Weldun International, Inc. *and* United Steelworkers of America, AFL–CIO, CLC. Cases 7–CA–34343 and 7–CA–34805

July 15, 1996

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS COHEN AND FOX

On December 5, 1994, Administrative Law Judge Robert C. Batson issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply 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 the briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions as modified below and to adopt the recommended Order as modified and set forth in full below.[2]

1. The judge found that the Respondent's vice president of machining, Dick Koziel, unlawfully threatened employee David Pecoraro with unspecified reprisals and loss of benefits. Pecoraro testified that Koziel told him that ''if the Union gets in, it'd be like you guys started from day one.'' In crediting Pecoraro's testimony, the judge found that Koziel did not specifically deny threatening Pecoraro. The Respondent excepts, and we find merit in the exception.

Our review of the record indicates that Koziel specifically denied making the threat. Because the judge's credibility determination relied on an erroneous reading of the record, we reverse and dismiss this allegation. We will modify the conclusions of law and the Order and notice accordingly.[3]

2. The judge found that the Respondent's permanent layoff of 29 employees on March 11 and 12, 1993, violated Section 8(a)(3) and (1). As discussed in more detail below, we find no merit to the Respondent's exceptions to this finding.

a. The Respondent asserts that the judge failed to consider that 18 of the 29 alleged discriminatees were machining rather than assembly employees. It argues that these employees were laid off based on a business decision to restructure the machining operation to support the core business only. It further argues that their layoffs were properly deemed permanent given this restructuring.

The record supports the Respondent's assertions that the demand for machining was down due to a shift to less-heavily machined products and a decline in the general tool business. Nonetheless, the Respondent's argument concerning the layoff of the machining employees fails for much the same reason that its more general argument concerning the layoff fails: a complete lack of evidence that the Respondent was even considering such drastic action before it became aware of the union campaign. The Respondent claims that a reorganization plan for machining had been ''in the works'' for a year prior to the layoff. The record, however, does not support this claim. Indeed, Chief Executive Officer (CEO) Frank Schoenwitz testified that he decided to restructure the machining operation toward the end of February 1993—i.e., around the very time that the Union filed its petition.[4]

b. The Respondent further argues that the judge improperly failed to distinguish between two separate questions: whether a layoff of some type was lawful and, if so, whether the layoff was properly designated as permanent rather than temporary. Instead, the Respondent contends, the judge found that the Respondent's designation of the layoff as permanent ''tainted'' the entire layoff.

As the judge found, the General Counsel established a strong prima facie case that the March layoffs were unlawfully motivated. At that point, the Respondent bore the burden of demonstrating that it would have taken the same action in the absence of its employees' protected activity. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *Transportation Man-*

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

We also find without merit the Respondent's allegations of bias on the part of the administrative law judge. After full consideration of the record and the judge's decision, we perceive no evidence that the judge made prejudicial rulings or demonstrated bias against the Respondent.

[2] We shall modify the judge's recommended Order in accordance with our decision in *Indian Hills Care Center*, 321 NLRB 144 (1996).

[3] Moreover, in adopting the judge's conclusion that former Supervisor Robert Sprague unlawfully interrogated employee David Thomas and gave Thomas the impression that employees' union activities were under surveillance, we do not rely on the Respondent's failure to deny that portion of Sprague's testimony set forth in sec. B,1, par. 4 of the judge's decision, because such testimony involved privileged attorney-client communications which the judge properly found inadmissible.

[4] The Union filed its petition on February 24, 1993, and Schoenwitz testified that he learned of the organizing activity perhaps 2 days earlier. As the General Counsel points out, however, the employment and benefits manager, Dennis Scheer, interrogated an employee about the Union on February 12, and other supervisors engaged in interrogation on February 8 and 15. Their knowledge of the campaign is imputable to the Respondent.

agement Corp. v. NLRB, 462 U.S. 393 (1983). In agreement with the judge, we find that the Respondent failed to demonstrate that it would have taken the action that it did—the permanent layoff of 29 employees—had there been no union campaign. We further find that the Respondent failed to demonstrate that it would have instituted even a temporary layoff in the absence of the campaign. The record is devoid of any documentation or credited testimony indicating that the Respondent had plans for a layoff of any kind prior to the filing of the petition.

As to the Respondent's claim that the judge placed undue emphasis on the permanency of the layoffs, we note that the judge made two separate points in this regard, only one of which we rely on. The judge first noted that the Respondent departed from past practice (as well as its own handbook) in making the layoffs permanent. He found that this departure suggested an unlawful motive. We agree with this finding. The judge went on to state, however, that the Respondent disenfranchised the laid-off employees by making their layoffs permanent, and he found this to be a further indication of an unlawful motive. We do not rely on this finding. There is no evidence that the Respondent selected the particular employees to be laid off based on their support for the Union; rather, the evidence shows only that the Respondent used a mass layoff to intimidate its employees and to discourage them from voting for union representation. Accordingly, we do not rely on the judge's discussion regarding disenfranchisement of the discriminatees or on cases resting on such a theory of violation.

c. The Respondent excepts to the judge's finding that the only difference in the Respondent's economic condition in the first quarter of 1993 from that in the same period in 1990, 1991, and 1992 was the union organizational drive. Although the judge may have overstated matters somewhat—the backlog of orders was lower in early 1993 than it had been in the 3 previous years—we agree with the judge that the Respondent failed to sustain its burden of showing that it would have taken the action that it did in the absence of the union campaign.[5] As noted above, there is no credited evidence indicating the Respondent was planning a layoff of any kind before the Union filed its petition.[6]

3. In his decision, the judge referred to communications between the Respondent's supervisors and its counsel. The Respondent argues that, as the judge sustained its objections to questions regarding these communications on grounds of privilege, he should not have relied on these communications. We have disregarded all testimony and offers of proof concerning these conversations. Consequently, in adopting the judge's credibility resolution regarding Frank Schoenwitz, we do not rely on any statements involving privileged communications. The judge's finding that Schoenwitz was ''extremely evasive and certainly less than candid'' and specific examples cited by the judge of Schoenwitz' lack of candor in testifying provide a sufficient basis on which to discredit him.

4. The judge found that the production and maintenance unit sought by the Union constitutes an appropriate bargaining unit. The Respondent excepts, arguing that six positions should be included as plant clerical: manufacturing secretary, machining secretary, project manager secretary followup, production control scheduler, estimating clerk, and fin and spare parts estimator.[7] The Respondent further notes that three of these positions—machining secretary, estimating clerk, and fin and spare parts estimator—are not discussed in the judge's decision.

We agree with the judge's findings that the manufacturing secretary and the project manager secretary followup work in an office area in the plant and perform typical office clerical functions including typing, computing employee hours, and making travel arrangements. Indeed, the Respondent did not except to those findings. We also note that the machining secretary performs similar office clerical duties such as typing, faxing, telephoning, computing employee hours, and running the master telephone switchboard in the machining facility. The Respondent claims, however, that

[5] Unlike the judge, we do not rely on an inference that the Respondent's failure to introduce the documents underlying its economic defense indicates that the documents would be unfavorable to the Respondent. We note that the General Counsel was given a chance to inspect these documents following the hearing, and did not choose to supplement the record with the results of any such inspection.

[6] The Respondent also argues that, even assuming the illegality of the layoffs is established, no remedies should be granted to five of the discriminatees because, before the complaint in this case had issued, they had entered into private settlement agreements with the Respondent in which they had waived all legal rights arising from their employment with the Respondent in exchange for increased severance pay. We leave to the compliance stage of these proceedings the determination of the effect that the amounts received shall have on these employees' backpay awards. In so limiting the inquiry, we note that these settlement agreements are distinguishable from those at issue in *Hughes Christensen Co*., 317 NLRB 633 (1995), in which the three discriminatees in question had been members of the union committee negotiating over the implementation of a plant relocation and downsizing. At a time when their unfair labor practice charges alleging discriminatory denial of transfers had been dismissed as lacking in merit by the Regional Director and an appeal to the General Counsel was pending, the three employees had entered agreements waiving any claims arising from their employment in exchange for enhanced severance payments. Member Fox, who did not participate in *Hughes Christiansen*, takes no position on the correctness of that decision.

Member Cohen would leave to compliance the effect of the settlement agreements in the present case on both reinstatement and backpay.

[7] The Respondent also argues that the packaging and storage employees were improperly excluded. We agree with the judge's exclusion of these employees.

these three secretaries should be included in the unit because they have frequent daily contact and interaction with production employees. We disagree. The record evidence shows that the only contact between these secretaries and production employees involves either making travel arrangements and securing travel advances, or verifying the hours on an employee's timesheet in order to make the necessary corrections. Not only is this contact minimal, it does not directly involve production work. Accordingly, we find that these three secretaries are office clericals rather than plant clericals, and are therefore properly excluded from the unit. See *Hygeia Coca-Cola Bottling Co*., 192 NLRB 1127, 1129 (1971); *Dunham's Athleisure Corp*., 311 NLRB 175, 176 (1993).

As for the production control scheduler, this person schedules the date for materials to arrive, the date for wiring and assembly, and the number of people required for the job. The judge specifically found that this classification, along with several others, involves work skills and content that ''are clearly technical and approaching professional'' and ''bear no relationship to those of production employees,'' and the Respondent did not except to those findings. Instead, the Respondent claims that the judge erred in finding that the production control scheduler has only minimal contact with packaging employees and shares only a remote community of interest with production employees. Although the record contains testimony that the scheduler is on the floor ''quite a bit,'' the record also indicates that this contact only involves communications between the scheduler and packaging employees and then only if they are having problems getting material in on the scheduled date. Accordingly, we find that the production control scheduler has only limited contact with unit employees and, therefore, the judge properly excluded this position from the bargaining unit.

The estimating clerk works in an office area performing clerical functions for the quoting-and-estimating and the general tool employees, such as gathering and computing information on cost of materials and maintaining files on all quoted jobs. Her work requires frequent communication with customers and, if a problem developed with an order, the clerk would at times have to go out on the floor to check on the order with the machining employees. The estimating clerk testified, however, that she spends 99-1/2 percent of her time in the office area rather than on the production floor. We find that the estimating clerk not only performs basic clerical tasks but that her contact with unit employees is negligible. We, therefore, would exclude the estimating clerk from the bargaining unit. See *Nuturn Corp*., 235 NLRB 1139 (1978).

The fin and spare parts estimator works with the estimating clerk in the machining building. He is responsible for estimating the cost of spare machine parts for customers. If an ordered part is not complete, this employee has to estimate what it will take to finish the part so he can give the customer a delivery date. Consequently, according to the vice president of machining, the fin and spare parts estimator has ''close contact'' with employees on the floor. On these facts we would exclude the fin and spare parts estimator. His work, like that of the production control scheduler, involves skills far different from that of the production employees. Moreover, the testimony that the estimator has ''close contact'' with unit employees appears limited to checking on unfinished parts, and there is no evidence that such contact is frequent or requires substantial interaction with production employees. In these circumstances, we find that the record fails to establish that the fin and spare parts estimator should be included in the unit.

The cases relied on by the Respondent, *Hamilton Halter Co*., 270 NLRB 331 (1984), and *American Optical Corp*., 236 NLRB 1046 (1978), are distinguishable. The employees found to be plant clericals in those cases were at times assigned to work in the production or shipping areas. The disputed employees here have never performed any production work.

5. We also agree with the judge that the Respondent's unfair labor practices make a fair election unlikely and warrant a bargaining order under *NLRB v. Gissel Packing Co*., 395 U.S. 575 (1969). As the judge noted, the Respondent engaged in hallmark violations of the Act. In this regard, we note the unlawful mass layoff immediately before the scheduled representation hearing and the CEO's threat that the division would be ''doomed'' if the Union gained representative status. The abrupt and unlawful permanent layoff of over 20 percent of the unit sent a loud and clear message about the risks of seeking representation, a message well calculated to cause the employees to think twice about the consequences of their decision. Lest the remaining employees have any doubt that bringing in a union would jeopardize their future as well, CEO Schoenwitz hammered home the point with his warning about the ''doom'' of the Flexible Assembly Division under union representation.

The Respondent argues that its unfair labor practices cannot be found to have dissipated the Union's support—and that a bargaining order is therefore inappropriate. It notes that eight employees signed cards after the March layoffs.

We are not persuaded by this argument. In *Massachusetts Coastal Seafoods*, 293 NLRB 496 (1989), *all* of the authorization cards were signed after the respondent's president made a speech threatening the employees with plant closure and massive layoffs.[8]

[8] Indeed, the employees went to the union hall en masse immediately following the speech.

The Board therefore found that it could not be said that the initial threats had nullified majority support for the union, but nonetheless found a bargaining order appropriate. In so doing, the Board noted that the respondent had continued to engage in unlawful conduct, thereby driving home the point that it would take whatever steps were necessary to prevent unionization and undermining the union's support so as to make a fair election unlikely. Id. at 499–500. Similarly, in *Devon Gables Lodge & Apartments*, 237 NLRB 775, 777 (1978), the Board reversed the administrative law judge's determination that a bargaining order was not warranted because a substantial number of cards were signed after the commission of some of the unfair labor practices. The Board again noted that additional unlawful conduct postdated the card signing, but further stated that it would have reached the same result even absent this fact. Id.

Here, the vast majority of the cards—70 of 78—were signed before the massive layoff. Moreover, five of the eight employees who signed afterwards were among those permanently laid off—and hence had nothing left to lose. While a few other employees were apparently insufficiently cowed by the layoffs to forego seeking union representation, it is likely, as we have found, that many of the 70 earlier signers would have second thoughts after seeing one-fifth of their coworkers lose their jobs because of the Union's campaign. Moreover, we note that CEO Schoenwitz' warning that the division would be ''doomed'' if the Union gained representational status, a hallmark violation that demonstrated the Respondent's continued resolve to keep the Union out by any means necessary, followed the signing of all the additional cards. Such a threat is highly coercive under any circumstances. Here, it was particularly likely to weigh heavily on the employees—cardsigners and nonsigners alike—in view of the object lesson provided by the unlawful massive layoff. Thus, we find that the Respondent's unfair labor practices had a clear tendency to dissipate the Union's support, notwithstanding the fact that roughly 10 percent of the authorization cards were gathered after the egregious unlawful conduct had begun.

On a related issue, we find that a bargaining order is not precluded by the fact that the Union did not attain majority status until after the layoffs, falling one card short as of March 11.[9] In *Massachusetts Coastal Seafood*, discussed above, the Board deemed a bargaining order warranted even though the Union had not gathered any cards, much less attained majority support, at the time of the respondent's initial threats of plant closure and massive layoffs. See 293 NLRB at 499. Moreover, the Court of Appeals for the District of Columbia Circuit has categorically rejected the argument that a bargaining order should not issue where most of the illegal conduct took place before the union gained majority support. See *Davis Supermarkets v. NLRB*, 2 F.3d 1162, 1175 (D.C. Cir. 1993). In that case, the court first noted that the unfair labor practices continued after the union had attained majority status. It further stated, however, that to accept the respondent's argument would be to erect an artificial and ''nonsensical'' time barrier to proper remedial relief. Id.

Such a barrier would be particularly artificial here, where the Union was but one card short of a majority when the Respondent carried out the unlawful mass layoffs. Moreover, as in both *Massachusetts Coastal Seafoods* and *Davis Supermarkets*, the Respondent continued to engage in unfair labor practice—including threatening its employees with plant closure—following the Union's attainment of majority status.[10] On this record, we do not hesitate to find that the Respondent's unfair labor practices indeed undermined the Union's majority support.

In addition to undermining union support, we find that the Respondent's conduct is almost certain to have a residual coercive effect that cannot be dispelled by traditional remedies. As noted by the judge, the unfair labor practices continued over a considerable period of time, and were committed by high-level managers as well as first-line supervisors.[11] The threat of plant closure (the prophecy of ''doom'') was made by the highest company official, Schoenwitz—the very person capable of carrying out this threat, and one who had already demonstrated his readiness to jettison employees in order to avoid dealing with a union. Moreover, the threat was conveyed to each and every employee. Neither the threat nor the mass layoff is likely to be forgotten by the employees. To the contrary, these are the types of dire warnings and concrete measures certain to exert a substantial and continuing coercive impact on any employee, whether current or subsequently hired, contemplating a vote in favor of unionization.[12]

[9] The Union had gathered cards from 70 of the 140 unit employees as of that date. It first attained majority status on March 16, when the first of the eight additional cards was signed.

[10] In addition to Schoenwitz' threat, Vice President of Manufacturing Jerry Scroggins, Division President Russell Hanson, and First-Line Supervisor Marlin Phillips also made coercive statements to employees following the Union's attainment of majority status.

[11] Coercive statements were made by Division President Russell Hanson, Vice President of Manufacturing Jerry Scroggins, and Employment and Benefits Manager Dennis Scheer as well as by Company President and CEO Frank Schoenwitz.

[12] The Respondent asserts that it has erased any lingering effects of the layoffs by voluntarily offering reemployment to the laid-off employees. However, the alleged offers of reemployment appended to the Respondent's brief are nonrecord evidence and therefore have not been considered by the Board.

In any event, the great majority of the Respondent's communications were not offers of reemployment, let alone offers to reinstate the employees to their former position. They simply advised the employees that openings existed in ''hourly positions'' that they might apply for. Those ''offers'' were not accompanied by any admissions

Thus, we agree with the judge that a fair election cannot be held under these circumstances, and that a bargaining order is necessary to protect employee rights.

AMENDED CONCLUSION OF LAW

Delete paragraph 4(c) and reletter the subsequent paragraphs accordingly.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, Weldun International, Inc., Bridgman, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Permanently laying off and terminating its employees for engaging in conduct protected by the Act by joining and supporting United Steelworkers of America, AFL–CIO, CLC.

(b) Coercively interrogating its employees concerning their union membership, activities, and sympathies and the union membership, activities, and sympathies of other employees.

(c) Creating the impression that its employees' union activities are under surveillance by the Respondent.

(d) Telling its employees that the reason laid-off employees could not be recalled was because of the Union and the fact that the Union had filed unfair labor practice charges against the Respondent.

(e) Telling its employees that the layoff of other employees was related to the Union.

(f) Impliedly threatening its employees with plant closure by telling them that the FAS division would be ''doomed'' if they selected the Union to represent them.

(g) Failing and refusing to bargain in good faith with the Union which represents a majority of employees in an appropriate unit as demonstrated by valid authorization cards.

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

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

(a) Within 14 days from the date of this Order, offer full reinstatement to the employees named below to their pre-March 11, 1993 jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and remove from its files any references to their unlawful layoffs, and within 3 days thereafter notify the employees in writing that this has been done and that the layoffs will not be used against them in any way.

Jerry Boone	David Pecoraro
Steve Collins	Jeff Pomeroy
Dawn Condon	Roger Reitz
Ken Curtis	Randy Roach
John Delaney	Douglas Rouse
Jim Doud	Dave Sinner
Bob Dunning	Shayne Smith
Don Hill	Jeff Steinke
Tim Hunt	Bill Taylor
Rex Jackson	Robert Taylor
Del Kirsey	Jerry Thompson
Kurt Lindhorst	Keith Vanderploeg
Gene Matz	James Whitehead
David Mensinger	Ray Zion
Dennis Meyers	

(b) Make the above-listed employees whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of the decision.

(c) On request, bargain with the Union as the exclusive representative of all the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All full-time and regular part-time production and maintenance employees of the employer's Flexible Assembly Systems Division including assembly, machining, general tool and control employees employed at the employer's Bridgman, Michigan facility; but excluding all office clerical employees, Bosch Storage System employees, Bosch Packaging Machine employees, professional employees, guards and supervisors as defined in the Act.

(d) Preserve and, within 14 days of a 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.

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of wrongdoing, promises that the unlawful conduct would not recur, pledges to make the employees whole for lost wages and benefits, or assurances that the Respondent would respect the employees' Sec. 7 rights. Nor is there any evidence that such admissions, promises, and assurances were conveyed to other employees in the unit. In addition, we have only the Respondent's untested word, in the form of an affidavit, that actual reemployment offers were extended to even a few employees. Under these circumstances, the Respondent has failed to establish that the need for a bargaining order has in any way been obviated. Finally, we note that giving the traditional Board reinstatement and backpay remedies at the present time would have little chance of restoring the original unit, since belated offers are not likely to be accepted. See Weiler, ''Promises to Keep: Security Workers' Rights to Self-Organization under the NLRA,'' 96 Harv. L. Rev. 1769, 1792–93 (1983).

(e) Within 14 days after service by the Region, post at its Bridgman, Michigan facilities including the FAS and Machining Building and the Packaging Machine Building and the Bosch Storage Building copies of the attached notice marked ''Appendix.''[13] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent 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. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 15, 1993.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

[13] 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 do anything that interferes with these rights.

WE WILL NOT coercively interrogate employees regarding their membership in or activities on behalf of United Steelworkers of America, AFL–CIO, CLC or any other labor organization.

WE WILL NOT create among employees the impression that their union activities are under surveillance by us.

WE WILL NOT tell our employees that the reason laid-off employees could not be recalled was because of the Union and the fact that the Union had filed unfair labor practice charges against us.

WE WILL NOT tell our employees that the layoff of other employees was related to the Union.

WE WILL NOT impliedly threaten our employees with plant closure by telling them the FAS division would be ''doomed'' if they select the Union to represent them.

WE WILL NOT discharge or permanently lay off employees because these employees or other employees have joined or assisted the Union.

WE WILL NOT fail or refuse to recognize and bargain with the Union as the exclusive collective-bargaining representative of the employees in the unit.

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

WE WILL, on request, bargain with the Union as the exclusive representative of all the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All full-time and regular part-time production and maintenance employees of our Flexible Assembly Systems Division including assembly, machining, general tool and control employees employed at our Bridgman, Michigan facility; but excluding all office clerical employees, Bosch Storage System employees, Bosch Packaging Machine employees, professional employees, guards and supervisors as defined in the Act.

WE WILL, within 14 days from the date of the Board's Order, offer to the employees named below full reinstatement to their pre-March 11, 1993 jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

Jerry Boone	David Pecoraro
Steve Collins	Jeff Pomeroy
Dawn Condon	Roger Reitz
Ken Curtis	Randy Roach
John Delaney	Douglas Rouse
Jim Doud	Dave Sinner
Bob Dunning	Shayne Smith
Don Hill	Jeff Steinke
Tim Hunt	Bill Taylor
Rex Jackson	Robert Taylor
Del Kirsey	Jerry Thompson
Kurt Lindhorst	Keith Vanderploeg

Gene Matz	James Whitehead
David Mensinger	Ray Zion
Dennis Meyers	

WE WILL make the above-listed employees whole for any loss of earnings and other benefits resulting from their terminations, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful layoffs of the above-listed employees, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the layoffs will not be used against them in any way.

WELDUN INTERNATIONAL, INC.

Mark Rubin, Esq. and *Janice Jones, Esq.*, for the General Counsel.[1]

Frederick A. Stuart, Esq. (Stuart, Irvin & Sanford), of Atlanta, Georgia, for the Respondent.

Dan Lembach, Organizer, United Steelworkers of America, of Taylor, Michigan, for the Charging Party.

DECISION

STATEMENT OF THE CASE

ROBERT C. BATSON, Administrative Law Judge. On March 15, 1993,[2] United Steelworkers of America, AFL–CIO, CLC (the Union or the Charging Party) filed an unfair labor practice charge in Case 7–CA–34343 against Weldun International, Inc. (Respondent, Company, Employer, or Weldun). On July 23, 1993, the Union filed a charge in Case 7–CA–34805 and an amended charge on September 13, 1993. Both charges allege that Respondent had violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act. On September 15, 1993, the Regional Director for Region 7 (Detroit, Michigan) issued an order consolidating cases, amended consolidated complaint and notice of hearing (the operative complaint) alleging that the Respondent had committed numerous unfair labor practices in response an organizing campaign by the Union which originated in mid-November 1992 and accelerated in early February.

The complaint as further amended at the hearing alleges these violations specifically are that Respondent violated Section 8(a)(1) by coercively interrogating its employees; creating an impression of surveillance of their union activities; threatening unspecified reprisals and loss of benefits; elimination of consideration for a job-bidding system; telling employees that laid-off employees could not be recalled because unfair labor practice charges were filed and that laid-off employees could not be recalled because of the Union; that employees were laid off because of the union activities and that the flexible assembly system division would be ''doomed'' if the Union were selected as the collective-bargaining representative of the employees all in violation of Section 8(a)(1) of the National Labor Relations Act 29 U.S.C. § 151 et seq. (the Act).

As a result of the Union's organizational activities about February 22, 1993, the Union hand-delivered a letter to Respondent which constituted a continuing request that it be recognized as the exclusive collective-bargaining representative for all the employees in a unit therein described. On February 24, 1993, the Union filed a petition for certification of representatives in Case 7–RC–20006 (G.C. Exh. 34) requesting an election be conducted pursuant to Section 9 of the Act in a unit of:

> All full-time and regular part-time production and maintenance employees of the employer's Flexible Assembly Systems Division including assembly, machining, general tool and control employees employed by the Employer at its Bridgman, Michigan facility; but excluding all office clerical employees, Bosch Storage System employees, Bosch Packaging Machine employees, professional employees, guards and supervisors as defined in the Act.

Thereafter, in addition to continuing its course of interrogations, threats of reprisals, and other unlawful 8(a)(1) activities against its employees on March 11 and 12, contrary to its past practice, it permanently laid off 29 of the employees in the flexible assembly system division, i.e., the unit sought to be represented by the Union in violation of Section 8(a)(3) and (1) of the Act.

The complaint further alleges that from about November 12, 1992, until about March 9, 1993, and at all times thereafter a majority of the employees in the unit described above designated the Union as their representative for the purposes of collective bargaining and since that time the Respondent has failed and refused to recognize and bargain with the Union in violation of Section 8(a)(5) and (1).

It further alleges that the conduct described above is so serious and substantial in character that the possibility of erasing the effects of these unfair labor practices are remote and the likelihood of conducting a fair election by the use of traditional remedies is slight and the employees' sentiments regarding representation have been expressed through authorization cards would, on balance, be protected better by the issuance of a bargaining order other than by traditional remedies alone. Accordingly, the General Counsel requests that in addition to the usual cease-and-desist order, the Respondent offer the employees permanently laid off on March 11 and 12 full reinstatement to their former positions without prejudice to seniority or other rights and privileges and in all other respects affecting their terms and conditions of employment, and restore the pre-March 11, status quo ante and make them whole for any loss of pay, earnings, or other benefits they may have lost by reason of Respondent's conduct against them and under the doctrine of *NLRB v. Gissel Co.*, 395 U.S. 575 (1969), Respondent be ordered to recognize and, on request, bargain collectively with the Union as the exclusive representative of the employees in the unit.

In its filed answer to the operative complaint, the Respondent admitted all procedural allegations, but denied the appropriateness of the alleged bargaining unit and that it had violated Section 8(a)(1), (3), and (5) of the Act in any manner.

The General Counsel has sustained the burden of proof by a preponderance of evidence that Respondent violated Sec-

[1] The General Counsel or Government.

[2] All dates here are 1993 unless otherwise indicated.

tion 8(a)(1), (3), and (5) of the Act substantially as alleged in the operative complaint. I further find that the unit described in the complaint is an appropriate unit for the purpose of collective bargaining. I also find that at an appropriate time the Union obtained valid untainted authorization cards designating it as the exclusive collective-bargaining representative from a majority of the employees in the unit. I also find that a bargaining order is warranted to remedy the Respondent's misconduct in applying the tests set out in *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).

The trial in this consolidated case was held before me at St. Joseph and Benton Harbor, Michigan, on various dates between October 26, 1993, and November 18, 1993. At the outset of the hearing, I permitted the General Counsel to amend the complaint to add one additional 2(11) supervisor and an allegation that in addition to the nine 2(11) supervisors and 2(13) agents already named in the complaint, including Respondent's president and chief executive officer (CEO), Frank Schoenwitz. On November 18, 1993, I adjourned the trial in this matter sine die to afford the counsel for the General Counsel an opportunity to examine certain financial records and documents at Respondent's facilities and extended such time to December 31, 1993. A joint request was made to extend the time to February 14, for the General Counsel to examine such documents. This motion was granted. Briefs were received approximately March 14, 1994. Based on the entire record, including my observation of the demeanor of the witnesses testifying under oath, and after consideration of briefs filed by the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, Weldun International, Inc., is and has been at all times material a corporation, with an office and place of business located at Bridgman, Michigan (Respondent's Bridgman Campus), where it is engaged in the design, manufacture, and sale of automotive assembly and test systems. During the calendar year preceding the issuance of the complaint here, the Respondent in conducting its business operation described above sold and shipped from its Bridgman, Michigan facility goods valued in excess of $50,000 directly to points outside the State of Michigan. The consolidated complaint alleges, the Respondent admits, the evidence establishes, and I find that at all times material, Respondent has been an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION

United Steelworkers of America, AFL–CIO, CLC is and has been at all times material here a labor organization within the meaning of Section 2(5) of the Act. As is admitted and established by the evidence, I find that it is a labor organization within the meaning of Section 2(5) of the Act.

III. ALLEGED UNFAIR LABOR PRACTICES

A. *Overview of Respondent's Operations and the Dispute Here*

A rather detailed analysis of Respondent's organizational structure at its Bridgman, Michigan campus and whether Weldun's flexible assembly systems division including machining, general tool and control employees constitutes a unit appropriate for purposes of collective bargaining under Section 9 of the Act which was one of the most litigated issues in this case. The Respondent, Weldun International, Inc., is a wholly owned subsidiary of the Robert Bosch Corporation, an Illinois corporation, which in turn is a wholly owned subsidiary of Robert Bosch, a German corporation. (Tr. 1034.) The machining and assembly facilities at issue in this case are located at Respondent's Bridgman campus and are under the administration of Weldun's flexible assembly system division (FAS). (Tr. 1035.) As more fully set forth in an article written by Respondent's president and CEO, Frank H. W. Schoenwitz, and published in The Herald-Palladium Newspaper of Benton Harbor-St. Joseph, Michigan, on Sunday, February 28, 1993. Subsequent to Bosch's purchase of Weldun effective January 1, 1987,[3] Respondent created two new operations at the Weldun Bridgman campus in addition to the existing FAS operation; the Bosch Storage System, which is a startup operation engaged in the manufacture of automotive library computer tape systems (Tr. 1047) and Bosch Packaging Machinery, a business engaged in the production of packaging machinery. (Tr. 1039.) Bosch Storage Systems only began to ship products in mid-1993. (Tr. 1050.) The packaging operation engaged in the assembly of small packaging machines began a test practice in 1989 and is under the aegis of another Robert Bosch subsidiary headquartered in Plainville, New Jersey. As noted above, the article written by a Mr. Schoenwitz in late January and published in The Herald-Palladium paper on Sunday, February 28, describes its operation. In addition thereto it has a significant bearing on Respondent's defense with respect to the massive March 11 and 12 permanent layoffs in the FAS division. Therefore, it will be reproduced essentially as written as it best describes Respondent corporate structure:

> The year 1992 marked Weldun International's 40th anniversary in business, and it was also the most successful year in the history of the company.
>
> Sales grew in excess of 50 percent over the previous year and all business units were profitable, and that at a time when the economic climate was still overshadowed by the recession and massive layoffs nationwide.
>
> The company, which is still known in the community under the name of Weldun, is in actuality Bosch's Automation Group, comprising four independent businesses, which operate under separate names, have separate missions, and account separately for their financial performance.
>
> Although each of the four companies has its own individual purpose, the overall values are the same, and the shared mission of the group reads that: We are committed to help improve our customers' competitiveness by providing state-of-the-art products and engineered solutions to increase productivity of our industrial customers with assembly, test, and packaging needs, and our information systems' customers, who have data storage and retrieval needs.

[3] This is apparently when Frank Schoenwitz came on board as Respondent's president and chief executive officer.

The four companies are wholly owned subsidiaries of the Robert Bosch Corp., headquartered in Broadview, Ill.

The list of companies, beginning with its oldest and still largest member, is:

Weldun–Flexible Assembly Systems, located in Bridgman, is a systems integration company which builds flexible assembly and test systems for the automotive, computer, appliance, and pharmaceutical industries. Weldun-FAS is one of the two or three most respected integration companies in this field in North America.

Bosch Automation Products (BAP), located in Buchanan, markets and manufactures a wide array of automation products, from material transport systems to robotic devices. BAP continues to grow very rapidly, and is now the largest supplier with the broadest line of automation products in North America.

Bosch Packaging Machinery, located in Bridgman, builds form-fill-and-seal packaging machines, engineered primarily for the frozen food market. These machines, originally designed in Europe, are now the finest machines in their respective field.

Bosch Storage Systems, located in Bridgman, is the newest member of the Borsch Automation Group. It began operations in January. BSS will market and manufacture automated tape libraries for the data processing industry, specifically, the ''glass house'' or computer room. BSS has the best library in the industry, and will compete with formidable companies, like StorageTek and IBM. We are confident that this business will be successful as well.

The most difficult task during the past years has been to make the transition from a small, privately held company to a well-organized and fast-growing subsidiary of our world-class parent company, namely Robert Bosch GimbH of Germany.

The future challenge will be to overcome the physical limitations of the group's business in terms of plant and equipment.

If growth over the past few years serves us as an indicator, then Bosch's Automation Group will reach and exceed its revenue goal of $200 million within the next five years.

The group's 1992 success was largely the result of well thought out missions and strategies and the single-minded pursuit of our business goals.

Even though the entire group employees 430 full-time people, last year's 50 percent increase in revenues was achieved by adding only 30 new hires.

Through our dedication to the continuous improvement process, the Bosch Automation Group was able to increase its sales-per-employee by 70 percent over the last four years.

The year 1993 will see further major improvements through total quality management and our desire to obtain ISO 9000 certification in 1994.

In another area which is of great interest to Bosch, our Weldun-FAS division achieved public recognition for the unique MT3 training program for high school students (MT3 stands for Manufacturing Technology-Targeted Training), which is also being sponsored by four high schools.

By May 1993, 70 students will have been graduated from this program since its inception in 1992.

A number of area companies are already interested in hiring these young and well-trained people for a variety of entry level positions, which may lead to or involve college education at Lake Michigan College (another program partner).

This program has not only received significant attention outside of our geographical area, but just recently, a grant from the Michigan Department of Education was received, recognizing the MT3 program as an outstanding contribution for bringing high schools, industry and higher education closer together for the benefit of our young people.

The business outlook for 1993 continues to be bright for the Bosch Automation Group. However, economic signals are still inconsistent, and numerous large corporations, including some of our key customers, are still facing some financial difficulties.

The Bosch Automation Group will continue to make important contributions to the local economies in 1993 through steady growth in employment.

As noted above the first organizational activity began in mid-November 1992, when Dave Pecararo and other employees contacted a union representative to discuss representation. At that meeting on November 12 several employees, at least five, signed authorization cards. At the time, however, Schoenwitz wrote the above-cited article and also at the time of a party the Employer held for its employees in December and a state-of-the-company meeting and party in January there is no evidence that Respondent was aware of current union activity among its employees. At the January party there is voluminous testimony that Schoenwitz announced to his employees, much as he did in the above-quoted article, that 1992 had been the best year that Weldun had ever had and that he had every expectation that 1993 would be as good. There is some testimony, however, that he did advise at that point that some orders were down but that was usual for that time of the year.

As also noted above it was not until mid-February, approximately February 11, that the union organizational drive accelerated during a period of about 10 days when essentially all the additional cards were signed. It appears that the union organizational meetings were held at a facility called Park Inn International at Stevensonville, Michigan, not too far from Bridgman. During this same period of time, a period of 10 days, several of the organizational meetings were held there and there was also some handbilling at the Employer's facility. (Tr. 442, 443, 446, 457.)

As will be discussed more thoroughly hereafter the General Counsel introduced 72 authorizations cards executed prior to Respondent's March 11 and 12 layoffs and an additional 8 cards were signed shortly after the March 11 and 12 layoffs which occurred a few days before the representation hearing set for the case in 7–RC–20006.

As noted, in early February Respondent commenced its organizational response by coercively interrogating its employees, creating the impression of surveillance, and threatening unspecified reprisals and loss of benefits, elimination of

some benefits, the permanent layoff of 29 unit employees and there is other alleged unlawful activity.

The employees' handbook (G.C. Exh. 33 at p. 7), which was published by Schoenwitz after he became chief executive officer, contains an item called union-free principal.

> **Union-Free Principle**
>
> We believe that the best relationships result from a willingness to deal directly with each other rather than through a third party. We have a union-free operation, and it is our desire that it will always be that way.
>
> No company is free from day-to-day problems, but we believe that through appropriate policies, procedures, and an open-door policy, we can address problems in a timely manner. All of us must work together to keep our Company strong.
>
> You are encouraged to bring problems to your supervisors and other members of the management team who you feel can help. We, in turn, promise to listen to your concerns with respect and do our best to help solve problems. We believe that our employees want the right of every individual to express their opinions, to be heard and to act within the overall business goals of the Company.

Despite the above-quoted ''union-free'' language in the handbook, however, Schoenwitz replied on cross-examination that when he heard of the union organizational activities ''I was indifferent about it.'' (Tr. 1121.) Notwithstanding his indifference, the following day Schoenwitz met with Respondent's Atlanta, Georgia, based attorney on February 25, 1 day after the Union filed its representation petition.

It is not alleged or found that the union-free principles expressed in the employee handbook violates the Act in any manner; however, it does tend to belie a professed indifference to the Union's organizational activities among Respondent's employees.

Moreover, in Schoenwitz' February report to the Bosch corporate organization he states: ''United Steelworkers Union initiated a drive to mobilize a [sic.] FAS countermeasures are being planned and with RBUS/PER and F. STEWART.'' (G.C. Exh. 100, p. 2, emphasis added.)

The foregoing is an overview of Respondent's operations as of February 1993, at which time it became aware of the efforts by its employees to obtain union representation. The General Counsel alleges that at this point Respondent entered into its unlawful activities to counteract the union activities of its employees.

For decisional organization purposes, I shall first dispose of all the independently alleged 8(a)(1) violations; those alleged to have occurred both before and after the massive permanent layoffs of March 11 and 12, which are alleged to have been discriminatorily motivated.

I shall then dispose of the allegation that the permanent layoff of 29 unit employees violated Section 8(a)(3) and (1) of the Act. That the employer permanently laid off these employees is admitted, thus this section will deal primarily with the Respondent's asserted defense that the layoffs were necessitated by loss of business and its economic forecast that such loss of business was permanent which necessitated its ''downsizing'' the Flexible Assembly Systems Division (FAS).

I shall then determine whether the unit described above which the Union seeks to represent is an appropriate unit for purposes of collective bargaining or whether as the employer contends the only appropriate unit would include the other two divisions located at the Bridgman Campus: Bosch Storage Systems and Bosch packaging operation.

The fourth section will deal with a determination of whether the Union at some appropriate time represented a majority of the employees in the unit found to be appropriate as demonstrated by executed valid authorization cards designating the Union as their exclusive collective-bargaining representative.

The final section, assuming the Union obtained majority status as demonstrated by valid authorization cards, will be a consideration of the General Counsel's request that Respondent be ordered to bargain with the Union under authority of the *Gissel* doctrine:

> In ascertaining whether a bargaining order is warranted to remedy the Respondent's misconduct we apply the test set out in *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969). In *Gissel*, the Court delineated two types of situations where bargaining orders are appropriate: (1) ''exceptional'' cases marked by ''outrageous'' and ''pervasive'' unfair labor practices; and (2) ''less extraordinary'' cases marked by ''less pervasive'' practices. Thus, the Court placed its approval on the Board's use of a bargaining order in ''less extraordinary'' cases where the employer's unlawful conduct has a ''tendency to undermine [the union's] majority strength and impede the election processes.'' The Court indicated that when unfair labor practices are of this character and the union at one time had a majority support among the unit employees, the Board may enter a bargaining order.

B. *The Alleged Violations of Section 8(a)(1)*

1. Robert Sprague

David Thomas, an employee of Respondent since May 1979 who operates a rotary surface grinder in the Flexible Assembly Systems (FAS) Division, gave testimony that, about February 8 or 9, his then machine supervisor, Robert Sprague, came to his workstation and asked him if he knew anything about a union meeting. Thomas replied that he did not. According to Thomas, later that same day Sprague came back to Thomas and asked him if he had signed a union card to which Thomas replied in the negative. Later the same day Sprague returned and asked Thomas if he was involved in the Union. Thomas countered by asking Sprague if Sprague thought he was. A day or so later while a group of employees including Sprague and Thomas were on their way to a CIP (Continuous Improvement Program) meeting Sprague ''made some comment about going to get our union buttons.'' While in his testimony at trial Thomas placed three of the conversations about the Union with Sprague on the same day, apparently in his pretrial affidavit given to a Board agent he had stated ''that during the first 3 days of the of the week of February 8th he was approached several times by Bob Sprague while working at his machine.''

I was impressed with Thomas' testimonial demeanor and do not find the perceived conflict between his trial testimony and his affidavit to warrant discrediting his trial testimony.

Machining Supervisor Sprague had been employed by Respondent since 1966, having started as a window washer and as more fully discussed below was permanently laid off along with approximately 29 other employees on March 11 or 12, 1993. Sprague said he was, in February, very much against the Union and admits that he asked Thomas if he had his card turned in, but did not recall using the word ''Union.'' On another occasion when Thomas asked to leave early with the reason of doing something about a stereo Sprague said, ''Why don't you tell me you're going to set up chairs for the meeting.'' Again, Sprague denied using the word ''Union.''

Sprague who testified rather extensively on other matters which are not denied and will be discussed more fully below was a very credible witness. Respondent contends that Sprague should not be credited because he was a ''turncoat'' supervisor and angered at the Company over his termination. Much of Sprague's testimony, however, some of which was made by way of offer of proof, and is much more egregious and damaging to the Respondent than these instances of interrogation and possibly impression of surveillance is not denied. Any testimony adverse to the employer given by a terminated supervisor must be closely scrutinized and examined in detail. I find that Sprague's testimony survives this scrutiny and should be credited. Had Sprague chosen to fabricate testimony to spite his former employer he would have fabricated a far more damaging scenario.

Accordingly, I find the above comments made by Sprague to Thomas to constitute coercive interrogation and create the impression of surveillance of the employees' union activities in violation of Section 8(a)(1) of the Act.

2. Dennis Scheer

James Ireland who has been employed as a toolmaker in the machining building of Respondent since 1985 testified that he attended a union meeting on the evening of February 11, at the Park Inn International in Stevensonville, Michigan. At that meeting he signed a union card and obtained signed cards from several other employees. The following day, February 12, Ireland had occasion to go to the personnel department to check on certain insurance benefits for his wife with Kay Cornwell. Employment and Benefits Manager Dennis Scheer's office was adjacent to Cornwell's. Ireland testified that Scheer saw him there and asked if he had a minute. Ireland replied that he had and walked to the doorway of Scheer's office. Scheer asked Ireland if he knew anything about the union meeting they had last night, Ireland replied that he did not. Scheer told him that they had heard the meeting was going to be in the parking lot after work, but since they did not see anybody there they thought they might have moved it to that bar down the road. Ireland continued to deny knowledge of the meeting. Scheer then asked Ireland if he had been at Weldun during the last union drive and Ireland said that he had not. Scheer continued that he was just curious as to who they contacted this time and if there were a union representative present and observed that if there was not ''those guys had better be careful.'' (Tr. 30–31.) It appears clear that Ireland's denial of knowledge of such meeting was motivated by fear of reprisals by the Employer.

Scheer acknowledged that he had a conversation with Ireland at about the time and under the circumstances described. However, he could not recall any subject matter they might have discussed. However, in response to counsel's specific questions to each of the four statements about the Union, Ireland had alleged Scheer made to him, Scheer responded in a low voice ''No,'' thus denying any mention of the Union during the discussion. Scheer observed that most of Ireland's conversation was with Cornwell. (Tr. 898–902.)

In contrast with Ireland's straightforward testimony, although it did not appear to be rehearsed or conjured up out of thin air, Scheer seemed ill at ease testifying with respect to this brief exchange with Ireland. Cornwell, who was no longer employed by Respondent was not called as a witness. Ireland who was still employed by Respondent and by his denial of any knowledge of the union meeting the night before was fearful of reprisals would hardly have concocted this exchange, particularly Scheer's comment about which employees had been contacted by the Union this time. The Board has long viewed the testimony of a currently employed employee as more likely to be worthy of credit. Based on the testimonial demeanor of Ireland and Scheer, I credit Ireland. Scheer's comments to Ireland constituted coercive interrogation and created the impression that its employees' union activities were under surveillance by the Employer in violation of Section 8(a)(1) of the Act.

3. Brian Jenkins

James Thompson, a hydraulics technician at Weldun FAS north, since February 1978, worked under the supervision of Brian Jenkins in mid-February 1993. He testified as he came to work February 15 he observed union representatives handbilling the employees entering the gate just off Lake Street. Apparently, the handbilling was announcing a union meeting for that evening. During the afternoon, Jenkins came into the shop where Thompson was working, and ''He asked me if I was going to go to the union meeting that night.'' Thompson replied, yes, that he was going and that it was his right to know what was going on. Jenkins made no response at that time. (Tr. 443.) The following day first thing in the morning, according to Thompson, Jenkins came up to him and asked if he had gone to the union meeting. On an affirmative reply, Jenkins asked, ''Who are the people that's trying to organize?'' Thompson replied that he didn't know. Jenkins said, ''This has been going on for some time now, hasn't it?'' Again, Thompson stated that he did not know. (Tr. 444.)

Jenkins had been employed by Respondent for about 10 years, the last 8 of which he was a control supervisor for the FAS Division. He testified that he first learned of the union activity in early February from talk on the floor and employees coming to him with comments about the Union, some of which asked his advice as to whether they should attend such meetings. He named three such employees who approached him and discussed the Union. He says he told those who asked his advice on attending the meeting that if it were him he would attend to find out what was going on and treat it as any other election. However, he categorically denied any conversation with Thompson in any manner about the Union. Thompson, an employee for 15 years, impressed me as being straightforward and forthright in his testimony and I can fathom no reason he would totally have made up these two con-

versations with Jenkins. It is apparent that by this time Respondent was aware of the union activity and was attempting to ascertain as much information as possible about who was involved. I must credit Thompson's testimony that Jenkins had the conversation with him concerning his attendance at the meetings who was trying to organize the employees for the Union. This constitutes coercive interrogation in violation of Section 8(a)(1) of the Act.

4. Dick Koziel

David Pecararo was employed by Respondent as an engine lathe operator in machining from July 1977, until the massive permanent layoff of March 11, 1993. Dick Koziel, vice president of machining, was head of that department. Pecararo was among the first of the employees involved in contacting the Union concerning obtaining representation in mid-November 1992, and among the first to sign an authorization card. He testified that 2 days after the Union filed the representation petition and the day following the supervisory meeting called by President and CEO Frank Schoenwitz at Winschulers in Stevensonville, Michigan, at which Respondent's attorney was present, he had the following conversation with Koziel. It will be recalled that at that meeting Respondent's supervisors were told to make a list of the employees in their unit and evaluate whether or not they would be prone to support the Union.

The conversation with Koziel on February 26 occurred at Pecararo's lathe. Koziel remarked that it looked like there was quite a bit of lathe work starting to come in to which Percararo responded that it was only because they had not gotten around to farming it out yet. Koziel said, ''Nobody better farm the lathe work out or I'd better know the reason why.'' (Tr. 538.) This led to Pecararo's expressing his displeasure with an apparently new pay scale and observed that he thought it was ridiculous that a longtime employee of Weldun could quit and go to a competitor and still run Weldun work, but get paid a dollar an hour more. Koziel replied that the pay scale was a bad situation and said, ''I hope you guys know what you are doing with this Union thing.'' Pecararo responded that they did not have much choice, and the Union was their last resort. Koziel responded, ''Well you know, nobody can make you any promises. But if the Union gets in, it'd be like you guys started from day one.''

This conversation is alleged to be a threat of unspecified reprisals and loss of benefits. Koziel testified that he did not recall a conversation with Pecararo about the Union, but did not specifically deny it. (Tr. 852.) Under all the circumstances here, I find the above constitutes a violation of Section 8(a)(1) as alleged.

5. Stephen Renfer

At some point prior to the onset of the union activity the employer permitted or encouraged certain groups of employees to form committees or groups to come up with suggestions of ways to improve working conditions, customer relations, etc. These groups were called ''CIP'' standing for ''continuous improvement program,'' and they could call themselves by other names. The group to which James Ireland, Roger Reitz, and Alan Swain belonged called themselves the ''Renegades.'' Evidently they were sponsored by the director of human resources who at that time was Stephen W. Renfer who sat in on all their meetings. (Tr. 31–35.)

James Ireland and his group came up with the idea of a new system of job bidding by seniority which the employer did not have at that time. It is not disputed that Renfer, Vice President of Machining Dick Koziel, and Employment and Benefits Manager Dennis Scheer initially expressed some positive interest in the plan and thought it a good idea. At the meeting on March 5, with Renfer, after the Union had requested recognition and filed a petition for certification with the Board, Renfer told the team that they would just put the job bidding by seniority idea and long-range projects ''on hold until this Union thing blows over.''

The General Counsel alleges that Respondent's telling the CIP group to put its long-term projects on hold until the Union thing blows over violates Section 8(a)(1) and (5) of the Act. It is clear that the CIP teams here are not labor organizations within the meaning of Section 2(5) of the Act since they do not exist for the purpose of dealing with the employer with respect to compensation, benefits, and other conditions of employment, but merely to help identify and help solve work-related problems. Cf. *Electromation Inc*., 309 NLRB 990 (1992). The Government's contention is that this action by the Respondent constitutes a threat and a denial of benefit because of the presence of the Union.

The Respondent argues the CIP team, the ''Renegade team's,'' consideration of and recommendation to management to implement a job bidding by seniority was outside the scope of the team's concerns and when CEO Schoenwitz learned of this proposal he directed the facilitator and member of the oversight committee to redirect the team to issues within the scope of its concern.

It is well-settled Board law that an employer, during the pendency of a union petition for an election, is prohibited from soliciting employee grievances about, or making any unilateral changes in employee wages, hours, or other terms and conditions of employment. *Fiber Glass Systems*, 275 NLRB 1255 (1986). It is indisputable that a job-bidding system is a mandatory subject of bargaining were the Union to become the bargaining representative of the employees. Here the employer was literally caught between Scylla and Charydis. If it continued to consider and institute the job-bidding system proposed by the Renegade team it would certainly be charged with an unlawful change in working conditions. The General Counsel apparently perceived the bidding system to be a benefit to the employees and the charge would have been the granting of a benefit to induce the employees to not support the Union. It could just as easily have been alleged that the Employer imposed the job-bidding system on the employees in retaliation for their support of the Union.

I can fathom no theory under which the General Counsel can prevail on this allegation. Accordingly, paragraph 11 of the complaint is dismissed.

As will be considered and analyzed in much greater detail infra, on March 11 and 12, the Respondent without any prior notice, and contrary to all past practices and its own rules regarding layoff (G.C. Exh. 33, p. 13), permanently laid off 29 employees and at least 1 supervisor in its FAS division. Numerous employees, some of whom had been employed for more than 25 years, testified without contradiction that when layoffs had been necessary in the past, the Employer first

sought volunteers for layoff. They further testified that the layoffs had always been in accordance with the Employer's own rules as set forth in the employee handbook at page 13, under the headings, ''Length of Service'' and ''Loss of Service.'' These provisions are specific and there is no evidence that they were violated. The pertinent one here is under ''Loss of Service'' and provides ''Service will be lost if you . . . are laid off beyond one year, from the start of your layoff, or beyond your length of service, whichever is less.''

This brief statement regarding the layoffs is inserted here in view of the fact that most of the remaining independently alleged 8(a)(1) violations pertain to them.

6. Jerry Scroggins

It is alleged that the Employer's vice president of manufacturing, Jerry Scroggins, on or about April 1, told employees that the employees who were permanently laid off on March 11 and 12 could not be recalled because the Union had filed unfair labor practice charges. This allegation is based on the testimony of longtime employee William Mills. Mills testified that in a conversation with Scroggins just outside Scroggins' office, the subject of sales came up during the course of which Scroggins told him the Employer had won approximately $7 million worth of work. Mills testified that on hearing this he asked Scroggins if they would consider hiring some of the laid-off people back. Scroggins responded that at ''this point in time'' it would not be legal because of the unfair labor practices against Weldun that the Union had brought up. He added they could no longer hire any of the people who were fired nor could they hire temporaries because of the charges filed by the Steelworkers.

Prior to considering Respondent's argument that even if this conversation occurred as alleged it is not an independent violation of Section 8(a)(1), I will make determination as to whether the conversation occurred as alleged.

Vice President of Manufacturing Scroggins denied any conversation of this nature with Mills. Respondent contends that it could not have happened because Scroggins was on vacation from March 27 through April 5 taking a cruise in the Bahamas. The complaint alleges on or about April 1, however, when Mills was asked whether he had a conversation with Scroggins on April 1, he answered ''yes'' and then added ''I believe so,'' indicating to me that the conversation could have been on another date in that time period. Mills was an extremely impressive and obviously intelligent witness. It must be remembered that he was a longtime employee and was making allegations against a very high-ranking manager, vice president of manufacturing. I am persuaded that Mills would not have fabricated this conversation and it could do nothing for him except perhaps put his employment tenure in jeopardy.

The Respondent's contention that this allegation, standing alone, does not state an independent violation of Section 8(a)(1) of the Act since it is neither a direct nor implied threat; it is not coercive interrogation and is neither a direct nor implied promise of benefit is without merit. The statement is not only legally incorrect, but clearly coercive and designed to demonstrate to employees that the Union prevents the Employer from rehiring laid-off employees in order to dissuade employees from supporting the Union. Accordingly, I find the conduct found here to violate Section 8(a)(1) of the Act. See *Centre Engineering*, 253 NLRB 419, 421 (1980).

7. Russel Hanson

Paragraph 13(a) alleges that the president, Flexible Assembly Systems division, Russel Hanson, about April 15, told employees that the laid-off employees could not be recalled because of the Union. This allegation is based on the testimony of Joseph Nizzi formerly the products coating manager in FAS who was laid off March 11 or 12. Nizzi said that several weeks after the layoff he heard that due to some employees quitting, the Company needed some ''follow-up project managers,'' a field in which he had some experience, and hoping to obtain one of those positions he called president of manufacturing, Russel Hanson. After a couple of days he was able to contact Hanson by telephone. On Nizzi's inquiry about the openings, Hanson told Nizzi they were looking for people heavy in PLC controls. Hanson continued that he did not know when they would fill those positions because of the dealings with the Union and they would have to wait.

Hanson, while admitting to a phone conversation with Nizzi, about job openings gave a somewhat different version of what was said. He testified that Nizzi inquired if there was anything else going to happen at the Company at which time Hanson concluded the conversation as follows, ''and I said, Well, with the reorganization and the downsizing and everything, that I felt it was going to be a while yet before we could . . . I think I said . . . until the dust settles and until we figure out what we are going to be doing.''

Based on testimonial demeanor, and the fact Nizzi was not and would not have been in the bargaining unit, had nothing to gain and possibly a lot to lose, and had no motive to fabricate his version of the conversation, accordingly, I credit him. Respondent again argues, as in the Scroggins, incident above, that even if Hanson used the language attributed to him by Nizzi it would not state an independent 8(a)(1) violation. For the reasons stated above, I find no merit in this contention and find that Hanson's conduct here violated Section 8(a)(1) of the Act.

8. Marlin Phillips

Over the strenuous objection of Respondent, prior to the taking of any testimony, I permitted the General Counsel to amend the complaint to add paragraph 13(b) which alleges that on or about June 9, 1993, Respondent, by its foreman, Marlin Phillips, informed employees that the March 11 and 12 permanent layoffs were related to the union activities. This allegation rests on the testimony of employees Steven Reed and Lawrence Smith. Smith testified that in early June in a conversation with Phillips, Reed and others may have been present, Phillips said, ''If you guys hadn't attempted to start a union drive, the employees who were laid off would still be working.'' Reed testified that the comments made by Phillips occurred when the group of employees present were talking about the stupid changes in their terms and conditions of employment which had caused the employees to seek a Union. Phillips commented that ''Yeah, a lot of changes are stupid—well look at what that has already cost some guys—if it hadn't been for you guys, chances are those guys would

still have their jobs.'' Most of the employees present were wearing union buttons.

Phillips gives a somewhat different version. He testified that one of the employees mentioned that they felt the reason the employees were laid off was because of the union drive. At this point Phillips testified he paraphrased back to the employees saying, ''Well do you mean to tell me that had the Union drive not been going on, you feel those people would still be working here? You brought the Union in, we didn't.'' While there are some differences in the verbatim version between Smith and Reed, I credit the gist of the offensive language here—Reed had added that Phillips said that ''everything the Company did was legal and justifiable.''

Respondent argues that even if Reed and Smith are credited there would still not be a violation of Section 8(a)(1) since Phillips learned of the layoff on March 11 when the hourly employees did and he did not participate in any deliberations by the Company's senior management which led to the decision to layoff on March 11, and was thus merely expressing his opinion. On the other hand, the General Counsel argues that even Phillips' sarcastic version smacks of 8(a)(1) coercion. I find the above conduct violates Section 8(a)(1) of the Act.

9. Frank Schoenwitz

Again, I permitted the General Counsel to amend the complaint at the hearing over Respondent's objection to add paragraph 13(c) which alleges that Respondent by its president and CEO, Frank Schoenwitz, on or about June 11, threatened its employees that FAS would be doomed if the Union were selected to represent them. This allegation arises from what the Employer termed ''a series of employee communication meetings'' which it conducted on June 11. The meetings were held in all three divisions located at the Bridgman Campus with separate meetings being held for each division in three separate buildings. Russel Hanson, president of FAS, addressed business issues at the meeting held for the FAS employees and with the aid of an overhead transparency Schoenwitz addressed the union campaign.

At least five of General Counsel's witnesses, Lawrence Smith, Larry Johnson, Steven Reed, William Mills, and James Thompson, testified in support of this allegation. On direct examination, Schoenwitz testified that the only comments he made about the Union were those he read from the transparencies and graphs which Schoenwitz admittedly included comments to the effect that the Union had taken away the employees' right to vote in secret by filing unfair labor practices charges against the Company; and that at an NLRB hearing the identity of all the employees signing cards would be disclosed and that the Union could avoid this by withdrawing the unfair labor practices charges and going to a secret-ballot election. The graph also informed employees that the Company would do everything in its power that was legal and ethical to prevent the Union from being selected by the employees. The graphs and transparencies from which Schoenwitz read, inter alia, the above statements are not alleged to constitute independent violations of Section 8(a)(1) of the Act. However, in his posttrial brief, the General Counsel argues that those comments, particularly blaming the Union for depriving the employees the right to vote in secret, demonstrate animus. I will not address these comments further.

On direct examination Schoenwitz testified his remarks about the Union were limited to his reading of the graphs and transparencies. On cross-examination, however, he admitted answering employees' questions after he completed his presentation. It is during this period of the meeting that the alleged remarks about the FAS division being doomed if the employees selected the Union to represent them were made. As should be expected when several witnesses testify to the same event, whether it be words spoken to a large group of people or an automobile accident, there are going to be discrepancies in the words used by each witness. Indeed, it would be very suspect if five witnesses testified to the same event with identical words. Assuming there was only one meeting of all FAS employees on June 11, there would have been approximately 105 to 110 employees present. This estimate is based on the fact that the voter eligibility list submitted by the Employer dated March 6 contained 140 names, but on March 11 and 12, 29 of those employees were laid off and therefore were not present.

Among the versions of the words Schoenwitz used with respect to this allegation are: Lawrence Smith testified that Schoenwitz said, ''that he was afraid that if the Union was successful in getting in, it would doom the FAS Division.'' On cross-examination, Smith was asked if he was sure Schoenwitz had used the word ''doomed,'' he replied absolutely, and repeated that was the word he heard. The version of Larry Johnson was that he said, ''If the Union became a part of Weldun that it would be the doom of the FAS Division.'' Steven Reed testified that Schoenwitz said he felt like if the Union was to get into Weldun it would be doomed. William Mills' version of the incident was, ''One of the comments off to the side I believe he made, was I think his personal opinion—but if a union got into Weldun, it would—I don't recall exactly the word—damaged or doomed the FAS Division.'' Several other witnesses called by the General Counsel testified that after Schoenwitz prepared comments from the transparencies and the graphs were made there were other comments by him with respect to the Union during a question period, but did not remember specifics.

In addition to Schoenwitz, Respondent called two employee witnesses who were present who denied that Schoenwitz made the ''doom'' statement attributed to him; Schoenwitz testified that he made no remarks other than those on the transparency and categorically denied using the word ''doomed.''

I agree with the Respondent that the allegation, coming as it did at the commencement of the hearing must be carefully scrutinized, particularly because it pertained to an event occurring some months earlier. I have scrutinized the allegation carefully and thoroughly and find that Schoenwitz did make a comment to the effect that it the Union came in the FAS Division would be doomed. As will be discussed more fully in another section of this decision, Schoenwitz was extremely evasive and certainly less than candid in answering questions as a sworn witness. In this instance he testified that he made no other remarks other than those he had prepared from the graphs and transparencies which he read word for word. The testimony is overwhelming from numerous witnesses, although not remembering his alleged ''doom'' comment, that there were questions and discussion after Schoenwitz' prepared presentation.

The Board's standard in analyzing such threats is set forth in *299 Lincoln Street, Inc*., 292 NLRB 172, 173 (1988), in which the Board discusses the Supreme Court's decision in *NLRB v. Gissel Packing Co*., 395 U.S. 575 (1969):

> In determining whether a statement constitutes an unlawful threat, the Court differentiated communications of previously made plant closure decisions and ''carefully phrased'' predictions predicated ''on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control'' from statements suggesting that the employer might take actions in response to unionization not demonstrably based on ''economic necessities.'' Statements of the latter kind would be deemed threats of retaliation.

Schoenwitz' statements about Respondent's doom if the Union attained representational status were not carefully phrased predictions, but were bald threats made in the context of a meeting which was clearly part of Respondent's antiunion campaign. As noted above, the meeting dealt with the Union, and the ''doom'' statement was in the context of other antiunion comments, not in the context of a discussion of economic necessities. Schoenwitz' comments contained no discussion of any objective fact, and the doom comment, in the face of the March mass layoffs, conveyed to the assembled employees that if the Union became their representative, they, like their fellow employees laid off in March, would not have jobs. Said comments coerced the assembled employees, and violated Section 8(a)(1) of the Act.

C. *The March 11 and 12 Permament Layoff of 29 Unit Employees General Counsel's Wright Line Burden Respondent's Economic Defense*

During almost 30 years working in the field of labor relations, I have seldom encountered a case in which the employer responded more swiftly, blatantly, viciously, and indefensibly to the advent of union activities among its employees as in this case. Considering Respondent's hostility to the union organizational efforts of its employees as demonstrated by the 8(a)(1) violations found above; the Respondent's sudden awareness of its cataclysmic economic condition coinciding as it did with its knowledge of its employees' union organizational efforts; the layoffs occurring just days before a scheduled NLRB representation case hearing; and the unprecedented scope and manner in which the layoffs were accomplished—unlike previous layoffs, no volunteers were sought and the layoffs were permanent rather than temporary layoffs previously utilized by it and which is established in the Company's employee handbook. It is abundantly evident that the General Counsel has made a prima facie showing that protected conduct was a motivating factor in the employer's actions. Even if Respondent's economic defenses were credited in their entirety, which they are not, the Respondent would still have not met its burden of demonstrating that it would have taken the same action in the absence of protected conduct. The employer cannot carry this burden merely by showing that it also had a legitimate reason for the action, but must ''persuade'' that the action would have taken place absent protected conduct ''by a preponderance of the evidence'' *Roure Bertrand Dupont, Inc*., 271 NLRB 443 (1984); *NLRB v. Transportation Management Corp*., 462 U.S. 393 (1983). If an employer fails to satisfy its burden of persuasion a violation of the Act may be found *Bronco Wine Co*., 256 NLRB 53 (1981).

Elaborating further on the evidence in support of the General Counsel's having carried the *Wright Line* burden, much of which is not in dispute, is the following: The Respondent admits that it became aware of its employees' union activities in early to mid-February, President and Chief Executive Officer Frank Schoenwitz testified that he did not become aware of it until a couple days before the petition was filed. And, be that as it may, following knowledge by Respondent of its employees' union activities it engaged in the conduct found in section B, above, demonstrating union animus. Schoenwitz' testimony that he was ''indifferent'' to the union activities of his employees is discredited by the fact that within 1 or 2 days Respondent's Atlanta based labor attorney journeyed to Bridgman and met with Schoenwitz and essentially all the supervisors and managerial personnel in the FAS division. At that time the supervisors were asked to make a list of their employees and determine which were more likely to be for or against the Union. These instructions to the supervisors are not alleged nor found to constitute an unfair labor practice. Indeed, an employer may under certain circumstances including a demand for recognition by the Union based on its card majority, interrogate its employees concerning their union activities providing he advises them of certain safeguards designed to minimize the coercive impact.[4]

The permanent layoffs here occurred just days before a scheduled representation case hearing in Case 7–RC–2006. The layoffs of these 29 employees, and other support and managerial employees on March 11 and 12, differed from all previous layoffs by Respondent in that they were made permanent and the Respondent did not seek volunteers. There had been layoffs in the past, but Respondent had always first sought volunteers for layoffs, and if not acquiring enough volunteers for layoff, it laid off employees temporarily in accordance with its policy as set forth on page 13 of the employee handbook, which states that the employee will lose seniority, i.e., be considered a nonemployee, after 1 year on layoff or length of service whichever is less. It is well settled that the Board has viewed evidence that a layoff varying from the employer's past practice of layoffs to be demonstrative of a prima facie case. Thus, in *Twistex, Inc*., 283 NLRB 660 (1987), the Board found that the employer's failure to seek volunteers for a layoff which it had done during previous layoffs to be evidence of a prima facie case. Further, designating a layoff as permanent, when previous layoffs

[4] These rights were enunciated in *Johnnie's Poultry Co*., 146 NLRB 770, 775 (1964):

> Thus the employer must communicate to the employee the purpose of the questioning, assure him that no reprisal will take place, and obtain his participation on a voluntary basis; the questioning must occur in a context free from employer hostility to union organization and must not be itself coercive in nature; and the questions must not exceed the necessities of the legitimate purpose by prying into other union matters, eliciting information concerning an employee's subjective state of mind, or otherwise interfering with the statutory rights of employees. When an employer transgresses the boundaries of these safeguards, he loses the benefits of the privilege. [Fns. omitted.]

were temporary, is significant evidence of an illegal motive, thereby disqualifying the employees from voting in a representation election and is an 8(a)(3) violation of the Act, in and of itself. *Hovey Electric*, 302 NLRB 482 (1991), in *Ballou Brick Co. v. NLRB*, 798 F.2d 339 (8th Cir. 1986), the court held that the employees were told the layoff was permanent and not temporary as before the significance of which is because if it was a permanent layoff the employees would not be allowed to vote in the union election whereas they could vote if they were temporary layoffs. In *Horton Automatics*, 289 NLRB 405, 417 (1988), the Board affirmed a decision in which the administrative law judge concluded that layoffs were a violation of Section 8(a)(3) in part because the employer made the layoff permanent while the plant rules called for layoffs to become permanent after 1 year or length of service as in the case here.[5]

Another significant factor supporting the General Counsel's prima facie case under the *Wright Line* burden is the timing of the layoffs. The Board has found timing to be a significant element in finding a prima facie case of illegal layoff. See *Equitable Resources Energy Co*., 307 NLRB 730, 731 (1992), ''In view of the timing of the layoffs and the Respondent's unlawful conduct we find the General Counsel has established a prima facie case.'' The abruptness of the layoffs is also a significant factor in determining illegal motivation as the Board held in *Hunter Douglas*, 277 NLRB 1179 (1985), the abruptness of the layoff coming as it did at the time of the union drive, supports an inference of illegal motivation.

In this case a week before the layoff Vice President of Machining Dick Koziel told employee David Mensinger that due to the upcoming workload the employees would have to be running the grinders 24 hours a day in the near future. On March 8, Foreman Keith Fulbright told employee Billie Jean Taylor who was laid off March 11 that there was about another 4 or 5 weeks of overtime on the schedule at that time. The Respondent contends that its layoffs were based on skills of the employee rather than the employees' support of the Union, but the Board has held that it is not necessary to show that an employer specifically chose each employee for layoff based on that employee's position on the Union in order to demonstrate that the layoffs violated Section 8(a)(3) of the Act. The required unlawful motivation may be shown not only where the employer takes adverse action against individuals and employees in retaliation for union activities, but also where the employer takes adverse action against groups of employees regardless of their individual sentiments toward union representation. See *Mini-Togs, Inc*., 304 NLRB 644 (1991), and *Activ Industries*, 277 NLRB 356 (1985).

Moreover, prior to the sudden, abrupt, and unexpected layoffs, President and CEO Frank Schoenwitz in his monthly report for January and February 1993 gives no hint of a massive downsizing of its operation. In addition thereto, in December 1992 and January 1993, Schoenwitz advised employees at a party that while orders were down the employer expected to equal or almost equal its 1992 performance which is the first year in many in which it had made a profit. (G.C. Exh. 100.)

The Respondent argues that when Schoenwitz received the backlog figures for January at the end of the month he was ''alarmed'' to see that the backlog had dropped to $25 million—lower than it had ever fallen in recent years; and at that time instructed his senior management to begin developing a contingency plan. If Schoenwitz was alarmed at the backlog at the end of January he did not make that evident in his report to corporate headquarters and made no mention of the fact in the report that he had instructed senior management to begin developing a contingency plan for layoffs. (See G.C. Exh. 101.) Nor indeed in his February report to corporate headquarters dated March 9, 1993, did Schoenwitz indicate any alarm at the backlog or the prospect for the year 1993.

Based on the foregoing, it is evident that the General Counsel has sustained his *Wright Line* burden by making out a prima facie case that the massive permanent layoffs of the 29 employees named in the complaint violated Section 8(a)(3) of the Act and the burden now shifts to Respondent to persuade the trier of facts and the Board that the same action would have taken place absent protected conduct by a preponderance of the evidence.

Having determined above that the General Counsel has made a prima facie showing that protected conduct was a motivating factor in the Respondent's action against these employees, i.e., the permanent layoffs on March 11 and 12, we turn now to whether Respondent has satisfied its burden of persuasion by a preponderance of the evidence that it would have taken the same action absent the protected conduct. The Respondent contends that the March 11 and 12 layoffs were the culmination of a rapidly deteriorating business situation in the Company's Flexible Assembly Systems (FAS) business which developed in the first quarter of 1993. (Tr. 945–957.) In this regard CEO Schoenwitz on being asked on direct examination what factors he considered in the layoff he replied, ''But what is very, very important is—what is always very important is our backlog report which we update on a monthly basis.'' (Tr. 1073.) Schoenwitz further testified that he became concerned about the backlog in January, and in late January, after January 27, called an urgent meeting with the ''fellows'' because he had not seen a reversal in the decline in backlog in January. In his monthly report to corporate authorities, however, he did not indicate a great deal of concern about the backlog. Respondent admitted that historically the backlog in FAS declines toward the end of the year, begins to turn around in the first quarter of the next year, reaches its peak sometime around the middle of the year, and then begins to decline again as the cycle repeats itself. (Tr. 960–963 and 1078–1081.) The Respondent's chief financial officer, Ehaene, testified that an order becomes part of the backlog only when Respondent receives a valid purchase order and/or a valid letter from the customer. (Tr. 961.) Yet, Respondent's own internal documents demonstrate that a category of high-probability jobs is a significant factor to Respondent.

Further detracting from Respondent's argument, Schoenwitz testified that when he received the backlog figures for January at the end of the month he was alarmed to see the backlog had dropped to $25 million. Lower than it had ever fallen in recent years and he instructed senior management

[5] It is well settled that laid-off employees with a reasonable expectancy of recall are eligible to vote in a Board-conducted election whereas permanently laid-off employees are not. See *IMAC Energy*, 305 NLRB 728 (1991).

to begin developing contingency plans for layoff. (Tr. 1080–1081.) According to Schoenwitz, however, he decided to wait 1 more month before implementing any layoffs to see whether any significant orders might come in during the month of February. Had this happened Schoenwitz testified he would have frozen the contingency plans. (Tr. 1082.) According to Schoenwitz, when he received the February backlog during the last week of the month, he contends that the backlog had continued to fall ''precipitously'' and that no significant orders had yet been received. At that time, according to his testimony, he decided to revise the FAS forecast for 1993 downward to $35 million and instructed his senior management to develop a staffing plan which would support that level of sales.

It is interesting to note, that while his testimony at trial indicated that Schoenwitz had grave concern about the backlog as early as January 27, and that he had gotten his ''fellows'' together and directed them to devise a contingency plan, there is no reference to it in his January monthly report to corporate headquarters which issued February 9, 1993. While he does note in the January report that there was a shortfall in orders in FAS he indicated that such was due to the fact that they did not get any orders yet from clients such as Ford and AT&T. (See G.C. Exh. 101.) He notes in the same report that the current level of temporary employees decreased by 6 and they were down to 18 temporary employees and it is noted that he tells corporate headquarters that they implemented an hourly wage increase effective January 1, 1993, for the employees. This immediately raises the question as to why he did not inform corporate headquarters that he perceived his backlog situation to be so dire that he had ordered his managers to devise a contingency plan.

Similarly, in the February 1993 monthly report, which issued March 9, Schoenwitz notes that orders were below the expected forecast due to continued customers delays in projecting business stating that FAS has been very soft during the past 3 months and we are concerned that this trend may continue. The report indicates that the backlog at the end of February was $27.7 million and indicates that they expected to receive orders totaling approximately $12 million in the next few months. This is the report in which Schoenwitz advises headquarters that ''United Steel Workers Union initiated a drive to mobilize FAS. Countermeasures are being planned with RBUS/PER and F. Steward.'' Again he does not advise corporate headquarters, or even suggest, that within the next few days it would be necessary to permanently layoff 29 FAS employees. One can only speculate that this was the ''countermeasures'' to which he referred to in connection with the union organizational drive was the permanent layoff of 29 FAS unit employees which once again states in this report that the head count for the month was 421 employees a decrease of 1 from the previous month and the current level of temporary employees decreased by 1 down to 17 people.

The March report to headquarters which issued April 12 states with respect to the layoffs in item 3, page 1: ''Union activity at FAS is rather quiet. Our unrelated layoffs at FAS resulted in unfair labor practice charges by the Union. A hearing by the NLRB is scheduled for next month.'' In the March report Schoenwitz also states major projects for which FAS hopes to receive orders within the next few months include, and they are named, but the totals approximately $17 million. And in the March report he states the head count was 382 people a decrease of 39 from the previous month and current level of temporary employees increased by 2 to 19.

Schoenwitz' trial testimony is simply not supported by the monthly reports that certainly should demonstrate such concern if it existed.

While Respondent simply relies on the January, February, and March reports and Schoenwitz' subjective state of mind, the General Counsel subpoenaed all such reports for the years of 1990, 1991, 1992, as well as 1993. In these reports (G.C. Exh. 101) it is evident that the first 3 months of each of these years Respondent's backlog was down, this is admitted by Respondent, and that by the end of the first quarter they begin an upward climb. That this concern, if Schoenwitz had such concern, is something he would report in his monthly reports is evidenced by his January and February 1990 reports in which he expressed great concern over the financial prospect of Weldun.

Respondent's Exhibit 25 indicates that 1993 FAS backlog followed an essentially similar pattern in 1992 and 1991, as well as 1990, as indicated by General Counsel's Exhibit 101. Thus, in 1993, the backlog went down in January, February, and March and in January 1992, the backlog dropped far more precipitously than in January 1993, and the backlog continued to decline in February before bottoming out in March. (R. Exh. 25.) This also shows the backlog declining in February 1991. Schoenwitz testified that he became so concerned in late January 1993 that he called a meeting, however, Respondent's Exhibit 25 indicates that the drop in the January backlog was much less precipitous in 1993, than in record year 1992. As indicated above, Schoenwitz testified that he made the layoff decision after receiving the February backlog report. However, Respondent's Exhibit 25 demonstrates that in both 1992 and 1991 that February backlog continued on a downward spiral even deeper than in 1993.

The sum total is that the only difference in the employer's economic condition in January, February, and March 1993 and that of 1990, 1991, and 1992 is that in 1993, the Steelworkers began an union organizational drive and a demand for recognition was made on Respondent. As the General Counsel observes if Schoenwitz' testimony is totally credible the Respondent might prevail. However, I am unable to credit Schoenwitz' sworn trial testimony when it is not corroborated by other credited testimony or undisputed documentary evidence. Schoenwitz testified that he was ''indifferent'' about the Union's attempt to organize the FAS employees. His immediate action after learning of this indicates differently. Similarly, his failure to indicate in his monthly reports to corporate headquarters the dire economic plight that he perceived the FAS Division to be in is almost inconceivable. As indicated above in earlier reports he had indicated great concern about the economic future and such was indicated in his monthly reports. Another incident occurring near the close of the hearing, (Tr. 1132), following a brief recess the General Counsel on cross-examination asked Schoenwitz the following:

> Q. I saw you conversing with Respondent's Human Resource Director Larry Brown during the break or the recess that we had and then I saw the two of you leave

> the room and perhaps conversing outside were you, in fact, conversing outside in the hallway?
>
> A. When?
>
> Q. I asked the Judge for a recess a short time about a half hour ago.
>
> A. I did not talk to Brown during the recess.

The cross-examination continued with additional questions as to this incident and while Schoenwitz stated he talked to the judge for a few moments during the recess, he steadfastly continued to deny a conversation that had occurred between 15 and 20 minutes earlier. Schoenwitz buttressed this denial with a statement, ''I made it a habit not to talk to either my counsel or Brown during these proceedings.''

On rebuttal the General Counsel called David Pecararo who testified he was present at General Counsel's table during Schoenwitz' testimony and that he observed Schoenwitz having a discussion with Brown during the recess. (Tr. 1162.) As was implicated by counsel for the General Counsel's original question on cross-examination, it appears that counsel for the General Counsel had also observed Schoenwitz conversing with Brown during the recess. There was no objection to the General Counsel's question. While this is not testimony concerning a critical issue on the substantive issues, but it does weigh on the impact of the credibility of the Respondent's key witness. It is noted that the Respondent did not call Brown on rebuttal even though Brown was a high corporate official and was present in the courtroom at counsel's table. Under these circumstances the Board has held that

> when a party fails to call a witness who may reasonably be assumed to be favorably disposed to the party, an adverse inference may be drawn regarding any factual question on which the witness is likely to have knowledge. [Citations omitted.] In particular, it may be inferred that the witness, if called, would have testified adversely to the party on that issue. [Citations omitted.] Thus, while we recognize that an adverse inference is unwarranted when both parties could have confidence in an available witness' objectivity, it is warranted in the instant case, where the missing witness is a member of management.'' [*International Automated Machines, Inc*., 285 NLRB 1122, 1123 (1987).]

While it is true this testimony is on a collateral issue, it is not uncommon for administrative law judges, the Board, and the courts to cite such testimony as the basis for discrediting a witness. For instance in *Mini-Togs, Inc*., 304 NLRB 644, 647 fn. 4 (1991), Judge Wagman found as follows: ''Knighton fatally impaired his credibility when he flatly denied on cross-examination that he had discussed his testimony with either Respondent's counsel or Ed Akin prior to appearance as a witness for the Respondent.''

I agree with the General Counsel that the fact that Respondent did not introduce the very document he relied on in deciding the layoffs is significant. Respondent's Exhibits 23, 24, and 25 were shown to Financial Officer Dhaene. These exhibits had been introduced as documents kept in the regular course of business. When Dhaene was asked if these were the documents given to him, however, he testified that in fact the documents were not Respondent's business documents, but were prepared specially for the hearing about a month before the hearing. Respondent's failure to introduce these documents, central to its economic defense leads to an inference that the document, if produced would not be favorable to Respondent. *J. Huizinga Cartage Co*., 298 NLRB 965, 970 (1990).

In considering economic defenses to layoff allegations the Board has viewed an employer's deviation from past layoff policy including designating layoffs as permanent as opposed to past temporary layoffs to be significant evidence of an illegal motive. In *Hovey Electric*, 302 NLRB 482 (1991), the Board held it to be an 8(a)(3) violation for an employer to designate a layoff as permanent in order to make laid-off employees ineligible to vote. In *Ballou Brick Co. v. NLRB*, 798 F.2d 339 (8th Cir. 1986), the court held that designating a layoff as permanent rather than temporary is evidence of an illegal motive. In *Schwartz Mfg. Co*., 289 NLRB 874 (1988), it was held that, even though an employer presented evidence of economic problems, the layoffs were illegally motivated when they were converted from temporary to permanent; in *Mini-Togs*, supra, the Board held permanent layoffs to violate Section 8(a)(3) when the employer temporarily laid off employees on other occasions. And as here, in *Twistex, Inc*., 283 NLRB 660 (1987), the Board held one factor in concluding that the layoffs were in violation of Section 8(a)(3) was the fact that on previous occasions the employer had sought volunteers for layoffs, but not on the occasion in issue.

Much of Respondent's postlayoff conduct is not consistent with the economic defense. It was not unusual in the past for Respondent to subcontract out work on a limited basis during peak periods, such subcontracting increased significantly subsequent to the layoffs. (Tr. 320.) Subsequent to the layoffs hours increased in machining and FAS assembly. (Tr. 370, 447.) Respondent brought in eight outside electricians to perform work in assembly. Work had been performed by laid off workers. (Tr. 450.) There's evidence that prior to the layoffs Respondent sometimes utilized outside electricians; however, during periods of employee layoffs, had never done so. (Tr. 451.) Some employees testified to working record number of hours at certain times after the layoff and Foreman Elmer Copeland told employee Mensinger that he didn't know how he was going to be able to get his work out. (Tr. 473.)

Based on the foregoing, it is evident that Respondent's motive in the layoffs was unlawful: (1) the timing, coming as it did immediately on the filing of a representation petition; and (2) the fact that Respondent, contrary to past practice, did not seek volunteers and made the layoff immediately permanent contrary to its past practice, was evidently for the purpose of denying the permanently laid-off employees the right to vote in a Board-conducted election. It is well settled that temporarily laid-off employees are eligible to vote in Board-conducted elections where permanently laid-off employees are not. Vice President Koziel testified the March 11 and 12 layoffs were the only such permanent layoffs in the history of the Company and unlike previous layoffs, Respondent made no attempt to get volunteers. (Tr. 785.) As noted, laid-off employees with a reasonable expectancy of recall are eligible to vote in an election. Permanently laid-off employees are not *IMAC Energy*, 305 NLRB 728 (1991).

Joe Nizzi, a former product coating manager in FAS who had been laid off on March 12, testified that a few weeks after his layoff he heard that due to other people quitting he had heard the Company needed some ''follow-up project managers'' and since he had experience in that field he visited the plant hoping to obtain one of those positions. He apparently talked briefly to Russel Hanson, president of the Flexible Assembly Systems division, who told Nizzi that he would call him back. Hanson called the following day, but Nizzi was not home. Nizzi immediately returned Hanson's call and Hanson told him there were a couple of openings but they were looking for people who were heavy in PLC controls. Hanson told him he did not know what the climate of the business was due to the negotiations with the labor union. Hanson continued because of the Union they would have to wait. (Tr. 608–609.)

Both the General Counsel and the Respondent's credited evidence is overwhelming that the action taken by Respondent on March 11 and 12, i.e., the permanent layoff of 29 FAS unit employees, the unit seeking union representation, would not have been taken at that time absent the Union's demand for recognition and its filing a petition for certification of representative in that unit. The Employer makes no contention that there was not ample work for these laid-off employees for at least several months. Thus, the timing was motivated solely because of their union activity in order to disenfranchise them from voting in the contemplated Board-conducted election. This is a far greater compelling reason for their permanent termination than the reason advanced by Respondent that it wanted the employees to ''get on with their lives and not expect to be recalled.''

Accordingly, they shall be ordered reinstated to their former positions or, if those positions no longer exist, to substantially equivalent ones and made whole for any losses they sustained by virtue of Respondent's discrimination against them.

D. *The Appropriate Unit*

The General Counsel contends the unit sought to be represented by the union constitutes an appropriate unit for purposes of collective bargaining. Although it may not be the only one which might be found to be appropriate among these divisions of Respondent located at the Bridgman campus. That unit is:

> All full-time and regular part-time production and maintenance employees of the employer's flexible assembly systems division including assembly, machining, general tool and control employees employed by the Employer at its Bridgman, Michigan facility; but excluding all office clerical employees, Bosch storage system employees, Bosch packaging machine employees, professional employees, guards and supervisors as defined in the Act.

Whereas the Respondent contends that the only appropriate unit must include all three of the organizational separate divisions, including all support staff, excluding only those classifications statutorily excluded, and defines the unit as follows:

> All full-time and regular part-time flexible assembly, packaging, storage systems, and machining employees employed at the company's Bridgman, Michigan location, including manufacturing secretary, machining secretary, project manager secretary follow-up, production control scheduler, estimating clerk, quality assurance, project manager follow-up, fin and spare parts estimator, manufacturing engineer, junior manufacturing engineer, mechanical designer, engineering technical support, controls engineer, and lead transport engineer, excluding all office clerical employees, professional employees, guards, and supervisors as defined in the Act.

The issue is whether the unit sought by the Union is appropriate, not whether Respondent's proposed unit or any other unit is more appropriate or even the most appropriate. See *Morand Brothers Beverage Co*., 91 NLRB 409 (1950), enfd. 190 F.2d 576 (7th Cir. 1951). See also *Gateway Equipment Co*., 303 NLRB 340 (1991). In these cases, the Board examines the community of interest of the particular employees involved, considering their skills, duties, and working conditions, the employer's organization and supervision, and bargaining history, if any. See *Airco, Inc*., 273 NLRB 348 (1984). Further, the Board ''will continue to consider a petitioner's desires relevant,'' although this will ''not, however, obviate the need to show [a sufficient] community of interest on the facts of the specific case.'' Id. at 348 fn. 1.

The Union here sought recognition in a unit composed of approximately 140 employees within Respondent's FAS division machining and assembly plants on Respondent's Bridgman campus which were the only units there until their acquisition by Bosch Corporation in about 1986. Bosch subsequently added Bosch packaging plant, also located on the Bridgman campus and Bosch storage systems division. As noted above, the FAS machining and assembly jobs are functionally integrated in that the primary function of machining employees is the manufacture of tools and parts used by FAS assembly employees. Work flows from the FAS engineering department to the FAS machining department to the FAS assembly department. About 65 to 70 percent of machining work is directly related to FAS assembly.

Bosch packaging work is performed in the packaging building and is largely independent of the FAS machining and assembly work. The machining building is treated as somewhat of a stranger to the packaging operation and, indeed, must bid on any packaging work, just as an outside vendor would have to do. While there is continual work contact between employees in FAS machining and assembly necessitated by the integration of the operations, there is little work contact between FAS Assembly and Bosch packaging and storage system employees, and no work-related contact between FAS machining and Bosch packaging and storage systems employees.

While employees in all three divisions share the same work rules, fringe benefits, and human resources department, pay raises are dependent on the decisions of each operation's manager and first-line supervisors. Although a single human resources department services the FAS and the Bosch Packaging and Storage System operations, Respondent administers the three businesses through distinctly different administrative structures.

Notwithstanding CEO Schoenwitz' testimony to the contrary, both Schoenwitz' newspaper article (G.C. Exh. 37 and G.C. Exhs. 98 and 99) demonstrate that, in fact, parent Bosch Automation Group administers FAS and Bosch Packaging and Bosch Storage as separate businesses with separate administrative structures. For example, Bosch Packaging assembly supervisors report to Bosch Packaging Operations Manager Ratkay (Tr. 1135; G.C. Exh. 99), not to FAS Assembly Vice President Scroggins or to FAS Machining Vice President Koziel. Scroggins and Koziel report to FAS President Russ Hanson, who reports to Schoenwitz (Tr. 729). The head of Bosch Packaging, Ratkay, reports directly to Schoenwitz, and does not report to Hanson or Scroggins (Tr. 729). Each business, FAS (machining and assembly), Bosch Packaging, and Bosch Storage Systems, has a separate administrative hierarchy, a separate management structure, and a separate administrative staff, with Schoenwitz at the top (Tr. 730). The administrative structure of FAS (assembly and machining) is headed by Hanson. The administrative structure of Bosch Packaging is headed by Ratkay.

The Employer introduced evidence tending to show that a unit made up of employees of FAS and Bosch packaging and storage division would be appropriate. This evidence includes a common human resources department, a common shipping dock, sharing of drivers and maintenance, common nonwork social events, and the use of the Bosch packaging building for FAS assembly on occasions when all floor space is being utilized in the FAS assembly building. Respondent also introduced evidence that a small number of FAS assembly employees have been occasionally utilized by Bosch Packaging, and that some Bosch packaging employees have been occasionally utilized by FAS assembly (R. Exh. 10). On these occasions, Respondent has formally transferred these employees for the temporary assignment, and the employees, on these occasions, have worked under the supervision of their temporary department head. (Tr. 684–685; 732.) Employee Mills testified that from ''time to time'' FAS employees have been moved to assist in Bosch packaging, and vice versa (Tr. 323).

As set forth above, the issue is whether the FAS unit is appropriate, not whether Respondent's unit is also appropriate or even more appropriate. Here, the Union seeks a unit of FAS employees only. As noted above, the Board will consider a union's desires relevant, provided the union shows, ''some community of interest on the facts of the specific case.'' *Airco, Inc.*, supra at 348–349 fn. 1.

Here, the record demonstrates that, in addition to the desires of the Union, the Government has shown that the FAS employees share a distinct community of interest. First, the FAS' only unit parallels Respondent's organizational structure in that the FAS and Bosch packaging and Bosch storage businesses have separate managerial structures. The Board has found units to be appropriate where it parallels the employer's administrative or operational structure. See *State Farm Mutual Automobile Insurance Co.*, 158 NLRB 925, 930 (1966). Second, the work of FAS assembly and machining employees are functionally integrated, while the work of Bosch packaging and storage employees is not functionally integrated to the work of FAS employees. Third, FAS packaging and assembly employees, who are functionally integrated, work in proximity on the same product under the same administrative structure with continual work contact, and share a discrete community of interest. While there may be an overall community of interest among FAS and Bosch packaging employees, this does not negate the existence of a discrete community of interest.

Respondent introduced evidence pertaining to certain other classifications, principally office clerical or technical employees, none of whom are listed on General Counsel's Exhibit 91, the March 6 voter eligibility list in the FAS assembly building. Respondent introduced evidence as to the following classifications: project managers quoting, project managers followup, quality assurance, manufacturing secretary, project manager secretary quoting, and project manager secretary followup.

In the FAS assembly building, both project manager classifications are salaried and require a college education or equivalent. Their work is performed, mainly, in offices not on the production floor (Tr. 1172). The project managers quoting ''concept and quote'' incoming projects, while the project managers followup are responsible for the financial portions of the project (Tr. 635–640). The quality assurance employee is responsible for the last inspection of projects before shipment to customers and for requisitioning control materials. If he finds any problems, he completes, and reports and deals with supervision (Tr. 646–647). The quality assurance employee works in an office area within the plant, is an hourly employee, but works different hours from assembly employees. The manufacturing secretary performs office clerical functions in the office area, including travel arrangements and computing employee hours. The project manager secretary quoting performs office clerical functions in the office area, including typing and organizing quotations for project managers (Tr. 653–654). The project manager secretary-followup performs typing and computer work and documentation for project managers and handles travel arrangements in the absence of the manufacturing secretary.

The three secretaries work in the office area of the facility and perform typical office clerical functions, including typing and handling travel arrangements. These three classifications are essentially office clerical positions which the Board customarily excludes from production and maintenance units. See *Hygeia Coca-Cola Bottling Co.*, 192 NLRB 1127, 1129 (1971).

The project manager classifications also have little in common with the production employees. Unlike the production employees, they are salaried, perform work in the office area, use computers and office tools in their work, and possess college degrees or their equivalent in training and experience. Unlike production employees, the managers are directly supervised by Scroggins. The project managers are clearly technical employees with different work hours, supervision, remuneration basis, job skills, and educational background from production employees. Managers wear dress shirts and pants to work, as opposed to the blue jeans and T-shirts worn by production employees (Tr. 1168–1169), and park in reserved areas of the employee parking lot, as opposed to production employees. (Tr. 1168–1169.) Under these circumstances, being technical employees with little in common with production employees other than occasional work contact, the managers do not share a community of interest with production employees and should not be included in the unit. See *Sheffield Corp.*, 134 NLRB 1101 (1962). Similarly, the quality assurance employee works in an office area, works

different hours from production employees, and deals with supervisors rather than unit employees as to problems encountered. He should be excluded. See *Penn-Color, Inc*., 249 NLRB 1117, 1120 (1980).

Respondent produced little evidence to support the inclusion of these essentially white collar, quasi-professional classifications. The manufacturing engineer drafts the manufacturing processes that will be utilized for the assembly of packaging machines and orders materials for their production. The engineering technical support manager works in the office area and is charged with providing engineering support to solve problems associated with manufacturing. The junior manufacturing engineer orders materials and schedules production. The engineering technical support employee is charged with visiting customer's plants to assist with problems. The mechanical designers are charged with updating and making changes in drawings for the packaging machines produced by Respondent. The production control scheduler schedules materials to arrive on a particular date and schedules wiring and assembly. The project managers-transport systems initially quote the jobs to customers and ''follow'' the jobs to completion. The controls engineer designs the controls for transport systems. The transport engineer designs the floor layouts of the transport systems, their components, and the mechanical portions of the systems.

None of the above classifications have other than minimal contact with Bosch Packaging employees and share a remote community of interest with FAS production employees. Their work skills and content are clearly technical and approaching professional and bear no relationship to those of production employees. See *Dennison Mfg. Corp*., 296 NLRB 1034 (1989). Clearly, their work is far more sophisticated than that of the production employees. See *Edenwald Construction Co*., 294 NLRB 297 (1989). Despite occasional contact with Bosch Packaging production employees, they have little in common with FAS and Machining Unit employees. See *Jakel Motors*, 288 NLRB 730 (1988).

Based on the above analysis of the community of interest among the employees and their distinct operational structure, it is clear that the unit sought by the Union and the General Counsel constitutes a unit appropriate for purposes of collective bargaining. I so find.

E. *The Union's Majority Status in the Appropriate Unit*

The parties stipulated to the introduction of General Counsel's Exhibit 91, a payroll list for the period ending March 6, 1993, the last payroll period prior to March 9 (Tr. 556). Respondent's counsel described the list as containing, ''the names of all of the hourly employees employed by Weldun on the Bridgman campus. Last name, first and middle initial.''

General Counsel's Exhibit 91 contains the names of 155 employees, of whom 15 are designated as packaging employees and 140 are designated as either assembly or machining, the unit found appropriate here. As a result of discussions between counsel, two names should be considered in addition to the 140, those being James Whitehead and David Stafford. The parties agreed that Stafford died on March 4, during the payroll period ending March 6. The parties agreed that Whitehead was transferred from an assembly position to an engineering position on February 22. Excluding the Bosch Packaging employees, there were 142 hourly employees on Respondent's payroll in FAS Assembly and Machining. During the trial the Government introduced 72 authorization cards executed before Respondent's layoffs of March 11 and 12, 1993.[6] With the exception of Whitehead and Stafford, all signers are included on General Counsel's Exhibit 91. Additionally, counsel for the General Counsel introduced eight cards executed by employees in March, after the March 11 and 12 layoffs.[7] All eight of these individuals are also included on General Counsel's Exhibit 91. With the elimination of Whitehead and Stafford, the General Counsel introduced a net count of 70 cards dated prior to March 9.

The General Counsel pleads that the Union attained majority status about March 9. Respondent's payroll list (G.C. Exh. 91) indicates that there were 140 unit employees within FAS Assembly and Machining for the payroll period ending March 6, the last payroll period preceding March 9.

Counsel for the General Counsel also introduced eight authorization cards executed in March, after the March 11–12 layoffs, all eight of which individuals were listed on Respondent's payroll (G.C. Exh. 91). These individuals, the General Counsel's Exhibit number, and date of card execution are as follows: Daniel Kuntz (6), March 16; Meryl Ray Zion (27), March 21; Delmer Kirksey (68), March 28; N. Shayne Smith (87), March 18; Jeff Steinke (88), March 18; Donald Hill (89), March 19; Michael Sabernizk (94), March 28; and Clarence Hamann (95), March 28. Of these eight individuals, Kuntz, Saberniak, and Hamann were not laid off.

All eight of these cards were properly authenticated by the testimony of the card signer, or testimony of the individual who received the signed card from the signer, or by stipulation of the parties. Once counsel for the General Counsel introduces evidence that the card signature is authentic, the burden shifts to Respondent to disprove the card's validity and establish that the signature on the card is not genuine. See *Avecor, Inc*., 296 NLRB 727 (1989); and *Olympic Villas*,

[6] Following is a list of the cards, along with the G.C. Exh. number for each card: James Ireland (3); Bruce Charleston (4); Bill Schiek (5); Lawrence Smith (7); Timothy Hunt (8); Steve Lentz (9); Danny Pastrick (10); (Gordon) Steve Quick; Brigg Reynolds; Larry Truhn (13); Roger Reitz (15); David Thomas (16); Alan Swain (17); Rick Tygesen (18); Jimmy Lee Doud (19); John Delaney (20); Bill Taylor (21); Larry Johnson (22); Steven Reed (23); Donald Scharnowske (24); Jerry Rochefort (25); Ron Hartman (26); William Mills (38); Robert Taylor (39); Lafayette Marcum Jr. (40); Joel Kamerer (41); James Whitehead (42); Dawn Condon (43); Bob Dunning (44); Steve Curley (45); Brian Allen (46); Donald Smith (47); Mike Prenkert (48); Gregory Pribly (49); David Sinner (50); Alan Bass (51); Dave Gerold (52); L. Evertt Hartwig (53); Theodore Lagro (54); Jeff Schmidt (55); George Schueneman (56); Allen Wesner (57); Dennis Williams (58); James Thompson (59); Dan Livesay (60); Bob Bailey (61); Kevin Steinhiser (62); Scott Warren (63); David Mensinger (62); Rex Miller (65); Miro Virsik (66); Jerry Boone (67); Rex Jackson (69); David Staford (70); Robert Flick (71); Albert Klann (72); Keith Vanderploeg (73); James Burgess (74); Curtis McKee (75); David Pecoraro (76); Gene Matz (77); Kurt Lindhorst (78); Michael Ryan (79); Richard Becker (80); Gary Ehlert (81); Kenneth Murray (82); Gary Phillipe (83); Douglas Rouse (84); Steven Schmaltz (85); Arnold Truhn (86); Jerry Thompson (92); and Peter Klein (93).

[7] These eight employees and the G.C. Exh. numbers of their cards are as follows: Daniel Kuntz (6); Ray Zion (27); Delmer Kirksey (68); N. Shayne Smith (87); Jeff Steinke (88); Donald Hill (89); Michael Saberniak (94); and Clarence Hamann (95).

241 NLRB 358, 366 (1979). Respondent introduced no evidence challenging any card in the entire proceeding.

Thus, as of March 28, 78 employees signed union authorization cards out of 140 employees in the FAS assembly/-machining unit.

The Respondent contends that a card signed by Richard J. Tygesen (G.C. Exh. 18) was not properly authenticated. Employee Alan M. Swain testified that he gave the card to Tygesen to sign and 2 or 3 days later he found the completed and signed card in his toolbox. Although Swain did not see Tygesen sign the card, I find under the circumstances here the card was properly authenticated and will be counted.

The General Counsel introduced 78 valid authorization cards which constitutes a clear majority of the 140 employees in the appropriate unit. Should the Board also include the packaging department employees, there would be 155 eligible employees—78 valid cards would still constitute a majority.

I find that at an appropriate time the Union represented a majority of the employees in the appropriate unit.

F. *The Private Settlement Agreement*

Respondent introduced into evidence private non-Board settlement agreements reached with five of the employees named in the complaint in paragraph 14 as 8(a)(3) discriminates (R. Exhs. 1–5). Respondent apparently contends that a settlement is a bar to further litigation involving these individuals. The testimony of these individuals demonstrates that the settlement was private between the individual and the Respondent. There is no evidence that the settlements were discussed or negotiated with the Charging Party Union. Further, the Union did not join in the settlements, which were not presented to or approved by the General Counsel. Under these circumstances, with the Charging Party Union not being a party to the settlement, and with the General Counsel opposing the settlements, which do not include a provision for reinstatement, they do not serve as a bar for Board litigation. See *American Pacific Concrete Pipe Co*., 290 NLRB 623 (1988); and *Independent Stave Co*., 287 NLRB 740 (1987). Further, the private settlements deal only with the backpay portion of the remedy and do not impact on the finding of a violation.

All settlement agreements and mutual release claims are identical except for the names and amounts of the settlement.[8]

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[8] It reads as follows:

March 12, 1993

Jerry Thompson

Dear Jerry,

As a consequence of the worsening business conditions, FAS has been forced to adjust its operation to the business level expected for 1993. Also, FAS is restructuring and downsizing its operation, to focus its efforts and investments on its core business, which is the systems integration business, and to become more cost-competitive at all levels of the FAS organization. As a result of these actions, we are forced to resort to workforce reductions. Your position has been impacted by that reduction, and is being eliminated, effective March 12, 1993.

This letter agreement is to set forth the terms and conditions of your separation of employment from Weldun.

1. Weldun will pay you a lump sum amount equal to your current straight-time weekly pay for 15 weeks.

2. You will be entitled to continue medical insurance benefits, in accordance with the terms of the Comprehensive Omnibus Budget Reconciliation Act (COBRA). Details of the COBRA benefits will be provided to you. Weldun will pay you an additional lump sum amount of $2,000.00 to pay for six (6) months of the COBRA premiums.

3. Your remaining vacation eligibility for 1993 is 148 hours. You will be paid that amount in addition to the sums described in Paragraphs 1 and 2.

4. Weldun will provide you, at no cost to you, out-placement services through National Career Consultants, Inc.. The out-placement services shall constitute a workshop and career counseling.

5. You agree to sign the document ''Mutual Release of Claims,'' attached to this letter agreement as Schedule ''A.'' The terms and conditions of that release are incorporated in this letter agreement.

6. The existence, terms and conditions of this letter agreement shall remain confidential. This agreement may not be used or disclosed for any reason, except to enforce its terms, or pursuant to duly issued legal process.

7. This agreement will be construed in accordance with the laws of the State of Michigan. The provisions of this agreement are severable, except that if any of the releases under this agreement are held unenforceable, this entire agreement shall be void as of the date of execution, and all consideration paid pursuant to this agreement, with the exception of vacation pay, shall be refunded to the Company. If any other part of this agreement is found to be unenforceable, the other provisions shall remain valid and enforceable.

8. You and Weldun shall submit all disputed arising out of or related to this agreement, or the breach, alleged breach or interpretation of this agreement to binding arbitration. The arbitration shall be conducted in accordance with the then current rules of the American Arbitration Association (''AAA''), except that the AAA shall not have authority to make any award for punitive damages. The arbitration shall be held in St. Joseph, Michigan. The arbitration award shall be final and binding. The decision of the arbitrator may be entered in and enforced by any court of competent jurisdiction.

We wish you the best in your future endeavors. Please return a signed original of this letter agreement to Stephen Renfer, by no later than the close of business on April 2, 1993.

If you do not agree with the terms of this letter agreement, Weldun will tender to you two weeks' pay only, plus the payment described in Paragraph 3 above.

Very truly yours,
WELDUN INTERNATIONAL, INC.
/s/ Stephen W. Renfer

By signing this letter agreement, I agree to the terms and conditions set forth herein and those incorporated in this letter agreement. -16-,1993

By: /s/ Jerry A. Thompson

Schedule A

MUTUAL RELEASE OF CLAIMS

WELDUN INTERNATIONAL, INCORPORATED (''WELDUN'') and JERRY THOMPSON (''Employee'') mutually agree as follows:

1. Employee and Weldun have mutually agreed to sever their employment relationship, effective March 12, 1993.

2. Employee and Weldun desire to and have resolved all matters relating to the employment of Employee by Weldun and the ending of the employment relationship, effective March 12, 1993. This Mutual Release is made as part of that process.

3. Weldun, for and in consideration of the mutual covenants contained herein, and the terms and conditions set forth in the

It is apparent that these were not voluntary ''buy-outs,'' but the employees were told they would be laid off with or without the settlement release. These settlements do not constitute a bar to this action by the General Counsel as argued by Respondent.

G. *Bargaining Order as a Proper Remedy*

In determining whether a bargaining order is warranted to remedy the Respondent's misconduct, we apply the test set out in *NLRB v. Gissel Packing Co*., 395 U.S. 575 (1969). There, the Court identified two categories of cases in which a bargaining order would be appropriate absent an election resulting in a union's certification as the employees' bargaining representative. The first category of cases involves ''exceptional cases'' marked by unfair labor practices that are so ''outrageous'' and ''pervasive'' that traditional remedies can not erase their coercive effects thus rendering a fair election impossible. The second category involves ''less extraordinary cases marked by less pervasive practices which nonetheless still have the tendency to undermine majority strength and impede the election processes.'' In this second category of cases, the Court reasoned that the ''possibility of erasing the effects of past practices and of ensuring a fair election . . . by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order.'' Id. at 613, 614–615. [*Massachusetts Coastal Seafoods, Inc*., 293 NLRB 496, 498 (1989).]

I have found that Respondent has engaged in hallmark violations of Section 8(a)(1), (3), and (5) of the Act including repeated instances of coercive interrogation, threats, by high corporate officials, including the ''doom'' of Respondent if the Union were selected, the permanent layoff of 29 unit employees just days before the scheduled NLRB representation hearing, and other illegal actions. Having found above that the Union's request for recognition was a continuing one it is not crucial that on March 9, the Union had only 70 valid authorization cards in a unit of 140. Between that date and March 28, the Union obtained an additional eight valid authorizations, the first on March 16, when Daniel Kuntz signed a card. Thus, from March 16 forward the Union represented a majority of the employees in the appropriate unit. In considering Respondent's conduct here, I find it unnecessary to resolve whether the conduct falls under category I as discussed above. It clearly falls into at least category II and the Union had majority status. Therefore a bargaining order is warranted. See *Montgomery Ward & Co*., 288 NLRB 126, 129 (1988), where the Board held that similar actions fell in the second category. See also *Statewide Transportation*, 297 NLRB 472 (1989); and *Somerset Welding & Steel*, 304 NLRB 32 (1991).

While the size of a unit is a factor, the Board has issued *Gissel* bargaining orders in units significantly larger than in the instant case. See *Benjamin Coal Co*., 294 NLRB 572 fn. 7 (1989), where the Board imposed a bargaining order in a unit consisting of approximately 497 employees. Here, Respondent's unfair labor practices touched on virtually all unit members to some degree, extended over a long period of time, and were committed, in some cases, by top members of management; factors which render unlikely the possibility of a free election.

CONCLUSIONS OF LAW

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

2. The Union, United Steelworkers of America AFL–CIO, CLC, is a labor organization within the meaning of Section 2(5) of the Act.

3. The following described unit constitutes a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time production and maintenance employees of the Employer's Flexible Assembly Systems Division, including assembly, machining, general tool and controls employees employed by the Employer at its Bridgman, Michigan facility; but excluding all office clerical employees, Bosch Storage Systems employees, Bosch Packaging Machines employees, professional employees, guards and supervisors as defined in the Act.

4. Respondent has committed unfair labor practices in violation of Section 8(a)(1) of the Act by:

Letter Agreement to which this release is attached, the sufficiency of which is hereby acknowledged, does hereby release and forever discharge Employee of and from any and all known claims of any nature whatsoever up to the date of this Agreement.

4. Employee, for and in consideration of the mutual covenants contained herein, and the payment of sums of money set forth in the Letter Agreement, the sufficiency of which is hereby acknowledged, does hereby release and forever discharge Weldun, its officers, directors, employees, agents and assigns, individually and in their corporate capacity of and from any and all claims of any nature whatsoever up to the date of this Agreement and upon the tender of the remaining payments set forth in the Letter Agreement, to all claims accruing through the date of such tender, including, without limiting the generality of the foregoing, any and all claims arising out of the employment of Employee by Weldun, the separation from employment, all acts and statements made leading up to the termination of employment, as well as any and all claims arising under or based upon the **Age-Discrimination in Employment Act**, 29 U.S.C. § 621 et seq.; Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq.; **Employee Retirement Income Security Act**, 29 U.S.C. § 151 et seq.; or any other state or federal law or regulation relating to employment.

5. Employee represents to Weldun that he entered into this Mutual Release and the Letter Agreement of his own free will with a full understanding of its provisions. Employee further represents that, prior to making this Release, he has had the opportunity and been encouraged by Weldun to seek the advice of legal counsel and has been given adequate time and opportunity to do so.

6. Employee acknowledges that he has been given at lease twenty-one (21) days, within which to consider this Mutual Release before signing it, and may revoke this Mutual Release within seven (7) days after signing it. A revocation of this Release shall negate the obligations and rights of both parties to this Mutual Release and the Letter Agreement.

Dated this 12th day of March, 1993.

WELDUN INTERNATIONAL, INCORPORATED
By: /s/Stephen W. Renfre
By: /s/Jerry A. Thompson

(a) Coercively interrogating its employees concerning their union membership, activities, and sympathies and the union membership, activities, and sympathies of other employees.

(b) Creating the impression that their employees union activities were under surveillance by Respondent.

(c) Threatening its employees with unspecified reprisals including loss of benefits if they selected the Union to represent them in collective bargaining.

(d) Telling its employees that the reason laid-off employees could not be recalled was because of the Union and the fact that the Union had filed unfair labor practice charges against Respondent.

(e) Telling its employees that the layoff of other employees was related to the Union.

(f) Impliedly threatening its employees with plant closure by telling them that the FAS division would be ''doomed'' if they selected the Union to represent them.

5. Respondent has committed unfair labor practices in violation of Section 8(a)(1) and (3) of the Act by permanently laying off and terminating the individuals named below:

Jerry Boone	David Pecoraro
Steve Collins	Bill Taylor
Dawn Condon	Jeff Pomeroy
Ken Curtis	Roger Reitz
John Delaney	Randy Roach
Jim Doud	Douglas Rouse
Bob Dunning	Dave Sinner
Don Hill	Shayne Smith
Tim Hunt	Jeff Steinke
Rex Jackson	Robert Taylor
Del Kirsey	Jerry Thompson
Kurt Lindhorst	Keith Vanderploeg
Gene Matz	James Whitehead
David Mensinger	Ray Zion
Dennis Meyers	

6. The Respondent has committed unfair labor practices in violation of Section 8(a)(1) and (5) of the Act by:

> Since on or about March 28, 1993, failing and refusing to recognize and bargain collectively concerning rates of pay, wages, hours of employment, and other terms and conditions of employment with United Steelworkers of America AFL–CIO, CLC as the exclusive representative of the employees in the appropriate unit described in item 3 above.

7. The unfair labor practices committed by Respondent set forth above are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that Respondent has engaged in certain unfair labor practices in violation of Section 8(a)(1), (3), and (5) of the Act as set forth above, it shall be ordered to cease and desist therefrom and from any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act. Moreover, Respondent shall be required to post an appropriate notice attached hereto as an appendix.

Having found that Respondent has unlawfully permanently laid off and terminated the 29 employees named in the Conclusion of Law and Order herein it shall be ordered to offer them immediate and full reinstatement to their former positions of employment or, if those positions are no longer available, to a substantially equivalent ones without prejudice to their seniority or any other rights or privileges they may have previously enjoyed and make them whole for any loss of earnings and benefits they may have suffered by reason of Respondent's discrimination against them. Backpay will be computed in accordance with the Board's decision in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).[9] Further Respondent shall be ordered to remove from its files any references to their unlawful discharges and notify them that it has done so and that it will not use their terminations against them in any way.

Having found above that at an appropriate period in time the Union represented a majority of the employees in the appropriate unit found here as indicated by valid authorization cards executed by a majority of the employees in that unit it shall be ordered in view of the ''outrageous'' and ''pervasive'' unfair labor practices engaged in by the Respondent as found here the cards would on balance be better protected by a bargaining order. The Employer's conduct found here has made the likelihood of a fair election remote if not impossible. Accordingly, Respondent shall be ordered to recognize the United Steelworkers of America, AFL–CIO, CLC and on request bargain in good faith with the said Union.

[Recommended Order omitted from publication.]

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[9] Under *New Horizons*, interest is computed at the ''short term Federal rate'' for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621. Interest accrued before January 1, 1987 (the effective date of the amendment) shall be computed as in *Florida Steel Corp.*, 231 NLRB 651 (1977).