

**Uforma/Shelby Business Forms, Inc. d/b/a Miami Systems Corporation, Shelby Division, and CC Direct, a Single Integrated Enterprise and Graphic Communications Union, Local 666-S, a/w Graphic Communications International Union, AFL-CIO.** Cases 8-CA-25112 and 8-CA-25606

December 18, 1995

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING  
AND TRUESDALE

On May 6, 1994, Administrative Law Judge Martin J. Linsky issued the attached decision. The Respondent filed exceptions and a supporting brief,<sup>1</sup> the General Counsel filed an answering brief to the Respondent's exceptions, and the Respondent filed a reply brief to the General Counsel's answering brief.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings,<sup>2</sup> findings,<sup>3</sup> and con-

<sup>1</sup>The Respondent has requested oral argument. The request is denied, as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

<sup>2</sup>We affirm the judge's ruling that evidence of threats made by the Respondent's human resources manager, Pifer, and Plant Manager Vail during informal grievance settlement discussions in October 1992 is not inadmissible under Rule 408 of the Federal Rules of Evidence, which pertains to evidence of conduct or statements made during settlement negotiations. See *Jenmar Corp.*, 301 NLRB 623, 631 fn. 6 (1991); *Vulcan Hart v. NLRB*, 718 F.2d 269, 276-277 (8th Cir. 1983).

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

In his discussion of the General Counsel's prima facie showing that the Respondent violated Sec. 8(a)(1) and (3) of the Act by eliminating the third shift, the judge incorrectly described G.C. Exhs. 15(a) through (c) as showing hours worked from October 1992 through December 1993. These exhibits actually show the hours that were *projected* to be worked by department, per week, and in total during the period, rather than the precise number of hours that were actually worked. G.C. Exh. 15(b) is a tabulation of job orders, rather than hours worked or projected to be worked.

The judge also mistakenly stated that the amount of business lost by the Respondent as a result of its loss of contracts with J. C. Penney and the State of Ohio in 1992 was "made up for" by the amount of business gained as a result of increased orders resulting from the Respondent's contract to produce New Jersey traffic tickets. The record establishes, however, that the total combined revenue from the J. C. Penney and State of Ohio contracts was approximately \$1.2 million per year, while the increase in the Respondent's 1992 revenue over its 1991 revenue as a result of its New Jersey contract was \$173,000.

clusions,<sup>4</sup> as modified, and to adopt the recommended Order as modified.<sup>5</sup>

1. On December 15, 1992, the Respondent eliminated its third shift, and simultaneously laid off several employees in conjunction with and as a direct result of that action. *Non*third-shift employee Dan Reese was also laid off at the same time. The judge found, the record establishes, and the Respondent does not dispute, that Reese was laid off as a direct result of the elimination of the third shift.<sup>6</sup>

The judge also found, and we agree, that the Respondent eliminated its third shift in retaliation for the Union's pursuit of a grievance relating to the third shift, and that in doing so the Respondent violated Section 8(a)(1) and (3).

In addition, the judge found that Reese's layoff constituted an independent violation of Section 8(a)(1) and (3). We find it unnecessary to pass on this additional finding, because Reese's layoff was inextricably intertwined with the unlawful elimination of the third shift, and therefore violated Section 8(a)(1) and (3) on that basis alone.

2. We adopt the judge's recommendation that the Respondent be ordered to reinstitute its unlawfully eliminated third shift. At the compliance stage of this proceeding, the Respondent may introduce evidence that was not available prior to the January 31-February 1, 1994 unfair labor practice hearing, if any, to demonstrate that reinstatement of the third shift would be unduly burdensome. *Lear Siegler, Inc.*, 295 NLRB 857 (1989).

3. The judge found that the Respondent's elimination of the third shift also violated Section 8(a)(5) and (1). The judge concluded that neither the management-rights clause nor the "zipper" clause of the parties' collective-bargaining agreement constituted a clear and unmistakable waiver of the Union's right to

These errors, however, do not affect our affirmance, based on the preponderance of all the relevant evidence, of the judge's finding that the Respondent eliminated its third shift for discriminatory reasons, in violation of Sec. 8(a)(1) and (3).

<sup>4</sup>In affirming the judge's finding that Human Resources Manager Pifer threatened to eliminate the third shift in violation of Sec. 8(a)(1), we do not rely on employee Reese's testimony about what he *understood* Pifer's statement to mean. The test to determine interference, restraint, or coercion under Sec. 8(a)(1) is an objective one, and thus it is not dependent on an employee's subjective interpretation of a statement. See *American Freightways Corp.*, 124 NLRB 146, 147 (1959).

<sup>5</sup>The judge found that the Respondent laid off Dan Reese in violation of Sec. 8(a)(5) and (1), but the judge inadvertently failed to include Reese's layoff in the conclusions of law and the recommended Order. We modify the judge's Conclusion of Law 5 by inserting "and laid off Dan Reese" after "eliminated [the] third shift," and we modify the recommended Order and notice accordingly.

<sup>6</sup>Plant Manager Eric Vail testified, without contradiction, that Reese was laid off because the Respondent determined that it could get along with two fewer maintenance employees with the third shift eliminated.

bargain over the Respondent's decision. We agree with this finding, and we find it unnecessary to pass on our concurring colleague's additional grounds for finding this violation.<sup>7</sup>

### ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Uforma/Shelby Business Forms, Inc. d/b/a Miami Systems Corporation, Shelby Division, and CC Direct, a Single Integrated Enterprise, Shelby, Ohio, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(b).

“(b) Eliminating the third shift and laying off employees, including Dan Reese, in conjunction with such elimination, without giving the Union prior notice and an opportunity to bargain about the elimination and its effects.”

2. Substitute the following for paragraph 2(a).

“(a) Restore the status quo ante by reinstating the third shift and reinstating all employees, including Dan Reese, who were laid off as a result of the elimination of the third shift.”

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

MEMBER BROWNING, concurring.

I agree with my colleagues in all respects, including our finding, in agreement with the judge, that the Respondent's elimination of the third shift violated Section 8(a)(5) and (1) of the Act, on the grounds that neither the management-rights clause nor the zipper

<sup>7</sup>In affirming the judge's finding that the zipper clause in the parties' collective-bargaining agreement does not constitute a clear and unmistakable waiver by the Union of its right to advance notice and an opportunity to bargain with the Respondent over the elimination of the third shift and the effects of that elimination, we do not rely on the cases he cited in support of this finding. His finding is, however, supported by, e.g., *Outboard Marine Corp.*, 307 NLRB 1333, 1337-1338 (1992); *General Electric Co.*, 296 NLRB 844 (1990); and *Suffolk Child Development Center*, 277 NLRB 1345, 1350-1351 (1985). Cf. *GTE Automatic Electric*, 261 NLRB 1491 (1982) (zipper clause containing language like that in instant case constitutes waiver by union where employer implemented new benefit for nonunit employees, but refused to bargain with union about union's midterm demand that new benefit be extended to unit employees; Board held implementation of new benefit for nonunit employees does not constitute change in terms and conditions of employment for unit employees, and employer is permitted to invoke zipper clause as shield against union's midterm demand for bargaining over new benefit; Board emphasized that employer sought only to maintain the status quo for unit employees, and did not make unilateral changes that directly and adversely affected unit employees, with accompanying effect of undermining and derogating union).

Member Truesdale is of the view that the 8(a)(3) and (5) findings cannot exist simultaneously. Accordingly, in adopting the findings of 8(a)(3) and (5) violations for the reasons stated by the judge, he does so as alternative findings.

clause of the parties' collective-bargaining agreement constituted a clear and unmistakable waiver of the Union's right to bargain over the elimination of the third shift and its effects.

As an additional grounds for the above finding, I also rely on (1) our affirmance of the judge's conclusion that the elimination of the third shift was discriminatorily motivated, in violation of Section 8(a)(1) and (3) of the Act, and (2) the principle that where, as here, a decision is motivated by antiunion reasons, it cannot nevertheless be construed as a legitimate entrepreneurial decision, exempt under *First National Maintenance Corp. v. NLRB*,<sup>1</sup> from the employer's bargaining obligation.<sup>2</sup> By analogy, where, as here, an employer seeks to avoid bargaining about an unlawfully motivated decision and its effects on the asserted grounds that the union waived its right to bargain about the subject matter of the decision,<sup>3</sup> it would be anomalous to hold that the terms of a collective-bargaining agreement constitute a waiver legitimizing under Section 8(a)(5) conduct that is unlawful under Section 8(a)(1) and (3). Instead, as the Supreme Court stated in *First National Maintenance*, supra,

[T]he union's legitimate interest in fair dealing is protected by [Section] 8(a)(3), which prohibits partial closings motivated by antiunion animus, when done to gain an unfair advantage. . . . An employer may not simply shut down part of its business and mask its desire to weaken and circumvent the union by labeling its decision "purely economic."<sup>4</sup>

In the same way that a decision to close or eliminate an operation cannot logically be called purely "entrepreneurial" if it is unlawfully motivated, so too, a union cannot be said to have clearly and unmistakably "waived" its right to bargain over a decision that is grounded in unlawful, antiunion motivation. Accordingly, because the Respondent's decision to eliminate the third shift was motivated by union animus, the Respondent had an obligation to bargain with the Union about that decision and its effects<sup>5</sup>—an obligation which the Respondent clearly did not meet.

Thus, on the basis of these additional grounds, as well as on the grounds set forth by my colleagues, I find that the Respondent violated Section 8(a)(5) and

<sup>1</sup> 452 U.S. 666 (1981).

<sup>2</sup> See *Equitable Resources Energy Co.*, 307 NLRB 730, 732 fn. 11 (1992); *Continental Winding Co.*, 305 NLRB 122, 125 (1991) ("Discrimination on the basis of union animus cannot serve as a lawful entrepreneurial decision," citing *Strawsine Mfg. Co.*, 280 NLRB 553 (1986)); accord: e.g., *Parma Industries*, 292 NLRB 90 (1988); and *Challenge-Cook Bros.*, 288 NLRB 387 fn. 2 (1988).

<sup>3</sup> See *Central Transport*, 306 NLRB 166, 167 fn. 6 (1992) (employer asserted that union waived right to bargain by failing to request bargaining).

<sup>4</sup> 452 U.S. at 682 (emphasis added; citation omitted).

<sup>5</sup> *D & S Leasing*, 299 NLRB 658, 659-660 (1990).

(1) of the Act by its unilateral elimination of the third shift and by its layoff of employees in conjunction with that elimination.

#### 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 National Labor Relations Act gives employees these rights.

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

WE WILL NOT threaten to eliminate the third shift or remove bargaining unit work if the Union pursues a grievance or tries to represent newly acquired employees.

WE WILL NOT eliminate the third shift and lay off employees in conjunction with such elimination without giving the Union prior notice and an opportunity to bargain about the elimination and its effects.

WE WILL NOT eliminate the third shift or lay off employees because the Union pursues a grievance to arbitration.

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

WE WILL restore the status quo ante by reinstating the third shift and reinstating all employees, including Daniel J. Reese, who were laid off as a result of the elimination of the third shift.

WE WILL make Daniel J. Reese and those persons adversely affected by the elimination of the third shift whole for any loss of pay and other benefits suffered by them because of the unlawful elimination of the third shift.

WE WILL bargain in good faith with the Union respecting hours, wages, and other terms and conditions

of employment of the employees in the bargaining unit.

UFORMA/SHELBY BUSINESS FORMS, INC.  
D/B/A MIAMI SYSTEMS CORPORATION,  
SHELBY DIVISION, AND CC DIRECT,  
A SINGLE INTEGRATED ENTERPRISE

*Thomas M. Randazzo, Esq.*, for the General Counsel.  
*David K. Montgomery, Esq.*, of Cincinnati, Ohio, for the Respondent.

*Richard P. James, Esq.*, of Toledo, Ohio, for the Charging Party.

#### DECISION

##### STATEMENT OF THE CASE

MARTIN J. LINSKY, Administrative Law Judge. A charge, a first amended charge, and a second amended charge in Case 8-CA-25112 were filed by Graphic Communications Union, Local 666-S, a/w Graphic Communications International Union, AFL-CIO (the Union), against Uforma/Shelby Business Forms, Inc. d/b/a Miami Systems Corporation, Shelby Division (Respondent or Respondent Uforma) on December 28, 1992, January 14 and February 9, 1993, respectively. The charge in Case 8-CA-25606 was filed by the Union against Respondent Uforma/Shelby Business Forms, Inc. d/b/a Miami Systems Corporation, Shelby Division, and CC Direct on July 14, 1993.

On August 31, 1993, the National Labor Relations Board, by the Regional Director for Region 8, issued an amended consolidated complaint (complaint), which alleges that Uforma/Shelby Business Forms, Inc. d/b/a Miami Systems Corporation, Shelby Division, and CC Direct are a single-integrated enterprise and that Section 8(a)(1), (3), and (5) of the National Labor Relations Act (the Act) were violated by Respondent's threats, elimination of the third shift, layoff of employee Dan Reese, and bad-faith bargaining.

At the hearing Respondent stipulated that for purposes of this litigation, Uforma/Shelby Business Forms, Inc. d/b/a Miami Systems Corporation, Shelby Division, and CC Direct are a single employer and a single-integrated business enterprise. In its timely filed answer, Respondent denied that it violated the Act in any way.

A hearing was held before me in Shelby, Ohio, on January 31 and February 1, 1994.

On the entire record in this case, to include posthearing briefs submitted by the General Counsel and Respondent, and on my observation of the demeanor of the witnesses, I make the following

#### FINDINGS OF FACT

##### I. JURISDICTION

Respondent admits for purposes of this litigation only, and I find, that Uforma/Shelby Business Forms Inc. d/b/a Miami Systems Corporation, Shelby Division, and CC Direct constitute a single-integrated business enterprise and a single employer within the meaning of the Act.

At all material times Respondent, a Michigan corporation, with an office and place of business in Shelby, Ohio (Respondent's facility), has been engaged in the manufacture of printed business forms.

Annually, Respondent, in conducting its business operations described above, sells and ships from its Shelby, Ohio facility goods valued in excess of \$50,000 directly to points outside the State of Ohio.

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

## II. THE LABOR ORGANIZATION INVOLVED

Respondent admits, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

## III. THE ALLEGED UNFAIR LABOR PRACTICES

### A. Failure to Bargain in Good Faith

The employees of Respondent who worked for Uforma/Shelby Business Forms, Inc., d/b/a Miami Systems Corporation, Shelby Division are represented by the Union. A collective-bargaining agreement covering the period May 9, 1991, to June 1, 1994, was in effect. That agreement contained a management-rights clause in article 4 which provides as follows:

#### ARTICLE 4

##### MANAGEMENT RIGHTS

**4-1** The management of the Company and the direction of the working force, including the right to plan, direct and control plant operations; to schedule and assign work to employees; to establish and determine job duties and the number of employees required thereof; to determine the means, methods, processes, schedules and standards of production; to determine the products to be manufactured; the location of its Plants, and the continuance of its operating departments; to subcontract work; to establish and require employees to observe Company rules and regulations; to hire, layoff or relieve employees from duties; to maintain order and to suspend, demote, discipline and discharge employees for just cause; are the sole rights of the Company.

**4-2** The foregoing enumeration of management's rights shall not be deemed to exclude other rights of management not specifically set forth; and it is the intention of the parties hereto, that the Company retains all management rights, powers, authority and functions, whether heretofore or hereafter exercised, and regardless of the frequency or infrequency of their exercise, which shall remain vested exclusively in the Company, except insofar as specifically surrendered by express provisions of this Agreement.

**4-3** The exercise by the Company of any of the foregoing rules, shall not alter any of the specific provisions of this Agreement, nor shall they be used to discriminate against any member of the Union.

In the instant case Respondent on December 15, 1992, eliminated the third shift at its Shelby plant. That shift ran

from 11 p.m. to 7 a.m. It is clear, reading the language of the management-rights clause set forth above, that management's right to eliminate a shift is not specifically enumerated as one of the rights of management. It is also hornbook law that the elimination of a shift is a mandatory subject of collective bargaining since mandatory subjects of collective bargaining include wages, hours, and other terms and conditions of employment. A union can waive its right to bargain about a mandatory subject of collective bargaining but that waiver must be clear and unmistakable. See, *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983); *Dubuque Packing Co.*, 303 NLRB 386 (1991). There was no clear and unmistakable waiver to bargain over the elimination of the third shift in this case.

There was a so-called zipper clause in the contract. It provided as follows:

#### ARTICLE 30

##### SOLE AGREEMENT

**30-1** This Agreement concludes all collective bargaining between the parties hereto, during the terms thereof, and constitutes the sole, entire, and existing Agreement between the parties hereto; and supersedes all prior commitments or practices, whether written, oral, expressed, or implied, between the Company and the Union, or its employees; and expresses all obligations and restrictions imposed on each of the respective parties during this term.

**30-2** The parties acknowledge that during the negotiations, which resulted in this Agreement, each had the unlimited right and opportunity to make demands and proposals with respect to any subject or matter not removed by law from the area of collective bargaining, and that the understandings and agreements arrived at by the parties, after the exercise of that right and opportunity, are set forth in this Agreement. Therefore, the Company and the Union, for the life of this Agreement, each voluntarily and unqualifiedly waives the right, and each agrees that the other shall not be obligated to bargain collectively with respect to any subject or matter not specifically referred to, or covered in this Agreement, even though such subject or matter may not have been within the knowledge or contemplation of either or both of the parties at the time that they negotiated or signed this Agreement.

Such a zipper clause will not be construed as a waiver of statutory bargaining rights. See *Chicago Tribune Co.*, 304 NLRB 495 (1991); and *Johnson-Bateman Co.*, 295 NLRB 180, 184-188 (1989).

Therefore, before Respondent could eliminate the third shift it was required by law to give prior notice and opportunity to bargain about the matter to the Union. The testimony of Union Secretary-Treasurer Dan Reese and current Union President but then-Union Vice President Mike Lybarger, who were witnesses for the General Counsel, as well as the testimony of General Manager William O'Bryan and Plant Manager Eric Vail, who were witnesses for Respondent, prove beyond all doubt that Respondent did *not* give prior notice and opportunity to bargain to the Union concerning the elimination of the third shift or its effects.

Accordingly, Respondent violated Section 8(a)(1) and (5) of the Act.

The elimination of the third shift resulted in 17 employees from the third shift either being laid off (5 of them were) or bumping into jobs on either the first or second shifts (12 of them did that). In addition, Dan Reese, a maintenance machinist who was *not* a third-shift employee was also laid off. The testimony of Plant Manager Eric Vail establishes beyond doubt that Dan Reese was laid off as a direct result of the elimination of the third shift because Respondent could get along with two fewer maintenance employees with the third shift eliminated. Reese was brought back to work in May 1993 in a different capacity and returned to a maintenance machinist job in July 1993.

The remedy for this 8(a)(5) failure to bargain in good faith is to restore matters to the status quo ante and make affected employees whole. This would include Dan Reese, those employees from the third shift who were laid off, those that bumped into the first or second shift, and those laid off from the first or second shift as a result of the bumping.

*B. Threats to Eliminate the Third Shift or Remove Bargaining Unit Work*

As noted above, the third shift was eliminated on December 15, 1992, without Respondent giving prior notice and opportunity to bargain to the Union. But events occurred months earlier regarding the third shift. Pursuant to the collective-bargaining agreement assistant foremen were to be selected by Respondent even though they were in the bargaining unit. An assistant foreman left the third shift leaving the assistant foreman's position open.

On July 20, 1992, the Union filed a grievance alleging that supervisors were doing bargaining unit work in violation of the collective-bargaining agreement. The remedy requested by the Union was that the assistant foreman's position be filled. The grievance was denied at the first and second step. It is alleged that Respondent twice violated Section 8(a)(1) of the Act by threatening to eliminate the third shift or remove bargaining unit work from the plant if the Union pursued the grievance any further. Periodically, Union Secretary-Treasurer Dan Reese or Union Vice President Mike Lybarger or both would meet with Respondent's manager of human resources, Beulah Pifer, or Respondent's plant manager, Eric Vail, or both, to discuss the settlement of outstanding grievances.

Dan Reese credibly testified that on or about October 20, 1992, he, Mike Lybarger, and Beulah Pifer met to discuss the July 20 grievance regarding the third shift. According to Reese, Pifer told them that she had discussed the July 20 grievance with Respondent's general manager, William O'Bryan. Pifer then told them that O'Bryan became upset when she had discussed the grievance with him and told her that, if the grievance was not "taken care of" he would just eliminate the problem. Reese stated that he understood Pifer's statement to mean that O'Bryan would eliminate the third shift of work rather than have the grievance over the third-shift work go to arbitration.

Mike Lybarger corroborated Reese's testimony by credibly testifying that on or about October 20, he and Reese discussed the July 20 grievance with Pifer. Lybarger testified that Pifer mentioned that she had spoken to O'Bryan about the grievance. According to Lybarger, Pifer stated that

O'Bryan "blew up" and said that, if she could not take care of the problem, he would eliminate it. Lybarger testified that he asked Pifer if that meant the third shift would be eliminated, and she said, "[Y]es, that's a possibility."

The complaint alleges that Pifer's statement to Reese and Lybarger that O'Bryan stated that if Pifer could not "take care of" the third-shift grievance "problem," then he would take care of it by possibly eliminating the third shift of operation, is a threat to eliminate the third shift and remove the third-shift jobs if the Union engaged in union activity—namely, the pursuit of the grievance to arbitration. Both Reese and Lybarger credibly and consistently testified as to Pifer's statements. Pifer is an admitted agent and supervisor of the Respondent.

Beulah Pifer did not testify. Pifer is no longer an employee of Respondent but works for another employer in the area. Since I found Reese and Lybarger to be credible the only questions are whether what Pifer said to them is a threat in violation of Section 8(a)(1) of the Act and whether what she said in this informal grievance settlement discussion is admissible.

I'll answer the second question first, namely, is evidence of Pifer's statement admissible. The answer is yes. Under Rule 408 of Federal Rules of Evidence offers of compromise in settlement discussions are not admissible but the rule does not prohibit the introduction of evidence of threats during a settlement discussion. For example if the Union and Respondent met to try to settle a grievance regarding an alleged unlawful discharge an offer by Respondent to pay the discharged employee a sum of money if he waived reinstatement would not be admissible to prove the discharge was unlawful but a threat to kill or injure the discharged employee if he didn't accept the offer would be admissible in a criminal trial for threats to kill or do bodily harm. The answer to the first question is also yes, namely, a threat to eliminate the third shift is a violation of Section 8(a)(1) of the Act. The Union, in pursuing a grievance, is engaged in protected concerted activity and cannot legally be threatened with discriminatory action for engaging in that activity. As noted in section III(A) above, the elimination of the third shift was a mandatory subject of collective bargaining and Respondent cannot threaten to take unilateral action against employees simply because a grievance is being pursued. Pifer's statement was a threat in violation of Section 8(a)(1) of the Act.

Dan Reese also credibly testified that, on or about October 27, the Union met again with management to discuss the July 20 grievance. According to Reese, he, Lybarger, and then-Union President Virgil Porter met with Vail and Pifer at the Respondent's facility. Reese credibly testified that during the discussion of the July 20 grievance, Vail stated that if the Union pursued the grievance to arbitration, O'Bryan could move some of the work in Shelby to other plants owned and operated by Respondent. According to Reese, Vail also stated that he could justify the movement of work from the facility when it came time to eliminate the third shift of operation. Reese also stated that Vail told them that, when the Union voted on whether to arbitrate the grievance, they (meaning the union officers) should encourage the union members on how to vote and to let them know the importance of this particular grievance. Thus, according to the credible testimony of Reese, Vail told the union officers that if the Union pursued the grievance to arbitration, the third

shift would be eliminated, the work could be relocated to other plants, and the Respondent could justify the elimination of the third shift.

Mike Lybarger's credible testimony about the meeting with management corroborates the testimony of Reese. Lybarger stated that he, Reese, and Porter met with Pifer and Vail to discuss the third-shift grievance on or about October 27. According to Lybarger, when they were discussing the third-shift grievance, Vail stated that O'Bryan could move the work elsewhere if the Union pursued the grievance to arbitration because the Respondent had other facilities.

Virgil Portion did not testify. Nor did Beulah Pifer. However, Vail did testify. Although he denied making any threats I credit the testimony of Reese and Lybarger over him. Reese and Lybarger impressed me by their demeanor as individuals exceedingly worthy of belief. Vail did not. Since the statements of Eric Vail are admissible even though made during a grievance settlement discussion and are a threat as noted above I find that Section 8(a)(1) of the Act was violated when Vail impliedly threatened to remove bargaining unit work because the Union was pursuing a grievance.

*C. The Elimination of the Third Shift and Layoff of Dan Reese*

The record reveals that on November 12, 1992, the union executive board met to discuss grievances and to decide if it would recommend that the union membership pursue certain grievances to the arbitration stage of the grievance-arbitration procedure. The executive board of the Union is comprised of the union president, vice president, secretary-treasurer, recording secretary, sergeant at arms, and four union members. Dan Reese testified that it was a common practice for the union executive board to recommend to the union membership whether or not to pursue a grievance to arbitration, and the union membership would subsequently vote on those matters. In the fall of 1992, both Dan Reese and Mike Lybarger were on the executive board because of the union positions they held at that time.

In the executive board meeting on November 12, the union officers specifically discussed whether to recommend that the union membership vote to take the July 20 third-shift grievance to arbitration. Both Reese and Lybarger credibly testified that they addressed their fellow members of the executive board by stating that Respondent's management officials had told them that there was a possibility the third shift would be eliminated if the Union pursued the grievance to arbitration. They both testified, however, that the executive board voted to recommend to the membership that the grievance be pursued to arbitration.

The record reveals that 3 days later, on November 15, the union membership met to vote on whether to pursue the July 20 grievance to arbitration. Both Reese and Lybarger addressed the union membership. Reese testified that he "told the members at this meeting that Eric Vail and Beulah Pifer had told [he] and Mike Lybarger that there was a possibility the third shift would be eliminated if we pursued this grievance." (Tr. 106-107.) Similarly, Lybarger testified that he addressed the union membership and he "repeated basically what [he] had said at the Executive Board meeting"—that "if we pursued this . . . [grievance] the threat of eliminating third shift [was] there." (Tr. 257.) Both Reese and Lybarger stated, however, that the union membership voted to pursue

the third-shift grievance to arbitration. Lybarger testified that he informed Pifer of the union membership's vote the following day, and that her response was that "she was disappointed."

Lybarger credibly testified that after the membership vote on November 15, two third-shift employees approached him and expressed their concern over pursuing the third-shift grievance to arbitration. Specifically, Lybarger stated that employees Charlie Smith and Morris Baker Jr. told him that, "if it meant losing their jobs on third shift . . . they would [rather] have their names taken off the grievance." In response, Lybarger testified that he would take their concerns "up with the officers of the Union and go from there."

The record shows that, based on the employees' concerns, the concerns of both Reese and Lybarger that the threat to eliminate the third shift could be "real," and since only 20 to 30 union members (out of approximately 166) voted to pursue the grievance to arbitration, the union officers decided to discuss their concerns with management and to request that Respondent hold off on its decision to eliminate the shift until the union membership could vote again.

On November 23, Reese and Lybarger approached Vail and Pifer with their concerns about the vote and the threatened elimination of the third shift. In that meeting Reese told Vail and Pifer that they had concerns about the vote and the threatened elimination of the shift, and Reese asked the management officials if it would be possible to allow the Union to have another vote on whether to arbitrate the grievance. According to Lybarger, Vail told them that, since they were union officers, they could "persuade the vote and try to take care of the *problem*." (Emphasis added; Tr. 261.) According to the credible testimony of Lybarger, Vail then told the union officials that the Respondent had three "options": to eliminate the assistant foremen; have the operators O.K. their own work; or eliminate the third shift. Based on these concerns and the request by the union officers, Vail agreed to delay his decision to eliminate the third shift until the Union could vote again, but he told the Union that "you guys are going to have to shit or get off the pot."

These statements or options attributed to Vail in the context of the Union's vote to pursue the third-shift grievance to arbitration were specifically corroborated by the credible testimony of Dan Reese. Likewise, Vail admitted that he told the union officers that one of Respondent's options if the Union pursued the grievance to arbitration was to eliminate the third shift.

Vail agreed that the Respondent would delay its decision to eliminate the third shift until the Union had another opportunity to vote on the decision to arbitrate the third-shift grievance. On December 13, 1992, the union executive board once again voted to recommend to the union membership that the July 20 grievance be pursued to arbitration. On that same day, the union membership met to vote on the July 20 grievance. In that meeting, the union membership asked how the union executive board voted on the issue of recommending that the third-shift grievance be taken to arbitration, and the executive board members who voted to pursue it to arbitration stood up in front of the union members to show how they voted. Subsequently, the members who voted not to pursue it to arbitration stood up to reflect that fact. It is undisputed that Reese voted to take the grievance to arbitration and Lybarger voted not to do so. Ultimately, the executive

board decided to recommend arbitration of the grievance. After the executive board revealed how they voted, the union membership voted. The result of that vote was for the Union to pursue the grievance to arbitration.

Mike Lybarger testified that the morning following the vote, December 14, 1992, Eric Vail approached him at his work station and asked him how the vote went. Lybarger responded that he probably already knew, and Vail stated that he knew "bits and pieces." Lybarger then stated that it [the third-shift grievance] was voted to arbitration, and Vail asked him if there were enough people to have "a standing of the body." Lybarger in turn responded that there were enough to have a vote. Vail then stated that "he heard the vote was four to four." Lybarger, however, told him that was the executive board vote, and not the union membership vote.

Later that day, Dan Reese and Mike Lybarger were told by their supervisors to go to Eric Vails' office. Reese and Lybarger subsequently met with Eric Vail and Beulah Pifer in Vail's office. At that time, Vail told Reese and Lybarger that the third shift was being eliminated, and Pifer stated that her office personnel were in the process of contacting the employees on the third shift to inform them that they were being laid off. The record shows that 17 unit employees who worked on the third shift were laid off from the third shift on December 15, 1992. A number of them bumped into first- or second-shift jobs and a total of five employees actually were put out of work.

Respondent put on a case to justify the wisdom of eliminating the third shift and why it made economic sense to do so. This is, of course, no defense whatsoever to the 8(a)(5) violation spelled out in section III(A), above. The Respondent must give prior notice and opportunity to bargain to the Union and cannot act unilaterally even if what they want to do is a good idea and makes economic sense.

With respect to the allegation that the elimination of the third shift was a violation of Section 8(a)(3) of the Act because it was done in retaliation for the union members protected concerted activity of pursuing a grievance to arbitration, I must consider the Board's landmark decision in *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982).

Based on the threat to eliminate the third shift by Beulah Pifer on October 20, 1992, and the implied threat by Eric Vail on October 27, 1992, and the fact that the third shift was eliminated virtually simultaneously with the Respondent learning that the Union was definitely going to pursue the third-shift grievance to arbitration, it is clear that the General Counsel made out a prima facie case.

Respondent's defense that it was a good idea and made sense to eliminate the third shift puts us in a clear mixed motive situation. The timing of the elimination of the shift, however, is extraordinarily persuasive in determining motivation. Clearly Respondent had lost some business prior to the elimination of the third shift, i.e., the J. C. Penney contract and the State of Ohio snap contract, however, this was made up for by the increased work necessary to be done in connection with the New Jersey traffic ticket contract Respondent received a year or so earlier. In addition, exhibits reflecting the hours worked between October 1992 and December 1993 reflect that the hours worked at the plant did not vary and it was not lack of work that justified the elimination of the

third shift. See General Counsel's Exhibits 15(a), (b), and (c).

I also note that Bill O'Bryan, the highest ranking official at the plant, testified that the third shift was eliminated to save money and he was the one who made the decision to eliminate the third shift and yet when he was on the stand he did not even know how much money the elimination of the third shift had saved Respondent. Although there was evidence that a new acquisition by Respondent, namely, the CC Direct operation, was projected to increase the work load for Respondent by \$1 to \$3 million a year at the Shelby facility, Plant Manager Eric Vail and his boss General Manager Bill O'Bryan claim they didn't know in December 1992, when they eliminated the third shift, about the acquisition and there is no evidence in the record to refute them.

Considering all the facts, to include the timing of the elimination of the third shift and the earlier threats to eliminate the third shift, I conclude that Respondent eliminated the third shift to retaliate against the Union for pursuing the July 20 grievance and, in doing so, Respondent violated Section 8(a)(1) and (3) of the Act.

It is alleged that Dan Reese was fired because of his actions regarding the grievance, all of which was protected concerted activity, in violation of Section 8(a)(1) and (3) of the Act. I concur. Dan Reese and Mike Lybarger were the union officials who met with Beulah Pifer and Eric Vail on this grievance and others. The final union vote on December 13, 1992, to pursue the grievance to arbitration was preceded by a union executive board vote. Lybarger voted against taking the grievance to arbitration. Reese voted to take it to arbitration. Plant Manager Eric Vail admits he knew the executive board vote was 4 to 4 with the then-president breaking the tie but claims he didn't know how Reese voted and claims he couldn't remember who told him the breakdown of the vote. It seems clear to me Vail knew how Reese voted and structured the layoff occasioned by elimination of the third shift such that Reese would be laid off.<sup>1</sup> Hence Respondent violated Section 8(a)(1) and (3) of the Act when it laid off Dan Reese.

*D. Threat to Remove Work if Union Attempted to Represent Employees at CC Direct*

The record reflects that Respondent purchased the CC Direct operation located in Allentown, Pennsylvania, in early 1993, and moved that operation into the Shelby facility in March 1993. The parties stipulated that these two entities are a single-integrated enterprise and single employer for the purposes of this litigation.

Mike Lybarger testified that sometime in early March 1993, Pifer told him that the Respondent was bringing in a new operation to the Shelby facility and that the new oper-

<sup>1</sup>Two machinists, Chuck Huston and Martin Bore were kept on even though they had less seniority than Reese. Respondent exercised its right under the contract and selected Huston and Bore to be assistant foremen. However, Huston and Bore, according to the opinion of two union members who were maintenance men themselves, namely, Kenneth Phelps and James Holtz, were more talented than Reese. If one maintenance man actually had to go it was not unreasonable to keep Huston and Bore over Reese. Respondent concedes that Reese was a good worker and competent but maintains that Huston and Bore were better. I credit Vail that Respondent actually believed Huston and Bore to be more qualified than Reese.

ation would be nonunion. According to the credible and un rebutted testimony of Lybarger, he and Reese met with Pifer sometime in March to discuss the possibility of representing the newly acquired CC Direct employees. At that meeting, Pifer told Reese and Lybarger: "you better back off, if you push [the] situation [the Respondent] could take the work elsewhere." (Tr. 275.) Lybarger then asked Pifer if that was a threat, and she responded by stating "[t]hat's the way these people do business." (Tr. 275.)

Reese corroborated Lybarger's testimony by stating that, in the meeting with Pifer in March 1993, Pifer told them that they "should really kind of back off on this CCD thing; that it was new." (Tr. 143.) According to Reese, Pifer also stated: "you know how these people are." (Tr. 143.) The credible testimony of Lybarger and Reese was un rebutted by the Respondent who did not call Pifer to testify. The Respondent did not show that Pifer was unavailable to testify at the hearing, and it did not offer any explanation for her absence. Since I find both Lybarger and Reese to be credible witnesses I conclude that what they claim Pifer said was indeed said.

Pifer's statement to Reese and Lybarger that they should "back off" and that if they pushed the situation the Respondent could take the work elsewhere is a threat to remove the newly acquired work if the Union attempted to represent the recently acquired employees of Respondent CC Direct. This threat was especially chilling in light of Respondent's elimination of the third shift just 3 months earlier and the statement violates Section 8(a)(1) of the Act.

The statements to Reese and Lybarger by Pifer on October 20, 1992, and in March 1993 and the statements to Reese and Lybarger by Vail on October 27, 1992, are not protected speech by an employer under Section 8(c) of the Act because the statements contain threats of reprisal.

#### CONCLUSIONS OF LAW

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

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

3. Respondent violated Section 8(a)(1) of the Act when it threatened on October 20, 1992, to eliminate the third shift and threatened on October 27, 1992, to relocate bargaining unit work if the Union pursued a grievance to arbitration.

4. Respondent violated Section 8(a)(1) of the Act when it threatened to remove bargaining unit work if the Union tried to represent recently acquired employees.

5. Respondent violated Section 8(a)(1) and (5) of the Act when it eliminated the third shift without giving prior notice and opportunity to bargain to the Union about the elimination of the third shift or its effects.

6. Respondent violated Section 8(a)(1) and (3) of the Act when it eliminated the third shift and laid off Dan Reese in retaliation for the Union pursuing a grievance to arbitration.

7. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

#### REMEDY

The remedy in this case should include a cease-and-desist order, the posting of a notice, restoration of the third shift, and a make-whole order for those employees, to include Dan

Reese, who were adversely impacted by Respondent's 8(a)(5) and (3) misconduct in eliminating the third shift and laying off Dan Reese without giving prior notice and opportunity to bargain to the Union (the 8(a)(5) violation) and in eliminating the third shift and laying off Dan Reese in retaliation for the Union's protected concerted activity of pursuing the July 20 grievance (the Section 8(a)(3) violation).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>2</sup>

#### ORDER

The Respondent, Uforma/Shelby Business Forms, Inc. d/b/a Miami Systems Corporation, Shelby Division, and CC Direct, Shelby, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening to eliminate the third shift or remove bargaining unit work if the Union pursues a grievance to arbitration or tries to represent newly acquired employees.

(b) Eliminating the third shift without giving prior notice and opportunity to bargain to the Union about the elimination or its effects.

(c) Eliminating the third shift or laying off employees because the Union pursues a grievance to arbitration.

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

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

(a) Restore matters to the status quo ante by reinstating the third shift.

(b) Make Dan Reese and those persons adversely affected by the elimination of the third shift whole for any loss of pay and other benefits suffered by them because of the unlawful elimination of the third shift. Backpay to be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). (See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).)

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

(d) Bargain in good faith with the Union respecting hours, wages, and other terms and conditions of employment of the employees in the bargaining unit.

(e) Post at its facility in Shelby, Ohio, copies of the attached notice marked "Appendix."<sup>3</sup> Copies of the notice, on forms provided by the Regional Director for Region 8, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt

<sup>2</sup>If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

<sup>3</sup>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."

and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

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