

**Jefferson Smurfit Corporation and General Drivers,
Warehousemen and Helpers Union Local 142,
International Brotherhood of Teamsters, AFL-
CIO.** Cases 13-CA-33283, 13-CA-33286, 13-
CA-33585, and 13-RC-19060

January 20, 1998

DECISION, ORDER, AND DIRECTION OF
SECOND ELECTION

BY CHAIRMAN GOULD AND MEMBERS FOX AND
HURTGEN

On July 2, 1997, Administrative Law Judge Nancy M. Sherman issued the attached decision. The Respondent filed exceptions and a supporting brief and the General Counsel filed an 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 record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions² and to adopt the recommended Order as modified.³

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Jefferson Smurfit Corporation, Crown Point, Indiana, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following as paragraph 1(e).

“(e) Threatening employees with loss of jobs as a result of collective bargaining.”

2. Insert the following as paragraph 1(f) and reletter the subsequent paragraphs.

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

²We agree with the judge, for the reasons she states in the remedy section of her decision, that the triggering date, in the event the Respondent is required to mail notices to employees, should be the date of the first unfair labor practice. See *Excel Container*, 325 NLRB 17 (1997).

³The judge found that on February 2, 1995, Plant Manager Timothy Welty threatened employees with loss of benefits and jobs as a result of collective bargaining. The judge credited employee Daniel Nieto in making this finding. However, on cross-examination, Nieto specifically testified that with respect to benefits, Welty said that they could go either way as a result of collective bargaining, i.e., employees could get more or less. We find Welty's statement concerning benefits lawful. See *Somerset Welding & Steel, Inc.*, 314 NLRB 829, 832 (1994). We shall modify the judge's Order and notice accordingly. We shall also conform the judge's Order and notice.

“(f) Interrogating employees about how they intend to vote in an election conducted by the National Labor Relations Board.”

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

IT IS FURTHER ORDERED that the election held in Case 13-RC-19060 is set aside, and that case is severed and remanded to the Regional Director to conduct a new election when he deems the circumstances permit the free choice of a bargaining representative.

[Direction of Second Election omitted from publication.]

APPENDIX

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

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

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

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

WE WILL NOT solicit your grievances and impliedly promise to remedy them, in order to discourage you from selecting General Drivers, Warehousemen and Helpers Union Local 142, International Brotherhood of Teamsters, AFL-CIO, as your bargaining representative.

WE WILL NOT threaten to close and move the plant if Local 142 comes in the plant.

WE WILL NOT promise you benefits if Local 142's representation petition is withdrawn.

WE WILL NOT tell you that we will not likely choose to sign a contract with Local 142 if it wins an election conducted by the National Labor Relations Board.

WE WILL NOT threaten you with loss of jobs as a result of collective bargaining.

WE WILL NOT interrogate you about how you intend to vote in an election conducted by the National Labor Relations Board.

WE WILL NOT promise you a pay increase if you do not select Local 142 as your collective-bargaining representative.

WE WILL NOT refuse to permit you to wear union tee shirts on company premises.

WE WILL NOT threaten to withhold wage increases because Local 142 has filed objections to an election conducted by the National Labor Relations Board.

WE WILL NOT tell you that because you voted for Local 142, you are being written up on the basis of conduct for which employees who did not vote for Local 142 are not being written up.

WE WILL NOT threaten to stab you in the back because you have given statements to the Board.

WE WILL NOT discourage membership in Local 142, or any other union, by issuing written warnings to you, suspending you, discharging you, denying you previously promised reviews and reconsiderations of your suspension or discharge, or otherwise discriminating in regard to hire or tenure of employment or any term or condition of employment.

WE WILL NOT discharge or suspend employees, deny them previously promised reviews and reconsiderations of their suspension and discharge, or otherwise discriminate against employees, because they have filed charges or given testimony under the Act.

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, within 14 days of the Board's Order, offer Daniel Nieto reinstatement to his former job or, if that job no longer exists, to a substantially equivalent job, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Daniel Nieto whole, with interest, for any loss of earnings and other benefits he may have suffered by reason of the action against him.

WE WILL, within 14 days from the date of the Board's Order, remove from our files all reference to the unlawful discrimination against Daniel Nieto; and WE WILL, within 3 days thereafter, notify Nieto in writing that this has been done and that the actions and matters reflected in these documents will not be used against him in any way.

JEFFERSON SMURFIT CORPORATION

Richard Kelliher-Paz, Esq., for the General Counsel.
Thomas M. Hanna, Esq., of St. Louis, Missouri, for the Respondent.
Mr. John Jurcik, of Gary, Indiana, for Charging Party.

DECISION

STATEMENT OF THE CASE

NANCY M. SHERMAN, Administrative Law Judge. These consolidated cases were heard before me in Chicago, Illinois, on June 12, 13, and 14, 1996, and January 24, 1997. The unfair labor practice complaint was issued on December 14, 1995, against Respondent Jefferson Smurfit Corp. (JSC), pursuant to a charge in Case 13-CA-33283 filed by General

Drivers, Warehousemen and Helpers Union, Local 142, International Brotherhood of Teamsters, AFL-CIO (the Union) on April 3, 1995; a charge in Case 13-CA-33286 filed by the Union on April 4, 1995, and amended on December 6, 1995; and a charge in Case 13-CA-33585 filed by the Union on July 31, 1995, and amended on August 16, 1995. Case 13-RC-19060 was initiated by a representation petition filed by the Union on January 5, 1995, seeking certification as the exclusive representative of a unit of JSC's employees in its Crown Point, Indiana facility. An election directed by the Regional Director was conducted on March 2, 1995. The Union lost, by a tie vote of 10 to 10, and subsequently filed timely objections thereto. On December 14, 1995, the hearing on these objections, which largely track unfair labor practice allegations in the complaint, was consolidated with the hearing on the complaint. The complaint alleges that on various occasions before the election, including occasions after the petition was filed, JSC violated Section 8(a)(1) of the National Labor Relations Act, as amended (the Act) by promising benefits to the employees if they did not select the Union as their bargaining representative; by threatening employees with reprisals for union activities; by threatening to refuse to bargain or negotiate with the Union if it won the election; and by instructing employees not to wear union t-shirts at work. Most of these allegations are encompassed in the Union's objections, which also rely on allegedly false and misleading company literature distributed to the employees after the petition was filed and before the election. The complaint also alleges that after the election, JSC further violated Section 8(a)(1) by threatening employees with reprisals for supporting the Union and giving testimony to the Board, and because the Union had filed objections to the election. In addition, the complaint alleges that in and after about March 1995, JSC violated Section 8(a)(3), (4), and (1) of the Act by issuing warnings to, suspending, discharging, and refusing to reinstate employee Daniel Nieto, and by denying him a previously promised review and reconsideration of his suspension and discharge, because of his union activities and for filing charges or giving testimony under the Act.

On the basis of the entire record, including the demeanor of the witnesses, and after due consideration of the briefs filed by counsel for the General Counsel (the General Counsel) and counsel for JSC, I hereby make the following

FINDINGS OF FACT

I. JURISDICTION AND THE UNION'S STATUS

JSC is a corporation with an office and place of business in Crown Point, Indiana, where JSC is engaged in the manufacture of corrugated pallets. During the 12-month period ending November 30, 1995, JSC sold and shipped from its Crown Point facility goods valued in excess of \$50,000 directly to points outside Indiana. I find that, as JSC admits, JSC is engaged in commerce within the meaning of the Act, and that assertion of jurisdiction over its operations will effectuate the policies of the Act.

The Union is a labor organization within the meaning of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES AND OBJECTIONABLE CONDUCT

A. Background

Before November 1994, the Crown Point plant was operated by a company called Gate Pallet Systems. Gate Pallet had a practice of using mostly employees of a temporary employment service called Job Placement Service, although Gate Pallet did make some Job Placement employees its own after they had worked in the plant for 90 days. When JSC bought the Crown Point plant, which JSC began to operate on November 1, 1994, JSC did not want to continue Gate Pallet's manning practices. Accordingly, all the Job Placement employees who had been working at the Crown Point plant became employees of JSC after the takeover.

Before the takeover, rumors had been circulating among the employees that after the takeover they would be unionized and would receive a pay increase. However, although after the takeover the Crown Point employees' benefits were increased, the employees did not receive a wage increase. At least partly because of this disappointment, in December 1994 employee Daniel Nieto got in touch with the Union. Later that month, Nieto and employee Harold Koonce met with union organizers Larry Regan and John Jurcik at the union hall, where they discussed the steps which had to be taken in order to get the Union started in JSC. The employees asked whether they could be terminated if they organized, and about protecting their rights before the election. During this conversation, Nieto and Koonce agreed to have the Union represent them. The union organizers gave Nieto at least two unsigned copies of a document captioned "Petition for the Union," which stated that the signatories authorized the Union to represent them for the purposes of collective bargaining; and at least two unsigned copies of "An Open Letter to the Management," which stated that the signatories were "members of the Union Committee." The union organizers told Nieto and Koonce to talk to employees off company time and property, to obtain employee signatures on all these documents, to return the "Petition for the Union" to the Union, and to give the "Open Letter" to management.

During the lunchbreak on January 3, 1995, and outside company property, day-shift employee Nieto signed, and induced three of his fellow employees (including Peter Barten) to sign, the "Petition for the Union"; himself signed the "Open Letter to the Management"; and induced all of the petition signers except Barten to sign the "Open Letter." Later that day, Nieto gave Koonce the signed "Open Letter." On the following day, Nieto obtained a fourth employee signature on the "Petition," and then gave it to the Union.

Also on January 3, second-shift employee Koonce went to the lunchroom before the beginning of his shift and induced seven of his fellow employees to sign both the "Petition for the Union" and the "Open Letter." Koonce himself signed both documents. During the second-shift meal break that day, Koonce went to the office of then Production Supervisor William Albach, who was admittedly a supervisor, and gave him both of the "Open Letter" documents—the copy circulated by Koonce and the copy circulated by Nieto. Koonce said that "we were asking the Teamsters to represent us" and that he had been told that he had to give it to his super-

visor. After looking at these documents, Albach started to laugh. He said that he was not getting involved in this, and that he would give the documents to the "proper people." Then, Albach telephoned production supervisor Michael Collins (also spelled "Colins" in the record), who was admittedly a supervisor. Albach told Collins that "they are trying to organize with the Teamsters Union," and that Albach was going to put the letter on the desk of then Plant Manager Timothy David Welty, admittedly a supervisor, and let him deal with it the next day. Albach made a copy of the "Open Letter" documents for himself and (at Koonce's request) another one for Koonce. Then, Koonce went to work. That same day or (perhaps) early the following morning, Albach left the "Open Letter" documents on the desk of Collins (the day supervisor) together with a note whose contents are not shown by the record and which Collins gave to General Manager Mark Huneke (admittedly a supervisor) on a date not shown by the record. Then Plant Manager Welty found out about these documents on January 4.

B. Alleged Preelection Unfair Labor Practices and/or Objectionable Conduct

1. Alleged prepetition promises of benefits through General Manager Mark Huneke (complaint par. V(a))

Before 9:30 a.m. on January 4, Welty brought the "Open Letter" documents to Huneke. Huneke had been living in St. Louis, Missouri, before JSC purchased the Crown Point plant, and January 4 was the first day after he had relocated to the Crown Point area. He credibly testified that his receipt of these "Open Letter" documents was the first time he became aware of the Union's organizing campaign. Huneke arranged with Welty for a meeting with the first shift at 9:30 that morning, at the beginning of their break, and with the second shift before that shift began.

During the meeting with the first shift, Huneke showed the employees the documents which he had received from Welty that morning, and asked "what was this?" Nieto replied that it was an open letter notifying JSC of the employees' rights to unionize. Huneke said, "Okay, why?" Nieto said that the employees had some concerns about JSC and some issues in the plant. Huneke said that he was there to understand these concerns, that this was the first he had heard about them. Huneke went on to say that he had been with "the company" for only 6 or 7 weeks,¹ and that other aspects of the business had prevented him from spending as much time at the plant as he wanted to; but that he had been trying to find out from Albach, Collins and Welty how people liked the newly instituted benefit plans. Huneke said that he was now at the plant full-time, and had moved his family over the Christmas-New Year holidays. Huneke further said that this was the first time he had heard about the Union's organizing drive, and that Albach, Collins, and Welty were all "shocked" by it. After a while, a lot of the employees present started expressing "some concerns and some issues that they had." Some of the employees said that they wanted to know more of what was going on at JSC, to which Huneke replied, "We owe it to you."²

¹He was obviously referring to the Crown Point plant. He had been working for JSC since 1990.

²My findings as to this meeting are based on Huneke's testimony.

Huneke made much the same remarks during his meeting with the second shift later that day. When he asked why the employees wanted a union, some of them said that management were “making promises and . . . breaking their promises as fast as they could make them.” At some point during Huneke’s presentation, he stated that “if you have further problems or there’s things here in the plant that you don’t like, why don’t you give us a chance to address them first before you take this step?”³

During one or both of these meetings, a couple of employees remarked that JSC’s wages were a little low, and that JSC was paying them a lower hourly rate directly than the hourly rate Gate Pallet had been paying Job Placement for their services. Huneke said that the employees were “probably misinterpreting” and were “probably unsure” about what fringe benefits JSC was giving them. He said, “Let us work it out and then get with you at a later date.”⁴

I find that during the January 4 meetings, JSC solicited employees’ grievances, and impliedly promised to remedy them, in order to discourage employees from selecting the Union as their bargaining representative, in violation of Section 8(a)(1) of the Act.⁵ I do not agree with JSC that Huneke’s remarks constituted merely a legitimate attempt to provoke a dialogue about union representation. Rather, Huneke responded to the employees’ expressed dissatisfaction with their wage level by pointing to JSC’s action in improving fringe benefits and requesting that the employees let JSC “work . . . out” their remaining concerns. Similarly, when during the first-shift meeting employees Nieto made the generalized representation that the employees wanted to unionize because of “concerns” and “issues,” Huneke promptly referred to JSC’s newly instituted benefit plans and said that he had just started to work at the Crown Point full time.

However, because these remarks were made before the representation petition was filed, they will not be considered a basis for setting the election aside. See cases cited *infra* fn. 6.

2. Alleged shutdown threat by William Albach (complaint par. V(h))

Prior to the hearing, both the General Counsel and JSC counsel at least attempted to subpoena Richard Oldham Jr., who had been employed by JSC during relevant periods but had been laid off shortly before the hearing. Oldham did not come to the hearing room on either the first or the second day of the hearing (that is, June 12 and 13, 1996). On June 13, the General Counsel rested his case conditionally, the condition being that if Oldham eventually showed up pursuant to JSC’s subpoena, the General Counsel reserved the right to call him in support of complaint allegation V(h), which (the General Counsel stated) he would otherwise with-

³My findings to this meeting are based on a composite of credible parts of the testimony of Huneke, Albach, and employee Richard Oldham Jr.

⁴My findings in this paragraph are based on credible parts of Huneke’s testimony.

⁵*NLRB v. Berger Transfer & Storage Co.*, 678 F.2d 679, 691 (7th Cir. 1982); *Escada (USA), Inc.*, 304 NLRB 845, 850 (1991), *enfd.* 140 LRRM 2872 (3d Cir. 1992); *Torbitt & Castleman, Inc.*, 320 NLRB 907, 909–910 (1996); *New Life Bakery*, 301 NLRB 421, 427 (1991), *enfd.* 980 F.2d 738 (9th Cir. 1992).

draw. JSC counsel stated that he had no objection to this procedure. Paragraph V(h) alleges that in violation of Section 8(a)(1), “In or about late February or early March, the exact date being unknown to the General Counsel but particularly within the knowledge of Respondent, Respondent by Bill Albach, at the timeclock, threatened employees with plant closure if they selected the Union as their representative.”

Immediately after the General Counsel had thus conditionally rested, JSC called as its first witness William Albach, alleged in paragraph V(h) of the complaint as having threatened plant closure, who in November 1995 had been involuntarily separated from JSC, and who was testifying pursuant to subpoena. JSC counsel did not ask Albach whether he had made any threats of plant closure in the presence of Oldham, whom the General Counsel had just named as the witness whom he expected to testify to such a threat. After testifying for JSC, Albach was excused as a witness later that morning, June 13, 1996.

On June 14, 1996, I closed the hearing subject to Oldham’s appearance pursuant to proceedings to enforce the subpoena issued at JSC’s behest. On January 24, 1997, Oldham testified for JSC pursuant to a subpoena enforced by the United States District Court. Then, he testified for the General Counsel, without objection, to the following effect: Before the election, he engaged in a conversation with Albach during which he tried to get Oldham not to vote for the Union. Albach, who (Oldham testified) was “worried about losing his job,” told Oldham that “we” did not need a Union in Crown Point, and that if the Union came into that plant, JSC would close the doors and move it to Alabama. Oldham said that he did not think JSC could do this. Albach said that JSC could indeed do this. Oldham said, “. . . okay, whatever.”

Because the allegations of paragraph V(h) are substantially tracked by the above-described testimony of Oldham; because, before Albach testified, JSC was advised that Oldham was expected to testify in support of paragraph V(h); because paragraph V(h) alleges that the alleged unlawful statements were made by Albach; and because JSC’s counsel stated on the record that he had no objection to the General Counsel’s resting conditionally in view of JSC’s efforts (ultimately successful) to cause Oldham to come to the hearing, I do not agree with JSC that it “lack[ed] effective notice” of such testimony by Oldham. Nor do I agree with JSC that such testimony is rendered “tenuous” by Oldham’s further testimony that before Albach’s statement, Oldham “could have” asked him what he thought would happen if this place goes union, and “could have said” that Oldham was worried about his job if the place went union. As discussed *infra*, part II,C,2,c,(4),(c), I credit most of Oldham’s testimony as a witness for JSC. I also credit his testimony, as a witness for the General Counsel, that Albach said the Crown Point plant would close and move if the Union came in. I find that when Albach so stated, JSC violated Section 8(a)(1) of the Act.

Oldham testified that this conversation occurred before the election, but did not otherwise testify about the date. This conversation obviously occurred after Albach first found out about the Union’s organizing campaign, a date which (the record shows) was no later than January 3. Moreover, the evidence fails preponderantly to show that this conversation occurred after the filing of the petition on January 5. Accord-

ingly, in assessing the validity of the objections to the election, this incident will not be considered.⁶

3. Alleged unfair labor practices and/or objectionable conduct between the filing of the petition and the election

a. *Background*

The Union filed its representation petition on January 5, 1995;⁷ the record fails to show when JSC first received a copy. On January 18, JSC received a notice stating that the hearing on the representation petition would be held on January 20.

b. *Alleged discharge threat by Michael Collins (complaint par. V(b))*

Nieto testified to the following effect: On January 18, 1995, Supervisor Collins, who was Nieto's immediate superior, approached him and said that Collins knew who was forming the Union. Nieto asked who. Collins said that it was employees Nieto, Koonce, and Javier Garza. Collins went on to say that "you had better watch out, you could be discharged for this." Then, Collins said that the Company "can and will close down for slow business, being that we were kind of slow at that time of the year."

Collins denied telling Nieto that Collins knew who was forming the Union, and that Nieto had better watch out, he could be discharged for that. As to the reference to a shut-down, Collins (who had worked in the plant under Gate Pallet) testified to saying that JSC had just bought the plant, was not making any money, and could close the doors any time it wanted to. Collins testified that at that time, he was in fear for his own job.

I regard as unlikely the alleged exchange about the identity of the union leaders, in view of the fact that 2 weeks earlier the Union had given Albach (who discussed the matter with Collins) documents in which the signatories identified themselves as members of "the Union Committee" and on which the first signatory on one copy was Nieto and the first two signatories on the other were Koonce and Garza. In view of these considerations and after considering the witnesses' demeanor, I credit Collins.

c. *Alleged solicitation of grievances, and implied promises of benefits, by Huneke (complaint par. V(a))*

About January 17 (see *infra* fn. 8), JSC conducted a meeting of all the hourly employees on both shifts. Present for JSC were Huneke, Albach, Collins, then Plant Manager Welty, and Maintenance Supervisor Dave Miller, all of whom were admittedly supervisors. Huneke asked the employees why they felt that "we" needed a union and why they wanted one. An employee identified in the record as "Cybil" said that she felt intimidated by Collins. Koonce said that he would like, and feel more protected with, a contract. A few other employees said that they would feel more comfortable, and more secure in their jobs, if they had a

union. Huneke asked the employees to drop the representation petition and give him 6 more months so he could show the employees what JSC could do for them.⁸

I agree with the General Counsel that during this meeting, Huneke solicited employees' grievances and impliedly promised benefits to employees if the Union's representation petition was withdrawn, in violation of Section 8(a)(1) of the Act. (See the cases cited *supra* fn. 5.)

d. *Alleged statement by Welty that JSC would refuse to bargain with the Union if the employees voted for it (complaint par. V(c))*

On January 26, JSC called all employees on both shifts to a meeting which was attended by Welty, Huneke, and Michael Harrington, who is JSC's vice president, personnel and industrial relations. At this meeting, Harrington stated that JSC presently had a number of union contracts. However, Huneke and Welty said that JSC had never acquired a non-union company as to which JSC later signed a first contract with a union. Welty went on to say that "just because you are union, it doesn't mean your benefits and your wages are going up; they could go down and that you start negotiating in the middle and people could lose money and benefits."

My findings as to what Huneke and Welty said during this meeting are based on Koonce's testimony. Welty testified that he "could have" made the statement quoted in the last sentence of the preceding paragraph, and he tacitly conceded that he may have made the remarks which Koonce testimonially attributed to him about first contracts (see pp. 315-316 of the transcript). Huneke denied that Welty discussed the Union during this meeting, and denied, in effect, that either of them made at any time such remarks about first contracts.⁹ On direct examination, Koonce testified that Welty and Huneke made such remarks during the meeting on February 16, which Huneke did not attend. However, on cross-examination, Koonce did not question JSC counsel's statement that Koonce had testimonially attached this meeting to the end of January. Koonce, who was still in JSC's employ at the time of the hearing, impressed me as an honest witness who did not affirmatively desire to assist the General Counsel. I credit Koonce, for demeanor reasons and in view of Welty's tacit admission that management did refer to the unionization of plants which were nonunion when acquired by JSC.

I agree with the General Counsel that such remarks by Welty and Huneke constituted a violation of Section 8(a)(1) by JSC. While these statements were confined to acquired

⁶ *Operating Engineers (Weather Wise) Local 295-295C*, 282 NLRB 273, 275 (1986); *Gold Shield Security*, 306 NLRB 20, 22 (1992); *Gibraltar Steel Corp.*, 323 NLRB No. 100, slip op. at 3 (Apr. 30, 1997).

⁷ All dates hereafter are 1995 unless otherwise stated.

⁸ My findings as to what was said at this meeting are based on Koonce's testimony. His testimony that this meeting included both shifts establishes that it was not one of those held on January 4, both of which included one shift only. My finding as to the date of the meeting described by Koonce is based on his testimony that it occurred within a week or two after JSC received the "Open Letter," an event which occurred on January 3; and that after the meeting described by him, JSC began to conduct such meetings, each of which was attended by both shifts, every Thursday; January 4 was a Wednesday, and the earliest of such Thursday meetings whose date is established by documentary evidence was conducted on January 19.

⁹ However, Huneke's testimony at least suggests that such statements were made by Harrington. The complaint does not allege that Harrington engaged in any unlawful conduct.

nonunion plants, they did apply to the plant where the employees in the audience actually worked. Moreover, because whether a union could obtain a contract with respect to any JSC plant was obviously within JSC's control, and because JSC had chosen to assert (during a meeting where it urged a vote against the Union) that it had never chosen to sign a union contract with respect to a plant which had been nonunion when acquired, Welty and Huneke were telling the employees, in effect, that JSC would likely not choose to sign a contract with the Union even if it won the forthcoming election—a statement violative of Section 8(a)(1). See *Outboard Marine Corp.*, 307 NLRB 1333, 1335 (1992), *enfd.* 9 F.3d 113 (7th Cir. 1993); *Overnite Transportation Co.*, 296 NLRB 669, 670 (1989), *enfd.* 938 F.2d 815, 819 (7th Cir. 1991); *Forest City Grocery Co.*, 306 NLRB 723, 729 (1992).¹⁰

e. Alleged threats by Welty of loss of wages, benefits, and jobs (complaint par. V(d))

During an employee meeting convened by JSC on February 2, Welty delivered a speech urging employees to vote against the Union. He further stated that the “whole union thing” could “make us or break us.” He went on to say that as a result of collective bargaining, the employees could gain money, but at the same time they could lose money and benefits. Employee Nieto stated that the employees could only gain, that they could not lose. Welty said that Nieto was wrong, and that the employees could lose their jobs as well.

My findings in the last three sentences are based on Nieto's testimony. At one point, Welty testified that he could not remember whether or not he made the remarks which Nieto attributed to him. Elsewhere, Welty denied threatening employees with any kind of loss, and testified that he “could have” said that the union does not mean that wages and benefits would go up, that they could come down. In view of these uncertainties in Welty's testimony, and after considering the demeanor of the witnesses, I credit Nieto.

I agree with the General Counsel that during this meeting, Welty threatened employees with loss of benefits and of jobs if they chose union representation; and that such statements constituted a violation of Section 8(a)(1) by JSC. I note that Welty did not tell the employees that they could gain benefits as a result of collective bargaining. However, because as to wages Welty made the accurate statement that the employees could gain money or lose money, I conclude that he did not threaten employees with loss of “wages,” as alleged in paragraph V(d) of the complaint.

f. Alleged interrogation by Welty (complaint par. V(e))

During a meeting of both shifts conducted by JSC on February 9, 1995, Welty twice asked the group how they intended to vote. Some employees replied that they were going to vote, other employees replied that they did not intend to vote, and others replied how they intended to vote. Nieto, at least, said nothing.¹¹

¹⁰See also, *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969).

¹¹My findings in this paragraph are based on Nieto's testimony. Welty denied that during this meeting he asked the employees to demonstrate, by a show of hands or by voice, whether they intended

I agree with the General Counsel that when Welty engaged in such conduct, JSC violated Section 8(a)(1) of the Act by engaging in unlawful interrogation. In so finding, I note that the questions were directed by the plant manager at the entire work force during a meeting which JSC required them to attend; that no legitimate purpose for inquiries about how individual employees intended to vote in a secret-ballot Board election was given to them or appears in the record; that the employees were given no assurances against reprisals; that a principal union activist (Nieto) failed to reply, and other employees gave evasive replies; that JSC issued threats of reprisal for union activity and engaged in other unfair labor practices, both before and after this meeting; and that JSC thereafter disciplined and discharged Nieto because of his union activity and his statements to the NLRB about the election. *NLRB v. Ajax Tool Works, Inc.*, 713 F.2d 1307, 1313–1315 (7th Cir. 1983); *Long-Airdox Co.*, 277 NLRB 1157, 1170–1171 (1985).

g. Alleged February 16 threats by Welty that JSC would not bargain with the Union (complaint par. V(f))

Nieto testified, without corroboration, to the following effect: During an employee meeting on February 16 convened by JSC, Welty said that JSC would not and did not have to deal with the Union and “as far as negotiations goes, [JSC] won't even mess with” the Union. Welty went on to say that “all this thing is going to end up in is . . . a strike.”

Nieto testified that Huneke was present during this meeting, but Huneke credibly denied attending the February 16 meeting. Nieto further testified, without contradiction, that this meeting was attended by Koonce (a witness for the General Counsel) and JSC witnesses Collins, Albach, and Miller. None of these individuals was asked whether Welty made the February 16 statement which Nieto attributed to him. For demeanor reasons, I credit Welty's denial.

h. Alleged February 23 implied promise of pay raises if the Union lost the election (complaint par. V(g))

During a meeting of both shifts convened by JSC on February 23, Huneke passed out a “Pay for Skills” chart setting forth hourly rates paid at JSC's Montgomery (Alabama) plant, which manufactures corrugated board rather than the corrugated pallets manufactured at the Crown Point plant. Except at the entry level, the Montgomery rates were substantially higher than those paid at the Crown Point plant. Then, Harrington stated that the “Pay for Skills” system was also being utilized at JSC's Hanover Park plant. Harrington stated that “Pay for Skills” had been used in nonunion operations, but there was no guarantee such a system would be implemented at the Crown Point plant. However, he stated, the “Pay for Skills” program would not likely be installed in a unionized shop. Harrington said that JSC “cannot make any threats or promises during this time frame.” He went on to say that it would be foolish to not to give management

to vote for the Union or against the Union. Although I credit Welty's denial, Nieto's testimony did not attribute to Welty the conduct he was specifically asked about.

a chance, and asked the employees to vote “No.”¹² Then, Huneke read to the employees a speech which stated, in part:

I am not making a prediction about what will happen, nor am I making any kind of threat about what will happen to you. [JSC] has a number of union contracts and a number of union-free operations, so it is prepared to survive no matter what.

Huneke went on to say that if the Union won the election and bargaining negotiations began, the JSC negotiator’s “first order of business . . . will be to create a framework which gives management the maximum freedom to manage all its affairs and, this is important [the] language of the agreement must be clearly settled before any real progress can be made on money issues.” Then, Huneke stated:

No sooner does [JSC] buy this plant and improve the holiday package than the Union asks for an even bigger package of benefits. Headquarters is going to think some people are ungrateful for those benefits, freely given, without any union. Do you want to send a message to [headquarters] that it is better not to give employees something extra because they will go out and get a union and ask for more? If you do that, you create a disincentive for management to ever do more than provide the bare minimum so that it will have something to offer when the union comes around.

Huneke went on to say that if the employees insisted that their wages be set by union contract, JSC would be “force[d] to set a pay scale which considers the lowest common denominator . . . to look at what the average or low to average employee produces because a union shop tends to protect the below average worker and over a period of time the quality of the work force declines.” Huneke stated that JSC presently made an individual evaluation of each employee’s performance; and that “[w]e do not have to fight with a union who says John should be paid the same as Jim, regardless.” He stated that even if an employee disagreed with the individual evaluation which management had made, “Would you be better off in a union shop where the individual is not considered, only the group? I do not think any one of you would benefit. Ask yourself, ‘How can I lose by being non-union?’” Huneke concluded by saying:

[W]e have employees with the potential to become an outstanding work force who need confidence in their own ability to shape their future. I hope you like our management team and will place your trust in us to do the right thing when the time comes by staying union-free.

As to the “Pay for Skills” plan, Huneke said that it could not be implemented at the Crown Point plant with a union, because the Union would not want that kind of pay plan. Employee Barten asked how long it would take to implement the “Pay for Skills” plan if the Union did not get voted in. Huneke said that he was not sure.

¹²My findings as to Harrington’s remarks are based on management’s notes, which are a part of the exhibit which includes JSC’s agenda for the meeting.

During this meeting, after remarking that Welty had previously said that JSC had never signed a first contract (see part II,B,3,d, supra), Koonce gave Welty a copy of a document which (Koonce said to Welty) was a first contract which JSC had signed with one of the Union’s sister locals. Welty replied, “I don’t recall saying that, and I think it’s time we move on to something else.”

I agree with the General Counsel that in context and taken as a whole, Huneke’s speech included a promise that employees would receive a pay increase if they did not select the Union as their collective-bargaining representative. I find that when Huneke so advised the employees, JSC violated Section 8(a)(1) of the Act.

i. *Allegedly unlawful restriction on union tee-shirts*
(complaint par. V(i))

(1) Facts

During the election campaign before the day of the election, about half of the employees, including Nieto, wore union tee-shirts to work. During this period, management did not require any employees to remove these shirts.

Welty testified that JSC’s corporate offices had instructed Crown Point management that on the day of the election, there were to be no union paraphernalia in the plant. He further testified that this policy was enforced. The polls in the representation election, which was conducted upstairs in the breakroom, were open between 3 p.m. and 4 p.m. on March 2, 1995. At 2:45 p.m. that day, Nieto arrived at the plant wearing a union hat, a union pin, and a union tee-shirt. At the loading dock, he encountered Welty, who (in the presence of employee Ambrosio Calo) told Nieto to either take the shirt off or leave the premises. Nieto asked why. Welty replied “because I said so.” Nieto asked whether Welty wanted him to go outside. Welty said that he wanted Nieto to get off the premises; Nieto obeyed. Then, an employee identified in the record as “Johnny” asked Nieto why he was standing out there. Inferentially, Nieto explained. Johnny said that when the election started, Nieto would have to take his union shirt and hat off “anyways,” and suggested that Nieto go in when the election started. When the polls opened, Nieto removed his union shirt and hat, went inside, and voted.¹³

After the polls opened at 3 p.m., Collins asked Welty whether the employees were allowed to wear union tee-shirts. Welty thereupon went upstairs, where the election was being conducted. Welty testified without direct contradiction, “We had been instructed [by JSC’s corporate offices] that there was to be no, meaning us, that means everybody, employees, the company, there was to be no election day paraphernalia or information about. So I asked the [Board agent who conducted] the election, and he said, no, it’s true.” Then, Welty advised Collins that according to the Board agent, the employees could wear the union tee-shirts in the shop, but were not allowed to wear them to vote.¹⁴

¹³My findings in this paragraph are based upon Nieto’s testimony; see infra fn. 14.

¹⁴Except as otherwise indicated, my findings in this paragraph are based on Collins’ testimony. Because his testimony shows that the polls had already opened when Welty at least allegedly consulted the Board agent about the tee-shirt matter, and because of Nieto’s uncontradicted testimony that his contact with Welty took place 15

As soon as employee Oldham entered the plant door that day, wearing a union tee-shirt, Collins told him not to take his coat off and not to wear that shirt. Oldham refrained from removing his coat.¹⁵

A month or two after the election, Albach and Collins asked employee Koonce, who had been an observer for the Union during the election, whether employees were allowed to wear union tee-shirts during the day of the election. Koonce said yes (see *infra* fn. 17). Then, Collins said that Welty had told him that the employees were not allowed to wear union tee-shirts on the day of the election.

(2) Analysis and conclusions

In the absence of special circumstances, an employer violates Section 8(a)(1) of the Act by refusing to permit an employee to wear union insignia in the workplace.¹⁶ I assume, without deciding, that such “special circumstances” would include a statement from a Board agent conducting a representation election that employees would not be allowed to wear union insignia while they were voting.¹⁷ However, Collins’ credible testimony about Welty’s version of what the Board agent told Welty establishes that Welty did not in good faith believe that any insignia ban called for by the Board agent extended to periods when the polls were not open, or to portions of the plant other than those where the voting was taking place. Accordingly, JSC violated Section 8(a)(1) by forbidding employees to wear union insignia in the plant at any place or at any time on the day of the election. (See cases cited *supra* fn. 16.)

j. Allegedly objectionable company literature

The Union’s Objection Number 7 alleges in part as follows:

On or about February 23, 1995, [JSC] distributed literature that was false and misleading, concerning Loss of Wages and Benefits if employees became Union.

As to wages and benefits, the literature on which the Union relies states, in substance, that after collective bargaining, wages and benefits could get better, stay the same, or get worse—a statement which accurately summarizes the possible consequences of lawful bargaining by an employer. Moreover, the literature includes an at least substantially accurate summary of how lawful bargaining can lead to such

minutes before the polls were scheduled to open, I do not credit Welty’s testimony that he did not tell Nieto to remove his union tee-shirt until after Welty’s consultation with the Board agent. Further, for demeanor reasons, I credit Nieto’s testimony regarding the contents of his conversation with Welty and Nieto’s reaction thereto, and do not credit Welty’s version to the extent that it may be inconsistent with Nieto’s.

¹⁵My findings as to the Collins-Oldham exchange are based on Oldham’s testimony. For demeanor reasons, I do not credit Collins’ testimony that he never followed up on Welty’s instructions.

¹⁶*Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 801–803 (1945); *NLRB v. Shelby Memorial Hospital*, 1 F.3d 550, 565 (7th Cir. 1993); *Inland Counties Legal Services*, 317 NLRB 941 (1995).

¹⁷If given, such instructions would have been erroneous. The Board’s Casehandling Manual, part two, representation proceedings (September 1989), states at Sec. 11326.3, “Voters need not remove insignia, even though they constitute electioneering material.”

results. I perceive no basis for any election objection based on this document.

k. The validity of the election

In view of my finding (*supra* part II,B,3) that JSC engaged in certain unfair labor practices (on occasion, in the presence of virtually the entire electorate) between the filing of the representation petition and the election, which the Union lost by a tie vote, I find that such conduct constitutes objectionable conduct affecting the results of the election held on March 2, 1995, in Case 13–RC–19060. *Dal-Tex Optical Co.*, 137 NLRB 1782 (1962); *MK Railway Corp.*, 319 NLRB 337, 342–343 (1995).

C. Alleged Postelection Unfair Labor Practices

1. Alleged independent violations of Section 8(a)(1)

a. Alleged threat to employee Oldham by Supervisor Albach with reprisals for giving testimony to the Board (*complaint par. V(l)*)

As of June 13, 1996, JSC had at least arguably served former employee Oldham with a subpoena and JSC’s counsel, Thomas M. Hanna, had been advised that Oldham would not comply therewith. On that date, Hanna stated on the record that he was contemplating proceedings to enforce the subpoena. Although counsel for the General Counsel, Richard Kelliher-Paz, had also at least attempted to subpoena Oldham, Kelliher-Paz stated on the record on June 13, 1996, that he was resting “conditionally”; and that if Oldham never did appear, Kelliher-Paz would withdraw complaint allegation V(h), because it would be based on testimony by Oldham. Hanna stated that this arrangement was agreeable to him.

On June 13 and 14, 1996, JSC put on its case in chief. Among the witnesses called by it was William Albach, who had involuntarily left JSC’s employ in November 1995 and was appearing pursuant to a subpoena. Albach testified on June 13, 1996, and was then excused.

After subpoena enforcement proceedings initiated at JSC’s behest, Oldham testified on January 24, 1997. After Oldham had completed his testimony as a witness for JSC, he testified as a witness for the General Counsel. In response to questions by Kelliher-Paz, Oldham gave testimony in support of paragraph V(h) of the complaint, which alleges that Albach “threatened employees with plant closure if they selected the Union as their representative” (see *supra* part II,B,2). In addition, in response to questions by Kelliher-Paz, Oldham gave testimony to the following effect: After the Union had claimed that the election was unfair, Albach pulled Oldham over to the side and told him not to make any statements to the Board for the Union, because “they’d bring [him] to court”; and that if Oldham did make a statement to the NLRB, he would be fired. Hanna did not object at the hearing to the receipt of this testimony, and cross-examined Oldham about it. Albach did not testify at the resumed hearing; nor is there any claim that JSC attempted to subpoena him again, even though Kelliher-Paz had advised Hanna that Oldham would be asked about the statements which paragraph V(h) attributed to Albach. Kelliher-Paz’s posthearing brief contends (p. 14) that through this statement by Albach, JSC violated Section 8(a)(1); paragraph V(l) of the com-

plaint alleges that JSC violated Section 8(a)(1) when Albach "threatened employees with reprisals for giving testimony to the Board." Hanna's posthearing brief, filed simultaneously with Kelliher-Paz' posthearing brief, contends that no unfair labor practice finding should be made in connection with Albach's at least alleged remarks about statements to the Board, on the ground that the evidence about such statements was not adduced during the General Counsel's case in chief and does not fall within the allegations of paragraph V(h) of the complaint, the only paragraph cited by the General Counsel when he conditionally rested.

I agree with JSC that the General Counsel is procedurally barred from relying on Oldham's testimony to support paragraph V(l) of the complaint. Such January 1997 testimony by Oldham was given at a point in the hearing when JSC had no reason to anticipate any further evidence in support of paragraph V(l), in view of the General Counsel's June 1996 action in resting his case without any reference to that paragraph;¹⁸ and, therefore, JSC had had no reason to anticipate any need to subpoena Albach again in connection with this testimony by Oldham. Accordingly, the testimony described under this heading will not be relied on in connection with either paragraph V(l) or in connection with the 8(a)(4) allegations with respect to employee Nieto. However, because reviewing authority may disagree with this ruling, I note that Oldham was a generally reliable witness, that Nieto credibly testified to remarks by Albach which were very similar to the remarks which Oldham attributed to him (see *infra* part II,C,2,c.(3)), and that JSC later discriminated against Nieto because of statements which he made to the NLRB (*infra* part II,C,2,c.(4), d).

b. *Alleged unlawful threat to withhold wage increases (complaint par. V(k))*

(1) Facts

During the meetings on January 4, 1995, several employees complained that they had not been evaluated since they had been with Gate Pallet. In response, Huneke stated that "one of the things we need to do at some point in time was provide a base line of where our skills are versus where we needed to be, given . . . that we are going to bring new equipment in here to change our method of production."

In late January 1995, JSC handed out to the employees some self-evaluation forms which the employees were required to fill out and return to management. When these evaluation blanks were distributed, Welty told the employees that these evaluations would affect the size of their wage increases. In January or February, management told the employees that wage increases had been put on hold until after the union election. By February 28, JSC had completed a wage survey which, in Huneke's opinion, showed that JSC's starting wage was "okay," but that "the star performers probably deserved more."

On March 8, 1995, employee Koonce received what Welty and Albach told him was an "outstanding" evaluation; Welty added that he had never before given anyone an "outstanding" evaluation. Welty said that after the evaluations had been completed by the end of the month, raises would

¹⁸ As discussed *infra* part II,C,2,c.(3), during the June 1996 hearing Nieto gave testimony tending to support par. V(l).

be given out. On the following day, March 9, the Union filed its objections to the election, which objections were received by JSC on March 10. JSC continued to make employee evaluations after the March 2 election, but until November or December did not finally determine which evaluations would lead to individual employee wage increases, or intimate to the employees which of them would likely receive them.

On March 13, 1995, JSC issued to all the employees a memorandum advising them that the Union had filed objections to the election. The memorandum went on to say, in part:

If the NLRB finds that these objections are valid, it will set aside the March 2 election, and we will have another election sometime in the future. If the Board finds that these objections are not valid, they will certify the results of the March 2 election, and we can go on with our lives. I would point out that any single objection, if found to be true, is sufficient to set aside the election.

Some of you may be asked to give evidence in support of the Teamsters Union's objection. This request will come from the Teamsters Union. Whether you support these objections or not is your business; however, it is vitally important that you tell the truth and be absolutely correct in what you say.

If there is a dispute as to whether or not certain comments were made, there will be a hearing and those who have given statements, as evidence, will be expected to testify.

In the meantime, the Company's hands are tied insofar as its ability to make changes until this election matter is resolved.

By letter to Welty dated March 17, 1995, with copies to all employees, the Union stated:

It has been brought to the attention of this Local Union that the management of [JSC] have made statements that are misleading concerning the unfair labor practice charges and objections filed by this Union.

These actions are only against [JSC's] conduct during the election and have nothing to do with any increases in wages and benefits that [JSC] feels it could give to their employees.

Be assured, this Union will not file any charges against [JSC] if the company wishes to give any increases that are non discriminatory.

As a matter of fact, we would welcome them and extend our congratulations to all the employees of [JSC].

By memorandum distributed to all employees and dated March 23, 1995, Huneke stated (emphasis in original):

THE TEAMSTER'S UNION HAS SENT A LETTER TELLING ME THAT IT WILL NOT FILE CHARGES AGAINST [JSC] "IF THE COMPANY WISHES TO GIVE ANY INCREASES *that are non-discriminatory.*" By sending this letter, the Union has demonstrated that it has been the delaying factor here because of its admitted power to file "charges."

Now the Union wants you to believe that it is no longer blocking wage increases by its presence. First of all, you should remember that we did not promise any-

more an increase in wages or benefits. More importantly, if we wanted to increase wages or benefits, the union letter just is not “good enough” legally to permit increases to be made. I would like to point out that the Union uses a tricky phrase letter, the phrase “on-discriminatory.” What does the Union mean? Does the Union mean that if they believed that someone got “too much” and another “too little” that “discrimination” had occurred leaving it free to file charges?

WE WANT TO GET THIS UNION ORGANIZING BUSINESS OVER WITH AS SOON AS POSSIBLE. WE DO NOT WANT TO JEOPARDIZE THE RESULTS OF THE MARCH 2 ELECTION WHEN HALF OF THE EMPLOYEES SAID THEY DID NOT WANT UNION REPRESENTATION. IF THE UNION WANTS TO WAIVE ALL RIGHTS TO FILE CHARGES THAT’S FINE, BUT THEY HAVE NOT DONE THAT YET. EVEN THAT WILL NOT DO THE JOB. UNDER THE LAW, EVEN IF THE UNION WAIVES ITS RIGHT TO FILE A CHARGE “ANY PERSON” CAN FILE A CHARGE. A CHARGE COULD BE FILED BY AN EMPLOYEE WHO SUPPORTS THE UNION, A LAWYER OR EVEN A TOTAL STRANGER THAT THE UNION PUTS UP TO FILING A CHARGE, AND THE CHARGE WILL HAVE THE SAME EFFECT AS IF THE UNION FILED.

AS I SAID BEFORE, WE WANT THIS TO BE OVER. THE UNION IS UNHAPPY ABOUT THE LOSS OF THIS ELECTION AND IS PUTTING ALL OF US TO MORE TROUBLE AND DELAY. THIS IS THE KIND OF THING WHICH HAPPENS WITH UNIONS AND IS ONE GOOD REASON WHY YOU SHOULD WANT TO REMAIN INDEPENDENT.

The Union never told JSC what the Union meant by the term “non-discriminatory,” and JSC never asked the Union what it meant. When distributing this letter, Huneke told the employees that JSC attorneys had said that it was “just a union trick,” and that if JSC gave raises, anyone could file a charge or a grievance against the raises on the ground that they were discriminatory. Koonce never received the wage increase he had in effect been promised in March 1995 on the basis of his “outstanding” March 8 evaluation. So far as the record shows, nobody at the plant received any wage increases until November or December 1995. Huneke testified that JSC gave wage increases at that time, when the Union’s objections were still pending, because

[i]t had been a year since we owned the company. We were appalled by how long it took the NLRB to get to these objections and file a case, and it was terribly unfair to the employees, that we decided to go ahead and give them increases based on their performance.

(2) Analysis and conclusions

I find supported by the evidence and relevant precedent the allegations in paragraph V(k) of the complaint that about March 14, JSC “threatened to withhold raises and benefits because the Union had filed objections to the conduct of the election.” I so find because in telling the employees that JSC could not improve wages or benefits until the Union’s objections had been resolved, JSC did not make it clear to the employees that the adjustment would occur whether or not they selected a union and that the sole purpose of the postponement was to avoid the appearance of influencing the outcome of any rerun election; and because, moreover, JSC persisted

in placing the onus of such action on the Union’s presence even after the Union assured JSC that it would not file any charge against it if it wanted to give “any increases that are non-discriminatory.” See *LRM Packaging, Inc.*, 308 NLRB 829, 830 (1992); *Atlantic Forest Products*, 282 NLRB 855, 858–859 (1987); *A.M.F.M. of Summers County, Inc.*, 315 NLRB 727, 732 (1994); *Lovejoy Industries*, 309 NLRB 1085, 1125 (1992), *enfd.* in relevant part 26 F.3d 162 (D.C. Cir. 1994); *NLRB v. The Industrial Erectors, Inc.*, 712 F.2d 1131, 1135–1136 (7th Cir. 1983). That JSC’s conduct was not really motivated by any concern about a free rerun election is shown by its claim to the employees that the Union’s phrase “non-discriminatory” is “tricky,” without ever asking the Union to explain it; by the fact that JSC eventually did give wage increases during the pendency of the objections; and by JSC’s disingenuous claim that an effective waiver by the Union would not have afforded JSC any protection (see *Queen of the Valley Hospital*, 316 NLRB 721 (1995)).

The General Counsel’s posthearing brief contends (p. 13) that JSC violated the Act by withholding or postponing wage increases. However, the complaint does not so allege, and this contention is not treated in JSC’s posthearing brief.¹⁹ Accordingly, this contention will not be considered on its merits.

2. Allegedly unlawful discrimination against Daniel Nieto; alleged additional independent violations of Section 8(a)(1)

a. Background

Daniel Nieto, who at all times relevant here was a forklift operator, began to work at the Crown Point plant, as an employee of Job Placement Service, while the plant was still being run by Gate Pallet. During this period, in about mid-June 1994, Nieto damaged a warehouse wall by backing his forklift into it. After conducting an investigation of Nieto’s explanation that his brakes had failed, and concluding that this was not true, Gate Pallet put him on indefinite probation effective June 21, 1994. The document which memorialized Nieto’s indefinite probation was written by Welty; and directed Nieto to improve in forklift safety and operation, in understanding of stacking, banding, and stretch wrap instructions, in trailer loading, and in “general attitude . . . Failure to improve in all these areas may result in your dismissal.” JSC does not contend that this accident motivated Nieto’s discharge, in whole or in part. Also, on July 21, 1994, Albach, who was a supervisor under Gate Pallet, warned him about chewing tobacco.

On November 3, 1994, after JSC had taken over the plant and Albach had acquired the title of operations manager, he gave Nieto a “second warning” about “chewing [tobacco] on company time” in the lunch room. At that time, Nieto was advised that no tobacco of any kind was allowed on company property.²⁰ Also on November 3, 1994 (see *infra*

¹⁹ However, the discussion is headed (p. 10): “Re: Complaint Paragraph 5(k), the Alleged Discriminatory Withholding of Wage Increases.”

²⁰ Albach testified without contradiction that Nieto had been caught chewing tobacco in the plant and spitting on the floor. However, the warning says nothing about spitting. On the November 3 warning Nieto wrote, “I did not realize that the break room was part

Continued

fn. 22), Nieto, who testimonially described himself as Mexican/American Indian/German, engaged in an on-the-job verbal altercation with then employee Shannon Frazier, who is black. During this altercation, Frazier took offense at some derogatory remarks which are not directly shown by the record. Frazier thereupon came to Albach's office in tears and in a rage, and said that he was not taking any more of Nieto's abuse, verbal or otherwise. Albach told him to "wait a minute, we can't let this fester, sit down." Then, after arranging for Nieto to be present also, Albach told Nieto that his remarks were racist, they were uncalled for, and JSC was not going to put up with them. Albach went on to say that either both of these employees were going to go if they could not get along, or they were going to "straighten up [their] act and work together." After about a half hour in Albach's office, the two employees shook hands and agreed to try and work things out. According to Albach's testimony, "that was the end of it" and ever since, Nieto and Frazier had been "decent" to each other. A form authenticated and signed by Albach and dated November 3, 1994, contains check marks before "Attitude" and "Conduct" under the heading "Violation," and states that Nieto "got into a verbal altercation with [Frazier] out in the plant. I called them both into the office and let them know that this kind of attitude is not going to be [accepted] in the plant./Verbal Warning." This document was put into Nieto's personnel file but was not shown to him, although the form calls for an employee statement and other "Warning Reports" issued by Albach had contained an "Employee Statement."²¹ Albach testified that to his knowledge, Frazier did nothing wrong; no warning was inserted into his personnel file. Albach testified without objection that after JSC discharged Nieto in August 1995, he worked for Frazier in Frazier's shop. In view of this testimony by Albach and his account of how the Nieto-Frazier-Albach conference ended, I credit Nieto's testimony that he and Frazier became "very good friends after that."²²

*b. Alleged events between the beginning of the
organizational campaign and the
representation election*

As described supra part II,A, Nieto was one of the two employees who first contacted the Union and who induced other employees to sign the "Petition for the Union" and the "Open Letter to Management" which described the signatories as members of the union committee. Nieto's signature was the first signature attached to one copy of both documents. Moreover, during the January 4, 1995 meeting caused by JSC's receipt of the "Open Letter to Management," Nieto advised Huneke that this letter notified JSC of the employees' right to organize, and, in response to Huneke's inquiry about why the employees were organizing, gave an explanation for this activity (see supra part II,B,1).

of the plant." Nieto testified that under Gate Pallet the employees were not supposed to chew tobacco anywhere in the workplace.

²¹ When asked why he used this form but did not obtain a written statement from Nieto, Albach testified that he was "probably in a hurry and I just jotted it down . . . but it was basically a verbal warning."

²² My finding as to the date of the Frazier-Nieto altercation is based on Albach's testimony and on the date which he wrote on Nieto's warning slip. I believe Nieto was mistaken in testifying that this incident occurred in June 1994.

Shift Supervisor Collins testified that on the following day, during a conversation at the stretch wrap machine, Nieto remarked that "if you ever watch TV, people get their [obscenity] kicked for not voting for the Union." Collins testimonially identified, as made by him shortly after this alleged conversation, a notation which tracked the foregoing testimony and is written on a sheet of paper torn from a tablet. Collins testified that he did not show this notation to anyone before Nieto's discharge. Collins testified that this conversation was "probably" discussed by him with Albach, but Albach was not asked about it. Collins testified that this alleged conversation with Nieto "was a real short conversation. It really was meaningless. He did that a lot. He liked to kill time." In the absence of corroboration by Albach regarding this incident, because Collins' testimony that it was "meaningless" is difficult to square with his having troubled to memorialize it, and after considering the witnesses' demeanor, I credit Nieto's denial that he made the remark which Collins' testimony attributes to him.

On January 31, 1995, Collins made a personal notation, "Continuously repeating directions to Dan Nieto/doesn't pay attention." Collins testified that he made this notation because Nieto "always" asked him what to do next, after he had already advised Nieto what to do next. Collins never disciplined Nieto for this, nor did Collins ever show this notation to anyone else in JSC before Nieto's discharge.

On February 7, 1995, employee Shane Carter told Collins that while blowing off the forklift, Nieto had deliberately squirted an air nozzle toward Carter's face as he was walking up the aisle. Collins credibly testified to the opinion that such conduct is "very dangerous." After Carter had advised Collins that Nieto's conduct had been witnessed by employee Barten, Collins asked Barten about the incident. Barten said that he had seen it, but did not want any problems with Nieto. Collins wrote up the incident as "conduct/carelessness" on an employee warning report, which he presented to Nieto. Nieto refused to sign, stating that "it was a crock." Collins said that he had an eye-witness, that what Nieto had done was very dangerous and stupid, and that the warning report was going into Nieto's file whether he signed it or not.²³

On February 20, after talking with employee Doug Sheehy (who is much smaller than Nieto), Collins added, to the piece of paper on which he had noted his repeatedly giving Nieto directions, a notation that Nieto had told Sheehy that if JSC fired him, "we would deal with it in the parking lot." The notation also states that Nieto had directed some irritating remarks to Collins and that Nieto "was sitting in warehouse doing absolutely nothing for at least 1/2 hour." Nieto was not disciplined for the alleged parking-lot remark, which (Collins testified) was "everyday talk for" Nieto; nor (so far as the record shows) was he disciplined for allegedly doing

²³ My findings in this paragraph are based on Collins' testimony and on statements in the employee warning report. Both his testimony and the report were received without objection or limitation. Carter did not testify. Barten, who by the time of the hearing had been laid off by JSC, testified for JSC but was not asked about this matter. Collins testified without objection, contradiction, or corroboration that the nozzle incident led to Nieto's stopping Carter in the middle of the road on the way home from work and obscenely threatening to fight him, "but you know, that's personal business outside the shop."

nothing for a half hour. Collins' testimony about Sheehy's alleged report was received without objection or limitation. After considering the demeanor of Collins and Nieto, I credit Nieto's denial of a factual basis for Sheehy's alleged parking-lot report, and Nieto's denial that he sat around for a half hour doing nothing.

c. Alleged events after the March 2, 1995, representation election; alleged additional independent violations of Section 8(a)(1); alleged discrimination against employee Nieto

(1) Alleged unlawful threat of discipline (complaint par. V(j)); allegedly discriminatory writeups in March 1995

Immediately after the counting of the March 2 representation-election ballots disclosed that the Union had lost the election by a tie vote, union organizer Regan advised all parties that the Union was going to file objections to the election. These objections were in fact filed on March 9.

After the election, Nieto received a writeup at least ostensibly for driving his forklift in a supposedly restricted area, another writeup at least ostensibly for punching in 1 minute too early, and another writeup at least ostensibly for punching in 1 minute too late after lunch.

On March 6 or 7, JSC received a complaint from one of JSC's best customers that a lot of pallets had been damaged because they had been tied together too tightly. Collins testified, in effect, that Nieto was responsible for this error. According to Collins' testimony, the damage was due partly, at least, to Nieto's failure to consistently use dunnage (padding) between the wrapping and the product, and partly to his having tied some of the pallets too tightly (including some where dunnage had been properly used). Albach and Collins rebuilt some of the pallets and repaired the damaged parts. On March 7, Albach issued a written warning to Nieto which stated, in part:

Mr. Nieto was banding pallets. . . . He got the band [too] tight on six of the stacks, causing damage to the top sheet on the top pallet. Mr. Nieto did use [dunnage] under the bands to prevent damage. With this style of pallet, the [dunnage] didn't work with the band being [too] tight.

Albach told Nieto that Albach had issued this warning because pallets that Nieto had banded too tightly had come back from a customer. Nieto said that he had done the banding the way he was taught. Albach said that Nieto was being written up for it. In the space calling for an employee statement on the warning slip, Nieto checked a box after the printed statement, "I agree with the company statement." He added the notation, "Would like to know proper procedure for all this. Thanx [sic]." Collins testified as follows:

[T]he next day . . . I went over a refresher course with all truck drivers and people that might just jump on the fork truck just to help out. . . .

Q. By [JSC counsel]: Did that include Mr. Nieto?

A. Yeah, it did. He was the main character, so to speak. I showed him how to do it the right way again. I mean, everybody knows that everybody knew how to do it to begin with, but—

Q. Had he been trained initially—

A. Yes. Absolutely.²⁴

About March 16, Welty discussed with Nieto the self-evaluation form which Nieto had previously filled out. Welty changed all of Nieto's entries, and told Nieto that his supervisor, Collins, had told Welty that Nieto was doing a poor job. None of Nieto's supervisors had ever previously told him this.

Before about mid-March 1995, Nieto had sometimes worked on the first shift, and had sometimes worked on the second shift. A few days before March 20, Nieto was permanently transferred to the second shift. Nieto had been following the practice, when working on the second shift, of coming to the plant early. On March 20, he came to the plant about 45 minutes before the beginning of his shift at 3:30, and engaged in conversation with employee Frazier, a first shift forklift driver who was still on work time and who performed no productive work during this conversation. The record fails to show the subject of this conversation, or whether Collins could overhear it. Upon seeing Collins watching him, Frazier went on his way. Then, Nieto went over to first-shift employee Garza (also a forklift driver), stopped him from working, and started talking to him. The record fails to show the subject of this conversation, which was outside of Collins' earshot; however, Garza (like Nieto) had signed the January 3 "Open Letter" which identified the signatories as members of the "Union Committee." Collins thereupon approached Nieto and obscenely told him to get off the floor. Nieto said that he had previously come in at 2:45 every day to learn from the first-shift forklift driver what was being loaded. Nieto asked why, on this occasion, Collins was ordering him to get off the floor. About six times, and becoming angrier and angrier, Collins obscenely yelled at Nieto to get off the floor. Nieto repeatedly and obscenely refused until Collins told him that he had better get off the floor if he wanted to keep his job. Then, Nieto walked away mumbling under his breath. Collins followed him and asked what he was saying. Nieto said that if Collins wanted to hear what Nieto had to say, Collins should follow him outside, that "that way I'm not an employee anymore." The two men then walked outside. Collins asked what his problem was. Nieto said that he did not have a problem, and asked what Collins' problem was. Collins said that his problem was that Nieto was there too early and was disrupting Collins' work force. Collins said that other people did come early and did not come on the floor. Collins went on to say that people could come in a little early to find out what was going on so that things moved smoothly through the shift change, but stated that thereafter, Nieto was not to be there until 3 p.m., a half hour before his shift was scheduled to begin.²⁵

Then, Nieto headed for the lunchroom. En route, he encountered Albach, to whom Nieto said that Collins was threatening and harassing him. Albach asked what had happened. After Nieto had explained, Albach said that Collins

²⁴ To the extent inconsistent with this testimony by Collins, I do not credit Nieto's testimony that after he received the warning, JSC did not in fact show him the proper way to band the material.

²⁵ My findings as to this incident are based on a composite of credible parts of Collins' and Nieto's testimony. For demeanor reasons, I do not credit Nieto's testimony that Collins said he was fired, and later said, ". . . just don't come in early any more."

did not have the power to fire anyone, that Nieto was not going to get fired over this, that Nieto was a good employee, that Albach needed him, but that Nieto should put personal things aside and just do his job—"we have got to have harmony in here."²⁶

About 2 hours later, Nieto told Albach that Nieto wanted to speak to Huneke about this matter, because Nieto did not get anywhere when he talked to Welty. Albach said that Nieto would have to go through the chain of command. Then, Nieto went to Welty, and told him about the incident involving Garza and Collins, to which Welty replied, "I don't have time for it, I don't want to hear it." Later that day, Nieto's duties took him to Huneke's office. At Nieto's request, Huneke agreed to talk to him about his at least perceived problem with Collins. Nieto said that "whenever [he] was talking to Garza, [Collins] just blew up and started swearing at me and telling me to get . . . off the floor . . . and wound up saying that [Nieto] was fired."²⁷ Huneke told Nieto to return to work, and said that there was a need for "all of us" to get together. Thereafter, Nieto told Albach that Nieto had gone through the chain of command, that "it seems like I don't get anywhere" with Welty, but that Huneke seemed like a "fair guy." Albach said that Nieto, Welty, Albach, and Collins would have a meeting. Nieto said "okay."

On the following day, March 21, Nieto had a 10-minute conference with Collins, Welty, and (perhaps) Huneke. At the conclusion of this meeting, Welty asked Nieto to forget the whole thing, shake hands with Collins, and go back to work. After some reluctance on Nieto's part, the two did shake hands.

That same day, March 21, Albach instructed Nieto to put a bundle of #9 stringers on the conveyor belt. Instead, Nieto mistakenly put on the belt a bundle of #61 stringers, which are the only other stringers in the warehouse of the same length as #9 stringers. When the workers who were supposed to process the stringers noticed the error, production was delayed while Nieto was located and while he replaced the wrong bundle with the right one.²⁸ Albach gave Nieto a writeup specifying "Carelessness," and said that Welty had ordered him to take this action.

During working hours on March 22, Albach wanted Nieto to perform a loading job, but was unable to find him on the plant floor. Thereafter, Albach prepared, and gave to Nieto, a writeup form dated March 23 which stated:

On 3-22-95 Dan Nieto went to [Mark Huneke's] office and [asked] to speak to him. Mark said yes. Nieto did not get permission from me to leave his job on the floor to do

this. He was off his job for over 30 [minutes]. Mike Collins loaded a truck because we were unable to locate Mr. Nieto. Marti paged Mr. Nieto, but he didn't hear it. Dan had [no] right leaving his job without his supervisor's o.k.²⁹

Upon receiving this writeup, Nieto asked, ". . . how come I'm getting written up for all these things?" when no writeups were issued to other employees who did the same things. Albach said that Nieto had voted for the Union, and they had not.³⁰ Nieto remarked that he thought this was a "pretty [scatological adjective] deal." Albach said yes. Nieto said, ". . . it is probably all Tim, isn't it?"—inferentially, referring to Plant Manager Timothy Welty. Albach said, "Yes, it is." On previous occasions, Nieto had left the floor in order to speak to a manager or supervisor, and he had never previously been informed that he had to get permission to do so.

My findings as to this conversation are based on Nieto's testimony. Albach testified that this writeup should have been taken out of Nieto's file, and that its continued presence was "probably an oversight on my part." Albach initially testified that after he "issued" the writeup to Nieto, Nieto explained that he had been with Huneke and the controller corroborated Nieto. However, Albach then went on to testify that when he received this explanation from Nieto and the controller, Albach "already had [the writeup] wrote up and ready to issue"—testimony which not only is inconsistent (as to sequence) with his prior testimony, but also is inconsistent with the fact that the writeup was put into Nieto's file. Moreover, both of Albach's testimonial versions of when he found out the reason for Nieto's absence from the production floor are inconsistent with the writeup itself, whose contents establish that it was written after Albach found out why Nieto was absent, and which complains of his failure to give his immediate supervisor advance notice of his absence, and not of the absence itself. In view of these considerations, and for demeanor reasons, I credit Nieto's version of this conversation with Albach.

Also on March 22, Albach instructed Nieto to check the warehouse for some #512 sheets, which are normally bundled in 300-sheet bundles. Later that day, Nieto reported to Albach that Nieto had not been able to find any such sheets. A fruitless search for such sheets was likewise conducted by Albach and by employee Koonce. Then, at Albach's instructions, Koonce cut down to the size of #512 sheets 68 larger sheets which were in stock. On the following day, March 23, Albach told Nieto that four bundles of #512 sheets had been found in row A13-2, which on March 22 had been checked

²⁶ My findings as to the content of this conversation are based on a composite of credible portions of Nieto's and Albach's testimony. Albach admitted telling Nieto that he was a good employee.

²⁷ The quotation is from Nieto's testimony. This testimony aside, there is no evidence that he had any other problems with Collins involving Garza.

²⁸ My findings as to this incident are based on a composite of credible parts of Albach's and Nieto's testimony. Nieto's testimony that Albach told him to leave the #61's on the conveyor belt because no #9's were in stock, that the next (i.e., the morning) shift asked why the #61's were there, and that these events caused Welty to have Albach draft Nieto's writeup, is difficult to square with Albach's action in attaching the same date to Nieto's error and to the writeup.

²⁹ Nieto and, in effect, Albach both testified that Albach showed this writeup to Nieto on March 22. However, the writeup is dated March 23.

³⁰ My finding that Albach made this statement is based on Nieto's testimony. At one point, he dated this statement as March 21 or 27; elsewhere, he dated it as May 21 or 27. In giving the May date, he testified that he could not remember which writeup this statement was attached to because he received so many writeups. He further testified that Albach so stated on only one occasion. As to the date, I accept Nieto's initial testimony that the conversation was attached to the writeup connected with Nieto's absence from the floor. Notwithstanding Nieto's confusion about dates, I credit his testimony that Albach made this statement, and discredit Albach's denial, for demeanor reasons and because of the considerations discussed in the next paragraph and *infra* part II,C,2,c,(4),(b)-(d).

for #512 sheets by Nieto, Koonce, and Albach himself. This was the only occasion when Nieto, who had organized the warehouse, was unable to locate material and it was found at a later point. Albach showed Nieto a reprimand note, which Albach had written at Welty's instructions and which is on a sheet of paper rather than on an employee report form, and which stated, in part, that on March 23 "we came into work and were told that there were 4 bundles of 512 sheets in row A13-2. This is standard work."

Nieto's personnel file includes a note from Albach, dated March 27, 1995, which states that Nieto had been instructed to put 10 bundles on a conveyor belt but had put on only 9. This note was never shown to Nieto. Albach testified that Welty "wanted anything out of the ordinary that slowed production down, whoever did it, he wanted something in their file to indicate they had made a mistake. [Nieto] was not the only one that got warnings like that."

(2) The April 6 conference

At Huneke's request, Welty called a conference which was conducted on April 6 among Huneke, Welty, Albach, Collins, and Nieto. Nieto expressed the opinion that he was being persecuted. He named other employees who (he felt) were getting special treatment. In addition, he complained that he was still on probation administered by Welty because of Nieto's June 1994 fork-lift accident (supra part II.C.2.a), for which (he maintained) he had been wrongfully blamed. Welty said that he had not liked Nieto in the first place, that unions are for lazy people, that Nieto was a lazy person, and that this was the only reason why Nieto wanted the Union in there.³¹ Huneke said that "we aren't here for that." Nieto and Collins each gave their respective versions of the March 20 incident.³² Albach said that he did not have any problem with Nieto; that he was a "real good employee"; that as a supervisor, Collins should know better than to start that kind of situation with another employee; and that both Nieto and Collins had learned "a serious lesson." Huneke said that he had to take Collins' word for what had happened because Collins was a supervisor, and that Nieto should take this as a stepping stone as to what not to do in the future. Nieto said that he planned to be a model employee from then on.³³ During this meeting, Nieto was taken off probation.

Albach testified that he was requested to write down a brief description of the April 6 meeting and to put it into Nieto's file and that Albach did so. He initially testified that this request was made by Huneke, and that the document Albach prepared in compliance with this request was the document received into evidence as Respondent's Exhibit 5; the first line of this document reads "Meeting With Dan Nieto," followed by a space, and then "4-6-95," and the

³¹ This finding is based on Nieto's testimony about the April 6 conference. Welty denied making this remark during the March 21 meeting during which Collins and Nieto shook hands (supra part II.C.2.c.(1)). To the extent that Welty may have denied making this remark at all, for demeanor reasons I credit Nieto.

³² Inferentially, they gave the same versions to which they testified before me. To the extent that their testimonial versions differed, I have credited Collins. The versions which they gave during this April 6 conference are immaterial to the instant proceeding.

³³ This finding is based on credible parts of Nieto's and Albach's testimony. Elsewhere, Nieto testified that he did not recall taking that pledge.

last line reads "W. Albach 4/21/95." Later, Albach testified that this request emanated from Welty. Then, Albach went on to testify that the document which he prepared on the same day as the April 6 meeting, in compliance with a superior's request, was the document received into evidence as General Counsel's Exhibit 20, whose first line is the same as the first line on Respondent's Exhibit 5 but which is otherwise undated. Albach testified that before lunch on April 21, Huneke asked him to make sure that the memorandum which Albach had prepared immediately after the April 6 meeting was in Nieto's file, that Albach could not find that memorandum (G.C. Exh. 20), and that, accordingly, he prepared on April 21 a second memorandum (R. Exh. 5) regarding the April 6 meeting. The two documents are identical through the end of the fourth sentence.³⁴ The last four sentences in General Counsel's Exhibit 20 describe a discussion about discipline as to which there is no testimony at all, although this discussion would be wholly consistent with the discussion described in both the testimony and the statements included in both that exhibit and Respondent's Exhibit 5. Respondent's Exhibit 5, which does not contain any of the assertions in the last four sentences of General Counsel's Exhibit 20, contains the following sentence which is not in General Counsel's Exhibit 20: "[Nieto] was told that verbal threats will not be tolerated." Nieto testified that he was "almost positive" that this statement was not made during this conference. Albach, the author of this document, testified that he did not remember whether any of the management personnel brought up to Nieto at the April 6 meeting that verbal threats would not be tolerated. There is no other evidence that management made such statements during this conference. In view of their testimony in this respect and Albach's failure in General Counsel's Exhibit 20 to mention such statements, I find that such statements were not in fact made during that conference, and that Respondent's Exhibit 5 was untruthful when it alleged that they had been made.

(3) Alleged threat of reprisals for contacts with NLRB (complaint par. V(I))

Nieto gave his first statement at the NLRB's Regional Office in February 1995. After the March 2 election, to which the Union filed objections, he gave additional statements at that office on March 20 and April 17. On an occasion between May 21 and 27, in Albach's office, Albach told Nieto that he was a good friend of Albach's but that Albach thought Nieto may have stabbed him in the back. Albach said that JSC's attorneys had let him know what Nieto had told the NLRB. Albach said that if he found out that Nieto had done this, "since [Nieto] had stabbed him in the back, . . . he would stab [Nieto] in the back as well." Because Nieto was afraid of losing his job, he stated that he had not said "anything . . . in that respect or anything like that, and if I did I would drop the charges against" JSC.

³⁴ The documents received into evidence as R. Exh. 5 and G.C. Exh. 20 are both photocopies. Comparison of the handwriting and phrasing suggests that at one point in the history of their production and reproduction, they had their origin in the same handwritten document. However, this matter was not explored at the hearing.

(4) Alleged discrimination against Nieto in July and August 1995

(a) *Background*

(i) The soda-pop incident

On an occasion between June 24 and July 10, when maintenance employee Oldham opened his lunch box, he noticed that a can of soda pop was missing. Suspecting that Nieto had taken it, Oldham looked over at him and asked him where it was. Initially, Nieto said that he knew nothing about it. However, after Oldham pressed him, he said that the pop was up in the cabinet. Oldham thereupon retrieved his pop. After this incident, Oldham stopped talking to Nieto. The next day, Nieto asked Oldham what his problem was. Oldham responded by describing the soda-pop incident. Nieto said that he had been just joking with Oldham. Oldham asked him how long he had been "doing that."³⁵ After some further remarks from Nieto, Oldham said that he did not want to talk to him, that Oldham did not trust him any more. A little later, after Oldham had returned to the maintenance department, Nieto got off the fork truck, came back to the maintenance department, and tried to talk to him. When Oldham rebuffed these overtures, Nieto started physically pushing him and said that he wanted to fight Oldham. Eventually, Nieto quit pushing Oldham, who reported the matter to lead man Koonce. Koonce then talked to Nieto, who did not thereafter bother Oldham any more.

(ii) The fan incident

At all relevant times until late December 1995, employee Barten worked in the plant as a welder fabricator. He had initially agreed to accompany Nieto during his first conference with the Union, but never did show up. However, Barten did sign the January 1995 "Petition."

While performing his welding operations on the day shift, Barten had a practice of using a portable fan owned by JSC. On occasion, the fan would be taken by the night shift, and left in their area. Eventually, having become annoyed at repeatedly searching for the fan, Barten, who is ethnically an American Indian, wrote an Indian inscription on the fan "to verify that it was mine."

About July 13, 1995, Barten found the following words written by felt-tip pen on the chrome base of the fan, which was at his workstation, "To hell with old redskins and stupid [obscenity] Indians." Barten, who testified to bring "immensely" distressed by this inscription, told Albach that Barten expected him to do something about it or Barten would take care of it himself. Albach asked Barten if he knew who had written the inscription. Barten said that he assumed Nieto had written it, but had not seen him do it. Albach said that he could not do anything on an assumption, that JSC had to have proof.³⁶ Albach told Barten not to

³⁵ Oldham testified that so far as he was aware, nothing else had ever been removed from his lunch box.

³⁶ Barten testified that Albach and Miller said that they recognized second-shift employee Nieto's handwriting on the fan. I am inclined to discredit such testimony, because it was not corroborated by either Albach or Miller, and because it would likely be difficult to compare handwriting with a felt-tip pen on a chrome lamp base with handwriting produced in the form usual as to exemplars—namely, pen or

worry about the matter, that it would be taken care of. Nieto knew about Barten's ethnic origin, and is himself partly of American Indian descent.

Nieto was absent from the plant on the day the inscription on the fan was discovered. In the evening of that same day (about July 13, a Thursday), Oldham told Barten that Oldham had telephoned Nieto and told him how upset Barten had been over the fan inscription, and that Nieto had replied, ". . . good, I got what I wanted out of it anyway, and that was to upset" Barten.³⁷ About July 14, Barten and Oldham reported to Albach the contents of this alleged telephone conversation between Nieto and Oldham. When Albach asked the employees in the plant about who had written on the fan, he received reports from some employees that other employees had reported to them that Nieto had written on the fan. When Albach asked Nieto about the matter, he denied writing on the fan.³⁸ On July 17, 1995, JSC posted the following notice, signed by Albach:

We have recently experienced a very ugly incident in this plant involving a racial slur. Despite our vigorous efforts to pinpoint responsibility, we have been unsuccessful. However, this lack of success does not mean that JSC will tolerate conduct of this type. This plant will not accept race baiting by anyone, sexual harassment, or harassment of one employee by another employee. This is unacceptable conduct and will most definitely be punished whenever guilty parties can be identified. I would point out that the punishment will usually be discharge in those cases involving deliberate misconduct.

You can assist us by helping us identify any offending employees.

The inscription remained on the fan for at least 5 months after Barten was laid off by JSC in late December 1995, and there is no evidence that it was ever removed or that JSC ever tried to remove it.

(b) *The glue-box incident; allegedly unlawful suspension of Nieto on July 24*

Nieto's usual job was to use the forklift to bring corrugated board to the decking and other machines. On July 20, the decking machine was "down," and he had no such work to do. Accordingly, employee Koonce (the leadman on that shift, who is not alleged to be a supervisor) told Nieto to use the forklift to empty the remaining contents of a glue box, most of whose contents had been used, into another, partly used-up glue box. Nieto untruthfully said that he did

pencil handwriting on paper or cardboard. However, the issue is immaterial.

³⁷ This finding is based on Barten's testimony, which on timely objection was not received to show the contents of the alleged Oldham-Nieto conversation. Nieto denied having a telephone conversation with Oldham at this time. Oldham was not asked about this matter.

³⁸ My finding about this inquiry is based on Albach's testimony. For demeanor reasons, I do not credit Nieto's testimony that Albach did not ask him about the matter. In view of the credible testimony regarding a July 24 telephone conversation between Nieto and Oldham (see *infra* part II,C,2,c,(4),(c)), I believe that Nieto was in fact the author.

not know how to do this, and went on to say that if he did this he would be written up and fired for it. Koonce said to go ahead and do it, because Collins had said it was all right. Nieto said that Collins was probably one of the members of management that wanted to get rid of him, and that if he emptied the old glue into the new glue, management would tell him that he should have known better than to do that.³⁹ After a 15-minute argument (which gradually escalated) about the matter, during which Nieto performed no work, he agreed to perform this task. However, by this time, the decking machine had been repaired and was in operation. For this reason, and because the glue-box job would have required Nieto's continuous use of the forklift for 15 or 20 minutes, Koonce told him to forget about the glue-box job and proceed to perform his usual task of using the forklift to transport cardboard to the decking machine. However, Koonce remarked to Nieto that the incident would probably be reported by Supervisor Miller, who during this incident had been repairing the decking machine and checking its functioning after it was returned to operation.⁴⁰

Albach testified that on the following morning, July 21, Miller told him that on the previous evening, when Koonce had told Nieto to "break down more glue totes," Nieto "was very verbally abusive to Harold Koonce and wouldn't go do what he told him to do."⁴¹ Albach thereupon asked Koonce what had happened the previous night. Koonce said that Nieto had argued with Koonce about doing a job, and that by the time Nieto agreed to do the job, Koonce had told him to forget it because the equipment was running and Koonce needed him to do other things. Albach said that he was going to suspend Nieto for 3 days for "disobeying to do what he was told to do." Koonce said that he had not intended even to bring up the situation. When Albach asked why, Koonce said that once the glue dumping job had started, it was a continuous process, and that if Nieto had started performing the job after agreeing to do it, he would not have been able to complete it before he was needed for other purposes.⁴²

³⁹ Under certain, rather limited circumstances, glues should not be mixed. More specifically, they should not be mixed if they do not have the same "number" (inferentially, are chemically different), if the old glue has been contaminated, or if the old glue has been there for a "real long time"—more than 7 months. Nieto's testimony suggests that he believed or feared on July 20 that the old glue had been contaminated or would be so described by management.

⁴⁰ My findings as to this incident are based on credible parts of the testimony of Miller, Koonce, and Nieto. For demeanor reasons, I do not credit Miller's testimony that the Koonce-Nieto exchange consumed a half hour, and that Nieto was finally told by Koonce, who was "rather mad," "If you don't go do it, go punch out and go home, I don't need this."

⁴¹ Miller testified that on July 21 he reported the glue-box incident to Albach and Collins, but Miller was not asked exactly how he had described it.

⁴² Except as otherwise indicated, my findings in this paragraph are based on Koonce's testimony. Albach testified that Koonce said that the incident "absolutely" warranted discipline. Albach went on to testify that, in Miller's presence, Koonce said that he had instructed Nieto three times to perform a particular task and that Albach would have fired both Nieto and Koonce if Miller had not repaired the machinery when he did, because Koonce had had enough of Nieto's abuse and was going to hit him. Albach went on to testify to saying that it was a good thing Koonce had not done this, that "we are going to handle things the right way," and that Nieto had "prob-

Collins testified that on the day after the glue-box incident, Koonce asked Collins if "it was legal if [Koonce] could take [Nieto] off company property and beat the [scatological term] out of him"; that Collins did not know at the time if Koonce could do this; and that Collins suggested that Koonce not do that. Collins testified that Koonce was "pretty hot" and "pretty irritated" about the incident. Koonce (who was still in JSC's employ at the time of the hearing) was the first witness who testified, was not recalled on rebuttal, and was not asked about this conversation. Nonetheless, I do not credit the testimony of Collins summarized in this paragraph, for demeanor reasons, because I regard as inherently incredible Collins' testimony that at that time he did not know whether it would be "legal" for Koonce to beat up Nieto, and because the sentiments and emotion which Collins ascribed to Koonce a day after the incident are difficult to reconcile with Koonce's written and credible testimonial accounts of the incident.

Albach testified that on Friday, July 21, he told Huneke that there was a problem on the back shift; that "with everything that has built up in [Nieto's] file and everything we have done to try to make a model employee out of him, he's still being abusive to [Koonce] on the night shift and not doing what he's instructed." Albach went on to testify that he told Huneke, ". . . as far as what's in his file and what happened last night, this warrants time off." Huneke concurred.

At about 8 a.m. on Monday, July 24, Albach told Nieto by telephone that he was being suspended for 3 days for failing to comply with the instructions of Koonce, who "as a leadman was your supervisor." Albach said that Nieto's conduct during this incident was "unbecoming of an employee," that JSC could not put up with "that disruption," and that Nieto had been warned about disruptions before. Nieto said that he did not think it was fair. Albach told Nieto to "just take it with a grain of salt"; to come back to work on July 27; and to call before he came.⁴³

(c) *The allegedly unlawful extension of Nieto's suspension, and his allegedly unlawful discharge*

In the afternoon of Sunday, July 23, Barten went to the police station to file a criminal complaint against Nieto based on Oldham's July 13 or 14 assertion to Barten that Nieto had admitted to Oldham having written on the fan.⁴⁴ On the following day, July 24, Barten told "the company" (he did not testify whom he told) that he had filed this complaint on the previous day. By letter dated July 24, but not received by Nieto until July 31, Albach advised Nieto that he was receiving an immediate suspension for 3 days for insubordination by repeatedly failing to follow "lead person" Koonce's di-

lems." Because Miller was not asked about this conversation and for demeanor reasons, I credit Koonce.

⁴³ My findings in this paragraph are based on a composite of credible parts of Albach's and Nieto's testimony. Nieto testified at one point that he initiated this call on Koonce's instructions, but later testified that the call was initiated by Albach. Koonce and Albach were not asked about this matter. I am inclined to believe Nieto's initial testimony. However, except as to Nieto's credibility generally, the issue is unimportant.

⁴⁴ When asked why he had waited for almost 10 days before making a report, Barten testified to having told the police that he was waiting for JSC to take some kind of disciplinary action.

rectives on July 20.⁴⁵ After telling him to next report to work on July 27, the letter went on to say, "If you engage in any further misconduct of any kind, you will be subject to further discipline up to and including discharge."

Meanwhile, during a basketball game with some of JSC's employees at some time during the July 22-23 weekend, Nieto heard "rumors" from employees Koonce and Ambrosio Calo that Oldham had reported to JSC that Nieto had admitted scratching employee Jeremy Linowski's vehicle with a key.⁴⁶ In addition, Koonce told Nieto that according to Oldham, Nieto had said that he was going to "fuck [Oldham] up" (see *infra* fn. 48). On the evening of July 24, Nieto telephoned Oldham and asked why he had "screwed [Nieto]; why [Oldham had] snitched him out."⁴⁷ Oldham hung up on him. Less than 5 minutes later, Nieto telephoned Oldham again, and again asked why Oldham had "snitched him out." Oldham said that he did not know what Nieto was talking about, except for the one time Oldham had told Albach about the incident where Nieto wanted to start a fight during the soda-pop incident (see *supra* part II,C,2,c,(4),(a),(i)). Nieto said that because of Oldham's "snitching," Nieto was going to lose his job. Nieto asked Oldham why he was making up accusations about vehicle-scratching. Oldham replied that he had to look out for himself and save his own job. Nieto brought up the subject of Peter Barten, and Oldham at least tacitly admitted that he had told Albach that Nieto had written the inscription on Barten's fan. Nieto said that he could not remember how he wrote the inscription on the fan, said that he had no use for Barten, and described him as a "stupid redskin Indian." During this conversation, Nieto repeatedly said that Oldham had fucked up, and (using similar obscenities whose use in the plant was not uncommon) said that Nieto was going to revenge himself against Oldham.⁴⁸ Nieto said that because he knew Oldham would go to the police, Nieto would not "get" Oldham physically, but would "get" him another way; Nieto said that he would get Oldham fired for stealing, but did not specify any other way he planned to "get" Oldham. Nieto also said that he would get Miller fired for stealing; as previously noted, Nieto's suspension that day had been preceded by Miller's purported description to Albach of the July 20 glue-pot incident, following which Koonce had told Oldham to anticipate a report from Miller to his superiors about the incident. At the hearing, Oldham credibly denied that either he or Miller had stolen anything from JSC. There is no evidence that during this conversation, Nieto re-

⁴⁵ Nieto did not retain the envelope in which he received this letter, and testified that he did not remember the postmark date.

⁴⁶ Barten testified about an alleged conversation with Nieto where he admitted doing this. Oldham, who impressed me as a more honest witness than Barten, testified that he overheard Albach-Barten and Nieto-Barten conversations about this subject, but that Nieto never did anything to Linowski's vehicle, at least so far as Oldham knew. In view of such testimony by Oldham, and for demeanor reasons, I credit Nieto's denial.

⁴⁷ My finding as to the date is based on the testimony of both men. Nieto initially dated the conversation as July 25, but changed his testimony when it was pointed out to him that his prehearing affidavit gives a July 24 date.

⁴⁸ However, it is uncontradicted that Nieto did not on this occasion threaten to fuck Oldham bad. Oldham testified that Nieto had previously told him this, but that Oldham could not remember when, where, or why.

ferred to Oldham's wife or family. Nieto credibly denied making any kind of threat of physical harm toward Oldham or his family.⁴⁹

Before commencing work on July 25, Oldham told Albach that on the previous evening, Nieto had telephoned him at home, and that Nieto "was harassing [Oldham] about somebody telling [Nieto] something and wanted to know how everything got out." Albach said that he had told Nieto not to harass anybody else in the plant, "And then he called [Oldham] at home and [Albach] said this was good enough to do what he wanted to with" Nieto. Albach said that he wanted Oldham to "write up everything [Nieto] said on the phone" because "they were going to fire [Nieto] over it. They wanted to build a case on him."⁵⁰

Then, that same day (July 25), Oldham spent about an hour of company time writing a report, with respect to Nieto, which was received into evidence as Respondent's Exhibit 7. Oldham's report, which on timely objection was not received to show the truth of the contents, stated as follows: Nieto telephoned him on July 24 asking why Oldham had "snitched him out." Oldham said that he did not know what Nieto was talking about, and hung up on him. Nieto called back, and again asked why Oldham had "snitched" on him. Oldham again said that he did not know what Nieto was talking about, and that the only incident Oldham had reported to management was the soda-pop incident. Nieto said that Oldham had "screwed him," and reminded Oldham that Nieto had previously told Oldham that if he "messed with" Nieto he would "fuck [Oldham] bad"; Oldham's statement averred that Nieto "had said this many times to me in the past [too] but I took him jokingly in the past but not [too] sure." Nieto said that he had no use for a "dumb stupid red skinned Indian [and] and [Nieto] couldn't remember how he had wrote it on the fan." Nieto said that he could not get Oldham physically because he would go to the police, but Nieto would get Oldham in other ways. Nieto went on to say that he would get even with Oldham and Miller by having them fired for stealing, and "that was just a start. [Nieto] would get even."

My findings that Oldham prepared this statement at Albach's request, and that Oldham wrote this statement and gave it to Albach on July 25, are based on Oldham's testimony. Albach initially testified that he took this written statement from Oldham before sending Nieto a letter (discussed *infra*) dated July 27, 1995. However, Albach later testified that after telling him about the conversation, Oldham went to the local police and gave them a statement, that Albach asked Oldham to give him a copy of the statement

⁴⁹ My findings as to the contents of this telephone conversation are based on a composite of credible parts of the testimony of Oldham and Nieto. After considering the events which preceded this conversation and for demeanor reasons, I do not credit: (1) to the extent inconsistent with my findings in the text, Oldham's testimony that Nieto never specified the events which were the subject of Oldham's alleged "snitching"; (2) Oldham's testimony that in connection with the fan incident, he said that he did not want to know about things Nieto was doing there, and that some day Oldham would probably have to tell on him if Oldham was asked; and (3) to the extent inconsistent with my findings in the text, Nieto's denial that he told Oldham that Nieto had written vulgar language on the fan.

⁵⁰ My findings in this paragraph are based on Oldham's testimony. Albach was not asked the content of this conversation.

Oldham gave to the police, that the statement received into evidence is a copy of the statement Oldham gave to the police, and that on August 9, 1995, Oldham signed the copy and gave it to Albach. However, Albach testified, in effect, that on August 1, 1995, he wrote a memorandum which averred that Oldham's written statement was already in JSC's file.⁵¹ I credit Oldham, and further find that Albach's credibility generally is impeached by his testimony regarding Oldham's written statement.

After receiving Oldham's oral report about Nieto and (inferentially) Oldham's written report, Albach discussed the matter with Huneke. JSC's rules include the provision, "Employees may not threaten, strike, fight or assault another employee," the penalty being dismissal for the first offense; and the provision, "Employees may not verbally harass or abuse another employee," the penalty being a written warning for the first offense, suspension for the second offense, and dismissal for the third offense (except that racial or sexual harassment is subject to dismissal for the first offense). Huneke testified that Albach said Nieto had called Oldham "repeatedly threatening [him] with bodily harm and his wife and child"; the written statement which Oldham had given to Albach avers that Nieto expressly disclaimed any intention of inflicting bodily harm, and neither Oldham's written statement about his telephone conversation with Oldham, nor the testimony of Oldham, Albach, or Nieto about this conversation, refers at all to Oldham's family. Albach testified that he told Huneke that Oldham had filed charges with the police about his conversation with Oldham; Huneke testified that Albach said that Oldham "is filing" a police report.⁵² Albach testified to telling Huneke that Nieto had been warned, that management had worked with him, but he was still not the model employee he stated he was going to be and "it was very disruptive in the plant." Huneke, and at one point Albach, testified that they decided to extend Nieto's suspension.⁵³ After this discussion, Albach sent the following letter, dated July 27, 1995:

Please be advised that an allegation has arisen that on July 24, 1995, you threatened, verbally harassed or abused another employee and/or engaged in other conduct violative of applicable procedures at [JSC]. As you are aware, violation of any of the standards outlined above is cause for immediate dismissal. In addition, the alleged misconduct occurred at a time when you were under suspension for insubordination and at a time

⁵¹ This memorandum averred that Oldham's statement was in Nieto's file. The parties stipulated that the memorandum dated "8-9-95" is the only memorandum in Nieto's file about Nieto from Oldham.

⁵² Oldham was not asked whether he filed a police report about the matter. Laying to one side Albach's version of his report to Huneke, the only evidence that Oldham ever filed a police report is Albach's testimony that R. Exh. 7 is a copy of the report which Oldham gave to the police. Albach's testimony in this respect is inconsistent, not only with Oldham's testimony about how he came to write that document, but also with Albach's initial testimony about the matter. Huneke testified, "In my mind, if a guy is going to go that far to file a police complaint, it's probably worthy."

⁵³ Elsewhere, in response to what amounted to a leading question (not objected to) by JSC's counsel, about the content of this conversation, Albach impliedly testified to having recommended Nieto's discharge.

when you had been expressly advised that any further misconduct would result in additional discipline up to and including discharge.⁵⁴

Given the seriousness of the allegations and the potential discipline involved, [JSC] wants to consider any and all evidence which you may have regarding this incident. Accordingly, and to allow you to prepare a full response to the allegation, you are hereby suspended pending investigation. Kindly present any and all evidence, in writing, which you wish to have the Company consider no later than 5:00 p.m., Monday, July 31, 1995. The Company will make a decision as to your status based upon all the evidence available as of 5:00 p.m., Monday, July 31, 1995, so please submit your evidence, in writing, by the deadline set forth above.

On Thursday, July 27, before receiving Albach's July 27 letter and in accordance with Albach's instructions when suspending Nieto on July 24, Nieto telephoned Albach and asked whether Nieto was going to get to come back to work that day. Albach said no, that Nieto was being terminated for threatening another employee "off company grounds." Nieto asked who had made these accusations. Albach said that he could not give out that information. Nieto asked whether it was Barten; Albach said no. Nieto asked whether it was Miller; Albach again said no. Nieto asked whether it was Oldham; Albach said nothing. Nieto denied threatening Oldham. Albach said that Nieto had told Oldham that Nieto was going to f_k him up. Nieto said no, that he had told Oldham that "that [he] was fucked up, that he would make up an accusation about me." Albach said, ". . . it doesn't make a difference, you don't want to work here anyway." Albach said that Nieto would be mailed some release papers, that he would be eligible for a review, and that he might be able to be hired back. Nieto asked what he had to do. Albach told him to handwrite or type a statement, and to send it to JSC before August 1. Nieto said that he could do this.

On an undisclosed date during Nieto's suspension, Albach told Koonce that Albach had terminated Nieto for harassing Oldham over the telephone. When asked about this by Koonce, Nieto said that he had not done it.

(d) Alleged unlawful denial of promised review of Nieto's allegedly unlawful suspension and discharge

Nieto did not receive Albach's July 27 letter until Monday, July 31. Upon receiving it in the mail that day, Nieto immediately telephoned the plant and asked for Albach. When advised that Albach was not there, Nieto asked to speak to Huneke. When Huneke got on the line, Nieto said that he had just received a discharge letter from Albach. Huneke said that he had not realized that Albach had discharged Nieto. Nieto said that the reason he had been given for his discharge was that he had allegedly threatened another employee, Oldham, on the telephone. Nieto said that he had just received the discharge letter, that the discharge letter had given him until 5 p.m. that same day (July 31) to send in what Nieto described as his "review," and that this had not given him time to respond. Nieto asked whether Huneke would give him time to respond; Huneke said yes. Huneke

⁵⁴ There is no credible evidence that Nieto had received such a warning. See supra part II.C.2.c.(2).

asked for Nieto's telephone number, and said that either Huneke or Albach would call Nieto directly. Also, Huneke said that Albach was then in California, and that Nieto would have to talk to him when he returned to the Crown Point plant.⁵⁵ Then, Huneke telephoned Albach, who was temporarily working in a JSC plant in California; and authorized him to extend "for a couple of days," if he agreed, Nieto's time to reply to Albach's discharge letter.

After his July 31 conversation with Huneke, Nieto prepared a handwritten position statement. However, he did not receive the promised telephone call from either Albach or anyone else from JSC. Finally, on August 9 or 10, Nieto telephoned Albach, who (inferentially) had by this time returned from California to Crown Point. In the meantime, JSC had received on August 4 a charge which the Union had filed with the NLRB and which alleged that Nieto had been unlawfully discharged about July 27. As previously noted, on an August date prior to August 10 Albach requested Koonce to give JSC a written account of the July 20 glue-box incident, a request with which Koonce complied by a memorandum dated August 9. Also, on an undisclosed date after July 20, Albach asked Miller to prepare a written memorandum of the glue-box incident, a request with which Miller complied by a memorandum which he wrote and submitted on August 10.⁵⁶ During the August 9 or 10 telephone conversation, Nieto told Albach, in effect, that Nieto had failed to send JSC a letter requesting "review" of his discharge because JSC had not "got back to" him. Nieto went on to say that he had not been receiving unemployment compensation either; ". . . don't I get anything? You guys told me I get a review." Albach said, ". . . you let the Union and the NLRB help you out all this time, you let them help you out now." In consequence of this conversation, Nieto never gave JSC the position statement which he had prepared.⁵⁷

My finding that Nieto had no telephone contact with JSC between July 31 and his conversation with Albach on August 9 or 10 is based on Nieto's testimony. Albach initially testified that while he was in California, he telephoned Nieto and told him that he would have "a couple more days to respond." After Albach so testified, JSC counsel showed Albach a purported memorandum by Albach which was eventually received in evidence, without objection, as Respondent's Exhibit 8. After inspecting this document, Albach testified that this conversation with Nieto took place on August 1, and that Nieto was to respond in writing by August 3. Albach went on to testify that on a later date which he did not recall, Nieto asked him when he was going to have his hearing, to which Albach replied, ". . . we never got a response from you. What hearing?" Albach testified that JSC had never promised Nieto a hearing; that "We asked for him to explain his side of the incident that led up to his discharge

in writing, and he never responded"; and that when he did not respond, "we assumed that he accepted the responsibility for his acts and he was terminated." I do not credit either the foregoing testimony by Albach, or his testimony that he wrote Respondent's Exhibit 8 on August 1, the date it bears, for demeanor reasons and in view of the following additional considerations: (1) The July 27 suspension letter from Albach to Nieto gave him until 5 p.m. on July 31 to respond, and not until August 1 as alleged in Respondent's Exhibit 8. (2) Respondent's Exhibit 8 states that as to the July 31 conversation, Nieto had telephoned Albach; but Albach (like Nieto) testified that it was Albach who called Nieto. (3) Respondent's Exhibit 8 avers, in effect, that Oldham's written statement (Respondent's Exhibit 7) "is in Mr. Nieto's file"; but Albach testified that Oldham signed this statement, and gave it to Albach, on August 9, 8 days after the date on which (according to Albach's testimony) he wrote Respondent's Exhibit 8. (4) Albach testified that the alleged telephone conversation occurred while he was working in JSC's California plant, Respondent's Exhibit 8 dates the conversation as August 1 and is itself dated August 1, and Albach testified that he wrote it on August 1; but the document is typewritten on business stationery whose letterhead reads, "Smurfit Pallet Systems/A Division of Jefferson Smurfit Corporation" and gives only a Crown Point, Indiana, address.

d. Analysis and conclusions

The evidence shows that JSC earnestly wanted to prevent the Union from obtaining representative status among JSC's employees. In furtherance of this purpose, between January 1995 and the March 1995 representation election, JSC impliedly solicited employees' grievances and impliedly promised to remedy them, stated that JSC would likely not agree to a contract with the Union even if it won the representation election, promised employees pay raises if the Union lost the election, and unlawfully interrogated employees about how they intended to vote in that election. In addition, JSC announced its intention to punish union activity by inflicting loss of employment—more specifically, JSC threatened to close its Indiana plant and move to Alabama if the Union came in, and stated that employees could lose their jobs as a result of collective bargaining. Furthermore, JSC was well aware of Nieto's leadership in the union movement: his name was the first signature on the copy of the "Open Letter," on which Nieto obtained other employees' signatures; Nieto thereafter explained to management the employees' reasons for signing the "Open Letter"; he openly disputed Plant Manager Welty's assertions about the likely effects of collective bargaining; on the day of the election, Nieto wore a union tee-shirt, which Welty unlawfully told him to remove unless he left the premises; and Welty thereafter told Nieto that unions are for lazy people and his alleged laziness was the only reason he wanted the Union in the plant. Further, after the election, JSC unlawfully told the employees that wage increases were being deferred because the Union had filed objections to the election.

After the March 2 election, JSC issued to Nieto a series of writeups. When Nieto asked Albach why Nieto was getting written up so much for everything, and why he was being written up for things that other people had done without being written up, Albach said that Nieto had voted for

⁵⁵ My findings as to this Nieto-Huneke conversation are based on a composite of credible portions of their testimony.

⁵⁶ The record fails to show which, if any, conduct described in these two sentences occurred before the August 9 or 10 telephone conversation between Albach and Nieto.

⁵⁷ My findings as to the content of the Nieto-Albach conversation are based on Nieto's testimony. A memorandum of this conversation, written by Albach, states that Nieto asked him "when [Nieto] was going to get his meeting about his [suspension]. I told him that since he was going through the NLRB that he would have to ask them."

the Union and they had not. Such statements by Albach constitute persuasive evidence that these writeups were motivated by Nieto's union activity; see *NLRB v. Ferguson*, 257 F.2d 88, 90 (5th Cir. 1958); *L'Eggs Products, Inc. v. NLRB*, 619 F.2d 1337, 1339 (9th Cir. 1980). That the ostensible grounds for these writeups were pretextuous is further indicated by other evidence. Thus, two of the writeups were allegedly based on infractions which would appear trivial in the extreme—namely, clocking in 1 minute too early in the morning, and clocking in 1 minute too late after lunch. Moreover, the writeup dated March 23, ostensibly for leaving the floor without permission to talk to Huneke, remained in Nieto's personnel file even though Albach admitted that that he should have removed it. Furthermore, as to the writeup ostensibly based on Nieto's inability to find a particular size of sheets in the warehouse, Albach and Koonce had been unable to find them either. Also, Albach's testimony that he filed certain informal notations of Nieto's alleged errors, because they were too petty to warrant written warnings but Albach wanted to draw to Nieto's attention that he needed to improve his work a little bit, is difficult to reconcile with Albach's failure to show these notations to Nieto—an omission which, accordingly, suggests that these errors either were never committed by Nieto or that Albach deemed them very minor indeed. Similar inferences are also generated by Albach's failure to show Nieto Albach's March 27 note stating that Nieto had put 9 bundles instead of (as instructed) 10 on a conveyor belt. As to the March 7 writeup, ostensibly in connection with damaged pallets which had been tied together too tightly, Collins testified that as to some pallets, dunnage had not been properly used; Albach testified, in effect, that dunnage had been properly used; and all personnel who operated the fork lift even occasionally were thereafter given a "refresher course" about how to package and load the pallets—testimony which, when read together, largely corroborates Nieto's testimony that he loaded the pallets the way he had been taught. The foregoing evidence, particularly Albach's admission that Nieto was being discriminated against with respect to writeups because of his union activity, preponderantly shows that this was at least in part the reason for these writeups; and I do not credit Albach's or Welty's testimony otherwise. See *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962).

By late May 1995, JSC had discovered additional protected activity by Nieto which added to JSC's animus against him—more specifically, Nieto's action in giving statements to the NLRB's Regional Office. Thereafter, on May 21 or 27, Albach told Nieto that if he had stabbed Albach in the back by telling the NLRB what JSC's attorneys had attributed to Nieto, Albach would stab Nieto in the back as well. Thereafter, on July 24, Albach told Nieto that he was being suspended for 3 days for disobeying a "supervisor's" order on July 20, although the individual (Koonce) who had issued the order was not a supervisor, Koonce had accurately told Albach that Nieto had agreed to comply with the order after arguing with Koonce about it, and Koonce had further told Albach that Koonce had not intended even to bring up the incident. On the following day, after receiving a report from Oldham that Nieto "was harassing [Oldham] about somebody telling [Nieto] something and wanted to know how everything got out," Albach told Oldham that "this was good enough to do what [Albach] wanted to do with" Nieto, and

that "They were going to fire [Nieto] over it. They wanted to build a case on him." After thus expressing JSC's intent to discharge Nieto once sufficient pretext could be found, Albach's opinion that what Oldham had already told him was "good enough," and JSC's desire to "build a case on" Nieto, Albach told Oldham to put his oral report into written form, a task which consumed an hour of Oldham's paid working time. After that, Albach made a report to Huneke which (according to Huneke's testimony) attributed to Oldham a report that Nieto had threatened him and his wife and child with bodily harm—an untrue representation contrary to Oldham's report.⁵⁸ When Huneke agreed with Albach that Nieto's July 24–27 suspension should be extended, Albach sent Nieto a letter, dated July 27, which untruthfully alleged that he had been expressly advised that further misconduct would result in additional discipline up to and including discharge (see *supra* part II.C.2.c.(2)), suspended him pending investigation, and set 5 p.m. on July 31 as the deadline for submitting any evidence regarding the alleged misconduct. However, on that same day, July 27, Albach orally advised Nieto that he was being terminated because he had threatened Oldham. When Nieto denied threatening Oldham, Albach said that Nieto would be eligible for a review, that he might be hired back, and that to get such a review he should send a written statement to JSC before August 1. On July 31, Huneke told Nieto that he would be given additional time to respond, and that Huneke or Albach would telephone Nieto directly about the extension matter. However, Nieto never did receive such a call from either of them; and on August 4, JSC received a charge which had been filed with the NLRB and which alleged that Nieto had been unlawfully discharged about July 27. When Nieto telephoned Albach on August 9 or 10, and explained that he had not given JSC a request for review (although by this time he had completed preparation of a position statement) because JSC had not got back to him, Albach replied, ". . . you let the Union and the NLRB help you out all this time, let them help you out now." The foregoing evidence—particularly the discriminatory writeups which Nieto had previously received; Albach's threat to stab Nieto in the back because of his statements to the Board; Albach's comment that the Union and the Board should continue to help out Nieto, when Nieto complained that he had not received his promised opportunity to seek review of his discharge; and Albach's statement to Oldham, just before the July 24 extension of Nieto's suspension, that JSC wanted to "build a case on" Nieto in order to discharge him—preponderantly shows that Nieto's July 24 suspension, the July 27 extension of his suspension, his August 1 discharge, and JSC's conduct with respect to his promised review, which conduct had the predictable effect of depriving him of that review, were at least partly mo-

⁵⁸ Any such false representations by Supervisor Albach would have been motivated by his intent, as revealed by Oldham's uncontradicted and credible testimony, to obtain a pretext for discriminatorily discharging Nieto. Accordingly, the extension of Nieto's suspension, and his eventual discharge, on the basis of such representations would be unlawful even if Huneke reached a decision to take such action against Nieto in good faith reliance on such representations. *NLRB v. E.D.S. Service Corp.*, 466 F.2d 157, 158 (9th Cir. 1972); *Grand Rapids Die Casting Corp. v. NLRB*, 831 F.2d 112, 117–118 (6th Cir. 1987), rehearing denied 833 F.2d 605 (6th Cir. 1987); and cases cited.

tivated by his union activity and his statements to the Board; and I do not credit either Huneke's testimony otherwise or Albach's testimony that Nieto's union activity had nothing to do with Albach's recommendations that Nieto be terminated. *Walton*, supra, 369 U.S. at 408. The existence of such an antiunion motive is not disproved by JSC's retention of employee Koonce, who was also a leader in the union campaign. See *Nachman Corp. v. NLRB*, 337 F.2d 421, 424 (7th Cir. 1964); *Handicabs, Inc.*, 318 NLRB 890, 897-898 (1995), enf. 95 F.3d 681 (8th Cir. 1996).

Accordingly, JSC violated Section 8(a)(1) and (3) by its writeups of Nieto in March 1995, and violated Section 8(a)(1), (3), and (4) by suspending and discharging Nieto and depriving him of the opportunity to obtain a review of his discharge,⁵⁹ unless JSC can prove, by a preponderance of the evidence, that its actions were based on legitimate reasons which, standing alone, would have induced JSC to take the same personnel action.⁶⁰ JSC has failed to make such a showing.

JSC seems to be contending that it would have discharged Nieto because Oldham's written report stated that Nieto had admitted writing a racial slur on the fan used by Barten (a fellow Indian), JSC's written rules call for "dismissal" for a "first offense" of racial harassment, and the July 17 notice about the fan states that making racial slurs "is unacceptable conduct and will most definitely be punished . . . the punishment will usually be discharge in those cases involving deliberate misconduct." However, when Nieto directed a racial slur at employee Frazier before starting the union movement, Nieto received only a writeup; the July 17 notice merely states that the punishment would "usually" be discharge; Nieto was never disciplined or told he would be disciplined as a result of the fan incident; and no manager or supervisor ever told him that the fan incident was the reason or part of the reason for his suspension and termination.⁶¹ Moreover, JMC permitted the racial inscription to remain on the fan well after Barten's layoff 5 months later, and never (so far as the record shows) attempted to erase or mark out the writing thereon. Further, although Oldham's written re-

⁵⁹ As JSC does not appear to question, employer discrimination against an employee because he has given statements to the Board violates Sec. 8(a)(4). *YMCA of the Pikes Peak Region v. NLRB*, 914 F.2d 1442, 1452-1453 (10th Cir. 1990); *Well-Bred Loaf, Inc.*, 280 NLRB 306, 310-311 (1986).

⁶⁰ *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 398-404 (1983); *NLRB v. Advance Transportation Co.*, 979 F.2d 569, 574 (7th Cir. 1992); *NLRB v. Advance Transportation Co.*, 965 F.2d 186, 190-191 (7th Cir. 1992); *NLRB v. Bestway Trucking, Inc.*, 22 F.3d 177, 180 (7th Cir. 1994); *KNTV, Inc.*, 319 NLRB 447, 452 (1995); *Williamhouse of California, Inc.*, 317 NLRB 699, 715 (1995).

⁶¹ I note, moreover, that as to a February 1995 incident where Nieto allegedly threatened to fight employee Carter, Collins' testimony at least implies that such conduct was not an appropriate subject for discipline because it occurred (like the Oldham telephone conversation) "outside the shop" (see supra fn. 23). However, the Carter incident occurred before Nieto had been advised in the July 27 letter that "any further misconduct [will] result in additional discipline up to and including discharge." The same is true of the Nieto's April 1995 "pushing" conduct on the production floor in connection with the soda-pop incident, for which Nieto was never disciplined (see supra part II,C,2,c,(4),(a),(i)); in any event, it is unclear when management found out about it (see supra part II,C,2,c,(2),(c)).

port states that Nieto had threatened to have Oldham and Miller fired for stealing, and JSC rules call for dismissal for a first offense of threatening another employee, Huneke testified that he had merely authorized Albach to suspend Nieto even though Albach reported that Nieto had threatened Oldham and his family with bodily harm.⁶² Finally, although JSC may be contending that Nieto would have been suspended, even if he had not been a union activist who gave statements to the Board, because he argued with a non-supervisory leadman before eventually agreeing to comply with the order in dispute, I note that the leadman himself told management that he had not intended to bring the matter up at all.

For the foregoing reasons, I find that JSC violated Section 8(a)(1) and (3) of the Act by issuing written warnings to Nieto in March 1995. In addition, I find that JSC violated Section 8(a)(1), (3), and (4) of the Act by suspending and discharging Nieto, and by denying him a previously promised review and reconsideration of his suspension and discharge. Also, I find that JSC violated Section 8(a)(1) of the Act when (as alleged in par. V(j) of the complaint) Albach told Nieto on March 23, 1995, that because he voted for the Union, he was being written up on the basis of conduct for which employees who had not voted for the union were not being written up;⁶³ and when (as alleged in par. V(l) of the complaint) Albach threatened to stab Nieto in the back because he had given statements to the Board.

CONCLUSIONS OF LAW

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

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

3. JSC has violated Section 8(a)(1) of the Act by engaging in the following conduct:

(a) About January 4, 1995, through Supervisor Mark Huneke, by soliciting employees' grievances, and impliedly promising to remedy them, in order to discourage employees from selecting the Union as their bargaining representative.

(b) On an undisclosed date between December 1, 1994, and March 2, 1995, through Supervisor William Albach, by stating that if the Union came into the plant, JSC would close it and move it elsewhere.

4. JSC has violated Section 8(a)(1) of the Act, and has engaged in objectionable conduct affecting the results of the election conducted on March 2, 1995, in Case 13-RC-19060, by engaging in the following conduct:

(a) About January 17, 1995, through supervisor Huneke, by soliciting employees' grievances and impliedly promising benefits to employees if the Union's representation petition was withdrawn.

(b) On January 25, 1995, through Supervisors Huneke and Timothy Welty, by telling employees that JSC would likely not choose to sign a contract with the Union if it won the forthcoming election.

⁶² Huneke had not yet seen Oldham's written report, which stated that Nieto had expressly disclaimed the use of bodily harm.

⁶³ See *Shelby Memorial Hospital*, supra, 1 F.3d at 564; *Winges Co.*, 263 NLRB 152, 153 (1962). Unlike JSC, I believe that this incident was encompassed by the complaint allegation that Albach "threatened employees with discipline for supporting the Union."

(c) On February 2, 1995, through Supervisor Welty, by threatening employees with loss of benefits and of jobs as a result of collective bargaining.

(d) On February 9, 1995, through Supervisor Welty, by interrogating employees about how they intended to vote.

(e) On February 23, 1995, through Supervisor Huneke, by promising employees a pay increase if they did not select the Union as their collective-bargaining representative.

(f) On March 2, 1995, through Supervisors Welty and Michael Collins, by refusing to permit employees to wear union tee shirts on company premises.

5. JSC has violated Section 8(a)(1) of the Act by engaging in the following conduct:

(a) On March 13 and 23, 1995, by threatening to withhold wage increases because the Union had filed objections to the election.

(b) On March 23, 1995, by telling employee Nieto, through Supervisor Albach, that because Nieto had voted for the Union, he was being written up on the basis of conduct for which employees who had not voted for the Union were not being written up.

(c) In May 1995, by threatening, through Supervisor Albach, to stab employee Nieto in the back because he had given statements to the Board.

6. JSC has violated Section 8(a)(1) and (3) of the Act by engaging in the following conduct:

(a) In March 1995, after March 2, by issuing written warnings to employee Daniel Nieto ostensibly based on driving his forklift in a restricted area, punching in 1 minute early, and punching in 1 minute late.

(b) By issuing written warnings to Nieto on March 7, 1995; March 21, 1995; March 22, 1995; about March 23, 1995 (ostensibly for leaving the floor); and on March 23, 1995 (ostensibly for substandard work).

7. JSC has violated Section 8(a)(1), (3), and (4) by engaging in the following conduct:

(a) On July 24, 1995, by suspending employee Nieto.

(b) On July 27, 1995, by extending Nieto's July 24 suspension.

(c) On July 27, 1995, by discharging Nieto.

(d) On August 9 or 10, 1995, by denying Nieto a previously promised review and reconsideration of his suspension and discharge.

8. The unfair labor practices set forth in Conclusions of Law 3-7 affect commerce within the meaning of Section 2(6) and (7) of the Act.

9. JSC has not violated the Act, or engaged in objectionable conduct affecting the results of the election conducted on March 2, 1995, in Case 13-RC-19060, by engaging in the following conduct:

(a) Through Supervisor Collins, by threatening on January 18, 1995, to discharge an employee for union activity and to close the plant because of the union movement.

(b) Through Supervisor Welty, on February 2, 1995, by threatening employees with loss of wages if they chose union representation.

(c) Through Supervisor Welty, by threatening on February 18, 1995, that JSC would never bargain with the Union.

10. JSC has not engaged in objectionable conduct by distributing literature which urged a vote against the Union.

THE REMEDY

Having found that JSC has violated the Act in certain respects, I shall recommend that JSC be required to cease and desist from such conduct, or like and related conduct, and to take certain affirmative action necessary to effectuate the policies of the Act. Thus, JSC will be required to offer Nieto reinstatement to his former position or, if no such position exists, to a substantially equivalent position, and to make him whole for any loss of earnings and other benefits he may have suffered by reason of his unlawful suspension and termination, as prescribed in *F.W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). In addition, JSC will be required to expunge from its records all references to Nieto's unlawful writeups, unlawful suspension, and unlawful discharge, including, without limitation: the writeups dated March 7, 1995 (G.C. Exh. 10); March 21, 1995 (G.C. Exh. 12); and March 23, 1995 (G.C. Exhs. 13 and 14); the note from Albach dated March 27, 1995 (G.C. Exh. 15); Albach's second notation regarding the meeting of April 6, 1995 (R. Exh. 5); Oldham's July 25, 1995, report (R. Exh. 7); Albach's July 27, 1995 letter to Nieto (G.C. Exh. 18); Koonce's August 9, 1995, memorandum (G.C. Exh. 8); Miller's August 10, 1995 memorandum (G.C. Exh. 21); Albach's memorandum dated August 1, 1995 (R. Exh. 8); and Collins' notations dated January 5, 1995, January 31, 1995, and February 20, 1995 (R. Exhs. 14 and 15). JSC will be required to notify Nieto, in writing, that this has been done and that the actions and matters reflected in these documents will not be used against him in any way.

In addition, JSC will be required to post appropriate notices in connection with the unfair labor practice proceedings (Cases 13-CA-33283 and 13-CA-33286). In *Indian Hills Care Center*, 321 NLRB 144 (1996), the Board modified its standard notice-posting policy by adding a provision for mailing of notices if the facility were closed down, and without regard to whether the record showed that the facility had in fact closed down. This notice-posting requirement is reflected in part 2(e) of my recommended Order. In *Indian Hills*, if the facility were to be closed down, notices were to be sent to all employees who had worked for the respondent employer at any time since a particular date (specified in the Order) which was subsequent to the commission of the unfair labor practices found and whose inclusion in the Order is unexplained is the Board's decision. In *Quebecor Printing Dickson, Inc.*, 323 NLRB No. 15 (Feb. 27, 1997), which found that unfair labor practices had been committed on November 3 and 8, 1995, the Board issued an Order which called for mailing notices (if the facility closed) to employees who had worked for the respondent employer at any time since November 9, 1995, "which was the date that the Union filed the instant unfair labor practice charge"; no other charges had been filed. Because the first charge herein (filed on April 3, 1995) included unfair labor practice allegations which I have sustained on the merits, application of this rule would be relatively easy in the case at bar. However, in procedurally different cases, selection of the triggering date might be complicated if the complaint allegations generated by the initial charge had been dismissed, if all of the charges had been filed before the occurrence of the unfair labor practices found, or if it is unclear which of several charges was the first to generate a sustained complaint allegation; cf.

NLRB v. Fant Milling Co., 360 U.S. 301 (1959). Because the purpose of the notice is to counteract the effect of unfair labor practices on the employees who may have been exposed thereto, I conclude that the triggering date should be the earliest date on which the unfair labor practices were shown to have begun—in this case, January 4, 1995. I do not believe that the appropriateness of such a policy is diminished by the fact that such a mailed notice would reach more of the employees who may have been exposed to unfair labor practices than would have been reached if the facility had still been in operation and, therefore, the notices would have been posted rather than mailed. Indeed, a good case could be made for routinely requiring a still-operating facility to mail notices to possibly exposed employees who had been separated before notices were posted in the facility.

Having further found that JSC engaged in objectionable conduct that affected the results of the election in Case 13–RC–19060, I shall recommend that the election held on March 2, 1995, be set aside, that a new election be held, and that the Regional Director include in the notice of election the paragraph set forth below (see *Lufkin Rule Co.*, 147 NLRB 341 (1964)):

Notice to All Voters

The election conducted on March 2, 1995, was set aside because the National Labor Relations Board found that certain conduct of the Employer interfered with the employees' exercise of a free and reasoned choice. Therefore, a new election will be held in accordance with the terms of this notice of election. All eligible voters should understand that the National Labor Relations Act, as amended, gives them the right to cast their ballots as they see fit, and protects them in the exercise of this right, free from interference by any of the parties.

On the basis of these findings of fact and conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I issue the following recommended⁶⁴

ORDER

The Respondent, Jefferson Smurfit Corp., Crown Point, Indiana, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Soliciting employees' grievances, and impliedly promising to remedy them, in order to discourage employees from selecting General Drivers, Warehousemen and Helpers Union Local 142, International Brotherhood of Teamsters, AFL–CIO, as their bargaining representative.

(b) Threatening to close and move the plant if Local 142 came into the plant.

(c) Impliedly promising benefits to employees if Local 142's representation petition is withdrawn.

(d) Telling employees that Respondent will likely not choose to sign a contract with Local 142 if it wins an election conducted by the National Labor Relations Board.

(e) Threatening employees with loss of benefits and of jobs as a result of collective bargaining.

(f) Promising employees a wage increase if they do not select Local 142 as their collective-bargaining representative.

(g) Refusing to permit employees to wear union tee-shirts on company premises.

(h) Threatening to withhold wage increases because Local 142 has filed objections to an election conducted by the National Labor Relations Board.

(i) Telling employees that because they voted for Local 142, they were being written up on the basis of conduct for which employees who had not voted for Local 142 were not being written up.

(j) Threatening to stab employees in the back because they have given statements to the National Labor Relations Board.

(k) Discouraging membership in Local 142, or any other labor organization, by discharging, suspending, or issuing warnings to employees, by denying them previously promised reviews and reconsiderations of their suspension and discharge, or by otherwise discriminating in regard to hire or tenure of employment or any term or condition of employment.

(l) Discharging or suspending employees, denying them previously promised reviews and reconsiderations of their suspension or discharge, or otherwise discriminating against employees, because they have filed charges or given testimony under the Act.

(m) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights under 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 Daniel Nieto full reinstatement to his former position or, if this position no longer exists, a substantially equivalent position, without prejudice to his seniority or any other rights and privileges previously enjoyed.

(b) Make Daniel Nieto whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of this decision.

(c) Within 14 days from the date of this Order, remove from its files all references to Daniel Nieto's unlawful warnings, suspension, and termination, including, without limitation, the material listed in the remedy section of this decision; and, within 3 days thereafter, notify him in writing that this has been done and that the actions and matters reflected in these documents will not be used against him in any way.

(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 or useful in analyzing the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by Region 13, post at its facility in Crown Point, Indiana, copies of the attached notice marked "Appendix."⁶⁵ Copies of the notice, on forms pro-

⁶⁴If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board, and all objections to them shall be deemed waived for all purposes.

⁶⁵In the event that the Board's 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 be changed to read, "Posted Pursuant to a Judgment of the United

vided by the Regional Director for Region 13, 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 facility 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

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the Respondent at that facility at any time since January 4, 1995.

(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 at that facility at any time since January 4, 1995.

Paragraphs V(b) and (f) of the complaint are dismissed. Paragraph V(d) is dismissed to the extent that it alleges a threat of loss of wages.

IT IS FURTHER ORDERED that the election held on March 2, 1995, in Case 13-RC-19060 be set aside, and that a new election be held at such time and under such circumstances as the Regional Director shall deem appropriate.