

United Refrigerated Services, Inc. and Jeremiah James and United Steelworkers of America, AFL-CIO-CLC. Cases 10-CA-28499, 10-CA-28589, 10-CA-28610, and 10-RC-14602

January 16, 1998

DECISION, ORDER, AND DIRECTION OF
THIRD ELECTION

BY CHAIRMAN GOULD AND MEMBERS FOX AND
LIEBMAN

On May 15, 1997, Administrative Law Judge Robert C. Batson issued the attached decision. The Respondent filed exceptions and a supporting brief.

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

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,¹ and conclusions as further discussed below, and to adopt the recommended Order as modified² and set forth in full below.

1. We find meritless the Respondent's exception asserting that the Board erred in failing to pursue enforcement of the Respondent's subpoena ad testificandum served on its former general manager, Dennis Lawrence. The record shows that the Respondent's counsel informed the judge at the outset of the hearing that Lawrence would not appear voluntarily, requested the Regional Director to begin subpoena enforcement proceedings, and requested a continuance of the hearing until enforcement was secured. The judge directed counsel for the General Counsel to cooperate and explain to the Respondent the necessary steps to request that the Board seek enforcement of the subpoena,³ but

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

² We shall modify the judge's recommended Order to include reinstatement and make whole provisions for the discriminatees, to delete the recommended bargaining order for the reasons discussed infra, and to comport with our decision in *Indian Hills Care Center*, 321 NLRB 144 (1996).

³ The Board may seek subpoena enforcement in Federal district court pursuant to Sec. 11(2) of the Act, which provides:

In case on contumacy or refusal to obey a subpoena issued to any person, any United States district court or the United States courts of any Territory or possession, within the jurisdiction of which the inquiry is carried on or within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides or transacts business, upon application by the Board shall have jurisdiction to issue to such person an order requiring such person to appear before the Board, its member, agent, or agency, there to produce evidence if so ordered, or there to give testimony touching the matter under investigation

declined to postpone the hearing. The judge explained that if it appeared at the conclusion of the General Counsel's case that the Respondent would be prejudiced by Lawrence's absence, he would reconsider the Respondent's request for a continuance at that time.

At the conclusion of the General Counsel's case, the Respondent's counsel reported to the judge that it desired Lawrence's testimony with respect to only one single complaint allegation and stated that "if we could somehow eliminate that allegation, then we feel comfortable proceeding without him." Counsel for the General Counsel declined to delete that one allegation. The judge accordingly advised the parties that he would proceed with the rest of the case, and if at the conclusion of the Respondent's defense it still desired subpoena enforcement with respect to that single complaint allegation, the judge would reconsider the issue of a continuance at that time. The Respondent never raised the issue of subpoena enforcement again at the hearing, however. Nor did it raise the issue in its 79-page posthearing brief to the administrative law judge.⁴ In these circumstances, there is no merit to the Respondent's exception that "the Board failed, without reason, to initiate enforcement proceedings[.]" Rather, the record establishes that the Respondent effectively abandoned its request for subpoena enforcement.

2. We agree with the judge's finding, for the reasons set forth by him, that the Respondent violated Section 8(a)(3) and (1) of the Act by discharging Jeremiah James for receiving a gratuity from a truckdriver. The Respondent contends in its exceptions that the evidence shows that James in fact received a gratuity, and that it accordingly lawfully discharged him pursuant to the Respondent's policy prohibiting such conduct. The judge did in fact find that the Respondent had a reasonable belief that James received a gratuity. The judge specifically credited testimony, however, that the practice of receiving gratuities was widely practiced at the Respondent's Birmingham facility involved here, including by management personnel working at the Birmingham location, without disciplinary action occurring. In light of the credited testimony regarding the Respondent's practice with respect to receipt of gratuities at the Birmingham facility, we agree with the judge's finding that the Respondent failed to prove that it would have discharged James in the absence of his union activities.⁵

or in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof.

⁴ Rather, the Respondent affirmatively stated in its posthearing brief that "[a]ll parties were represented and had the opportunity to present evidence and cross-examine witnesses."

⁵ We note that the only two examples submitted by the Respondent of disciplinary action resulting from acceptance of gratuity did not occur at its Birmingham facility, but rather at the Respondent's locations in Syracuse and Atlanta.

3. We agree with the judge's finding, for the reasons set forth by him, that the Respondent violated Section 8(a)(3) and (1) of the Act by discharging Phillip Johnson. The Respondent's exceptions assert that the discharge was lawful because Johnson in fact violated the Respondent's policy against "lot jumping," and that the judge erred in finding that Johnson engaged in the permissible practice of "force filling." We need not decide whether Johnson engaged in "force filling," rather than "lot jumping," because the judge found, and the credited evidence shows, that Johnson informed Supervisor Mitchum of his inability to find sufficient lots to fill the order, and Johnson thereafter followed Supervisor Mitchum's instructions as to how to fill out the order. In these circumstances, we agree with the judge that the Respondent used the "lot jumping" allegation as a pretext and that the Respondent failed to establish that it would have discharged Johnson in the absence of his union activities.

4. We agree with the judge's finding, for the reasons set forth by him, that the Respondent violated Section 8(a)(3) and (1) of the Act by suspending Terris King in March 1995. The Respondent contends in its exceptions that it did not engage in unlawful conduct with regard to King because, although it in fact sent him home for a half-day on the day of the suspension, it ultimately paid King full compensation for that work-day and thus effectively rescinded the suspension.

It is settled that under certain circumstances an employer may relieve himself of liability for unlawful conduct by repudiating the conduct. To be effective, however, the repudiation must be timely, unambiguous, specific in nature to the coercive conduct, and free from other proscribed conduct. There must also be adequate publication of the repudiation to the employees involved and there must be no proscribed conduct after the publication. Further, the repudiation should give assurances to employees that the employer will not interfere with their Section 7 rights in the future. *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978).

We find that the Respondent's conduct here did not effectively disavow the suspension under the criteria set forth in *Passavant*. There is no evidence that the Respondent notified King of any specific repudiation of its coercive conduct, and the Respondent did not give him assurance that in the future it would not interfere with employee exercise of Section 7 rights. Further, the Respondent engaged in subsequent additional proscribed conduct by unlawfully issuing King a warning in April 1995 and imposing on him more onerous working conditions. We accordingly agree with the judge's finding that the Respondent unlawfully suspended King. See *Passavant*, supra at 138-139; and

MPG Transport, 315 NLRB 489 fn. 1 (1994), enfd. 91 F.3d 144 (6th Cir. 1996).⁶

5. We agree with the judge's finding that the Respondent violated Section 8(a)(1) of the Act by creating the impression of surveillance of employee union activity. The judge found, based on credited testimony, that supervisory personnel frequently made remarks to employee Jeremiah James to demonstrate to James that his union activities were being observed. For example, Supervisor Mitchum threatened James with discharge after James had signed a union authorization card. On another occasion Mitchum questioned James about the Union, and warned James that it would be in his best interest to vote against the Union. Supervisor Higgins likewise told James to watch out because the Respondent was aware that he was pro-union and that his name was thus on the "hit list." Warehouse Manager Clay told James that there were certain employees General Manager Lawrence wanted to get rid of, including James. Supervisor Mitchum further linked his comments regarding his observation of James' union activity to James' paralyzed son, by stating that the Respondent could make it financially easier—or harder—for James to visit his son depending on whether he voted against the Union. When considered in their entirety, the Respondent's numerous statements to Johnson would reasonably suggest to him that the Respondent was closely monitoring his union activities. We accordingly agree with the judge that the record shows that the Respondent unlawfully created the impression of surveillance of employee union activity.

6. We do not agree with the judge's conclusion that a bargaining order may appropriately be issued in this case pursuant to *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969). The judge observed that the Union had demonstrated majority status sufficient to support a *Gissel* bargaining order by virtue of its winning the representation election conducted in the instant bargaining unit on May 12, 1995. In its exceptions, the Respondent contends that the results of the May 12, 1995 election cannot be relied on to support a *Gissel* bargaining order because the parties thereafter stipulated to set aside that election. We agree with the Respondent.

The record reveals that on May 12, 1995, an election was held in Case 10-RC-14602. The tally of ballots shows 22 for and 18 against the Union. Thereafter,

⁶The Respondent's contention that it did not actually suspend King must fail in light of the fact that it sent him home from work on the day of the incident.

We note that the judge, in analyzing the complaint allegations asserting violation of Sec. 8(a)(3) of the Act, correctly utilized the test set forth in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). The judge, however, inadvertently characterized these complaint provisions as alleging a refusal to hire employees. This inadvertent error does not affect the outcome of the decision.

the Respondent filed timely objections, alleging that certain union misconduct interfered with employee free choice in the election. On June 13, 1995, the parties stipulated to set aside the May 12, 1995 election and hold a second election.

In conducting representation elections, the Board provides safeguards to ensure that the process is protected from conduct by either party that may interfere with the employees' exercise of their free choice. See *General Shoe Corp.*, 77 NLRB 124, 127 (1948). Under the Board's Rules, a party may initiate an investigation into the circumstances surrounding an election by invoking the postelection objections procedure. See generally Section 102.69. If the Board determines that the conduct of a party has interfered with the right of employees to register their free choice in the election, then the results are deemed not to reflect the uninhibited desires of the employees, the election is set aside, and a new election is directed. If, on the other hand, the Board determines that the objections lack merit, then the results stand, the election is deemed to be valid, and, depending on the tally of ballots, the Board certifies that the union is or is not the exclusive bargaining representative of the bargaining unit employees.

Here, although the Union won the May 12, 1995 election, the Respondent filed objections, alleging that union misconduct destroyed the conditions necessary for a fair election. The effect of filing these objections was to place the validity of the election in issue. However, the question whether the employees registered their free choice in the election was never decided by the Board, because the parties subsequently stipulated to set aside the May 12, 1995 election and hold a second election. Thus, we simply do not know whether the employees' vote in favor of union representation in the May 12, 1995 election truly represented an expression of their real desires. We believe that this doubt must be resolved against the General Counsel, because he has the burden of proof on the issue of majority status. Accordingly, we hold, in agreement with the Respondent, that the results of the May 12, 1995 election cannot be relied on in this proceeding as establishing that the Union acquired majority status among the employees in the bargaining unit.⁷

The General Counsel did not offer any other basis for supporting his requested bargaining order. In these

⁷The judge's reliance on *Benjamin Coal Co.*, 294 NLRB 572 (1989), is misplaced. As the Board made clear in fn. 8 of its decision, the respondent in that case did not argue that it was improper to rely on the results of the election that the parties had agreed to set aside. Therefore, the Board did not pass on the issue. By contrast, in this case, the Respondent is clearly contending that the results of an election that has been set aside by stipulation of the parties cannot be relied on as establishing majority status for *Gissel* purposes.

circumstances, we conclude that a *Gissel* bargaining order is not appropriate.

The judge additionally found, however, and we agree for the reasons set forth in his decision, that the Respondent engaged in objectionable conduct during the critical period leading up to the second election conducted on June 30, 1995.⁸ We accordingly find that the second election must be set aside due to the objectionable conduct, and we shall direct that a third election be held.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, United Refrigerated Services, Inc., Birmingham, Alabama, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening its employees with discharge because of their union activities.

(b) Creating the impression that it is engaged in surveillance of its employees' union activities.

(c) Promising its employees improved working conditions and promotions in order to defeat their organizing efforts.

(d) Telling its employees that it knows that employees are contacting the National Labor Relations Board.

(e) Changing the working conditions, imposing more onerous working conditions, warning, suspending, and discharging its employees because of their union activities.

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

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

(a) Within 14 days from the date of this Order, offer Jeremiah James and Phillip Johnson full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Jeremiah James, Phillip Johnson, and Terris King whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, with interest, in the manner set forth in the remedy section of the judge's decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful warnings, suspensions, and discharges, and within 3 days thereafter notify Jeremiah James, Phillip Johnson, Daryl Craig, and Terris King in writing that this has

⁸The June 30 election was conducted following the parties' stipulation to set aside the May 12, 1995 election. The tally of ballots in the June 30 election showed 14 for and 26 against the Union.

been done and that the warnings, suspensions, and discharges will not be used against them 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 to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its place of business in Birmingham, Alabama, copies of the attached notice marked "Appendix."⁹ Copies of the notice, on forms provided by the Regional Director for Region 10, 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 insure 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 the Respondent at any time since March 1, 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 has taken to comply.

[Direction of Third Election omitted from publication.]

⁹If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

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

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

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection

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

WE WILL NOT threaten our employees with discharge because of their union activities.

WE WILL NOT create the impression among our employees that we are engaged in surveillance of their union activities.

WE WILL NOT promise our employees improved working conditions and promotions in order to defeat their organizing efforts.

WE WILL NOT tell our employees that we know that employees are contacting the National Labor Relations Board.

WE WILL NOT change the working conditions and impose more onerous working conditions on our employees because of their union activities.

WE WILL NOT warn, suspend, or discharge our employees because of their union activities.

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

WE WILL, within 14 days from the date of the Board's Order, offer Jeremiah James and Phillip Johnson full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Jeremiah James, Phillip Johnson, and Terris King whole for any loss of earnings and other benefits resulting from the discrimination against them, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful warnings, suspensions, and discharges of Jeremiah James, Phillip Johnson, Daryl Craig, and Terris King and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the warnings, suspensions, and discharges will not be used against them in any way.

UNITED REFRIGERATED SERVICES, INC.

Jeffrey D. Williams, Esq., for the General Counsel.
Russell A. Gunter, Esq. and *Anita T. Lechner, Esq.*
(*McGlinchey, Stafford & Lang*), of Little Rock, Arkansas, and New Orleans, Louisiana, for the Respondent.
Homer Wilson, Esq., of Birmingham, Alabama, for the Charging Party.

DECISION

ROBERT C. BATSON, Administrative Law Judge. This hearing was held in Birmingham, Alabama, on April 16, 17, and 18, 1996. The charge in Case 10-CA-28499 was filed on June 2 and amended on June 21, 26, and 29, August 10, and September 22, 1995. The charge in Case 10-CA-28589 was filed on July 6 and amended on July 27 and August 10, 1995. The charge in Case 10-CA-28610 was filed on July

18, 1995. A consolidated complaint issued on September 28, 1995.

The Respondent, the Charging Party, and the General Counsel were represented and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence. On consideration of the entire record and briefs filed by Respondent and the General Counsel, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent admitted that it is an employer engaged in the business of cold storage warehousing. It is a Delaware corporation with facilities located in Birmingham, Alabama. Respondent admitted that it shipped goods in excess of \$50,000 directly from its Birmingham, Alabama facilities to customers located outside Alabama during the past calendar year. Respondent admitted that has been an employer at material times within the meaning of Section 2(2), (6), and (7) of the National Labor Relations Act (the Act).

II. LABOR ORGANIZATION

Respondent admitted that United Steelworkers of America, AFL-CIO-CLC is a labor organization.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The 8(a)(1) Allegations*

Threat of Discharge

By Dennis Lawrence in February or March 1995: Warehouse Manager Jeffrey Clay admitted that during March and April 1995, he told Jeremiah James that there were certain employees that Dennis Lawrence would like to get rid of including P. J., T. K., Jeremiah James, and both Daryls. Daryl Craig and another Daryl whose name Clay could not recall. P. J. is Phillip Johnson. T. K. is Terris King.

After Jeremiah James wrote Respondent, the EEOC, and the NLRB on April 29, 1995, complaining that Respondent engaged in racial and union discrimination, Dennis Lawrence called James into his office. Lawrence told James that Respondent Management Official Gail Adams had phoned and she wanted him to discharge James. Lawrence told James that he had told Adams that there was no reason to fire him that Jeremiah James was a good worker. Lawrence said, "Jeremiah, there's nothing for me to fire you for. I can't walk into a courtroom and tell somebody that there was something for me to fire you for. It's just not."

After receiving a second warning before the May 12, 1995 election, Phillip Johnson met with Operations Manager James Mitchum and General Manager Dennis Lawrence. Johnson testified that he asked Lawrence why was he writing him up for stuff that he was not writing up anybody else. Lawrence told Johnson that "it seemed like you're unhappy here. Why don't you just leave? You're making it bad for everybody else." Before he left the office, Lawrence said something like, "As sure as God makes green apples, I'm gonna fire you, Peanut Butter, the next time I catch you talking." Peanut Butter was Johnson's nickname.

B. Findings

1. Credibility

I credit the testimony of Jeffrey Clay, Jeremiah James, and Phillip Johnson. Dennis Lawrence did not testify. As shown in more detail here, I do not credit the testimony of James Mitchum.

2. Conclusions

The credited testimony of Jeffrey Clay showed that from 1994, Dennis Lawrence identified employees Phillip Johnson, Terris King, Jeremiah James, and Daryl Craig as employees that he would like to discharge. The full record as shown here shows that those employees were involved in union activities in 1994 and that Dennis Lawrence was aware of their union activities.

The credited testimony of Jeremiah James proved that he was threatened with discharge by Dennis Lawrence after April 29, 1995, when Lawrence told him that Respondent Vice President Gail Adams wanted to discharge James after James wrote the EEOC and the NLRB. Respondent argued that Gail Adams testified to the contrary. Nevertheless, the testimony as to what Dennis Lawrence said is not rebutted. Lawrence's comments, even if Adams never made such a statement, constitute a threat of discharge from a high ranking official. Phillip Johnson's credited testimony proved that Lawrence threatened him with discharge before the May 12, 1995 election because of Johnson's union activities. Lawrence told Johnson that Johnson was unhappy and was making it bad for everybody else. The only activity that Johnson was shown to have engaged in that upset Lawrence was his union activity.

I find that Lawrence's threats of discharge stemmed from his belief that Jeremiah James and Phillip Johnson were engaged in union activities and those threats constitute violations of Section 8(a)(1) of the Act.

By James Mitchum: Shortly after March 24, 1995, James Mitchum came to Terris King in the railcar where King was working. Mitchum told King that it was gonna get kind of rough in there. Mitchum said, "The union's gonna try to come back in again and we want to get the union out of here. Give me a chance and let me get everything situated and we'll get together and we won't have a union in here." King said that he had heard the same thing before. Mitchum said, "Well, just give me a chance and believe me, after you give me this chance, you won't want to vote for the union." King testified that Mitchum also said, "T. K., I'll tell you just like this. I got you out here for a reason, and if anything happens, if I catch you talking or out of your work area, you'll be written up. If I even hear you talking about the union, you're gonna be fired. So, this is the situation you put me in for not being on your team."

Around and after March 1995, Jeremiah James had several conversations with James Mitchum regarding the Union. On several of those occasions, Mitchum asked James why did the employees want a union. He told James that he had a family to support. During a conversation in the freezer, Mitchum questioned James about the Union. James asked if Mitchum was still harassing him about the Union and Mitchum replied yes and that he did not want a union in there. Mitchum said that James had a family, that he knew

James was having financial problems with his family, and that it would be in James' best interest to vote against the Union.

After Jeremiah James signed his union card in March 1995, Mitchum told James that he could not continue attending computer class. James asked why and Mitchum responded, "Cause I'm gonna fire you." James asked if the union activities had anything to do with it and Mitchum replied, "Yeah, you know the consequences of it."

James testified that Mitchum made an array of threats on occasions before the May 1995 election, telling James that he was gonna get rid of him. On one occasion Mitchum told James that James could "kiss [his] job good-bye."

On May 12, 1995, immediately after Jeremiah James voted in the NLRB election, James Mitchum talked to James at the rail dock. Mitchum told James that it won't be long now. He said that James would not be with them long. James replied, "You keep threatening me but you don't even know how I voted." Mitchum said that it didn't matter how James voted that James was on his list and he was gonna get rid of him anyway. James testified that Mitchum said that he was going to get rid of T. K., Daryl Craig, Phillip Johnson, and James.

Jeremiah James also recalled a conversation where Mitchum told him to stop filing charges against him at the Labor Relations Board. After looking at his affidavit, James testified that conversation occurred in June 1995. Mitchum said that was hurting his job. He wanted to bring his family to Birmingham but they would not come because they were not sure he would have a job. Mitchum said that he felt his job was in jeopardy because one of the reasons he was hired was to keep the Union from coming in and that a group including James, Daryl Craig, Vincent Banks, Terris King, and Lipsey were gonna be fired. Mitchum also said that James' family would be better off with James having a job than with him not having a job.

James Mitchum testified that he is now manager of Respondent's transload facility. Before that he was operations manager for the main warehouse in Birmingham. He held that position from his first hiring by Respondent in September 1994. His immediate supervisor at the warehouse was Dennis Lawrence. Supervisors Jesse Jenkins and Jeff Clay reported to Mitchum.

Mitchum testified that when he was interviewed for the job by Dennis Lawrence, Lawrence told him there was an effort to organize for the Union in 1994 and one of Mitchum's challenges would be to improve employee relations. He denied that Lawrence told him that he was to weed out union supporters. Mitchum denied there was ever a hit list. He denied that he told supervisors or employees that employee performance was to be monitored because the employee was in favor of the Union or in the hope that the employee would be terminated.

Mitchum admitted that he had conversations with Jeremiah James regarding the Union. He recalled talking in the freezer where James told Mitchum of concerns he had with Respondent. James expressed that he felt that Dennis Lawrence was racist and that he did not like the way Mitchum talked to him. James told Mitchum that he was going to fight the Company for a union. Mitchum testified that he was surprised by James' comments and that he had no clue about the employees' union activities before the Union filed its petition.

James Mitchum testified that he first learned of the union organizing campaign on March 27, 1996, when Respondent received the Union's petition. Before that he had no knowledge that the employees were engaged in any type of union activity. Mitchum denied that he ever threatened employees with adverse action, because the employees supported the Union. He denied that he ever promised employees anything if they voted against the Union. He denied that he ever spied on employees' union activities or that he ever interrogated employees about the Union. Mitchum denied that he offered anyone including Terris King, a supervisory position because of the Union. He denied that he ever gave the employees the impression that he was engaged in surveillance.

Mitchum admitted that he did ask King of his interest in a supervisory job in February 1995.

He denied there was a mention of union during that conversation. King replied that he might be interested and asked if there was an opening. Mitchum testified that he told King there was not an opening. Mitchum denied that he told King there would be an additional \$5000 salary if King accepted the supervisory position. He denied that he ever offered King a supervisory job.

C. Findings

1. Credibility

I credit the testimony of Terris King and Jeremiah James. As shown in more detail here, I do not credit the testimony of James Mitchum in view of his demeanor and the full record. I found portions of Mitchum's testimony were not believable.

2. Conclusions

The credited testimony of Terris King proved that he was threatened with discharge by James Mitchum if he was found talking about the Union. The credited testimony of Jeremiah James proved that James Mitchum interrogated him about union activities and threatened James with discharge on several occasions both before and after the May 12, 1995 election because of James' union activities. Immediately after James voted on May 12, Mitchum threatened to discharge James, Phillip Johnson, Daryl Craig, and Terris King because those employees were on a hit list. The full record proved that Respondent maintained a hit list during 1994 and 1995 because the employees on that hit list were involved in union activities. The above proves that Respondent engaged in violations of Section 8(a)(1) of the Act.

3. Created the impression of surveillance

By James Mitchum on March 1, 1995: As shown above, after Jeremiah James signed a union card and after attending computer class for about 4 weeks, James was told by Mitchum that he could not continue attending the computer class. James asked why and Mitchum responded, "Cause I'm gonna fire you." James asked if the union activities had anything to do with it and Mitchum replied, "Yeah, you know the consequences of it." During the first 1995 union campaign Mitchum made several threats to Jeremiah James that he was gonna get rid of him. On one occasion during the first 1995 election campaign, Mitchum told James that he could "kiss [his] job good-bye."

James testified that Mitchum knew that he had a son in the military that had become paralyzed and that James was spending a lot of money going to Memphis to see his son. Mitchum told James that things could be arranged about his financial security and his being unable to continue to make trips to see his son. Mitchum said it would be in James' best interest to vote against the Union and that things could be arranged where James' financial situation would get better.

Before he started working for Respondent, Jeffrey Clay had a second interview with James Mitchum in October 1994. Clay was offered the warehouse supervisor job and he accepted. During that interview Mitchum gave Clay the names of employees that Mitchum described as trouble-makers. Those names included Terris King, Phillip Johnson, Jeremiah James, Vince, Daryl, and Sterling. Mitchum said to look out for those guys, that they had a lot of influence, knew a lot and could cause trouble for Clay. Mitchum said they were guys that he felt like were trying to push the Union. On several occasions James Mitchum told Clay to look out for Jeremiah, Terris King, and the other named employees. Once or twice Mitchum told Clay that "those are the guys we feel like they're pushing union." Mitchum said that if those guys cause trouble that Clay should write them up and he told Clay how to go about writing up those guys.

James Mitchum denied that he ever said anything to Jeffrey Clay about having a list of employees he wanted watched. Mitchum denied that he ever talked with Clay about the Union until the Union filed its petition in March 1995.

Mitchum testified that when he was interviewed for the job by Dennis Lawrence, Lawrence told him there was an effort to organize for the Union in 1994 and one of Mitchum's challenges would be to improve employee relations. He denied that Lawrence told him that he was to weed out union supporters. Mitchum denied there was ever a hit list. He denied that he told supervisors or employees that employee performance was to be monitored because the employee was in favor of the Union or in the hope that the employee would be terminated.

Mitchum admitted that he had conversations with Jeremiah James regarding the Union. He recalled talking in the freezer where James told Mitchum of concerns he had with Respondent. James expressed that he felt that Dennis Lawrence was racist and that he did not like the way Mitchum talked to him. James told Mitchum that he was going to fight the Company for a union. Mitchum testified that he was surprised by James' comments and that he had no clue about the employees' union activities before the Union filed its petition.

James Mitchum testified that he first learned of the Union's organizing campaign on March 27, 1996, when Respondent received the Union's petition. Before that he had no knowledge that the employees were engaged in any type of union activity. Mitchum denied that he ever threatened employees with adverse action because the employees supported the Union. He denied that he ever promised employees anything if they voted against the Union. He denied that he ever spied on employees' union activities or that he ever interrogated employees about the Union. Mitchum denied that he offered anyone including Terris King, a supervisory position because of the Union. He denied that he ever gave the employees the impression that he was engaged in surveillance.

D. Findings

1. Credibility

I credit the testimony of Jeremiah James and Jeffrey Clay. As shown in more detail here, I do not credit the testimony of James Mitchum in view of his demeanor and the full record.

2. Conclusions

The testimony of Jeremiah James proved that James Mitchum routinely told James things to show that James' union activities were being observed. As shown above after James signed a union card in March 1995, Mitchum threatened him with discharge because of James' union activities. Mitchum illustrated that he was aware of all James' activities by telling James that he knew that James had a paralyzed son in the military in Memphis that created financial problems for James. The testimony of Jeffrey Clay proved that Mitchum was aware of the union activities of employees King, Johnson, James, and others from October 1994. I find that the activities of James Mitchum illustrated that Respondent created the impression of surveillance of its employees' union activities in violation of Section 8(a)(1) of the Act.

3. Promised improved working conditions and promised promotions to supervisor

By Randy Kitchens on July 24, 1995: Charles "Mike" Saunders testified that Terris King was offered a supervisor's position about a month before the March 1994 NLRB election. Saunders, Paul Higgins, Dennis Lawrence, and King were present in Lawrence's office. Lawrence asked King if he would think about taking a supervisor's job. Saunders testified that he did not recall anything being said about the Union.

On another occasion Dennis Lawrence asked Saunders and Paul Higgins to offer King a supervisor's job. Lawrence commented that supervisors could not vote for the Union. After reading his prehearing affidavit Saunders testified that Lawrence said King "wouldn't be able to vote, and he was one of the main people, you know, that brought the union in." Lawrence said that if we got King to be a supervisor "the rest of them would probably follow him." "Fall in line and follow him."

Around the first of March 1995, Operations Manager James Mitchum asked Terris King to be on "our team" and take a supervisory position. Mitchum told King that he could add \$5000 to his salary and King could become a team player.

Later on that same day Mitchum told King that he wanted him to join their team and work with Mitchum on things. King replied that he was working with Mitchum. Mitchum said that if "the union comes in here, it's gonna tear us apart. You know, we need to work together and not get the union in here 'cause I'm telling you the union's not coming in here. So, I'm asking you to get on our team."

Two weeks later, Mitchum approached King on the rail dock and told King that he needed an answer that day about the supervisory position. King told Mitchum that he did not want to be brought to that through the Union. Mitchum told King, "Well, if you don't want to join this team, T. K., you

won't have another chance because, like I told you, the union isn't coming in here."

E. Findings

1. Credibility

I credit the testimony of Terris King and Charles Saunders. I do not credit the testimony of James Mitchum in view of his demeanor and the full record.

2. Conclusions

The testimony of Charles Saunders was not disputed as it regards Dennis Lawrence. Lawrence did not testify. Saunders' testimony proved that Dennis Lawrence offered Terris King a supervisor's job in 1994 in order to prevent King from voting in the Union.

The evidence did not show that Randy Kitchens offered to promote anyone, because of the employees' union activities. However, as shown above, the credited evidence proved that James Mitchum asked Terris King to be on "our team" and take a supervisory job and a \$5000 increase in salary. Mitchum associated being on our team with keeping the Union out in later conversations with Terris King. *Bon Marche*, 308 NLRB 184 (1992). That matter was fully litigated. Mitchum denied that he offered King a supervisor's job because of King's union activities.

3. Told employees that Respondent would know if they contacted NLRB

By Randy Kitchens on July 24, 1995: During a meeting in July 1995, Randy Kitchens talked to the employees. Kitchens told the employees:

I'm sorry, but I've got to break some bad news to everyone. Someone in here is going down to the NLRB making statements and accusations against us, and it's gonna come to a stop. (Kitchens looked toward King and said) I'm gonna tell y'all just like this; y'all going down there to that NLRB, it's not gonna help you. You can do whatever you want 'cause I'll fight you all the way to the Supreme Court if it takes it, and you're not gonna win anything.

And the union, you can forget it; it's not coming in here. So, y'all can just sit there and look, and I'm gonna tell you now, we're gonna see you eye-to-eye in a courtroom.

Kitchens also told the employees that when he saw them eye to eye in the courtroom that he would know who was going to be there and who was not. Kitchens said that he would deal with the employees then.

Randy Kitchens admitted that he held an employee meeting on July 24, 1995, to tell the employees of the Union's objections to the election. Kitchens testified that he had a written speech and that he did not deviate from that speech.

Randy Kitchens called another meeting of all the employees. He said:

"You know, You guys are still doing it. You're going down to the National Labor Relations Board. You're not gonna win." (Kitchens) said more about the NLRB. Said that the NLRB is trying to get the union in here

without us voting on it and he's not gonna let this happen. He don't want to break up the company. The union isn't gonna come in here regardless if the NLRB tries to get them in here without us voting. It's not gonna happen.

And he looked at me the whole time he was saying this, and I just sat there and turned my head. And that was the end of that.

Randy Kitchens denied that he ever threatened employees with termination or any adverse consequences because of their union support. He denied that he ever interrogated employees about the Union or that he spied on employees. Kitchens denied that he ever promised employees anything if they agreed not to support the Union.

F. Findings

1. Credibility

I credit the testimony of Terris King. I do not credit the testimony of Randy Kitchens in view of his demeanor and the full record. Kitchen's contention that he was unaware of the employees' union activities until March 27, 1995, is not believable in view of the entire record. There was an NLRB-conducted election a year earlier and Respondent was advised that the Union would file another petition a year after that election. The record shows that Respondent was engaged in a full-blown campaign against the Union continuously from before the 1994 election.

2. Conclusions

The credited testimony of Terris King proved that Randy Kitchens told the employees during a July 1995 speech that he knew that employees were going down to the NLRB making statements and accusations against Respondent. Kitchens threatened to deal with those employees after seeing them in a courtroom. In a later talk, Kitchens again told employees that he knew the employees continued to go to the NLRB. I do not credit Kitchen's testimony that he did not deviate from a prepared text. The text does include statements that are similar to those recalled by Terris King, and I am convinced that King testified correctly as to what Kitchens actually said to the employees. I find that action constitutes violations of Section 8(a)(1) of the Act. *Hoffman Fuel Co.*, 309 NLRB 327 (1992); *Flexsteel Industries*, 311 NLRB 257 (1993).

3. The 8(a)(3) allegations

Charles "Mike" Saunders testified that he worked for Respondent for 7 years until he was dismissed in August 1994. In 1994 he was a supervisor. He recalled that Respondent conducted management meetings and discussed strategy before the March 1994 NLRB election. Those meetings were held each Monday. During each of those meetings, Respondent Attorney Fred Price would go through a list of employees and ask the supervisor if each employee was for or against the Union.

General Manager Dennis Lawrence told Saunders to write up those employees identified as for the Union, whenever they did "any little thing that come up." Lawrence called Saunders into his office and gave Saunders a verbal warning,

because Saunders was not giving as many writeups as another supervisor.

Saunders testified there were 5-minute meetings involving only those employees on the "hit list." The hit list was a list of those employees that had been identified as prounion during the supervisors' meetings.

Jeffrey Clay was a warehouse supervisor from October 1994 until April 4, 1995. Before he was hired Clay was interviewed by James Mitchum and then by Dennis Lawrence along with Mitchum. During his interview with Lawrence present, James Mitchum told Clay that the employees had tried to vote in a union the year before but that had failed. He said several of the guys had animosity toward management.

Clay had another interview with James Mitchum later in October 1994. Clay was offered the job and he accepted. During that interview Mitchum gave Clay the names of employees that Mitchum described as troublemakers. Those names included Terris King, Phillip Johnson, Jeremiah James, Vince, Daryl, and Sterling. Mitchum said to look out for those guys, that they had a lot of influence, knew a lot and could cause trouble for Clay. Mitchum said they were guys that he felt like were trying to push the Union. Some of the top guys would be pushing the Union.

On several occasions Mitchum told Clay that they had to look out for Jeremiah, Terris King, and the other named employees. Once or twice Mitchum told Clay that "those are the guys we feel like they're pushing union." Mitchum said that if those guys cause trouble that Clay should write them up.

After the petition was filed in Case 10-RC-14602 in March 1995, Dennis Lawrence talked with Clay. They talked two or three times. Lawrence said that the managers should write down or listen to any conversations the employees would have and to watch what we said around them because they could use that against Respondent. Lawrence said that he hated they had petitioned for the Union.

Dennis Lawrence told Clay that he and Division Manager Dane Bear had a discussion the year before when the employees voted union and failed. Lawrence said that Bear said that he wished "that we could get rid of everyone that's in the building now." Lawrence responded to Bear, "Well, no, the next time around we will be okay." Lawrence told Clay, "I should have went ahead and proceeded to get rid of everyone who I thought voted union."

Lawrence also told Clay that the only ones who would survive if the employees voted union would be the guys who walk up to him and say, "I don't want union and I didn't vote for it." He said those would be the only ones working for Respondent a year from that date. Lawrence said that he would get rid of them.

According to Clay his conversations with Lawrence and Mitchum occurred during March and April 1995.

Clay admitted that he told Jeremiah James that there were certain employees that Dennis Lawrence would like to get rid of including "P. J., T. K., Jeremiah James and both Daryls. Daryl Craig and another Daryl whose name Clay could not recall."

G. Findings

1. Credibility

I credit the testimony of Charles Saunders and Jeffrey Clay. I do not credit the testimony of James Mitchum. Dennis Lawrence did not testify.

2. Conclusions

The credited testimony of Charles Saunders showed that Respondent conducted a 1994 antiunion campaign that included efforts to identify employee supporters of the Union and to issue disciplinary action against those employees. The credited testimony of Jeffrey Clay proved that Respondent continued to look at employees identified as union supporters as troublemakers. Respondent continued to try and discipline those union supporters and it continued to engage in surveillance of the activities of those employees. Clay's testimony proved that Respondent wanted to get rid of the employees that supported the Union.

In February and March 1995, changed working conditions for Jeremiah James; issued a verbal warning to Jeremiah James on April 4, 1995; and suspended then discharged Jeremiah James in June 1995: Jeremiah James was a lift driver for Respondent from February 1993 until June 22, 1995. He supported the Union during the campaign leading to the March 1994 election.

James had several conversations with General Manager Dennis Lawrence before the 1994 election. On one occasion Lawrence told James that he didn't think it would be good to have a union in the warehouse. Lawrence listed some employees that the Company wanted to get rid of including Terris King, Daryl Avery, Phillip Johnson, Daryl Craig, and J. R.

After James Mitchum started working for Respondent in September 1994, Mitchum and James talked in James' car. Mitchum said he was hired, in part, to get rid of certain people including Terris King, Daryl Avery, Phillip Johnson, Daryl Craig, and J. R. James told Mitchum that those were good workers. Mitchum said that he was to put false writeups in their files and indicate the employee refused to sign the writeup.

Also during the 1994 campaign, Supervisor Paul Higgins told James to watch out because they had found out he was a union organizer and his name was on the hit list.

James recalled that Jeffrey Clay also told him that he was told to harass and intimidate certain employees and that he had a list of employees that he was to get rid of.

Warehouse Manager Jeffrey Clay admitted that he told Jeremiah James that there were certain employees that Dennis Lawrence would like to get rid of including "P. J., T. K., Jeremiah James and both Daryls."

Before the first 1995 Union's organizing campaign James made arrangements with James Mitchum and Dennis Lawrence to take a computer class twice each week. In order to make his classes James had to leave work no later than 5:30 p.m. on the days of the class.

Jeremiah James signed a union authorization card in March 1995. He passed out union cards and spoke to others about the benefits of the Union.

Around March 1995 the employees were called to a meeting in the warehouse. Dennis Lawrence told them that the union was trying to come back in, that he did not want a union and was not going to have one. After that meeting Jeremiah James had several conversations with Mitchum regarding the Union. On several of those occasions Mitchum asked James why did the employees want a union. He told James that he had a family to support. During a conversation in the freezer, Mitchum questioned James about the Union. James asked if Mitchum was still harassing him about the Union and Mitchum replied yes and that he did not want a union in there. Mitchum said that James had a family, that he knew James was having financial problems with his family, and that it would be in James' best interest to vote against the Union.

After Jeremiah James signed his union card after about 4 weeks of attending computer class, Mitchum told James that he could not continue attending the class. James asked why and Mitchum responded, "Cause I'm gonna fire you." James asked if the union activities had anything to do with it and Mitchum replied, "Yeah, you know the consequences of it."

James Mitchum admitted that James asked him about taking a computer class. He told James that he could take the class. Mitchum told James he did not see a problem with James getting off to attend classes but there may be occasions when James could not leave and he could not guarantee that James could always leave for his class.

Mitchum testified that James came to him in late April and said that he was having to drop one of his classes, because Mitchum did not allow him to get off work. Mitchum was shocked because he had not know of a problem. James asked for the refund of his \$35 tuition payment. Mitchum referred him to Dennis Lawrence. Mitchum admitted that James was reimbursed for his \$35 tuition and Mitchum admitted that James was occasionally required to work overtime during the period when he was signed up for class.

During the first 1995 union campaign, Mitchum talked to Jeremiah James on several occasions. James testified that Mitchum made an array of threats during several conversations before the first 1995 election. Mitchum repeatedly told James that he was gonna get rid of him. On one occasion during the first 1995 election campaign, Mitchum told James that he could "kiss [his] job good-bye."

James testified that Mitchum knew that he had a son in the military that had become paralyzed and that James was spending a lot of money going to Memphis to see his son. Mitchum told James that things could be arranged about his financial security and his being unable to continue to make trips to see his son. Mitchum said it would be in James' best interest to vote against the Union and that things could be arranged where James' financial situation would get better.

James Mitchum denied that he knew that Jeremiah James had a son that was paralyzed.

On April 29, 1995, Jeremiah James wrote Respondent management officials, the Equal Employment Opportunity Commission, and the NLRB and complained about several actions by Respondent including racial and union-related discrimination and Mitchum's action in forcing James to drop out of his computer class. In discussions following James' letter Respondent through Gail Adams agreed to reimburse him for the cost of the computer class.

Dennis Lawrence called Jeremiah James into his office. Lawrence told James that Gail Adams had phoned and she wanted him to discharge James. Lawrence told James that he had told Adams that there was no reason to fire him that Jeremiah James was a good worker. Lawrence said, "Jeremiah, there's nothing for me to fire you for. I can't walk into a courtroom and tell somebody that there was something for me to fire you for. It's just not."

On May 12, 1995, immediately after James voted in the NLRB election, James Mitchum talked to James at the rail dock. Mitchum told him that it won't be long now. He said that James would not be with them long. James replied, "You keep threatening me but you don't even know how I voted." Mitchum said that it didn't matter how James voted that James was on his list and he was gonna get rid of me anyway. James testified that Mitchum also said that he was going to get rid of T. K., Daryl Craig, Phillip Johnson, Vincent Banks, and James. Mitchum had referred to those employees as troublemakers during one of his conversations with James.

Jeremiah James also recalled a conversation where Mitchum told him to stop filing charges against him at the Labor Relations Board. After looking at his affidavit James testified that conversation occurred around June 2, 1995. Mitchum said that was hurting his job. He wanted to bring his family to Birmingham, but they wouldn't come because they wasn't sure he was gonna have a job. Mitchum said that he felt his job was in jeopardy, because one of the reasons he was hired was to keep the Union from coming in and that a group including James, Daryl Craig, Vincent Banks, Terris King, and Lipsey were gonna be fired. Mitchum also said during one of the conversations with James that James' family would be better off with James having a job than with him not having a job.

Division Sales and Operations Manager Randy Kitchens testified that Dennis Lawrence was general manager at the Birmingham facility. Kitchens testified that Respondent's disciplinary policy involves class I and class II offenses. Class I may involve an immediate termination or suspension. Class II involves less serious offenses. Under class II there is a four-step procedure beginning with a verbal warning, then a formal warning, a 3-day suspension, and termination. Occasionally it may be necessary to skip some of the four steps and go immediately to termination or suspension. The policies are outlined beginning at page 29 in the employee handbook. That handbook is distributed to each employee when hired.

Randy Kitchens testified that he learned that the Union had filed a petition in the early afternoon on March 27, 1995. He was surprised and devastated. Before that date he had not heard of any union activity during 1995. Kitchens testified that he believes there is not anything the Union can do to benefit Respondent's employees. Kitchens first learned there were employee relations problems at the Birmingham facility after Dennis Lawrence resigned in June 1995.

After Lawrence resigned Kitchens was designated acting manager. In that capacity he became actively engaged in the campaign opposing the Union before the second 1995 election.

Randy Kitchens denied that he ever threatened employees with termination or any adverse consequences because of their union support. He denied that he ever interrogated em-

employees about the Union or that he spied on employees. Kitchens denied that he ever promised employees anything if they agreed not to support the Union.

Kitchens testified that Respondent has a policy that prohibits employees from receiving tips, gratuities, or bribes from customers. Employees are informed of that policy. Randy Kitchens testified that he was not aware that employees violated that rule.

James testified that he received a verbal warning in the spring of 1995. The employees were told not to talk. James was in charge of loading and Terris King was the checker. James had gotten off his loader to recount the boxes ready for loading. James Mitchum came up and gave King and James warnings for talking. Jeremiah James pointed out to Mitchum that they could not do their jobs without communicating.

James Mitchum admitted that employees are allowed to take breaks in addition to scheduled breaks. For example, employees that work in the freezer may come out occasionally to warm up and employees are permitted to go to the bathroom as needed even though they are not on break. Mitchum defined unauthorized break as any break in action that is not productive such as loitering and wasting time.

Mitchum testified that on one occasion he gave verbal warnings to Terris King, Jeremiah James, Steve Lipsey, and Daryl Craig because they were engaged in a long conversation on the rail dock. Mitchum testified that Maintenance Manager Jeff Kyser told him the employees were taking an unauthorized break. The four employees made no effort to disperse after seeing Mitchum.

Jeremiah James testified that he was suspended from work on June 20, 1995. Mitchum came to James as he was leaving work and said, "I got you now. I got you now. They want to see you down into Randy's office." James went to Randy Kitchen's office along with Mitchum. Kitchens asked James if he had taken money from a customer. James replied no. James recalled that Kitchens asked him something else and he replied no comment. Kitchens told him that he was suspended until June 22 and to stop and Kitchens before James started working on June 22.

James Mitchum denied that he ever told James, "I've got you now."

Under cross-examination James admitted that he told Kitchens that he would not cooperate with them and that he answered no comment as to a number of questions. He recalled that he told Kitchens that he wanted to be represented by someone or at least for them to tell him what they were talking about.

James testified that the checker called J. R. had asked him to load a truck on June 20 as a favor to J. R. James loaded the truck in the presence of Randy Kitchens, two maintenance managers and a manager named Gil. The driver came up thanked James and shook his hand. James testified that the driver did not give him any money. That was the only truck that James loaded on June 20.

On June 22 James reported to Kitchen's office and was told to wait. James waited for a long time. As the time neared 8 o'clock he went to the dressing area. Mitchum came to him and said, "I got you now, I got you now. You out of here." James went down to Kitchens' office and Kitchens told him that based on his investigation James was fired for taking money from a driver. On cross-examination

James testified that he may have told Kitchens that he did not remember taking any money. He recalled that Kitchens said that he had talked to the driver and had proof from the driver that he had given James money. James told Kitchens that it was not his normal position to take money from drivers. Kitchens told James that taking money from drivers was a dischargeable offense. James told Kitchens that everybody took money from drivers and that it was mainly checkers. He said that supervisors and management also took money from drivers and that it had never been of concern to the Company. James admitted that he would not give Kitchens the names of anyone other than Jesse Jenkins that took money from drivers.

James testified that he felt he was set up on June 20 but that he did not knowingly accept money from the driver and, to his knowledge, the driver did not put money in his pocket.

Jeremiah James testified that even though he did not accept any money on June 20, it was the practice for employees to accept money as tips from drivers. The checkers were the employees that usually received a tip from drivers. Management including Jesse Jenkins and James Mitchum had also received tips under the practice. James testified that he did not know of anyone being disciplined for receiving a tip from a driver before June 20, 1995.

James Mitchum testified that Respondent has a policy against employees receiving tips and that policy is written in the disciplinary action section of the employee handbook. However the handbook does not contain a rule against receiving a gratuity. Mitchum testified that termination is the result of violation of that policy. Mitchum denied that he has ever violated that policy and he denied knowing that anyone other than Jeremiah James has violated that policy.

James has not been offered reinstatement.

Division Sales and Operations Manager Randy Kitchens testified that Respondent has a policy that prohibits employees from receiving tips, gratuities, or bribes from customers. Employees are informed of that policy. Kitchens testified that he was not aware that employees violated that rule.

Kitchens testified that he was told by Chief Engineer Jeff Kyser that Kyser saw a driver give money to Jeremiah James. Kitchens had James Mitchum bring Jeremiah James to his office. Kitchens asked James if he had received any cash from any customers' drivers. James said that he had not. He then asked if James had received any cash from Colorado Meats and James replied that he had no comment. Kitchens told James that he was suspended until June 22. Kitchens contacted Colorado Meats and spoke to the driver. The driver admitted to Kitchens that he had given money to Jeremiah James. Kitchens testified that driver was Marty Lamb.

Kitchens admitted that Jeff Kyser was a supervisor and that Kyser had authority to confront Jeremiah James about receiving a gratuity. Kitchens admitted that he was never aware of whether Jeremiah James solicited a gratuity or whether the driver simply gave the gratuity without solicitation.

Kitchens met with James again on June 22. James denied that he had received money from a driver. Kitchens testified that James did admit that a driver had bought him a coke or something like that. Jeremiah James told Kitchens that everyone on the dock accepted money. Kitchens asked James to identify the ones that accepted money and James named Jesse Jenkins. James refused to give Kitchens any names

other than Jenkins. Kitchens told James that because of his taking money and because he lied about taking money, that James was terminated. James came back into Kitchens office and left a copy of unfair labor practice charges.

Kitchens' note of the June 22 meeting with James shows that he confronted Jesse Jenkins with James' claim that Jenkins received money from drivers. Jenkins replied no that the only thing he had ever done was accept a coke from a driver.

James Mitchum admitted that he had conversations with Jeremiah James regarding the Union. He recalled talking in the freezer where James told Mitchum of concerns he had with Respondent. James expressed that he felt that Dennis Lawrence was racist and that he did not like the way Mitchum talked to him. James told Mitchum that he was going to fight the company for a union. Mitchum testified that he was surprised by James' comments and that he had no clue about the employees' union activities before the Union filed its petition. Mitchum recalled that James made it clear in that conversation that he supported the Union. Mitchum testified that conversation occurred about the first week in April 1995.

James Mitchum testified that he first learned of the Union's organizing campaign on March 27, 1996, when Respondent received the Union's petition. Before that he had no knowledge that the employees were engaged in any type of union activity. Mitchum denied that he ever threatened employees with adverse action, because the employees supported the Union. He denied that he ever promised employees anything if they voted against the Union. He denied that he ever spied on employees' union activities or that he ever interrogated employees about the Union. Mitchum denied that he offered anyone including Terris King, a supervisory position because of the Union. He denied that he ever gave the employees the impression that he was engaged in surveillance.

Mitchum admitted that in February 1996, he did ask Terris King if King would be interested in a supervisory position. He denied there was a mention of union during that conversation. King replied that he might be interested and asked if there was an opening. Mitchum testified that he told King there was not an opening. Mitchum denied that he told King there would be an additional \$5000 salary if King accepted the supervisory position. He denied that he ever offered King a supervisory job.

H. Findings

1. Credibility

I credit the testimony of Jeremiah James. Dennis Lawrence and Paul Higgins did not testify.

As shown above I do not credit the testimony of Randy Kitchens in view of his demeanor and the full record. I am convinced that he testified untruthfully especially in his testimony that he first learned of the employees' union activity on March 27, 1995. Kitchens testified that he first learned of the employees' union activity on March 27 and that he was devastated. That was the day that Respondent received the Union's March 24 petition. However, as shown here the record reveals that Kitchens was advised that the Union may file another petition in March 1995 and Respondent continued to engage in an antiunion campaign throughout 1994 and 1995. The credited record especially those facts regarding the

March 3, 1995 discharge of Phillip Johnson shows that Respondent was aware of its employees' union activities long before March 27.

I do not credit the testimony of James Mitchum in view of his demeanor and the full record. I found portions of Mitchum's testimony was not believable. For example Mitchum admitted that Jeremiah James came to him about attending computer class and being able to get off early enough to attend those classes. Mitchum told James that he could not guarantee James would not have to work overtime but that he saw no problem with James getting off to attend classes.

Mitchum testified that he was shocked when James told him that he was having to drop a class due to his having to work overtime. Mitchum admitted that he frequently assigned James to work overtime during the time when James was taking the class. According to Mitchum when he was unable to get enough employees to volunteer for overtime he selected employees in inverse seniority for that overtime work. James was third from the bottom in seniority and for that reason James was frequently selected. Respondent's records introduced through Mitchum do show that James was routinely selected for overtime throughout most workweeks. Apparently as shown in those records there was no effort to permit James to leave at the end of his shift and attend classes despite Mitchum's assurance to James that he did not anticipate a problem with James attending class. Mitchum testified that James was not required to work more overtime than other employees, but Mitchum failed to show why James' schedule was not considered in light of his scheduled classes and in light of James having cleared attending the classes with Mitchum.

James Mitchum also testified that he first learned of the union campaign when the Union filed its March 1995 petition. I do not credit that testimony. It is undisputed that Respondent campaigned against the Union in 1994 and it is uncontested that Supervisor Jeffrey Clay told Jeremiah James that he was told to harass employees and Clay was instructed to get rid of a list of employees including Jeremiah James. Supervisor Paul Higgins told James to watch out because they had discovered that he was a union organizer and James' name was on the hit list.

Moreover, Mitchum testified that when he was interviewed for the job by Dennis Lawrence, Lawrence told him there was an union organizing effort in 1994 and one of Mitchum's challenges would be to improve employee relations.

Additionally I credit the testimony of former Supervisor Jeffrey Clay. Before he was hired Clay had interviews with James Mitchum. In an interview late in October 1994, Clay accepted a supervisory job with Respondent. During that interview Mitchum gave Clay the names of employees that Mitchum described as troublemakers. Those names included Terris King, Phillip Johnson, Jeremiah James, Vince, Daryl, and Sterling. Mitchum said to look out for those guys, that they had a lot of influence, knew a lot and could cause trouble for Clay. Mitchum said they were guys that he felt like were trying to push the union.

As shown above on several occasions, Mitchum told Clay that they had to look out for Jeremiah, Terris King, and the other named employees. Once or twice Mitchum told Jeffrey Clay that "those are the guys we feel like they're pushing

union.” Mitchum said that if those guys cause trouble that Clay should write them up.

2. Conclusions

As to whether Respondent illegally changed working conditions, issued a verbal warning, and suspended and discharged Jeremiah James because of his union activities, I shall first consider whether the General Counsel proved through persuasive evidence that the Respondent acted out of antiunion animus in refusing to hire the alleged discriminatees. *Manno Electric*, 321 NLRB 278 fn. 12 (1996); *Wright Line*, 251 NLRB 1083 (1980), enf. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

Respondent was aware of Jeremiah James’ union activities from before the 1994 election. The testimony showed that Respondent repeatedly threatened to discharge James because of his union activities.

From 1994 through both union organizing campaigns in 1995, Respondent threatened to discharge union supporters including James, Phillip Johnson, Terris King, and Daryl Craig. Those threats were made by high-level supervisors including Dennis Lawrence and James Mitchum.

James Mitchum interrogated Jeremiah James about union activities and threatened James with discharge on several occasions both before and after the May 12, 1995 election because of James’ union activities. Immediately after James voted on May 12 Mitchum threatened to discharge James, Phillip Johnson, Daryl Craig, and Terris King because those employees were on a hit list. The full record proved that Respondent maintained a hit list during 1994 and 1995, because the employees on that hit list were involved in union activities. After Jeremiah James signed a union card and after attending computer class for about 4 weeks, Mitchum told him that he could not continue attending the computer class. James asked why and Mitchum responded, “Cause I’m gonna fire you.” James asked if the union activities had anything to do with it and Mitchum replied, “Yeah, you know the consequences of it.”

In view of the above, I find that the General Counsel proved that Respondent was motivated to direct James to cancel his computer class because of James’ union activities. Respondent failed to prove that it would have required James to cancel his class in the absence of union activities. I find that Respondent did change James’ working conditions by forcing him to discontinue his class because of his union activities.

On another occasion during the first 1995 election campaign, Mitchum told James that he could “kiss [his] job good-bye.”

Mitchum knew that James had a son in the military that had become paralyzed and that James was spending a lot of money going to Memphis to see his son. Mitchum told James that it would be in James’ best interest to vote against the Union and that things could be arranged where James’ financial situation would get better.

James Mitchum regularly told Jeremiah James that James’ union activities were being observed. After James Mitchum started working for Respondent in September 1994, Mitchum and Jeremiah James talked in James’ car. Mitchum said he was hired, in part, to get rid of certain people including Terris King, Daryl Avery, Phillip Johnson, Daryl Craig, and

J. R. James told Mitchum that those were good workers. Mitchum said that he was to put false writeups in their files and indicate the employee refused to sign the writeup.

On April 4, 1995, James along with Terris King, Lipsey, and Daryl Craig were awarded warnings. One forklift driver left the area due to another assignment. As he was leaving and his replacement arrived, King was taking the paperwork from one and giving it to the replacement. Mitchum walked up and yelled, “What are y’all doing?” After the employees explained they were getting the paperwork for the forklift, Mitchum replied, “Well, I don’t think y’all are talking about any paperwork. This is a verbal for all of you guys. This is called an unauthorized break.”

James Mitchum admitted that employees are allowed to take breaks in addition to scheduled breaks. For example employees that work in the freezer may come out occasionally to warm up and employees are permitted to go to the bathroom as needed even though they are not on break. Mitchum defined unauthorized break as any break in action that is not productive such as loitering and wasting time.

Mitchum testified that he gave verbal warnings to Terris King, Jeremiah James, Steve Lipsey, and Daryl Craig because they were engaged in a long conversation on the rail dock. Jeff Kyser told Mitchum the employees were taking an unauthorized break. The four employees made no effort to disperse after seeing Mitchum.

All four employees warned on April 4 had been listed on numerous occasions by Dennis Lawrence, James Mitchum, and other supervisors, as employees that Respondent suspected as pushing the union and that Respondent would like to terminate. There was no evidence showing that the employees were not discussing matters related to their work and the employees testified that was what they were discussing. Moreover, even if the employees were on break, the record illustrated that Respondent permitted breaks at other than scheduled times.

Moreover, shortly before April 4, James Mitchum had warned Terris King that he would be written up if Mitchum caught King talking about the Union. King was in the group with James, Lipsey, and Craig warned because they were seen talking on April 4. All four were known by Respondent to be union pushers, and it is reasonable to believe that Mitchum suspected they were talking about the Union.

I find that the General Counsel proved that Respondent was motivated to issue the April 4 warnings because of the employees’ union activities. In view of my credibility determinations, I find that Respondent failed to prove that it would have issued the warnings in the absence of their union activities.

Jeremiah James was suspended on June 20 and discharged on June 22, 1995, for allegedly receiving a gratuity from a truckdriver.

As shown above, Respondent engaged in an unfair labor practices by forcing James to cancel his computer class and by warning James for taking an unauthorized break on April 4, 1995.

Jeremiah James was threatened with discharge by Dennis Lawrence after April 29, 1995, when Lawrence told him that Respondent Vice President Gail Adams wanted to discharge James after James wrote the EEOC and the NLRB.

Immediately after James voted on May 12 Mitchum threatened to discharge James, Phillip Johnson, Daryl Craig, and

Terris King because those employees were on a hit list. The full record proved that Respondent maintained a hit list during 1994 and 1995, because the employees on that hit list were involved in union activities.

I am convinced in view of the above evidence that Respondent was motivated to suspend and discharge Jeremiah James because of his union activities.

Respondent contends that it suspended and discharged James, because he received a gratuity. The testimony from Jeff Kyser shows that James was seen receiving money from a driver and the driver confirmed to Randy Kitchens that he had given money to James. I find that Respondent did show that it had a reasonable belief that James received a gratuity. Even though I generally credit James' testimony, I find that he gave conflicting testimony as to whether he received a gratuity.

Nevertheless, I am convinced that Respondent failed to prove that it would have suspended and discharged Jeremiah James in the absence of his union activity. James was the only employee shown to have been disciplined for receiving a gratuity without solicitation. Respondent failed to offer any evidence that other employees were disciplined for the same infraction as James. Randy Kitchens testified about disciplining Terris King, but King was accused of soliciting cash. There was no evidence that James ever engaged in solicitation. Moreover, I credit the testimony showing that the practice of taking gratuities was widely practiced. I find that Respondent failed to prove that it would have suspended and discharged James in the absence of union activities.

I find that the credited record proved that Respondent was motivated to require James to quit a computer class (see *Sawyer of Napa*, 300 NLRB 131 (1990)), to suspend James on April 4, 1995, and to discharge James in June 1995, because of James' union activities. Respondent failed to prove that it would have suspended or discharged James in the absence of his union activities.

Issued a written warning to Daryl Craig on March 31, 1995: Daryl Craig currently works for Respondent. He has worked there since June 1993. His jobs have included those of checker and warehouseman. Craig was involved in the 1994 and 1995 union organizing campaigns. In 1994 he attended union meetings and wore union badges, pocket protectors, hat pins, and hats at work. Jesse Jenkins was also involved in the 1994 union organizing campaign. Subsequently Jenkins was promoted to supervisor. Jenkins was aware of Craig's union activities.

On March 31, 1995, Craig was running late for work and he parked his car on the public street. He testified that Supervisors James Mitchum and Jesse Jenkins were watching when he as well as another employee, Brian Levan, parked on the street. After lunch, Supervisor Jesse Jenkins asked Craig if he had not warned Craig not to park on the street. Craig denied that he had been warned not to park on the street. Jenkins asked Craig to sign a written warning for parking on the street.

Craig went into James Mitchum's office. Mitchum told him to sign the March 31 warning. Craig responded that he had done nothing wrong. Mitchum said that he had warned Craig in November not to park on the street. Craig told Mitchum that he had worked nights in November and he was allowed to park almost anywhere. Craig disputed Mitchum's assertion that he had been warned in November and asked

to see the November warning. Mitchum said that warning was not available.

Craig talked Randy Kitchens, Dennis Lawrence, Gail Adams, and James Mitchum about his written warning. Kitchens said he would investigate. Kitchens and Lawrence met with Craig later and Kitchens told Craig that he had been warned in November 1994. Craig denied that he had been warned in November and asked to see his file. Kitchens told him that was against Company policy. Craig pointed out that Dane Bear had said during the March 1994 election that any employee could see his file if a member of management was present.

Daryl Craig testified that he had parked on the street for the whole week of March 31, 1995. He had also parked there on many occasions before that week. However, before March 31 he was not disciplined for parking on the street.

After receiving his warning Craig did not park in the spot on the street. Other employees did park there according to Craig.

As shown above, Brian Levan also parked on the street at the same time as Craig on March 31. Levan told Craig that he did not receive a warning. Levan had been an observer for Respondent during the March 1994 election.

Division Sales and Operations Manager Randy Kitchens explained that employees are required to park east and west of the building. Employees are not permitted to park on the truck apron or in the truck lot area. Employees are not permitted to park on portions of 25th Avenue because that restricts truck traffic into Respondent's facility. Employees were told of those restrictions.

Kitchens testified that Daryl Craig approached him about being disciplined for unauthorized parking. Kitchens investigated the matter and let the discipline stand. Kitchens was told by Dennis King that Craig had parked in an unauthorized area.

James Mitchum testified that employees were told during startup meetings to park on the east or west end of the building. He testified that employees are not permitted to park on 25th Avenue West.

Mitchum saw Craig's car parked on 25th Avenue West shortly after lunch. There were no other cars parked there at that time. Mitchum testified that he has issued warnings to other employees for unauthorized parking.

James Mitchum identified other employees including Darla Green, Phil Brown, Vincent Banks, and Steve Lipsey as having received warnings for unauthorized parking. Brown and Lipsey were warned for blocking cars parked in the east end authorized parking area. Mitchum did not identify any warnings for having parked on 25th Avenue West other than the one awarded Daryl Craig. He denied that he saw Craig park on the street that morning or on any other occasion other than the time he gave Craig the warning.

I. Findings

1. Credibility

I credit the testimony of Daryl Craig. Jesse Jenkins and Dennis Lawrence did not testify. As shown here, I do not credit the testimony of James Mitchum or Randy Kitchens.

2. Conclusions

As to whether Respondent illegally issued a warning Daryl Craig because of his union activities, I shall first consider whether the General Counsel proved through persuasive evidence that the Respondent acted out of antiunion animus in refusing to hire the alleged discriminatees. *Manno Electric*, supra; *Wright Line*, supra; *NLRB v. Transportation Management Corp.*, supra.

As shown above, the credited testimony of Jeffrey Clay, Charles Saunders, Jeremiah James, Terris King, and Phillip Johnson showed that Respondent was fully aware of the union activities of Daryl Craig before March 31, 1995.

The credited testimony of Daryl Craig proved that he was observed by Supervisors James Mitchum and Jesse Jenkins when he parked on 25th Avenue West on the morning of March 31, 1995. Another employee, Brian Levan, also parked on 25th Avenue West at that same time and Levan was also observed by Mitchum and Jenkins. Mitchum did not discipline Daryl Craig until Brian Levan moved his automobile during the lunchbreak. Brian Levan was shown to have been Respondent's observer during the March 1994 election. That evidence proved that Daryl Craig was treated in a disparate manner.

As shown above the record fully supports the General Counsel's contention that Respondent acted out of union animus in disciplining Daryl Craig. Craig was treated in a disparate manner. Respondent illustrated strong union animus. Respondent's supervisors, Mitchum and Lawrence, threatened on numerous occasions to discipline several employees including Daryl Craig because of those employees' union activities. The full record shows that Respondent followed up its threats by disciplining Daryl Craig in a disparate manner because of his union activities.

Respondent failed to show that it has disciplined anyone other than Craig for parking on 25th Avenue West even though at least one employee that failed to support the Union was observed parking in the same area. I find that the General Counsel proved that Respondent was motivated by union animus in warning Craig and Respondent failed to prove that it would have disciplined Craig in the absence of his union activities. *Yale New Haven Hospital*, 309 NLRB 363 (1992); *A.M.F.M. of Summers County*, 315 NLRB 727 (1994).

Imposed more onerous working conditions on Terris King in March/April 1995: On March 23 and in April 1995 suspended Terris King: Terris King worked for Respondent from 1988 until September 9, 1995. He was a product manager/checker. He was formerly a supervisor but the position he held in his last 2 years with Respondent was not a supervisory position.

King was active in the 1994 union campaign. He and other employees gave out banners and union cards. During that campaign Dennis Lawrence called King into his office. No one else was present. Lawrence said to King, "T. K., I know you are very strong individual with the employees out there and I'm gonna talk to you on how to turn the union around." Lawrence asked King what it would take to turn it around. King replied that he didn't know what Lawrence was talking about. Lawrence said, "Well, is your house note due? Is your bills behind? Do your car payment need paying? Anything you need to be get done, we can get it done for you." King testified that Lawrence asked him about su-

pervisory positions. King responded that he would think about it.

Charles "Mike" Saunders testified that Terris King was offered a supervisor's position about a month before the March 1994 NLRB election. Saunders, Paul Higgins, Dennis Lawrence, and King were present in Lawrence's office. Lawrence asked King if he would think about taking a supervisor's job. Saunders testified that he did not recall anything being said about the Union.

On another occasion Lawrence asked Saunders and Paul Higgins to offer King a supervisor job. Lawrence commented that supervisors could not vote for the Union. After reading his prehearing affidavit Saunders testified that Lawrence said King "wouldn't be able to vote, and he was one of the main people, you know, that brought the union in." Lawrence said that if we got King to be a supervisor "the rest of them would probably follow him." "Fall in line and follow him."

Terris King was also involved in the first and second elections in 1995. He wore union buttons, gave out cards and leaflets, and testified for the Union. He was the union observer at both 1995 elections.

Around the first of March 1995, Operations Manager James Mitchum asked King to be on "our team" and take a supervisory position. Mitchum told King that he could add \$5000 to his salary and King could become a team player. Later on that same day Mitchum told King that he wanted him to join their team and work with Mitchum on things. King replied that he was working with Mitchum. Mitchum said that if "the union comes in here, it's gonna tear us apart. You know, we need to work together and not get the union in here 'cause I'm telling you the union's not coming in here. So, I'm asking you to get on our team."

Two weeks later, Mitchum approached King on the rail dock and told King that he needed an answer that day about the supervisory position. King told Mitchum that he did not want to be brought to that through the Union. Mitchum told King, "Well, if you don't want to join this team, T. K., you won't have another chance because, like I told you, the union isn't coming in here."

James Mitchum denied that he offered anyone including Terris King, a supervisory position because of the Union.

Mitchum admitted that he did ask Terris King if King would be interested in a supervisory position in February 1996. He denied there was a mention of union during that conversation. King replied that he might be interested and asked if there was an opening. Mitchum testified that he told King there was not an opening. Mitchum denied that he told King there would be an additional \$5000 salary if King accepted the supervisory position. He denied that he ever offered King a supervisory job.

James Mitchum denied that he ever talked to Terris King about the Union.

King testified that he was suspended from work on two occasions in 1995.

King testified that he was suspended until further notice during March 1995. Dennis Lawrence took him over to the office of General Manager Randy Kitchens. Kitchens told King that he was suspended, because employee Ken Walls complained that King had talked to Walls about the Union. Walls said that King had told him that if the Union came in he would be fired. Kitchens told King that he did not want to hear King's side of the story.

Later that day Dennis Lawrence phoned King. Lawrence told King to report back to work 2 hours into the next shift. Lawrence said that Ken Walls was still upset but that he was "gonna step over everybody and you're coming back to work." King returned to work on March 24, 1995. He did not lose pay because of that incident. Lawrence told King that he was rescinding the suspension.

On that same day, March 24, the Union filed a petition for an election. King testified that he was reassigned to work in an isolated area, on the railcar. Before March King had rotated for 3 months on the railcar job. Employees were rotated to that job but King should not have been reassigned for several months. Instead the normal rotation was broken and he was assigned back to the railcar on March 24.

According to Randy Kitchens, Ken Walls came to his office and asked if he was being fired. Walls told Kitchens that Terris King had told him that he was about to be fired. Kitchens sent King home for the day but King was paid for that day and no disciplinary action was taken. Kitchens qualified his testimony saying that King may have been disciplined for disruptive behavior. Respondent offered into evidence time records showing that Terris King was paid for the time lost because he was sent home.

There was no traffic in that area of his railcar job other than maintenance and the lift driver. Before March 24 King had worked in areas with other employees. Also from March 24 his work became more physically difficult. He was required to lift 40-pound boxes by himself. Before that it was a team effort and did not require full-time lifting by King.

Shortly after March 24 James Mitchum came to King in the railcar. Mitchum told King that it was gonna get kind of rough in there but Mitchum talked about King giving him a chance. Mitchum said, "The union's gonna try to come back in again and we want to get the union out of here. Give me a chance and let me get everything situated and we'll get together and we won't have a union in here." King said that he had heard the same thing before. Mitchum said, "Well, just give me a chance and believe me, after you give me this chance, you won't want to vote for the union." Mitchum also said, "T. K., I'll tell you just like this. I got you out here for a reason, and if anything happens, if I catch you talking or out of your work area, you'll be written up. If I even hear you talking about the union, you're gonna be fired. So, this is the situation you put me in for not being on your team."

Mitchum identified from a summary of documents which he testified illustrated that Terris King had been assigned to the rail dock from December 1, 1994, up to about March 10, 1995. After March 10, Daryl Avery was assigned to the rail dock as checker. King was occasionally assigned to the rail dock some three to five times between March 10 and June 30, 1995. Mitchum testified that King was placed on limited duty because of an injury in late March or early April 1995. He denied that King was assigned to sweep the parking lot or to engage in any activity in violation of the limitations placed on King's workload due to the injury.

King testified that he was required to attend 5-minute meetings. As shown above, only prounion employees on Respondent's hit-list attended those meetings. During the above conversation, Mitchum referred to the 5-minute meetings as including King's buddies. King was not invited to attend

other antiunion meetings that Respondent held for other employees.

James Mitchum admitted that in February 1995, he did ask Terris King if King would be interested in a supervisory position. He denied there was a mention of union during that conversation. King replied that he might be interested and asked if there was an opening. Mitchum testified that he told King there was not an opening. Mitchum denied that he told King there would be an additional \$5000 salary if King accepted the supervisory position. He denied that he ever offered King a supervisory job.

On April 4, 1995, King was awarded a verbal warning. One forklift driver left the area due to another assignment. As he was leaving and his replacement arrived, King was taking the paperwork from one and giving it to the replacement. Mitchum walked up and yelled, "What are y'all doing?" After the three employees explained they were getting the paperwork for the forklift, Mitchum replied, "Well, I don't think y'all are talking about any paperwork. This is a verbal for all of you guys. This is called an unauthorized break."

Later that week, James Mitchum called King into Dennis Lawrence's office. Lawrence was also present. Mitchum showed King a written warning including 3 days' suspension for the above incident. King told Mitchum that the warning indicated he had a previous warning for unauthorized break. King testified that was not true. He had not received a previous warning for unauthorized break. Mitchum replied that King had a previous warning in November 1994. King asked to see that warning, and Mitchum replied that King could not see the warning.

James Mitchum identified a verbal warning issued to Terris King dated November 8, 1994, for "wasting time" as the previous warning for unauthorized break. King did not sign that warning.

Mitchum testified that he gave verbal warnings to Terris King, Jeremiah James, Steve Lipsey, and Daryl Craig because they were engaged in a long conversation on the rail dock. Jeff Kyser told Mitchum the employees were taking an unauthorized break. The four employees made no effort to disperse after seeing Mitchum. The warning issued on that occasion was dated April 7, 1995.

Mitchum testified that as to the April 4, 1995 incident, King was not suspended. Instead King was warned that he could be suspended on the next similar violation. According to Mitchum he has written up other employees for similar violations.

James Mitchum admitted that employees are allowed to take breaks in addition to scheduled breaks. For example employees that work in the freezer may come out occasionally to warm up and employees are permitted to go to the bathroom as needed even though they are not on break. Mitchum defined unauthorized break as any break in action that is not productive such as loitering and wasting time.

J. Findings

1. Credibility

As shown here, I credit the testimony of Terris King and Charles Saunders. Dennis Lawrence did not testify. I do not credit the testimony of James Mitchum.

As shown in more detail here, I do not credit the testimony of James Mitchum or Randy Kitchens in view of their demeanor and the full record.

2. Conclusions

As to whether Respondent illegally imposed more onerous working conditions and suspended Terris King because of his union activities, I shall first consider whether the General Counsel proved through persuasive evidence that the Respondent acted out of antiunion animus in refusing to hire the alleged discriminatees. *Manno Electric*, 321 NLRB 278 fn. 12 (1996); *Wright Line*, 251 NLRB 1083 (1980), enf. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

The record shows without dispute that Respondent knew of King's union activities from 1994 and afterward. Respondent felt that King one of the union leaders and offered King a supervisory position to keep him from voting Union in 1994 and to influence other employees to vote against the Union.

The credited testimony of King proved that Respondent offered him a supervisory position in early March 1995 in order to have King join Respondent's team in fighting the Union. King was told he would realize a \$5000 salary increase. King was told that he would not have another chance to be a supervisor if he did not join Respondent's team during the union campaign.

Terris King was suspended from work during March 1995, on the assertion that he had threatened employee Ken Walls with discharge. Ken Walls did not testify, and I do not credit the hearsay testimony that Walls was threatened by King. Although the record show that King's March suspension was rescinded, I am convinced that he was suspended. In view of the full record including the credited testimony that King was threatened with discharge if he was caught talking about the Union, I find that the General Counsel proved that Respondent was motivated to suspend King, because of his union activities. I find that Respondent engaged in pretext in finding that King was falsely accused of threatening employee Walls. I find that Respondent failed to prove that it would have suspended King in the absence of his union activities.

As shown here, I find that Respondent's award of a warning to King, as well as Jeremiah James, Steve Lipsey, and Daryl Craig, on April 4, 1995, constituted conduct in violation of Section 8(a)(1) and (3) of the Act. All those employees were known by Respondent as union supporters. The credited testimony illustrated that the employees were not engaged in activity which normally resulted in Respondent issuing warnings and that Respondent took that action because of a fear that the employees were talking about the Union. As shown above, employees including Terris King, were warned of discharge if caught talking about the Union. Respondent failed to prove that it would have suspended King in the absence of his union activities.

I credit the testimony of Terris King showing that after his suspension he was assigned to a low traffic work area. I also credit his testimony showing that work was more difficult than other assignments. *Yale New Haven Hospital*, 309 NLRB 363 (1992). He suffered a strain in his right shoulder while on that job and was placed on light duty. The credited

testimony showed that Respondent routinely rotated checkers to the railcar job, that King had recently completed his rotation at that job and that he was no due for another assignment for several months.

Terris King was assigned to a more onerous job in a low traffic area during the period before the first 1995 election. In view of the full record including the credited testimony showing that James Mitchum threatened King with discharge if he was caught talking about the Union, I find that King was reassigned to the isolated area of the railcar, because of his union activity. The General Counsel proved a prima facie case of discrimination. Respondent failed to prove that King would have been assigned to an isolated work area in the absence of his union activities. The record shows that although King was assigned light duty work, that assignment occurred after he was isolated on the railcar job. The record shows and I find that Respondent engaged in action in violation of Section 8(a)(1) and (3) of the Act.

3. Discharged Phillip Johnson on March 3, 1995

Phillip Johnson testified that he worked for Respondent from June 1992 until March 3, 1995. When discharged he was a forklift operator. Johnson was the employee that first suggested contacting the Union before the 1994 union campaign. He passed out union flyers during that campaign. He spoke to employees about the Union and he wore a union button.

Johnson recalled that he had three or four conversations about the Union with Supervisor Paul Higgins. Early in 1994 Paul Higgins came in the freezer where Johnson was working and said to Johnson that he had heard Johnson was in charge of some union activities, that Vince Banks was the head and Johnson was the vice president. Johnson told Higgins that he did not know what he was talking about.

Subsequently Higgins came in the freezer and told Johnson that he had lied to him. He told Johnson that he was in charge or whatever. Higgins said that he knew that Johnson and Vince were in charge. Higgins asked Johnson, "What do y'all want? Right now is the time to get anything you want." Higgins said, "Y'all got it made. Right now is the time to get anything you want." Johnson responded, "We don't have it made, Paul. You've got it made. I don't know what you're talking about this union thing." Higgins told Johnson, "I know you're lying. If you got something to do with this, Dennis is gonna fire you when all this blows over." Higgins said there was no possible way to win the election.

On the day before the March 1994 election, Higgins flagged Johnson down as he was driving out of the plant parking lot. Higgins asked if there was anything he could do and was Johnson still in the Union. Was there anything he could do to change Johnson's mind? Johnson told Higgins no.

Late in 1994 Higgins told Johnson that Dennis Lawrence had said that Johnson had come through the doors "fork first." Johnson told Higgins that he knew he did not do that. Higgins then said, "Well, hey, look, man, Dennis [Lawrence] is watching you. Be careful."

Johnson testified that it was the practice not to write up employees for tardiness if they called in within 2 hours of their shift starting. He called in one morning around 30 minutes late and told Supervisor Mike Saunders that his car had stopped on the freeway. When Johnson arrived Saunders told

him that Dennis Lawrence had told him to write up Johnson. Johnson refused to sign the writeup. Johnson was shown his affidavit on cross-examination and he admitted that he dated the above incident in September 1994.

Randy Kitchens testified that Respondent's attendance policy required that each employee be shown as tardy when they clock in late. He examined records and testified that neither Ray Sanders nor Brian Levan was tardy at any time in the week of August 8 through 12, 1994.

On one occasion Mike Saunders told Johnson and Terris King that Dennis Lawrence had some type of hit list of the people that he wanted Saunders to help get out of the company. As shown above, I credit testimony showing that Respondent identified union supporters on a hit list.

Johnson received warnings from Operations Manager James Mitchum for talking on the job. The record contains warning for talking dated November 7 and 8, 1994. After the second warning Johnson met with Mitchum and Dennis Lawrence. Johnson testified that he asked Lawrence why was he writing him up for stuff that he was not writing up anybody else. Lawrence told Johnson that "it seemed like you're unhappy here. Why don't you just leave? You're making it bad for everybody else." Before he left the office Lawrence gave him "some kind of little format that goes like, 'As sure as God makes green apples, I'm gonna fire you, Peanut Butter, the next time I catch you talking.'" Peanut Butter is Johnson's nickname.

Johnson was fired on March 3, 1995. Early in the week of his discharge he told James Mitchum that he had four extra cases left over from a load. Mitchum told him to unload those four cases in E-50. On the day of his discharge Johnson had a load that was 49 cases short. He told Mitchum and Mitchum told him to go and get those four extra cases. Later that day Mitchum discharged Johnson for "lot jumping." Mitchum told Johnson that he knew he had told Johnson to get those extra cases but from what Johnson's paperwork it looks like Johnson did not do what Mitchum said. Johnson testified that Dennis Lawrence wanted to see him before he left but he just left the building. Jesse Jenkins was present during Johnson's discharge. Johnson testified that lot jumping is common practice and that no one had been discharged before he was.

Vincent Banks was also terminated on March 3, 1995. Banks was the checker that checked the lots going into the trucks. He was also accused of lot jumping as to the incident that resulted in both he and Johnson being fired. However, after Banks went back and talked with Randy Kitchens, Banks was reinstated. James Mitchum testified that instead of termination Banks was suspended for 3 days without pay. According to Mitchum Jesse Jenkins removed the wrap on the load in question while Banks was on break. The wrap shows the lot number and its removal prevented Banks from being able to check the number. The circumstances of Banks suspension is outlined in a memorandum from Dennis Lawrence dated March 7, 1995.

James Mitchum testified that he is sure that Vincent Banks supported the Union but that Banks never told him of his views of the union campaign.

Division Sales and Operations Manager Randy Kitchens testified that Respondent's disciplinary policy involves class I and class II offenses. Class I may involve an immediate termination or suspension.

Randy Kitchens described lot jumping as incorrectly claiming that some portion of a lot was actually part of another lot. That practice is prohibited. Instead if an employee is unable to locate a complete lot he should report that to his supervisor. An employee should not take it on himself to substitute from another lot, sufficient product when he is unable to locate the complete designated lot.

Randy Kitchens testified that he learned that the Union had filed a petition in the early afternoon on March 27, 1995.

James Mitchum testified that the employees were finally cautioned against lot jumping in February 1995. The employees were told that anyone violating the prohibition against lot jumping would be terminated. Shortly thereafter during March, Phillip Johnson was discovered to have engaged in lot jumping by claiming to have shipped out 1000 cases of the same lot. However, on the following day 50 cases of that lot were found in the warehouse.

K. Findings

1. Credibility

I credit the testimony of Phillip Johnson. Paul Higgins did not testify. I do not credit the testimony of James Mitchum or Randy Kitchens. Dennis Lawrence did not testify.

2. Conclusions

As to whether Respondent illegally discharged Phillip Johnson, I shall first consider whether the General Counsel proved through persuasive evidence that the Respondent acted out of antiunion animus in refusing to hire the alleged discriminatees. *Manno Electric*, 321 NLRB 278, 280 fn. 12 (1996); *Wright Line*, 251 NLRB 1083 (1980), enf. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

As shown above, the record proved that Phillip Johnson engaged in union activity in both 1994 and 1995. Respondent was fully aware of Johnson's union activity. Respondent threatened employees including Johnson with discharge because of their union activity.

Before he started working for Respondent Jeffrey Clay had a second interview with James Mitchum in October 1994. Clay was offered the warehouse supervisor job and he accepted. During that interview Mitchum gave Clay the names of employees that Mitchum described as troublemakers. Those names included Phillip Johnson, Terris King, Jeremiah James, Vince, Daryl, and Sterling. Mitchum said to look out for those guys, that they had a lot of influence, knew a lot and could cause trouble for Clay. Mitchum said they were guys that he felt like were trying to push the Union. Once of twice Mitchum told Clay that "those are the guys we feel like they're pushing union." Mitchum said that if those guys cause trouble that Clay should write them up and he told Clay how to go about writing up those guys.

Around the first of March 1995, Operations Manager James Mitchum asked Terris King to be on "our team" and take a supervisory position. Mitchum told King that he could add \$5000 to his salary and King could become a team player. Later on that same day Mitchum told King that he wanted him to join their team and work with Mitchum on things. King replied that he was working with Mitchum. Mitchum said that if "the union comes in here, it's gonna tear us apart. You know, we need to work together and not get the

union in here 'cause I'm telling you the union's not coming in here. So, I'm asking you to get on our team."

Johnson was fired in March 1995, for allegedly lot jumping. The record shows that Johnson was the first employee fired for lot jumping and another employee involved in the same incident was not fired. Vincent Banks was the checker involved in the same incident with Johnson. Respondent contends that he was initially discharged then suspended Banks after talking to Randy Kitchens about the incident.

Moreover, the credited testimony shows that Phillip Johnson told James Mitchum of the problems with the lots that lead to his discharge. Mitchum admitted to Johnson that Johnson had advised him about the problem but he contended that Johnson did not follow his directions.

Randy Kitchens testified as to the difference between lot jumping and force filling. Lot jumping is prohibited whereas force filling is an allowed practice. As to the role of the lift operator the difference in the two concerns whether he notified the supervisor of the problem with filling a lot. In the case of Phillip Johnson the credited testimony showed that Johnson told James Mitchum of his inability to find sufficient lots to fill an order. Thereafter, he followed Mitchum's direction as to how to fill out the order. James' action complied with Kitchens' definition of force filling. Even though the computer may not have reflected force filling, that would not have been the fault of Phillip Johnson. Mitchum and the checker, Vincent Banks, would have been responsible for the computer.

I find that the credited evidence revealed that Phillip Johnson did not engage in lot jumping. Instead he followed directions of James Mitchum in force filling an order. The evidence revealed that employees are not normally disciplined for actions similar to that of Johnson. I am convinced that Respondent used that incident as a pretext in order to discharge Phillip Johnson.

The General Counsel proved that Respondent was motivated to discharge Phillip Johnson because of Johnson's union activities. Respondent failed to show that it would have discharged Johnson in the absence of his union activities. The record showed that Respondent did not crackdown against the practice of lot jumping until its employees engaged in union activity, that Phillip Johnson never engaged in lot jumping, that Respondent used that allegation as a pretext to discharge Johnson and the alleged crackdown was discriminatorily applied to prounion employee Phillip Johnson. I find that Respondent did not prove that it would have discharged Johnson in the absence of his union activities.

3. Objections

Three NLRB elections were held. In the first, in March 1994, a majority of the votes were cast against the Union. No objections were filed. Another election was held in Case 10-RC-14602 among employees in the below-described collective-bargaining unit on May 12, 1995, and a majority of the employees voting in that election selected the Union as their bargaining representative:

All full-time and regular part-time warehouse maintenance and plant clerical workers employed by Respondent at its three Birmingham, Alabama locations including forklift operators, lumpers, checkers, lead workers and warehouse, dock and customer service clerks but

excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

By June 13 stipulation the parties agreed to set aside the May 12 election. On June 30 a rerun election was held. A majority of the votes were cast against the Union. The Union filed objections. On November 3, 1995, the Regional Director issued an order consolidating cases in which he found that of approximately 44 eligible voters, 14 cast valid votes for the Union, and 26 cast valid votes against the Union. The documents in evidence show that the objections were stamped received in the NLRB office on July 7, 1995. The Regional Director held that the objections were filed on July 7 and that they were timely. I reject Respondent fourth affirmative defense in its answer that the Union's objection were not timely. In his order the Regional Director held, among other things:

Petitioner's objections make reference to "By this and other actions, the Employer interfered with the employees' choice and the election should also be set aside." Although not specifically alleged by the Petitioner as objectionable conduct, the investigation of the objections and a concomitant unfair labor practice charge disclosed evidence, encompassed by the reference to—"this and other actions," that the Employer, during the critical period of May 12, 1995, to June 30, 1995, engaged in unlawful threats, promises, intimidation, suspensions and discharges. Such evidence of objectionable conduct, although not specifically alleged, may be considered. *Framed Picture Enterprise, Inc.*, 303 NLRB 722 (1991); *White Plains Lincoln Mercury*, 288 NLRB 1133 (1988).

Clarence Brown works for the Union. Brown testified that he represented the Union at the June 30 election. According to Brown he requested Jeremiah James as the union observer in the presence of the NLRB agent and attorneys for Respondent. Respondent objected saying that if the Union used James Respondent would file objections to the election. Brown then requested that Terris King be the union observer.

As shown above Respondent engaged in activity in violation of Section 8(a)(1) and (3) of the Act. Many of those incidents occurred during the period after the first 1995 election on May 12 and before the second election on June 30.

As shown above I find that on May 12, 1995, immediately after Jeremiah James voted in the NLRB election, James Mitchum talked to James at the rail dock. Mitchum told James that it won't be long now. He said that James would not be with them long. James replied, "You keep threatening me but you don't even know how I voted. Mitchum said that it didn't matter how James voted that James was on his list and he was gonna get rid of him anyway. James testified that Mitchum said that he was going to get rid of T. K., Daryl Craig, Phillip Johnson, and James. I find that Mitchum's comments constitute a violation of Section 8(a)(1) and objectionable conduct which occurred between the May 12 and June 30, 1995 elections.

James Mitchum told Jeremiah James to stop filing charges against him at the Labor Relations Board. After looking at his affidavit James testified that conversation occurred in June 1995. Mitchum said that was hurting his job. He wanted

to bring his family to Birmingham but they wouldn't come because they wasn't sure he was gonna have a job. Mitchum said that he felt his job was in jeopardy because one of the reasons he was hired was to keep the Union from coming in and that a group including James, Daryl Craig, Vincent Banks, Terris King, and Lipsey were gonna be fired. That threat of discharge also constitutes objectionable conduct which occurred between the May 12 and June 30, 1995 elections.

As shown above I find that Respondent was motivated to discharge Jeremiah James in June 1995, because of James' union activities. Respondent failed to prove that it would have suspended or discharged James in the absence of his union activities. That activity constitutes objectionable conduct which occurred between the May 12 and June 30, 1995 elections.

In view of those incidents I find that the June 30 election should be set aside.

4. Requested bargaining order

The General Counsel alleged that Respondent's alleged unfair labor practice are so serious and substantial in character that the possibility of erasing the effects of those unfair labor practices and conducting a fair rerun of the June 30, 1995 election by the use of traditional remedies is slight, and the employees' sentiments regarding representation, having been expressed through the results of the May 12, 1995 election would, on balance, be protected better by the issuance of a bargaining order than by traditional remedies alone.

I find in agreement with the General Counsel that the Union demonstrated majority status by winning the May 12, 1995 election. *Benjamin Coal Co.*, 294 NLRB 572 (1989). During that May 12 election 22 employees voted for and 18 employees voted against the Union.

I find that the unfair labor practices are so serious and substantial in character that the possibility of erasing the effects of those illegal acts and conducting a fair rerun of the June 30, 1995 election is slight and the employees' sentiments expressed in the May 12 election would, on balance, be better protected by issuance of a bargaining order. The unfair labor practices including threats of discharge, warnings, suspensions and discharges are especially serious and substantial in character. Additionally the continuing nature of Respondent's antiunion action against its employees increase the likelihood that traditional remedies would be ineffective.

Respondent's antiunion campaign may be depicted by a calendar showing approximate dates starting before the 1994 NLRB election. As shown above:

Before March 1994

Respondent offered Terris King supervisory position because of the union campaign.

Respondent held supervisory meetings and tried to identify union supporting employees.

Respondent instructed supervisors to write up union supporters for any little thing that come up.

September 1994

October 1994

October 1994—April 1995

March 1995

Respondent held 5-minute meetings for employees on the hit-list as union supporters.

General Manager Dennis Lawrence threatened employee Jeremiah James that Respondent would like to get rid of Terris King, Daryl Avery, Phillip Johnson, Daryl Craig and J. R. and to keep the Union out of the warehouse.

Supervisor Paul Higgins told Jeremiah James to watch out because Respondent knew he was a union organizer and James' name was on Respondent's hit list.

James Mitchum told Jeremiah James that he had been hired to get rid of employees including Terris King, Daryl Avery, Phillip Johnson, Daryl Craig, and J. R.

James Mitchum told supervisor applicant Jeffrey Clay that employees Jeremiah James, Terris King, Phillip Johnson, Vincent Banks, Daryl Craig, and Sterling were troublemakers and union pushers.

Supervisors told by Respondent (Mitchum) to look out for Terris King, Phillip Johnson, Jeremiah James, Vince, Daryl, and Sterling because Respondent feels those guys are pushing the Union and they should be written up.

Supervisor Jeffrey Clay told Jeremiah James that he was to harass and intimidate employees named on Respondent's hit-list and that Respondent would like to get rid of those employees.

James Mitchum offered a supervisory position to Terris King in order to have King assist in opposing the Union. Mitchum told King that if he did not join team in fighting the Union he would not have another chance to be a supervisor.

Mitchum threatened to discharge Jeremiah James because of James' union activities.

	Mitchum told James he would be better able to finance trips to see his paralyzed son if James opposed the Union.		Mitchum threatened Jeremiah James with discharge on several occasions because James supported the Union.
March 3, 1995	Discharged Phillip Johnson in violation of Section 8(a)(3).		Respondent imposed more onerous working conditions on employee Terris King in violation of Section 8(a)(3).
March 23, 1995	Issued warning and suspension to Terris King in violation of Section 8(a)(3).	April 1995	Issued warning and suspension to Terris King in violation of Section 8(a)(3).
After March 24, 1995	Mitchum asked Jeremiah James to support Respondent in its opposition to the Union and threatened to fire James if James was caught talking about the Union.	After April 29, 1995	Dennis Lawrence threatened Jeremiah James that Respondent (Gail Adams) wanted to get rid of him.
April 4, 1995	Jeremiah James, Terris King, Steve Lipsey, and Daryl Craig were verbally warned for unauthorized break because of their union support.	Before May 12, 1995	Dennis Lawrence threatened to fire Jeremiah Johnson May 12, 1995 NLRB conducted election. Mitchum threatened to discharge Jeremiah James because he was on the hit-list of employees that supported the Union.
March 31, 1995	Respondent issued an illegal warning to Daryl Craig in violation of Section 8(a)(3).	June 1995	Respondent (Mitchum) told Jeremiah James to stop filing charges with the NLRB and that it knew that union support was coming from employees Jeremiah James, Daryl Craig, Vincent Banks, Terris King, and Lipsey.
March/April 1995	Former Warehouse Manager Jeffrey Clay admitted that he told Jeremiah James that Dennis Lawrence wanted to get rid of James, Phillip Johnson, Terris King, and both Daryls.	June 20, 1995	Jeremiah James suspended from work in violation of Section 8(a)(3).
	Dennis Lawrence threatened to get rid of the most apparent union supporters. James Mitchum interrogated Jeremiah James about the Union and told James it would be in his financial interest to vote against the Union.	June 22, 1995	Jeremiah James discharged in violation of Section 8(a)(3).
	Respondent (Mitchum) required Jeremiah James to cancel his computer class because of James' union support.	July 1995	Randy Kitchens told employees that Respondent knew employees were going to NLRB and making statements. Kitchens told employees that he would not let the Union come in.
	Dennis Lawrence told supervisors to listen to any employees' conversations and to watch what they said to employees, that he hated employees had petitioned for the Union.		
	Lawrence told Supervisor Clay that Respondent had wanted to get rid of everyone it suspected of voting Union in 1994 and that only employees that declared their opposition to the Union would survive in 1995.		

In view of the credited record, I am convinced that Respondent's illegal activity throughout 1994 and 1995 punctuated by hallmark violations including numerous threats of discharge, warnings, suspensions, and discharges to several of the very employees that Respondent held out as union pushers and supporters throughout those years, illustrates that normal remedies would be ineffective. I am convinced and find that a bargaining order should issue. *Benjamin Coal Co.*, 294 NLRB 572 (1989).

CONCLUSIONS OF LAW

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

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

3. Respondent, by threatening its employees with discharge; creating the impression of surveillance of its employees' union activities; by promising its employees improved working conditions and promotions in order to defeat their union organizing efforts; and by telling its employees that it would know if they contacted the NLRB, has engaged in conduct violative of Section 8(a)(1) of the Act.

4. Respondent, by changing the working conditions of its employee Jeremiah James; by warning, suspending, and discharging Jeremiah James because of his union activities; by warning its employee Daryl Craig because of his union activities; by imposing more onerous working conditions and suspending employee Terris King because of his union activities; and by discharging its employee Phillip Johnson because of his union activities; has engaged in conduct violative of Section 8(a)(1) and (3) of the Act.

5. All full-time and regular part-time warehouse maintenance and plant clerical workers employed by Respondent at its three Birmingham, Alabama locations (currently located at 600 & 700 West 25th Avenue, and 1801—4th Street West), including forklift operators, lumpers, checkers, lead workers and, warehouse, dock, and customer service clerks, but excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

6. United Steelworkers of America, AFL-CIO-CLC is and has been, since May 12, 1995, the designated representative of a majority of employees in the unit described above and is the exclusive bargaining representative of the aforesaid employees within the meaning of Section 9(b) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6), (7), and (8) of the Act.

THE REMEDY

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

As I have found that Respondent has illegally warned, suspended, and discharged its employees Jeremiah James, Daryl Craig, Terris King, and Phillip Johnson in violation of sections of the Act, I shall order Respondent to offer employees James and Johnson immediate and full employment to their former jobs or, if those jobs no longer exist, to substantially equivalent positions without prejudice to their seniority or other rights and privileges. I further order Respondent to make Jeremiah James, Daryl Craig, Terris King, and Phillip Johnson whole for any loss of earnings suffered as a result of the discrimination against them and that Respondent remove from its records any reference to the unlawful actions against Jeremiah James, Daryl Craig, Terris King, and Phillip Johnson and notify James, Craig, King, and Johnson in writing that Respondent's unlawful conduct will not be used as a basis for further personnel action. Backpay shall be computed as described in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as described in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

[Recommended Order omitted from publication.]