

Pepsi-Cola Bottling Company of Fayetteville, Inc. and United Food and Commercial Workers Union, Local 204, affiliated with United Food and Commercial Workers International Union, AFL-CIO, CLC. Cases 11-CA-14889, 11-CA-15034, 11-CA-15181, 11-CA-15281, 11-CA-15289, 11-CA-15383, and 11-CA-15556

December 16, 1994

DECISION AND ORDER

BY MEMBERS STEPHENS, DEVANEY, AND COHEN

On May 11, 1994, Administrative Law Judge Lowell M. Goerlich issued the attached decision. The Respondent filed exceptions and a supporting 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 brief and has decided to affirm the judge's rulings, findings,¹ and con-

¹ 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'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings. The Respondent further claimed essentially that the proceedings here were tainted by bias. After a careful examination of the entire record we are satisfied that this allegation is without merit.

With respect to the judge's finding that employee Faass' discharge was unlawful, the judge placed reliance on the fact that the Respondent waited over 2 months after Faass' last personal injury to discharge him. We note that there is a testimonial discrepancy as to when Faass' last personal injury occurred. We find, regardless of when the injury occurred and without relying on any 2-month delay, that the judge correctly found that the General Counsel established a prima facie case of discriminatory motivation for the discharge, and the Respondent failed either to rebut that case or establish a defense under *Wright Line*, 251 NLRB 1083 (1980).

Member Devaney, in adopting the judge's finding that several statements at the captive audience meeting constituted threats of termination for engaging in union activities, finds it unnecessary to rely on the judge's citation of *Baddour, Inc.*, 303 NLRB 275 (1991), in which he dissented, and which he views as distinguishable on its facts.

Member Stephens would not find that employee William Bryan Frazier was an agent of the Respondent. When an employer places an employee in a position such that other employees could reasonably believe that the employee speaks on behalf of management, the employee's actions are attributable to the employer. Here, as the judge found, employees initially asked Frazier to be their union shop steward, an incongruous circumstance if employees truly could perceive Frazier as an agent of the Respondent. Further, Frazier's agency status rests on virtually the identical factors found insufficient to confer supervisory status on him, e.g., signing timecards, writing up employees, solving maintenance problems, and performing various reportorial duties. In Member Stephens' view, the performance of these duties is also insufficient to cloak Frazier with agency status. He concludes, nonetheless, that even without a finding that Frazier was an agent, the record still establishes that the Respondent's discharge of employee Munn violated Sec. 8(a)(3) and (1).

clusions² and to adopt the recommended Order, as modified.

The judge found, inter alia, that the Respondent unlawfully refused to provide the information requested by the Union in its letter dated July 14, 1993. The Respondent excepts to that finding. We find merit in the Respondent's exception insofar as it relates to part of the Union's information request.

Items 1 and 2 of the Union's information request involved lists of all terminations and hires since January 18, 1993. The union representative who testified at the hearing stated, as the reason for requesting these items, a need to update files because she had been newly assigned to service the plant. As to these matters, we agree with the judge's conclusion that the information was necessary to the Union for adequate representation of employees and, thus, the Respondent's refusal to furnish it violated Section 8(a)(5) and (1) of the Act.

As to items 3 and 4 in its letter, the Union requested information concerning the terminations of employees Schriber and Faass. The day after it sent its letter to the Respondent, the Union filed unfair labor practice charges with the Board concerning the discharges of these employees. It is well established that the Board procedures do not include pretrial discovery. For that reason, the Board has held that when information is sought that relates to pending 8(a)(3) charges, it generally will not find that a refusal to provide such information violates the Act. *Union-Tribune Publishing Co.*, 307 NLRB 25, 26 (1992), and *WXON-TV*, 289 NLRB 615, 617 (1988). We recognize that *WXON-TV* is factually different from the instant case. In that case, an 8(a)(3) and (5) charge was filed the day after the information was sought. In the instant case, the 8(a)(3) charge was filed on the day after the information was sought and the 8(a)(5) charge was added 2 weeks later. Despite this difference in timing, we believe that the inference is plain that the information was sought because of its relationship to the 8(a)(3) charge. *American Oil Co.*, 171 NLRB 1180, 1188 (1968). Thus, for the reasons stated in the above decisions, we conclude that the Respondent did not violate Section 8(a)(5) when it failed to provide the information described in items 3 and 4 of the Union's July 14, 1993 request.³

² At one point in his decision the judge stated that employee Curtis' discharge violated Sec. 8(a)(3) as well as Sec. 8(a)(5). There was, however, no allegation that Curtis' discharge violated Sec. 8(a)(3), nor does the judge include such a finding in his conclusions of law. In adopting the judge, we clarify that Curtis' discharge violated Sec. 8(a)(5) and (1) only.

³ The judge inadvertently failed to include an affirmative order requiring the Respondent to provide the information requested in the Union's July 14, 1993 letter. We will modify the recommended Order so as to require the Respondent to provide the requested information to the extent consistent with this decision.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Pepsi-Cola Bottling Company of Fayetteville, Inc., Fayetteville, North Carolina, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Add the following as paragraph 2(f) of the judge's Order and renumber the subsequent paragraphs of the Order accordingly.

“(f) Furnish the Union with the information requested as items 1 and 2 in its letter of July 14, 1993.”

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

APPENDIX B

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

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

WE WILL NOT unlawfully discharge any of our employees or discriminate against them in any manner because of their union affection or union activities.

WE WILL NOT unlawfully discharge or discipline any of our employees because they have violated rules that we have unilaterally put into effect without bargaining with the Union as required by law.

WE WILL NOT unlawfully represent to our employees that it is futile to choose a union as their bargaining agent.

WE WILL NOT unlawfully threaten that our employees will lose benefits if they choose the Union as their bargaining agent.

WE WILL NOT unlawfully threaten employees that we will close our plant if the Union comes in.

WE WILL NOT unlawfully threaten our employees that they will be terminated if they choose the Union as their bargaining agent.

WE WILL NOT unlawfully blacklist employees.

WE WILL NOT unlawfully interrogate employees about their union activities.

WE WILL NOT unlawfully withhold wage increases to discourage union activities and WE WILL reimburse any employees from whom we have unlawfully withheld wage increases.

WE WILL NOT unlawfully assign employees onerous tasks because of their union affection.

WE WILL NOT unlawfully make unilateral changes in our employees' wages, hours, working conditions, or

other conditions of employment concerning mandatory subjects of bargaining without bargaining collectively with the Union in accordance with the requirements of Section 8(a)(5) of the National Labor Relations Act.

WE WILL NOT unlawfully refuse to provide information relevant and necessary to the Union's performance of its function as bargaining representative.

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

WE WILL offer Robert Dale Munn, Jerry Lane Parker, Christopher Matthew Hyatt, Joseph Theodore Lee Jr., Benjamin Frank Curtis, and John P. Faass Jr. immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to the seniority or any other rights or privileges previously enjoyed, and WE WILL make them whole for any losses of earnings and other benefits resulting from their discharges, less any net interim earnings, plus interest.

WE WILL notify the above-named employees that we have removed from our files any reference to their discharges and that the discharges will not be used against them in any way.

WE WILL remove from our files any reference to the disciplinary action taken against Roger Deskin on May 28 and June 26, 1992, and reimburse him for the earnings he lost by reason of his suspension, with interest.

WE WILL rescind and cease giving effect to rules for shop employees put in effect on May 12, 1992, the shop requirement that shop employees change tires and clean drains, the zero settlement policy effective December 9, 1992, the change of pay for full-service, tell sell, and bulk service employees, the change in the sparmen's work schedule, changes in hiring guidelines and employment guidelines in respect to driving violations, change in work schedules for merchandisers, and changes in lost time injuries and WE WILL bargain collectively on request with the Union with respect to the new rules and changes as the exclusive representative in the appropriate unit.

WE WILL reimburse our employees for any losses which they have suffered by reason of our unilateral changes and for any losses by reason of our withholding wage increases together with interest in accordance with the Board's usual policy.

WE WILL furnish the Union with the information requested by the Union's letter of July 14, 1993, described in items 1 and 2.

PEPSI-COLA BOTTLING COMPANY OF
FAYETTEVILLE, INC.

Paris Favors Jr., Esq., for the General Counsel.
Joel I. Keiler, Esq., of Reston, Virginia, and *Margie Case, Esq.*, of Raleigh, North Carolina, for the Respondent.
Shelda J. Upchurch, of Durham, North Carolina, for the Charging Party.

DECISION

STATEMENT OF THE CASE

LOWELL M. GOERLICH, Administrative Law Judge. The charge in Case 11-CA-14889, filed by United Food and Commercial Workers International Union, AFL-CIO, CLC (the Union) on February 27, 1992, was served on the Respondent, Pepsi-Cola Bottling Company of Fayetteville, Inc., on February 27, 1992. An amended charge was filed by the Union on July 27, 1992, and was served on the Respondent on July 27, 1992.

The charge in Case 11-CA-15034 was filed by the Union on June 15, 1992, and was served on Respondent on June 15, 1992. An amended charge was filed by the Union on July 27, 1992, and was served on Respondent on July 29, 1992.

The charge in Case 11-CA-15181 was filed by the Union on October 7, 1992, and was served on the Respondent on October 7, 1992. An amended charge in Case 11-CA-15181 was filed by the Union on November 19, 1992, and served on the Respondent on November 19, 1992. A complaint and notice of hearing having issued in Case 11-CA-14889 on April 10, 1992, and an order consolidating cases, consolidated complaint, and notice of hearing having issued in Cases 11-CA-14889 and 11-CA-15034 on October 26, 1992, and a second order consolidating cases, consolidated complaint, and notice of hearing issued in Cases 11-CA-14889, 11-CA-15034, and 11-CA-15181 on November 9, 1992. A second order consolidating cases, amended consolidated complaint, and amended notice of hearing was issued in Cases 11-CA-14889, 11-CA-15034, and 11-CA-15181 on November 20, 1992.

Among other things, it was alleged in the amended consolidated complaint that the Respondent unlawfully threatened its employees with loss of benefits, plant closure, reprisals, the futility of selecting the Union, termination for engaging in union activities, blacklisting employees because of union activities, withholding of wage benefits, bargaining from scratch, and onerous working conditions to dissuade its employees from supporting the Union and unlawfully interrogated its employees and promulgated a rule for its employees by requiring that all conversations pertain to company business all because of its employees' union activities, and all in violation of Section 8(a)(1) of the National Labor Relations Act (the Act). Additionally in the amended consolidated complaint it was alleged that the Respondent unlawfully discharged employee Robert Munn, assigned more onerous work to Roger Deskin and Jimmy Evers, warned and suspended Roger Deskin and withheld from its full-service route salesmen wage increases. It was further alleged that the Respondent violated Section 8(a)(5) of the Act by unlawfully making certain unilateral changes in working conditions.

It is also alleged in the amended consolidated complaint:

On or about April 10, 1992, the Regional Director, after investigation of the charge in Case No. 11-CA-

14889, issued a Complaint and Notice of Hearing alleging, inter alia, that the Respondent, at its Fayetteville, North Carolina facility, withheld from its employees, a wage increase.

On or about August 17, 1992, the Respondent and the Union entered into a private settlement which was to dispose of the alleged unfair labor practice described in paragraph 16 above. On August 18, 1992, the Union submitted a withdrawal request of that portion of the charge in Case No. 11-CA-14889 pertaining to that unfair labor practice and on August 18, 1992, the Regional Director issued an Order Conditionally Approving Partial Withdrawal Request and Partially Withdrawing Complaint and Notice of Hearing as it pertained to the unfair labor practice in paragraph 16 above. On October 27, 1992, the Union advised the Regional Director that the Respondent had not complied with the terms and the private settlement as it pertained to four full service route salesmen.

The Acting Regional Director, by letter dated November 20, 1992, partially revoked the order conditionally approving partial withdrawal request and partially withdrawing complaint and notice of hearing in Case 11-CA-14889 because of evidence that the Respondent had not performed the terms of the private settlement insofar as it pertained to the withholding of a wage increase to the full-service route salesmen as more particularly described in paragraph 14.¹

The Respondent filed timely answers denying that it had engaged in the unfair labor practices alleged.

The amended consolidated complaint, as amended,² came on for hearing on December 7, 8, 9, and 10, 1992, and February 1, 2, and 3, 1993, at Fayetteville, North Carolina.

All parties were afforded a full opportunity to be heard, to call, to examine and cross-examine witnesses, to argue orally on the record, to submit proposed findings of fact and conclusions, and to file briefs. All briefs have been carefully considered.

On the entire record in these cases and from my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT³

I. THE BUSINESS OF THE RESPONDENT

The Respondent is now, and has been at all times material, a Delaware corporation with a facility located at Fayetteville,

¹ On January 25, 1993, the Board on a direct appeal allowed an amendment to par. 14.

² Certain amendments were allowed at the hearing.

³ The facts found are based on the record as a whole and the observation of the witnesses. The credibility resolutions have been derived from a review of the entire testimonial record and exhibits, with due regard for the logic of probability, the demeanor of the witnesses, and the teachings of *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962). As to those witnesses testifying in contradiction of the findings, their testimonies have been discredited either as having been in conflict with the testimonies of credible witnesses or because the testimony was in and of itself incredible and unworthy of belief. All testimony has been reviewed and weighed in the light of the entire record. No testimony has been pretermitted.

North Carolina, where it is engaged in the manufacture and sale of soft drink products.

During the past 12 months, which period is representative of all times material, the Respondent, in the conduct of its business operations described above, derived gross revenues in excess of \$500,000.

During the past 12 months, which period is representative of all times material, the Respondent received at its Fayetteville, North Carolina facility goods and raw materials valued in excess of \$50,000 directly from points outside the State of North Carolina.

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

III. THE UNFAIR LABOR PRACTICES

A. *The Captive-Audience Meetings*

David Schriber, a route salesman for the Respondent, made the initial contact with the Union in 1991. Thereafter, Shelda Jean Upchurch, an organizer for the Union, became involved in the union campaign among the Respondent's employees, "approximately the week of September 16, 1991." Thereafter an election was held on October 11, 1991, and in due course the Union was certified as bargaining agent on September 4, 1992.

During the union campaign the union circulated a pamphlet citing "35 things your employer cannot do." The Respondent responded by holding captive-audience meetings on October 8 and 9, 1991, in which it discussed 34 things the employees could do. Randall Calvin Kennedy, general sales manager of the Respondent's Fayetteville and Sanford operations, presented the case for the Respondent. The 34 things were written on a flip chart⁴ which Kennedy reviewed with the employees and explained as he "went along." A copy of the flip chart, attached hereto as Appendix A (omitted from publication), was received in evidence.

Kennedy, in his testimony, related what he had told the employees. Among other things he stated in this testimony:

If you voted no, you voted the union out, the open door policy would continue, we would continue to work one-on-one, and wages and benefits could be improved . . . grievance or problems would be handled through a union steward . . . and at that point all wages and benefits would be frozen . . .

The next thing was if you vote yes and the Union is voted in, the only thing the Union really gets is the right to sit down and negotiate with our attorney, and that's the only right they get.

[T]here were two things the Union could not do. First, they could not come on Company property and, second, they would not be allowed to talk with management.

⁴ Respondent's attorney, Joel I. Keiler, supplied the information on the flip chart.

We stressed, at that point, that negotiations start at zero, that, in fact, they could get less than what they presently have.

According to Kennedy, he told employees that the Union would want three things: checkoff, property visits, and permission for the steward to conduct union business on company time:

I told them that there wasn't anyway that the Company would negotiate and give those things away, and then I said but, everything is negotiable, now if the Union wanted to give up something else to get one of these things, negotiations start at zero.

According to Kennedy, he stressed that employees, through negotiations, might get less than they do now.

Kennedy also told the employees that the Respondent would "not take a strike." He pointed out that the Respondent in two of its establishments had beat a strike and "permanently replaced the people who went out on strike." "I told them that they if they went out on strike, we would definitely permanently replace them. They would get their job back if and when their permanent replacement left the Company." "[T]here would not be any funds paid by the Union for first-time strike because there hadn't been any Union dues paid in." "[I]f you're not getting any money from Pepsi, unemployment benefits, and from the Union, the only possibility . . . is you might be able to get welfare." "[W]ho's going to provide for your families."

Kennedy also exhibited \$246 worth of groceries which he averred equaled the amount an employee would have to pay dues to the Union. "I told them that Pep Com Industries had 13 plants in North Carolina, we were privately owned by a large Japanese company, the Union was headed by Shelda, and I asked them, *there's going to be war . . . which side do you think is going to win.*" (Emphasis added.)

William Ivey Starnes Jr., a route manager for the Respondent, testified that he heard Kennedy make the statement "*when the war started, where would you fall at or who do you think would win.*" (Emphasis added.) Starnes also testified that he heard Kennedy say:

If you vote no for the Union, the open-door policy continues, there's still a one-to-one relationship, and wages and benefits could be improved.

If you vote yes for the Union . . . all benefits and wages were frozen at that point.

The Union has only one right . . . to sit down and ask our lawyer for a contract, and that is all. The Union can not come on the property, they can't talk to management, negotiations would start at zero, it was conceivable that you could end up with less than what you have at the present time.

Thomas Lee Swanson, a Respondent supervisor, testified Kennedy said, "[T]he only right [the Union] has is the Union has a right to sit down and ask you, our lawyer, for a contract. That's the only right they have." "Pep Com is owned by a large Japanese company . . . *when the war starts who do you think would win.*" (Emphasis added.)

Jimmy Ray Goodman, the Respondent's planning manager, heard Kennedy testify that all the Union would be "al-

lowed to do is sit down with our lawyer and negotiate a contract and that is all. The Union would not come on company property.” “Negotiations would start at zero. Now, you can lose more than you currently have.” “The Company would not allow that [checkoff, union ‘property visits’ or ‘a shop steward to conduct Union business on Company time’] that to happen.” In case of strike “the Plant would not close its doors but you would be permanently replaced and when and if your permanent replacement left, you could get your job back.”

Several of the Respondent’s employees testified as to what Kennedy said in his captive-audience remarks. Robert Dale Munn, a mechanic, among other things, remembered that Kennedy had said, “[T]hat everything is frozen from this day on, there would be more benefits, you won’t get no more benefits, you won’t get no more holidays, and you’re going not [to] get no pay raises because he said the Union is trying to come in and the Union has froze everything for us.” Munn testified that Attorney Keiler said in an answer to a question, “He said that he would go to the bargaining table, but he would not bargain with us, he didn’t have to . . . we were going to get less.” According to Munn, Keiler told him to “sit down and shut the hell up, that he would see me on welfare before he gave me anything . . . he said that he would not bargain, he would go to the table, but he would not bargain with us.” Munn further quoted Keiler as saying, “[I]f you strike, it don’t make any difference because its illegal, that you can’t have a job back, we’ll just bring new people in to replace you.” Munn testified that Keiler “threatened to close down the plant.” According to Munn, he asked Keiler “[W]hy are they threatening us” he said, “[F]or me to go to hell, that you wasn’t going to give us nothing and you would see me on welfare before you signed anything. You stated that you would go to the bargaining table, but you would not bargain. . . . [O]ther people started asking questions and it just started getting real loud.”⁵ Munn attributed these remarks to Keiler, “That you wouldn’t sign no contract” and in answer to a question Keiler said, “we mean go back to minimum wage, you said we will start with nothing, no benefits, no pay, nothing. . . . [Y]ou said to everybody else that you can all go to hell and that you would not give us nothing, we would start from zero . . . and you would not sign no contract, you will not bargain.”

Craig Lee Sanders, a forklift operator, remembered that Kennedy said, among other things, “[T]hat as far as benefits that, when or if the Union came in, that we would start with zero benefits and we would just go in with a scratch piece of paper.” He said that the Union would “force us out on strike.” Sanders quoted Keiler as saying, “[W]hen we come to bargain we’re going to sit down at a table, across from him, and he’s going to tell us to go to hell, we gonna have a list of all the things that we want and he’s going to tell us to go to hell.”

Roger Leon Deskin, a fleet vehicle mechanic, remembered, among other things, that Keiler said to Munn who had made a comment “shut up and go to hell and Bob Munn said he didn’t have to talk to him in that way, that he was a grown-up—and then he said that he would see him on the street on welfare before he worked at Pepsi Cola.” Deskin further

⁵ Keiler was interrogating Munn. The fact that Munn was facing Keiler enhances his credibility.

quoted Keiler as saying “[I]f we were to continue these Union activities that he would see us all on the street on welfare before we would work for Pepsi Cola again.” “When you sit down at a table with me, you may get two or your may have nothing when we sit at the table but by law I have to negotiate in good faith. . . . [Y]ou may end up with what you have now or nothing, something to that effect.” Negotiations could take “five years” but “you would have to negotiate in good faith.” Deskin further testified, “There were a lot of hot collars that day. . . . I believe it started with Bob Munn. . . . That’s when everything got kind of ugly.” Deskin testified that Kennedy said the plant would not close.

James Earl Britt, a merchandiser, attended the sales department meeting. He remembered, among other things, that Keiler said, “[W]e wouldn’t get anything we went to negotiate.”

David Scott Schriber, forklift operator, attended the October 9, 1991 captive-audience meeting with the sales force. Munn was not in this meeting.

Schriber quoted Keiler as saying, “[L]et me explain to you what’s going to happen in negotiations. . . . you’re going to come in . . . we want this and we want that in our contract. . . . I’m going to tell you, no, go to Hell.” Schriber commented that “it didn’t sound like you were bargaining in good-faith if every time we asked you for something you would tell us, no, go to Hell.” Keiler replied, “What’s going to happen, you’re going to charge me with not dealing in good-faith We’ll file the charges with the Labor Board, it will take a month or two before we get to court on the charges . . . when we get to court, I’m going to ask for a continuance. . . . Because I’m busy. . . . We’ll go to court, I’ll ask for a continuance because I’m busy. Then it will be a couple more months down the line before we get there after the continuance. Even if they find me guilty of not bargaining in good-faith, I will appeal the decision to Washington, D.C. . . . When we get to D.C., I ask for a continuance because, once again, I’m busy. . . . Then it will be further down the line before we get down to there. . . . [W]e could be over two and a half (2-1/2) to three (3) years just on the continuances going to court.⁶ . . . Even if I’m found guilty in Washington, D.C. we’ll come back here, we’ll put a little sign up on the bulletin board back there saying—we’re sorry, we didn’t bargain in good-faith, we’ll go back to the negotiation table, we’ll sit down and you’ll say we want this and that in the contract and I’m going to tell you, no, go to Hell.”

Kennedy said, “[I]f you went out on strike that you would lose your job, you would be permanently replaced.” Schriber said that the Union had a strike fund. Keiler responded, “There’s no Union in the United States that has a first time strike fund.” Schriber testified that no one said the plant would close for any reason, but it was said that “you could get a contract that would be less than you have.” Management did not actually say it would not sign a contract.

⁶ Apropos is the language in *Ron Junkert*, 308 NLRB 1135 fn. 2 (1992):

In this context, Junkert’s statement that he had only to negotiate with the Union, not sign a contract, and negotiations could last a year, was not a mere statement of the law as argued by the Respondent. Rather, in this context, it was coercive and, indeed, a threat that employee support for the Union would be futile.

Jerry Lane Parker, a route salesman, remembered that in answer to a question, Keiler said, “[W]e didn’t need a damn Union . . . he held up a blank sheet of paper and he said, this is what you will have. . . . [N]othing because all he had to do was negotiate in good faith and to him good faith was considered just showing up . . . and he didn’t care because the longer he stayed there the more he got paid.”

Thomas Odell McLamb, a route supervisor, attended the salesmen’s meeting. He remembered Kennedy said, “If you vote yes, no open-door policy. If you vote yes, salaries and no problems. Problems would have to go to [the] steward, then steward to Shelton, from Shelton to attorney in Atlanta and then our Company would go to Washington for our lawyer, and then all wages and benefits would be froze. If the Union is voted in, they only gets one right and that is to sit down with our lawyer and ask for a contract. The Union would not be allowed to come on our property. The Union could not talk to management.” “Negotiations would start at zero and they could wind up with less.” The Company said, “[N]o way” to checkoff or union business on company time. “Rockingham and Durham had a strike and they did not shut the doors and we will not shut the doors. . . . If you take a strike, we will permanently replace you.” McLamb testified that Keiler said, among other things, “[h]e’d say the hell⁷ with it and walk out, or something like that.”

Keiler’s testimony conformed quite closely to Kennedy’s testimony. Of war he testified Kennedy said, “This may develop into a war. You’ve got a large Japanese company with thirteen plants in North Carolina that’s well financed on one side, and you’ve got shelter [sic] on the other side. *Who do you think is going to win? Which side do you want to be on?* (Emphasis added.) Keiler denied that he had told any employee to “go to hell” or see him on welfare. He reminded the employees that he had negotiated cuts in wages. “At some point, they’re [the Union] going to say, ‘That’s it, we’re not taking less than this, and we insist that this is what it is’ and I said, ‘If I look them in the eye and if I tell them I’m not going to do it, go to hell, what are they going to do? Get up and punch me in the nose?’ That’s all that was said about that.” “The real world is that you could get less. If you think I’m wrong [bargaining in bad faith] and you file charges, wait three years and find out if I’m right or not.” Kennedy testified, “Your go to hell was not to Munn or to any employee, you were acting out the role-play what you would say in that particular situation with negotiations, if they’d reached an impasse.” Goodman testified he remembered Keiler said at the point of impasse, “I would tell the Union lawyer to go to hell.”

The last item on the flip chart was “Vote No—No one is terminated.”⁸

The foregoing evidence which I have credited establishes that the Respondent harbored a strong antiunion animus and in manifesting such animus made statements which advised employees that it would be futile for its employees to select the Union as their bargaining representative. These statements, which were deliberately conditioned to cause employees to forgo or abandon any affection for the Union, coming

⁷Swanson testified that Keiler said that if the union negotiators said something smart “he would just tell them no, to go to hell.” McLamb read Kennedy’s affidavit before testifying.

⁸There is a strong implication here that if the employees voted yes they would be terminated.

2 days before the election, had a coercive and restraining effect on employees’ rights protected by Section 7 of the Act and were in violation of Section 8(a)(1) of the Act.

The Respondent used language which would lead employees to believe they must strike in order to obtain any concessions more than zero, and that a war between the Union and the Respondent was inevitable which the Union would lose. In judging the Respondent’s conduct, we must be mindful that “[t]he central purpose of the Act [is] to protect and facilitate employees’ opportunity to organize unions to represent them in collective bargaining negotiations.” *American Hospital Assn. v. NLRB*, 499 U.S. 606, 609 (1991); *Long Island Hospital*, 310 NLRB 689 (1993).

B. *The Supervisory Status of William Bryan Frazier*

The General Counsel asserts that William Bryan Frazier was a supervisor and/or an agent within the meaning of the Act. The Respondent contests this assertion.

Frazier worked in the automobile repair shop as a truck mechanic. Other mechanics assigned to the shop were Jimmy Ray Evers, Robert Dale Munn, and Roger Leon Deskin.

Munn testified that Robert J. Tauchen, fleet manager, and Frazier’s supervisor told him that Frazier “would be running the shop and, if we had any problems or anything, to see him.” Munn testified Frazier ordered parts, was contacted when employees were out sick, gave employees permission to “be off,” gave employees daily work schedules, told them what was to be worked on, signed employees’ timecards, and gave employees their job assignments.

According to Evers, Tauchen told him that Frazier was acting as the employees’ supervisor. Evers testified that Frazier gave out work assignments. Some work assignments were given verbally, others were posted, “if we done a job and it wasn’t done proper he would write us up for it.” Frazier occupied an office. “We reported directly to Billy Frazier for any maintenance problem that we had. We were instructed by Bob Tauchen that we answered directly to Billy Frazier.” Frazier was advised by employees when they went to lunch and when they came back. In Evers’ affidavit appeared, “If I was sick or needed time off, I would tell Billy and he would get it approved through Bob Tauchen” and “Billy really didn’t give me work schedules, I had my own area to work.”

Deskin testified that Frazier gave out assignments, scheduled worktimes, and was available for employee problems with their work. “He would have a maintenance work sheet posted on the bulletin board with dates and vehicle numbers on it and I would follow that work sheet prescribed by him and if anything would be changed, he would do so at the time of his arrival or my arrival.”

Tauchen, who was in charge of the Respondent’s shop activities including the Fayetteville shop, testified that Frazier’s wage was lower than that of Evers or Deskin. Tauchen classified Frazier as a fleet mechanic who worked on vehicles. “He executed the Preventive Maintenance Policy and kept me informed what was going on in the shop.” Frazier told employees what to do. “He would do the prescribed month end reports, vehicle inspections.” He executed purchase orders within limits. Frazier worked directly for Tauchen with whom he communicated with by telephone. “I tried to get down there once a week.”

Tauchen further testified that the mechanics reported to Frazier; Frazier discussed with Tauchen “which trucks were in the shop and who was working on the trucks”; Tauchen reviewed the P.M. schedule with Frazier, based on his knowledge of the mechanics’ expertise, Frazier would assign work to them; Frazier observed the other employees’ work; Frazier exercised independent judgment, “he was acting as a mechanic and whether or not a particular part was needing replacement or was defective.” “[I]f there were deviations from that plan [directions as to which trucks needed to be worked on] he could deviate but he was expected to notify me and keep me abreast of any deviations”; in emergencies Frazier had the responsibility of assigning the work; Frazier made Tauchen aware of any disciplinary matters when Tauchen was absent to which Tauchen would respond (if the matters were severe enough) by coming to Fayetteville; there was a \$200 to \$400 limit on Frazier’s purchase of parts.

Frazier testified that he was a truck mechanic and voted without a challenge in the representation election. Although other supervisory employees received raises, he did not. Frazier had never been told he was a supervisor. Tauchen conferred with Frazier; he checked “the files” and made sure that “the trucks were being repaired and everything and go over time schedules, looking at bills, asking any questions.” “If I had a problem, if I needed a special part, I had to call for his approval. Or, if there was a problem with scheduling or repairing a truck, any difficult item that he needed to know about, then I would notify him, or any question that I had . . . if someone was out or if they needed to relay a message to him . . . If they wanted a day off or something, I would notify him.”

Frazier was present when Munn was discharged. In the office Frazier “[f]iled the work orders and stuff when they completed the job.”

Frazier worked in the shop from August 1986 until October 1992. Frazier could not hire or fire employees and had no authority to discipline or effectively recommend hiring, firing, or disciplining employees.

Tauchen testified that Frazier exercised independent judgment in respect to “[s]pecific mechanic’s tasks meaning areas where he was acting as a mechanic and whether or not a particular part was needing replacement.”

A supervisor is defined in Section 2(11) of the Act:

[A]ny individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Frazier’s job does not fit this criterion. He was a conduit for Tauchen without supervisory powers. Moreover, although other employees claimed he was their supervisor, nevertheless, incongruously, they asked Frazier to be their shop steward. According to Munn, “Nobody knew whether he was a supervisor or not.” I find that Frazier was not a supervisor within the meaning of the Act.

Nevertheless, the General Counsel insists that Frazier was an agent of the Respondent and the Respondent was bound by his acts.

The record reveals that Frazier first said he was for the Union but, as testified to by Munn, “Bob Tauchen came down and stayed a day with us and him and Billy stayed in the office probably about five and a half hours and then he went on—Billy, that day, went on vacation. When he come back from vacation, then he was totally against the Union. He kept on telling me that I was going to be fired if I voted for a Union.” These detailed events occurred about 3 weeks after Munn was hired, which would have been around September 23, 1991.⁹

Jimmy Evers testified that after Frazier came back from his vacation, “[h]e started hassling us about the Union, telling us the Union wasn’t no good for us and the Union was going to cause us to loose our benefits, our raises, our merit increases.”

Roger Leon Deskin testified of Frazier, “[H]is attitude turned around completely . . . [H]e said he didn’t want nothing to do with the Union. It wasn’t worth shit and it would keep us from getting a wage increase and benefits.”¹⁰

From this testimony it is clear that Frazier was advancing the Respondent’s antiunion stance.

The Respondent placed Frazier in a position where employees could reasonably believe that he spoke on behalf of the Respondent. Not only did Frazier fulfill functions for the Respondent such as work assignments, signing of timecards, permitting employees to get off, writing up employees, solving of maintenance problems, approving sick leave through Tauchen, executing the preventative maintenance policy, informing Tauchen what was going in the shop performing vehicle inspections, doing monthend reports, executing purchase orders, working directly for Tauchen, observing other employees work, making Tauchen aware of any disciplinary matters when Tauchen was absent, and referring requests for time off to Tauchen; he was also reflecting the Respondent’s antiunion policy. Frazier was also present at the discharge of Munn and participated in and reported on Deskin’s alleged failure to repair a truck properly. Frazier was the conduit through which Tauchen operated. Frazier was Tauchen’s representative in the shop and so conducted himself. Thus, the Respondent placed Frazier in a strategic position where employees could reasonably believe that he spoke on behalf of the Respondent. Because the Respondent vested apparent authority in Frazier to act for it, Frazier’s actions are attributable to the Respondent. I find that Frazier was an agent of the Respondent.¹¹

⁹Frazier’s vacation was 1 week.

¹⁰I credit the foregoing testimony of Munn, Evers, and Deskin. I consider Frazier to be an unreliable witness. Frazier admitted talking about the Union with Munn.

¹¹In *House Calls, Inc.*, 304 NLRB 311 (1991), the Board opined: Under Board law, the test for agency is whether, under all the circumstances, an employee would reasonably believe that the alleged agent was speaking for management and reflecting company policy. *Lovilia Coal Co.*, 275 NLRB 1358, 1372 (1985). See also *Corrugated Partitions West*, 275 NLRB 894, 900 (1985); *Minnesota Boxed Meat*, 282 NLRB 1208, 1213 (1987); and *Roskin Bros.*, 274 NLRB 413, 421 (1985).

Tauchen utilized Frazier to transmit instructions to the employees in the shop and to furnish him with reports on the operation of the shop and the conduct of the employees.

C. *The Discharge of Robert Munn*

Robert Dale Munn was employed as a mechanic by the Respondent from September 2, until November 22, 1991, on which date he was discharged. According to Tauchen, who discharged him, he was discharged because he went to Carlton Hawkins, vice president of operations,¹² with complaints.¹³ Tauchen "felt" that Munn had "gone over his head." Tauchen also testified that he hired Munn and at the time he considered that Munn was an employee who could be put in the Respondent's employment. During Munn's employment, Tauchen had received no complaints about Munn's job performance. Although Tauchen claimed that he did not know Munn was a union partisan, he knew about the union campaign. According to Tauchen, when Munn accused Tauchen of firing him because of his union activities, he denied it.

Munn testified that he became involved with the Union and signed a union card. He attended union meetings and talked to people about the Union. Frazier knew of Munn's union sympathies. As noted above Frazier was initially prounion but after a protracted conversation with Tauchen, and on his return from vacation, he changed his attitude and spoke against the Union.

Munn testified that he attended the captive-audience meeting at which Kennedy presented the Employer's position. Munn further testified that he said at the meeting, "I don't know much about the Union and I don't know much about Pepsi, I ain't been working here that long, but if you don't care if the Union comes in, why are you threatening us by no raises, no insurance, and being fired and stuff like that, and the Pepsi attorney told me to sit down and shut the hell up, that he would see me on welfare before he gave me anything,¹⁴ and I got upset and I told him, look I didn't curse at you that way and I expect you not to curse at me that way and, as far as being on welfare, I have never been on welfare and I will not be on welfare, and he said that he would not bargain, he would go to the table, but he would not bargain with us. . . . They ended the meeting . . . people started yelling and stuff . . . Mr. Kennedy told me to calm down and told everybody to calm down and then he said the meeting's going to dismiss." When Munn returned to the shop, Frazier told Munn that "Mr. Kennedy told him that I was a hot head over the Union."¹⁵ According to Munn, Frazier said, "I told you if you voted for the Union, you were going to get us in trouble, that's going to get us fired, I told you you wouldn't even get a job in Fayetteville."

Munn testified that after the captive-audience meeting and "vote, Billy [Frazier] was not giving [him] work to do."

¹² According to Tauchen, Hawkins was a "consultant" to him.

¹³ "Munn was complaining [to Hawkins] that he didn't have enough to do" (Tauchen's testimony), and that Frazier was physically abusing him. Both of these complaints "bothered" Tauchen.

¹⁴ Roger Deskin, an employee who attended the meeting, testified Keiler said, "[I]f we were to continue these union activities that he would see us all on the street on welfare before we would work for Pepsi Cola again."

¹⁵ Frazier denied that he made such statement. His denial is not credited.

When Munn asked Frazier for assignments, he would "not ever answer" him. "He started right after [to withhold work assignments] the meeting, but then it got worse after the vote."

About a week or two after the election, Munn went to Frazier's office. According to Munn, he asked Frazier why he was not giving him work. "He said if you'd done like I told you to, to keep this Union out, we'd all be all right, but right now we're all going to loose our jobs. I said . . . I need to show that I'm productive because when it comes for a raise, then I ain't going to get one because I ain't shown I'm doing any work. He said, well, we ain't going to get no raise anyway because they're all froze because of the Union. . . . He said I'm still on my 120 day probation and I could be fired."¹⁶

According to Munn, on November 17, 1991, he asked Hawkins, who was on one of his visits to the plant, whether he could talk to him. Munn told Hawkins that "Frazier was not giving me no work to do. . . . [t]hat I was concerned because I was still on my 120 day probation, that if I wasn't showing I was productive that I could get fired." Hawkins phoned Tauchen and told him that there was a problem and "he needed to come next morning and straighten it out now."

After Munn had left his conversation with Hawkins, Frazier accosted him. Munn testified, "Frazier grabbed me around the throat and throwed me up against the wall . . . He asked me what in the hell did I think I was doing by go talking to Carlton Hawkins. I said look, you ain't give me no work to do and I ain't getting no raises if I ain't got no work to do. He said you ain't going to get no raise anyway because they're froze and if you done like I told you to and vote this shit out, we won't have this Union, we won't be in this predicament."

According to Munn, Tauchen came to the shop on November 20, 1991. He spoke to Frazier in the office for about 6 hours. Tauchen came out of the meeting and said "there would be a change, that Billy [Frazier] would not be running the shop, that he would be for right now." Thereafter, Tauchen gave Munn some work to do. Later, Munn talked to Tauchen who said:

I [Munn] had good reports, that you're a good mechanic, that you was good on carburetors.

Bob said that I was caught between a rock and a hard spot and he said you coming in here and a union trying to get in here. He said how do you feel [about] the Union. I said well, I feel like if you feel like the Union is for you, you vote for it. If you don't, then don't. That's your right. He said fine.

On November 21, 1991, while Munn was working on a trailer, Tauchen asked Munn about the Union. "He said that he used to work at [a] place where they tried to get a Union in and the atmosphere was bad and a lot of employees got sacrificed because of the Union."

On November 22, 1991, Frazier asked Munn to come to Tauchen's office. According to Munn, Tauchen told him, "[I]t was time for Bob Munn and Pepsi to part." Munn

¹⁶ Frazier admitted that Munn had complained about not being assigned work.

asked why, and Tauchen answered, “[T]hat my pace and Pepsi’s pace were different. That my pace was too fast and they just didn’t feel like they needed somebody like that to work here and he told me to give him the shop keys and to leave the premises and do not discuss my dismissal or the Union to nobody.”¹⁷

The following Monday, Munn called Hawkins, who did not know Munn had been fired. Munn told him that his pace was too fast. Hawkins¹⁸ observed that “that didn’t sound right.” He then asked Munn if he would like to have a meeting with Tauchen. Munn answered, “[Y]es.”

On the Wednesday after his discharge, Munn met with Tauchen. Munn testified as to what occurred at the meeting:

I asked Bob, I said Bob I want to know why you fired me because I don’t think the pace that wasn’t a good enough reason. He said you tell me. I said I feel like the reason why you fired me is because you think I am enticing Jimmy and Roger to vote yes for the Union and that I [was] putting Union ideas in their head. He said you said it, not me. And he said the termination still stands and that was the end of the meeting.¹⁹

Munn’s personnel records jacket reveals, “Terminated during 120 day pro oak [sic] period.” On a resignation notice it is entered “Robert Munn refused to sign.” “Bob Tauchen, 11/29/91 and Robert Munn was terminated during his 120 probationary period, signed R.T. 11/29/91.”

In the case of Munn, the General Counsel’s prima facie case showing discriminatory motivation is supported by the following credible evidence:²⁰

1. The Respondent’s antiunion animus was of such an adamant nature that the Respondent committed unfair labor practices as a means of dissuading its employees from union affection.

2. The Respondent was aware of Munn’s union affection and that he was an activist for the Union.

3. Prior to Munn’s discharge, the Respondent had no complaints about Munn’s job performance and considered him to be a good employee.

4. Technically Munn did not go over Tauchen’s head because Hawkins was not Tauchen’s immediate supervisor but a consultant.

¹⁷Tauchen, as did Frazier, denied that he was discharged “because his pace was too fast”; however, Tauchen did not testify as to what he told Munn in respect to the reason for his discharge. Frazier, who was present at the discharge meeting, testified that he was “letting him [Munn] go because he was evaluating him on his 120 days and that he wasn’t satisfied with his work.” That was all that Frazier recalled Tauchen say. According to Frazier he was asked to attend the meeting by Tauchen as a witness. Hawkins name was not mentioned during the meeting.

¹⁸Hawkins did not testify at this hearing.

¹⁹Tauchen admitted that Munn “said something about being terminated for being involved in the Union.”

²⁰As stated in *Greco & Haines, Inc.*, 306 NLRB 634 (1992):

Under Board precedent, a prima facie case may be established by the record, as a whole and is not limited to evidence presented by the General Counsel. . . . The Board’s precedent allows the judge to analyze the prima facie case based on all record evidence.

5. Hawkins did not recommend any disciplinary actions for Munn’s contacting him.

6. This was the first time Munn had lodged a complaint with a company official.

7. Fraizer, who was in a position to evaluate Munn’s work, did not recommend Munn’s discharge nor had he complained to Tauchen about Munn’s work.

8. Tauchen, who spent most of his time in Raleigh, would have had little opportunity to observe Munn’s work. Moreover, before Tauchen fired Munn he had no complaints about his job performance.²¹

9. The Respondent’s witnesses presented inconsistent reasons for discharge: Fraizer stated that Tauchen told Munn that he was letting Munn go because he was not satisfied with his work, whereas Tauchen stated Munn was discharged because he went to Hawkins over his head.

10. The Respondent threatened to see Munn on welfare.

In *Wright Line*, 251 NLRB 1083 (1980), the Board established the rule that when the General Counsel makes a prima facie case showing sufficient evidence to support the inference that protected conduct was the “motivating factor” in the employer’s decision to discharge, the burden shifts to the employer to demonstrate that the discharge would have taken place even in the absence of the protected conduct.²²

The Respondent has not met this burden.²³ As to its defense, the Respondent asserts that Munn was discharged because he went over Tauchen’s head to complain to Hawkins. To accept this defense Tauchen has to be believed even though Frazier testified that Tauchen told Munn he was firing him because Tauchen was not satisfied with his work. I do not credit Tauchen, I found him to be an unreliable witness. Tauchen’s reasons stated for firing Munn appears to have been and afterthought to counter the fact that Munn was a good employee and it could not be proved that Munn’s work was so unsatisfactory that he warranted discharge.²⁴ I

²¹Tauchen testified that “before [he] fired Mr. Munn, [he] didn’t have any complaints about his work or job performance.”

²²The Board has said in *Best Plumbing Supply*, 310 NLRB 143 (1993):

In *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), the Board explained its causation test for cases alleging violations of the Act that turn, as does this case, on employer motivation. First, the General Counsel must establish a prima facie showing sufficient to support an inference that the protected conduct, such as an employee’s union activity, was a motivating factor in the employer’s decision. The elements commonly required to support a prima facie showing of discriminatory motivation under Section 8(a)(3) are union activity, employer knowledge, timing and employer animus. Once such prima facie unlawful motivation is shown, the burden shifts to the employer to demonstrate that it would have taken the adverse action against the employee even in absence of the protected activity. It is within this framework that we analyze the evidence, the arguments of the parties

²³The Board has said:

The elements commonly required to support a prima facie showing of discriminatory motivation under Section 8(a)(3) are union activity, employer knowledge, timing and employer animus.

Best Plumbing Supply, supra at 143. The General Counsel has met this test.

²⁴Apparently Frazier and Tauchen were confused as to what line their testimony should take.

find that the reason for which Tauchen claimed that he fired Tauchen is false. I find that the Respondent fired Munn for his union sympathies. The Respondent's antiunion animus by way of discharge was visited on Munn, a union partisan who voiced his union sympathies at the captive-audience rankling meeting. By discharging Munn the Respondent violated Section 8(a)(1) and (3) of the Act.²⁵

IV. THE 8(A)(1) ALLEGATIONS

(a) The General Counsel asserts that the Respondent threatened its employees with loss of benefits if they selected the Union as their collective-bargaining representative. The General Counsel cites the following facts to support his contention. Employee David Schriber testified that on September 5, 1992, he talked to Supervisor Mike McFarland in his office. Schriber asked McFarland, "What is all this I am hearing about, you know we'll lose all our benefits and start with a blank piece of paper." McFarland answered, "Well, basically that's how it works."

Employee James Britt, "probably a couple of months" before the election, conversed with Supervisor Bill Starnes in his office. Starnes asked him what he knew about the Union, "did I know what was going on." Among other things, Starnes told Britt that the Union would start with a blank piece of paper when they went to the bargaining table. "You might wind up with less after you get the Union than you've got right now." "The loading crew he said that was a benefit to us and we may not even have that after we got a Union in."

Britt also testified that Supervisor Goodman "[h]eld up piece of paper and told us this is what we're going to start with."

Jerry Parker testified that in late September he had a conversation with Supervisor Jay Goodman, along with employee Zack Hams, which lasted for over 2 hours. Among other things, Goodman asked them if they "knew much about the Union" and what "they thought about it." Goodman said they "would be paying from \$50.00 to \$60.00 a week in Union dues and that it wouldn't benefit us." The Union "didn't care about us as individuals."

Employee Craig Sanders testified that at a captive-audience meeting, Kennedy stated that "no one could receive any wage increase because everything was frozen and . . . that as far as benefits . . . [they] would start with zero benefits and we would just go in with a scratch piece of paper." Deskin testified that about the second week of October, Frazier informed him that Frazier "didn't want nothing to do with the Union. It wasn't worth shit and it would keep us from getting a wage increase and benefits and that he didn't want nothing else to do with it." The flip chart, among other things, discloses, "all wages and benefits are frozen"²⁶ "negotiations start at zero," "you can end up with less."

²⁵ As stated in *W. F. Bolin Co.*, 311 NLRB 1118 (1993):

Discriminatory motivation may reasonably be inferred from various factors, including an employer's expressed hostility toward protected activity together with its knowledge of the employees protected activity An employer cannot simply present a legitimate reason for the its action but must persuade by a preponderance of the evidence that the same action would have taken place in the absence of protected activity.

The Respondent has not met its burden.

²⁶ See *Teksid Aluminum Foundry*, 311 NLRB 711 fn. 2 (1993).

I agree with the General Counsel that the foregoing evidence, which I credit,²⁷ establishes that the Respondent threatened employees with loss of existing benefits if they selected the Union as their collective-bargaining representative, thus the Respondent violated Section 8(a)(1) of the Act.²⁸

(b) The General Counsel asserts that the Respondent threatened its employees with plant closure if they selected the Union as their collective-bargaining representative. The General Counsel cites the following testimony to support his contention.

Employee Jerry Lane Parker testified that he conversed with Supervisor Tommie Swanson in late September to early October. Swanson told Parker, "[I]f the Union came in that Pepsi would shut the doors on the Plant and that there was no way that they were going to let a Union come in and he also said that people like us or like hisself and like me that didn't have college educations would have a hard time if they lost their jobs because of the Union" This testimony, which is not inconsistent with the other of the Respondent's credited mouthings, I credit, and find that by Swanson's statements, the Respondent violated Section 8(a)(1) of the Act.

(c) The General Counsel asserts that the Respondent threatened its employees with unspecified reprisals if they selected the Union as their bargaining agent.

Supervisor Thomas Odell McLamb testified that at one time Parker, during the union campaign, came up to him and asked him, "[W]hat did I think of the Union and I told him that I hoped it didn't come in because because I didn't like a Union."

Parker testified that McLamb on one occasion asked him how may people were at the union meeting, and how he "thought the Union was going to go. Was they going to go for it or against." Parker answered that he thought it would go "strongly for the Union." McLamb responded, "I should hope that it didn't because if it did, things would definitely change for the worse if the Union came in because the Company was not going to allow a union." The conversation occurred around October 7, 1991. According to Parker, after the vote, McLamb asked him how he "thought the vote had gone." Parker responded that he thought "it had come in."

²⁷ I do not credit the denials of Starnes and Goodman.

²⁸ In the case of *Fredeman's Calcasieu Locks Shipyard*, 206 NLRB 399 (1973), the Board held a statement "if the Union gave the employees anything else, the Respondent would 'have to take something back that [it] had already given [them]'" was a violation of Sec. 8(a)(1). See also *Teksid Foundry*, supra at fn. 2 and 717-718. In *Lear-Siegler Management Service Corp.*, 306 NLRB 393 (1992), the Board confirmed the standard set out in *Taylor-Dunn Mfg. Co.*, 252 NLRB 799, 800 (1980), enf. 810 F.2d 638 (9th Cir. 1982):

It is well established that "bargaining from ground zero" or "bargaining from scratch" statements by employer representatives violate Section 8(a)(1) of the Act if, in context, they reasonably could be understood by employees as a threat of loss of existing benefits and leave employees with the impression that what they may ultimately receive depends upon what the union can induce the employer to restore. On the other hand, such statements are not violative of the Act when other communications make it clear that any reduction in wages or benefits will occur only as a result of the normal give and take of negotiations.

McLamb said, "I should hope that it didn't because if it did, things would change for the worse."²⁹

By McLamb's statements that, if the Union prevailed, things would change for the worse constituted a threat of the loss of employee benefits and was in violation of Section 8(a)(1) of the Act.

(d) The General Counsel asserts that the Respondent threatened its employees with termination for engaging in union activities. The General Counsel cites the following factors to support his contention.

Employee Deskin testified that at the October meeting Keiler told Robert Munn to "shut up, go to hell" and that Keiler said that he would "see him on the street, on welfare before he worked at Pepsi-Cola" Deskin also testified that Keiler said, "[I]f employees continued their union activities he would see us all on the street on welfare before we would work for Pepsi-Cola again."³⁰

Item 18 of the flip chart reads "we will permanently replace you"; item 19 states "when the strike is over, you could get your job back, if and when your replacement leaves"; and the last item reads, "vote no—no one will be terminated."

It would have been a dull employee indeed who would not have grasped the message from the presentations of the Respondent that it was antiunion and that a vote for the Union would put employees' jobs in jeopardy. An employee could anticipate, from the Respondent's presentation, a refusal to bargain, a contrived strike, replacement, loss of the strike, and probable loss of employment. To so beleaguer employees in such a manner was an interference with their Section 7 rights. Compare *Larson Tool & Stamping Co.*, 296 NLRB 895 (1989); *Baddour, Inc.*, 303 NLRB 275 (1991).

(e) The General Counsel asserts that the Respondent threatened to blacklist employees because of their union activities. He cites the following testimony to support his assertion.

Munn testified credibly that during the captive-audience meeting Kennedy told employees that "if they were fired or lost their jobs at Pepsi, when they applied for work elsewhere and the potential employer called for job references, Pepsi would tell them that they were involved in union activities and they would not be hired anywhere in Fayetteville.

Munn testified that Frazier said:

that if we lost our jobs that we'd never get a job in Fayetteville because as soon as the company called back for a reference, that Pepsi would tell them that we were involved in union activity and he said we won't get no job.

By the statements of Kennedy and Frazier, the Respondent violated Section 8(a)(1) of the Act. See *Alaska Pulp Corp.*,

²⁹ I credit Parker as to these conversations.

³⁰ Munn testified that Frazier said, "[I]f we lost our jobs that we'd never get a job in Fayetteville because soon as the company called back for a job reference, that Pepsi would tell them we were involved in union activities and he said we won't get no job." Frazier told Munn that he was still in his probationary period and he could be fired for voting for the Union. Frazier also told employees "if [they] voted for the Union [they were] going to get in trouble, [they] were going to get fired and [they] would not be able to get a job in Fayetteville."

296 NLRB 1260, 1262 (1989); *Fontaine Body & Hoist Co.*, 302 NLRB 863 (1991).

(f) The General Counsel asserts that the Respondent interrogated its employees concerning their union activities. He cites the following evidence to support his assertions.

Jerry Lane Parker testified that on or about October 7, Supervisor McLamb questioned him about his union activities. McLamb asked Parker, "[W]as there many people at the union meeting." Parker answered, "I told him a right good many." McLamb also asked Parker "[H]ow I thought the Union was going to go. Was they going to go for it or against it. I told him I thought it would go strongly for the Union. He said, well, I hope—I should hope that it didn't because if it did, things would definitely change for the worse if the Union came in because the Company was not going to allow a Union in." On another occasion, McLamb asked Parker "how I thought the vote had gone." Parker responded that he "thought it had come in and again he told me that I should hope that it didn't because if it did, things would change for the worse."

Supervisor Billy Starnes, during the union campaign, asked James Britt what he knew about the Union. "Did I know what was going on and I told him I'd heard about it."³¹

These interrogations during an on-going union campaign by an employer who was hostile to the union constituted unlawful interrogation and were in violation of Section 8(a)(1) of the Act. See *Rossmore House*, 296 NLRB 1176 (1984), *enfd.* sub nom. *Hotel & Restaurant Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985).

The test evaluating the legality of an interrogation is whether, in the totality of the circumstances, the questioning reasonably tends to restrain, coerce, or interfere with employees' exercise of statutory protected rights. These interrogations meet the test.

(g) The Respondent threatened to withhold wage increases from its employees because of their support for the Union. The General Counsel cites the following evidence to support his assertion.

According to Kennedy, the employees at the Fayetteville plant would have received a wage increase in January 1992 but, as he said, "[A]ll of the wage and fringe benefits will be frozen until we're done negotiating."

Kennedy testified that in the 6 years he had been with the Respondent, it was an annual corporate decision to grant wage increases and he would be notified of this in September or October. Kennedy had the responsibility for implementing the increases at the two facilities under his direction, the Fayetteville and Sanford, North Carolina plants. All other plants of the Respondent were included in the wage increases. Sanford employees, who were nonunion, received the wage increases Fayetteville did not. To deny the Fayetteville employees the customary wage increases other Respondent employees were given was a violation Section 8(a)(1) and (3) of the Act. See *Martin Industries*, 290 NLRB 857, 859 (1988). It is clear that had the Fayetteville employees been nonunion employees with a union not in the picture,

³¹ The General Counsel requests that the complaint be amended to include Billy Starnes' interrogation of Britt in that the incident was fully litigated. The amendment is granted.

they would have received the budgeted³² wage increases as did employees in the other plants of the Respondent.³³

(h) The General Counsel asserts that the Respondent advised its employees that if they selected the Union as their collective-bargaining representative, bargaining would start from scratch. He cites the following facts: item 7 of the flip chart states “negotiations start at zero.” The same idea was stated in the captive-audience meetings. Employee Craig Sanders testified that Michael Kaelin, vice president for sales for the Respondent, told him the day after the captive-audience meeting that “when you start collective bargaining you start with zero benefits.”

The implication in this evidence is that if employees chose the Union, their extant wages and benefits would be put in jeopardy, all of which is clear from the context in which the idea of starting from scratch or zero in bargaining was presented and the totality of all the circumstances. The employers alleged “hard bargaining” anticipated ultimate loss of employee benefits and a fixed disposition to punish the employees for choosing the union.

In *Plastronics, Inc.*, 223 NLRB 155, 156 (1977), the Board opined:

Depending upon the surrounding circumstances, an employer which indicates that collective bargaining “begins from scratch” or “starts at zero” or “starts with a blank page” may or may not be engaging in objectionable conduct, *Saunders Leasing System*, 204 NLRB 448, 454 (1973); *Stumpf Motor Company, Inc.*, 208 NLRB 431, 432 (1974). Such statements are objectionable when, in context, they effectively threaten employees with the loss of existing benefits and leave them with the impression that what they may ultimately receive depends in large measure upon what the Union can induce the employer to restore. On the other hand, such statements are not objectionable when additional communication to the employees dispels any implication that wages and/or benefits will be reduced during the course of bargaining and establishes that any reduction in wages or benefits will occur only as a result of the normal give and take of collective bargaining. *White Stag Mfg. Company*, 219 NLRB 1246, 1246-51 (1975) (Member Fanning dissenting); *Computer Peripherals, Inc.*, 215 NLRB 293, 293-294 (1974) (Member Fanning dissenting); *C & K Coal Company*, 195 NLRB 1038, 1038-39 (1972). The totality of all the circumstances must be viewed to determine the effect of the statements on the employees.

³² Kennedy testified that in June or July after the ballots were opened, “it was decided we would put into effect the pay changes that had been budgeted [sic] for our facility for 1992 and those pay changes would bring us in line . . . with our other facilities.”

³³ Had the raise in wages been given as scheduled, it would have confirmed the employees’ expectations who had for a number of years received such increases and which did occur in the Respondent’s other establishments. It was the withholding of such increases that frustrated the employees’ expectation and led employees to believe that the Respondent was visiting a reprisal on them because of the advent of the Union. See *DTR Industries*, 311 NLRB 833 (1994). Apropos language is “[t]he only reasonable inference left for employees was that their own desire to improve their lot though union representation had deprived them of increases that they might have otherwise received.” (311 NLRB at 837.)

As in the *Plastronic, Inc.* case, supra, the Respondent’s statements were objectionable because in context, they effectively threatened employees with loss of existing benefits and left them with the impression that what they might ultimately receive depended in a large measure on what the Union could induce the Employer to restore. The Respondent’s start from scratch or zero statements threatened employees with the loss of existing wages and benefits and were violations of Section 8(a)(1) of the Act. See also *Columbus Mills*, 303 NLRB 223, 236 (1991).

(i) The General Counsel asserts that the Respondent because of union activities promulgated a rule for its employees by requiring that all conversations pertain to company business. He cites the following facts to support his contention.

On May 12, 1992, the Respondent unilaterally issued a list of rules for shop employees. The first rule stated, “Talking amongst themselves. This should be kept to a minimum and only pertain to shop and truck repair issues.” Evers testified that prior to May 12, employees could talk to one another as long as they did not abuse the privilege. Deskin testified that prior to May 12, 1992, there was no restriction on employees talking among themselves. Thereafter, Tauchen told employees they could only talk about shop business.

The General Counsel claims this rule was promulgated to separate active union supporters and curtail their discussions about the Union. The General Counsel has not established a prima facie case.

A. *The Alleged Assignment of More Onerous Work to Employees Roger Deskin and Jimmy Evers*

The General Counsel claims that the Respondent violated the Act when shortly after the election, Roger Deskin, a fleet vehicle mechanic, was assigned to change tires on a 10-bay delivery truck. Subcontractors had performed this work; however, when the subcontractors were busy, shop employees would sometimes change the tires.

The General Counsel also claims that a week after the election Jimmy Evers was assigned to clean the drains and had to resort to digging out the sludge with a shovel and bucket. The drains had been cleaned by an outside contractor.

In view of the Respondent’s strong union animus, its various unlawful threats, its apparent desire to wean its employees away from the Union, I find that the Respondent’s assignment of more onerous work was in violation Section 8(a)(1) of the Act.

B. *The Warnings and Suspension Issued to Roger Deskin*

The General Counsel maintains that Deskin was given warnings and a 5-day suspension because of his union activities. He asserts that “Deskin’s union activities and the Respondent’s demonstrated animus towards the same” established a prima facie case.

Deskin was given a “counseling statement” on May 28, 1992, by Tauchen in which it was stated, among other things, “The employee failed to do a thorough and complete repair on route truck 81-13. See attached statements from Billy Frazier and Bob Tauchen.”

Deskin testified that he had “worked on the steering gear box unit and transmission selector unit” of vehicle 8113 from May 15 to May 21, 1992. Thereafter, the vehicle was

road-tested by Frazier, passed, and returned to service. On May 26, 1990, the driver of the truck phoned and stated that it would not move. Deskin went to the truck to see if he could repair it. Deskin found that a "clevis pin" was missing.³⁴ Deskin "repaired it enough" to bring it to the shop so it could be corrected, which was done, whereupon the driver with the truck returned to his route.

Frazier asked Deskin what he had found. Deskin told him that "the clinch pin was missing." Frazier reported the incident to Tauchen.

Two days later Tauchen called Deskin to his office and handed him a counseling statement. According to Deskin, Tauchen did not understand the nature of the alleged infraction. His information came from Frazier. On the request of Tauchen, Deskin explained, "step by step" how "it worked technically." Deskin explained to Tauchen that "the vehicle would not have functioned properly the first day it went on the road test if it wasn't done correctly at that time because due to the vibration of that particular type of model, it would not have stayed in."

Tauchen testified that he did not inspect Deskin's repair job himself but "perhaps" he received his information from Frazier.³⁵ Tauchen related that he went to Fayetteville and asked Frazier to show him what happened. Tauchen looked under the truck and discussed the matter with Frazier. At the time of the inspection the truck had been repaired. Deskin was not present when Tauchen examined the truck. Tauchen had received no complaints from the driver nor did he interview the driver. According to Tauchen, Frazier's road testing "would insure that the repair—that the truck functioned and was okay to go." Tauchen "believed that Billy would have road tested the vehicle."

Tauchen explained what he thought occurred: "Either he forgot to put in the cotter pin or it was installed incorrectly and it broke and fell out."

On June 26, 1992, Tauchen issued another counseling statement to Deskin setting forth, that, among other things, "The employee failed to adjust the parking brake on vehicle #87.75-2. . . . The employee—will be suspended for one week without pay."

According to Deskin, he was assigned a breaking problem on a Chevrolet Astro Mini-Van to survey and repair. After it was repaired, it was road-tested by Frazier. Frazier said after the test that "it ran and steered funny." Frazier said "[T]o go ahead and do a complete G-9-G-11 services on it."³⁶ Deskin performed this work. Deskin again appeared in Tauchen's office. Sammy Jones, who had been hired within the last 2 weeks as a supervisor, was also present. Deskin

was given a counseling statement. Deskin was told that the problem was that "the *parking brake* traveled too far." (Emphasis added.)³⁷ Jones determined that the parking brakes were not working properly "by applying the parking brake and using the accelerator." This is not the test which conforms to the manual. Deskin told Tauchen that Frazier had road tested the vehicle and said "it was all right," and asked that Frazier be brought in the meeting. Tauchen refused the request. Deskin was suspended from June 29 to July 3, 1992, without pay.

According to Deskin, if Jones' test were applied, the car would have moved because he applied the parking brake while the vehicle was in gear at the same time he applied the accelerator. Tauchen testified that he determined Deskin failed from a review of the situation with the shop manager, a review of the work orders. Jones made no recommendation nor did Tauchen examine the brakes. Tauchen is not a first class mechanic or an engineer, although he is in charge of all the Respondent's vehicles and five or six repair facilities. Jones was not called to testify.

Tauchen testified Jones determined on a test drive "that the *rear brakes*, the emergency brake, was not adjusted properly and it was determined that the *rear brakes* were not adjusted."³⁸ (Emphasis added.)

Although Tauchen testified that in a conversation after June 26, 1992, he told Deskin "it hurt me personally when I learned that he was involved in the union . . . he should re-examine where he's going and what his motivations were."

Tauchen testified in respect to his knowledge of Deskin's union activities:

The specific time and date I don't remember.

Q. Was that before you issued him the warnings.

A. I can't say for certain.

The General Counsel has established that the Respondent harbored an antiunion animus and that Tauchen did not respond favorably to Deskin's union sympathies. Deskin's alleged improper repair jobs were based on tenuous and flimsy representations. In regard to the clinch pin incident, there is no credible proof that Deskin had faulted; in regard to the brake incident, in the test applied, i.e., placing a foot on the accelerator and applying the brake, it would appear that the car would have moved in any event. Indeed, there is a question whether it was a rear or a parking brake involvement. Moreover, Jones was not called as a witness to verify the test which was not the one set out in the manual. Additionally, Frazier had by a road test approved the repair of each vehicle. Frazier was not disciplined for any laxity nor was he called in the meeting at which Deskin was disciplined for the second incident, although Deskin made the request. Frazier was antiunion. Frazier was apparently favored. Thus, it appears that the foregoing incidents were utilized by the Respondent without an apparent discernable reason for disciplining Deskin unless it was because of Deskin's union affection.

³⁴The pin was described as:

Its a straight pin with a machine hole drilled through it with a flat surface on the other side to keep it from going straight through and you push it through two different units, one being attached to the transmission and the other piece being the cable attached through the floor board on the selector drive. . . . [I]t attaches to two pieces together as a link and it is locked in place by a cotter key.

³⁵Tauchen testified, "Billy Frazier called me and explained to me—I don't remember if Billy called me directly or—actually, to be honest with you, I don't remember exactly how I learned of this incident."

³⁶"That is a service and repair from front to rear of a vehicle changing fluids, repairing and replacing light bulbs, lenses, what have you."

³⁷"By the manufacturer's specification a vehicle is—when it's put into a parking position—. . . on any incline, forward or reverse, is not to move when the application of the parking brake is applied."

³⁸Deskin was disciplined because he "failed to adjust the parking brake."

The Respondent had failed in its burden to show that it would have issued the warnings and suspension to Deskin even in the absence of his protected concerted activities. See *Wright Line*, supra.

C. The Withholding of the January 1, 1992 Wage Increase for the Full-Service Employees

On August 1, 1992, Kennedy called the full-service salesmen, namely, Chris Blanchard, David Schriber, Tony Williams, and Mike Brewington, into the conference room where he proceeded to tell them the method of paying their wages would be changed. Chinese overtime was involved in the change.³⁹

Kennedy testified:

[W]hat we did with Full Service and Tell Sell is brought them in line with the rest of the Company, structured like the rest of the Company.

Full Service went to \$4.00 an hour, 19 cent a case, and it's the Chinese overtime where you figure half-time combining the cases and the hourly's."

Michael H. Kaelin, vice president of sales, testified that "the drivers are making less under the new system than the old system." Kaelin admitted the wage changes and that the changes had not been negotiated with the Union but were implemented unilaterally.

Kaelin testified that the Respondent did not grant these employees the wage increases retroactive to January 1, 1992. The Respondent's failure to grant the wage increases was in violation of Section 8(a)(1) and (5) of the Act. *Mike O'Connor Chevrolet*, 209 NLRB 701, 703 (1974); *Toyota of Berkely*, 306 NLRB 893 (1992).

D. The Withholding of the January 1, 1992 Wage Increase from Felix Romero and Others Similarly Situated

Romero was a bargaining unit employee of the Respondent from January 1, 1992, until he voluntarily quit his employment on or about June 1992. He was rehired on or about November 1992. He asked for his wage increase which accrued during his tenure. It was denied because he had quit his employment. The Respondent, by withholding the wage increase from Romero and other employees similarly situated was in violation of Section 8(a)(1) and (5) (see supra). See *DTR Industries*, 311 NLRB 833 (1993).

*E. Unilateral Changes*⁴⁰

(a) On May 12, 1992, Tauchen implemented a list of rules for the shop employees. The General Counsel claims these rules contained unilateral changes. Prior to the implementation of the rules, employees had unlimited access to the telephone. The rule restricted the employees' use of the telephone to emergencies. According to Evers, Tauchen in-

formed the employees that they would no longer have more than two 15-minute break periods. In addition, Tauchen changed the lunch periods for the employees.

Evers testified that Tauchen stated, "[T]hat he didn't like Roger and I having lunch at the same time and we wasn't allowed to talk to one another." Prior to May 12, 1992, "standing around a few minutes and talking, there was no problem."

Deskin testified, "I could no longer [after May 12, 1992] or anybody could no longer punch out and wander through the shop and talk to another mechanic or whoever happened to be at the shop at that time. . . . There was no limits to where I could eat my lunch."

The rules conditioned employees talking among themselves: "This should be kept to a minimum and only pertain to shop and truck repair issues." "Phone calls, new guidelines . . . personal phone calls while on duty should be limited to emergencies." "When a person is punched out, he should not be standing around talking to employees who are punched in."

Because the Respondent failed to bargain with the Union in respect to the foregoing rule changes, which were mandatory subjects of bargaining, the Respondent by the rule changes violated Section 8(a)(1) and (5) of the Act. *Livingston Pipe & Tube v. NLRB*, 987 F.2d 422 (7th Cir. 1993).

(b) Deskin's assignment to change tires and Evers' assignment to clean shop drains with a bucket and a shovel were unilateral changes in working conditions which were mandatory subjects of bargaining in violation of Section 8(a)(1) and (5) of the Act.

(c) The implementation of the zero settlement policy, a mandatory subject of bargaining, on December 9, 1991, was a unilateral change in violation of Section 8(a)(1) and (5) of the Act. This new policy, effective December 9, 1992, unlike the policy then in effect, required route salesmen to check up to "zero" on a nightly rather than on a weekly basis with respect to "cases, empties, monies and flats." See further discussion, infra under the discharge of Jerry Lane Parker.

(d) The unilateral changes in the method of pay for the tell sell route salesmen and the bulk truckdrivers.

Prior to July 1992, the bulk truckdrivers were paid what was called "a 663 and its a Chinese overtime type deal." Thereafter, this rate was "\$7.35 an hour and time and a half for anything over 40 hours." They were also placed on a 5-day week.

A new pay system was also put in effect for the tell sell and full-service route salesmen. Tell sell "deliver bottle and can, and Food Service, which is the part that goes into restaurants and bag in the box." Full-service "fills vending machines." The changes that were effected for the bulk truckdrivers, tell sell route salesmen, and the full-service route salesmen were not discussed with the Union prior to the changes. Thus, the unilateral changes, which were mandatory subjects of bargaining, were in violation of Section 8(a)(1) and (5) of the Act.

F. The Discharge of Jerry Lane Parker

Jerry Lane Parker was discharged according to Kennedy, "I terminated Mr. Parker for failing to settle—it was zero settlement policy and Mr. Parker failed to abide by that policy." Kennedy testified, "We've always had the policy that the salesman settles to zero But he was allowed, at

³⁹ Chinese overtime was explained by Kennedy, "Basically the more hours you worked, the less you make per hour over 40."

⁴⁰ As stated in *Page Litho*, 311 NLRB 881 (1993):

It is well settled that the real harm in an employer's unilateral implementation of terms and conditions of employment is to the Union's status as bargaining representative, in effect undermining the union in the eyes of the employees.

times, to—if he checked up short on Tuesday, then the monies would not be taken out of his check until Friday . . . we went to a policy that said there's no change, we still have zero settlement. Now, *instead of weekly settling, you've got to settle on the daily basis.*" (Emphasis added.)

Kennedy's testimony confirms that the zero settlement policy was changed. Because it was an unlawful unilateral change without negotiating with the employees' bargaining agent,⁴¹ it was in violation of Section 8(a)(1) and (5) of the Act. See *Blossom Nursing Center*, 299 NLRB 333, 341 (1990). Thus, the discharge of Parker was in violation of Section 8(a)(1) and (5) of the Act. See *Randolph Children's Home*, 309 NLRB 341 (1992). *Livingston Pipe & Tube*, supra.

G. *Cases 11-CA-15281, 11-CA-15289, and 11-CA-15383*

Cases 11-CA-15281, 11-CA-15289, and 11-CA-15383 came on for hearing in Fayetteville, North Carolina, on August 17 and 18, 1992. The complaints in the cases, among other things, alleged that the Respondent had made certain unlawful unilateral changes and had unlawfully discharged several employees in violation of Section 8(a)(1), (3), (4), and (5) of the Act. The Respondent denied any wrongdoing.

H. *The Unilateral Changes*

First: A "spareman's responsibility at Pepsi-Cola is to fill in for any driver or assist any driver in stocking Pepsi products in their store or in their machines." In November 1992 the Respondent, without bargaining with the Union, changed the sparemen's work schedule.

Jimmy Manfred Barber, a spareman, brought the schedule change to the Union's attention and thereafter the sparemen were returned to the former schedule some time in January 1993.

Because the schedule change was made without the Respondent bargaining about a mandatory subject of bargaining, the Respondent violated Section 8(a)(1) and (5) of the Act. Whether any backpay is owing to the sparemen is left to the compliance stage of this proceeding.

Second: The hiring guidelines and employment guidelines,⁴² which were handed to the employees alleged to have been unlawfully discharged, were as follows:

HIRING GUIDELINES

Convictions or accidents totalling the following amounts make an applicant ineligible for employment requiring driving of a Company vehicle:

3 moving violation convictions⁴³ or chargeable accidents⁴⁴ in past 12 months

⁴¹ The policy was put in effect after the employees had designated the Union as their bargaining agent.

⁴² These guidelines were printed in an employee handbook.

⁴³ Kennedy testified, "[T]here is a list of moving violations that is printed, I guess by the State of North Carolina that lists everything that's, you know, the codes for them and their moving violations. A conviction would be that he's, as I discussed earlier, the policeman writes him a ticket for DWI, speeding, or whatever. The fact that he gets it reduced doesn't matter. That's a conviction."

⁴⁴ Kennedy testified: "[A] chargeable accident is he has an accident. It can be on the grounds or it can be on the street and either

4 moving violation convictions⁴⁵ or chargeable accidents in past 36 months

1 DWI in past 36 months.

EMPLOYMENT GUIDELINES

All drivers must comply with the hiring guidelines.

Chargeable accidents—includes those in which the police issue a citation or the accident committee deems was avoidable. Also included are the incidents involving Company vehicles which result in property damage in excess of \$250.00.

Employees who must drive a Company vehicle to accomplish their jobs will be terminated if their totals equal the stated guidelines. These positions are Route Salesmen, Route Supervisors, Transport Drivers, Vending Mechanics, Food Service Mechanics and Garage Mechanics.

Employees who drive a Company vehicle to get to the location where they do their job will lose the privilege of using a Company vehicle if their totals equal the stated guidelines. The loss of this privilege will be for 6 months or until their record on a rolling calendar is not in excess of the guidelines, whichever is longer.

Permanent revocation of the Company vehicle driving privilege will result from either of the following: a second incidence of exceeding the guidelines or a moving violation conviction or accident during a period of suspended privilege.

Any DWI conviction is immediate cause for termination or loss of driving privilege. The loss of driving privilege will be for a minimum of 24 months.

The General Counsel maintains that these guidelines were unilaterally changed without bargaining with the Union and announced to employees on January 14, 1993. The following evidence was offered to support this claim.

According to Joseph Franklin Murphy, Randall Calvin Kennedy, general sales manager, met with the route salesman on or about January 14, 1993. Kennedy pointed out on a chart or bar graph that Fayetteville had more accidents than any other Pepsi Cola plant. Kennedy said, "[U]pper management had looked at this and they weren't going to tolerate our high number of accidents." Continuing Kennedy said:

[I]f you were cited for a ticket and whether you were charged with it or not, or convicted, you would be held accountable for it by Pepsi Cola. And he said it didn't matter how deep your pockets was from the standpoint that if you got a lawyer and you weren't charged with it Pepsi Cola would look at that as a conviction and hold it against you anyway.

Around 32 employees attended the meeting.

Joseph Theodore Lee also attended the meeting. He testified that Kennedy said:

they write him a ticket on the street or the Safety Committee deems it to be his responsibility. That's chargeable."

⁴⁵ The word "conviction" was left out of the Respondent's proposal to the Union on guidelines.

Yes, sir, he said it didn't matter if your pockets were deep, that if you got a lawyer and you got out of it, it didn't matter. They still—if they knew about it, it was considered you were an unsafe driver after so many things. They were going to do that now.

[H]e said it was going to be different now, that it had gone through PepCom and they was going to restructure where it was going to be that if you showed any inclination of unsafe driving manner that you were going to be terminated for three of them. It didn't matter if they were chargeable or not. That if they came up that you were going to be terminated.

Kennedy remembered the meeting but not the exact date; however, he thought it was shortly after the first of the year. Among other things, Kennedy explained, “[C]onvictions are chargeable accidents. . . . [I]f the Safety Committee determines that he's at fault, then that's the same thing as if he got a ticket on the street. . . . [I]f you got a DWI and you had a good lawyer and you could get that reduced . . . we still view that as you got a DWI because you got the DWI because you were guilty of being under the influence.”

Kennedy denied that at the bar graph meeting he told employees for the first time that “it wasn't the convictions that counted but the fact that they got the ticket and did it.” Kennedy claimed that he had made this statement to employees between “eight and twelve times” prior to the bar graph meeting.

Kennedy admitted that he had said, “[H]aving deep pockets and getting out of the tickets.” “That if you had deep pockets and you could get a ticket, a DWI, reduced to improper equipment, it was still a DWI as far as PepCom was concerned.”

Based on the credible evidence, the question is: Did the Respondent unilaterally change the rule to include as chargeable accidents and moving violations situations in which the employee was not convicted of fault in an accident or convicted of a moving violation. The General Counsel claims a new rule was announced on July 14, 1993, changing the concept of chargeable accidents and moving violation convictions. The Respondent claims the rule was already in effect.

Based on the credible evidence, I find that the rule was changed in that prior to the rule change only moving violation convictions and chargeable accidents were counted for discharge whereas thereafter moving violations without conviction and accidents without fault were counted for discharge. This conclusion is buttressed by the fact that the Respondent has taken lightly its obligation to bargain with the Union concerning changes in working conditions and that its contract proposal to the Union omitted the word “convictions.”⁴⁶ I find that the Respondent's misconduct in making the unlawful unilateral changes without bargaining with the Union concerning a mandatory subject of bargaining is in violation of Section 8(a)(1) and (5) of the Act. See *Frontier Hotel & Casino*, 309 NLRB 761, 766 (1992).

⁴⁶David Schriber, a member of the Union's negotiating committee, testified that during the negotiations the Respondent presented the proposal but no agreement was reached.

F. *The Discharges of Christopher Matthew Hyatt, Joseph Theodore Lee Jr., and Benjamin Curtis*

Christopher Matthew Hyatt, Joseph Theodore Lee Jr., and Benjamin Frank Curtis were each discharged because each was declared by the Respondent to have reached the maximum for allowable chargeable accidents or moving violation convictions.

First: In regard to the discharge of Hyatt on December 30, 1993. Kennedy testified that “Chris Hyatt was terminated because he fell out of the—his driving record fell out of the guidelines, the retention guidelines. He had four accidents or moving violations within a thirty-six month period. Actually he had five.”⁴⁷

Kennedy's list of infractions were:

2-13-91—Hit pickup \$150.00
8-2-91—Bent a bumper \$175.00
6-5-92—Hit truck getting out warehouse
1-12-92—Speeding 67/55
7-25-92—Speeding 69/55⁴⁸

Kennedy testified that Hyatt was involved in another accident not on the list—June 20, 1992.

Hyatt admitted the following accidents: February 2, 1991—the air brakes on Hyatt's truck failed and he “ran into the back of a lady,” he “received a ticket but it did not go on his license”; August 2, 1991—Hyatt backed into a pylon going to the warehouse in back of the garage;⁴⁹ June 5, 1992—Hyatt's truck was hit by another truck driven by John Norman while standing still near the warehouse, Hyatt reported the accident to Kennedy and Kennedy said, “I was not at fault because I was sitting still.”

Hyatt admitted the two moving violations. Hyatt testified, “I took them both to court.⁵⁰ I had the first one reduced to improper equipment. The second one, I went to a driving school and had it dismissed.”⁵¹ Hyatt's motor vehicle report (MVR) indicates no moving violation convictions for accidents on February 12, 1991, and June 12, 1990.

When Hyatt arrived to work on December 23, 1992, he was ushered into Kennedy's office where Kennedy advised him that he was being discharged for “having five chargeable accidents within thirty-six (36) months.” Hyatt protested. Kennedy read the list of Hyatt's accidents. When he came to the one involved with Norman, Hyatt voiced that it was Norman's fault. Kennedy said he would “check with

⁴⁷Kennedy testified that he had no discretion in retaining employees who had gone beyond the safety requirements.

⁴⁸Had the Respondent's rule rested on citations as claimed by Kennedy rather than convictions, Hyatt apparently should have been discharged on January 12, 1992, when he incurred his fourth violation.

⁴⁹Hyatt testified that the accident on February 12, 1991, and the accident on August 2, 1991, were found by the accident committee to be “avoidable.”

⁵⁰Kennedy testified in regard to Hyatt's attendance at driving school:

[T]he ticket would be taken off the record but it doesn't change the fact that he got the ticket so if he was guilty of the speeding, he just got it dropped for insurance purposes or driving records or whatever for his own personal driving record. We still counted it as a chargeable.

⁵¹The Employer's performance record card showed that these events had occurred.

Bill Peterson on it and get back to me later on that evening.” Hyatt also told Kennedy he had no speeding tickets. Kennedy asserted to the contrary. The next morning Hyatt went to Kennedy’s office with his driving record which as of August 26, 1992, showed no record of convictions or suspensions. According to Hyatt, while discussing the accidents with him, Kennedy dropped the Norman accident. In respect to the moving violation charges, Hyatt, addressing Kennedy, said, “How could he charge me with it and the State of North Carolina didn’t.” Kennedy said he would check into it and that Hyatt should call him back later on that afternoon.

Hyatt phoned Kennedy. Kennedy asked him to come to the plant but Hyatt said that if you are going to terminate me, terminate me on the phone. Kennedy accommodated. According to Hyatt, Kennedy said he was discharging Hyatt for “four chargeable accidents.”

Hyatt testified that when he first received the traffic ticket he told Kennedy he was “going to hire myself a lawyer, and I was going to take it to court and I was going get it dropped.” Kennedy replied, “fine . . . just bring me the results,” which Hyatt did.⁵²

When the Union was organizing, Hyatt helped handbill and went to union meetings. He also “talked with different employees about it.” Supervisors drove by while Hyatt was handbilling. Hyatt also talked to Supervisors Starnes, McLamb, Conway, Lewis, and Melvin. Hyatt told Starnes, among other things, that it would be better for the employees to have a union.

The credible record indicates that Hyatt was involved in two chargeable accidents and received two traffic tickets for speeding for which he was absolved. It is obvious that he was not convicted of two moving violations. No persuasive proof exists in the record that it was his fault when his brakes failed. Although he “reached in his pockets” and prevailed in court, under the new rule which permitted a finding of guilt without a conviction he was discharged.

In view of the fact that Hyatt was a known partisan, that the Respondent harbored a deep antiunion animus, and that Hyatt was discharged under an unlawful unilaterally changed rule, I find that the Respondent violated Section 8(a)(1), (3), and (5) in discharging Hyatt. I further find that had he not been a union partisan he would not have been discharged. See *Wright Line*, supra.

Second: The discharge of Joseph Theodore Lee Jr.—March 19, 1993. Kennedy described the reason for Lee’s discharge as “Mr. Lee’s three accidents within twelve months or three citations or a combination of chargeable accidents within 12 months put him outside the retainment guide lines of our company.”

Lee’s MVR from North Carolina (August 17, 1992) shows a speeding violation of August 31, 1988, 60/45 for which he was charged three points. An MVR from Florida (August 17, 1992) shows a speeding violation of April 7, 1992, 65/55 for which he was charged three points.

Lee admitted a moving violation in Florida in May 1992 before he was employed at Pepsi Cola. Lee admitted that he

was charged with failing to stop at a school stop in March 1993. As explained by Lee it appeared that he was not guilty. Indeed, Lee was never convicted of the above alleged violation. As explained by Lee, “I went to court with Mike Walford, a lawyer here in town, and I got out of it. I had deep pockets, as Kennedy, would say.”

In November 1992, Lee testified that he had an accident. It was raining “very heavily.” A car pulled out in front of him; he stomped on his brakes; the trailer swung to the right. “I let off the brakes to bring it back around and swung back to the left. And I went into the other lane to keep from going up in that car. So the trailer came on around and smacked the tractor and crushed the driver side of the tractor door in.” The person who had caused the accident “took off.”

When Lee returned to the plant he was shown an accident report which revealed that a man had called and reported that he had seen the accident and that the truckdriver could not have avoided it.

Lee went before the safety committee and gave his version of the accident, “every body in the room seemed to agree with him.” In January 1993, Kennedy informed Lee that he was found chargeable and he would have to pay the deductible, which he did.

On March 19, Lee was called into Kennedy’s office. Kennedy told him he was going to terminate him because he had two moving violations and a wreck. Referring to the school crossing incident, Lee said, “I haven’t been charged with this yet. . . . It’s just a citation and I told you I’ve got a lawyer and I’m going to get out of it.” Kennedy replied, “[T]hat didn’t matter, that was the way it was now I can no longer have a job with Pepsi.”

As noted above, the Respondent unlawfully changed the rules with respect to the basis for discharge. Because Lee was discharged under an unlawful unilaterally changed rule, the Respondent violated Section 8(a)(1) and (5) when it discharged him.

Third: The discharge of Benjamin Frank Curtis—March 3, 1993. Kennedy testified that he discharged Curtis, a route salesman because he was involved in an accident in the plant “totally uncalled for.” Curtis ran into a truck where the trucks were checking out. Curtis was suspended. An emergency meeting of the safety committee was held. It reviewed the accident and found the accident was “definitely uncalled for” and a chargeable accident; Curtis was terminated for “unsafe driving.” The accident occurred on February 26, 1993.

Curtis testified that he was on his route on February 27, 1993, when Kennedy appeared and said he was suspended until further investigation of the accident. On March 3, Curtis was discharged. “They said, looking at my past driving record and the accident that happened—that took place on the Pepsi lot, they said they had to terminate me because of my driving record.” Kennedy “called” out Curtis’ driving record.

Because it would appear that Curtis fell victim to the same unlawful rule as Hyatt and Lee Jr., I find the Respondent violated Section 8(a)(1), (3), and (5) of the Act when it discharged Curtis.

The credible evidence indicates that Curtis had not exceeded the Respondent’s guidelines.

⁵² On Hyatt’s violation and review record, Kennedy noted regarding the July 25, 1992 speeding ticket, “On 10/10/92 he goes to Wilmington for a driving school. All points will be dropped.” Both of Hyatt’s traffic tickets were given to him while he was driving his private car.

G. *The Discharge of Felix Romero III*

Romero was discharged on April 6, 1993. Romero testified in this case on December 8, 1992. After the union campaign, Romero resigned voluntarily. He was rehired. According to Kennedy, Romero was discharged because of his accidents.

Romero was a lift truckdriver. He described what occurred on the day he was discharged. Romero was putting pallets on a truck. When he put the third one on, the truck door fell. "It was raining and when Dwight [Muffet, warehouse manager] seen the door fall he told me to stop. And the dock was wet and when I stopped my brakes locked up and I slid into the door and the door shot back up and I slid into the truck. In the back of the truck. Then the door—it went up with a force that when I slid under it, it come down behind me."⁵³ Romero had had a similar experience before (see *infra*).

Kennedy told Romero to run the lift truck in and out of the truck "to see if the door fell." Romero went on and off the truck "about three times" and the door did not fall. Kennedy left and returned to his office. Romero returned to work.

When Romero described to Leonard Williams, Dwight Muffet, and Mitchell Pittman what happened, Muffet said, "[I]t was plain to see that it wasn't my fault."

Thereafter, Kennedy called Romero into his office. Romero explained what happened. Kennedy listened and then said, "[G]o back out and do your work and I'll let you know what I am going to do."

Romero was fired. He describes the incident:

He told me the last time I had an accident that I was going to get terminated and I had had too many accidents. I wasn't being safe and I didn't lock the door down like I was told the last time. He wrote me up and Randy Kennedy had a note that he had wrote to Mitchell to let me sign saying that I had had too many accidents and I was terminated. On the write up it said that I was being unsafe and I didn't have the door lock down like it should have been and I wasn't paying attention. Mitchell asked me to sign it—to sign that—to sign the note that Randy Kennedy had wrote and plus my termination paper. I signed my termination and the note that Kennedy wrote, but the write up I did not sign, because I was not given the right equipment to lock down the door like the warehouse manager said.

As noted above, Romero had been involved in a similar accident which occurred in January 1993. As Romero described the incident, he was unloading a super route trailer. He had gone on to the truck a couple of times. "[A]bout the seventh time I was coming off the door⁵⁴ just—it failed. The spring let go and the door fell behind me . . . the front mast on my forklift hit the door and bent it off track."⁵⁵

⁵³ According to Kennedy, "The doors are laid such that when they're all the way up, they'll lock in—it's not locked but they stay in place. They won't come back down until you take the strap and pull it back down." "[T]he person going in and out that trailer is responsible to see that the door is all the way up."

⁵⁴ "It's a roller door that goes up and down."

⁵⁵ According to Kennedy, on an accident report Mitchell indicated that if a brace had been supplied, the accident could have been

avoided; however, upon checking it was found that if the door was all the way up it would not come down.

According to Romero he was suspended for 3 days and was told if he had any more accidents he would be terminated.

Prior to the accidents set out above, Romero was involved in an accident while operating his forklift. Romero punctured a hole in the wall of the warehouse manager's office. Romero was "written up" and told "to be careful, to just watch what I was doing."

Romero received counseling statements on June 28, 1991, for failure to report for work on June 28, 1991, and not contacting his supervisor, on June 23, 1992, for coming in late for work, on March 9, 1993, for riding on the back of an O.T.R. Trailer,⁵⁶ on December 30, 1992, for causing damage to warehouse office wall, and on January 8, 1993, for carelessness in operating a forklift.⁵⁷ Romero's last counseling statement was composed on April 5, 1993. It reported "That due to lack of attention to proper safety procedures Felix has developed a work history indicating an unsafe employee."⁵⁸

Kennedy testified that Romero was discharged for violating the following work rule appearing in the employees' handbook:

14. Willful violation of safety rules, creating or contributing to unsafe or unsanitary conditions.

According to Kennedy, this rule was the guideline for forklift operator. There is no rule which calls for the discharge of a forklift operator after a certain number of accidents.

Romero's name, among others, appeared on a union handbill passed out by the Union and admittedly seen by Kennedy. A part of the handbill read, "We have authorized the United Food and Commercial Workers Local 204 to use our name to encourage others to vote yes!"

As noted, Romero gave testimony in this case for the General Counsel on December 8, 1992. He had returned to work for the Respondent on November 9, 1992.

I do not find that Romero, as claimed by the General Counsel, was discharged in violation of Section 8(a)(3) and (4) of the Act in that it would appear that he would have been discharged even though he was a union partisan or even though he had testified in this proceeding.⁵⁹

H. *Case 11-CA-15556*

Case 11-CA-1556 came on for hearing at Fayetteville, North Carolina, on November 30 and December 1, 1993. In the complaint it was alleged, among other things, that the Respondent unlawfully discharged John Faass on May 27,

avoided; however, upon checking it was found that if the door was all the way up it would not come down.

⁵⁶ On the counseling statement it was written:

That this is very serious safety violation that will result in termination of the employee if this occurs again. Due to receiving 3 write-ups in less than 60 working days any further write ups will result in termination.

⁵⁷ On the counseling statement it was written, "Felix is suspended for (2) days without pay and any other accidents will result in termination."

⁵⁸ It was further noted, "Due to Felix' [sic] unsafe work history he is hereby terminated for contributing to an unsafe work atmosphere." It was signed by Mitch Pittman.

⁵⁹ General Counsel's motion to amend the complaint in Case 11-CA-15383 set out Br. 20 dated January 5, 1992, is denied.

1993, unlawfully unilaterally changed employees' working conditions, and unlawfully failed to provide the Union with certain requested information, all in violation of Section 8(a)(1) and (3) of the Act. The Respondent denied any wrongdoing.

I. *The Discharge of John P. Faass Jr.*

John P. Faass Jr. was hired on June 6, 1991, and was terminated on May 27, 1993. According to his separation notice, Faass was terminated "because of [his] accident and injury record." According to the notice, Faass had been involved in two "driver accounts," one "unavoidable," and the following "personal accidents":

- 8-7-91 pulled muscle⁶⁰
- 3-9-92 pulled muscle⁶¹
- 4-17-92 hurt right wrist⁶²
- 6-3-92 fell between pallets⁶³
- 11-17-92 lower backbone bruised⁶⁴
- 11-23-92 left upperback⁶⁵
- 3-17-93 injured forearm muscle⁶⁶

Faass reported all the personal injuries he received to his supervisors. According to Kennedy (although he was not wholly clear on the subject), all the personal injury reports were submitted to the safety committee which reviewed the situation and composed recommendations. Kennedy testified:

[A]fter the employee has described what happened . . . [t]he Safety Committee or myself will ask him questions if there are any to be asked. He will leave the room and then the Safety Committee will decide whether or not it's preventable or non-preventable and make their recommendations at that point. . . . [L]et's say he pulled a muscle and in his describing the accident and from the questions, it would be determined that he pulled a muscle because he was not working properly the way, you know, he's supposed to work. In that case the Safety Committee would say that that accident was a preventable accident and it was preventable on the part of the employee.

Neither the notes of the safety committee nor the recommendations were offered into evidence by the Respondent. Kennedy was unable to quote any findings or recommendations of the committee. Nor did he review them before he fired Faass.

⁶⁰ Faass pulled his stomach muscle on the route "lifting a bag in a box"; he went to the doctor; and lost 3 days.

⁶¹ Faass lifted drinks out of the truck and pulled muscles in his back. He lost 2 days; he saw a doctor.

⁶² Faass pulled the muscles in his right forearm lifting drinks out of a truck. He lost a week's work.

⁶³ Faass climbed on some pallets that gave way; he fell with the drinks and pallets on top of him. He injured his right knee. Faass was given medical attention. He lost 2 weeks' work.

⁶⁴ Faass testified that a pallet fell out of a truck and hit his "collarbone."

⁶⁵ Faass did not mention this injury in his testimony.

⁶⁶ According to Faass, he "jerked" a pallet "real hard" to avoid hitting a person who walked in front of it and "made [his] bicep real tender on [his] arm." Faass testified that the injury occurred in April 1993.

Faass operated what was called a "Tellsell Route." Faass drove a "regular ten pay truck." He covered an area "about a eighty square mile around Fayetteville."

Faass became involved in union activity when he voted for the Union. He attended union meetings. On one occasion, Faass spoke at a sales meeting that was conducted by Kennedy in April 1993. Present were the employees of the sales and route managers and General Manager Kennedy. Kennedy told employees that "all wages and back pay were frozen due—because of the Union."

Faass replied, "I bet if the Union was in, we would get all of our back pay, our retro-pay."⁶⁷

Kennedy did testify that on three occasions Faass discussed the Union with him either in his office or at the door of his office.⁶⁸

The credited evidence further discloses that Faass never received any warning that he would be discharged for too many personal injuries, that there was no written rule or unwritten rule on the subject of discharge for personal injuries decimated to employees⁶⁹ that Kennedy never talked to Faass prior to his discharge in regard to his personal injuries, that Faass' discharge was not recommended by any of his su-

⁶⁷ Kennedy denied this incident. His denial is not credited.

⁶⁸ Kennedy testified:

The initial one was probably spring—I'd say somewhere spring of '92 and he came in and asked me something involving pay. John wasn't happy with his pay at that time and wanted to know was there anything that could be done and I explained to him that we were, you know, negotiating with the Union and that was it. I also explained to him that I couldn't discuss this kind of stuff with him and we ended it at that.

The latter part of '92 there was a situation where he came in and—came by the office and asked me did I have a minute and I said, yeah, and he asked me where we were with the Union deal and I explained to him that I didn't understand what he was talking about and he said, well, he was going to talk to his lawyer to see what could be done about getting rid of the Union and I explained to him again that, John, these are conversations I can't have with you.

Then the other one was early '93, the same thing, situation on pay again, and John came by and John would have a tendency to stop by the office occasionally and he stuck his head in the door asking about pay and I told him the same thing again. We're in negotiations with the Union and that's it.

I am not convinced that these discussions occurred as narrated by Kennedy. It appears to me they were colored in order to accommodate the Respondent's claim.

⁶⁹ Kennedy further testified:

JUDGE GOERLICH: What's the unwritten rule?

THE WITNESS: We take a look at—if an employee is constantly getting injured, pops up before the Safety Committee quite often and starts to exhibit a pattern of unsafe working or being accident prone or whatever, then we'll review that individual.

JUDGE GOERLICH: Is there a specific number of incidents that you require before you discharge him?

THE WITNESS: No, sir, there's not.

JUDGE GOERLICH: You could discharge him for one incident under your—

THE WITNESS: Well, I think we could but then that wouldn't be in line with him establishing a pattern so I don't think we would do that, no, sir.

JUDGE GOERLICH: There has to be a pattern. If a pattern is established you use that as a basis for discharge?

THE WITNESS: Yes, sir.

pervisors, and that Faass was the only person who was ever discharged at the Fayetteville plant for excess personal injuries.⁷⁰ Kennedy waited 2 months and 15 days after Faass' last personal injury to fire him.

The General Counsel claims that Faass was discharged in violation of Section 8(a)(1), (3), and (5) of the Act. The 8(a)(1) and (5) violations are based on the Respondent's discharge of Faass under a new rule or standard which was instituted unilaterally and made effective against Faass without negotiating with the Union in respect to the change in such employment conditions. The 8(a)(3) violation is planted on the claim that Faass was discharged because of his union leanings.

The following credible evidence supports the General Counsel's prima facie case.

Neither in its handbook nor orally had the Respondent advised its employees that as a condition of employment an employee would be discharged if a "pattern" of personal injuries was ascertained. Nor was there any explanations to employees as to the number or type of personal injuries that would establish a pattern nor the timeframe in which the personal injuries must occur in order to fix a pattern, neither did the Respondent negotiate or discuss the charge in such condition of employment with the Union as it was required to do without implementing it unilaterally.

Faass was the first and only employee discharged for incurring excess personal injuries. Kennedy discharged Faass without reviewing the findings or recommendations of the safety board which he admitted he could not remember. Faass never received any warnings that he would be discharged for receiving too many personal injuries. Kennedy never discussed Faass' personal injuries with him prior to his discharge. Faass' discharge was not recommended by any of his supervisors. Kennedy waited over 2 months after the last personnel injury incident to discharge Faass. Nothing had occurred during this period to which Kennedy could point for discharge.⁷¹ The record herein is replete with evidence of the Respondent's antiunion animus. Faass' discharge occurred after Faass at a sales meeting said he "bet if the Union was here" employees would have received their backpay and cost-of-living increases. Kennedy admitted that Faass had attempted to "discuss" the Union with him on three occasions.⁷² The credible evidence does not establish that Faass was other than a satisfactory employer.

A prima facie case having been established by the General Counsel, the burden shifted to the Respondent to show that it would have discharged Faass even though it knew of his union activities. See *Wright Line*, supra. The Respondent has not sustained that burden. Kennedy formulated a new rule and siezed on it to discharge Faass, who had demonstrated

⁷⁰ Kennedy claimed he fired a person when he worked at Lumber-ton as sales manager. The person was involved in three "accidents . . . in a close period of time." It is not clear whether these involved personal injury accidents or "driving accidents" involving personal injuries.

⁷¹ Waiting for 2-1/2 months before discharging Faass could not have been an oversight on Kennedy's part because Kennedy was allegedly privy to the safety committee's findings and recommendations.

⁷² Kennedy asked, "Did Faass ever discuss the Union with you?" Kennedy answered, "There were three occasions when he attempted to discuss the Union with me."

his union partisanship which no doubt aroused Kennedy's antiunion sympathies. As noted above, nothing occurred between Faass' last personal injury incident and his discharge, except that he again had given utterance to union sediments. Except for his union activity, I find that Faass would not have been discharged. He was discharged in violation of Section 8(a)(3). Because he was discharged for an unlawfully instituted rule instituted in violation of Section 8(a)(5), the Respondent also violated Section 8(a)(1) and (5) of the Act.⁷³

J. Unilateral Changes

First: Around July 1, 1993, the Respondent unilaterally changed the work schedules of merchandisers so that merchandisers worked on Saturday and were given a day off during the week. Prior to the change, merchandisers did not work on Saturday. The change was effected without bargaining with the Union. The Respondent dealt directly with the employees involved.

Second: In June or July 1993, the Respondent unilaterally changed the starting time for route salesmen from 6 to 5:45 a.m. without bargaining with the Union. The Respondent dealt directly with the employees involved.

After the Union became the bargaining agent, the Respondent became obligated to bargain with the Union in respect to the change of work rules that effected wages, hours, and working conditions. This the Respondent did not do. Thus, the Respondent's direct dealing with its employees and its unilateral change of the bargaining rules offended Section 8(a)(1) and (5) of the Act.

In the instant case, the credible evidence indicates that the Union was given no notice of the Respondent's intent to change the foregoing rules and regulations nor does the credible evidence indicate that the Union had waived its right to bargain about the changes.

K. The Request for Information

A letter dated July 14, 1993, was addressed to the Respondent requesting the following information:

The union request the following information:

(1) A listing of all employees terminated since January 18, 1993, with dates of termination and reason for termination.

(2) A listing of all new hires, with dates of hire, address, phone number, job assignment and rate of pay, since January 18, 1993.

(3) A copy of the termination paper on David Schriber copies of any statements used in terminating him, and copies of all previous disciplinary actions against him, and a copy of the company policy concern charging employees for missing cash. We would also like to know if the cash loss from Schriber's truck safe was covered by the company insurance?

(4) A copy of the termination paper on John Faass, including a listing of on-the-job injuries used in deciding to terminate him (including dates, incident, time missed from work). We further request any prior disciplinary actions against this employee, and a record of any other employees who have been disciplined for on-the-job injuries.

⁷³ Cf. *Livingston Pipe & Tube v. NLRB*, supra at 429.

The Union stated the following reason for requesting the information:

John Faass had been fired. He had been told it was for having too many on-the-job injuries so I wanted to object to a new policy concerning on-the-job injuries and to request a copy of the policy if there was a policy in writing. The Handbook did not make any reference to a number of on-the-job injuries that could get you fired so I assume it must have been a new policy.

I was asking for a list of employees who had been terminated since the last list I had which was January 18, '93, and—so I could update my files since I had just been newly assigned to service this plant. . . . Well, I needed to update my list. I needed to know who was still working there so I'd know, you know, who the employees were that we were representing. . . .

In Item Number 2 I asked for a list of the new hires, their dates of hire, and address and phone number, job assignment and rate of pay similarly to add them to my list so I would be able to contract them and so I would know, you know, what job categories they were assigned to.

. . . .
I felt we needed to update the list. I knew that there had been several people who had left or had been terminated. I assume that there had been a number of new hires in that time and I needed to have this information so we could properly represent them.

. . . .
David Schriber had been fired prior to my getting this assignment. I was requesting—I had—was requesting information concerning his termination and other actions that had been taken against him.

Also, earlier he had been—sometime in January he had been accused of cash missing out of his safe in his truck. He was not terminated for that reason but he was forced to pay for the loss of the money which was about \$2,000.00 through wage garnishment on a weekly basis and I wanted to know whether the Company had recovered that money through an insurance policy in which case I wanted to represent Mr. Schriber because I didn't think he should have to pay for it if the Company had recovered that money through an insurance claim. So, that's the other part of the request.

. . . .
John Faass had been fired so I asked for relevant information concerning the reasons for his discharge. He had been told it was on-the-job injuries and I wanted to know any other actions that had been against him and also wanted to know if there had been other employees disciplined for on-the-job injuries so I could evaluate the charge that the Union was filing in his behalf.

For the reasons stated by the Union it is clear that the information requested was essential to the Union for adequate representation of the employees. In failing to furnish the information requested by the Union the Respondent violated Section 8(a)(1) and (5) of the Act. See *Enertech Electrical*, 309 NLRB 896 (1992), and cases therein cited.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and it will effectuate the purposes of the Act for jurisdiction to be exercised.

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

3. By interfering with, restraining, and coercing employees in the exercise of rights guaranteed by Section 7 of the Act, the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1).

4. By unlawfully discharging Robert Dale Munn on September 2, 1991, the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act.

5. By unlawfully discharging Jerry Lane Parker on January 29, 1992, the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act.

6. By unlawfully discharging Christopher Matthew Hyatt on December 30, 1993, the Respondent engaged in unfair labor practices within the meaning of Section 8(a)(1), (3), and (5) of the Act.

7. By unlawfully discharging Joseph Theodore Lee Jr. on March 19, 1993, the Respondent engaged in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act.

8. By unlawfully discharging Benjamin Frank Curtis on March 3, 1993, Respondent engaged in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act.

9. By unlawfully discharging John P. Faass Jr. on May 27, 1993, the Respondent engaged in unfair labor practices within the meaning of Section 8(a)(1), (3), and (5) of the Act.

10. By unlawfully disciplining Roger Deskin on May 28 and June 26, 1992, the Respondent engaged in unfair labor practices within the meaning of Section 8(a)(3) of the Act.

11. By assigning more onerous work to employees, the Respondent engaged in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act.

12. By withholding the January 1, 1992 wage increase for employees, the Respondent engaged in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act.

13. By unilaterally making changes in its employees' wages, hours, working conditions, or other conditions of employment concerning mandatory subjects of bargaining without bargaining collectively with the Union in accordance with Section 8(a)(5) of the Act, the Respondent engaged in and is engaging in unfair labor practices in violation of Section 8(a)(5) and (1) of the Act.

14. By refusing to furnish the Union with lawfully requested information, the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. Having also found that the Respondent unlawfully discharged Dale Munn, Jerry Lane Parker, Christopher Matthew Hyatt, Joseph Theodore Lee Jr.,

Benjamin Frank Curtis, and John P. Faass Jr., and has failed and refused to reinstate them in violation of the Act, it is recommended that the Respondent remedy such unlawful conduct. In accordance with Board policy, it is recommended that the Respondent offer the above-named persons immediate and full reinstatement to their former positions or, if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights and privileges previously enjoyed, dismissing, if necessary, any employees hired on or since the date of their discharges to fill the positions, and make them whole for any loss of earnings they may have suffered by reason of the Respondent's acts here detailed, by payment to them of a sum of money equal to the amount they would have earned from the date of their unlawful discharges to the date of valid offers of reinstatement, less their net interim earnings during such periods, with interest thereon, to be computed on a quarterly basis in the manner established by the Board in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest to be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

It is further recommended that the Respondent restore the status quo ante of all unilateral changes.⁷⁴

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁷⁵

ORDER

The Respondent, Pepsi-Cola Bottling Company of Fayetteville, Inc., Fayetteville, North Carolina, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discouraging union or concerted activities of its employees or their membership in United Food and Commercial Workers Union, Local 204, affiliated with United Food and Commercial Workers International Union, AFL-CIO, CLC or any other labor organization, by unlawfully and discriminatorily discharging its employees or discriminating against them in any manner in respect to their hire and tenure of employment or conditions of employment in violation of Section 8(a)(3) and (1) of the Act.

(b) Unlawfully representing to employees that it is futile to choose the Union as their bargaining agent.

(c) Unlawfully threatening employees that they would lose benefits if they chose the Union as their bargaining agent.

(d) Unlawfully threatening employees that if the Union came in it would close its plant.

(e) Unlawfully threatening employees that they would be terminated if they chose the Union as their bargaining agent.

(f) Unlawfully blacklisting employees.

(g) Unlawfully interrogating employees about their union activities.

⁷⁴ As stated in *Porta-King Building Systems*, 310 NLRB 539 (1993):

Indeed, in cases involving unlawful unilateral changes, the Board's normal remedy is to order restoration of the status quo ante as a means to ensure meaningful bargaining

⁷⁵ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(h) Unlawfully withholding wage increases from employees to discourage union activities.

(i) Unlawfully assigning employees onerous tasks because of their union affection.

(j) Unilaterally making changes in its employees' wages, hours, working conditions, or other conditions of employment concerning mandatory subjects of bargaining without bargaining collectively with the Union in accordance with the requirements of Section 8(a)(5) of the Act.

(k) Refusing to bargain with the Union by failing or refusing to furnish timely requested information relevant and necessary to the Union's performance of its function as bargaining representative.

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

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

(a) Offer Robert Dale Munn, Jerry Lane Parker,⁷⁶ Christopher Matthew Hyatt, Joseph Theodore Lee Jr., Benjamin Frank Curtis, and John P. Faass Jr. immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to a substantially equivalent position, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(b) Remove from its files any reference to the unlawful discharges of the above-named employees and notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

(c) Remove from its files any reference to the disciplining action taken against Roger Deskin on May 28 and June 26, 1992, and reimburse him for the earnings he lost by reason of his suspension with interest.

(d) Rescind and cease giving effect to rules for shop employees put in effect on May 12, 1992, the requirement that shop employees change tires and clean drains, the zero settlement policy effective December 9, 1992, the change in pay of full-service, tell sell, and bulk service employees, the change in the sparemen's work schedule, changes in the hiring guidelines and employment guidelines in respect to driving violations, change in work schedules for merchandisers, changes in lost time injuries, and reimburse employees for any losses suffered by them by reason of unilateral changes and because employees were unlawfully denied wage increases⁷⁷ together with interest in accordance with the Board's usual policy and comply fully with the remedy and, on request, bargain about any future rule changes.⁷⁸

(e) 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.

⁷⁶ As to Parker, see *Randolph Children's Home*, 309 NLRB 341 fn. 3 (1992).

⁷⁷ See *Premier Maintenance*, 282 NLRB 10 (1986).

⁷⁸ See *Randolph Children's Home*, supra at fn. 2; *Porta-King Bldg. Systems*, supra.

(f) Post at its Fayetteville, North Carolina establishment copies of the attached notice marked "Appendix B."⁷⁹ Copies of the notice, on forms provided by the Regional Director for Region 11, after being signed by the Respondent's authorized representative, shall be posted by the Respondent

⁷⁹If 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."

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.

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

IT IS FURTHER RECOMMENDED that the complaints be dismissed insofar as they allege violations of the Act other than those found in this decision.