *post* the notice until May 19, 1993, does not, in my judgment, excuse Respondent’s conduct for not complying with the agreed terms thereof on an earlier date, *i.e.*, on the effective date of the settlement agreement, no later than the end of business on Monday, May 10, 1993.

But these same supervisors engaged in substantial, similar presettlement violations as well. Whether or not Respondent actually chooses to use its low-level supervisors as its instrument to engage in unfair labor practices, the conduct of such supervisors was a basis on which the Regional Director (as the instant complaint reveals with regard to presettlement allegations) apparently caused Respondent to settle the matter before issuance of the instant complaint. Analytically, it would indeed be anomalous for the Regional Director to be able to threaten issuance of complaint based on the activities of low-level supervisors and yet not be able to set aside the settlement on the basis of similar postsettlement activities of the same supervisors.

Next, Respondent argues that the above incidents were *isolated* and each was only “the opinion of the individual [supervisor]” (R. Br. 14). These incidents were not isolated. They were part and parcel of the supervisors’ continuing unlawful campaign, presettlement and postsettlement, against the Union. If the postsettlement unlawful conduct of a single supervisor could not be categorized as “isolated,” *Metropolitan Life Insurance Co.*, 166 NLRB 553 (1967), then it would be difficult to conclude that the repetitious unlawful conduct of two supervisors could be thought of as “isolated.”

Respondent further defends on the ground that the postsettlement unfair labor practices must be “substantial,” relying on the footnote of the administrative law judge in *Foodarama, Inc.*, 260 NLRB 298, 299 fn. 2 (1982). I find that the postsettlement violations of Section 8(a)(1) by Supervisors Kelsey and Hale, an unlawful offer, interrogation and threats of job loss, in the presence of and repeated to other employees, are “substantial.” See *Metropolitan Life Insurance Co.*, *supra*, 166 NLRB at 554.

Lastly, the Respondent defends on the ground that a *union handbill* (R. Exh. 5), widely distributed on May 12, 1993 (quoting a newspaper article of the same day (R. Exh. 6)), quoted Respondent’s division president’s (Thomas) statement that: “Charges Oster intends to move if it is Unionized are flatly false.” The union flyer then ends with the Union’s statement: “they will not close and walk away from the best plant they have!” (R. Exh. 5).

Respondent argues that the union-distributed handbill of May 12, 1993, on the eve of the election, quoted the high company official as having denied that the plant would move because of the Union. Respondent concludes (R. Br. 15), that such a union-disseminated handbill eliminates the unlawfulness of similar “one-on-one” statements of plant move or closure by its supervisors (R. Br. 15).

Respondent concedes that this argument of repudiation or disavowal of its supervisors’ unlawful conduct does not meet the Board’s test for repudiation of unfair labor practices in *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978). Rather, Respondent argues that the employees were put on notice, as effectively as could be, that there was not going to be any plant movement or closure because of unionization. It is then argued that “the slate was wiped clean through the disavowal just as it was found by the Board in *Agri-International*, 271 NLRB 925 (1984), wherein disavowal of lower-level supervisor conduct occurred 1 week before the election. But *Agri-International* hardly supports Respondent’s position. In the first place, in that case, the employer’s chief supervisor posted on company bulletin boards, and mailed to

employees, a disavowal notice spelling out employees' rights under the Act and pledging that employees would not in the future be asked how they were going to vote. By contrast, in the instant case, Respondent's postsettlement actions included continued coercive interrogation, offer, and threats. Furthermore, in the cited case, the employer directly communicated, in detail, the contents of the notice at group meetings of each shift of employees. In those meetings, each supervisor involved in unlawful conduct individually came forward before the group and announced that he would thereafter be committed to the principles set forth in the posted notice to employees. That did not happen in this case. Here, Respondent's supervisors committed further unfair labor practices.

Moreover, the issue in the cited case was whether, despite the employer's attempted repudiation, the employer's prior conduct nevertheless constituted interference with the employees' free choice in an *election*. In other words, it was whether there had been a sufficient prior repudiation or disavowal of unfair labor practices to have permitted a free election. That is not the issue with which we are presently dealing. We are not now dealing with the issue of misconduct sufficient to set aside an election; we are dealing only with the issue of misconduct sufficient to set aside a settlement agreement.¹³

In short, therefore, unlike *Agri-International*, supra, we do not have here, as Respondent concedes, a *Passavant Memorial Area Hospital*, supra, repudiation; we do not have the lower-level supervisors promising, in the presence of all employees at formal meetings of each shift, to refrain from their prior unfair labor practices; and, more important, we are not here dealing with whether that repudiation was sufficient to avoid the lingering effects of objectionable conduct which could interfere with the laboratory conditions of election. Here, the legal issue is only whether a settlement agreement was broken by "substantial" postsettlement unfair labor practices or should be set aside because of substantial postsettlement unfair labor practices whether or not in direct violation of the settlement agreement.

I find that the unfair labor practices, postsettlement, were neither isolated nor insubstantial nor was there a lawful repudiation of any of them and that they violated the settlement agreement. I therefore recommend to the Board that the Regional Director's settlement agreement, executed by the parties on May 7 and by the Regional Director on May 10, 1993, be set aside because of violation of the settlement agreement and because of the existence of postsettlement substantial unfair labor practices.¹⁴

¹³ Among other things, the requisite proof to set aside a *settlement agreement* is merely that the subsequent unfair labor practices be substantial enough to have either violated the settlement agreement or be substantial new ones. On the other hand, to set aside an *election*, unfair labor practices (coextensive with objections to the elections, as herein) must be sufficiently *widespread* as to have effected the conduct of the *election*. *Sears Roebuck de Puerto Rico*, 284 NLRB 258, 259 fn. 13 (1987).

¹⁴ To the extent Respondent argues, R. Br. 22, that its above few postsettlement unfair labor practices are not "substantial" because they occurred in a unit of 550 employees, Respondent misperceives the actual issue at hand. Not only were they committed in the presence of and repeated to other employees, but, again, we are not dealing with the question whether conduct has a widespread impact sufficient to set aside an *election*, *Sears Roebuck de Puerto Rico*, supra.

The May 10, 1993 settlement agreement having been set aside, the alleged unfair labor practices (and parallel objectionable conduct) occurring presettlement are now uncovered and may be analyzed to inquire if the *election* should be set aside.

E. *The Alleged Presettlement Unfair Labor Practices and Objectionable Conduct; Violation of Section 8(a)(1)*

1. Paragraphs 9(a) and (b) of the complaint

In December 1992, 2 weeks before Christmas, employee Norris discussed Respondent's recent reduction of employee vacation benefits with Supervisor Doris Snyder; in the presence of employee Peggy Blair. Employee Norris said that the employees needed a union. Snyder asked Norris where he would work if a union was selected and told him that if a union came into the plant, Respondent would close the plant and move to Mexico (Tr. 34, 50-52). Snyder's statement that the plant would close and move to Mexico if the Union got in is an unlawful threat; and his statement, posed in the form of a question, of where employee Norris would work if the Union got in, is a threat of loss of his job in the event that the Union got in. Each statement constitutes a violation of Section 8(a)(1) of the Act.

In the spring of 1993, the Union began an organizing campaign among Respondent's production and maintenance employees. Its petition for certification was filed on March 24, 1993. About 2 weeks before the filing of the petition, employees Blair and Norris and Supervisor Snyder had a conversation between 2 and 4 a.m. on their night shift. When Blair and Norris discussed whether the Union would get in and whether the Employer would then close the plant, Supervisor Snyder stated that the plant would close and Respondent would lock the door and would move to Mexico. Employee Norris said that the plant was a moneymaker, making millions of dollars of profit, and would never close to save a hundred thousand dollars because of the Union (Tr. 36). Snyder answered that if the plant didn't close, the employees would go back to minimum wage.

Complaint paragraph 9(a) alleges that in mid-December 1992, and again on or about March 10, 1993, Respondent threatened employees with removal of Respondent's facility to Mexico if employees selected the Union; and (b) on or about March 10, told employees it would be futile for the employees to select the Union. The above uncontradicted conversations clearly show unlawful threats by Snyder that Respondent would move the plant to Mexico if the employees selected the Union, in both the mid-December and March 10 conversations. And his threat to the employees that the advent of a union would cut their wages back to minimum wages is also unlawful.

The General Counsel's complaint characterizes this as a demonstration of "futility" if the employees selected the Union. I do not see it as an issue of "futility"; rather, it is a threat that unionized employees would lose their higher wages if the Union were selected. This is not futility. This is a threat of loss of wages. In any event I find Snyder's

Rather, the question is whether the settlement agreement should be set aside on the basis of postsettlement unfair labor practices in violation of the settlement agreement.

statements violate Section 8(a)(1) of the Act. In this regard, Respondent failed to call Supervisor Snyder or any other witness to refute the testimony of employee William C. Norris whose credible testimony supported the above findings.

2. Paragraphs 10(a) through (c) of the complaint

Paragraph 10 of the complaint deals with alleged violations of Section 8(a)(1) of the Act, in the period May 7 through 14, 1993, by Supervisor Steve Hale, the first-shift supervisor.¹⁵

The allegations of paragraphs 10(a) and (b) are supported solely by the testimony of 17-year employee Katherine Templeton whom I have credited, above, particularly because of Respondent's failure to call or explain the absence of, Supervisor Hale to refute her testimony. Templeton's testimony relating to these following violations is wholly uncontradicted.

Thus, about a week before the election, i.e., around May 7 as Templeton was leaving her work station (she had not yet identified herself as a union supporter) in the presence of other employees, Supervisor Hale approached her while she was cleaning her hands (Tr. 63). He told her that he heard some "bad things about you lately." When she said that one could hear a great many things in the plant, Hale said that he had heard that she was "for the Union" (Tr. 63). He then told her:

[You have] too many years to lose at Oster, and [you have your] children and [your] job to think about, and a lot of people depended on [your] paycheck . . . that the plant could move to Mexico . . . that [you need] to make up [your] mind that [you should] call [your] Sunday school teacher and that [you] had better get [your] head on straight [Tr. 64].

On the following Monday morning, May 10, at her work station, with employee Rhonda Burnett at her elbow, Hale came up behind her and asked: "Have you thought about what I said?" (Tr. 67). When Templeton said that she had thought about it, Hale told her, again: "You've got too many years to lose; . . . too many depending on [your] paycheck and [do you] have [your] head on straight?" (Tr. 67).

As above noted, this testimony sheds light, as background evidence, on the meaning of Hale's postsettlement conversations with Templeton on May 12 and 14, 1993, *supra*. I find that Respondent, by Hale's May 7, 10, 12, and 14 conversations with Templeton, threatened her with job loss or threatened that the plant would move to Mexico if the employees selected the Union in the election which was to follow on May 13 and 14, 1993. These threats are serious threats, in the presence of Burnett and fellow employees. In any event, by virtue of subsequent union handouts and handbills, together with Respondent's division president, Thomas, being quoted¹⁶ in the local newspaper, as above-noted, all suggest

¹⁵As above-noted, an additional alleged violation of April 30, 1993, was deleted at the hearing. Hale was Margaret Knight's and Katherine Templeton's supervisor in the above-discussed postsettlement unfair labor practices.

¹⁶Division President Thomas' pre-May 12 assurance that the charges of moving the plant if unionized were "flatly false" (R. Exh. 6, p. 2) was not consistent with Hales' May 7 or 10 statement to Templeton, *supra*. Nor is Thomas' denial necessarily consistent

that Hale's threat to close the plant and move to Mexico was an understanding widely disseminated among and commonly held by the employees. I find that such statements by Hale constitute unfair labor practices within the meaning of Section 8(a)(1) of the Act. Pursuant to the consolidation of the unfair labor practice hearing with a hearing required to resolve the unalleged objections in the Regional Director's Report on Objections, and since the unfair labor practices track the unspecified objections, Hale's threats and statements of May 7 and 10, as well as his postsettlement statements of May 12 and 14, not only constitute violations of Section 8(a)(1), but also are objectionable conduct which interfered with the holding of a full, fair, and free election and the laboratory conditions necessary therein. On the basis of Hale's May 7 and 10 conduct, widely disseminated (threat of plant closure; movement to Mexico, loss of job) among Respondent's unit employees, I would recommend that on this conduct, alone, that the election of May 13 and 14 be set aside.

3. Complaint paragraph 7; violation of Section 8(a)(1) of the Act

Paragraph 7 is devoted to allegations of 8(a)(1) violations by Respondent's plant superintendent, David Smith, on April 2, 1993, following the March 24, 1993 filing of the petition for certification and prior to the May 13-14, 1993 election, thus also within the *Ideal Electric Co.*, 134 NLRB 1275 (1961), critical period. As noted hereafter, Smith and Manufacturing Manager Yates followed the same course of action in dealing unlawfully with at least three employees.

4. Paragraphs 7(a), (c), and (e)

On or about April 2, 1993, Plant Superintendent Smith sent for employees Sam Phillips and Charles Evans to come to his office. When Phillips got to the office, employee Evans and Supervisor (manager, manufacturing services) Tommy Yates were already in the office. Smith said that the employees were called into the office because of their asking another employee, on "company hours" (Tr. 131), to sign a union card. Smith said if they were caught signing a union card or asking anybody to sign a union card they would be out the door. Smith denied asking the employee to sign a union card. Smith also told Phillips that he, Smith, needed his job and: "I don't know about you, but if the Union comes in here this plant could move to Mexico" (Tr. 132). Phillips also credibly testified, without contradiction, that at the time this meeting in Smith's office took place, there was no rule in the plant regarding talking during working time (Tr. 133).

As alleged, Smith's statements to Phillips that if the Union was selected by the employees, the plant would move to Mexico; asking him if he distributed union cards on com-

with Plant Manager David Smith's statements to employee James Sweeten. See above text. In fact, Thomas' denial, quoted in the newspaper, was apparently in response to Respondent's perception of widespread employee fears of plant closure or moving in response to unionization. Hence Thomas' denial. But the rumors were not mere fictional union-based propaganda. Respondent's supervisors were making the same threats to employees. Such threats (plant closing or moving) understandably are presumed to spread quickly among unit employees. *NLRB v. J-Wood*, 720 F.2d 309, 317 fn. 11 (3d Cir. 1983).

pany “hours” (without a rule prohibiting this) and telling him that if he was caught getting anybody to sign a union card or talking union on company time, that he would be “out the door” (Tr. 132) all constitute unlawful threats of discharge, unlawful interrogation, and unlawful threat of plant removal all in violation of Section 8(a)(1) of the Act as alleged.¹⁷ Since this April conversation among Smith, Evens, and Phillips occurred within the *Ideal Electric* critical period, and since these unfair labor practices track the objections specified in the Regional Director’s Report on Objections, I recommend to the Board that these objections be sustained and that these objections provide additional basis on which the election should be set aside.

5. Paragraphs 7(b), (d), and (e): violations of Section 8(a)(1) of the Act¹⁸

The above paragraphs relate to violations of Section 8(a)(1) in statements by Plant Superintendent Smith implying the futility of employees selecting the Union; unlawful interrogation and a threat of discharge for engaging in union organizing activities.

Employee James Sweeten, employed for 6 years, a setup operator in the punch press area, testified without contradiction: that on Friday, April 2, 1993, he was called into the office of Plant Manager David Smith in the presence of Supervisor Tommy Yates (Tr. 93) because of an argument between Sweeten and employee Brad Bolding, a tool-and-die employee. Supervisor Yates asked Sweeten if the argument in the tool-and-die department was about the Union. Sweeten told Yates that the argument was about wages. In the argument with Bolding, Sweeten called another employee a “suck but” (Tr. 96). Yates told Sweeten that he had heard that he was harassing employees in the toolroom and asking them to go to union meetings. Sweeten told him that it was the other way around, that every time he went into the toolroom, Bolding would tell him that he would have to ask his union steward if he could do certain work for Sweeten (Tr. 97). Sweeten told Supervisor Yates and Plant Manager Smith that Bolding was harassing him by suggesting that there was a union steward Bolding would have to consult before he could do the work for Sweeten (Tr. 97–98).

Plant Manager Smith then asked Sweeten if he would like to “keep working at Oster” and when Sweeten said that he would, Smith said that he knew of 10 employees on the second shift that were trying to organize (for the Union) (Tr. 98). Smith told Sweeten that Sweeten knew who they were but Sweeten said that he “might not know them” (Tr. 98). Smith insisted that Sweeten did know who they were and that if he caught those 10 employees organizing or handing out cards, they would be terminated or out the door, “suspended” (Tr. 98). Smith told Sweeten that he had worked for

¹⁷Neither Supervisor Smith nor Yates testified. Distributing or soliciting union cards during company “hours” is not necessarily subject to prohibition. If the solicitation was on breaktime or lunchtime, for instance, the solicitation of union cards and signatures, *prima facie*, could not be lawfully prohibited. In any event, there was no plant prohibition of this conduct.

¹⁸Par. 8 of the complaint alleging the April 2, 1993 unlawful interrogation of employees concerning the employees’ union activities would be merely cumulative in the context of any restraint or order prohibiting such conduct that I might find. Since it is cumulative, I need not address that allegation.

Oster for 34 years without a union and that he hoped that it would be 34 more years without one (Tr. 98).

When Smith told Sweeten that there were 10 employees on the second shift who were trying to organize in favor of the Union (Tr. 98), he mentioned that Sweeten was 1 of the 10 organizers (“he said there’s 10 of you, 10 on second shift”).

In fact, at a prior union meeting, the union agent asked for 10 volunteers from among the employees to help the Union get information as to what was going on in the plant (Tr. 106). Sweeten, in fact, signed on as one of the volunteers (Tr. 106). This union meeting had occurred on Tuesday prior to the Friday meeting in Smith’s office with Supervisor Yates (Tr. 106).

In one part of the conversation concerning moving of the plant, when Smith asked Sweeten what he would do if he was “out of a job tomorrow,” Sweeten told him he would be looking for another job. In the same conversation (Tr. 104–105), when Smith asked Sweeten if he would like to see the plant stay in McMinnville (Tr. 105), Sweeten asked Smith “point blank” that if the Union came in, would Respondent move the plant. Smith said that he was not saying that; he was saying that Respondent would make clippers (Tr. 105).

With regard to the allegations of complaint paragraph 7(b) wherein Smith allegedly implied that it would be futile for the employees to select the Union by telling them that the employees would never have a union at its facility, I recommend that this allegation be dismissed as unproven. The most that Sweeten testified to was that Smith said that he was happy that there had been no union in the plant for 34 years and hoped there would never be one for an additional 34 years.

With regard to complaint paragraph 7(d), there is no question that Smith told Sweeten not only that he knew that there were 10 employees on the second shift that were trying to organize for the Union, but that Sweeten was 1 of them, a fact which was true on Sweeten’s undenied and uncontested testimony. Smith’s statement was therefore a statement of Respondent’s unlawful and accurate surveillance of Sweeten’s union activities. It is a violation of Section 8(a)(1) as alleged.

Finally, with regard to paragraph 7(e), when Smith asked Sweeten, in the same conversation, whether he would like to keep working at Oster and what Sweeten would do if he were out of a job tomorrow and would he like the plant to stay in McMinnville, I find that these are unlawful threats of discharge, loss of job, and plant moving, in violation of Section 8(a)(1) of the Act as alleged.

Since Sweeten’s conversation with Supervisor Yates and Plant Manager Smith was uncontradicted and since, again, neither Yates nor Smith was called, I fully credit Sweeten’s testimony. Moreover, since the conversation on April 2 occurred within the critical *Ideal Electric* period I find that Yates’ and Smith’s conversation with Sweeten constitutes objectionable conduct and is a basis for setting aside the election.

CONCLUSIONS OF LAW

1. Respondent Oster Specialty Products, a Division of Sunbeam-Oster Corporation at all material times has been

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

2. Sheet Metal Workers International Association, Local 483, AFL-CIO has been and is a labor organization within the meaning of Section 2(5) of the Act.

3. By engaging in, since mid-December 1992, and through May 14, 1993, the following acts and conduct, Respondent interfered with, restrained, and coerced its employees in violation of the rights secured them by Section 7 of the Act, thereby violating Section 8(a)(1) of the Act:

(a) Threatening employees with removal of Respondent's facility to Mexico if employees selected the Union to represent them.

(b) Threatening the employees with job loss if the Union was selected by the employees.

(c) Threatening the employees with plant closure and loss of jobs if the employees selected the Union.

(d) Conditioning a benefit to an employee on abandonment of an employee's support for the Union.

(e) Coercively interrogating employees with regard to their membership in, sympathy for, and activities on behalf of the Union.

(f) Unlawfully surveilling the union activities of its employees.

THE REMEDY

Having found that Respondent engaged in unfair labor practices in violation of Section 8(a)(1) of the Act, I shall recommend to the Board that it order Respondent to cease and desist therefrom.

Having found that Respondent violated the May 10, 1993 informal settlement agreement, and having found that Respondent's conduct in the *Ideal Electric* period subsequent to March 24, 1993, and on, and prior to, May 14, 1993, interfered with the holding of a fair election among Respondent's employees in the appropriate unit, I shall recommend to the Board that both the settlement agreement and the election of May 13-14, 1993, be set aside. This recommendation is based on the unfair labor practices paralleling the objections (complaint pars. 7 through 11) described in the Regional Director's Report on Objections.

To the extent Respondent argues that, pursuant to Board Rules and Regulations, Section 102.69, there are actually no election objections of record because all of the Union's specified objections have been withdrawn, that matter must be addressed to the Board rather than to me. Even if that were true, however, the crucial fact is that a consolidated hearing remains. For the Board Rule, as Respondent concedes (R. Br. 31-34) is that findings of unfair labor practices litigated in a hearing consolidated with a hearing on objections in a representation case, can form the basis for setting aside the election even though those unfair labor practices were not raised by the objections. *Monroe Tube Co.*, 220 NLRB 302, 305 (1975). Indeed, Respondent concedes, as it must, that in *White Plains Lincoln Mercury*, 288 NLRB 1133 (1988), the Board held:

Simply stated, a meritorious objection is anything that would justify setting aside the election, whether that

misconduct was raised by the Union in its objections or was discovered subsequently by the Agency's own procedures in resolving the questions raised as to the propriety of the election.

In the instant case, in the investigation of unfair labor practices, evidence was discovered by the Regional Director which would form the basis for setting aside the election. Allegations supported by such evidence indeed were pleaded as the instant unfair labor practices and also found to be the pleaded unalleged objectionable conduct.

To the extent Respondent relies on *Framed Picture Enterprise*, 303 NLRB 722 (1991), and *John W. Galbreath & Co.*, 288 NLRB 876 (1988), for the proposition that evidence discovered after the time for filing objections ordinarily should not be considered as a basis for setting aside the election, those cases are wholly distinguishable. Those cases are not consolidated representation and unfair labor practice cases. They are purely representation cases and do not remotely involve the rationale and rules stated in *Monroe Tube Co.*, supra, and *White Plains Lincoln Mercury*, supra.

Respondent argues that Board Rule, Section 102.69, and its requirement for timely filed objections, becomes meaningless if the Union is permitted to simply file any statement of objections, file a contemporaneous unfair labor practice charge, and "hope that something thereafter will result in the issuance of a complaint" (R. Br. 34). That argument is unavailing. The Charging Party Union, in such a hypothetical case, merely does not "hope" that something thereafter would result in the issuance of a complaint. Rather, if investigation of the charge results in dismissal or withdrawal, then there would be no complaint and hence no consolidated case on which to base objectionable conduct derived from parallel unfair labor practices. In such a case, the rule in the two cases cited by Respondent, above, would be engaged. If, on the other hand, the charge is meritorious and unfair labor practices within the critical period are alleged and found, then it is not a "hope" that results in a consolidation of the cases (and perhaps the setting aside of the election); rather, as in the instant case, it is Respondent Employer's own misconduct and unfair labor practices.

I have found that Respondent's objectionable conduct, occurring after the filing of the March 24, 1993 petition and up to and including the May 13-14, 1993 election, came within the *Ideal Electric* period (supra, 134 NLRB 1275); and, constituting unfair labor practices, a fortiori, constitutes conduct which interfered with the exercise of a free and untrammelled choice in the election. This is because the test of conduct which may merely interfere with the "laboratory conditions" for an election is considerably more restrictive than the test of conduct which amounts to interference, restraint, or coercion which violates Section 8(a)(1). *Dal-Tex Optical Co.*, 137 NLRB 1782, 1786-1787 (1962). I thus recommend to the Board that the objections be sustained; that the election in Case 26-RC-7538 be set aside and that a new election be held whenever the Regional Director for Region 26 finds that the circumstances for such new election are just and proper.

[Recommended Order omitted from publication.]