

Nu-Skin International, Inc. and Graphics Communications International Union, affiliated with AFL-CIO, Local 96-B and Industrial Union Department, AFL-CIO, on behalf of GCIU, AFL-CIO. Cases 10-CA-25743 and 10-CA-25916

December 21, 1995

DECISION AND ORDER

MEMBERS BROWNING, COHEN, AND TRUESDALE

On July 20, 1993, Administrative Law Judge Philip P. McLeod issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed cross-exceptions and a supporting brief and a brief in opposition to the General Counsel's exceptions.

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

The Board has considered the decision and the record in light of the exceptions, cross-exceptions, and briefs, and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.

1. The General Counsel has excepted to the judge's finding that the Respondent did not violate either Section 8(a)(3) or 8(a)(5) of the Act in reaching and implementing its decision to close its Atlanta, Georgia distribution facility. With respect to the 8(a)(3) findings, we agree with the judge that, although the General Counsel made out a prima facie case of unlawful motivation in the closing, the Respondent established that economic circumstances would have compelled the closing in any event. The Respondent therefore established an affirmative defense under *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982). With respect to the 8(a)(5) issue, we conclude, for the following reasons, that the Respondent did not violate the Act by failing to bargain with the Union over the decision.

At the time of the announced closing of the Atlanta order processing facility on March 6, 1992, the Respondent was experiencing substantial damage to its business. As the judge found, the Respondent's total orders and net sales had dropped by over 50 percent from May and June 1991 through the end of 1991, and it faced significant financial obligations because of pending lawsuits and overseas financial commitments. Because of this state of affairs, the Respondent decided to process all of its orders from its distribution center in Provo, Utah, a highly automated, state-of-the-art facility that was underutilized in light of the Respondent's dramatic reduction in orders nationwide.¹ This

¹ The Atlanta facility remained open on a limited basis to receive "walk-in" orders.

decision entailed the relocation of work formerly performed at the Atlanta facility—the processing of orders for the Respondent's southeastern United States distributors.

After the closing of the Atlanta facility, the Respondent was able to process all of its nationwide orders solely from its Provo facility without having to hire any additional employees at Provo, thereby saving an anticipated amount of approximately \$4.5 million annually.² Indeed, the Respondent's nationwide orders dropped so dramatically that monthly orders nationwide from December 1991 and thereafter were comparable to orders processed at the Provo facility alone in mid-1991. Further, the number of orders that the Respondent had formerly processed in Atlanta in mid-1991 was comparable to the decrease in orders that the Respondent experienced nationally thereafter. Thus, the Respondent processed in the range of 73,000 to 76,000 monthly orders in Atlanta in June and July 1991 out of a nationwide total of approximately 158,000 to 164,000 orders in each of those months. By March 1992, it processed just under 77,000 orders nationwide, a reduction roughly equivalent to losing *all* of the orders formerly processed in Atlanta.³

On these facts, we find, under the test set forth in *Dubuque Packing Co.*, 303 NLRB 386 (1991), that the Respondent did not violate Section 8(a)(5) and (1).

Dubuque Packing establishes the following test for determining whether an employer's relocation decision is a mandatory subject of bargaining:

Initially, the burden is on the General Counsel to establish that the employer's decision involved a relocation of unit work unaccompanied by a basic change in the nature of the employer's operation. If the General Counsel successfully carries his burden in this regard, he will have established prima facie that the employer's relocation decision is a mandatory subject of bargaining. At this juncture, the employer may produce evidence rebutting the prima facie case by establishing that

² Indeed, the Respondent's work force in Provo actually *dropped* after the closing of the Atlanta facility. Specifically, the Respondent employed 531 employees in Provo in January 1992, 522 in February 1992, 481 in March 1992, 475 in April 1992, 471 in May 1992, 449 in June 1992, 436 in July 1992, 428 in August 1992, and 352 in September 1992.

³ The Respondent processed 81,450 orders in Provo in May 1991; 84,664 orders in Provo in June 1991; and 88,573 orders in Provo in July 1991. The Respondent processed 99,406 orders in Atlanta in May 1991; 73,371 orders in Atlanta in June 1991; and 75,534 orders in Atlanta in July 1991. Thereafter, 80,915 nationwide orders were processed in Provo and Atlanta *combined* in December 1991; 104,760 in January 1992; 92,643 in February 1992; and 76,868 in March 1992. After the closing of the Atlanta facility, the Respondent processed in Provo 69,353 nationwide orders in April 1992; 62,530 orders in May 1992; 63,404 orders in June 1992; 73,059 orders in July 1992; 67,689 orders in August 1992; and 72,981 orders in September 1992, the most recent month in evidence.

the work performed at the new location varies significantly from the work performed at the former plant, establishing that the work performed at the former plant is to be discontinued entirely and not moved to the new location, or establishing that the employer's decision involves a change in the scope and direction of the enterprise. Alternatively, the employer may proffer a defense to show by a preponderance of the evidence: (1) that labor costs (direct and/or indirect) were not a factor in the decision or (2) that even if labor costs were a factor in the decision, the union could not have offered labor cost concessions that could have changed the employer's decision to relocate. [Id. at 391.]

As an initial matter, we find that the Respondent's decision to close the Atlanta facility and to relocate the order processing tasks formerly performed there to its Provo facility involved a relocation of unit work unaccompanied by a basic change in the nature of the Respondent's operation. The order processing work relocated from Atlanta to Provo remained essentially the same work albeit performed with more advanced equipment at the automated Provo facility. Cf. *Noblit Bros., Inc.*, 305 NLRB 329, 330 fn. 9 (1992). Thus, both before and after the closing of the Atlanta facility, the Respondent continued to process orders received from its southeastern United States distributors and used warehouse/distribution employees who performed similar functions to fill those orders. Accordingly, because the facts here show essentially a relocation of unit work from one distribution facility to another distribution facility, we do not consider the Respondent's action as akin to a partial closing of its business under *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981). Instead, we find that the analysis set forth in *Dubuque Packing* is applicable to this case.

Under *Dubuque Packing*, once it is established that the decision involves a relocation of unit work unaccompanied by a basic change in the nature of the operation, as here, the evidentiary burden shifts to the employer. The Respondent contends that it has satisfied that burden because, even though labor costs admittedly were a factor in its decision, the Union could not have offered labor cost concessions that could have changed the Respondent's decision to relocate the unit work. We find merit to that contention.

It is uncontested that monthly labor costs in Atlanta were approximately \$468,000 and that the Respondent anticipated savings in the range of \$389,000 monthly once it closed the Atlanta facility.⁴ It is also

⁴In addition to the savings in labor costs, the Respondent anticipated other savings of about \$53,000 in monthly costs incurred at Atlanta, such as the cost of receiving freight, insurance costs, utilities, facilities rent, and equipment rental. This would be offset by additional freight costs of about \$132,000 to service its southeastern

uncontested that the cost to modernize the Atlanta facility from its essentially manual mode of operation to a more automated operation was in the range of \$1.5 million. Further, the Respondent anticipated that the orders formerly processed in Atlanta could be processed in Provo without the hiring of any additional employees in light of the underutilized capabilities of the Provo work force and facility. And, indeed, after the relocation, the Respondent's Provo work force actually declined in number.

Accordingly, the enormous projected savings realized by relocating the Atlanta unit work and by closing that facility were not offset by any additional personnel costs to be incurred at Provo. Moreover, because of the continual decrease in nationwide orders to be processed, the number of orders that the Respondent formerly processed in Atlanta virtually disappeared when viewed as a proportion of the former number of nationwide orders.⁵ Further, as noted, the Provo facility was an automated state-of-the-art facility with efficiency advantages that were underutilized,⁶ while the Atlanta facility would have required a major capital investment to improve its primarily manual operation.

In these circumstances, particularly the uncontested record evidence showing an enormous reduction in orders to be processed and the reduced number of employees needed to process those orders, as well as the overwhelming cost savings and dramatic efficiency advantages to be derived from closing the Atlanta facility and relocating its work to Provo, we conclude that there was no practical way for the Union to offer labor cost concessions that could have changed the Respondent's decision. Accordingly, we find that the Respondent did not violate Section 8(a)(5) and (1) as alleged.

2. The Respondent has excepted to the judge's finding that the Respondent violated Section 8(a)(1) when Controller Max Esplin and Assistant Manager Todd Harris threatened employees with plant closure if employees selected the Union as their collective-bargaining representative.⁷ Although the Respondent contends

customers from Provo, as compared to servicing them from Atlanta. Accordingly, the Respondent anticipated recapturing all but about \$79,000 of its monthly labor cost savings.

⁵As a result of the Respondent's demonstration of its projected cost savings, this case is distinguishable from *Owens-Brockway Plastic Products*, 311 NLRB 519, 522-525 (1993), in which the Board rejected the employer's contention that the union could not have offered labor cost concessions.

⁶Following the relocation, the number of nationwide orders that the Respondent processed and shipped per employee hour worked increased dramatically, thereby demonstrating that the relocation was accompanied by dramatic efficiency advantages.

⁷No exceptions were filed to the judge's findings that the Respondent violated Sec. 8(a)(1) by interrogating employees about their union sympathies, by soliciting complaints and grievances and promising employees job security and improvements in working conditions to dissuade them from selecting the Union, and threatening them with reprisals for their union activities, and Sec. 8(a)(3) and

that its president, Blake Roney, as well as another management representative, Kent Smith, effectively repudiated these threats by stating to employees that the Respondent would stay in Atlanta, we find, in agreement with the judge, that those statements do not meet the standards for effective repudiation set forth in *Passavant Memorial Hospital*, 237 NLRB 138 (1978). Thus, the evidence, as set forth by the judge, does not establish that the purported repudiations specifically adverted to each instance of the coercive conduct or that they were accompanied by assurances that there would be no further interference with employees' Section 7 rights. Further, the Respondent engaged in unlawful conduct after the purported repudiations. For all of these reasons, the statements of Roney and Smith, on which the Respondent relies, did not effectively repudiate the prior coercive conduct.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Nu-Skin International, Inc., Atlanta, Georgia, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

(1) by reprimanding and warning employee Gary Cabe because of his union activities.

Susan Pease Langford, Esq., for the General Counsel.
Jeffrey M. Mintz, Esq. and *J. Michael Magee, Esq.* (*Jackson, Lewis, Schnitzler & Krupman*), of Atlanta, Georgia, for the Respondent.
Jeffrey S. Wheeler, Esq., of Riverdale, Georgia, for the Union.

DECISION

STATEMENT OF THE CASE

PHILIP P. MCLEOD, Administrative Law Judge. I heard this case on November 2–6, 9, 10, 12, and December 1–4, 1992, in Atlanta, Georgia. The charges which gave rise to this case were filed by the Industrial Union Department (IUD), AFL–CIO, on behalf of Graphics Communications International Union (GCIU), affiliated with AFL–CIO, Local 96-B (the Union), on December 30, 1991, and April 10, 1992, against Nu-Skin International, Inc. (Respondent). The charges were later amended on February 5 and April 29, 1992, respectively. On June 30, 1992, an order consolidating cases, consolidated complaint, and notice of hearing issued.

The consolidated complaint alleges that Respondent violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act (the Act). The complaint alleges that Respondent interrogated employees concerning union activities; threatened employees with plant closure; threatened to reduce wages and other benefits; threatened that Respondent would not bargain in good faith with the Union if it was selected by employees as their collective-bargaining representative; threatened employees with loss of jobs and loss of work; promised employees increased benefits if they would refrain

from union activity; and maintained a "human resources committee" for the purpose of soliciting grievances from employees. The complaint also alleges that Respondent lowered the evaluation scores of employees, issued written warnings to employees, and discharged certain employees in retaliation for their union activities. Finally, the complaint alleges that Respondent discharged more than 300 employees at its Marietta, Georgia facility and relocated the work performed at that facility to Provo, Utah, because employees selected the Union as their collective-bargaining representative. The complaint alleges that Respondent effected this plant closing unilaterally without giving the Union prior notice or an opportunity to bargain about the relocation of this work.

In its answer to the consolidated complaint, Respondent admitted certain allegations including the filing and serving of the charges; its status as an employer within the meaning of the Act; the status of the Union as a labor organization within the meaning of the Act; and the status of certain individuals as supervisors and/or agents of the Respondent within the meaning of Section 2(2), (11), and (13) of the Act. Respondent denied having engaged in any conduct which would constitute an unfair labor practice within the meaning of the Act.

At the trial, all parties were represented and afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence. Following the close of the trial, counsel for the General Counsel and for Respondent both filed timely briefs with me which have been duly considered.

On the entire record in this case and from my observation of the witnesses, I make the following

FINDINGS OF FACT

Analysis and Conclusions

I. JURISDICTION

Nu-Skin International, Inc. is, and has been at all times material, a Utah corporation with corporate headquarters and a plant located at Provo, Utah, where it is engaged in the production and nonretail distribution of cosmetics. In the course and conduct of its business operations, Respondent annually purchases and receives at its Utah facility goods and materials valued in excess of \$50,000 directly from points located outside the State of Utah. Respondent also annually sells and ships from its Utah facility products valued in excess of \$50,000 directly to points located outside the State of Utah.

Respondent is, and has been at all times material, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION

Graphics Communications International Union, AFL–CIO, Local 96-B is, and has been at all times material, a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. Background

Nu-Skin International, Inc. was founded in 1984 in Provo, Utah. Respondent sells cosmetic and health care products through a system of distributors who act as independent con-

tractors. The distributors, in turn, sell the products directly to the public.

From its founding in 1984 through May 1991, sales grew rapidly, sometimes running as high as 400 percent annually. Growth was so rapid that during 1990 employees at Respondent's Provo headquarters were being housed in 10 different buildings.

By 1988, Respondent was receiving complaints from east coast distributors concerning lengthy delivery times of orders for products. Respondent began to consider the need to open an east coast distribution center, and it eventually chose Atlanta. In 1989 Respondent opened a warehouse and shipping center in Smyrna, Georgia, a suburb of Atlanta. Some time in late 1989 or early 1990, Respondent moved to a larger facility in Marietta, Georgia, another suburb of Atlanta.

Not long after opening the Atlanta warehouse and distribution center, Respondent began receiving advice that it should consider closing that facility. In February 1990, Respondent was in the process of negotiating improved shipping rates with various carriers. In a letter to Provo distribution center general manager Max Pinnegar, Federal Express stated it was "most interested in working with (Respondent) to evaluate the appropriateness of closing the Atlanta distribution facility." It was at about that same time that Respondent decided instead to expand the Atlanta operation and move into the new warehouse in Marietta.¹

During this same time, because of its rapid growth, Respondent began planning for a new corporate headquarters and shipping facility in Provo, Utah. In planning for the Provo center, Respondent hired an efficiency consulting firm, DCB & Co., to assist it. During consultations, Respondent requested DCB Representative William Bladen to tour the Atlanta facility and make a recommendation as to what, if anything, could be done to improve its efficiency. Bladen visited the Atlanta facility in July, August, and October 1990.

After Bladen's visits to the Atlanta facility in July and August 1990, Bladen met with Respondent's representatives in September. On September 27, Bladen met with Corporate President Blake Roney, Vice President Brook Roney, Max Pinnegar, and others who comprise Respondent's owners and executive management team. The main purpose of this meeting was to present his firm's proposed design for the new Provo distribution center. In that meeting Bladen informed Respondent that the new Provo facility was larger than they needed, that in fact they would have "excess capacity at that facility." Bladen made the point that there would be no need for a distribution center in Atlanta. Nevertheless, Brook Roney, who had made the decision to open the Atlanta distribution center and who therefore felt some personal stake in that decision, asked Bladen to visit the Atlanta facility again specifically for the purpose of determining whether there were recommendations he would make to improve efficiency at that facility.

Bladen again visited the Atlanta facility in October 1990. After his trip in October, Bladen reported that it would cost approximately \$1.5 million to upgrade and make Atlanta more efficient by installing certain material handling equip-

ment and computer inventory software. Bladen reported to Respondent, however, that such an investment would not bring Atlanta anywhere near the capabilities that would be available at the new Provo distribution facility. Bladen recommended that Respondent not invest any more capital into the Atlanta facility. Respondent followed Bladen's advice not to invest any more capital into the Atlanta facility, but Respondent did not act on Bladen's recommendation to move forward in planning for only one national distribution center. The Atlanta distribution center simply continued to operate as it had before.

Construction began on the new Provo headquarters and distribution facility in the summer of 1990. At that time, the Provo distribution facilities were spread over 10 different sites throughout the Provo area. The new Provo facility was completed and opened on February 18, 1991. In preparation for the transition and move to the new facility in Provo, Respondent shifted the responsibility for shipping to certain states from Provo to the Atlanta warehouse. By memo in December 1990, Respondent's management was informed of this temporary assignment. The memo also informed the managers that in April or May 1991, after the "bugs" were worked out in Provo, new boundaries would be drawn and Atlanta would then be responsible for shipments only to the Southeast United States. Prior to this memo, Atlanta had also been responsible for shipping to Northeastern states.

At the time Respondent's new facility opened in Provo, the Atlanta facility demonstrated that it was no longer the answer to the problems Respondent experienced in 1988 which lead to its opening. When the new Provo center opened in February, the Atlanta warehouse was beginning to fall behind in its shipments. Growth in business was out-pacing the Atlanta warehouse's ability to keep up. Therefore, toward the end of February 1991, Bladen suggested Respondent test the validity of one national distribution center. Respondent agreed to test the new Provo facility by assigning some of the states being serviced by Atlanta to Provo. The new distribution center's ability to handle all of Respondent's shipments within the United States was specifically confirmed in April 1991. On April 9, 1991, Provo Distribution Center Manager Bradley Morris sent a memo to Respondent's management proclaiming "we have both the capacity in equipment and the manpower to easily handle the present volume we are shipping in the United States."

Respondent's 8 years of rapidly expanding growth came to an abrupt end in 1991. Beginning in early 1991, Respondent's business practices were investigated for possible consumer fraud by the attorneys general of several States. The first investigation began in February by the State of Florida. Between March and September 1991, the attorneys general in Connecticut, Illinois, Michigan, Ohio, and Pennsylvania all opened formal investigations of Respondent's business. In addition, both the Federal Trade Commission and the Securities and Exchange Commission began to investigate Respondent's business practices.

These actions by state and Federal Government agencies resulted in a rash of negative publicity. The first was published on May 10, 1991, in an article entitled "The Cult of Nu-Skin" in the Boston Phoenix. Respondent was the subject of an article in USA Today on July 9, 1991. On July 22, an article appeared in Newsweek magazine about Respondent entitled "A Slippery Pyramid." During July, Re-

¹ Brook Roney, Respondent's vice president of distribution, testified that Respondent moved to the larger Marietta location in April 1990.

spondent was also the focus of a report on ABC's Nightline program. Altogether, from May 10 to the end of 1991, Respondent's business practices were the subject of at least 21 articles in a wide range of publications.

It is not simply coincidence that May 1991 was the month in which Respondent reached its apex in numbers of domestic orders distributed. In May 1991, Respondent shipped over 180,000 orders. After May, Respondent's orders began to decline dramatically. In June, shipments dropped to 158,000. By August, shipments had dropped to 132,000. Orders continued to drop throughout 1991, as more fully discussed below.

Whether related or simply coincidental, the fact is that employee union activity at the Atlanta facility began and continued during the very period in which Respondent received the greatest adverse publicity and in which sales declined dramatically. During April 1991, employees Gary Cabe, Patricia Presnell, and Joan Chapman contacted the Union about organizing Respondent's employees. In May, the union campaign picked up speed by holding meetings with employees and circulating petitions among employees calling for a union election.

On June 12, 1991, the Union filed a petition with the Board seeking an election among all full-time and regular part-time production, maintenance, and packaging employees at the Marietta, Georgia facility. An election was held among employees on August 2.

In order to place this case in its proper context, it is important to note not only that the union campaign among employees was taking place at the very time Respondent was suffering a rash of negative publicity and a dramatic decline in orders, but also it is important to acknowledge that these facts were well known to employees at the Atlanta facility. Several witnesses called by counsel for the General Counsel testified that the adverse publicity and the rapid decline in business were common knowledge among employees in the Atlanta distribution center and were discussed among employees during the preelection campaign. In fact, orders declined so rapidly yet employees were retained such that employees were actually sitting around on the job for hours playing various card games and board games. It was in this context that the preelection campaign was conducted by both the Union and Respondent.

*B. Events Predating the Election May or June 1991:
Human Resource Committee*

There is no dispute that in the late spring of 1991 Respondent established a "Human Resource Committee" (the Committee) to solicit, discuss, and attempt to resolve employee problems and concerns. Employee Linda Lusebrink, who was on this committee, testified without contradiction she was told by Assistant Plant Manager Todd Harris the purpose of the committee was "to bring complaints, concerns, and questions from the floor from general employees" in order to "discuss compromises or solutions to those problems." Harris admitted that the purpose of the Committee was "to give employees in-put for bettering the work place, ideas or suggestions on how to make things better with policies and it was—the purpose of the Committee was—and the Committee members—was to gain that feedback from employee, get some employee in-put."

The Human Resource Committee was established and functioned for the purpose of soliciting and attempting to resolve employees' general complaints and grievances. Each member of the Committee was provided with a trapper-keeper style notebook in which they were told to keep notes about any questions or concerns raised by employees in their work area. Lusebrink testified credibly that at each meeting each member of the Committee was expected to read from their notebook any questions or concerns which they had noted since the prior meeting. Committee members were called on to identify each employee who made a complaint or comment.

Although Lusebrink testified that she first heard of the Committee in March or April 1991, she did not become a member of the Committee until mid-June, and, as more fully discussed below, I find no reliable evidence that the Committee existed before mid-June. Counsel for the General Counsel alleges that the Committee represented an unlawful solicitation of grievances from employees in response to union activity. Respondent contends the Human Resource Committee was activated in early May 1991, before there is any evidence that it was aware of union activity. Harris testified that he first became aware of the union activity at the end of May 1991.

Minutes of committee meetings were prepared and maintained by Respondent. The earliest minutes of the Human Resource Committee meeting are dated June 11, 1991. The only earlier dated committee document produced by Respondent is a three-line agenda dated May 6, 1991. Assistant Plant Manager Todd Harris testified that the May 6 agenda was found not in Respondent's files but on a personal computer. Harris testified he printed the agenda from the computer in the latter part of 1991, and it has been with Respondent's attorney since that time. I have grave doubts about giving any weight to the computer entry showing a three-line agenda dated May 6. That entry could have been made at any time, and there is simply not sufficient foundation to consider it reliable. There was no testimony explaining the circumstances of the initial writing of the May 6 agenda. There was no testimony about why the May 6 agenda was not maintained in files along with other records of the Human Resource Committee meetings. There was no testimony by Harris about any specific recollection of a May 6 meeting, and no minutes were introduced reflecting that a meeting was in fact held at that time. In short, Respondent failed to produce any credible evidence that the Human Resource Committee existed prior to it being aware of union organizing activity.

The latest dated document involving the Human Resource Committee is a copy of minutes dated July 24, from a meeting of the Committee held on July 17, 1991. The minutes of the July 17 meeting reflect discussion about adding a telephone for employees, evaluations, late call-in times, and the dress code. The meeting concluded by Respondent encouraging employees' suggestions with an assurance that the suggestions would be seriously considered.

Lusebrink testified without contradiction that after the Board-conducted election the Human Resource Committee meetings "dropped off completely and dissolved." As Lusebrink testified, "It just dissolved and we turned in our notebooks. After the election, Todd Harris asked the Com-

mittee members to turn the Human Resource Committee notebooks in.”

In its posttrial brief, Respondent’s principal argument concerning the Human Resource Committee is that “the allegation . . . cannot be proved.” I disagree. From Respondent’s own records, the earliest dated minutes of a Human Resource Committee meeting is June 11. There is no reliable evidence that a meeting was held before that day. On the contrary, there is every reason to believe if meetings were held prior to June 11, minutes of those meetings would be in Respondent’s possession and would be available to prove when those earlier meetings were held. I find it is no coincidence that the earliest dated minutes are dated approximately 2 weeks after Respondent became aware of union activity, and the latest dated minutes are only a few weeks before the Board-conducted election. The available evidence leads me to conclude that the Human Resource Committee was hastily established by Respondent as soon as it learned of employee union activity, specifically for the purpose of soliciting employee complaints and grievances in violation of Section 8(a)(1) of the Act. It is not necessary for the Employer to explicitly promise to remedy employees’ concerns in order for there to be unlawful interference with employees’ rights. In such circumstances, employees would tend nevertheless to anticipate improved conditions of employment that would make union representation unnecessary.

1. Mid-June 1991: Distribution Center Manager Mark Fleming’s conversations with Linda Lusebrink

Linda Lusebrink testified that she began to openly support the Union in early June 1991 by wearing a union button while at work. Lusebrink testified that one day in mid-June approximately 3 or 4 weeks after she began wearing the union button Distribution Center Manager Mark Fleming approached her and fellow employee Phylis Figueira as they were working in the damages department.

Fleming spoke to Lusebrink and Figueira for approximately 45 minutes. Lusebrink testified credibly that Fleming questioned the two employees about what the Union could do for them. Fleming then asked Lusebrink and Figueira to “give him a chance and make changes . . . to satisfy our needs as far as working at Nu-Skin goes.” On cross-examination, Lusebrink was even more specific, testifying that Fleming asked to have a chance “to change policies, to better suit the needs of employees. Maybe structure a more fair evaluation system. Perhaps to even give us a better insurance coverage for less money, that sort of thing.”

Fleming admitted having a discussion with Lusebrink and Figueira in which he discussed certain policies and benefits with them. Fleming admits speaking not only to Lusebrink but many other employees shortly after he was promoted to distribution center manager, and telling them “I would like a chance to run the warehouse union-free. . . . And the company was a good growing company, I felt we had a bright future there and I would just like a chance for her to vote for me and allow me to do that and if she wasn’t happy with it after the way things went after about a year or so, they could petition for another election if the other employees wanted to do so.” Fleming denied telling Lusebrink that he wanted to develop a more fair evaluation system. He admitted speaking about evaluations, however, and ensuring her “that things would be done on time the way they were sup-

posed to be done and *not the way they had been done* in the past.” (Emphasis added.) I find even Fleming’s own choice of words to promise implicitly, if not expressly, a change and a more fair evaluation system. Regarding other policy changes, Fleming testified that he told Lusebrink and other employees “we couldn’t change a policy because we were in the campaign. And it would be illegal to do that.” Fleming later testified, “I said that some things probably needed to be changed but we can’t do anything.”

By the time of this conversation between Fleming, Lusebrink, and Figueira, Lusebrink had become an open and active union supporter. Accordingly, by asking Lusebrink what the Union could do for her, Fleming was not interrogating her about her union sympathies, but rather was simply using this as a way to initiate the conversation. I find that Fleming did not unlawfully interrogate Lusebrink. *Rossmore House*, 269 NLRB 1176 (1984). On the other hand, I find that Fleming both intended to and in fact either expressly or impliedly promised Lusebrink and other employees that he would change things which needed to be changed and thereby improve working conditions if employees would only “give him a chance” by voting against the Union in the upcoming election and delaying union representation at least a year. I find that by expressly or impliedly promising such changes and improvements in return for forgoing union representation, Fleming violated Section 8(a)(1) of the Act.

2. June 1991: Filling of office positions

Throughout 1991 Teresa Williams and Deanna Reeves worked at Respondent’s Atlanta facility as gatekeepers, primarily responsible for keeping track of the comings and goings of employees and keeping accurate timecards. Both Williams and Reeves testified candidly that they were strong antiunion, procompany employees. Williams and Reeves offered significant and mutually corroborative testimony about the filling of two front office positions in May or June 1991. Front Office Supervisor Derrick Fountain asked Williams and Reeves to make an announcement to employees that anyone wanting to take the test for a front office position should sign up at the gatekeeper’s desk. Williams testified that after employees signed up on the list, she and Reeves rewrote the list and took it to the front office to Fountain. Williams spoke to another office worker while Reeves talked with Fountain about the list. On their way back to the gatekeeper’s desk, Williams saw Reeves highlighting names on the list. Reeves told Williams that Fountain had asked her to highlight the names of union supporters on the list.

Reeves testified credibly that when she took the list to Fountain, Fountain asked if she knew which ones were union supporters. Reeves said that she could tell him to the best of her knowledge, but there were some employees about whom she was not quite sure. I credit Reeves that Fountain stated he did not want any union supporters in the front office, and Fountain gave Reeves a highlighter and instructed her to highlight the union supporters. Fountain stated he would let all the employees take the test, but union supporters would not get into the front office. Reeves testified credibly that after she highlighted this list and returned it to Fountain he then gave her a list of day-shift employees and asked her to highlight the people she knew were union supporters on that list as well.

Fountain denied even making a list of employees who wanted to take the test. According to Fountain, employees wanting to take the test just came to the office when the test was being given. Fountain also claimed that he did not know Reeves' or Williams' union sentiments. Fountain was less than candid. When asked whether he ever had conversations with other supervisors about any employees union feelings, Fountain repeatedly attempted to evade the question. He finally claimed that he never had conversations about any employees' feelings concerning the Union.

Williams and Reeves, on the other hand, testified quite candidly. They did not hesitate to implicate themselves and their own role in keeping the front office free of union supporters. It is completely reasonable and believable that a supervisor would request assistance in identifying prounion applicants from openly staunch procompany employees such as Williams or Reeves. While Fountain was generally stiff and unconvincing, Williams and Reeves were altogether candid and believable. While there is no allegation of an unfair labor practice in connection with filling of front office positions, Fountain's conduct and comments clearly reflect animus on the part of Respondent toward employee union activities.

3. July 1991: Conversation between Supervisor William Ratlift and Linda Lusebrink

Linda Lusebrink testified that Supervisor William Ratlift approached her and another employee approximately 2 weeks before the Board-conducted election in the receiving area near the dock doors. Ratlift began talking about the Union. Lusebrink testified credibly, "He was blatant about it and he asked me what good could a union do if the plant was closed." Lusebrink also testified Ratlift said he had a cousin or brother involved with a union and that it was all negative. After a brief conversation which lasted only approximately 5 minutes, Ratlift left the area.

Ratlift testified he remembered speaking to Lusebrink on occasion, although he did not remember a particular conversation with Lusebrink and the other employee. Ratlift denied, however, ever asking Lusebrink what good a union could do her if the warehouse was closed. Ratlift explained, "I would not say that." Ratlift testified, as did many of Respondent's supervisors, that he had been trained by Respondent's counsel what would be unlawful for him to do or say during the union organizing campaign. Ratlift testified he had been "trained . . . not to say stuff like that in TIPS, like threatening, interrogating, promising and spying." Ratlift then added, "That would threaten her. I would not threaten nobody."

In its posttrial brief, Respondent's arguments concerning credibility rely heavily on the fact that many supervisors testified they received training and therefore would not have engaged in the conduct of which they are accused. In making credibility resolutions, I do not ignore the fact that Respondent's supervisors received training about lawful and unlawful conduct. Nor, however, do I rely on this fact in finding that any specific conduct did not occur. There are numerous Board cases where even attorneys, indeed even labor specialists, have been found to have engaged in unlawful conduct. The fact that one knows certain conduct should not be engaged in is simply not particularly probative of whether that person actually engaged in the conduct at issue. Though I

may be accused of being cynical, such knowledge would seem to be much more significant in determining whether one is likely to admit that they have engaged in such conduct. In making necessary credibility resolutions in this case, I do take into account and consider the fact that supervisors received training about certain types of conduct which would be unlawful. Ultimately, however, I rely on their entire testimony, including my observation of the witnesses, in making necessary credibility resolutions.

In this instance, I credit Lusebrink who testified candidly and credibly that Ratlift specifically asked her what good a union could do if the plant was closed. I find that Ratlift's question carries the implied, if not express, threat that Respondent would close the Atlanta facility if employees chose the Union as their collective-bargaining representative, and Respondent thereby violated Section 8(a)(1) of the Act.

4. July 1991: Conversation between Supervisor Trace Loner and Gary Cabe

Gary Cabe testified that during mid-July 1991, he participated in a group discussion with Supervisor Trace Loner about the Union. Loner was admittedly not Cabe's supervisor. Cabe testified, "I noticed Loner back there [in the stocking area] talking to several of his employees, and I just happened to get in on the conversation." Cabe then testified, "it was anti-union conversation, and he was discussing the employees that if the Union would be voted in, come negotiation time, our wages would go down to minimum wage, all our benefits would go out the door, and everything would start out from ground zero." Cabe testified that almost identical comments were made by Supervisors Lewis Washington and Stanley Crumley. Washington and Crumley both deny making such comments, while Loner was not called as a witness.

Even though Cabe's testimony concerning the alleged comment by Loner is technically uncontroverted, I have serious doubts about some of Cabe's testimony. In particular, I do not believe Cabe's testimony about the alleged comment by Loner is reliable. When confronted on cross-examination with one of the sworn affidavits he had provided to the Board, Cabe admitted that the conversation with Loner began when Cabe himself asked Loner, "when they are negotiating, do you take wages down to minimum wage." Cabe, who was one of the leading union adherents and one of the three employees who initially contacted the Union, was then forced to admit that it was he who raised the leading question and the issue. I do not credit Cabe that Loner told employees wages would go down to minimum wage and all benefits would go out the door. His testimony on this and similar alleged statements by other supervisors was very conclusionary and unreliable. Accordingly, I reject Cabe's proffered testimony concerning the alleged comment by Loner and other alleged similar statements by other supervisors, and I dismiss those allegations of the complaint.

5. Summer 1991: Conversation between Supervisor Lewis Washington and Quincy Young

Quincy Young testified credibly that Supervisor Lewis Washington approached him one day during the summer 1991 in the manifest area and started a conversation about the Union. Young testified that during this conversation,

Washington stated "if you vote for the Union . . . your pay could be cut . . . they may close the plant." Young, who at the time of this conversation with Washington was undecided about supporting the Union, testified very candidly and credibly. Young readily admitted on cross-examination he could not remember the date of the conversation with Washington, or the exact words used by Washington. Young recalled that Washington stated either the company "would" or "could" or "can" cut employees pay and "could" or "would" close the facility if employees chose the Union. Young readily admitted that even before the conversation with Washington, he was nervous about being able to keep his job because of the bad publicity Respondent was receiving in various publications.

Washington recalled a conversation with Young in which Young supposedly made the statement that employees did not need a union. Washington denied saying anything about the plant closing or pay being cut if employees selected the Union. Washington asserted that he would not make such a statement because "it would sound like a threat" and would be "illegal." In the case of Washington, however, I believe his training more likely to result in a denial of the statement than in actually refraining from making the statement. On cross-examination Washington admitted not only talking to employees about the Union, but about rumors about the plant closing.

I credit Young, and I find that Washington conveyed a clear threat of reprisal by employees' pay being cut and a threat of the plant closing if employees selected the Union to represent them for purposes of collective bargaining. Respondent thereby violated Section 8(a)(1) of the Act.

6. July 1991: Conversation between Distribution Center Manager Mark Fleming and Quincy Young

Quincy Young also testified about a conversation with Manager Mark Fleming about the Union. Young testified that during the summer 1991, prior to the union election, Fleming approached him and a group of employees "down by the dumpster." Young was able to recall specifically that the group included employees Earl Johnson, Charles Dials, Briscoe Carr, and Thomas Gunn. Young testified that prior to the election he was not an active supporter of the Union and, at the time of this conversation, several employees in the group had not publicly expressed any position on the Union.

Young testified that people in the group were talking among themselves when Flemming approached and entered the conversation. Young testified that Flemming asked various people in the group questions about the Union. Young also testified that during this conversation, Flemming then asked Young pointedly how he felt about the Union. Young replied by saying he really didn't care one way or the other. Young candidly admitted that the only thing he specifically recalls or even specifically paid attention to during this conversation was Flemming asking him directly how he felt about the Union.

Flemming recalled a conversation with Young near a dumpster. Flemming denied asking Young how he felt about a union, however, saying, "that would be an interrogation." Flemming did not testify about the conversation beyond this simple denial. I credit Young, who was particularly credible and candid about what he could and could not remember

concerning this conversation. Young was not an open and active supporter of the Union, and I find that Flemming's interrogation of Young about his sentiments toward the Union violated Section 8(a)(1) of the Act. *Rossmore House*, supra.

7. July 1991: Conversation between Supervisor William Ratliff and Israel Cook

Israel Cook is a young man not long out of high school who began work at Nu-Skin in August 1990 as part of a high school work program. Cook testified about two conversations he had with Supervisor William Ratliff. The first conversation occurred approximately 2 weeks before the Board-conducted election in the sample pack area of the warehouse where Cook was working. Cook testified that Ratliff started the conversation, during which Ratliff stated that, "if we was to get the Union, that the plant would close down and we would be out of a job."

Ratliff simply testified that he did not recall ever speaking to Cook about the Union. Although he could not remember speaking to Cook, Ratliff denied ever telling Cook the plant would close if employees selected the Union. According to Ratliff, he was "trained about saying those kind of things and the tips. That was a threat and I would not threaten anyone." As I listened to and observed Ratliff, however, I was left with the distinct impression he himself wondered if he might have said something very close to Cook's testimony.

As will be seen below, I do not credit all aspects of Cook's testimony. However, with regard to his conversations with Ratliff, Cook impressed me as candid and reliable. I find Supervisor Ratliff threatened Cook that if employees selected the Union, Respondent would close its Atlanta facility. In so doing Respondent violated Section 8(a)(1) of the Act.

8. July 1991: Conversation between Head Supervisor Evelyn Milam and Ilene Anthony

Ilene Anthony testified that she heard a rumor Respondent's Atlanta facility was closing, and she was concerned about her job. As a result, Anthony approached Head Supervisor Evelyn Milam and asked if there was any danger of the plant closing. Anthony testified credibly Milam responded, "all she could say was that if people thought that Blake Roney would sit by and watch somebody else tell him how to run this business, they were crazy. He would shut down and move to another state."

Milam denied making the statement attributed to her by Anthony. Milam, like many other of Respondent's supervisor witnesses, pointed to the training she had received as the basis for her denial. Milam had good reason, however, to be biased in her testimony and, indeed, she impressed me as being somewhat less than candid. During a relatively brief tenure with Respondent, Milam has received an inordinate number of promotions. Even when Respondent closed the Atlanta facility, Respondent moved Milam to its Provo, Utah, headquarters where she has become the assistant manager of the distribution center. During her testimony, Milam attempted to avoid even the appearance that she mentioned Roney's name in conversations with employees, but eventually she admitted doing so, albeit reluctantly.

Weighing the testimony of both Anthony and Milam, I credit Anthony. Milam admitted knowing that many employees were concerned about the possibility of the Atlanta plant

closing. Anthony was one of these employees, and she went to Milam seeking some assurance that the facility would remain open. I find that instead of doing so, Milam used the opportunity to tell Anthony that if employees selected the Union to represent them, Respondent would shut down and move. I find that this threat of plant closure violated Section 8(a)(1) of the Act.

9. July 1991: Conversations of Supervisor Toni Estes and Assistant Manager Todd Harris with Andrea Ray

Andrea Ray testified concerning a series of conversations she had in July 1991 with her Supervisor Toni Estes, and with Estes' supervisor, Todd Harris. Ray testified that these conversations began when Estes accused Ray of talking about the Union and telling people how to vote when Ray was suppose to be working. Ray was concerned about the impression her fellow employees were being given about her, and Ray went to talk to Assistant Manager Harris. Harris told Ray that he had heard she was disrupting work and talking about the Union. Ray told Harris this was not true.

After Ray returned to her work area, she was questioned by a fellow employee about her union sentiments. As Ray and her fellow employee were talking, Estes approached and told Ray she was going to lose her job if she did not stop talking about the Union and disturbing the workplace. Ray went back to Harris a second time, and complained about Estes' comments. Estes was present during this second conversation with Harris. Ray testified that Harris said little during this meeting, that most of the talking went on between her and Estes. Ray testified credibly that during this conversation, Estes admitted she had asked the fellow employee to find out where Ray stood on the Union and to see if her feelings were really strong. Estes apologized to Ray, offering the explanation that it was her job to investigate. Harris apparently acted as somewhat of a mediator between Ray and Estes, eventually asking them if they had worked things out, and sending them both back to work.

Five or ten minutes after returning to work, another employee approached Ray and informed Ray that Estes had asked this employee to tell Harris that Ray was talking about the Union again. Ray went directly back to Harris' office. This is the point at which the testimony differs between Ray and Harris. According to Ray, when she again complained about Estes, Harris stated that he could not have an employee working there who was disrupting the workplace. Ray asserts Harris stated that she was going to lose her job. Ray asked Harris if he was saying she was going to lose her job for talking about the Union when she wasn't even doing that. Harris supposedly responded and told Ray he was having enough problems, and he could not have somebody disrupting the workplace and creating problems. Ray told Harris there would not be any problems if he got Estes off her back and kept Estes away from her. Ray admits Harris then told Estes to stay away from Ray.

Estes attempted to paint a much different picture of the incident, claiming that the focus of these conversations was on what Ray might need to do to be promoted to a coordinator position, and claiming that it was Ray who initiated the conversations. Harris' testimony about this series of events, however, is much like Ray's testimony. In fact, Harris substantially corroborates Ray. Harris admits telling Estes to be

aware of the situation and to be watchful to be sure she was not riding or singling out Ray.

I credit most of Ray's testimony, both because of her candor and because it was substantially corroborated by Harris. I do not credit Ray's assertion, however, that Harris told Ray "I was gonna lose my job if I didn't stop talking about the Union." I credit Ray that Harris did say there were already enough problems and he could not afford to have anyone disrupting the workplace. I do not believe, however, Harris told Ray she was going to lose her job if she didn't stop talking about the Union. In fact, all available evidence, including Ray's own testimony, reveals that Harris came to Ray's aid in the dispute with Estes. Ray even admitted Harris told Estes to "just stay away from me."

I find that Estes admitted to Ray she set up other employees to find out Ray's true union sentiments. Estes effectively interrogated Ray about her union sentiments. I also find that after setting up an employee to ask Estes about her union sentiments, she then used the opportunity to verbally reprimand Ray for talking about the Union during work. I find that Estes' actions violated Section 8(a)(1) of the Act. I do not find, however, the Harris' actions vis-a-vis this incident violated the Act. I credit Ray that Harris issued the general statement forewarning that he could not tolerate the workplace being disrupted, but I do not credit her contention that Harris went on to specifically warn Ray she might be fired for talking about the Union. It was Estes who stated that position, while it was Harris who supported Ray and told Estes to leave Ray alone. I dismiss the allegations as to Harris regarding this incident.

10. Week of July 25, 1991: Group meetings with employees

Between June 1 and the Board-conducted election on August 2, Respondent held several meetings with groups of employees for various purposes related directly or indirectly to Respondent's preelection campaign. During June Respondent held a series of meetings to explain and emphasize existing benefits. During the week of July 25, Max Esplin, who was then corporate controller and who is now vice president of finance, held a series of meetings with employees which constituted Respondent's primary campaign pitch prior to the election. After Esplin's meetings, and before the election, Corporate President Blake Roney held one last series of meetings with employees. The complaint alleges, and counsel for the General Counsel contends, that in the meetings Esplin held with employees, Respondent engaged in various unfair labor practices, including threats of reprisal and plant closure.

In support of these allegations, counsel for the General Counsel presented six employee witnesses, some of whom attended the same meeting, but most of whom attended different meetings held by Esplin. Their testimony is discussed in detail below. Respondent presented Esplin and other company representatives who attended these meetings. Esplin testified that during each meeting he used a prepared text from which he admittedly, although rarely deviated. These facts are also discussed in detail.²

² In her posttrial brief, counsel for the General Counsel discussed the July meetings in detail but also made reference to meetings al-

Gary Cabe and Patricia Presnell were two of the three employees who initially contacted the Union. Cabe and Presnell also attended the same meeting held by Esplin in July. Cabe and Presnell sat together during the meeting, and they admit carrying on a conversation between themselves as Esplin spoke to employees. Cabe and Presnell claim, however, that their private conversation did not interfere with listening and paying attention to Esplin, and both testified concerning Esplin's remarks. Cabe testified that approximately 30 employees were present in the meeting. According to Cabe, Esplin stated that if the Union was voted in, negotiations would be a long drawnout process, that Nu-Skin would not kneel down to the Union, and that if the Union was voted in on August 2, there was nothing to hold Nu-Skin in Atlanta on August 3. Cabe recalled that Esplin described certain portions of the National Labor Relations Act, that Esplin stated he would be in on any negotiations that took place, that all benefits are negotiable, and that employees would not be guaranteed any more than they already had. According to Cabe, Esplin stated, "when we went to negotiations with the GCIU that negotiations would be longer, drawn out process, and that if the Union was voted in on August 2, there would be nothing to Nu-Skin on August 3." Other than Esplin's alleged remark that if the Union was voted in on August 2 there would be nothing to Nu-Skin on August 3, I find nothing in Cabe's testimony which would constitute a violation of the Act.

On cross-examination, it was discovered that Cabe not only allegedly took notes of the meeting with Esplin, but he made a tape recording of that meeting which he testified he gave to the Board during the investigation of this case. There was never any effort by counsel for the General Counsel to enter this tape or Cabe's contemporaneous notes into evidence, and no assertion or explanation was ever offered suggesting that she did not actually have both items. In light of the very substantial credibility dispute concerning Esplin's remarks and after giving careful consideration to the matter, I have come to the conclusion that counsel for the General Counsel's failure to offer the tape recording and the contemporaneous notes warrant an inference that neither of these would support Cabe's assertion that Esplin blatantly threatened plant closure.

Patricia Presnell testified that Esplin told employees, "if the Union was voted in on August 2, that there would be no need for them to be there on the 3rd and . . . they were not going to lay down for a union." (Emphasis added.) On cross-examination, Presnell recited the same remark, adding that Esplin finished the comment by saying, "because the Provo warehouse could handle what we were doing in the Atlanta warehouse." According to Presnell, Esplin told employees that if the Union was voted in, "wages could go down to minimum wage and may not be raised back up. Some of our benefits might be cut." Presnell testified the meeting lasted 15 to 25 minutes and that in addition to giving his speech, Esplin answered questions raised by employ-

legedly held by Esplin in May and June 1991. Esplin testified credibly that the only meetings he held with employees at the Atlanta facility prior to the Board-conducted election were held during the week of July 25. To the extent counsel for the General Counsel actually argues that Esplin held meetings with employees in May and June, that argument is rejected.

ees. Presnell claimed that Esplin did not read his speech and was not even speaking from notes.

Presnell admitted on cross-examination that she did not mention Esplin or his presentation in the affidavit she supplied to the Board during the investigation of this case. Esplin denies any remark either expressly or impliedly threatening to close the Atlanta facility if employees elected the Union. Necessary credibility resolutions concerning Esplin's remarks could have been resolved with substantial certainty if counsel for the General Counsel had introduced the tape recording of Esplin's speech made by Cabe. Without it, I have extreme doubts that Esplin blatantly threatened plant closure, loss of wages, or other express reprisal. I cannot credit Presnell that Esplin stated wages would be reduced to minimum wage, but I do credit her that Esplin stated if the Union won the election there would be "no need" for Respondent to stay in Atlanta.

Thomas Gunn testified that in the meeting he attended Esplin talked about the terms of Respondent's 401(k) plan and insurance plan. Gunn did not know Esplin by name and could not describe the physical appearance of the man making the presentation, but Gunn recalled that he was wearing an expensive Rolex watch. Esplin testified credibly he does not wear or even own a Rolex watch. According to Gunn, "the meeting was specifically about the 401(k) plan . . . and a health plan. I want to say it was a combined meeting of the two." According to Gunn, Esplin described employee contributions, matching contributions by Respondent, and Respondent's insurance plan. According to Gunn, he asked several questions during the presentation including whether the 401(k) plan and the insurance plans would still be available if employees voted in the Union. According to Gunn, Esplin replied, "Well, we're not going to negotiate with no union. We're not going to have a union come in here to run this company. We will not bargain with the Union." Gunn testified that he asked Esplin if the Company would bargain in "fair faith." According to Gunn, Esplin replied, "No. . . . They would not allow a union to come in and try to tell them how to run their company." Although Gunn recounted in detail the alleged contents of Esplin's presentation, he did not know Esplin by name and could not even describe Esplin. All he remembered was the person giving the presentation wore an expensive Rolex watch.

Richard Cannell testified that he attended a meeting held by Esplin approximately 2 or 3 days before the Board-conducted election. Cannell is not too far off base in his timing. It appears that in fact Corporate President Blake Roney held meetings with employees 2 or 3 days before the election, while Esplin held his meetings with employees 4 to 6 days prior to the election. Cannell testified that in the meeting he attended, there were approximately 20 to 25 other employees. Cannell testified that there were comments made by Esplin concerning benefits which employees already had, including the 401(k) plan and health insurance. After these items were mentioned, the Union was discussed. According to Cannell, Esplin stated, "If we did vote a union in there, they would just pick up and move away." Unlike Cabe and Presnell, when Cannell was asked if Esplin spoke extemporaneously or read from something, Cannell testified, "He read from some things and he also spoke on his own."

Cannell was also questioned briefly about the speech given by Corporate President Blake Roney between the time of

Esplin's speech and the election. Cannell candidly admitted that in Roney's speech, he said, "We were here regardless of what happened. It [the Atlanta distribution center] was here to stay."

Andrea Ray and Deanna Reeves both worked on the night shift. It is not clear whether they attended the same meeting or different meetings Esplin held with employees on that shift. Ray placed the meeting in early July. According to her, Esplin began the meeting by passing out copies of the "corporate mission statement" printed on small cards. Esplin testified that he did not pass out such a document at the meetings he held. Ray may have confused Esplin's meeting with the meetings held in early June by a different representative where the primary focus was to describe and explain existing employee benefits. According to Ray, after the corporate mission statements were handed out, Esplin then explained Respondent's 401(k) and insurance plans, perhaps again confusing the two meetings. According to Ray, however, she responded to Esplin's comments about the 401(k) plan by stating she did not like the waiting period to become enrolled in the plan. Ray testified that Esplin then abruptly responded to Ray by stating that is the way Blake Roney feels, that Roney built the Company up, that that's the way he wants to run his Company, and that he will shut the Company down before he will let a union come in. Ray testified that "it was a very quick response out of the blue, he just brought up the Union."

On cross-examination, when Ray was asked if the meeting she attended was about union negotiations or how negotiations work, Ray answered "no." Regardless of how Esplin may have deviated from his prepared speech, as more fully discussed below, it is quite evident that Esplin indeed discussed negotiations and the negotiating process. Ray further testified that Assistant Manager Todd Harris introduced Esplin but did not attend the meeting. Harris testified credibly, however, that he was present at all night-shift meetings given by Esplin. Considering Ray's testimony as a whole, in spite of Ray's claim that she was "paying careful attention" to what Esplin said, I have doubts about whether Ray was describing the meeting where Esplin spoke. Her overall description of the meeting, including both time and content, suggest that Ray was either describing the earlier June meeting held by someone other than Esplin or confusing the two separate meetings she attended. As a result, Ray's assertion that Esplin unequivocally threatened plant closure is suspect.

Last but not least, Deanna Reeves testified about the meeting she attended conducted by Esplin. At the time of the union campaign, Reeves was a gatekeeper, as noted above. As also noted, she was an open procompany employee who expressed this position "very often." Reeves correctly placed the meeting about 1 week before the election, and in the meeting she attended, there were approximately 15 to 20 other employees. Reeves like Ray testified that the meeting began with the passing out of "little cards, a corporate mission statement." It is possible she is mistaken on this point, but it is also possible that such cards were handed out to employees, either by Esplin or another corporate representative present at the meeting. Ray and Reeves were the only two witnesses called by counsel for the General Counsel who testified that the meeting they attended started by the corporate mission statement card being distributed to employees. Ray

and Reeves both worked the night shift. Reeves provided a detailed and altogether credible account of what took place at the meeting. In fact, in many respects her recollection parallels much of the prepared statement which Esplin states he read to employees.

Reeves testified that Esplin talked about how "Blake Roney and a few other people had gone and started the company from the ground up in a basement." Reeves testified credibly that during his remarks, Esplin stated that "Nu-Skin had just built an eight-million dollar fully automated warehouse in Provo, and they could handle all of the work that Nu-Skin Atlanta was doing and more." Reeves testified credibly that Esplin went on to say, "we might want to keep that in mind when we voted." Esplin then said, "The way you vote on August 2 may determine whether we are here on August 3." I found Reeves to be a very credible witness. Indeed, an examination of the prepared speech which Esplin claims to have read to employees shows that he did discuss the Provo distribution center in his remarks regarding negotiations. In the prepared text, the discussion about Provo concerns its availability for distribution as an alternative in case of a strike. It is entirely possible and plausible that at or near that point in his speech Esplin deviated from the prepared text. As more fully discussed below, even Esplin admits that at some point or another he did deviate from the prepared text. The prepared text states, "Please listen carefully—we don't want *or* intend to move any work from Georgia. I am just explaining that it must make economic sense for us to continue operations here. Unreasonable Union restrictions *or* a Union strike could change that." (Emphasis added.) This would have been a perfect point and opportunity for Esplin to have made the statements attributed to him by Reeves, but there are also other places as well, as seen below.

Although various employee witnesses called by counsel for the General Counsel attended different meetings, I simply do not credit any of them that Esplin made an outright express threat that Respondent would close the Atlanta facility if the Union was elected. On the other hand, I discredit both Esplin and Harris to the extent they assert that Esplin did not deviate from the prepared text. This is not to say that Reeves provided a totally and absolutely accurate account of everything that Esplin said. Reeves stated, for example, that Esplin did not talk about negotiations in his speech, a point on which I find her to be mistaken. Nevertheless, of all the witnesses called by both counsel for General Counsel and Respondent, I believe Reeves provides the most accurate and thorough account of remarks Esplin made which carried at least the implied threat to close the Atlanta facility.

Reeves, who at that time was very much a company supporter, was upset and shaken by Esplin's remarks. Reeves testified credibly that after she left Esplin's meeting she ran into Assistant Manager Todd Harris. Reeves pulled Harris aside and asked Harris, "Do you really think that if they vote a union in here that we will lose our jobs and that they will close down and move to Provo?" I credit Reeves that Harris replied it was "a big possibility." Harris added, "You know, we never can really say what's going to happen."

Esplin testified credibly that the only visit he made to Atlanta during the preelection campaign period was during the week of July 25 to hold these small group meetings with em-

ployees.³ Esplin testified that in preparation for these meetings, Respondent's attorney provided a recommended text which Esplin reviewed. Esplin and Roney made certain proposed changes to the text. Upon his arrival in Atlanta, Esplin went over the proposed changes he and Roney had made with Respondent's counsel. Only a few of the proposed changes were incorporated in the final text. Esplin denied the substantive allegations made by each of counsel for General Counsel's witnesses. As discussed above, Esplin credibly denied that he wore a Rolex watch, and testified he knew of no Respondent officer who did. Esplin testified he never distributed a card containing Respondent's "corporate mission statement." He may be right or he may be wrong on this detail, but in any event it is not dispositive of the major credibility resolution which needs to be made concerning Esplin's remarks to employees.

Esplin denied discussing in detail Respondent's 401(k) plan or its health insurance plan, and it appears that he is correct on this point. However, both of these items were mentioned even according to his prepared text. Esplin credibly denied that he told employees Respondent would not bargain in good or "fair" faith. Esplin not only received the training other supervisors received, he also received personal guidance and direction from Respondent's attorneys before his presentation about restrictions on what an employer can say during an election campaign. I simply do not credit those employee witnesses who testified that Esplin made outright explicit threats to close the Atlanta facility if employees selected the Union. I discredit such testimony.

On the other hand, throughout Esplin's testimony, he several times represented only to have read the prepared text. Assistant Manager Todd Harris and Manager Mark Flemming both testified that Esplin simply read the speech "word-for-word." However, even Esplin admitted at one point in his testimony giving "extra background" on Respondent toward the end of his presentation. Esplin was specifically questioned further about the word "insert" handwritten on one page of the typed text. Esplin testified that the word "insert" was written where he was to insert some "counters" written by one of Respondent's attorneys as a response to information the Union was providing to employees. When Esplin was then asked if he inserted any language at that point of the speech, however, Esplin answered, "No, not really." Esplin's testimony was peppered with partial credulity and partial incredulity—in short, half-truths.

Esplin was also asked about handwritten notes in other places in the margin of the prepared text. Esplin testified that one of those handwritten notes appeared to read, "to [sic] strong, to [sic] many alternatives, or something I have said there." Esplin claimed that he did not state those words in his presentation to employees and that he did not recall what those words meant. The handwritten phrase, however, itself suggests what might have been said as an aside. On cross-examination, Esplin also admitted that employees asked questions during the meetings and that he responded to those questions without the benefit of any prepared text or notes. I find that in reality Esplin did for the most part follow the prepared text in making his presentation to employees. I also

³ Esplin made only one other visit to the Atlanta distribution center, in December 1990, shortly after he joined Respondent.

find, however, that at various points Esplin deviated from the prepared text and provided extemporaneous comments.

In conclusion, Esplin was no fool, and I discredit those employee witnesses who claimed that Esplin made outright express threats that the Atlanta facility would be closed if employees selected the Union. On the other hand, I credit Presnell to the limited extent Esplin made a more subtle statement to the effect that if the Union was voted in on August 2, Respondent would have no "need" to stay in Atlanta on August 3. I also credit Reeves entirely that Esplin emphasized to employees that Respondent had a new fully automated facility in Provo which could handle all of Respondent's work. More specifically, I credit Reeves that Esplin went on to say employees "might want to keep that in mind when we voted. The way you vote on August 2 may determine whether we are here on August 3." The fact that Esplin did not state outright bold threats to close Atlanta does not mean that Esplin did not convey that message, and I find he did so in a most effective manner. I find that these particular comments were phrased to specifically suggest that if employees selected the Union the Atlanta facility would almost certainly close. These particular remarks by Esplin were intended to insinuate that if the Union's organizing drive was successful Respondent would move. They did not constitute some economic prediction based on objective facts, but rather were an implied threat of plant closure.

I find that to the extent Esplin's remarks addressed the possibility that employees might lose benefits if the Union was selected, these remarks were made in the context of the give-and-take process of negotiating a collective-bargaining agreement. I find that these remarks simply portray the reality of a collective-bargaining process and did not violate the Act.

Having found that Esplin impliedly threatened plant closure if employees selected the Union, I note too that when employee Deanna Reeves approached Assistant Manager Todd Harris with her concern, Harris did nothing to alleviate Reeves' fear. I find that by his response, Harris in fact perpetuated the implied threat of plant closure, thereby further violating Section 8(a)(1) of the Act.

The question now arises whether Esplin's and Harris' threats of plant closure were "neutralized" by the later speech given to employees by Corporate President Blake Roney. Gary Cabe testified that in Roney's speech, given after Esplin's speech, Roney stated "that the company wanted to be open and remain open in Atlanta" and "did not want or intend to move from Georgia." Depending on the precise context, a statement by Roney that Respondent "wanted to be open" or wanted "to remain open" could actually be part of an implied threat to close. Only the statement by Roney that Respondent "did not . . . intend to move from Georgia" can clearly be said to tend to counter Esplin's implied threat of plant closure. Richard Cannell testified, however, that in the meeting he attended, Roney stated the Atlanta facility was here to stay regardless of what happened in the election. Such a statement weighs much more heavily that Roney may have "neutralized" Esplin's implied threat.

The difficulty I have with finding that Roney "neutralized" Esplin's implied threats to close the Atlanta facility is that other than the brief questions and answers on cross-examination given by Cabe and Cannell, there is no detailed

evidence concerning Blake Roney's speech, either as to what was said or as to whom it was said. In the last analysis, I find that if Respondent wanted to advance a serious argument that Roney "neutralized" any implied threat by Esplin, Respondent could have and should have elicited detailed testimony from any number of witnesses about Roney's full speech and precise remarks. Respondent simply did not do so, and I find the scant record evidence insufficient to warrant a finding that Roney neutralized Esplin's implied threat of plant closure. Accordingly, I find that by Esplin's remarks, Respondent violated Section 8(a)(1) of the Act.

11. Mid or late July: Conversation of Supervisor Toni Estes with Teresa Williams and Deanna Reeves

As already mentioned above, Teresa Williams and Deanna Reeves were gatekeepers, whose job it was to oversee employee timecards. Both Williams and Reeves testified credibly that throughout the entire preelection period, both were strong procompany supporters. Williams and Reeves also testified credibly about an incident and conversation with Supervisor Toni Estes in mid or late July at the gatekeeper's desk. Estes had just come out of a supervisor's meeting and went to the gatekeepers' desk to tell them that she was going outside to take a smoke break. Estes appeared to have been crying. Williams and Reeves were together at the time, and both testified credibly that after Estes approached the gatekeepers' desk, she lingered momentarily and stated, "Don't those people understand that if the Union is voted in, this place will close down?"

Estes did not recall this situation, yet nevertheless denied ever making such a statement. Estes' sole reason for her certainty was, "because that is an illegal statement and I was taught not to say that." Williams and Reeves both impressed me as extremely candid. Estes admitted she knew gatekeepers Williams and Reeves were against the Union. Estes also admits she and the gatekeepers expressed mutual concerns about the possibility of the Atlanta facility closing. Estes denies, however, connecting the possibility of the Atlanta facility closing with the union campaign, even in conversations with known antiunion employees. I have no doubt, after observing Williams and Reeves, that the incident occurred exactly as they described it. In spite of their role of keeping track of other employees' timecards, gatekeepers were apparently included in the bargaining unit which was awaiting the Board-conducted election. A very strong inference can be drawn that Estes was passing on to employees something she had been told in the supervisors' meeting. It is not necessary, however, to draw that inference in order to find a violation of the Act. Whether or not Estes was told this in a supervisors' meeting, her statement to statutory employees itself carries a threat that the Atlanta facility would be closed if employees selected the Union, and, therefore, her statement alone violates Section 8(a)(1) of the Act.

12. July 31: Conversation between Supervisor Alan Henderson and Richard Cannell

Richard Cannell testified that 2 days before the election, Shipping and Receiving Supervisor Alan Henderson approached him in the warehouse. Cannell testified that Henderson told him he ought to consider his vote and give the Company a chance for at least a year. Cannell testified

credibly that Henderson then stated if there was a union representing employees there would not be the togetherness between employees that there had been, nor the picnics among employees, and the Company would close down.

Henderson recalled having a conversation with Cannell. Henderson testified that he told Cannell about his own unsatisfactory experiences with a labor union when Henderson worked at Lockheed. That was all Henderson could specifically remember about the conversation with Cannell. On cross-examination, Henderson admitted that he "used" the 1-year period after which a union can again petition for an election as a campaign argument in conversations with employees. Henderson also admitted expressing strong sentiments against the Union and further admitted that one of his "major concerns" was the way a union would affect camaraderie and team spirit. These admissions tend to lend credibility to Cannell's description of remarks made by Henderson.

On re-direct examination Henderson stressed that he wanted this to be a "very ethical campaign," and I have no doubt that he meant this. On the other hand, Cannell's description of Henderson's remarks is extremely credible and supported by Henderson's admissions about arguments and statements he did make to employees to dissuade them from supporting the Union. I credit Cannell, and I find Henderson not only asked Cannell to give Respondent a chance for 1 year, but also went on to tell Cannell that the Union would destroy employee camaraderie and would result in Respondent's eliminating employee picnics and perhaps even closing. I find Henderson's remarks concerning the elimination of picnics and the possibility of closing to constitute express threats of reprisal against employees for selecting the Union as their collective-bargaining representative, and such remarks violated Section 8(a)(1) of the Act.

13. Late July 1991: Conversation between Supervisor Warren Chandler and Richard Cannell

Richard Cannell, who openly supported the Union, testified about a conversation he had with Quality Control Supervisor Warren Chandler just a few days before the Board-conducted election. Chandler approached Cannell in Cannell's work area. Cannell testified credibly that Chandler told Cannell he ought to really consider his vote because Chandler felt that if the Union was voted in, the Company would close down and move. Cannell responded that he thought the plant was going to move anyway, whether or not the Union was voted in. Chandler replied that he did not think that would happen because "Mormons just don't pick up and move around." Cannell testified credibly that Chandler ended the conversation by telling Cannell to "be sure to do the right thing" on election day.

Chandler, who could not even recall speaking to Cannell about the Union prior to the election, nevertheless denied making the statement reported by Cannell. Chandler, like so many other of Respondent's witnesses, based his denial on the fact, "I was trained it was illegal to tell it, to say that." Chandler admitted, however, that he did talk to employees about the possibility of the warehouse closing. Chandler noted, "everybody feared it would close down because of the amount of orders."

Chandler admitted that he engaged in "a lot" of conversations with employees about the Union. He also admitted that employees were concerned about the Atlanta facility closing,

although he originally asserted that that concern arose in November 1991, after the election. In response to my questioning him, Chandler finally admitted that these concerns actually arose shortly before the election. Finally, Chandler admitted that he himself was concerned about the possibility of the plant closing and that he had both group and one-on-one conversations with employees about that concern. Chandler admitted that either in the "training" he received or in other conversations with higher management, Chandler was instructed to talk to employees about not voting for the Union whenever the opportunity arose. All of these facts, considered together, tend to lend credence to Cannell's testimony. Further, as I have already observed, I found Cannell to be a credible witness. I find his description of the conversation with Chandler to be accurate. I find the Chandler threatened Cannell with plant closure if employees elected the Union to represent them for purposes of collective bargaining, and Respondent thereby violated Section 8(a)(1) of the Act.

14. August 1: Conversation between Supervisor Toni Estes and Richard Cannell

Richard Cannell also testified about a conversation he had with Supervisor Toni Estes on the day before the Board-conducted election. Cannell testified that Estes stopped him just as he was going into the triple-checking area and reminded Cannell that "he really ought to consider his vote." Cannell testified credibly that Estes went on to say that if the Union was elected, work would just continue to get slower and slower "and there'll be layoffs and the company will eventually close down." When asked on cross-examination if Estes had threatened plant closure on any prior occasion, Cannell carefully refrained from adopting the term "threat" and answered saying, "she had said that she felt it would close if the Union came in." Cannell testified that he and Estes had spoken about this subject more than once, and these conversations took place several weeks before the election.

Estes testified about two conversations she had with Cannell concerning the Union. According to Estes, one of these occurred over lunch at a Waffle House a day or two before the election. Estes denied ever telling Cannell that she thought the plant would close if employees selected the Union, but Estes admits telling Cannell you "never know what could happen with or without a union at Nu-Skin." Estes also admits telling Cannell that she believed the Atlanta facility would close with or without a union. Estes even admitted that some employees came to her and expressed their fear that the Atlanta facility would close if the Union was elected. Estes admitted that she did not try to dissuade them from that idea, testifying, "I just said, you never know what could happen . . . that is all I said basically to them."

Estes also recalled the second conversation with Cannell, which took place in the warehouse the night before the election. Estes admitted that she and Cannell spoke "quite openly back and forth because at the time he was debating whether or not to go for Nu-Skin or to go for the Union." Estes admitted that because she "could not tell him how to vote since it's an illegal thing to do," she told Cannell "you never know what can happen with or without a union at Nu-Skin."

During cross-examination, Estes was asked if she ever expressed her concern to employees that the warehouse might close. In a totally self-serving reply, Estes stated, "Yes, I

did, but I did not say it in a way that would be illegal." I credit Cannell that the conversation occurred exactly as described by him. I find that by telling Cannell if employees selected the Union work would continue to get slower and slower and eventually the Company would close Estes violated Section 8(a)(1) of the Act.

15. August 2: Conversation between Supervisor William Ratliff and Israel Cook

Israel Cook testified that on the day of the Board-conducted election, right before Cook was to go in to vote Supervisor Ratliff spoke to him once more about the Union. According to Cook, Ratliff told him to "do the right thing" and "vote no." Cook also testified credibly that in this conversation Ratliff continued by telling Cook that if the majority of employees voted "yes and the Union gets in, the company will close down."

Ratliff testified that he did not recall speaking to Cook. Ratliff, however, admitted taking every opportunity to encourage employees not to vote for the Union and further admitted discussing employees' concerns about the plant closing because of the Union. In contrast to Ratliff's lack of recollection, Cook was not at all hesitant in his testimony and clearly recalled the comments Ratliff made to him. I credit Cook, and I find that Ratliff threatened plant closure in the event employees elected the Union to represent them for purposes of collective bargaining. Respondent thereby violated Section 8(a)(1) of the act.

16. August 2: Conversation between Assistant Manager Todd Harris and Andrea Ray

Andrea Ray testified that she was approached by Assistant Manager Harris on election day in the triple-checking area of the plant. Harris, who knew Ray supported the Union, asked her, "Andrea, do you still feel the same way about the Union?" Ray responded, "Yes, I do." Ray testified credibly that Harris then stated, "Well, I am really worried about my job . . . I fear for my job. . . . Well, if I don't have to worry about my job, no one else here will have to worry about theirs."

Harris did not specifically remember having a conversation with Ray on the day of the election, but denied Ray's testimony on the basis of his training. Harris admitted, however, it was possible he expressed fear to employees about his concern for their jobs. Harris asserted that he did so only in the context of the well-known decrease in orders and available work. Numerous witnesses, including both Ray and Harris, testified how slow work became even prior to the election. The fact that work became so slow, however, lends just as much credence and probability to Ray's testimony as it does to Harris' denial. While I do not credit Ray in all particulars of her testimony, as can be seen above, I do credit her description of this conversation with Harris. As Ray was an open and active supporter of the Union, I do not find Harris' questions concerning Ray's support for the Union to violate the Act. *Rossmore House*, supra. I do find, however, Harris' expressed fears for his job, uttered on the very day of the election, and his promise, "if I don't have to worry about my job, no one else here will have to worry about theirs," to be both an implied threat of plant closure if the Union was elected by employees to be their collective-bargaining rep-

representative and a promise of job security to dissuade Ray from voting for the Union. In this respect, Harris' comments clearly violated Section 8(a)(1) of the Act.

C. *The Election and Resulting Procedures*

In the Board-conducted election held on August 2, 1991, 217 votes were cast in favor of union representation, while 200 votes were cast against representation. In addition, there were 16 challenged ballots and 1 void ballot. Respondent filed timely objections to conduct affecting the results of the election, and a hearing was held concerning those objections on September 24–26, 1991. The hearing officer's report issued on November 26, 1991, recommending that the election results not be certified and that a new election be held.

The Union filed exceptions to the hearing officer's report. Those exceptions were still pending before the Board when Respondent closed the Atlanta facility on March 6, 1992. Thereafter, on April 22, 1992, the Board issued its Decision overturning the hearing officer's recommendation. The Board certified the election results and the Union as the exclusive representative of employees in the bargaining unit.

D. *Events Postdating Election*

1. August 20: Gary Cabe's evaluation

On or about August 20, 1991, Gary Cabe received an unfavorable employee evaluation by his supervisor, Eric Suit. When Cabe questioned Suit about the low evaluation, Suit stated that the low score was due to a "no-show" on April 25. There is no dispute about the fact Respondent maintains a policy that if an employee has a no-show during an evaluation period he or she receives a zero on the attendance section of the evaluation.

On April 25, 1991, Cabe arrived at work more than 2 hours after the start of his shift. He had not called in to inform Respondent he would be late. When Cabe arrived at work, his supervisor informed Cabe that he would probably get a no-show. Nothing further was said to Cabe about this or about him receiving a no-show until 5 weeks later on June 3, just after Respondent learned of union activity. On June 3, Cabe spoke to a fellow employee about the Union in a conversation which was overheard by Supervisor Margie Fretwell. Shortly after that conversation, Cabe was called into Personnel Administrator Kinley Shell's office. Shell told Cabe he was receiving a "no-show" on his record for the April 25 tardiness. Cabe questioned Shell about the long delay. Shell told Cabe that he had just received the "paperwork," and that the no-show would go on Cabe's record.

Later in June, Cabe participated in an employee gripe session held by Head Supervisor Evelyn Milam, apparently in conjunction with operations of the "Human Resource Committee." After the gripe session, Cabe spoke individually to one of Respondent's representatives from corporate headquarters in Provo, Utah, who was at the Atlanta facility that day. This representative, Kent Smith, told Cabe that he would look into the situation. Two days later, Smith met with Cabe and Personnel Administrator Shell in Shell's office. I credit Cabe that Smith informed him in that meeting, "I'm going to take this write-up off your record and the no-show is gone."

When Supervisor Suit referred to the "no-show" as the basis for Cabe's low score on the August 20 evaluation,

Cabe suggested that he and Suit go and speak with Shell. When they did so, Shell told Cabe that although the written warning for the "no-show" was removed, the no-show itself remained, and points were still deducted in the evaluation. Cabe protested that that is not what Smith told them in the earlier meeting. Shell stuck by his position that Cabe lost the evaluation points for the April "no-show" even though the official warning for it had been removed by Smith.

Because of Cabe's low score on the evaluation, Suit had issued Cabe a written warning in conjunction with the evaluation. Suit originally told Cabe the written warning resulted from the low score on the evaluation due to the loss of points on attendance. When Cabe and Suit met with Shell, Shell told Cabe and Suit that the written warning should have been for the overall low evaluation score and not for the April no-show. Suit admitted that he had originally understood his instructions to issue a written warning to Cabe for the poor evaluation due to the "no-show" on his record. When Shell told Suit that the written warning should be based on the overall low evaluation score and not specifically on the "no-show," the original written warning was destroyed and replaced by a written warning based on the low evaluation score in general.

Suit testified that Cabe did not really complain about the "no-show" referred to in the evaluation. I do not credit this claim, for it is clear that if Cabe had not complained to Suit about the original no-show writeup, Suit's "error" would not have been brought to Shell's attention and changed. It is clear that Cabe not only complained about the no-show writeup, but continued to protest the low evaluation in general. Specifically, Cabe questioned the low score received on his evaluation in the area of "attitude." Cabe expressed concern about the disparity between the attitude score received from Supervisor Evelyn Milam compared to the attitude score received from Supervisor Suit. Cabe testified credibly he told Suit that it did not seem right for Milam to have scored him so low, and Cabe asked Suit if he thought his union activities had anything to do with the low score. I credit Cabe that Suit responded by saying he was sure it did, but that Suit was not part of that.

In the "comments" section of the employee evaluation form, Suit wrote that Cabe "feels he was discriminated against due to his union activities." Suit did not add any comments on the evaluation form suggesting that he refuted or attempted to ease Cabe's concerns about his evaluation and union activity. I do not credit Suit's claim that he assured Cabe union activities had nothing to do with the low score or informed Cabe that Milam had nothing to do with scoring Cabe's evaluation. If Suit had made either point to Cabe, I am quite sure Suit would have noted such a disclaimer on the evaluation form. Instead, Suit made no entry in response to Cabe's noted feeling that union activities played a part in his evaluation.

Moreover, Respondent did not present any evidence about which supervisor or supervisors may have evaluated Cabe's attitude or given him a low score. There is no claim by Suit that Cabe evidenced a poor attitude. Suit simply testified that the preevaluation sheets with attitude scores from other supervisors are shredded. Respondent, however, also did not present any objective evidence of a bad attitude displayed by Cabe. This lack of any evidence of a bad attitude which might have lead to a low attitude score carries a strong infer-

ence that Cabe's attitude was assessed as bad due to his union activities. The absence of any written comments counteracting Cabe's feelings of discrimination based on his union activity is more consistent with Cabe's description of the evaluation and his discussions with Suit, and Suit's agreement that Cabe's union activities probably did affect Cabe's overall low evaluation score. It also warrants a conclusion Respondent purposely left Cabe with the impression that his low evaluation was indeed connected to his union activity. Considering all the circumstances, I find that Cabe's unsatisfactory evaluation violated Section 8(a)(1) and (3) of the Act. In addition, Suit's comment to Cabe about the probable negative impact that his union activity had on the evaluation is itself a violation of Section 8(a)(1) of the Act.

2. August 23: Discharge of Israel Cook

As already mentioned above, Israel Cook began to work for Respondent on a part-time basis in the summer of 1990 while he was still a high school student. After graduating from high school, Cook began working full-time for Respondent. Cook was often late for work, and it appears that while Cook was still a student and working part-time Respondent tended to overlook Cook's tardiness.⁴ After becoming a full-time employee, however, Cook continued his practice of regular tardiness. Finally, on July 30, 1991, Cook was given a written warning for regularly being late to work. When Cook nevertheless continued his regular habit of being late, Cook was discharged on August 23, 1991.

Cook claimed that prior to being discharged on August 23 he had never been given a warning for being late. He denies receiving the written warning on July 30 and denies that the signature on the warning is his. I find Cook's denial of the July 30 written warning hard to believe. On cross-examination, Cook admitted that he was aware of a rule forbidding tardiness. Cook's understanding of the rule was that "you get three and that was a verbal warning and after the fourth one they will talk to you about being late and then if you get—be late again or whatever, they will let you go." According to Cook, it was permissible to report late as long as the employee called in. When asked how many times he was late during 1991, Cook testified "5 or 6." Cook's attendance records reflect that in fact Cook was late 5 times in January, 5 times in May, 4 times in June, 13 times in July, and 10 times in August 1991 prior to his discharge.

Cook continued to maintain that he was never warned about being late, even after he was shown a warning with a signature which purported to be his, also signed by Personnel Administrator Kinley Shell. Cook claimed that the signature on the warning was not his. Shell testified credibly, however, that he gave Cook the warning on July 30. Shell also testified credibly that both he and Cook signed the warning. Finally, Shell testified that at the time he gave Cook the warning he emphasized to Cook it was Cook's responsibility to get to work on time and that further disciplinary action could include termination. Shell credibly denied telling Cook that car trouble could be used as an excuse for being late regularly or that it was permissible to report to work late as long as the employee telephoned.

⁴It is undisputed that in Cook's evaluation of February 1991, Cook did not lose any points or receive any negative comment related to tardiness.

It is undisputed that between July 30 and Cook's discharge on August 23, Cook was tardy 10 times. Counsel for the General Counsel nevertheless contends that Respondent tolerated Cook's tardiness prior to the advent of union activity, and seized on the tardiness policy in August to discharge Cook. Cook was not one of the most active union supporters. Cook testified only that on occasion he handed out union pamphlets and wore a union T-shirt at work. Shell testified that he did ever recall seeing Cook wearing a union T-shirt. Whether Cook did or not, it is apparent that Cook engaged in some limited union activity, but he was by no means one of the primary employee activists.

Counsel for the General Counsel introduced no evidence supporting Cook's interpretation of the tardiness rule and no evidence that Respondent generally allowed regular tardiness from other full-time employees. In fact, Respondent introduced evidence that other employees have been discharged for being repeatedly tardy who had better records than Cook. While it appears that Respondent did tolerate Cook's tardiness prior to the union campaign, this appears to be more related to Cook being a part-time employee while still in high school than a part of any general practice by Respondent to overlook tardiness. In July 1991, after Cook had graduated from high school and was a full-time employee, Cook was nevertheless late for work 13 times. Further, in August 1991 between the time of the written warning and his August 23 discharge, Cook was tardy 10 more times. In short, Respondent's application of the tardiness rule to Cook was entirely consistent not only with the rule on its face but with practice as that rule has been generally applied to other employees. Counsel for the General Counsel has fail to prove that Cook was discharged because of his union activity, and I shall dismiss that allegation from the complaint.

3. August 23: The written warning to Richard Cannell

Work continued to be slow after the Board-conducted election on August 2. Because work was so slow, Respondent began allowing employees to go outside and smoke during what normally would have been working time as long as they asked for permission first and clocked out before going outside. About 1 week after the policy change, gatekeeper Teresa Williams approached Cannell and told Cannell that he was going to be written up for using up his timecard. On August 15, Cannell received a verbal warning from Williams.

Approximately a week later, Cannell was given another error sheet by Williams for "using both the front and back of his timecard by punching out too much to smoke." Cannell not only expressed his displeasure to Williams, but took the error sheet from Williams after Williams told him not to do so. Cannell took the error sheet from Williams in order to show it to Union Steward Ken Brown.

About 10 minutes later, Cannell was called into security head Warren Chandler's office. Williams was also present. Cannell asked for a union steward. Chandler responded that Respondent did not recognize the Union. Chandler told Cannell he abused the smoking policy by clocking out so many times that he had completely used up his timecard. When Cannell questioned Chandler about the specifics of the policy, Chandler responded (truthfully) that there were no specifics, but that it was an abuse of the privilege to clock in and out so many times that a timecard was completely

used before the end of a pay period. Chandler converted the "verbal" error sheet given by Williams to a "written" error sheet because Cannell had disobeyed Williams by taking the sheet from her to show to Union Steward Brown.

Counsel for the General Counsel argues that because "Respondent failed to present any evidence to establish that Cannell would have been disciplined for violating this vague, undefined [smoking] policy had he not been a union supporter," the warning to Cannell violated Section 8(a)(3) of the Act. I disagree. The fact that Respondent chose to extend a privilege to employees to allow them to go outside and smoke during what would normally have been working time does not mean that Respondent was required to reduce this privilege to some hard and fast written rule. Employees were informed of the privilege, and about a week later Cannell was informed by Williams that he was abusing the privilege by clocking out too many times to smoke. Cannell, however, chose to continue the practice unabated. Between August 12 and 22, Cannell clocked out (and back in) 29 times to smoke. His numerous smoke breaks led him to use up his timecard for the pay period ending August 24 by the end of August 22. This precipitated the error sheet given by Williams on August 23 which was upgraded to a "written" error sheet simply because Cannell grabbed the sheet from Williams in defiance of Williams' instructions.

It is counsel for the General Counsel who has not shown any disparate treatment. Cannell's warning on August 23 was simply a case of an employee abusing a privilege after he had already been warned about doing so, and disobeying a coordinator's directions.⁵ There is simply no reason to believe or conclude that Cannell's union activity played any part in his receiving this warning. Conversely, there is every reason to believe that Respondent would have given Cannell the August 23 warning regardless of his protected union activities. Accordingly, I dismiss this allegation from the complaint.

4. September 3: The warning issued to Gary Cabe

Gary Cabe was one of the three employees who initiated the union campaign. By the time of the election on August 2, Cabe's prounion sentiments and activities were well known to Respondent.

Respondent's telephone policy allowed employees to use the telephone any time during their shift, as long as they clocked out before making the call. On September 3, 1991, Cabe was issued a written warning for allegedly violating the company telephone policy on August 29, 5 days prior to the warning.

⁵ Teresa Williams, who testified on behalf of counsel for the General Counsel in this proceeding, was extremely candid about her procompany, antiunion feelings during the preelection period. She was also extremely candid about her role in helping to keep prounion employees from positions in Respondent's front office, as fully described above. I note with interest the fact that Williams was not asked by counsel for the General Counsel to testify regarding the warnings given to Cannell even though she was centrally involved. In view of her candor elsewhere, there is every reason to believe that if Cannell's prounion sentiments played any part in Williams giving Cannell; either of these warnings, she would have candidly admitted it. Instead, counsel for the General Counsel studiously avoided asking Williams any questions whatever about the warnings issued to Cannell.

It should be remembered that during August and September 1991 work was so slow that employees were actually spending hours playing card games and board games during working time. Cabe testified credibly that on the day in question he used the telephone two times during his shift, and both times he clocked out. Cabe was given the written warning for allegedly using the telephone three times and clocking out only twice.

Inventory Control Manager John Pickard, who was not Cabe's supervisor, testified that on August 29, between 1:30 and 2:30 p.m. he observed Cabe use the telephone three times. Pickard checked Cabe's timecard and found that Cabe had clocked out for only two of the phone calls. Pickard admits he did not talk to Cabe's supervisor at all. Pickard supposedly wrote a memo about the incident and submitted it to Assistant Manager Todd Harris, but Respondent made no attempt to introduce this memo into evidence.

Pickard testified that between 1:30 and 2:30 p.m. on August 29 he walked through the phone area no less than six times. Pickard had no explanation for why he walked through this area so many times during the 1-hour period, or how his trips happened to coincide with Cabe's phone use. Todd Harris testified that Supervisor Pickard came to him and informed him that Cabe had used the phone three times but had only clocked out twice. Harris testified that Pickard asked what he should do, and that Harris told Pickard to give Cabe an error sheet.

August 29 was a Thursday. On the following Monday, September 3, Pickard gave Cabe the error sheet for allegedly failing to clock out all three times. Cabe asked Pickard why he was receiving the error sheet several days after the infraction. Pickard responded that this was the first opportunity he had to get with Cabe.

I credit Cabe that on the day in question he used the telephone only twice and clocked out both times. The evidence is clear that Cabe not only knew Respondent's telephone policy, but complied with it on at least two occasions that day. During a time when employees were already sitting around with little to do, it is unlikely that Cabe would go through the trouble to seek permission from his supervisor and clock twice to use the phone during a 1-hour period and then fail to follow that same procedure for a third call.

It is peculiar indeed that Inventory Control Manager Pickard very coincidentally walked through the phone area three different times at the precise moment, each time, that Cabe was on one of his three telephone calls. Pickard did not even speak to Cabe's own supervisor, yet waited all of the rest of that day, all of the next day, and until the following Monday before giving Cabe the written warning. I am left with the distinct impression that Pickard was intentionally accusing Cabe of conduct which he had reason to believe Cabe could not disprove, thereby hoping to validate the warning.

The fact that Respondent presented warnings given to four other employees for failing to clock out when using the telephone is of little or no consequence. I find that Pickard issued a warning to Cabe for conduct which Cabe did not engage in. Pickard waited until the third working day after the alleged infraction before giving Cabe the warning precisely because it left Cabe in a position of not being able to disprove the alleged conduct. However, even if I were to find that Cabe actually used the telephone three times during the

time in question on August 29, I would nevertheless find Pickard's written warning to have been discriminatorily issued. The evidence carries a strong suggestion that Pickard was surveilling Cabe's telephone use. The four warnings introduced by Respondents given to employees for failing to clock out when using the telephone all took place before the union organizing campaign and before the time when employees were sitting around with no work to do, playing card games and board games. Although Pickard claimed he warned at least three other employees about using the phone without clocking out within a week or two prior to Cabe's September 3 warning, Respondent did not even attempt to introduce any of these alleged warnings.

The lack of other warnings during the same time period; the unlikelihood that Cabe would not clock out once when he willingly clocked out two times to use the telephone; the unlikelihood that Pickard would just happen to walk through the phone area each of three times that Cabe was on the phone; the absence of any warnings from Cabe's immediate supervisor for failing to seek permission to use the telephone; the fact that Pickard did not even bother to speak to Cabe's immediate supervisor before issuing the warning to Cabe; the fact that while Cabe was being warned for not clocking out for a 3- to 5-minute telephone call when employees all around him were talking, playing cards, and playing board games; the fact that Pickard waited 3 working days before issuing Cabe the warning all offer strong evidence that Cabe was either being set up or singled out by Pickard because of his union activities and not because of any infraction of the telephone clockout policy. I so find, and I find that Pickard's warning to Cabe violated Section 8(a)(1) and (3) of the Act.

5. November 19: The written warning to Thomas Gunn

On November 19, 1991, Thomas Gunn received a written warning for stealing company time by claiming that he worked through lunch period on November 18, when in fact he did not, in order to clock out early that day.

Gunn testified in minute detail about his movements and activities on November 18. It is not necessary to repeat all of those details. In short, Gunn claims that he asked for and received prior permission to work through lunch in order to leave early. Gunn claims he first spoke to his supervisor, Quincy Young, who instructed him to speak to Supervisor Evelyn Milam, who in turn told him to speak to Kinley Shell. According to Gunn, Shell questioned Gunn about why Gunn wanted to work through lunch. Shell also allegedly stated that if Gunn chose to work through lunch, he might receive a disciplinary memo, but that since Gunn did not have many memos on file, it would not really hurt. Gunn testified he specifically asked again whether it would be okay to work through lunch, and that Shell told Gunn he could work. According to Gunn, he relayed this to Supervisor Young who assigned Gunn to clean up an area where a birthday party was being held for another employee. According to Gunn, Supervisor Trevor Boyles, who was present at the time, offered Gunn a piece of birthday cake. Gunn testified he took the cake, but ate it in one bite. Gunn then spent the rest of the time cleaning up after the party.

Other facts suggest rather strongly that Gunn did not work his lunch hour on November 18, and that he lied in order to be paid for work not actually done during that time and in order to clock out and leave work early. Head Supervisor

Evelyn Milam initially did not recall Gunn asking if he could work through lunch. When confronted with a memo she wrote concerning the matter, her recollection was refreshed. This memo stated, "Thomas Gunn came to me, said he did not take a lunch, said he was leaving at 3:30. I told him at this time we always had to take a lunch. I told him to see Kinley about this. We always to take a lunch hour." This memo was written at 1:07 p.m. Its terms contradict Gunn's testimony that he approached Milam before lunch, and it evidences that Gunn asked for permission from Milam to work through lunch after he had allegedly already done so.

Assistant Manager Todd Harris testified that during the lunch hour he observed Gunn in the breakroom sitting down and talking to fellow employees. Harris testified that he later observed Gunn in the area of the birthday party eating cake. According to Harris, he then observed Gunn proceed to the front office where Gunn approached Milam and stated, "I did not take a lunch and would like to go home early." Harris testified that after listening to the conversation between Gunn and Milam, Harris told Milam to make sure she remembered what Gunn had said and to write it down. Harris' testimony tends to be corroborated by the terms of Milam's memo, written at 1:07 p.m. after the lunchbreak. Regarding this incident, I credit Harris over Gunn. I find it extremely difficult to believe that a supervisor such as Kinley Shell would tell an employee that even though an employee might get a disciplinary memo for doing something it would be okay since the employee did not have many disciplinary memos. Shell, who was personnel administrator at the time, denied talking to Gunn about getting a memo for working through lunch.

The fact that Gunn was perceived to be a strong union supporter strikes me as being of little or no consequence in this instance. The facts strongly suggest that Gunn never received prior permission to work through lunch, that he approached head Supervisor Milam only after the lunch hour to claim that he had worked through lunch in order to leave early and yet get paid for an entire day. This incident does not involve merely a few minutes for a personal phone call or a few minutes for some other personal detour, but rather involves claiming a substantial period of time allegedly working when in fact he was not. The fact that Respondent allowed employees the privilege of playing card games and board games while still being paid does not justify an employee deciding unilaterally that he should also be paid for time when he is not even at Respondent's facility. Counsel for the General Counsel has offered no evidence to suggest that Respondent tolerated such conduct from other employees. Indeed, Respondent introduced evidence that several other employees have been disciplined for stealing company time. I find that counsel for the General Counsel has failed to prove Gunn's union activities played any part in the November 19 warning, and I shall dismiss that allegation from the complaint.

6. December 16: The conversation between Distribution Center Manager Mark Fleming and Gary Cabe

Gary Cabe asserted that Supervisor Suit repeatedly "ran off" employees who tried to speak with Cabe about the Union. Cabe testified that on or about December 16 he complained to Distribution Center Manager Fleming about Suit "running off" people who wanted to talk to him. Cabe testi-

fied that Fleming said “the bottom line is we don’t recognize the Union and we don’t recognize you as shop steward, and you have no business talking about union activities on company time.”

Fleming recalled the conversation with Cabe. Fleming admits he told Cabe that the Union was not certified and that Respondent had no obligation to recognize union stewards at that point. Fleming testified Cabe then asked why he could not talk to employees in his work area. According to Fleming, he responded telling Cabe “that when there was work to do in this area he was expected to work, not to talk to employees, not to have employees come over and talk to him . . . just like any other employee in the area.” Fleming denied he ever told Cabe that Cabe had no business talking about union matters. Fleming testified credibly that he told Cabe the policy regarding talking to employees while work needed to be done and stated that Respondent was not playing favorites. Fleming also testified credibly that after the conversation with Cabe, Fleming took the additional step of speaking to Suit about the situation to make sure Cabe was not being unfairly singled out.

If, as Cabe alleges, Fleming stated flatly that Cabe had no business talking about union activities on company time, Fleming may well have technically violated the Act. Under the circumstances, however, I doubt that this is what Fleming said. The thrust of the conversation centered around Cabe’s complaint that he was not being allowed to function as a union steward. Fleming admits he told Cabe that the Union was not certified and that Respondent had no obligation to recognize stewards at that point. Such a statement in no way violated the Act. Cabe’s own description of the incident strongly suggests that the entire subject of the conversation centered around what employees could or could not do when they were expected to be working. I find no violation of the Act. Moreover, I find that even if the conversation occurred as described by Cabe it represents an isolated incident which is inconsequential. The allegation that Fleming violated the Act in this conversation with Cabe is therefore dismissed.

E. *The Plant Closing*

As the background of this case shows, there is no question that prior to any union organizing activity at the Atlanta distribution center Respondent’s management had had numerous conversations about the possibility of consolidating Atlanta into the Provo headquarters operation, thereby closing the Atlanta facility. Further, the new Provo distribution facility designed by William Bladen of DCB & Co. provided “state of the art” processing equipment. According to Bladen’s projections the physical capacity of the new facility, using two work shifts, would be approximately two and one-half times greater than Respondent’s total orders shipped at its sales peak in May 1991. There is really no question, and counsel for the General Counsel does not seriously dispute, that the new Provo distribution center eliminated any need for maintaining the Atlanta facility. Be that as it may, Atlanta was maintained, even when orders declined to such a point that employees were allowed to play card games and board games while on the clock and being paid by Respondent. In fact, Respondent does not contend that it actually decided to consolidate Atlanta into Provo before February 1992. Several events which happened to coincide with the union campaign lead Respondent to close the Atlanta facility.

First, of course, is the uncontroverted fact that after the Board-conducted election on August 2, sales orders continued their rapid decline. As noted above, in May 1991 orders peaked at more than 180,000. By the time of the Board-conducted election in August, shipments had dropped to 132,000. Orders continued to drop throughout 1991, and by December they had fallen to just over 80,000. Net sales dropped from \$37 million in June 1991 to just \$16 million by the end of the year.

The record reflects that at the same time as this dramatic decline in sales and orders Respondent faced several significant financial obligations, most of which were not within its control. As a result of the suits filed by the various attorneys general of different States, Respondent entered into various settlements with the States in which it changed its policy regarding returned products. As a consequence of these settlements, between June and December 1991 Respondent paid \$9.6 million to distributors for returned products, almost four times the normal amount.

Other financial commitments Respondent had taken upon itself before the advent of any union activity began to take on a new significance as sales dropped dramatically. Prior to 1991, Respondent had made commitments to open new markets in Hong Kong and Taiwan. The Hong Kong market opened in September 1991. The Taiwan market opened in February 1992. The opening of these markets necessitated a cash outlay of \$5.3 million in late 1991 and early 1992.

In approximately September 1992, just after the Board-conducted election in Atlanta, Respondent started developing a new line of nutritional items. The target date for introduction of these new products was during Respondent’s distributor convention, scheduled for June 1992. The products had to be developed, manufactured, and available for display and sale at the distributor convention. The cost of developing this new line of nutritional items was \$3.6 million. Counsel for the General Counsel points out in her posttrial brief that it was Respondent’s own choice to go forward with this “discretionary expenditure . . . during the period it claims it was experiencing severe negative cash flow problems.” Counsel for the General Counsel is right that Respondent voluntarily undertook this expenditure, but her argument overlooks the fact that this expenditure nevertheless helped create the cash-flow problem. It is not for the Board to second guess whether initiating this new product line was a good gamble which might substantially raise Respondent’s overall sales or whether it was a terrible business decision in light of Respondent’s already declining sales. It is clear that the introduction of this new product line had nothing whatever to do with employee union activity. Therefore, this significant expenditure was just that—an expenditure which tended to effect cash flow and which the Board is in no position to criticize.

The most significant financial obligation with which Respondent was confronted during this period resulted from a suit filed against Respondent in California referred to as *Arata*, the name of one of the plaintiffs. This suit was filed in August 1991 as a class-action on behalf of thousands of Respondent’s distributors. A comprehensive settlement of this suit was reached in December 1991, and approved by the judge in that matter in January 1992. By the terms of this settlement, Respondent was required to mail claim forms to more than 800,000 potential claimants. Respondent initially

estimated that payouts in Arata would cost between \$5 and \$10 million. At the time of this hearing, total verified claims had reached \$18.2 million and were continuing.

It is painfully clear that by December 1991, Respondent was confronted with a major economic problem. Respondent was facing major liabilities at the same time that sales were falling drastically. During the 3-month period from December 1991 through February 1992, Respondent took a number of steps to deal with the cash-flow problem at hand. Respondent began to look for ways to reduce expenses to meet its cash-flow requirement. In that connection, during December 1991 the possibility of closing the Atlanta facility was again raised in discussions between Vice President Brook Roney, Controller Max Esplin, Provo Distribution Center Manager Bradley Morris, and Systems Specialist Ronald Norton.

Discussions on this subject continued during January 1992, with one of the main points of discussion being the conclusion reached earlier during the spring of 1991 that all of Respondent's shipments could be made from the Provo facility without adding any additional labor force. Various documents were generated during that period setting forth and/or discussing the possibility of all orders being shipped from the Provo facility. Vice President Brook Roney testified about a specific meeting in January 1992 between him, Corporate President Blake Roney, and Controller Esplin in Blake Roney's office. Roney testified that in this meeting the pros and cons of closing the Atlanta facility and laying off employees were discussed. Roney candidly admitted that one of the subjects discussed during this meeting was how the Union would perceive the decision to close the Atlanta warehouse. No decision was made in this January meeting about the Atlanta facility except to pursue the idea further. Roney directed Esplin to gather certain financial and production information. The decision was also made to seek outside advice from Respondent's labor counsel in this matter.

On February 6, 1992, Respondent filed a form with the Internal Revenue Service to change its tax year. Because of tax code provisions, this change resulted in Respondent receiving a \$5.1 million deposit back from the IRS. Esplin testified credibly that while this was not a good strategy from a tax standpoint, Respondent nevertheless decided to and took this action because of its simple and immediate need for cash.

Respondent took other actions as well. Respondent attempted to secure a \$5 million loan from several banks to meet its cash need. Respondent, however, was turned down for the loan by every bank. Two banks did offer to loan Respondent half that amount under certain conditions, but as of the hearing here no loan had yet been consummated.

Another action Respondent took in early 1992 was to negotiate stratified payments in the Arata settlement so that the smallest dollar claims would be paid first. This postponed the need to pay larger claims as long as the court would permit.

On or about February 11, 1992, a special meeting of Respondent's board of directors was held to consider closing the Atlanta facility. The documents generated during January 1992 by Norton and Esplin and by Respondent's labor counsel were discussed. The documents generated by Norton and Esplin reflect that orders handled by both distribution facilities almost tripled from May 1990 through May 1991. From May 1991 through December 1991, however, the total number of orders dropped approximately 55 percent. Just as it

had been the opinion of Bladen when designing the Provo facility that it could handle all of Respondent's orders, and more, it was also Esplin's and Norton's conclusion that the Provo distribution center could handle all of Respondent's distribution needs without increasing staff. In other words, all of the more than 300 employees at the Atlanta facility could be eliminated without hiring any additional employees in Provo. The "summary of expense savings" prepared by Norton and Esplin estimated that Respondent could thereby save approximately \$390,000 monthly or more than \$4.5 million yearly. These savings would begin to be realized immediately as soon as the payroll in Atlanta was eliminated. Following Controller Esplin's presentation and recommendation to the assembled group, Respondent's board of directors decided to close the Atlanta facility as soon as practicable.

On March 6, 1992, the immediate closing of the Atlanta facility was announced to employees and supervisors alike. Order placement and shipping was transferred to Provo as of that day. Employees were told that the official closing date of the Atlanta distribution center would be May 6, 1992, and that employees would be paid through that date but not required to work. Stated differently, the Atlanta facility actually closed immediately on March 6 and employees were given 60 days' severance pay.

Counsel for the General Counsel's argument that Respondent discharged the Atlanta employees and closed that facility because of their union activity offers considerable appeal. Prior to closing the Atlanta facility, Respondent had never even temporarily laid off employees in Atlanta. The evidence is quite clear that prior to the union campaign, Respondent had never considered closing the Atlanta facility in spite of recommendations it had received to do just that. There is considerable credible evidence that during the union campaign prior to the Board-conducted election on August 2, employees at the Atlanta facility were directly threatened by local supervisors and management that if they selected the Union to represent them for purposes of collective bargaining, Respondent would close the facility. There is also credible evidence that in the speeches Max Esplin gave to employees prior to the election, Esplin also impliedly threatened plant closure. Moreover, the timing of closing the Atlanta facility while results of the election were still being considered by the Board pursuant to objections to the election supports an argument that Respondent acted precipitously to avoid having to bargain with the Union. If one considers only the evidence present by counsel for the General Counsel, one would have to conclude that she has established a very respectable prima facie case that Respondent discharged its Atlanta employees and closed that facility in direct retaliation for their union activities.

I cannot agree with counsel for the General Counsel, however, that Respondent has given shifting reasons for its decision to close the Atlanta facility. Nor do I agree with her that Respondent did not approach its decision to close the Atlanta facility in a thoughtful businesslike manner or that the information it relied on in making that decision did not evidence a cash-flow problem. On the contrary, Respondent's stated reason for closing the Atlanta facility has been and continues to be that it did so in order to save more than \$300,000 per month and more than \$4.5 million per year. There is no simpler way to say it than closing the Atlanta facility itself represented a substantial cash-flow savings. Counsel for the

General Counsel is quite right that Respondent was aware of that potential savings even before the inception of union activity. Respondent has quite clearly demonstrated, however, that almost simultaneously with the inception of union activity, business conditions changed drastically. The attorneys general of several States began consumer fraud investigations of Respondent's business. Both the Federal Trade Commission and the Securities and Exchange Commission began to investigate Respondent's business practices. A rash of negative publicity ensued in newspapers, magazines, and on television. Orders dropped from over 180,000 in May 1991, near the inception of the union campaign, to just over 80,000 in December 1991, a drop of more than 50 percent. Even employees at the Atlanta facility expressed the opinion during the union campaign that the Atlanta facility would undoubtedly close whether or not the Union was elected as their collective-bargaining representative.

There can be little doubt that during late 1991 and early 1992, Respondent began to suffer major cash-flow problems. While sales plummeted more than 50 percent, major liabilities began to mount. Between June and December 1991, settlement of the consumer fraud investigations required Respondent to pay out almost \$10 million to distributors for returned products, four times the normal amount. In December 1991, settlement of the Arata suit brought in California was expected to require payouts between \$5 and \$10 million. In fact, payouts have been almost twice the anticipated maximum. In conjunction with commitments made prior to 1991, Respondent faced cash outlays of more than \$5 million in late 1991 and early 1992 in opening new foreign markets. In addition, in September 1991, Respondent committed itself to developing a new line of nutritional items which entailed expenses of almost \$4 million. In light of these figures, the conclusion is simply inescapable that Respondent had good reason to exercise whatever cost-saving measures were available to it.

The fact that Respondent was also feeling the effects of a cash-flow shortage is quite apparent. Obviously, substantial sums were not only being committed, but were actually being paid out for the various expenses discussed above. Respondent tried to borrow \$5 million from several banks, but was unsuccessful. Respondent apparently was successful in attempting to stratify payments pursuant to the Arata settlement so that the smallest dollar claims were paid first, thereby delaying payment of larger claims. In February 1992, just a few days before the decision to close the Atlanta facility, Respondent filed with the Internal Revenue Service to change its tax year, thereby resulting in it being refunded a \$5.1 million deposit. Last but not least, Respondent decided to close the Atlanta facility thereby saving almost \$400,000 monthly and more than \$4.5 million annually.

After considering all of the evidence, I come to the conclusion that in spite of counsel for the General Counsel's prima facie evidence, Respondent has established without question that the Atlanta facility would have been closed regardless of whether or not employees at that facility had ever engaged the Union to represent them for purposes of collective bargaining. I also come to the conclusion that because of the drastically declining sales and the drastically increasing expenses which Respondent was encountering, the decision to close the Atlanta facility indeed represented a partial closing of its business and a basic change in the nature of

its operation. While sales were plummeting and expenses multiplying, Respondent was able to eliminate a major cost factor by closing the Atlanta facility. In doing so, Respondent was abandoning altogether the notion of an East Coast distribution center. Therefore, whether one chooses to use the "Wright Line Test" set forth in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), or the "Darlington Analysis" set forth in *Textile Workers v. Darlington Co.*, 380 U.S. 263 (1965), or the "Dubuque Packing Test" set forth in *Dubuque Packing Co.*, 303 NLRB 386 (1991), the result is the same. In reaching the decision to close the Atlanta facility, Respondent did not violate either Section 8(a)(3) or 8(a)(5) of the Act. Accordingly, I dismiss that allegation from the complaint.

CONCLUSIONS OF LAW

1. Respondent Nu-Skin International, Inc. is, and has been at all times material, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Graphics Communications International Union, AFL-CIO, Local 96-B is, and has been at all times material, a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent established its "Human Resource Committee" for the purpose of soliciting employee complaints and grievances in order to discourage employees from selecting a union as their collective bargaining representative, and Respondent thereby violated Section 8(a)(1) of the Act.

4. By asking Linda Lusebrink, a known union supporter, what the Union could do for her, Distribution Center Manager Mark Fleming was not interrogating her about her union sympathies, but rather was simply using this as a way to initiate a conversation, and Respondent did not violate the Act. Accordingly, that allegation is dismissed from the complaint.

5. By Distribution Center Manager Mark Fleming promising employees changes and improved working conditions if they would vote against the Union, Respondent violated Section 8(a)(1) of the Act.

6. By Supervisor William Ratliff impliedly threatening employees that Respondent would close the Atlanta facility if they chose the Union as their collective-bargaining representative, Respondent violated Section 8(a)(1) of the Act.

7. Counsel for the General Counsel fail to prove by credible evidence that Supervisor Trace Loner threatened employees that wages would be reduced and benefits would be taken away if employees selected the Union as their collective bargaining representative, and that allegation is dismissed.

8. By Supervisor Lewis Washington threatening employees that their pay would be cut and that Respondent would close its facility if employees selected the Union to represent them for purposes of collective bargaining, and Respondent violated Section 8(a)(1) of the Act.

9. By Distribution Center Manager Mark Fleming interrogating employee Quincy Young, who was not a known union supporter, about his union activities and/or sentiments, Respondent violated Section 8(a)(1) of the Act.

10. By Supervisor William Ratliff threatening employees that if they selected the Union to represent them for purposes of collective bargaining, Respondent would close its Atlanta facility, Respondent violated Section 8(a)(1) of the Act.

11. By Head Supervisor Evelyn Milam threatening employees that if they selected the Union to represent them for purpose of collective bargaining, Respondent would close the Atlanta facility, Respondent violated Section 8(a)(1) of the Act.

12. By Supervisor Toni Estes interrogating employees about their union activities and/or sentiments, verbally reprimanding employees for talking about the Union, and threatening employees with possible discharge for talking about the Union, Respondent violated Section 8(a)(1) of the Act.

13. Assistant Manager Todd Harris did not threaten employee Andrea Ray that she might be fired for talking about the Union, and that allegation is dismissed.

14. By Controller Max Esplin, in group meetings with employees, impliedly threatening employees that if they selected the Union to represent them for purposes of collective bargaining, Respondent would close its Atlanta facility, Respondent violated Section 8(a)(1) of the Act.

15. Controller Max Esplin, in those same group meetings, did not threaten employees that benefits would be reduced if they selected the Union, but rather limited his comments to explaining the give-and-take of negotiating a collective-bargaining agreement, and that allegation is dismissed.

16. By Assistant Manager Todd Harris, in a conversation with employee Deanna Reeves, perpetuating and republishing Esplin's implied threat that Respondent would close the Atlanta facility if employees selected the Union to represent them for purposes of collective bargaining, Respondent violated Section 8(a)(1) of the Act.

17. By Supervisor Toni Estes threatening employees that the Atlanta facility would be closed if employees selected the Union, Respondent violated Section 8(a)(1) of the Act.

18. By Supervisor Alan Henderson threatening employees with the elimination of benefits and other reprisals if they selected the Union to represent them for purposes of collective bargaining, Respondent violated Section 8(a)(1) of the Act.

19. By Quality Control Supervisor Warren Chandler threatening employees with plant closure if they selected the Union to represent them for purposes of collective bargaining, Respondent violated Section 8(a)(1) of the Act.

20. By Supervisor Toni Estes threatening employees that if they selected the Union work would continue to get slower and slower, and eventually the Company would close, Respondent violated Section 8(a)(1) of the Act.

21. By Supervisor William Ratliff threatening employees with plant closure in the event they elected the Union to represent them for purposes of collective bargaining, Respondent violated Section 8(a)(1) of the Act.

22. By asking employee Andrea Ray, a known union supporter, if she still supported the Union, Assistant Plant Manager Todd Harris did not violate Section 8(a)(1) of the Act, and that allegation is dismissed.

23. By Assistant Manager Todd Harris impliedly threatening employee Andrea Ray with plant closure if the Union was elected by employees as their collective-bargaining representative, and promising employees job security to dissuade Ray from voting for the Union, Respondent violated Section 8(a)(1) of the Act.

24. Respondent issued an unsatisfactory evaluation and a concurrent written reprimand to employee Gary Cabe be-

cause of Cabe's union activity and/or sentiments, and Respondent thereby violated Section 8(a)(1) and (3) of the Act.

25. Counsel for the General Counsel has failed to prove that Israel Cook was discharged because of his union activity, and that allegation is dismissed.

26. Counsel for the General Counsel has failed to prove that the written warning issued to Richard Cannell was the result of his union activity and/or sentiments, and that allegation is dismissed.

27. Respondent issued a written warning to Gary Cabe because of his union activities and/or sentiments, and not because of any infraction of Respondent's telephone clockout policy, and Respondent violated Section 8(a)(1) and (3) of the Act.

28. Counsel for the General Counsel has failed to prove that the written warning issued to Thomas Gunn was the result of Gunn's union activities and/or sentiments, and that allegation is dismissed.

29. Distribution Center Manager Mark Fleming did not prohibit employee Gary Cabe from talking to fellow employees about union activities "on company time," and that allegation is dismissed.

30. Respondent closed its Atlanta facility because of drastically declining sales combined with dramatically increasing expenses and liabilities, thereby effecting a partial closing of its business, and such actions would have occurred regardless of whether employees at the Atlanta facility engaged in union activity or selected the Union to represent them for purposes of collective bargaining, and the allegation that Respondent closed the Atlanta facility unlawfully is dismissed.

31. The decision to close the Atlanta facility represented not only a partial closing of its business, but a basic change in the nature of Respondent's operation, and Respondent therefore had no obligation to bargain with the Union over the decision to close that facility, and the allegation that Respondent made that decision unlawfully is therefore dismissed.

32. The unfair labor practices which Respondent has been found to have engaged in, as described, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

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

On these findings of the facts and conclusions of law and on the entire record in this proceeding, I issue the following recommended ⁶

⁶If 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.

ORDER

The Respondent, Nu-Skin International, Inc., Atlanta, Georgia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Soliciting employee complaints and grievances in order to dissuade them from selecting a union to represent them for purposes of collective bargaining.

(b) Interrogating employees about their union sentiments or activities, or the union sentiments or activities of other employees.

(c) Promising employees job security and/or changes and improvements in working conditions in order to dissuade employees from selecting a union to represent them for purposes of collective bargaining.

(d) Reprimanding employees, either verbally or in writing, for talking about the Union during work or for engaging in union activities.

(e) Threatening employees, either expressly or impliedly, that it would close if employees selected the Union to represent them for purposes of collective bargaining.

(f) Threatening employees, either expressly or impliedly, with pay cuts, eliminations of benefits, or other reprisals for selecting a union to represent them for purposes of collective bargaining.

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

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

(a) Expunge from the personnel file of employee Gary Cabe the unsatisfactory evaluation issued to him in August 1991, the written warning which accompanied that evaluation, and the written warning issued to Cabe in September 1991, and notify him in writing that this has been done, and the evidence of the unlawful discipline against him will not be used as a basis for future action against him, nor as a basis for a negative reference to other employers.

(b) Mail to all employees who were on the payroll at the time the Atlanta, Georgia facility was closed copies of the attached notice marked "Appendix."⁷

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

⁷In view of the fact Respondent has closed the Atlanta facility, mailing of the notice to employees is the only effective manner of communicating its contents to employees. Because that facility has been closed, there is obviously no point in ordering Respondent to post the notice to employees. Accordingly, that normal provision is deleted. Further, it is noted that if this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

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

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

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT solicit employee complaints and grievances in order to dissuade them from selecting a union to represent them for purposes of collective bargaining.

WE WILL NOT interrogate employees about their union sentiments or activities, or the union sentiments or activities of other employees.

WE WILL NOT promise employees job security and/or changes and improvements in working conditions in order to dissuade employees from selecting a union to represent them for purposes of collective bargaining.

WE WILL NOT reprimand employees, either verbally or in writing, for talking about the Union during work or for engaging in union activities.

WE WILL NOT threaten employees, either expressly or impliedly, that we would close if employees selected the Union to represent them for purposes of collective bargaining.

WE WILL NOT threaten employees, either expressly or impliedly, with pay cuts, eliminations of benefits, or other reprisals for selecting a union to represent them for purposes of collective bargaining.

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

WE WILL expunge from the personnel file of employees Gary Cabe the unsatisfactory evaluation issued to him in August 1991, the written warning which accompanied that evaluation, and the written warning issued to Cabe in September 1991, and notify him in writing that this has been done, and the evidence of the unlawful discipline against him will not be used as a basis for future action against him, nor as a basis for a negative reference to other employers.

NU-SKIN INTERNATIONAL, INC.