

Naomi Knitting Plant, A Division of Andrex Industries Corporation and International Ladies' Garment Workers' Union, AFL-CIO¹ Cases 11-CA-15720, 11-CA-15771, 11-CA-16376, and 11-RC-5954

August 30, 1999

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS LIEBMAN AND BRAME

On January 25, 1996, Administrative Law Judge Richard J. Linton issued the attached decision. The General Counsel and the Charging Party filed exceptions and supporting briefs and the Respondent filed an answering brief.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings,² findings,³ and conclusions only to the extent consistent with this Decision and Order.⁴

Background

The Respondent operates a knitting plant with approximately 100 employees working three shifts. The Union waged an unsuccessful organizing campaign at the facility, culminating in an election on October 20 and 21, 1993.⁵

¹ Subsequent to the filing of the charges herein, the Union merged with the Amalgamated Clothing and Textile Workers' Union to form the Union of Needletrades, International and Textile Employees, AFL-CIO, CLC (UNITE).

² As we agree with the judge that the General Counsel failed to meet his burden of proof regarding the complaint's allegation that former Comptroller Steven Fowler threatened employees with a loss of benefits if they were to select the Union, we find it unnecessary to pass on the judge's admission into evidence of an affidavit given by Fowler, who had died before the hearing.

³ The Charging Party and the General Counsel have 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.

⁴ We shall modify the judge's recommended Order in accord with the Board's decision in *Indian Hills Care Center*, 321 NLRB 144 (1996), as modified by *Excel Container, Inc.*, 325 NLRB 17 (1997).

⁵ The vote was 55 against and 47 for the Union with 1 challenged ballot. The Charging Party filed objections to the election. The judge recommended that Objections 2, 3, and 7, concerning the threat of a loss of benefits, the granting of benefits, and a threat to withhold benefits be sustained and that a new election be held. In the absence of exceptions, we adopt these recommendations, pro forma, and, as discussed below, find merit in additional complaint allegations, which are coextensive with other objections filed by the Charging Party.

The petitioned-for bargaining unit includes all production and maintenance employees, including hourly and mechanics, janitors, quality control and warehouse employees employed by the Employer at its Zebulon, North Carolina facility; excluding all office clerical employ-

Between mid-November and December 1994, a union organizer met with interested employees, and had them circulate a prounion petition in the plant to gauge continued employee support for the Union. At all times relevant, Stephen Gottdiener was the Respondent's president and CEO; Frank Carter its labor consultant and agent; James Hartman its plant manager; Barbara Alston its human resources director; and William Batts and Renate Hord its knitting supervisors.

The judge found that the Respondent violated Section 8(a)(1) by granting benefits to employees to discourage union support, by threatening to withhold scheduled pay raises to discourage employees from union activity, and by threatening employees with a loss of benefits if they selected the Union, engaged in union activity, or filed charges with the Board. The judge also found that the Respondent violated Section 8(a)(2) and (1) by dominating or interfering with the formation or operation of a labor organization called the Design Team and that a *Gissel* bargaining order is not appropriate in this case.⁶ No exceptions were filed to the finding of these violations or the denial of a *Gissel* bargaining order. The judge dismissed the complaint's other alleged violations of Section 8(a)(1) and dismissed the allegation that the Respondent violated Section 8(a)(3) and (1) by discharging employee Mary K. Harris. We reverse the judge with respect to the dismissals discussed below.

The interrogations

The judge dismissed the allegations that the Respondent violated Section 8(a)(1) through Frank Carter's and Barbara Alston's interrogation of employee Deborah Baines and Carter's interrogation of members of the Design Team. The General Counsel and the Charging Party except, and we find merit in their exceptions.⁷

A. The Interrogation of Baines by Alston and Carter

In October or November 1994, Alston called employee Baines to a meeting in Alston's office with Carter and asked her what was going on with the Union. Baines replied "[n]othing I know of." Carter told Baines that the Respondent had heard that the Union was trying to come back in and, in response, Baines said she was unaware of it. The conversation then ended.

The judge concluded that the Respondent's "double-team" questioning of Baines was not coercive and did not violate Section 8(a)(1), relying upon his finding that the "generalized" nature of Alston and Carter's questions did not suggest that they sought information that would result in the Respondent's taking adverse action against employees. The judge also noted that Alston and Carter

ees, professional employees, salaried mechanics, salaried warehouse employee, guards and supervisors as defined in the Act.

⁶ See *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).

⁷ We need not pass on the allegation that the Respondent violated Sec. 8(a)(1) through Alston's interrogation of employee Annie White as such a finding would be cumulative and would not affect the remedy.

did not ask followup questions or request that Baines report renewed activity, and that Baines' apparent height and robust health would have prevented her from feeling coerced by the questioning. The judge further concluded that Baines' service as a union observer in the election rendered her an open union supporter, so that the questioning was not coercive, citing *Sunnyvale Medical Clinic*, 277 NLRB 1217 (1985).

Contrary to the judge, we find that, under all the circumstances, Alston and Carter's conversation with Baines violated Section 8(a)(1). As an initial matter, we disagree with the judge that the questions were of such a "generalized" nature as to render them noncoercive. Indeed, Alston directly asked about the status of union activity in the plant, and Carter, in an apparent attempt to prompt a response different from Baines' initial negative reply, stated that they had heard the Union was trying to come back in.⁸ Moreover, Alston called Baines into a meeting with the Respondent's labor consultant in a supervisor's office, so that the location and "double-teaming" of the colloquy would have amplified the questioning's impact.

The Respondent's assigning Baines to an employee involvement team called the "Design Team" does not insulate its interrogation of her from a finding of unlawfulness. After the election and on the advice of a consultant, the Respondent formed the Design Team, composed of employees, to address a wide range of employment and production issues. The judge found that the Respondent violated Section 8(a)(2) and (1) of the Act by dominating the formation and operation of the Design Team. We find that, as the Design Team was an unlawful tool to interfere with employee free choice, and the Respondent's choosing the employee members contributed to its interference with Section 7 rights, Baines' involvement with management personnel on the Design Committee does not render the Respondent's interrogation lawful. Finally, in view of all the other circumstances, the evidence of Baines' limited union activity does not negate the questioning's coercive nature. See *Stoody Co.*, 320 NLRB 18 (1995) (employer coercively interrogated open, ardent union supporter).

B. Carter's Interrogation of Design Team Members

The General Counsel excepts to the judge's dismissal of the allegation that in November 1994, Carter unlawfully interrogated about 10 employees during a meeting with members of the Design Team. At the meeting, Carter stated that the team needed to talk about communications, that there were rumors that the Union would come in if employees signed a piece of paper, and that such a result could not occur under the law. Carter asked

the employees whether anyone had heard anything about the Union. Several or perhaps all of the employee members replied that they had not. Although the minutes of the meeting included the statement that a memorandum would be posted informing employees that their signing a paper would not confer rights on the Union, both Alston and an employee member testified that the Design Team did not agree to that statement.

The judge found that Carter's statement was not coercive and therefore did not violate Section 8(a)(1). He noted that Carter did not single out any individual, that he asked no followup questions, that no "coercive motive was indicated," and that it appeared that the purpose of the question was to determine if the Respondent needed to post a notice for the employees' "educational benefit."

Contrary to the judge, we find that Carter's conduct violated Section 8(a)(1). A finding that an employer has interfered with, restrained, or coerced employees in their exercise of statutory rights does not depend on the respondent's motive or the success or failure of the coercion, but depends instead on whether the respondent engaged in conduct that may reasonably tend to interfere with the free exercise of rights under the Act. *Williamhouse of California, Inc.*, 317 NLRB 699, 713 (1995).

We find that, under the circumstances, Carter's questioning of the employees would reasonably tend to interfere with their rights. Carter's direction of the question to 10 employees rather than to an individual does not remove the coercive impact of the question and in fact may enhance it, as the questions thus put every employee on the spot. Moreover, the fact that employees responded to the Respondent's questions does not indicate that the questions were noncoercive. Finally, as discussed, above, the Respondent's use of an unlawful employee involvement committee, the Design Team, to communicate with employees about the Union does not mitigate the coercive nature of the questioning.

The solicitation of grievances

The Charging Party excepts to the judge's finding that the Respondent did not violate Section 8(a)(1) through Supervisor Renate Hord's alleged solicitation of grievances from employees. Based on the credited testimony of employee Annie White, the judge found that, on September 22, 1993, White was brought by a supervisor to another supervisor's office to meet with Hord. Hord told White that she wanted to educate her about the Union and its constitution. During the discussion, Hord asked White what problem had caused the employees to want to bring in the Union. White said that there were race problems because none of the supervisors were black, that she had asked the plant manager about this issue and that, although he said he would get back to her with an answer, he did not do so. White added that the Respondent offered its janitors, most of whom were male, positions as fixers before it offered them to more senior em-

⁸ We do not rely on the judge's comments concerning Baines' apparent height and robust health, as such considerations are irrelevant to the determination of whether the Respondent's questioning of Baines constitute unlawful interrogation.

ployees. Hord replied that, as a woman, she could understand the problem, and that she would get an answer for White. Hord did not follow up with White. The judge found that Hord's conduct did not violate Section 8(a)(1), noting that Hord never returned with an answer or corrected the problems and that getting an "answer" implies the possibility that circumstances would not change.

Contrary to the judge, we find that Hord's conduct violated Section 8(a)(1). The Board has long held that the solicitation of grievances from employees during union campaigns, in the absence of evidence establishing grievance meetings were held in the past, raises the inference that the employer is making an implied promise to remedy the grievances. *Logo 7, Inc.*, 284 NLRB 204, 205-206 (1987). In this case, Hord explicitly solicited the grievances that had motivated the organizing effort, expressed her sympathy with White and her concerns, and promised that she would take action on White's behalf, i.e., get her an answer. Under these circumstances, we find that Hord's solicitation contained an implied promise to consider seriously the concerns of White and the other employees and to remedy them.⁹ See *Foamex*, 315 NLRB 858, 859 (1994) (asking employees about their problems and for possible solutions contains implied promise to resolve problems). The Respondent has advanced no evidence to rebut the inference that its conduct was unlawful. Finally, Hord's failure to remedy the grievances, taken alone, does not serve to rebut the inference. See *New Life Bakery*, 301 NLRB 421, 427 (1991), *enfd.* 980 F.2d 738 (9th Cir. 1992).¹⁰

The discharge of Mary K. Harris

We also find merit in the exceptions of the General Counsel and the Charging Party to the judge's finding that the Respondent did not violate Section 8(a)(3) and (1) in its discharge of employee Mary K. Harris.¹¹ As established by the Board in *Wright Line*, 251 NLRB 1083, 1089 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982), to set forth a violation under Section 8(a)(3), the General Counsel is required to show by a preponderance of the evidence that animus against protected conduct was a motivating factor in the employer's conduct. Once this showing has been made,

⁹ Moreover, we note that, although the plant manager had a practice of inquiring about problems and provided a suggestion box, there is no evidence that the supervisors did so, and in this case, Hord specifically inquired about grievances that motivated the organizing effort. Thus, there is insufficient evidence to conclude that the Respondent had lawful reasons for the solicitation of grievances.

¹⁰ We need not pass on the allegation that the Respondent violated Sec. 8(a)(1) through Gottdiener's solicitation of grievances, as such a finding would be cumulative.

¹¹ As there is sufficient evidence to conclude that the Respondent violated Sec. 8(a)(3) and (1) by discharging Harris, we find it unnecessary to pass on the judge's ruling that a tape recording and transcript of a state unemployment compensation hearing involving Harris's discharge were inadmissible and not relevant.

the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct. To sustain his initial burden, the General Counsel must show

- (1) that the employee was engaged in protected activity,
- (2) that the employer was aware of the activity, and
- (3) that the activity was a substantial or motivating reason for the employer's action. Motive may be demonstrated by circumstantial evidence as well as direct evidence and is a factual issue which the expertise of the Board is peculiarly suited to determine.

FPC Moldings, Inc. v. NLRB, 64 F.3d 935, 942 (4th Cir. 1995), *enfg.* 314 NLRB 1169 (1994) (citations omitted).

The judge concluded that the General Counsel failed to establish a prima facie case that the Respondent discharged Harris for engaging in protected union activity. The Respondent contends that it discharged Harris on about December 8, 1994, for her conduct at a safety meeting held at the plant 2 days earlier. We find, contrary to the judge, that the General Counsel has met his initial burden and that the Respondent has failed to rebut it.

The facts, based on the credited testimony or undisputed in the record, follow. Harris began work for the Respondent in May 1988 and consistently received positive performance evaluations. Prior to her discharge, Harris had never been disciplined or warned. Moreover, although the Respondent had long experienced poor attendance and high turnover problems with its work force, Harris had no unexcused absences during her entire employment and had the distinction of maintaining a nearly perfect attendance record, having missed only 3 days (due to a miscarriage) in over 6 years. Indeed, Plant Manager Hartman testified that, in his 23 years' experience in the textile industry, Harris' attendance was so unusual that he could think of no other employee with a similar record. The Respondent's absenteeism problem was so significant that, in the fall of 1994, the Respondent threatened to downsize the plant if attendance did not improve. Thus, the record shows that Harris was a reliable and more than satisfactory employee.

Harris actively and openly supported the Union and served as a Union observer at the October 1993 election. She continued to wear a union T-shirt to work about once a month until about May 1994. The judge found that, despite its assertions to the contrary, the Respondent was well aware of her union activity and knew her to be one of the employees who continued to support the Union and was most likely to be involved in the November and December 1994 resurgent union activity, of which the Respondent was also aware.

On December 6, the Respondent held a mandatory safety training meeting for Harris and about 60 other employees on a day Harris was scheduled to be off. Human Resources Director Alston had invited Guy

Farmer, an instructor from the state community college system, to conduct the training and had arranged for employees to receive further training through a community college located in Raleigh, North Carolina, if they chose to do so. At the beginning of the meeting, Alston introduced Farmer, explained the safety program, and began to distribute a continuing education preregistration form supplied by the college. Alston explained that the purpose of the form was to allow the college to enter the employees' names into its computer so the ones who wished to enroll at the college would be registered in the college's system. Alston also told employees that the form would verify their attendance at the safety meeting.¹²

Harris was seated at a table with six other employees, including her mother, Mary Moore. After the forms were distributed, an employee asked why the employees had to fill out the forms. Alston replied that they had to do so to show the school that the attendees had taken the course for a certain number of hours. Harris then remarked, while facing others at her table, "I'm not going to fill out this form, I don't want to be here anyway."¹³ Harris then turned, raised her hand, and in a loud voice¹⁴ asked Alston, who was near the end of the table, "Barbara, do we have to fill out these forms?" Alston replied "No," went to her office, and returned with a piece of paper, which she slapped onto the table in front of Harris. Alston informed the employees that those who did not wish to fill out the college's form should sign the blank piece of paper to be paid for attending the meeting.¹⁵ The judge found that Harris and two other employees at her table signed the paper. Neither Harris nor Moore filled out the college form. Harris then stayed until the end of the meeting and participated in the training program.

After the safety meeting, Alston reported Harris' statements to Plant Manager Hartman, who the judge found decided to have Harris discharged for insubordination "on the spot." Both Alston and Hartman spoke to Supervisor Batts, who agreed that Harris should be terminated. On December 8, Alston told Batts that the termination slip should indicate that the grounds for dis-

charge were insubordination and failure to participate in the safety program.¹⁶

After being told by Batts on the morning of December 8 that she was being discharged, Harris asked Alston for the reason. Crediting Harris and Moore, the judge found that Alston reached into her desk and pulled out a community college form and said that Harris had refused to sign one. Harris replied that she had not refused to sign the form and that Alston had told the employees that those who did not want to sign the form could sign a blank piece of paper to get paid. Alston reiterated that Harris had refused to sign. Harris responded that she could prove that others at her table did not sign the form as well, but Alston answered that she was sure that Harris was the only one who had not. Harris stated that Moore had not signed it. Moore was summoned and she verified that she too had not signed it. Alston said she was sure that Moore had signed it and that she would ask the college to return the form so Moore could identify it.

In response to Moore's query as to the whereabouts of the blank piece of paper that she had signed, Alston replied that she threw it away because the employees had signed their timecards. Harris told Alston that she would have signed the college form if she had known it had anything to do with her job. After meeting with Hartman and Alston on December 8, the Respondent's president, Gottdiener approved the discharge. Alston conceded at the hearing that she had never investigated whether Moore or any other employee failed to sign the college forms.¹⁷

As noted above, we find that the General Counsel has met his initial burden of showing that the Respondent discharged Harris because of her union activity in violation of Section 8(a)(3) and (1). As the judge found, Harris had been an open and active union supporter and the Respondent was well aware of her activity. Further, the record contains ample evidence of the Respondent's anti-union animus, which exceeded a lawful position that it did not wish the employees to vote for union representation. This animus is illustrated by the Respondent's various violations of the Act. Moreover, the Respondent discharged Harris relatively soon after her union activity and on the heels of a resurgent union movement. Thus, the timing of the discharge also supports an inference of discriminatory motivation.¹⁸ Harris's length of employ-

¹² Harris understood Alston as stating that the purpose of the form was to register employees in the event they wanted to take classes at Wake Tech, which is about 40 miles from her home.

¹³ The judge characterized Harris' tone as loud, angry and "rude" and carefully considered the issue of the individuals to whom Harris addressed the remark. We accept the judge's ultimate findings about Harris' tone of voice. Farmer testified that he thought that Harris was speaking to him and he responded that it was her choice whether to attend. He testified that he did not consider her tone to be abusive or a personal affront. However, as the judge observed, Farmer may have been testifying about a discussion he had with different employee. Harris denied that Farmer ever came to her table.

¹⁴ As asserted by the Respondent, admitted by Harris, and noted by the judge, Harris generally speaks in a loud voice.

¹⁵ At the end of the meeting, Alston gave Farmer a list with the name and social security number of each attendee.

¹⁶ The termination slip listed the reason for action as "Terminated, Insubordination" and stated under supervisory comments "Failure to Participate in Safety Training Program. . . . Decline[d] to complete paper work (1) form all employees [were] asked to fill out."

¹⁷ Alston, whom the judge did not credit with regard to this conversation, testified that she told Harris that her conduct had been insubordinate, "which warrants termination, and that was it." The judge found that Alston shifted her reasons for the termination during her testimony.

¹⁸ Contrary to the judge, we do not find that the timing factor necessarily favors a respondent whenever the discipline is imposed, as in this case, immediately following the alleged infraction. An employer might wait for a pretextual opportunity to discipline an employee for engaging

ment, her good employment record, her attendance record, which the Respondent admitted was remarkable, and the absence of any previous discipline during the entire tenure of her employment also support the General Counsel's showing.

In response, the Respondent asserts that it discharged Harris for her insubordinate conduct at the safety training meeting, which was reflected in the loud and "rude" nature of her comments. In contrast to this asserted reason, the termination slip stated that Harris was insubordinate because *she failed to participate in the safety program and declined to complete the paperwork*. These latter grounds are consistent with the reasons Alston stated to Harris on December 8.

In fact, however, Harris fully participated in the safety program and, after asking Alston if it was necessary to sign the form and receiving a negative response, signed the blank piece of paper instead of the college form, as Alston told her she could. At least two other employees failed to sign the college form and were not disciplined in any way. Harris explained these facts to Alston on December 8, and Alston chose not to investigate. Thus, Harris, until that time a reliable employee with an unblemished employment record, was discharged for an asserted rationale that bears no relation to her actual conduct, and for which other employees in the same position were not disciplined. Such is a classic case of disparate treatment.¹⁹

Shifting its justification for Harris' discharge, the Respondent asserted at the hearing and to the Board that Harris was insubordinate because of the manner of her speech. Thus, contrary to its statements to Harris upon her discharge, the Respondent no longer contends that Harris failed to follow instructions. With regard to the volume of her speech, the evidence reflects that Harris has a loud voice and had never received discipline for it prior to her discharge. We find the remaining evidence concerning the manner of Harris' expression, including her "rudeness," insufficient to rebut the General Counsel's strong showing of discrimination.²⁰ Moreover, the Board has long held that shifting reasons constitute evi-

in protected activity. In addition, we do not agree with the judge's implication that an employer's failure to engage in a campaign of harassment against a particular employee demonstrates that the employer did not maintain animus toward that employee for union activities.

¹⁹ Thus, we do not agree with the judge that Harris' refusal to sign the college form was "carved in stone" as soon as she exclaimed that she was not going to fill out the form and that she did not want to be there, as she immediately checked with Alston directly concerning whether she was required to sign the form and Alston told her that she did not have to do so.

²⁰ Other than her tone, Harris' "rudeness" apparently consisted in commenting that she did not want to be there on her day off and was not going to fill out the form, and asking why she had to fill out forms for the convenience of a community college. While we do not second-guess an employer's discipline, we find that this conduct, under the circumstances of this case, is insufficient to outweigh the evidence supporting a finding that her discharge was for pretextual reasons.

dence of discriminatory motivation, and we so find here.²¹ See *Mastercraft Casket Co.*, 289 NLRB 1414, 1420 (1988), *enfd.* 881 F.2d 542 (8th Cir. 1989). Accordingly, we find that all of the Respondent's asserted reasons for the discharge are pretextual, and the Respondent has not shown that Harris would have been discharged in the absence of her union activity and support. See *Limestone Apparel Corp.*, 255 NLRB 722 (1981) (having concluded that the reasons advanced were pretextual, the analytical objectives of *Wright Line* are met).

CONCLUSIONS OF LAW

1. The Respondent, Naomi Knitting Plant, a Division of Andrex Industries Corporation, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

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

3. From October 1993 through November 9, 1993, the Respondent violated Section 8(a)(1) of the Act by granting employees benefits and by threatening to withhold scheduled pay raises, both to discourage employees from engaging in union activity, and by threatening employees with a loss of benefits if they chose the Union to represent them.

4. On September 22, 1993, the Respondent violated Section 8(a)(1) of the Act by soliciting and impliedly promising to remedy an employee's grievance in order to discourage her from union activities.

5. In October or November 1994, and again in November 1994, the Respondent violated Section 8(a)(1) of the Act by interrogating employees concerning their union activities and sympathies.

Beginning about December 1994, and continuing thereafter, the Respondent violated Section 8(a)(2) and

²¹ The General Counsel and the Charging Party argue that a finding of discriminatory motivation was supported by the discrepancies between Alston's testimony respecting the safety meeting and Harris' discharge and other record evidence, as well as the shift in the Respondent's asserted reasons for discharging Harris. The judge acknowledged the discrepancies and shifting reasons but rejected the General Counsel's and Charging Party's arguments which he characterized as relying on an assumption that the Respondent wanted to rid itself of Harris and her union sentiments. The judge found that assumption unsupported by the Respondent's conduct. We disagree with the judge's characterization of the Charging Party's and General Counsel's reasoning. They contend that the Respondent's stated motive for discharging Harris is not its real motive. When it is alleged that a respondent's stated reasons for discharging an employee are a pretext for underlying discriminatory motivation, the analysis of the respondent's case begins, not with an assumption that the respondent had an unlawful motivation for discharging an employee, but with an examination of the stated reasons for the discharge. If those reasons are consistent with the facts and with the respondent's actions at the time the employee was discharged, then the respondent will have established a strong case that it had a nondiscriminatory motive for discharging the employee. If, as here, the Respondent alters its stated grounds for discharging an employee as the matter proceeds, or its stated reasons for discharging the employee are inconsistent with its conduct, then the respondent, as in this case, leaves itself open to the inference that its asserted reasons for discharging the employee are not its actual reasons.

(1) of the Act by initiating, forming, assisting, and dominating the Design Team.

7. On or about December 8, 1994, the Respondent violated Section 8(a)(3) and (1) of the Act by discharging Mary K. Harris for engaging in protected activity.

8. The aforesaid violations affect commerce within the meaning of Section 2(6) and (7) of the Act.

9. The allegations raised in the Charging Party's Objections 2, 3, and 7 to the election held in Case 11-RC-5954, and other objections coextensive with the additional unfair labor practices found above, are sufficient to warrant a finding that the Respondent interfered with the conduct of the election and that a second election should be held.

THE REMEDY

Having found that the Respondent has violated Section 8(a)(3) and (1) of the Act, we shall order the Respondent to cease and desist from engaging in such conduct and to take certain affirmative action. The Respondent shall be ordered to offer Mary K. Harris immediate and full reinstatement to her former or substantially equivalent position, without prejudice to her seniority and other rights and privileges previously enjoyed, and to make her whole for any loss of earnings she may have suffered from the dates of her discharge to the date of the Respondent's offer of reinstatement, with interest, in accordance with *F.W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). The Respondent also shall be ordered to remove from its files any references to the discharge of Harris, and to notify her, in writing, that this has been done and that no evidence of this unlawful discharge shall be used as a basis for future personnel actions against her.

ORDER

The National Labor Relations Board orders that the Respondent, Naomi Knitting Plant, A Division of Andrex Industries Corporation, Zebulon, North Carolina, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Granting employees benefits and threatening to withhold from them scheduled pay raises in order to discourage them from engaging in union activity and threatening employees with a loss of benefits if they select the International Ladies' Garment Workers' Union, AFL-CIO or any other labor organization as their collective-bargaining representative.

(b) Soliciting and impliedly promising to remedy grievances from any employee to discourage union support or union activities.

(c) Coercively interrogating any employee about union support or union activities.

(d) Dominating or interfering with the formation or administration of any statutory labor organization.

(e) Discharging or otherwise discriminating against employees for supporting the International Ladies' Garment Workers' Union, AFL-CIO or any other labor organization.

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

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

(a) Immediately disestablish and cease giving assistance or any other support to the Design Team.

(b) Within 14 days from the date of this Order, offer Mary K. Harris full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position without prejudice to her seniority or any other rights or privileges previously enjoyed.

(c) Make Mary K. Harris whole for any loss of earnings and other benefits suffered as a result of the discrimination against her, in the manner provided in the remedy section of this decision.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge, and within 3 days thereafter notify the employee in writing that this has been done and that the discharge will not be used against her in any way.

(e) 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, including an electronic copy of such records if stored in electronic form, necessary or useful in analyzing the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its facility in Zebulon, North Carolina, copies of the attached notice marked "Appendix."²² Copies of the notice, on forms provided by the Regional Director for Region 11, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees em-

²² If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

ployed by the Respondent at any time since September 22, 1993.

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

IT IS FURTHER ORDERED that Case 11–RC–5954 is severed from Cases 11–CA–15720, 11–CA–15771, and 11–CA–16376, and that it is remanded to the Regional Director for Region 11 for action consistent with the Direction below.

[Direction of Second Election omitted from publication.]

MEMBER BRAME, dissenting in part.

I agree with my colleagues that the Respondent violated Section 8(a)(3) and (1) by discharging Mary K. Harris, violated Section 8(a)(2) and (1) by forming and dominating the Design Team, and violated Section 8(a)(1) by soliciting and impliedly promising to remedy grievances.¹ In agreement with the judge, however, I would not find that the Respondent violated Section 8(a)(1) by Supervisor Barbara Alston’s conversation with employee Annie White; by the conversation between Alston and the Respondent’s labor consultant Frank Carter and employee Deborah Baines; and by Carter’s discussion with employee members of the Respondent’s “Design Team.”² In my view, the judge correctly found that the interactions between the Respondent’s agents and these employees would not reasonably tend to interfere with the employees’ exercise of their Section 7 rights.

The facts are as follows. In June or July 1994,³ Alston approached White on the work floor and, in an apparent reference to the election in 1993, which the Union had lost, asked her what had happened about the Union. White, who acknowledged that she had openly supported the Union, replied that the employees would have been better off if the Union had come in.

In October or November, Alston and Carter spoke to Deborah Baines, who had served as one of the Union’s election observers, in Alston’s office.⁴ Alston asked Baines what was going on with the Union and Baines replied “[n]othing I know of.” Carter stated that he had heard that the Union was trying to come back in and Baines replied that she was unaware of it. The conversation ended without any additional questions. As the judge noted, Baines, as a member of the Design Team,

¹ I also agree with my colleagues that the Respondent did not unlawfully threaten employees with a loss of benefits or with bargaining from scratch.

² I agree with my colleagues that the Board need not pass on the allegation that the Respondent unlawfully solicited grievances through statements made by the Respondent’s president and CEO, Stephen Gottdiener, as it is cumulative.

³ Unless otherwise noted, all dates are in 1994.

⁴ I agree that Carter was an agent of the Respondent.

regularly interacted with Alston, Carter, and other management representatives.⁵

Finally, in a discussion of the need for better communication between management and employees during a meeting of the Design Team on November 30, Carter commented that he had heard rumors that the Union would come in if the employees “signed a paper,” and stated that such an event could not occur under the law. Carter asked if anyone had heard anything about the Union and the employees responded that they had heard nothing. Alston testified that employees at the meeting expressed concern about the rumor and wanted an explanation.

It is difficult to conceive of queries more general than those posed to Baines, White, and the Design Team committee employees, or exchanges more devoid of express or implied threats or promises than those recounted above. My colleagues have overreached in finding the questions above coercive, and their holding is in conflict with the Board’s announced rules of law. The Board has held that an employer’s interrogation of employees respecting union activity does not violate Section 8(a)(1) unless “*under all the circumstances* the interrogation reasonably tends to restrain, coerce, or interfere with rights guaranteed by the Act.”⁶ In *Rossmore House*, the Board referred with approval to test set out in *Bourne v. NLRB*⁷ and announced:

Our duty is to determine in each case whether, under the dictates of Sec[ti]on 8(a)(1), such interrogations violate the Act. Some factors which may be considered in analyzing alleged interrogations are: (1) the background; (2) the nature of the information sought; (3) the identity of the questioner; and (4) the place and method of interrogation.⁸

In each of the instances of questioning at issue here, weighing the factors militates against a finding of a violation of Section 8(a)(1). The 8(a)(1) violations found by the judge do not support a finding that the comments discussed above are unlawful, as they are unrelated and occurred at a substantially earlier time. In October 1993, the Respondent unlawfully granted benefits to employees to discourage union support and threatened to withhold

⁵ The Design Team was a committee of employees, organized by the Respondent in the aftermath of the Union’s previous unsuccessful organizing drive, with the stated purpose of improving communications with employees and addressing employment and production issues.

The judge found that the Respondent violated Sec. 8(a)(2) and (1) of the Act by dominating the formation and operation of the Design Team and no exceptions were filed to this finding.

⁶ *Rossmore House*, 269 NLRB 1176, 1177 (1984), *affd.* sub nom. *Hotel Employees Union, Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985) (emphasis added). See also *Sunnyvale Medical Clinic*, 277 NLRB 1217 (1985) (Board extends *Rossmore* standards to questioning of employees who are not open union supporters).

⁷ 332 F.2d 47 (2d Cir. 1964).

⁸ *Rossmore House*, 269 NLRB at 1178 fn. 20.

scheduled pay raises to discourage employees from union activity, and, in November 1993, threatened employees with a loss of benefits if they selected the Union, engaged in union activity, or filed charges with the Board. The comments at issue in these allegations were made in June or July and October or November 1994, some 7 to 8 months later, and others a year later, than the other violations of Section 8(a)(1). Thus, although the Respondent's plant was not completely free of unfair labor practices during the period relevant to the complaint, the innocuous remarks at issue here do not take on coercive impact because of a general atmosphere of coercion.

Further, Alston's discussion with White, who was an outspoken supporter of the Union, took place on the work floor, involved a low-level supervisor's single question about the aftermath of the representation election, elicited an unhesitating reply favoring union representation, and ended after one question.⁹ I find that the exchange contained no hint of coercion.¹⁰ See *NLRB v. Acme Casting Corp.*, 728 F.2d 959, 962-963 (7th Cir. 1984) (supervisor's question to employee regarding what was going on with union was not coercive). Likewise, Alston and Carter's questioning of open union adherent Baines involved nothing more than two generalized inquiries regarding the Union's activities. Although the discussion took place in Alston's office, Baines was accustomed to dealing on a face-to-face basis with both Carter and Alston, and again, the inquiry was general in nature, called for no information about Baines' own activities, did not ask her to name other employees or discuss their conduct or attitudes, and ended when Baines stated that she did not know about the Union.

I also find, in agreement with the judge, that Carter's questioning of the Design Team did not constitute unlawful interrogation. As the judge found, Carter directed a single question to the group as a whole, did not single out any employee, and asked no followup questions about any employee's actions or attitudes. His question was reasonably related to a determination of the need for a notice to inform employees regarding the law and to the employees' express desire for information. See *NLRB v. Village IX, Inc.*, 723 F.2d 1360, 1365-13969 (7th Cir.

⁹ As the court in *Graham Architectural Products v. NLRB*, 697 F.2d 537, 541 (3d Cir. 1983), rehearing and rehearing in banc denied 706 F.2d 441 (1983), modified 113 LRRM 3111 (1983), observed in overturning several Board interrogation findings:

Because production supervisors and employees often work closely together, one can expect that during the course of the workday they will discuss a range of subjects of mutual interest, including ongoing unionization efforts. To hold that any instance of casual questioning concerning union sympathies violates the Act ignores the realities of the workplace. This passage was cited with approval by the Board itself in *Rossmore House*, supra, 769 NLRB at 1177.

¹⁰ In so finding, I do not rely on the judge's comment that, because of her height and robust health, White would not have been easily intimidated.

1983) (court acknowledged employer's legitimate interest in finding out whether union has talked to employees, and does not violate Sec. 8(a)(1) if it merely asks without pressing inquiry contrary to employee wishes or utters coercive statement). Thus, all of the questions were general and nonthreatening in nature. The employer speech in each of these instances falls outside the ambit of Section 8(a)(1)'s proscription of interference, restraint, and coercion.¹¹

The Board has found that similar interchanges have not violated Section 8(a)(1). See, e.g., *Farr Co.*, 304 NLRB 203, 216-217 (1991) (effort by supervisor to ascertain support for a second union campaign not unlawful, as the supervisor worked closely with the employees, the purpose of the questions was self-evident, and the employees answered truthfully); and *Emery Worldwide*, 309 NLRB 185, 186-187 (1992) (no violation where supervisor asked employee how she felt about the union, but asked no followup questions and, inter alia, the conversation was "casual and amicable" and unaccompanied by coercive statements). Accordingly, I find that the Respondent did not violate Section 8(a)(1) through any of these discussions.

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 grant you benefits in order to discourage you from supporting International Ladies' Garment Workers' Union, AFL-CIO or any other labor organization, threaten to withhold your scheduled pay raises in order to discourage you from engaging in union activity, or threaten you with loss of benefits if you select the Union, or any other labor organization, as your collective bargaining representative.

WE WILL NOT coercively question you about your union support or activities.

¹¹ See *Midwest Stock Exchange v. NLRB*, 635 F.2d 1255 (7th Cir. 1980): "[t]o fall within the ambit of Sec. 8(a)(1), the words themselves or the context in which they are used must suggest an element of coercion or interference."

WE WILL NOT solicit or impliedly promise to remedy your grievances in order to discourage your union activities.

WE WILL NOT dominate or interfere with the formation or administration of any labor organization.

WE WILL NOT discharge or otherwise discriminate against any of you for supporting the International Ladies' Garment Workers' Union, AFL-CIO or any other labor organization.

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

WE WILL immediately disestablish and cease giving assistance or any other support to the Design Team.

WE WILL, within 14 days from the date of the Board's Order, offer Mary K. Harris full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed, and WE WILL make her whole, with interest, for any loss of pay she may have suffered as a result of her discharge.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Mary K. Harris, and WE WILL, within 3 days thereafter, notify her in writing that we have done so and that we will not use the discharge against her in any way.

NAOMI KNITTING PLANT, A DIVISION OF
ANDREX INDUSTRIES CORPORATION

Jane P. North, Esq., for the General Counsel.

Weyman T. Johnson Jr., Esq., Leslie A. Dent, Esq., and Kimberly M. Zywicki, Esq. (Paul, Hastings, Janofsky & Walker), of Atlanta, Georgia, for Naomi Knitting.

James R. Goldberg, Esq., of Atlanta, Georgia, for the Union.

DECISION

STATEMENT OF THE CASE

RICHARD J. LINTON, Administrative Law Judge. To a major extent, this is a discharge case (Mary K. Harris fired December 8, 1994). Naomi's knowledge of Harris' union sentiments (she was one of the Union's observers at the October 1993 election) is at issue. When employee interest resurged in November 1994, Naomi's top management, I find, directed local management to (figuratively), in the words of "Capitaine Renault":¹

Round up the usual suspects.

Arising from the Union's organizing campaign (the Union lost the October 20-21, 1993 election by a vote of 55 to 47), this case involves allegations of Section 8(a)(1) coercion (and related objections filed by the Union to alleged election conduct by Naomi), Section 8(a)(2) assistance to and domination of certain employee/management committees (the principal committee being the Design Team), Section 8(a)(3) discharge (Mary K. Harris was fired December 8, 1994), Section 8(a)(5)

¹ Claude Rains, as the French police chief in the finale, when Humphrey Bogart shoots the Gestapo major who is about to prevent the escape of Ingrid Bergman and Paul Henreid to America. (*Casablanca*, 1942).

refusal to recognize and bargain with the Union since August 26, 1993 (the date of a disputed visit to the plant by union representatives and the date the Union filed its election petition), and the Government's request for an order requiring Naomi to recognize and bargain with the Union.²

Although finding merit to three of the 8(a)(1) allegations, and also to the 8(a)(2) allegation, I dismiss the balance of the complaint, including the 8(a)(3) allegation (respecting the discharge of Mary K. Harris), and the 8(a)(5) allegation. I deny the General Counsel's request for a bargaining order. Based on the violations found, and on certain of the Union's objections to the election conduct by Naomi, I recommend that the Board set aside the October 20-21, 1993 election and direct that a second election be conducted.

I presided at this 7-day trial in Raleigh, North Carolina, beginning March 13, 1995, and closing May 23, 1995. Trial was pursuant to the February 23, 1995, third order consolidating cases, and consolidated complaint, and notice of hearing (complaint), as amended during trial, issued by the General Counsel of the National Labor Relations Board through the Regional Director for Region 11 of the Board.

The complaint is based on charges filed in the captioned cases by the International Ladies' Garment Workers' Union, AFL-CIO (the Union or ILGWU) against Naomi Knitting Plant, a Division of Andrex Industries Corporation (Naomi). In the lead case, Case 11-CA-15720, the Union filed its charge on November 1, 1993 (the charge was served that date on Naomi), and amended it on December 8. The Union filed the second charge, Case 11-CA-15771, on December 6, 1993, and the third charge, Case 11-CA-16376, on January 17, 1995. The latter two charges also were served on Naomi the same day they were filed.

The pleadings establish that the Board has both statutory and discretionary jurisdiction over Naomi, and that the ILGWU is a labor organization within the meaning of Section 2(5) of the Act.

On the entire record, including my observation of the demeanor of the witnesses, and after consideration of the briefs³ filed by the General Counsel (who attached a proposed order and notice to the Government's brief), the Union, and Naomi, I make these:

FINDINGS OF FACT

I. BACKGROUND

A. Naomi

Although complaint paragraph 2 (admitted) makes a global reference to "Respondent" as being a New York corporation, it clearly is Andrex Industries Corporation (Andrex) which is the New York corporation, with Naomi Knitting Plant being, at most, a division of Andrex. Naomi Knitting Plant is the name of an Andrex knitting plant located at Zebulon, North Carolina (7:1453) where, Stephen Gottdiener testified (7:1455), it produces double knit fabrics for men, women, and children.⁴

² Except as otherwise indicated, all dates are for 1993.

³ The parties submitted briefs which were very helpful by substituting the volume number of the transcript for "Tr.," and by anchoring their transcript references to the volume number, page number, and name of the witness.

⁴ References to the seven-volume transcript of testimony are by volume and page. Exhibits are designated GCX for the General Counsel's, CPX for the Charging Party ILGWU's, and RX for those of Respon-

Gottdiener is president and chief executive officer (CEO) of Andrex. (7:1453.) As the Zebulon plant is the only Andrex facility directly involved here, I refer to the company as Naomi.

There are record references to an Andrex plant at Asheville, North Carolina. Whereas the Zebulon plant is Andrex's major knitting plant, the Asheville plant, Gottdiener testified, serves as a research and design center and finishing plant. (7:1454–1455.) Greg Lundblad, vice president of manufacturing for Andrex, is in charge of both the Zebulon and Asheville plants. (7:1618.) Unless the context indicates otherwise, all references to the plant are to the facility at Zebulon.

The Zebulon plant is housed in one building and employs slightly over 100 employees working on three shifts. (7:1455.) The first shift has about 45 employees (including those in the office, 4:973), and the second and third shifts about 30 employees each. (4:932.) James Miller was plant manager from March 1993 to mid-February 1994. (4:852, 867, 923.) Miller was succeeded by James Hartman, who had been serving as the production control manager since being hired on September 6, 1993. (7:1336–1377.) Barbara Alston was the plant's first human resources manager, with her term of employment at the plant beginning about April 1, 1994, and ending about mid-March 1995. (6:1094–1095, 1256.) On the first shift, William Batts was, and is, the knitting room supervisor (7:1542), and Renate (Renee) Hord was the second-shift knitting supervisor (1:65–66; 7:1456).

[Although Naomi's counsel represent (Br. 6) that Renee Hord no longer works at the plant, they cite no record support for their representation. Hord did not testify, and presumably the representation is submitted to mean (1) Hord had left Naomi before the trial and (2) that is why Hord did not testify.]

B. The Organizing Campaign

Donna Burnett, currently a business agent for the ILGWU, and David Skinner, currently an assistant organizing director for the Union, were ILGWU organizers in the summer of 1993. Beginning August 4, they met after work several times with interested employees at a city park near the plant. By August 26, the two organizers rather quickly obtained signed one-purpose authorization cards from a large majority of the employees. At trial the General Counsel offered, through sponsoring witnesses, 80 authorization cards (signed as of August 26). Naomi objected to only 23. Commendably, Naomi's counsel, agreeing that the evidence establishes a card majority, concede the point and suggest that "the ALJ need not resolve the authenticity of the twenty-three cards to which Respondent objected at trial." (Br. 90–91.) I concur with Naomi's suggestion.⁵

On August 26 Burnett and Skinner went to the plant and attempted to speak with Plant Manager James Miller, but Miller was out. Overhearing an employee say that Controller Steven Fowler was present, Burnett asked to see Fowler, advising the receptionist that she and Skinner were with the Union, that the Union represented a majority of the plant's employees, and that she and Skinner were there to ask for recognition. Burnett gave

the receptionist one of her business cards. In circumstances indicating that the receptionist went to notify Fowler, the receptionist returned shortly and reported that Fowler did not wish to see them.

That same day, Vice President Lumblad called CEO Gottdiener and informed him, based on a report from Plant Manager Miller, that union representatives had come to the plant and presented a "petition" announcing that the Union had signed enough employees to have an "election." (7:1456, 1479–1481.) Miller confirms that he reported the visit to Lumblad. (4:855, 976.)

Leaving the plant that August 26, Burnett and Skinner went directly to the NLRB Region 11 office in Winston-Salem where they filed the Union's petition (GCX 32), docketed as Case 11–RC–5954, for an election to represent, basically, Naomi's production and maintenance employees. (3:646, 658.) On September 20 the Regional Director approved a stipulated election agreement by which the Union and Naomi agreed to an October 20–21 (one voting period each day) election in the following bargaining unit (CPX 1):

All production and maintenance employees, including hourly mechanics, janitors, quality control and warehouse employees employed by the Employer at its Zebulon, North Carolina facility; excluding all office clerical employees, professional employees, salaried mechanics, salaried warehouse employee, guards and supervisors as defined in the Act.

Before the election, Naomi officials mailed letters to employees, gave speeches, and met with employees in both small and large groups, to express the Company's position on the election issues. This effort apparently began with the September 7 letter (RX 13) from Plant Manager Miller (4:873) in which Miller informed employees of the Union's election petition, enclosed a copy of the petition (4:874), notified them there would be an NLRB-conducted election in 4 to 6 weeks, and advised that supervisors and managers would be providing employees with "a great deal of information about the union and the upcoming election." The employees were urged to examine all the facts before voting. As I discuss in a moment, unfair labor practice and interference allegations are directed toward some of the communications.

Of the 106 employees eligible to vote in the October 20–21, 1993 election (GCX 1g at 1; GCX 61), 55 voted No, 47 voted Yes, and only 1 cast a challenged ballot. (GCX 1g.) The Union had lost the election. On October 26 the Union filed eight numbered objections to conduct affecting the election, but later withdrew objection 6. (GCX 1g at 2–3.) For the most part, the objections parallel the complaint allegations. On December 15 the Regional Director issued his Report on Objections (GCX 1g) in which, after discussing the objections, he directed a hearing on the Union's remaining objections (1–5, 7–8), and consolidated the representation case with the unfair labor practice case for hearing.

In mid-November 1994 David Skinner, one of the Union's organizers, returned to the area, met with interested employees, and directed employees in the circulation of a pronoun petition in the plant for the purpose of gauging continued employee interest in the Union. (3:647, 662, 667; 4:710, 712, 736, 761.) Burnett also returned for a few days in early December 1994. (3:646–648.) Whatever the results of the Union's November–December 1994 gauging of continued employee interest, the

dent Naomi. Apparently because the testimony of days four and seven each exceeded 300 pages, the court reporting service split each of these days into 2 volumes. I have restrung them into single volumes so that each day of testimony constitutes a single volume of the transcript.

⁵ Counsel apparently (and unfortunately) did not alert the General Counsel that Naomi intended to concede the point, for the General Counsel, on brief, went through the tedious process of compiling the record references establishing the validity of the Union's card majority.

Union apparently decided to pursue the instant allegations rather than to file a petition in a new case.

The actual relevance, to this case, of the Union's late 1994 appearance on the scene, as argued by counsel at trial (3:648) and on brief (the General Counsel at 35; Union at 7), is that the renewed union activity so alarmed Naomi that it (on pretextual grounds) fired Mary K. Harris on December 8 in order to cast a deep chill over any resurgent union activity. Naomi counters that Harris was fired solely for insubordinate conduct 2 days earlier, on December 6. (Thus, if the alleged misconduct occurred as described by Naomi, and unless unlawful motivation is otherwise shown, the General Counsel's "timing" argument is misapplied because the sequence of events is natural, not the unnatural pattern of a stale event followed by union activity followed by discipline imposed for the stale conduct.)

C. Naomi Waives Motion to Dismiss

When the General Counsel and the Union rested their cases in chief (7:1418, 1427), Naomi moved to dismiss the 8(a)(1), (3), and (5) portions of the complaint. (7:1429–1451.) I denied the motion (7:1451–1452), and Naomi proceeded with its case in chief. On brief Naomi, in addressing these allegations, reurges its motion to dismiss. I do not consider Naomi's renewal of its motion to dismiss because, by proceeding with its case in chief rather than resting on its motion to dismiss, Naomi waived its motion to dismiss. *Alexandria Manor*, 317 NLRB 2, 4 fn. 3 (1995); *AutoZone*, 315 NLRB 115, 118 (1994). Accordingly, I have considered the entire record in reaching my decision in this case.

II. ALLEGED VIOLATIONS OF SECTION 8(a)(1)

A. Threat of Discharge—August 13, 1993—Johnny Wayne Holder

Complaint paragraph 9(f) alleges, in part, that Supervisor Holder threatened employees with discharge for engaging in union activity. Naomi denies the allegation and also the allegation that Holder, during the relevant time, was a statutory supervisor and also Naomi's agent. Naomi contends that Holder, a salaried mechanic, was merely a supervisor trainee, without statutory authority, who resumed his mechanic position on August 16 when Naomi decided that Holder's performance as a trainee did not justify his promotion to supervisor status.

At trial I granted Naomi a running objection to all statements attributed to Holder, ruling that "whether he's a supervisor, or agent, will simply depend upon what the record shows." (1:39; 2:284.) Thereafter, the parties adduced evidence in support of their respective positions. I do not need to decide whether Holder was a statutory supervisor, for it is sufficient if the evidence shows that he was Naomi's statutory agent. *United States Service Industries*, 319 NLRB 231 fn. 2 (1995); *Kidd Electric Co.*, 313 NLRB 1178, 1180 (1994). I would find it sufficient here to show agency, but I need not describe the evidence of agency because of my findings on the merits, a matter I address now.

Knitter Ruth Evans testified that, on August 13, Holder came and told her that everyone needed a job, that Plant Manager Miller had said if he found "a union list that—signed, we would be fired." Evans did not reply, and testified that there was no such list and that she did not know what Holder was talking about. (2:290, 297.) Evans remembers that the date was August 13 (a Friday) because she wrote it down, but threw away the note when she arrived home after work. However, she does

not recall the time of day that Holder told her this. (2:289–290, 295–296.) During the objections portion of her testimony, in describing an event in which Holder drove by the public park where the employees were meeting with union representatives, Evans was unable to recall whether the drive-by incident was before or after the August 13 statement to her by Holder. (2:301.) In her pretrial affidavit (RX 6), however, Evans places Holder's drive-by on September 22. (2:306.) Oddly, Evans was not asked to date Holder's statement to her in relation to the August 5 date that she signed her authorization card. (GCX 9.) By contrast with her inability to recall the time when Holder made his statement to her, Evans recalls that she was on her break and outside the building when she signed the union card. (2:296.)

Holder denies speaking to any employee about a union petition, although he did tell some employees in the plant, in relation to a rumored petition to remove Miller as plant manager, that employees were not to be signing any petition when they were supposed to be working. (7:1522–1523.) On this point, Holder testified persuasively, but Evans did not inspire confidence in her account. Crediting Holder, I shall dismiss complaint paragraph 9(f) as to Johnny Wayne Holder.

B. Solicitation of Grievances—September 22, 1993—Renate Hord

Complaint paragraph 9(a) alleges that Naomi, by Supervisor Renate (Renee) Hord on September 22 (and, as discussed later, by CEO Gottdiener on October 13), "Solicited and promised to remedy its employees' grievances in order to discourage their support for the Union." In support of this allegation, the General Counsel, as to Supervisor Hord, called first-shift knitter Annie Ruth Hicks White. As mentioned earlier, Hord did not testify.

On September 22, White testified, Supervisor Batts directed White to go to the supervisor's office for a conference with Supervisor Hord. In the supervisor's office, Hord told White that she wanted to educate White about the Union and its constitution. Presumably Hord began with some comments about the Union and its constitution, but those comments are not described. At some point, apparently after any presentation by Hord about the Union, Hord asked White what was the problem that would cause the employees to want to bring in the Union. White said there were race problems, because none of the supervisors was black. White said she had asked Plant Manager Miller about this (no date specified), that he had said he would get back to her with an answer, but that he had not done so. Moreover, White added, Naomi would offer the janitors promotions to fixer positions before the company made the offer to more senior employees. Hord said that, as a woman, she could understand the problem, and that she would get an answer for White, "but she didn't." (1:63–64, 67, 119, 130–133, 138, 163–164.)

Hord's reference to being a woman suggest that she understood White's second complaint to be one of gender, that promotions to fixers were being offered to low seniority janitors who, apparently, were all men rather than to higher seniority knitters who, apparently, were mostly women.

White testified persuasively enough on this, and, as Hord did not testify, I credit White respecting this incident. As I describe below, there is evidence that, in the past, Plant Manager Miller had a practice of inquiring about problems and providing a suggestion box for employees to use. There is no evidence,

however, that individual supervisors were ever part of any such past practice.

Citing *Blue Grass Industries*, 287 NLRB 274 fn. 4 (1987), the General Counsel argues that White's testimony establishes an 8(a)(1) violation, because it shows that Hord solicited grievances with an implied promise to remedy those grievances. Naomi counters with citations to support its argument that no implied promise is shown. Indeed, Naomi argues, White was complaining that Hord never returned with a response to the concerns she had expressed.

Although the solicitation or grievances at preelection meetings creates the presumption of an implied promise to correct the problems, *Blue Grass*, id., that presumption "is rebuttable by the employer." *Blue Grass Industries*, 287 NLRB 274 fn. 4 (1987). White's account includes the rebuttal in that Supervisor Hord is shown as doing more than soliciting grievances—she promised White that she would return to her with "an answer." An "answer" implies the possibility, among other equal possibilities, that nothing would be changed. Indeed, Hord never returned with an answer, much less an answer announcing changes favorable to the black employees and to the female employees. Accordingly, I shall dismiss complaint paragraph 9(a) as to Supervisor Hord.

C. Threat of Discharge—September 24–25, 1993—James Miller

The balance of complaint paragraph 9(f) (the first part is the Holder August 13 allegation which I dismissed) alleges that Plant Manager James Miller, on September 24 and 25, 1993, threatened employees with discharge for engaging in union activity. Knitters Doris Jean Hayman and Debra Richardson testified in support of the allegation.

Hayman, who worked on the second shift, was an open supporter of the Union during the campaign, wearing union insignia and union T-shirts, hats, and banners. (1:183.) Although Hayman did not so specify, apparently she did not begin wearing the union insignia and such until after the Union filed the representation petition on August 26. She also attended union meetings and solicited employees to attend union meetings and to sign union cards in the restroom and during breaks. According to Hayman (1:197), she did no campaigning on "Company Time." Plant Manager Miller testified that Supervisor Hord had reported to him that Hayman was away from her job and work area campaigning and interfering with employees who were trying to work. Hord asked Miller to speak to Hayman. (4:901–904.)

First-shift knitter Debra Richardson's duties required her to remain by her machines except when she went to the restroom. (2:359–360.) After signing a union card, Richardson testified, she did nothing more on behalf of the Union. (2:339.) Although she did wear a union pin (2:359). Supervisor Batts testified that he observed Richardson leaving her work area more than once to talk with employees in other areas, and on one of these occasions her machines stopped running. Batts told her not to leave her job. When she continued, he reported the matter to Plant Manager Miller. (7:1545–1547.)

On September 24 Hayman was called to a meeting with Miller and Hord. On this matter, I generally credit Miller, who testified persuasively, although Hayman's version is consistent with Miller's. Miller told Hayman that he understood she had been out of her work area several times, interfering with others who were trying to work, that she needed to stop, that if she

wanted to campaign it would have to be on her time, not companytime, and that if she continued, she would no longer work at Naomi. When Hayman responded that she had not been campaigning, Miller said, "Listen to me. If I hear it again, you will no longer work for this Company." Miller made no reference to the Union. (1:196, 218–219, Hayman; 4:904–905, Miller.) Before this meeting, Miller had told employees that, while they could express their opinions during the campaign, they had to do it on their time, not Naomi's time. (4:907, 960.)

Plant Manager Miller, in the presence of Supervisor Batts, held an essentially similar counseling with Debra Richardson about the same date. (Richardson dates it as September 25, but that date was a Saturday.) Following Miller's counseling session with Richardson, Batts had no further problem with Richardson's leaving her work area and interfering with others. (2:340, 360, Richardson; 4:905–907, Miller; 7:1547–1549, 1574–1575, Batts.)

Finding no unlawful threat of discharge in Plant Manager Miller's counselings of knitters Doris Hayman and Debra Richardson (and having earlier dismissed the Holder portion of complaint par. 9(f)), I now shall dismiss complaint paragraph 9(f) in its entirety.

D. Loss of Benefits Threats—Steven Fowler and James Miller

1. Introduction

As two allegations are closely related, I consider them together. The complaint alleges that Comptroller Steven Fowler (on September 30 and on October 1) and Plant Manager James Miller (on October 6, by letter) threatened employees that, if they selected the Union as their bargaining representative, bargaining "would start from scratch" (par. 9c), and (par. 9d) threatened employees "with loss of benefits" if they selected the Union.

Miller's one-page letter of October 6 to employees is in evidence. (GCX 12.) The bracketed portion in the *H. K. Porter Co.* quote appears in the letter, and I have not corrected minor modifications of the quoted Supreme Court's language, 397 U.S. 99 (1970), about "it hoped" ["hopefully" in the original] or "MUTUAL" [lower case in the original]. Miller's letter states (GCX 12):

In the discussions we recently had about the collective bargaining process, it was explained that a result could be that your wages/benefits could go *up*, remain the *same* or go *down*. Also, we discussed that in this bargaining process, your wages/benefits to be NEGOTIATED, starts at ZERO and your current wages/benefits can be frozen until the bargaining process is complete. THERE ARE NO GUARANTEES.

There is one other significant factor about collective bargaining we feel is important for you to know. Although, the company will bargain in good faith to reach agreement on "MANDATORY SUBJECTS" of bargaining, there can be no contract until we reach agreement. The company can say "NO" to any substantive proposals made by the Union.

In the *H. K. PORTER CO.* case, the Supreme Court of the United States made the following point very clear:

"The basic theme of the [NATIONAL LABOR RELATIONS] Act was that through collective bargaining, the passions, arguments, and struggles of prior years would be channeled into constructive, open discussions leading, it

hoped, to MUTUAL agreement. But it was recognized from the beginning that agreement might in some cases be impossible, and it was never intended that the Government would in such cases step in, become a party to the negotiations and impose its own view of a desirable settlement.”

In other words, the company has the right to say “NO” and the *only* way that any proposals become reality is if the company agrees.

Further, it should be pointed out that a study done several years ago indicated that 41% of first contracts were never reached.

Think about how much easier your work life will be if you VOTE “NO” on October 20th and 21st.

2. Steven Fowler—September 30—October 1, 1993

Miller’s October 6 letter begins with a reference to the “discussions we recently had . . .” Annie Hicks White (1:68–69, 76, 81, 138), Doris Hayman (1:197–198, 219–220), and Robin Hayman (2:255, 269–270), described, in a very limited fashion, remarks which Comptroller Fowler made to them in small group meetings (around five or six employees) during September 30–October 1, 1993. Their description is that Fowler used key words found in the October 6 letter.

Thus, White asserts Fowler said that at bargaining, everything would be “frozen” and bargaining would “start from zero.” White identified a reported case which Fowler distributed at the meeting. The copy (GCX 4) is of *Automation Division v. NLRB*, 400 F.2d 141 (6th Cir. 1968). White testified that Fowler could have distributed a two-page memo (RX 1), dated September 30, to all employees from Plant Manager Miller. White received the memo at some point, but she is not sure whether it was at that meeting.

Doris Hayman states that Fowler said bargaining would start at zero, “and we might get more than what we were making, or we might get less,” and that nothing was guaranteed. Robin Hayman claims that Fowler said, in the only statement she can recall, that “if the Union came in that we would go back to zero.”

There is no dispute that Comptroller Fowler died before the trial. Attorneys Dent and Johnson represented that the date was in early December 1994. (4:900; 7:1410.) As no party disputes that representation, I accept it as fact. During NLRB Region 11’s investigation of the charges in the case, Naomi submitted a three-page affidavit (the oath administered by a notary public on January 20, 1994) of six numbered paragraphs. Over objection, I received Fowler’s affidavit in evidence. As Fowler was dead, and as no other management person attended the two meetings which Fowler held with employees, Naomi would be unfairly prejudiced without the admission of the affidavit. See *Weco Cleaning Specialists*, 308 NLRB 310, 311 fn. 7, 314–315 (1992); *Doral Building Services*, 266 NLRB 1215, 1217–1218 (1983); and FRE 804(b)(5). After stating that he has been the comptroller of Naomi for 19 years, Fowler, in his affidavit, reports (RX 18):

2. In my position as Comptroller, I held a number of small group meetings with some of Naomi Knitting’s employees during the Union’s pre-election campaign. On September 30 and October 1, 1993, I met with approximately 6 to 7 employees, once in Naomi Knitting’s laboratory and the other time in the canteen.

3. At both meetings, I talked about what the law required of the Union and the Company during the campaign period. I also described the collective bargaining process, which would control in the event the Union won the election. In particular, I told the employees that during collective bargaining everything is negotiable. I said there were no guarantees in the collective bargaining process, and employee benefits resulting from the negotiations could go up, could go down or could remain the same. I never told the employees that their pay or benefits would necessarily go down if the Union won the election.

4. I spoke about the lack of guarantees in the process because I and other management employees learned that Naomi Knitting’s employees had been told by Union representatives that, if the Union won the election, all employees would receive significant pay raises. I wanted to convey to the employees that no one could guarantee that Naomi Knitting would give them higher wages or that anyone could predict the outcome of benefits negotiations.

5. The talk I gave to employees mirrored the statements made by James Miller, Naomi Knitting’s Plant Manager (“Mr. Miller”), in a letter he wrote to Naomi Knitting employees. See letter from Jim Miller, dated September 30, attached hereto. This letter and my discussions centered on the rights and obligations of both the Union and management during the collective bargaining process and made specific reference to the case law. I specifically saw to it that I confined by statements to what the law allows.

6. These meetings lasted approximately 20 to 30 minutes. At the end of each meeting, I asked the employees whether they had any questions about what we discussed. I cannot recall what questions were asked, but I attempted to answer them as best I could, still keeping my comments within the boundaries of the law.

In considering Fowler’s affidavit, I have weighed the fact that it probably was drafted with the assistance of someone representing Naomi, that it contains some generalities and conclusory statements, and that it generally favors Fowler’s self interest as well as Naomi’s interest. However, at points Fowler’s affidavit is specific, including the dates and length of his meetings, the number of attendees, and the topics covered. Respecting topics, Fowler cites Miller’s letter of September 30. Although a copy of the letter is recited as being attached to the affidavit that was submitted to NLRB Region 11, no copy of the letter is attached to RX 18. Even so, as the only September 30 letter in evidence is that of Miller (RX 1), I find that Fowler’s reference is to what eventually became RX 1. And that leads to the next question.

In his affidavit, Fowler asserts that his remarks to employees “mirrored” the statements Miller made in his September 30 letter. Thus, Miller’s letter, or memo, states that, in bargaining, Naomi does not have to agree to anything, that there are no guarantees, that collective bargaining is a “give and take process” (asking employees what employee benefits or wages would the Union give up in order to get a dues-checkoff clause), and “In other words, as a result of the collective bargaining process, you could get *more* . . . you could stay the *same* . . . or you could get *less*” (RX 1 at 1.) This last quotation is nearly an exact quote from the testimony of Doris Hayman. (1:198.)

There is nothing in Miller's September 30 letter about "frozen" or starting from "zero," although there is in his letter of October 6. What happened, I find, is that two of the General Counsel's witnesses (White and Robin Hayman), forgetting what Fowler said, inadvertently substituted Miller's October 6 comments. Accordingly, I find that Fowler's affidavit is a more reliable report of what he said at the two meetings he held than the reports of Annie White and Robin Hayman. Having so found, I further find that Fowler's remarks were not unlawful. I shall dismiss complaint paragraphs 9(c) and 9(d) as to Steven Fowler.

3. James Miller—October 6, 1993 (letter)

Return now to Miller's letter of October 6 (RX 1). Although they cite different cases, the General Counsel (Br. 11) and Naomi (Br. 23) generally agree that employer statements about bargaining from "scratch," or "zero," and that current wages and benefits can be "frozen," in the context in which made, are lawful if they merely characterize the realities of industrial life and the give and take of collective bargaining, as in *La-Z-Boy*, 281 NLRB 338 (1986) ("start from scratch"; "there's no guarantee"), and *Mantrose-Haeuser Co.*, 306 NLRB 377 (1992) ("typically remain frozen") [*Mantrose* followed in *Flexsteel Industries*, 311 NLRB 257 (1993)]. They are unlawful if they reasonably can be read to threaten that employees would lose wages and benefits, by voting in a union, because the employer would reduce all wages and benefits to zero (or at least to any statutory minimum) when it approached the bargaining table, as in *Capitol EMI Music*, 311 NLRB 997, 1008–1010 (1993), and *Teksid Aluminum Foundry*, 311 NLRB 711 fn. 2, 717 (1993).

Here, Miller's October 6 letter (GCX 12) falls in the protected first group, not in the prohibited second category. In the critical paragraph, Miller first emphasizes that, in the bargaining process, wages and benefits could go up, remain the same, or go down, and that wages and benefits to be negotiated (that is, future levels) start at zero in the collective-bargaining process. In the same bargaining process, current wages and benefits "can be frozen" until bargaining is complete. Finally, "THERE ARE NO GUARANTEES." The noncontroversial balance of the letter is consistent with a lawful context. Like the preelection videotape the Board found lawful in *Mediplex of Connecticut*, 319 NLRB 281 (1995), Miller's October 6 letter is protected by Section 8(c) of the Act, 29 U.S.C. § 8(c).

Having dismissed the first part of complaint paragraphs 9(c) and 9(d) (pertaining to Steven Fowler), and finding Miller's October 6 letter entirely lawful, I now shall dismiss complaint paragraphs 9(c) and 9(d) in their entirety.

E. Remedying Grievances—Stephen Gottdiener and James Miller

1. Introduction

Two related allegations are considered here together. As earlier noted, complaint paragraph 9(a) alleges that, on October 13, 1993, CEO Gottdiener solicited and promised to remedy grievances of Naomi's employees in order to discourage their support for the Union. Complaint paragraph 9(b) alleges that Gottdiener remedied employee grievances and granted additional benefits on October 7 and 14. However, the General Counsel's evidence, and brief, focus on Plant Manager Miller as the person who did any such remedying. At trial the General Counsel moved (7:1404) to add Miller to complaint paragraph 9(b), although counsel, apparently through inadvertence, failed

to move that Gottdiener's name be deleted. Reserving ruling on the motion (7:1407), I now grant the motion as the matter was fully litigated. Moreover, as the motion should have been to substitute Miller's name for that of Gottdiener, I now dismiss complaint paragraph 9(b) as to CEO Gottdiener. That leaves the issues of soliciting and promising as to Gottdiener on October 13 (complaint par. 9a), and granting benefits on October 7 and 14 as to Miller (complaint paragraph 9(b)).

2. Past practice respecting employee suggestions

Shortly after becoming Naomi's plant manager in March 1993 (4:852, 923), James Miller continued Naomi's open door policy and, until mid-May, held small group meetings with employees to hear and address any problems. He planned to do this on a 6-month schedule thereafter. Following the small group meetings, Miller held similar meetings with entire shifts, plus scattered meetings with other groups of employees outside his planned schedule. (4:853–854, 923–925.) Moreover, Miller continued the preexisting practice of a suggestion box for employees. (4:853–854, 857, 923–925, 989.) These open communication procedures generated several prepetition requests for improvements, such as fans, a tampon machine, and a microwave oven. Miller provided these requested items by July 1993. (4:857, 934–935.) Annie White reports that, in the past, supervisors and managers occasionally would hold shift meetings with employees, and that CEO Gottdiener has attended. Indeed, at a 1992 shift meeting, White testified without contradiction, Patricia Sutton asked Gottdiener about furnishing picnic tables for employees to use at breaks and lunch, but Gottdiener "made no promise" and "said nothing about it." (1:85.)

At trial (but not on brief), the General Counsel requested that an adverse inference be drawn from Naomi's failure to produce, in response to a subpoena (GCX 82, rejected), invoices for such items. Miller testified that he thought there would be receipts somewhere for the items. I denied the motion because, as the record reflects, with Comptroller Fowler dead, Naomi produced what receipts it could find. (4:937–939; 7:1387–1392.) Thus, unlike the situation in *Teamsters Local 776 (Pennsy Supply)*, 313 NLRB 1148, 1153–1154 (1994), no refusal to produce existing and available documents was shown. Instead, as in *Champ Corp.*, 291 NLRB 803, 803–804 (1988), enfd. 933 F.2d 688 (9th Cir. 1990), no bad-faith failure to locate and produce was shown. Moreover, not one of the General Counsel's employee witnesses contradicted Miller's testimony that he had purchased and installed these items. Surely, if no microwave was delivered and made available, a witness would have so testified. Finally, Miller testified convincingly as to the foregoing matters, and I credit him. I reaffirm my ruling denying the General Counsel's motion that an adverse inference be drawn.

3. Stephen Gottdiener—October 13, 1993

a. Evidence

Annie White testified that, at a small group meeting conducted by CEO Gottdiener on October 13 in the laboratory, employee Patricia Sutton asked whether picnic tables could be provided for employees, and that employee Kay Downey asked about getting a larger refrigerator. Employees had asked him and supervisors in 1992 for picnic tables but received no answer, White testified, and at this meeting Gottdiener gave no promise. (1:81–86, 139.) Downey testified that she always asked about picnic tables and a refrigerator at meetings, as early

as when the previous plant manager was there, and that at some meeting she asked Miller. (4:780, 812.) Miller confirms that, at a group meeting (date not specified) conducted after the Union filed its election petition, an employee asked about picnic tables being provided, and that thereafter a (larger) refrigerator was delivered as were, still later, picnic tables. (4:925.) [Actually, as I discuss in the next section, the purchase sequence was in the reverse order.]

Doris Hayman testified that at an October meeting conducted by CEO Gottdiener, attended by employees Thelma Crumler, Kim Manning, Barbara Taylor, Ulysses Yarborough, and Hayman [of these employees, only Hayman and Manning testified, and Manning was not asked about this meeting], Gottdiener began by saying he was there to talk about problems employees were having at work. (1:198, 209.) Gottdiener confirms that at such meetings he asked employees “what the issues were,” and testified that “we were asking lots of questions and why were we being troubled by a union, what was their fight with us that they couldn’t get to us and couldn’t get from us, why did they need an outside party.” (7:1488.)

Hayman further testified that, responding to Barbara Taylor’s statement that 25 cents additional per trainee per hour for training other employees was inadequate, Gottdiener said he “would try” to get the trainers an increase. (1:199, 210–211, 222–223.) Gottdiener testified that he responded by stating, “I would be glad to take it under consideration” (7:1476), and that “It was not a bad idea, I would look into it.” (7:1488.)

Hayman also testified that, although picnic tables had been installed recently outside, there was no way to reach them without going out the front and coming around to them, and that such travel used up much of the employees’ breaktime. (1:199–200, 222.) To this expressed problem, Gottdiener said he would see that a door was installed providing access to the picnic tables. (1:199–200.) Gottdiener confirms that the picnic tables already were in place, but were not in use for security reasons, in that Naomi was waiting to have a security fence installed for the area to keep strangers off the property. Gottdiener denies telling employees that a door would be installed. (7:1474–1475, 1481–1484.)

Hayman further testified, without contradiction, that Gottdiener asked the employees to give him a year to prove “themselves,” and if at the end of a year the employees were not satisfied, then he would let the Union in without a fight. (1:200, 210.) Gottdiener could not logically dispute the first half of this point, for in Naomi’s first campaign speech (RX 17), delivered by Plant Manager Miller between Miller’s September 7 letter (RX 13) and a September 16 letter (RX 14) from him to employees (4:882), Miller told employees (4:878; RX 17 at 5):

I ONLY ASK THAT YOU JUST GIVE OUR MANAGEMENT TEAM HERE THE CHANCE. We have to change. The business climate today is very fluid, and we must remain flexible. The very structure of third party involvement slows the changing process, and we must remain flexible to survive. If you vote NO on October 20th and 21st, and give me and my management team a chance to win your trust and loyalty, it is only for twelve months (just ONE year)! You may not know but the law requires that twelve months pass before another election can be held. If, after that twelve month period we have not deserved your trust and loyalty, then you can file a petition to bring the union in again.

Naomi observes (Br. 7), as I discuss in the next section, that the receipt for three picnic tables, purchased by Miller, is dated October 7. (GCX 49.) Naomi implies that, as the purchase occurred before the October 13 meeting, Gottdiener would not have promised to install the tables. This argument apparently addresses Annie White’s testimony. (Recall that Downey, listed by White as present at the lab meeting, attributes the statement to Miller who, in turn, concedes that at some meeting an employee asked about picnic tables.) Actually, on brief the General Counsel does not rely on White’s testimony for support of this allegation, but on Hayman’s. Hayman testified that the picnic tables arrived before the October 13 meeting, and that Gottdiener promised to install an access door so employees could use the tables as soon as a security fence could be erected.

b. Conclusions

The General Counsel’s evidence in this area is confusing, with the witnesses giving testimony which, if not contradictory, is either inconsistent or at least unresponsive. Manning was not even asked about the October 13 meeting, yet Hayman lists her as one of those present when Gottdiener supposedly promised to install a door and to “try” to raise the pay for trainers. As for the training wage rate, only Hayman testified on the point, and no such increase was implemented before the election. Finding Gottdiener’s version more reliable than the disjointed testimony of the employees, I shall dismiss complaint paragraph 9(a) as to Gottdiener for October 13. Having previously dismissed the first half of paragraph 9(a), I now dismiss complaint paragraph 9(a) in its entirety.

4. James Miller—October 7 and 14, 1993

a. Evidence—picnic tables and refrigerator

As the General Counsel observes (Br. 9), the dates of October 7 and 14, 1993, correspond to invoice dates for Miller’s purchase of the picnic tables on October 7 (GCX 49) and the refrigerator on October 14 (GCX 50). Miller testified that he purchased the items for employee use, in effect, on his own authority. (4:925–927, 934, 994.) Miller testified that he received requests for a larger refrigerator from employees in June (and even earlier), at least 4 months before the purchase, and this is supported by a June 5, 1993 employee suggestion form (RX 19) dropped in the employee suggestion box. (4:858, 908, 930.) Miller testified that, almost immediately after receiving the June 5 suggestion, he decided to purchase a larger refrigerator. (4:908–909.) The old one was a small capacity table model (1:201; 4:908, 930–931), and the new one is a 9.5 cubic foot floor model (GCX 50).

What accounts for the delay from Miller’s asserted June 1993 decision to purchase the refrigerator and the timing of the purchase of the picnic tables? According to Miller, he was unable to find a reasonably priced refrigerator before the October 14 purchase “on our doorstep” in Zebulon, a location he had “never really thought to look,” at \$100 less than anywhere else. (4:909, 929–930.) (\$259, plus tax. GCX 50.)

Respecting his decision to purchase the picnic tables (and associated patio umbrellas), on October 7 at a before—tax cost of \$390 (GCX 49), Miller offers no reason for the decision or its timing except as might be suggested by his testimony that an employee, at one of the postpetition meetings, asked whether a picnic table could be provided. (4:925.) At some point, Miller assertedly spent 2 to 3 weeks making a cost comparison (visit-

ing two stores), before making the October 7 purchase. (4:926.) As the invoice reflects (GCX 49), the picnic tables were bought at the same local hardware store (Lowe's) where, 1 week later, Miller purchased the refrigerator. As Miller did not tell the requesting employee that he already had decided to purchase the picnic tables, I find that he decided shortly after the meeting at which the request was made, and that several days later he purchased the picnic tables.

Similarly, in line with Downey's testimony, I find that at one of the preelection meetings, possibly the same one Miller confirms respecting the request for a picnic table, Downey asked Miller about a larger refrigerator. Miller does not assert that he announced at any meeting that he had decided to purchase a larger refrigerator. This failure, plus the lengthy delay, persuade me that, contrary to his testimony, Miller did not decide to purchase the refrigerator until about early October 1993.

b. Conclusions

An employer who has had a past practice and policy of soliciting employee grievances may continue to do so during an organizational campaign. *House of Raeford Farms*, 308 NLRB 568, 569 (1992), enfd. mem. 7 F.3d 223 (4th Cir. 1993). However, an employer may not significantly alter its past manner and methods. *House of Raeford Farms*, id. If the employer proceeds in accordance with its established custom, then it may grant those benefits which are consistent with its established custom. Indeed, the law requires that it proceed as if a union were not on the scene (although certain exceptions are applicable to wage increases). *Atlantic Forest Products*, 282 NLRB 855, 858 (1987).

Did Miller proceed here as he would have done had there been no union on the scene? I find the answer to be, No. First, other than Miller's word, there is no documentary evidence that he made a decision in June to purchase a larger refrigerator. Because such documentation was not shown to be part of the custom, I attach little weight to this factor. In any event, Miller's own past practice respecting the microwave and other items indicates that he took no more than 2 months to purchase and install the items. Here the refrigerator was purchased some 4 months after his purported decision. While that difference is not insurmountable (particularly since Naomi apparently made no announcement seeking to capitalize on installing the refrigerator), Miller's naked testimony was unconvincing. And the bottom line is just that—I am unpersuaded by Miller. As to the refrigerator, therefore, I find that no purchase would have been made in the foreseeable future had it not been for the Union's presence and the pending election. Thus, I find that Miller purchased the \$259 refrigerator on October 14 to persuade employees to vote No in the election. By Miller's conduct, Naomi violated Section 8(a)(1) of the Act. *House of Raeford Farms*, 308 NLRB 568, 569–570 (1992).

Respecting the picnic tables, the matter is somewhat complicated by the fact that the tables, although delivered, were not available before the election. While that may have caused some confusion among some employees, Gottdiener told employees that a security fence had to be installed before the tables could be used. (7:1483.) Had this been the first request by employees for picnic tables, followed by a routine purchase and installation, in line with established custom, no violation would be shown. Here, however, employees had been asking for picnic tables for 2 or 3 years, even asking Gottdiener himself at a 1992 shift meeting—all to no avail. Once the Union filed its election

petition, however, Naomi's attitude changed and, at the first employee request, Miller moved with alacrity to get the picnic tables and patio umbrellas delivered. When Miller did so, Naomi violated Section 8(a)(1) of the Act, as alleged in complaint paragraph 9(b).

F. Threats to Withhold a Scheduled Pay Increase—October 13, 1993

1. Introduction

Complaint paragraph 9(e) alleges that, on October 13, 1993, Vice President Greg Lundblad and, separately, Plant Manager James Miller "Threatened to withhold a scheduled pay raise in order to discourage its employees' union activities." Pursuant to a March 9, 1995 notice (GCX 1gg), at trial the General Counsel moved to add CEO Gottdiener to the allegation. I granted the motion. (1:15.) On brief the General Counsel addresses the allegations as to Lundblad and Gottdiener, but not as to Miller. Miller denies that he made any such threat. (4:913, 993.) Testimony by knitter Kay Frances Downey possibly was elicited in support of the allegation, but Downey simply asserts that, in response to a question whether employees were getting a COLA in January, Miller said "Not at this time." (4:799, 816.) That testimony does not constitute a threat as alleged. Accordingly, I dismiss complaint paragraph 9(e) as to Plant Manager Miller.

2. Greg Lundblad

It is undisputed that employees at Naomi historically have received any cost-of-living allowance (COLA) in January, and that practice held true for January 1994. Vice President Lundblad testified that in June 1993 he and CEO Gottdiener decided to modify that historical review process (the Asheville plant's schedule had been July 1) in order to conform to the September 30 closing of Andrex's fiscal year. (7:1621–1622.) Based on this decision, Lundblad posted a June 28 memo (RX 33) to the Asheville employees announcing both a wage increase, effective July 5, and the fact that henceforth the annual review and raise increase would be geared, retroactively, to the September 30 closing of Andrex's fiscal year. (7:1622–1623.) Lundblad testified that no similar notice was given at this time (June 28) to the Naomi employees, because there was no need to do so inasmuch as Zebulon's normal increase would not come until January. (7:1624.)

There is a conflict, mostly immaterial, between Lundblad (7:1624, 1630) and Miller (4:912, 961–963, 989–991) over whether Lundblad told Miller of this decision in July, per Lundblad, or not until the fall, per Miller. In any event, Miller's version tends to confirm that no announcement was made at Naomi before Lundblad spoke to the employees there during the preelection period.

As we know, between the June 1993 decision (to key annual COLAs to the September 30 closing of Andrex's fiscal year) and any probable late September 1993 announcement to the Naomi employees at Zebulon of the new schedule and COLA effective about October 1, the Union filed its August 26 election petition. During the preelection period, Lundblad acknowledges that he spoke to both small and large groups of Naomi employees (7:1620, 1625), that he was asked at one of the meetings if the employees were going to get their January pay raise (7:1620), that he responded and, not wanting to tell only one group, he probably (7:1630–1631) told others as well.

Annie White testified for the General Counsel in support of the allegation. There is little difference between White's version and that of Lundblad. Although White does not include the reference to negotiations with the Union, as described by Lundblad, I find that Lundblad so spoke. A composite of their testimony is: Lundblad told employees that the Asheville employees had received a COLA effective October 1 based on a new policy linked to the September 30 closing of Andrex's fiscal year, that the Zebulon employees also were supposed to have received one in October, but because the Union was trying to come in the Zebulon employees would not be given one because the wage increase, although scheduled, had not been announced before the Union filed its petition, that if the Union won the election the Union might want to negotiate for benefits other than a pay increase, and that if Naomi were to give the scheduled October COLA to the Zebulon employees it could create the appearance that Naomi was trying to bribe the employees. (1:88–91, 141–143, White; 7:1620, 1625, 1629–1630, 1632–1634, Lundblad.)

3. Stephen Gottdiener

Although Gottdiener denies addressing the COLA subject with employees (7:1476–1477), I credit Gordon Driver and Ernestine Smith that he did. As modified by cross examination, Driver testified that, at a meeting with the whole first shift on October 13, Gottdiener said Naomi had been considering a bigger than usual COLA, effective that October, but he could not do anything until after the election. (2:312–313, 318–321.)

Smith, now retired but then a first-shift employee, testified that (Smith could not recall the date of the meeting), Gottdiener told employees that Naomi had "planned" to give employees a raise earlier, but because of the union matter no raise would be given until later. (3:591, 593.)

4. Discussion

Strangely, the General Counsel, citing no case authority, limits her legal argument to a terse statement that the remarks of Lundblad and Gottdiener "constitute a violation of Section 8(a)(1) as alleged in paragraph 9(e) of the complaint." Citing *Advo Systems*, 297 NLRB 926 fn. 3 (1990), and *Progressive Supermarkets*, 259 NLRB 512 (1981),⁶ the Union argues that a violation, as alleged, is established because Naomi placed the "onus" of the postponement on the Union, even to the point of saying that the Union might negotiate for something else. The Union also improperly argues unlawfulness because (citing no record support) the announcement was at the only plant where union activity was occurring. (Br. 14.) I do not consider the last argument because it improperly assumes facts outside the record.

Citing cases such as *Hovey Electric*, 302 NLRB 482 (1991), and *Retlaw Broadcasting Co.*, 302 NLRB 381, 381–382 (1991), Naomi argues that no violation is shown because Lundblad explained the "Company's situation" by placing whatever blame was to be cast on the Board's election rules, not on the Union.

Agreeing with the Union, I find a violation, as alleged. Lundblad obviously sought to capitalize on the situation and to

enkindle animosity among the employees toward the Union, saying that what they would have gotten on October 1 had the Union not arrived, now could be negotiated away by the Union if the Union won the election. Clearly Lundblad sought to convert this employee animosity, animus he had just created, into votes against the Union in the forthcoming election.⁷ (Lundblad succeeded.) According, I find that Naomi, by Lundblad's October 13, 1993 remarks, violated Section 8(a)(1) of the Act, as alleged in complaint paragraph 9(e). *AutoZone*, 315 NLRB 115, 123 (1994).

As described by employee Driver, CEO Gottdiener's limited remark would not be unlawful. Employee Smith's description doubtlessly is a condensed report of what must have been either a longer statement or response by Gottdiener. Nevertheless, the abbreviated description, consistent with Lundblad's, unlawfully blames the Union for the postponement. I therefore find that Naomi, by CEO Gottdiener's remark, violated Section 8(a)(1) of the Act, as alleged in complaint paragraph 9(e).

G. Threat to Withhold Benefits—November 9, 1993 (letter)

Complaint paragraph 9(g) alleges that Naomi violated Section 8(a)(1) of the Act when CEO Gottdiener and Vice President Ellen Green, by letter dated November 9, 1993, "Threatened to withhold benefits because employees engaged in union activities and/or filed charges with the National Labor Relations Board." Naomi denies.

The one-page letter (GCX 11; 2:333–335; 7:1472, 1504), signed by Gottdiener and Green and addressed to Naomi employees, reads (the General Counsel, Br. 15, asserts that the fifth paragraph sentence which I bold, cap, and italicize, is the offending statement):

October 21st and 22nd has [have] come and gone and you as a group decided by a majority vote that you did not want to be represented by the International Ladies Garment Workers Union. Well, the ILGWU does not want to accept your majority decision. The democratic process the Union claims to be the foundation of their existence does not seem to please them when democracy is not in their favor.

After your vote, the Union filed objections to the election with the National Labor Relations Board (NLRB). The Union claimed the election was improper and was requesting a re-run or a new election. Now, the Union has converted the objections to unfair labor practice charges, (ULP's) [ULPs] and appear to be requesting what is called a *BARGAINING ORDER*.

Let me explain a Bargaining Order. If the Union is successful in receiving a Bargaining Order from the NLRB, the company would be required to recognize the ILGWU as your sole and exclusive bargaining agent and negotiate a collective bargaining agreement for your wages, benefits and working conditions.

What this means is the Union is attempting to represent you and bargain collectively on your behalf without winning the election. The majority decision that you made on October 21st and 22nd will have no standing and you will be represented by the ILGWU, even though you told them "NO."

⁶ Unlike *Progressive Supermarkets* and *AutoZone*, 315 NLRB 115, 131 (1994), in our case the complaint does not allege an 8(a)(3) postponement of the COLA, and the General Counsel does not seek such a finding or remedy. The matter was not litigated as including an 8(a)(3) allegation.

⁷ Incited anger needs an outlet, and voting against the Union in the election would provide that outlet." *AutoZone*, 315 NLRB 115, 123 (1994).

The Union has the right to file these charges, but, the charges have no merit and appear to be another tactic.

We felt it was important that you understand what is occurring at this time and we will continue to keep you informed. **HOWEVER, BECAUSE OF THESE OUTSTANDING CHARGES, OUR ABILITY TO CHANGE WAGES AND BENEFITS ARE RESTRICTED UNTIL THE ULPs ARE RESOLVED.** We also know that some employees in the plant are feeding you selective information from the Union. *REMEMBER*, the same employees and the same Union failed to give you all the facts during the campaign. If you have any questions, concerns, or issues about the ULPs or the process, please don't hesitate to ask your local management team or us when we come down.

Because the Gottdiener-Green letter of November 9 clearly (even strongly) blames the Union for the "restriction" (with no explanation as to whether the restriction is a prohibition or merely a requirement to meet certain conditions), I find that it is coercive. Although Naomi argues that the letter's discussion about the Union's charges and objections is "merely an explanation of Board procedure and the status of the case" (Br. 43), that contention expresses wishful thinking about what the letter should have described. Unfortunately for Naomi, the letter says nothing about Board law setting the conditions under which wage and benefit changes can be made in the postelection period during the pendency of objections to an election. Instead of explaining that any changes during the pendency of objections must conform to restrictions set by the Board, Naomi blames the Union's "outstanding charges" as the reason why Naomi's ability to change wages and benefits is restricted "until the ULPs are resolved." An employee reading that could well conclude that the Union's charges might prevent his receiving a January 1994 COLA until later, perhaps many months later. That the employees actually received the January 1994 COLA (and, in accordance with the new schedule, one in October 1994) is of no moment when evaluating the statement's capacity for adverse impact on employees in early November 1993. Accordingly, I find that Naomi, by the offending statement in the Gottdiener-Green letter of November 9, 1993, violated Section 8(a)(1) of the Act, as alleged in complaint paragraph 9(g).

H. Interrogation About Union Activities—June–December 1994

1. Introduction

Complaint paragraph 9(h) alleges unlawful interrogation. Added at trial by amendment (GCX 1gg; 1:15), as the amendment was amended (1:16–17), paragraph 9(h) alleges that Naomi violated Section 8(a)(1) of the Act when then Human Resources Manager Barbara Alston, in June or July 1994 "(one instance)" and in late October or early November 1994 "(one instance)," and when consultant Frank Carter, an alleged agent, in late October or early November 1994, and again in December 1994, interrogated employees concerning their union activities and the union activities of other employees. Naomi denies.

2. Barbara Alston—June–July 1994

Knitter Annie White testified in support of this allegation. As earlier noted, this incident is alleged by oral amendment at trial. (1:16–17.) Because Naomi had no advance notice of the allegation (1:9), and no opportunity to confer with Alston, no longer a Naomi employee, before having to cross examine White (1:11), Naomi was granted the right to postpone its cross

examination on this topic with the General Counsel having to produce White later if Naomi desired to exercise its right to cross-examine her as to this incident. (1:17, 157.) Naomi apparently elected not to ask that White be recalled for this purpose.

White's un rebutted testimony is that Alston, approaching White on the work floor in about June or July 1994, asked White (if any preliminaries occurred, they are not described), in the presence of Stephanie Lane (apparently another knitter), "What happened about the Union?" White answered, "We would have been better off had the Union come in." (1:108–109.) Lane did not testify. White, who distributed authorization cards before the petition was filed, acknowledges (1:125) that, after the Union filed its election petition, she made no secret of her support for the Union.

As I discuss in more detail later, after the election Naomi established certain employee committees on which one or more management representatives would be either participants or advisors. One of those committees was the Selection Committee (SC), and the employees elected White to serve as one of the employee members. (1:93–96, 143.) White thereafter interacted with management as part of her duties on the SC. (1:105, 107–108, 145.) Although there is no evidence that White ever openly wore union insignia after the Union's petition, she appears to have been rather outspoken on behalf of the Union. Certainly the terseness of the single question and answer exchange between Alston and White about June or July 1994 suggests that the two were accustomed to speaking with each other and that Alston was well aware of White's prounion sentiments.

In view of the location of the conversation (work station), its single-exchange nature, its lack of any suggestion that information was being sought to identify or punish union supporters, that White and Alston were accustomed to speaking with each other, and that White was an outspoken supporter of the Union, I find nothing coercive about the incident. In making this finding, I also attach some minor weight to the fact that White, who is rather tall and seems to be about 38 and in robust health, has the appearance of someone who would not easily be intimidated by anyone, and not at all by the ambiguous question asked by the much smaller Alston. Finding no coercion in the totality of the circumstances, I shall dismiss complaint paragraph 9(h) as to Barbara Alston for the incident of June–July 1994. *Sunnyvale Medical Clinic*, 277 NLRB 1217 (1985).

3. Barbara Alston and Frank Carter—October–November 1994

Patroller Deborah Baines, who served as the Union's second-shift observer at the October 1993 election (1:62; 3:466; 4:685), also served on the SC from 2 to 3 months (3:473, 509). Human Resources Manager Alston and Frank Carter, a consultant and alleged agent, were management representatives serving on the committee. (3:480–481.) In August 1994 Baines, at the invitation of Alston, joined the primary committee—the Design Team. (3:483, 499, 510; GCX 18m.) Alston and Carter, who functioned as "facilitators," would alternate, at times, in opening the meetings. (3:521.) Membership on the Design Team put Baines in interaction with members of management.

Recall my earlier description that David Skinner, one of the Union's organizers, returned to the area in mid-November 1994, met with interested employees, and directed employees in the in-plant circulation of a prounion petition for the purpose of gauging continued employee interest in the Union, and that organizer Burnett returned in December for a few days in that

connection. Baines testified that, at some point between mid-October to early November 1994, Alston called Baines to Alston's office where a conversation occurred in the presence of consultant Carter. Alston, Baines testified, asked Baines what was going on with the Union. "Nothing I know of," Baines replied. Carter said that they had heard the Union was trying to come back in. Baines said she was not aware of that. That ended the conversation. (3:502-504, 524.) Carter did not testify, and Alston was not asked about the incident, except, as a 611(c) witness for the Government, Alston testified that an employee told her there was a rumor that someone was saying the Union was coming in. (6:1212-1213.)

Baines testified that, about mid-November 1994, Alston and James Hartman (who became plant manager around March 1, 1994; 7:1336) asked her if she would be interested in a promotion to supervisor. After thinking about the offer for 2 to 3 weeks, Baines apparently declined. (3:517-518, 523.)

Although Baines, as a member of the Design Team, had interaction with Alston, Carter, and even senior management, the location of this conversation—in Alston's office—was more formal than the plant floor where Alston spoke to Annie White. Additionally, Alston and Carter double teamed Baines, whereas only Alston spoke to White. Two questions (counting Carter's statement as implying a question, which Baines answered) were asked Baines, but Alston asked White only one question. However, there were no followup questions, and no request that Baines report if she heard of any renewed activity. And nothing in the nature of the generalized questions suggests that Alston and Carter asked their questions for the purpose of obtaining information (such as identities) from Baines on which Naomi would take adverse action against employees. Finally, Baines, who appears to be about 5 feet 10 inches tall and in robust health, would tower over Alston. Under all the circumstances, I find that the two questions posed to Baines, an open supporter of the Union, by Alston and Carter were not statutorily coercive. *Sunnyvale Medical Clinic*, 277 NLRB 1217 (1985). I therefore shall dismiss complaint paragraph 9(h) as to Barbara Alston and Frank Carter for the incident of late October to early November 1994.

4. Frank Carter—December 1994

No party briefs this allegation, although Naomi (Br. 47) mentions the apparent incident in its discussion of the previous allegation. There is no evidence of a December 1994 interrogation by consultant Carter. Evidence was adduced regarding a November 30, 1994 meeting of the Design Team at which Carter, prefacing his remarks that the team need to talk about communications, reported that there were rumors the Union was coming in if employees signed a paper, advised members that such a result could not happen under the law. Carter asked whether anyone had heard anything about the Union. The employee members said they had heard nothing. (3:505-507, Baines; 3:574-575, 579-581, 585-586, McCowan.) Although the minutes (RX 4) of the meeting include the statement, "A memo will be posted informing the people that signing a paper gives the UNION no rights at this time," employee member Jerry McCowan (3:580) and Alston (6:1215) disavow that the Design Team agreed to the statement. Alston recalls that the employees were concerned about the rumor and wanted some explanation, with Carter saying he would prepare a memo. (6:1213-1214.)

Plant Manager James Hartman (who was present at the meeting), at first recalling no discussion at any Design Team meet-

ings about the Union (7:1364), testified that the minutes (RX 4) refreshed his memory that there were rumors at the time about some union activity at the time, and that Carter said he would post a notice as stated in the minutes. (7:1366-1368.) Although Hartman never saw any such posted notice (7:1368-1369, 1372), Annie White testified that she saw one, with Carter's name on it, posted on the bulletin board. (1:110-111.)

When asked what allegation the notice-posting pertained to, the General Counsel replied that it did not relate to an independent [8(a)(1)] allegation, but was relevant in showing a motive for the December 1994 discharge of Mary K. Harris. (1:111.) Thus, an argument could be made that, based on the General Counsel's statement of no relevance to an independent 8(a)(1) allegation, Naomi waived nothing by not objecting later and that any question by Carter at the November 30, 1994 Design Team meeting should be considered only in relation to the alleged December 1994 discharge of Harris. Nevertheless, I consider Carter's November 30 question (the date is close enough to December so that there is no variance, and Naomi failed to object to any variance), because the General Counsel was expressly addressing the posting, not Carter's question at the November 30 meeting. In short, the General Counsel's statement regarding relevance would not have misled Naomi so that Naomi did not object when testimony about the November 30 meeting itself surfaced.

Having found that Carter's question (I credit the testimony that Carter asked the question) at the November 30 Design Team meeting is the likely subject of the allegation of a December 1994 interrogation by consultant Carter, I now address the merits of the allegation. Carter's single question was to the group (about 10 unit employees; RX 4), followed by several, perhaps all, of the employees saying "No." No individual was singled out, there were no followup questions, and no coercive motive was indicated. Indeed, it appears that the purpose of the question was whether there was a need to post a notice for the educational benefit of the employees, and the employee members present expressed a need for an explanation. Finding no element of coercion in the circumstances, I shall dismiss complaint paragraph 9(h) as to the December [November 30] 1994 incident pertaining to Frank Carter. *Sunnyvale Medical Clinic*, 277 NLRB 1217 (1985).

Having dismissed the components of complaint paragraph 9(h), I now dismiss complaint paragraph 9(h) in its entirety.

II. ALLEGED VIOLATIONS OF SECTION 8(a) (2)

A. Introduction

The initial question here is whether, under Section 2(5) of the Act, the Design Team, an employee participation committee created by Naomi after the election, was a permissible "communications device" (a "conduit" for ideas and information generated by "brainstorming" sessions) as contended by Naomi (Br. 63, 76, 80), or, as argued by the General Counsel (Br. 26-28), a committee established to "deal with" Naomi's employees and therefore a statutory labor organization. If the Design Team is merely the former, the relevant complaint allegations must be dismissed. If the Design Team is the latter, a second question must be addressed: Did Naomi interfere with or dominate the formation or administration of the Design Team (or contribute financial or other support to it)? If the answer is no, Naomi wins. A yes answer results in a finding that Naomi, as alleged, violated Section 8(a)(2) of the Act.

Complaint paragraph 11 alleges that “The Design Team Committee, and its subcommittees, the Selection Committee and the Training Committee (the Committees) at the Respondent’s Zebulon, North Carolina, facility, is a labor organization within the meaning of Section 2(5) of the Act.” Naomi denies. Although paragraph 11’s syntax is confusing, the plural apparently is intended, as paragraph 12 confirms. However, the briefs focus on the Design Team in the singular. Although the General Counsel’s proposed order would direct the disestablishment of the two subcommittees as well as the Design Team, the evidence does not show that a Training Committee was ever established, and the Selection Committee, as we shall see, ceased functioning about August 1994.

Complaint paragraph 12 alleges:

12.

Since on or about November, 1993, and continuing at all times material herein, Respondent did initiate, form, sponsor, and promote the Committees and has rendered aid, assistance and support to and has dominated the Committees by:

- (a) Announcing to employees that the Committees would be set up to implement policies at Respondent’s facility;
- (b) Determining the structure and purpose of the Committees;
- (c) Placing management employees in the Committees, including, but not limited to, the meeting facilitator;
- (d) Holding, conducting, and directing meetings of the Committees on Respondent’s premises, and providing use of office equipment to the Committees;
- (e) Discussing and taking action on recommendations of the Committees involving terms and conditions of employment.

In paragraph 12 of its answer, Naomi admits that it “has initiated the committees described in Paragraph 11 of the Complaint and that meetings of some of the committees have been held on Respondent’s premises, but denies that it has rendered aid, assistance and support to, and/or has dominated those committees as described in Paragraph 12, subsections (a) through (c) and (e), inclusive.” Naomi further denies anything not admitted. Complaint paragraph 19 alleges that Naomi, by the conduct alleged in paragraphs 11 and 12, violated Section 8(a)(2) of the Act. Notwithstanding its admission that it initiated the committees, in paragraph 19 of its answer Naomi denies that it “engaged in any of the acts alleged in Paragraphs 11 and 12 of the Complaint,” and further denies that it has violated Section 8(a)(2).

B. The Design Team

1. Creation, purpose, and structure

During the preelection campaign, CEO Gottdiener testified, Naomi hired the Weissman Group (TWG), a consulting firm headed by Norman Weissman, its president, to guide Naomi through the election campaign. After the election, Naomi retained TWG as a management consultant. One proposal TWG made after the election was that Naomi establish a design team. Based on his industry contacts, Gottdiener was familiar with the design team concept. (7:1477–1478, 1491–1494.)

At trial I granted the General Counsel’s motion to name Norman Weissman as an agent of Naomi. (2:375, 384, 395; 6:1042; GCX 69.) As part of the evidence offered to show

agency, the General Counsel introduced, over Naomi’s objection and before Gottdiener testified, an October 28, 1993 letter (GCX 15) from Gottdiener. In receiving GCX 15 conditionally, I reserved ruling on the offer. (3:557, 561–565; 7:1395–1396.) In view of Gottdienier’s testimony concerning his hiring of TWG (7:1478, 1491), the General Counsel on brief (Br. 16, fn. 11) moves to withdraw the offer of Gottdienier’s October 28 letter. Although I grant the General Counsel’s motion, I shall not remove GCX 15 from the exhibit folder because that could create confusion in light of references in the record to the exhibit.

As Weissman outlined to Gottdiener, and as thereafter established at Naomi, the Design Team would have a “facilitator.” (7:1495.) The facilitator’s function, Human Resource Manager Alston testified, was to focus the discussion on any of four items: Production, Efficiency, Quality, and Safety. (6:1110, 1116.) During the initial stages, Weissman or Frank Carter, one of Weissman’s associates, served as the facilitator. (7:1495.) One of Weissman’s suggestions was that Naomi hire a human resource manager who eventually would assume the facilitator’s role. The suggestion was implemented, Gottdiener testified. (7:1495.) As Alston notes, however, at times Plant Manager Hartman served as the facilitator. (6:1115.)

The purpose of the Design Team was to provide a device to facilitate communication between management and the hourly workers. (7:1478, Gottdiener; 7:1627, Lundblad.) After the decision had been made to create a Design Team, Weissman, apparently in early December 1993, met with all the employees and described the concept to them. (7:1494, Gottdiener.) First-shift employee Shelby Poland credibly testified that Weissman told employees that employee committees would make employees a better place to work, and that “some of the employees would have a say so on everything that went on up there. The hiring, the firing, and everything else.” (3:611–612, 622.) According to Annie White, Weissman included “the pay raise” as one of the topics the Design Team could address. (1:94.) First-shift knitter Kay Downey, who could not recall whether the meeting occurred before or after the election, testified that Weissman (with Gottdiener present), who walked as he spoke, told employees that different committees would be formed so that problems could be discussed and to “see if we could better things in the plant.” (4:779, 800–802.) Weissman did not testify, and these descriptions stand un rebutted.

Those comprising the first group of hourly members of the Design Team were chosen by a process of nomination of 15 employees, 5 from each shift, at Weissman’s direction. (1:93–94, White.) As Shelby Poland describes, Miller took the nominees to a company-paid luncheon at a local restaurant where, in Miller’s absence, the employees, by voice vote, elected the first six (two from each shift) hourly members of the Design Team. As the minutes for the first meeting (January 11, 1994) reflect, those elected were to serve for 1 year. (GCX 17.) For the following year, and in filling vacancies, notices were posted inviting employees to sign the posting to indicate their interest. Minutes of the meetings were taken and typed by an office clerical.

Kimberly Manning, a second shift employee until she left Naomi in August 1994, testified that she was one of those elected to the Design Team. (2:370.) At the Design Team’s first meeting, held January 11, 1994, Weissman served as the facilitator. (2:374; GCX 17.) Weissman, Manning testified, told the group that the purpose of the Design Team was to achieve

better communication. One of the primary rules the Design Team would operate under, Weissman stated, would be that there would be no votes, and that everything had to be decided by consensus, which he defined as meaning consent by everyone. (Thus, Weissman's reference to "no votes" apparently meant that decisions would not be based on a majority vote. The minutes show references to votes to be taken, but decisions apparently were unanimous, with one possible exception which I mention later.) The employee members were to relay information to and from the employees in the plant in achieving the better communication. (2:374, 401-402, 427, 451.) The minutes for the initial meeting of January 11 list the operating rules, with the third one providing, "Everything is open for discussion." (GCX 17.)

2. Operation

As mentioned, an office clerical took and typed minutes of the Design Team meetings. Copies of the minutes were posted so that all employees could read them. Employee members attended meetings during paid time. Initially the Design Team met twice a month, but eventually the frequency was reduced to once a month.

One of the first tasks the Design Team tackled was that of formulating a mission statement. Agreement eventually was reached on one which emphasized quality and the ability to meet any goal. (GCX 18a-c.) At the second meeting, 14 potential committees were listed, with the first of these being the Selection Committee. (GCX 16.) That committee, or subcommittee, eventually was staffed by volunteers, all hourly employees, after posting. Those who signed their interest elected members from among the signers. Annie White was one of those elected. (1:95-97, 143-144.) The Selection Committee began meeting about March, but ceased functioning about August. (1:98, 144; GCX 18(l).) Although the actual members of the Selection Committee were hourly employees, the evidence reflects that Barbara Alston or Frank Carter would serve as an advisor to the committee, or liaison with the Design Team.

During 1994, as reflected in the minutes (GCX 18; RXs 4, 27-30) and the testimony, the Design Team discussed a variety of topics. Some of the topics were light, such as Family Day (RXs 27-30) or keeping the picnic area clean (GCX 18f), to heavy, such as job bidding (GCXs 18(l); 27) and drug testing, including random drug testing of current employees (GCX 18j, k, l, m). The General Counsel argues that the Design Team has existed, at least in part, for the purpose of "dealing with" Naomi on wages and conditions of work, and that this is reflected in the Design Team's handling of certain matters, including such employee-based proposals as a job bidding system, an attendance bonus, and resolution of differing views on a drug testing program. Additional topics include a no-smoking policy and an inclement weather policy.

Respecting job bidding, the Selection Committee drafted the initial proposal and submitted it to the Design Team. Thereafter, the Design Team and the Selection Committee collaborated to produce a final version. In this process, the combined team resolved differences regarding "what job a person would return to if for some reason they would not stay on a job that they applied for from the internal posting." (GCX 18(l); GCX 70; 6:1131-1134, Alston.) At the Design Team meeting of September 6, 1994, Alston distributed copies of the "final requirements for internal job posting." (GCX 18n.) Presumably the item distributed was the one-page "Guidelines For Internal Job Posting" which was attached to an October 5, 1994 memo

(GCX 27) to all employees from the Design Team on the subject of "Internal Job Posting Guidelines." Alston testified that GCX 27 resulted from the work of the combined committees, the Design Team and the Selection Committee. (6:1135.) With copies shown to Gottdiener, Weissman, and Frank Carter, the October 5 memo reads (GCX 27):

I Attached you will find a copy of the Internal Job Posting Guidelines that has [have] been adopted by the Design Team for hourly and Clerical positions at Andrex.

In order to establish these guidelines, The Design Team and The Selection Committee decided to work as a team on this project.

Signatures of 10 persons appear at the bottom of the memo. Among the employees signing was Deborah Baines, one of the witnesses here (3:496), and managers signing included Greg Lundblad (the vice president in charge of the Asheville and Zebulon plants), Jim Hartman, Naomi's plant manager, and Barbara Alston, the human resource manager. Thereafter, the guidelines attached to the October 5 memo (GCX 27) were included in Naomi's official policies and procedures. (6:1136, Alston; GCX 26 at 13.)

Naomi has been plagued by production problems caused by poor attendance. At one of the Design Team meetings one of the employee members, Alston testified, suggested that an incentive bonus be given for perfect attendance. Adopting this suggestion, the Design Team obtained Gottdiener's approval to give a \$20 gift certificate from a grocery store on a month-to-month basis beginning June 1, with the program's continuation depending on whether attendance improved. (6:1118-1120.) When attendance actually declined, the Design Team agreed that the program should be discontinued, and it was eliminated in July. (6:1121-1122; GCX 18g, k.)

The Design Team also agreed on a no smoking policy (GCX 72) which, after posting, Naomi implemented about August 1, 1994. (6:1142-1146, Alston.) Previously, smoking inside the building had been permitted only in the breakroom. (6:1144-1145.) When Naomi, by Alston (6:1142), incorporated the policy (as amplified by Alston) into its official policies and procedures (GCX 26 at 25), it gave credit to the Design Team ("has been adopted by the Design Team of Andrex Industries Corporation which bars smoking throughout the facility"). The official policy provides that any employee found smoking in an unauthorized area "will be subject to discipline, up to and including discharge." (GCX 26 at 25.)

The Design Team discussed whether to adopt a drug testing policy. The minutes first show this at the meeting of June 29, 1994. (GCX 18j.) There was agreement for a testing program as to new employees, but as late as August 10 there was still opposition to random drug testing of current employees. (GCX 18(l); 2:427, 452, Manning; 6:1166-1167, Alston.) In early August 1994 Manning left Naomi. (2:363, 455.) Manning had been the main opposition to random testing. As of the August 23 meeting, "Most of the team members" agreed that random drug testing was needed. (GCX 18m.) Although the implication is that the Design Team was not unanimous at that point, the minutes indicate that the decision was to proceed, with the penalty (rehabilitation or termination) left for future discussion. (GCX 18m.) Alston confirms that a decision was made by this date to proceed with both drug testing of new employees and random testing of current employees. (6:1168.) Thereafter, a drug testing program was implemented. (6:1165-1166.)

Other matters addressed by the Design Team include the adoption of the same inclement weather policy that prevailed at Asheville (those who can get to the plant may work, and an excused absence for those who cannot make it; GCX 18r; RX 27), and a plan for disbursing the “cardboard money.” Before the Design Team was established, Naomi had a cardboard recycling program. Earnings from the program were placed in a fund and distributed to employees at year’s end. It is unclear how the distribution had been made previously, although the implication is that it was divided equally, but the Design Team decided that the distribution payments should be smaller for those who had been employed for less than 6 months. (7:1352–1354, Hartman; GCX 18(o), (p).)

A substantial topic the Design Team worked on for awhile was that of revising Naomi’s existing official policies and procedures (RX 11), and a (very) rough draft was prepared by July 12. (GCX 18k.) However, because Naomi was advised by a consulting firm that Naomi could be courting legal problems by having hourly employees working on such a project, management withdrew the project (7:1359–1360, 1363) and, thereafter, assertedly without benefit of the rough draft, Alston prepared a set of revised policies which became effective January 1, 1995. (6:1141–1142, 1152–1156; 7:1360; GCX 26.)

Finally, the Selection Committee proposed to Alston that the premium paid to trainers be increased from 25 cents per hour per person to \$1 per hour per person. (3:472–480, 497–499, 516, Baines.) (Recall that during the campaign an employee had asked Gottdiener about increasing the premium paid to trainers.) Alston admittedly conveyed this suggestion to the Design Team (6:1164), and the minutes for June 7, 1994 (GCX 18h) so reflect. Although management eventually increased the premium by 25 cents, to 50 cents per hour per person, the decision apparently was made outside the Design Team. (6:1164; 7:1476, 1486–1491.) In fact, it appears that the Design Team, which was to check on the premium levels at other mills, found that Naomi’s was not out of line. (6:1165.) The implication is that, because of the survey’s findings, the Design Team made no recommendation for any change. Nevertheless, management doubled the premium. The relevant point, it appears, is that this was a wage rate topic, and that the Design Team did pursue the issue to some extent.

C. Conclusions

As mentioned in the introduction, the first issue to be determined is whether the Design Team is a labor organization within the meaning of Section 2(5) of the Act, 29 U.S.C. § 2(5). That section defines the term:

The term “labor organization” means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

In recent years the Board has written detailed opinions concerning whether employee participation committees, under the facts of the cases, constituted statutory labor organizations. The controlling decisions of the Board, which itself adheres to the Supreme Court’s instructive guidance, are *Electromation*, 309 NLRB 990 (1992), *enfd.* 35 F.3d 1148 (7th Cir. 1994), and *E. I. du Pont & Co.*, 311 NLRB 893 (1993).

Although “there is some room for lawful cooperation under the Act” with employee participation committees, *du Pont* at 893, it appears that if such cooperation extends beyond “brainstorming,” especially on a “pattern or practice,” then the employer is “dealing with” the committee and the committee is therefore converted into a statutory labor organization if the “dealing with” involves any of the statutory topics. Keep in mind also that the “wages” of Section 2(5) of the Act are not limited to money, but also includes other forms of compensation and benefits. *du Pont*, 311 NLRB 893, 894 fn. 8 (1993).

If labor organization status is found, the second question is reached, which is whether Section 8(a)(2) has been violated. *Electromation*, 309 NLRB at 994; *Electromation v. NLRB*, 35 F.3d 1148, 1161 (7th Cir. 1994).

Here there clearly was “dealing with” on a variety of the statutory topics. The discussions went far beyond mere “brainstorming,” and concerned such important “conditions of work” as a job bidding procedure and a drug testing program, the latter including random drug testing of current employees.

As the General Counsel acknowledges (Br. 26), the Board has left open the issue of whether, for the committee to meet the statutory test of a labor organization, employees on the committee must be acting in a representative capacity. *Electromation*, 309 NLRB at 994 fn. 20; *du Pont*, 311 NLRB at 894 fn. 7. Naomi defends on the basis that the employees here were chosen only by those who volunteered to be on the committee, and not chosen by the employees they supposedly represent, there is no required representative status. (Br. 82–83.) Countering, the General Counsel argues that the situation here (committee employees checking with plant employees on such matters as job posting guidelines and drug testing) parallels that in *Electromation* at 997. (Br. 26–27.) Agreeing with the General Counsel, I find that, to the extent such a finding is necessary, representative capacity existed here.

There is no dispute that employees participate in the Design Team. Aside from initial statements by Weissman indicating that the Design Team will address all topics, and even if I disregard the committee’s operational “Rules,” which Weissman laid down at the first meeting of January 11, 1994 (GCX 17), about “Everything is open for discussion,” the pattern and practice of the Design Team shows that the Design Team exists for the purpose of “dealing with” Naomi concerning many of the statutory topics. Accordingly, I find that, as alleged in complaint paragraph 11, the Design Team is a statutory labor organization.

As the General Counsel points to no evidence showing that the Selection Committee (which has ceased to function and may no longer exist) constitutes a labor organization, and as the Training Committee was never established, I shall dismiss complaint paragraphs 11 and 12 as to the Selection Committee and the Training Committee.

Having found the Design Team to have been, at all relevant times, a labor organization within the meaning of 29 U.S.C. § 2(5), I turn now to the next question of whether there was domination or interference as prohibited by Section 8(a)(2) of the Act, 29 U.S.C. § 8(a)(2).⁸ That section makes it an unfair labor practice for an employer:

⁸ For some reason, conclusion par. 19, as I noted in the introduction, alleges that par. 11 (labor organizations), as well as par. 12 (the conduct), constitutes a violation of Sec. 8(a)(2). Labor organization status does not violate Sec. 8(a)(2) of the Act. Even when a labor organization is unlawfully dominated, its status as a labor organization does not

to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: Provided, That subject to rules and regulations made and published by the Board pursuant to section 6, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay.

The record evidence, including the testimony of CEO Gottdiener and employees, such as Kimberly Manning, track the Board's language in *Electromation*, 309 NLRB 990 at 995–996 (footnotes omitted):

Although Section 8(a)(2) does not define the specific acts that may constitute domination, a labor organization that is the creation of management [as was Naomi's Design Team], whose structure and function are essentially determined by management [Naomi, by Weissman and Gottdiener, created the Design Team, and at its January 11, 1994 first meeting, as GCX 17 records, Weissman laid out the rules of operation, including the rule that "Everything is open for discussion."]. . . . and whose continued existence depends on the fiat of management [as at Naomi, where the Design Team met on company property, with members being paid regular time for attending, with minutes kept and typed by office clericals and posted at management's direction, and where the committee, with half its members being part of management, and its chair, or "facilitator," always a member of or a representative of management, could be dissolved instantaneously at Naomi's whim], is one whose formation or administration has been dominated under Section 8(a)(2). In such an instance, actual domination has been established by virtue of the employer's specific acts of creating the organization itself and determining its structure and function. . . . Thus, the Board's cases following *Cabot Carbon*, [360 U.S. 203, 79 S.Ct. 1015, 44 LRRM 2204 (1959)] reflect the view that when the impetus behind the formation of an organization of employees emanates from an employer [as here] and the organization has no effective existence independent of the employer's active involvement [as here], a finding of domination is appropriate if the purpose [as I have found here] of the organization is to deal with the employer concerning conditions of employment.

As the Board noted in making a domination finding in *du Pont*, 311 NLRB 893, 895–896 (1993), footnotes omitted:

The structural operations of the committees warrant the finding that the Respondent dominated the administration of the committees. As discussed above, the Respondent ultimately [as with Naomi's Design Team] retains veto power over any action the committee may wish to take. This power exists by virtue of the management members' participation [management constituted 50 percent of Naomi's Design Team] in consensus [Weissman defined "consensus" to mean unanimous] decision-making. The committee [as here] can do nothing in the face of management members' opposition. In addition, the record shows that [as with Naomi's Design Team] in each committee, a management member serves as either the leader or the "resource" (monitor or advisor) and therefore has a key

violate Sec. 8(a)(2). It is the unlawful domination (complaint par. 12) which violates 29 U.S.C. § 8(a)(2). See *Electromation*, 309 NLRB 990, 997 (1992).

role in establishing the agenda for each meeting and in conducting the meeting.

More could be quoted and written, but that is unnecessary. As alleged, I find that since about December 1993 (complaint par. 12 alleges about November, but the ambiguous evidence suggests December) Naomi, by establishing and dominating the Design Team, has violated Section 8(a)(2) of the Act. The remedy for domination is an order to disestablish. No doubt both management and employees at Naomi have benefited from the communication and results achieved through the Design Team as it has been created, structured, and operated. However, Congress, not the Board, wrote the statute, and it is the Congress that must write any amendment.

III. ALLEGED VIOLATION OF SECTION 8(a)(3)

A. The December 8, 1994 Discharge of Mary K. Harris

1. Introduction

Complaint paragraph 10 alleges that, about December 8, 1994, Naomi fired Mary K. Harris. Naomi admits. Paragraph 20 alleges that the discharge violates Section 8(a)(3) of the Act. Naomi denies.

There is no dispute that Naomi fired Harris on the stated ground of insubordination based on alleged conduct at a safety meeting conducted at the plant 2 days earlier (December 6). Conceding, in effect, that certain conduct by Harris perhaps was less than deferential to Human Resource Manager Alston, the Government and the Union contend that any misconduct was mild, that it was not insubordination anyhow (as it did not involve, as in past cases at Naomi, the refusal to obey a direct order), and even if it was (a different category of) insubordination, Naomi seized on a minor incident to rid itself of a union activist following rumors of renewed interest in the Union. Going even further, the Union argues (Br. 7, 22–23) that Naomi was additionally motivated to discharge Harris, because the Regional Director for NLRB Region 11 had just issued, in this case, the Government's November 30, 1994, amended consolidated complaint and notice of hearing (GCX 1y) in which, at paragraph 21, the Government significantly amended the outstanding complaint by requesting the extraordinary relief of a bargaining order as part of the remedy for the unfair labor practices alleged. Thus, the Union argues, and the General Counsel joins, Naomi's motivation not only was to eliminate a demonstrated activist (Harris had been one of the Union's observers at the October 1993 election), but to retaliate against union supporters by discharging one of the Union's election observers.

As will be seen from my description of and discussion of the material events, any prima facie case of the General Counsel depends largely on Naomi's great difficulty in locking onto a specifically articulated basis for the discharge, and Naomi's defense largely depends on the forthright admissions by Mary Harris. By any account, portions of this case approach the bizarre

2. Facts

a. Knowledge

Knowledge is contested. (As I begin summarizing the knowledge issue, keep in mind that, depending on whose account is described later, there were at least two or three persons involved in the decision to discharge Harris—Plant Manager James Hartman, Human Resource Manager Barbara Alston,

and Supervisor William Batts.) Harris served as the Union's first-shift observer at the October 1993 election (1:61-62; 4:684), a fact Naomi declined stipulating knowledge of (4:686), and appeared at the preelection conference with Union Representatives Donna Burnett and David Skinner in the presence of Plant Manager James Miller and Vice President Greg Lundblad. (4:685; 7:1637-1639.) Although Miller left Naomi about mid-February 1994 (4:852, 867), Lundblad, as we have seen, is still in charge of the Asheville-Zebulon operation. (7:1618.) Beginning before the election, Harris wore union insignia and a union T-shirt, wearing the T-shirt about once a month at work until nearly May 1994. (4:684, 711, 760.)

On one of the two election days, apparently the first, Harris' supervisor, William Batts, handed Harris company literature as Harris, wearing her union T-shirt and other union insignia, entered the door. (4:711.) Batts denies knowledge of or ever seeing Harris wearing a union T-shirt. (7:1552.) Although Batts supervised about 24 employees on the first shift in the summer-fall of 1993 (7:1543), Harris was only one of seven knitters who worked for Batts in the front section (7:1579). Batts also denies being aware that Harris was absent from her work area to serve as an election observer, testifying that he had been instructed to remain at the rear until after the voting. (7:1577.) Crediting Harris, I find that Supervisor Batts observed Harris wearing her union insignia and T-shirt both before the election and on the morning of the election. I also infer that Batts observed Harris wearing the union T-shirt on occasion during the next several months.

Although Harris signed the Union's interest-petition about November 15, 1994, she concedes that, so far as she knows, no supervisor or manager was aware that she had signed. (4:710, 712, 736, 761.) Batts denies hearing any rumors, or being told of any rumors, of renewed union activity. (7:1556, 1574.) In view of management's posting of the Design Team's minutes, or similar note from Frank Carter to offset rumors that the Union was "in" the plant, it is highly unlikely that Supervisor Batts was not made aware of the rumors either by the employees, by seeing the posting, or by management directly. I find that Batts was aware.

Human Resource Manager Barbara Alston began working at Naomi on April 4, 1994. (6:1109-1110.) Before arriving at Naomi, Alston had gained some 16 years' experience in human resource management at several companies. (6:1256.) Alston denies knowledge of any union activity by Harris, and denies ever seeing Harris wearing union insignia. (6:1259-1260.) As Harris ceased wearing her union apparel "a little before May" (4:760), it is possible that Harris actually stopped before Alston arrived, or that Alston did not in fact see it on the one day in April that Harris would have worn it after Alston's arrival. There is no evidence that Alston walked by Harris' work station every day, and Harris does not contend that Alston saw her wearing it. I find the evidence lacking on any direct observation by Alston.

Although Alston learned of the union rumors in November 1994, there is no evidence that either she or other management persons focused their attention on Harris. As I described earlier, Alston and Frank Carter asked Deborah Baines about the rumors. Baines apparently was asked because she was a member of the Design Team, not because she had been the Union's second-shift observer at the election over a year earlier. During her first week at the plant, Alston was told about the 1993 union campaign, and about August 1994, consultant Frank Carter

briefed Alston on the pending NLRB litigation. (6:1097-1099, 1107, 1250.) While Alston may have been told the names of the Union's observers, it is just as possible that she was not. Alston testified (6:1259) that she never learned that Harris was a union supporter.

Hired in September 1993 as Naomi's production control manager (7:1336-1337), James Hartman stepped up to plant manager about late February 1994 (7:1344) after Miller's mid-February (4:852, 867) departure. Apparently because Hartman supervised only six salaried office personnel while he was the production manager, Hartman testified that he was not involved in the union campaign. (7:1339-1340, 1343.) So far as the record shows, this is the first time Hartman has ever been a plant manager. Hartman's duties as production control manager took him to the plant floor several times a day, and at various times he observed that employees would be wearing union T-shirts. He asserts, however, that he did not link the shirts to faces in his memory. (7:1337, 1339.) In fact, Hartman testified, he was not able to link Harris' name to her face during the discharge events until he saw a woman entering Alston's office on December 8 and Alston later told him that had been Harris. (7:1603.) He had heard the November 1994 rumors, but Harris was not mentioned in any of the rumors. As of the December 6, 1994 decision to discharge Harris, Hartman testified, Hartman was unaware of any union activity by Harris. (7:1367, 1603-1605.) Institutionally, I find, Naomi had knowledge of Harris' 1993 to early 1994 union sentiments, as did Supervisor Batts. There is no direct evidence that Alston or Hartman had personal knowledge. I later discuss this matter further.

b. The December 6, 1994 safety meeting

On Tuesday, December 6, 1994, Harris was 1 of about 60 employees who attended a safety training meeting conducted in the breakroom at the Naomi plant beginning at 7 a.m. Attendance was mandatory for employees. For Harris as for most of the attendees, perhaps all (6:1262, Alston), December 6 was a scheduled off day. (Well before this date Naomi had switched to four shifts, A, B, C, and D, of 12 hours each. Harris, whose C shift worked days, was not scheduled to return to work until Thursday, December 8.) Alston had arranged for a guest instructor, Bernie Farmer, to conduct the training program for all employees. Farmer is an instructor with the North Carolina Center for Applied Textile Technology, a state-affiliated operation which is "under the umbrella of" the North Carolina community college system. (5:1002-1004.) Alston had arranged for the Naomi training program through Wake Technical Community College, located in Raleigh, North Carolina. (6:1261, 1281.)

Alston was present as the employees arrived so that she could introduce Farmer, explain the purpose of the safety training program, and to distribute a form (RX 23) for the employees to fill out. On its face, the one-page form bears the school name at the top, and in bold, capital letters, the centered title of the form states, "Continuing Education Registration."

There is a question whether Alston fully explained that the training was required by the State and that it was funded, at least partially, by the State, and that the school needed the form to verify attendance, although Alston insists that she so told the group. (6:1178-1179, 1262-1263, 1282.) I need not resolve that issue. The relevant point is that Alston explained that the purpose of the form was (or included) to enable Wake Tech to enter the employees' names in the school's computer so those

who wanted to take a class at Wake Tech later would be registered in the school's computer system, and to verify their attendance so that Naomi could pay them for attending the class that morning. (6:1178, 1277.) Harris understood Alston to explain the purpose of the form as being to register employees in the school's computer in the event they wanted to take future classes at Wake Tech. (4:692, 708, 721–722, 759.)

Kay Frances Downey, seated at the same table as Harris, asked Alston why the employees had to fill out the forms. Alston replied that it was for the school, to show that they had taken a course for so many hours. Downey said nothing further. (4:783, 810–811.) Farmer testified that all that was needed was the name and social security number. (5:1015.) There is no evidence that Alston specifically so limited her instruction regarding filling out the form, although she did testify that she told the employees there were parts they did not have to complete. (6:1264.)

As an atlas reflects, Zebulon is a small town situated about 20 miles east of Raleigh, and Harris lives at Nashville another small town about 20 miles east of Zebulon. Thus, Nashville is about 40 miles or so east of Raleigh. Harris testified that she lives about 48 miles from Wake Tech, but only 15 minutes from Nashville Technical College. (4:708, 719.) If Alston meant that Wake Tech would offer other extension courses at Naomi, as distinguished from classes at its Raleigh campus, she apparently failed to make that clear. The relevance of this geography is that it helps explain why Harris was not enthusiastic about completing, or even signing, Wake Tech's "registration" form.

Farmer prepared a diagram (RX 22) of the breakroom based on measurements he took there 3 days before testifying. (5:1007.) At this point the relevance of the diagram is merely to give us a general idea of the size and shape of the room. (Some of the testimony is rather wild in estimated distances.) As shown by Farmer's diagram, the breakroom is almost a square, being 35 feet from top to bottom (as one looks at the diagram) and 29 feet across. Vending machines flank a door (which apparently leads into the plant) on the left to upper left side, a microwave is at the bottom wall near a door (leading to a patio outside, 5:1032), and at the top is another door which opens into a corridor apparently leading to the office area. The upper right corner of the square is actually Alston's 12-foot by 13-foot office, with the door to her office opening from the breakroom. (5:1032–1033.) The employees sat at several tables in this breakroom.

Seated at a table with Harris were her mother (also a Naomi employee) Mary Moore, Adam Canady, Kay Frances Downey, Debra Carpenter, Cynthia Elliott, and Craig Sharon. (4:687–691, Harris.) Of these, Harris, Downey, Moore, and Canady testified (as witnesses called by the General Counsel). Testifying on this area as witnesses called by Naomi were Alston (first as a General Counsel witness under FRE 611(c), then as Naomi's witness), Farmer, and Supervisor Batts. Harris testified briefly in rebuttal, but not on this subject.

There is little agreement on where Harris and her tablemates were seated in relation to one another, and the evidence is incomplete in any event. The tables by Harris appear to have been situated perpendicular to the left wall (RX 12), and anyone walking or standing on the left side of the room could look down the length of the Harris table. Harris places herself facing the bottom or outside wall, with her back toward the top of the diagram and the area where Alston's office is situated.

Harris places her mother, Mary Moore, to her right, apparently at the table's left end. (4:691.) Moore asserts that she was seated at the center of the table, with Harris toward the end and on the side facing Moore. (4:845.) Consistent with the sketch drawn by Harris (RX 12), and the other evidence, I find that Harris was seated close to the left end (or plant side) of the table, with the possibility that someone else was seated to her right (although not at the short end of the table facing down the length of the table).

There is little agreement on where Alston and Farmer were standing during the time Alston was present. It is not necessary that I attempt to reconcile these substantial differences, for there mostly is agreement on the critical exchange between Harris and Alston. That exchange developed as follows. After Alston had distributed copies of the Wake Tech form (Farmer assisted in the distribution), Downey, as noted, asked Alston why they had to fill out the form. Alston said it was to show the school that the attendees had taken a course for so many hours. (4:783, 810–811.) Although Harris recalls Downey's question to have been whether the form was job related (4:693, 743), I credit Downey.

At about this point Harris (4:693, 738, 754) and Alston (6:1179, 1181, 1221, 1264) agree that Harris said:

I'm not going to fill out this form. I don't want to be here anyway.

There is a major dispute concerning to whom Harris spoke. Harris claims that she said this to those seated at her table. (4:693, 738, 743.)⁹ Downey supports this version (4:784, 806–808), but Downey also states that Harris and Alston began "bickering" and that Harris was loud with Alston, saying she did not want to sign the paper (4:783–785, 795–796, 804–808). [Downey tends to ascribe the "bickering" to Harris' admitted question about filling out the paper, a question I describe in a moment. However, at one point, Downey testified that she does not recall that Harris ever asked Alston a question. 4:790.] Neither Moore nor Canady addresses the point. Alston asserts (6:1179, 1181, 1186–1187, 1205, 1268) that Harris was looking directly at her, as Alston stood at the end of the Harris table, when Harris said it, although the "directly" contention is not (6:1208) contained in Alston's February 15, 1995 pretrial affidavit.

Although Batts places Alston at the Harris table, looking down the length of the table (7:1564), he could not see which way Harris was facing (7:1565) when she made the remark. However, from some 4 feet away, he certainly heard Harris' remark. Batts was "shocked" by the loud and "snotty" tone of Harris' remark. (7:1556, 1565, 1585–1586.) [The record, 7:1555:2, incorrectly renders "snotty" as "snooty."]

Consistent with the opening statement of Naomi's counsel (1:33), guest instructor Farmer asserts that it was "me" to whom Harris addressed her remark, in an elevated voice that everyone could hear, as he handed her the Wake Tech form. Farmer responded that it was her choice. (5:1010–1013, 1026–1027, 1029–1031.) Farmer testified that he did not consider Harris' "adamant" tone and leaning toward him to be abusive or a personal affront. (5:1029–1030.) Harris denies that Farmer ever came to her table (4:738), and Farmer's version appears inconsistent with that of Alston.

⁹ The circumstances call to mind the Psalmist's prayer, "O Lord, set a watch before my mouth, a guard at the door of my lips." Ps. 141:3.

According to Harris, Alston and Farmer were standing together about 100 feet behind her when she made her remark. (4:698, 740-742.) Harris' footage estimate is far off, of course, but the relevant point is that she places them to her rear in the upper left corner of the room on the rough sketch she drew at trial. (RX 12; 4:748.)

Harris denies that she spoke the remark in a loud tone, but she concedes that she spoke loud enough for those at her table to hear. (4:738-740.) Alston contends that Harris spoke her remark in a loud, angry, very rude, and "sassy" tone.¹⁰ (6:1181-1182, 1264, 1266.) Alston testified that Harris' remark, loud enough for everyone in the room to hear, embarrassed her in front of the guest instructor and the 60 or so employees. (6:1265-1266.) Batts asserts that Alston's face took on the expression of embarrassment at Harris' refusal remark. (7:1555.)

After making her refusal remark [for the moment, I leave unresolved whether Harris was facing Alston or her tablemates when making her remark], Harris turned, raised her hand, and before Alston could say anything, and admittedly in a rather loud and angry tone borne of frustration, asked Alston (4:693, 724-725, 755-756, 759, Harris):

Barbara, do we have to fill out these forms?

"No," Alston replied, who then went to her office and, returning with a sheet of paper and, slamming the paper down in front of Harris, told all attendees that those not filling out the Wake Tech form should sign the blank sheet of paper so that they could get paid for attending the mandatory meeting. (4:693-694, Harris; 4:786, 794, 796, Downey; 4:830, 832, Moore.) Canady is not sure from where Alston got the blank sheet, although he signed it rather than the Wake Tech form (6:1084-1085), as did Harris (4:695), and Moore (4:695, 831, 839-840). Batts recalls that Alston "put" the paper on the table. (7:1555.) Confirming the instruction, at least as to the part about getting paid, and that she had walked away to get the paper, Alston testified that she took a sheet from a legal pad and "laid" it on the table. (6:1201-1202, 1267.) Finding that Alston gave the full instruction, I also find that Alston, as a product of her humiliation, and angered at Harris, "slapped" the sheet of paper on the table with enough force that some noise was generated. "Slammed" appears to be an overly dramatic characterization because it implies a full arc motion of the arm. But it would not require a lot of force to "slap" the sheet of paper on the table, with a resulting "thump" or banging noise. Consistent with all the testimony, I find that Alston "slapped" the paper on the table, and that a moderate "bang" noise resulted. Alston was mad.

Harris concedes that she talks in a loud voice (4:755), and she admits that she did not want to be there that morning (4:755). Of course, as the training began at 7 a.m. on one of her days off, it is understandable that Harris, and others, might have been rather frustrated. However, the others controlled their frustration, and Harris testified that she is the only 1 of the some 60 employees who said that she was not going to fill out the form. (4:759.) Although there is testimony that some of the others at the table made a similar remark, I find that, if anyone other than Harris said it, he or she spoke so quietly that no one

away from the table could hear it. Indeed, as Harris testified, not even she heard it.

There also is disputed evidence that Harris and her tablemates were disruptive during Farmer's presentation after Alston had left. Harris admits that, during Farmer's presentation, she read a newspaper at the table for as much as 5 to 10 minutes. (4:698, 762.) I need not reach this matter because, as will be clear shortly, any such disruptive conduct was not relied on as a ground for the discharge.

c. The decision to discharge Mary K. Harris

(1) Harris' work and attendance record

Mary K. Harris began work at Naomi on May 4, 1988, in the knitting department. (GCX 34; 4:680.) She was fired some 6-1/2 years later on December 8, 1994. For much of Harris' tenure at Naomi, her supervisor was William Batts, with Geraldine Hinnant her supervisor for part of the time. Under both supervisors, Harris received good performance evaluations, with the reviews remarking, through January 1993, that her work and attitude were "good." (GCXs 34-41.) For his reviews of January 1, 1994 (GCX 43), and October 2, 1994 (GCX 44), Batts checked no boxes and entered no comments other than that Harris' pay was being increased per the "Company Increase."

Besides being a good worker, Harris had a near perfect attendance record, missing only 3 or 4 days when she suffered a miscarriage. (4:687.) Although, as summarized shortly, Alston and Plant Manager Hartman reportedly did not check Harris' records when deciding to discharge her, at trial Alston agreed that Harris was a very competent worker (6:1211), and Hartman testified that, in his 23 years' in the textile industry (7:1374), Harris' record of not one unexcused absence in her 6-1/2 years' employment at Naomi is so unusual that he could not think of another person with a similar achievement. (7:1375-1376.) All this is in the face of Naomi's admitted problem of a high rate of employee turnover. (6:1256, Alston.) In addition to the problem of a high rate of turnover, Naomi was plagued by poor attendance. As discussed earlier, attendance was so poor that the Design Team was able, temporarily, to persuade Naomi to grant an attendance bonus. Not even that incentive worked. Attendance was so bad in the fall of 1994 that, as the Design Team's minutes of October 5, 1994 (GCX 18p), reflect, CEO Gottdiener threatened to downsize the plant if attendance did not improve by mid-December.

Harris also had a clean employment record, it being undisputed, with one qualification, that she had never been given as much as an oral warning, much less any stronger discipline. The single qualification involves Supervisor Batts' testimony that, at a shift meeting Batts conducted about a month before Harris was terminated, Harris apparently complained that she was having to keep yarn on her machine while some of the trainees, because of their inexperience, were allowed to get by without keeping yarn on their machines. Apparently not responding at that point to Harris' gripe, which Batts describes as being "pretty loud," Batts explained the trainees' situation to Harris after the meeting. In so explaining, Batts asked Harris to come to him privately on any future disagreements, and Harris agreed. Batts asserts that, on this early November 1994 occasion, Harris was not nearly as "blunt" as she was in the December 6 safety training. Batts did not consider the early November incident to be insubordination, he did not inform his superiors about it, and he issued no warning on the matter. (7:1567-1568, 1587.) Although Harris correctly denies receiv-

¹⁰ I recall the word being "sassy" rather than the rendering of "snappy" at 6:1179:23. So long as "snappy" is understood as used with the connotation of sassy, I need not correct the record.

ing any warning on the matter (4:752–753), it is not clear that she denies the incident and Batts’ informal counseling or request. In any event, I credit Batts as to this incident. Turn now to the events following the December 6 safety meeting.

(2) The testimony

While the December 6, 1994 training session was in progress, Alston called the payroll section to obtain clarification on what was needed for the attendees to be paid. Receiving that answer (not specified, 6:1232, but apparently payroll said the employees needed to punch their timecards, 5:1022; 6:1202), Alston walked back into the breakroom as the training session ended, verified that all the attendees had punched in, and reminded them to punch their timecards on leaving. (6:1269.) That done, Alston then threw away the sheet of paper (so far as Alston recalls, only Harris signed the blank sheet, 6:1203–1204, 1233–1234), because she had learned that everyone had clocked in and she would not need to submit the sheet of paper to payroll. (6:1202, 1232, 1269.)

At this point, as the group was leaving, Alston went to Farmer and apologized for Harris’ “I’m not going to” statement. Farmer told her not to worry about it, although, he said, he had never before experienced anything like that. (6:1264, 1266–1267, 1278.) Farmer recalls Alston’s apology, but his testimony is not item—specific as to which statement she specified. (5:1014, 1027.) Recall Farmer’s testimony that Harris made her “I’m not going to” comment to him. (5:1011.)

After apologizing to Farmer, Alston testified, Alston went to Plant Manager Hartman. She reported Harris’ “I am not going to” comment, and described the circumstances, including, assertedly, that it had been made “to me.” “That’s insubordination,” Hartman said, asking if that was not grounds for termination. Alston said yes. Hartman said he recognized the name, but could not place the individual. Alston then left Hartman and, apparently going to her own office, proceeded to contact Supervisor Batts. (6:1271–1272.)

Hartman testified that, following the safety meeting, Alston came to his office and, saying that “We have a problem” (7:1614), reported the incident. Alston told Hartman that, after Alston had distributed the Wake Tech forms, Harris, in a loud voice, an angry tone, and a disruptive manner, stated that she was not going to fill out the forms, and that she did not want to be there anyway. Alston asked what Hartman thought, and Hartman replied, “That’s insubordination.” Alston agreed. (7:1380, 1602, 1608, 1613–1615.) At no point in Hartman’s testimonial recitation does he include Alston’s “to me” aspect.

Hartman testified that he made the decision to discharge Harris, and that it was based solely on Alston’s report. (7:1378, 1602–1603.) Hartman acknowledges that he did not first review Harris’ file (7:1374), made no attempt to ascertain how long she had been employed at Naomi (7:1374), did not obtain Harris’ version before his decision (7:1381), did not have a full investigation (7:1384), and did not review Naomi’s policy on discipline (RX 11; 7:1385–1386), because none of this, even a near perfect attendance record, would have made any difference because of the nature of the conduct. (7:1376, 1378–1379.) As Hartman explains, “She compromised me, she compromised the Company. She took an action that had to be acted on, and I felt like that was the only action that could be taken.” (7:1378.)

“I discharged her because of the nature of the incident,” Hartman asserts. (7:1385.) As Hartman further explains (7:1377–1378):

Being insubordinate is one thing, but being insubordinate in front of witnesses and other employees is entirely something else. If management does not react swiftly and decisively, we’ve lost all credibility. What is unique to Mary Harris’ case is not what she did, but it’s in the presence of the people that she did it in front of.

And (7:1380):

It was reported to be by Barbara Alston, the incidents that have already been testified to here [Hartman assisted at counsel table (1:19–20)], that Mary Harris, very angrily and very loudly refused to sign the paper work, whatever that was, I never saw it so I don’t know, that was given to her, it came from Wake Tech, to verify that they were taking this course to bring us in compliance with OSHA.

Had Mary Harris have asked Barbara to see her in her office or got off of that floor and discussed this with her, it would have been a totally different scenario. I mean, it’s just—it’s the nature of the incident.

JUDGE LINTON: And this is what you based your decision on?

THE WITNESS: Yes, sir.

And again (7:1602):

Just by the manner in which it was done, I don’t think we have any recourse but termination, because if you allow an employee in front of a host of witnesses to make a statement that emphatic, then what’s your recourse. I mean, you lose all credibility if you don’t take that action. I mean it’s policy anyway, but had it been another setting, it would have been entirely different, at least in my mind.

Finally (7:1614):

I think the biggest problem she [Alston] had with it, [was] that it really embarrassed her that it happened in front of Bernie Farmer, who is not an employee, but an outside consultant, if you will, coming in to teach this safety class.

Hartman made the discharge decision on the spot, while Alston was in his office. (7:1608, Hartman.) Later that day he spoke with Farmer and then with Batts. Hartman does not recall whether Farmer said whether Harris had made her remark to him or to Alston. (7:1608.)

After leaving Hartman’s office, Alston spoke with Batts. Alston does not recall whether they conferred in person, whether he called her from his home, or whether she called him. In any event, they discussed the situation. Batts called Harris’ conduct insubordination, and said, “We have to terminate her. You know, based on the policy.” They agreed that Harris should be terminated “because of insubordination.” (6:1204–1205, 1272–1273.) The decision, according to Alston, was by three persons: Hartman, Alston, and Batts. (6:1209, 1237.) Alston told Batts to prepare the discharge paper and to meet with Harris when Harris returned to work December 8. (6:1273.)

Supervisor Batts testified that, after he and the others left the safety meeting, Alston called him at home that day. Alston, Batts testified, said that she had talked with Hartman and that they had decided “it was insubordination so Mary Kay [Harris] was to be terminated whenever our shift came back on,” and to tell Harris “what she was being terminated for.” Batts testified that he agrees that it was insubordination (7:1557, 1587–1588),

and that Alston told him to state, on the termination slip, the discharge ground as “Insubordination, failure to participate in the safety training program.” (7:1586.)

When Alston arrived for work the morning of December 8, 1994, Batts brought her the termination form for Harris. Initially, Alston testified that this was before Harris had arrived for work. (6:1239.) Later Alston testified that it was after Harris had been terminated. (6:1274.) The latter appears to have been the more likely sequence because Alston there testified that Batts told her he had talked with Harris and that she would be coming in at 9:30 a.m. to see Alston. Alston took the form, added a comment in the comment section, signed the form, and submitted it for the next signature, that of Hartman. (6:1238–1239, 1274.) Actually, as we see in a moment, the next signature on the form is that of the controller, Steve Fowler.

(3) The termination form

Alston testified that, under Naomi’s procedure, the supervisor normally completes the termination form, and Batts filled out the form (GCX 76) for Harris. (6:1210.) Under the name of “Naomi Knitting Mills,” the form is entitled “Personnel Action Form.” It shows the name of Harris and that it was prepared on December 8, 1994, by Bill Batts. (GCX 76.) The action box checked is that for “Discharge.” Under reason for action, Batts wrote (7:1559–1560), “Terminated, Insubordination.” In the space for “Supervisors Comments,” Batts, as instructed, wrote, “Failure to participate in Safety Training Program.” (7:1559, 1586.) At the bottom left, Batts, it appears, filled in blanks stating that “This termination was discussed on: 12–8–94,” and signed his name. All else, Batts testified, was filled in by someone else. (7:1559–1560.) That includes a check mark by “Poor Attitude or Bad Morale?” which Batts attributes to Alston (7:1560), but which Alston attributes to Batts (6:1284).

Under the “Failure to participate” comment, inscribed by Batts as instructed, appears a second notation:

Decline[d] to complete paper work (1) form all employees was [were] asked to fill out.

Alston testified that she added the foregoing comment when Batts brought her the form. (6:1210–1211, 1283.)

There is a block for the employee’s comments, but nothing appears there except a notation by the payroll clerk. (6:1211.) In the space for the employee’s signature, nothing appears.

Aside from the signatures of Batts and (6:1210) Alston, there appears, as Alston stated (6:1239), Hartman’s signature. But there is also one other signature—that of the “Controller S. Fowler.” (GCX 76.)

Alston was questioned extensively about the “Declined to complete” comment which she added, and the reason for Harris’ discharge. Alston seemingly has some difficulty articulating the discharge ground, both on paper and at trial. Alston testified, first as a FRE 611(c) witness (6:1094, 1177) and then (6:1256) as Naomi’s witness, that the only reason for Harris’ discharge was her comment and because it was insubordination (6:1205); that the failure to sign a [Wake Tech] form had nothing to do with the discharge (6:1229–1230), and that “The comment that Ms. Harris made to me, which was insubordination, is what actually caused her discharge.” (6:1230.) Alston added her own “Declined” comment on the discharge paper because Harris’ refusal “was showing insubordination.” (6:1230.) Thus, when Harris said she was not going to fill out the form, “that is refusing to fill the form out.” (6:1231.) Harris’ comment constituted the only insubordination. (6:1231.)

The fullest expression in Alston’s own words comes when the Union’s attorney, on a revisit of the Harris discharge, asks (6:1244):

Q. So, what was her act of insubordination?

A. When she made the statement “I am not going to fill the form out. I don’t want to be here anyway.” The way she said it, the refusal to fill the form out, that was the insubordination.

Q. The way she said it, is that what you’re saying?

A. That, and refusing to follow through with my assignment. I mean, she was not asked to do anything that anybody else in that group, or any of the other meetings we had. All of them were asked to do the same thing.

Q. All right, and a lot of other people did not do the same thing?

A. I cannot answer that. I don’t know.

At the end of her testimony, Alston was asked why she had not written, on the discharge form, anything about Harris’ having been “rude” or speaking in an “angry” tone. “You don’t mention anything that you’ve described here as to what seemingly really shocked you.” Other than observing that the form does state “insubordination” and is marked for poor attitude, Alston answered, “I don’t know.” (6:1283–1284.)

Alston concedes that she never checked to see whether anyone else had failed to fill out the Wake Tech forms. (6:1231.) Although Alston testified (6:1178–1179, 1268–1269, 1281–1282) that the Wake Tech forms were needed to prove to Wake Tech, apparently the recipient of at least a partial government funding of the program, that the employees actually had attended, and supposedly told the attendees this (although she did not report in her pretrial affidavit that she told the attendees of the state funding and proof requirement, but only that the forms were needed for pay purposes and for any future school registration, 6:1276–1277), Alston never explains how the employees’ punching of their timecards would satisfy this proof. Of course, her testimony can be interpreted to mean that the only person she knew of who had signed the blank sheet, rather than the Wake Tech form, was Harris. In any event, guest instructor Farmer credibly testified that, at the close of the December 6 training session, Alston gave him a list containing the names and social security numbers of all the attendees. (5:1027.)

Alston acknowledges that she did not review Harris’ file or investigate the incident because Harris’ conduct was insubordination, and Naomi’s policy at the time stated that the penalty for insubordination was automatic discharge. (6:1235–1236, 1243.) Naomi’s written policy, effective at the time, in fact did specify discharge on the first offense of insubordination. (RX 11 at 8, par. 22.13.)

d. Mary K. Harris is fired

Early the morning of December 8, Supervisor Batts pulled Harris’ timecard. When Harris arrived, accompanied by her mother, employee Mary Moore, Batts motioned for them to come into his office. In the office, Batts testified, Batts told Harris that she was being terminated for insubordination by what she had said in the breakroom about refusing to fill out the form as requested, and that Human Resources had instructed him to terminate her when she reported to work. Observing that Harris appeared shocked, Batts said he hated to do it, that he hated to see anyone lose her job. He told Harris that if she

had any questions she could call Alston after 8 a.m. (7:1557–1558.)

Harris testified that, when Batts said that they were “going to have to let you go,” she asked him, “For what? Because of what I said in the meeting?” Harris protested that she had not cursed or refused to do anything. “I know,” Batts replied, but “it’s just out of my hands.” He told her she could return between 9:30 and 10 a.m. and speak with Alston. Batts added, “You’re going to have to think before you talk.” She asked what she was being fired for, and Batts replied, “Insubordination.” (4:701–702.) Moore’s testimony is consistent with that of Harris, except Moore first admits and then denies that Batts said Harris was being fired for insubordination. (4:832–834, 843–844.)

On her way out of the plant, Harris was able to speak with CEO Gottdiener, who apparently was at the plant that day. Harris told him of the matter, and said that had she known the paper related to her job she would have signed it. When Gottdiener asked if the paper did so relate, Harris said no. Gottdiener said he would hear Alston’s side, put the two sides together, and make some progress. (4:702–703.)

Later that morning in Alston’s office, Harris testified, Alston confirmed that Harris had been discharged. When Harris asked why, Alston reached into her desk drawer and, pulling out a Wake Tech form and holding it up said, “You refused to sign it.” “No,” Harris replied, “I didn’t refuse to sign the Wake Tech form, Barbara. You told us that those who didn’t want to sign the Wake Tech form to sign a blank piece of paper to get paid.” “Oh, yes. You refused to sign the paper,” Alston responded. “No, I didn’t,” said Harris. (4:704.) Harris said she could prove that two others at her table did not sign the Wake Tech form, but Alston said she was sure Harris was the only one who had not signed. Harris said her mother was one of the two who would verify that they had not signed it. (4:703–705.)

Mary Moore, Harris’ mother, was summoned and told Alston that she had not signed the Wake Tech form. Alston said she was sure Moore had signed it, and would have Wake Tech return the form so Moore could identify it. To Moore’s question what had happened to the blank sheet she had signed, Alston said she had thrown that away because everyone had punched their timecards. After Moore left, the meeting ended with Harris saying that she would have signed the Wake Tech form had she known it had anything to do with her job. Alston said she would call Harris that afternoon after she, Batts, and Hartman met to determine whether Harris was to be rehired. If Harris would be rehired, it would be without loss of seniority, Alston assured. (4:705–709, 764, Harris; 4:835, 841–842, Moore.) After this meeting, Moore testified, Alston never contacted her about receiving Moore’s form back from Wake Tech. (4:835–836, 842.)

Alston’s version is that she affirmed that Harris had been terminated for insubordination. Harris then “proceeded to talk about, you know, why it was not insubordination. She didn’t do this, she didn’t do that, but I just didn’t discuss it any further, because, you know, I had just said yes, it was insubordination, you know, which warrants termination, and that was it.” (6:1274.) Alston confirms that both Harris and Moore said that Moore had not signed the Wake Tech form, but denies telling Moore that she would check with Wake Tech. Alston asserts that she simply did not respond. Alston does not remember calling Wake Tech to ask about Moore’s form. (6:1216–1217, 1228.) In fact, Alston testified that she did not investigate into

whether Moore had signed the Wake Tech form (6:1229), or into whether anyone had failed to sign it (6:1231). According to Alston, Harris asked whether Alston would reconsider the termination decision. Because of a need to keep policy consistent respecting insubordination, Alston told Harris, the decision could not be reconsidered. (6:1274–1275.) Alston does not remember Harris’ saying that she would have signed the Wake Tech form had she known it related to her job. (6:1237–1239.) As with the absence of any review of Harris’ file and record (because the offense was insubordination) before the discharge decision (6:1235), neither did Alston do any such review after the December 8 meeting with Harris (6:1239).

Alston admits that Gottdiener asked her what had happened respecting the Harris matter, but she does not recall when that was or whether he was at the plant on December 8. (6:1278–1279.) [Although I sustained Naomi’s objection to the Union’s going further into this area on the ground that it exceeded Naomi’s direct examination, 6:1279, there was no motion to strike the foregoing, and I therefore consider that evidence.]

Harris concedes that neither Batts nor Alston mentioned the Union during their meetings with her, nor did she. (4:756.)

e. Disparity evidence

The General Counsel and the Union cite evidence that Naomi’s previous discharges of employees for insubordination involved refusals of direct orders to perform some task. The Union even argues (Br. 29) that “there have been no previous cases of discharge for making ‘snotty’ or ‘rude’ comments.” The Union conveniently ignores the absence of any evidence of a previous case involving “snotty” or “rude” comments to a supervisor or manager in a room full of employees and in the presence of a guest instructor.

As quoted earlier, Plant Manager Hartman testimonially explained the obvious—Harris’ conduct falls into a different category of insubordination from that of refusing to comply with an order. (Alston classifies Harris’ conduct as the refusal of a direct order by Alston to fill out the Wake Tech form. 6:1236.) Under the argument of the General Counsel and the Union, an employee, on receiving an order, could freely spit on the boss’ desk, so long as the employee obeyed the order. This disparity argument is without merit.

The Union also observes that employees Mary Moore and Adam Canady were not disciplined even though neither filled out a Wake Tech form, and even though they missed several subsequent safety meetings. That they missed subsequent meetings without being disciplined only remotely bears on the issues here. As to the first matter, Alston claims not to have been aware that anyone other than Harris signed the blank sheet. This is one of the issues to be considered when I discuss the overall credibility.

B. Analysis and Conclusions

1. The General Counsel’s prima facie case

a. Knowledge

When the Naomi plant received its copy of the November 30, 1994 amended consolidated complaint (GCX 1y) containing, for the first time, a request for a bargaining order, the service sheet (GCX 1z) shows that the plant copy was addressed to “Controller & Personnel Manager” Steve Fowler—the same Steve Fowler, I find, who signed Harris’ discharge notice (GCX 76).

Recall that when Union Representatives Burnett and Skinner visited the Naomi plant on August 26, 1993, Plant Manager Miller, the same day, notified Vice President Lundblad who, in turn, informed CEO Gottdiener. I infer that this same pattern was followed in November 1994 when Naomi learned of rumors that the Union was “in” the plant and Naomi posted a notice reassuring employees that such was not true. That is, I find that Plant Manager Hartman immediately notified Lundblad of the rumors and that Lundblad forthwith informed Gottdiener.

Once the November 1994 alarm bells had rung along management’s chain of command, some limited interrogation began by Alston and Frank Carter, as I have found. Although I dismiss the November interrogation allegation (of Deborah Baines) respecting Alston and Carter, the point here is that Naomi was seeking information.

Based on the foregoing events, it is reasonable that I infer, as I do, that Naomi’s top management asked the logical question of who might be involved. As I noted at the beginning of this decision, “Round up the usual suspects” (figuratively, that is) would have been the directive. Of course, as Hartman and Alston had been installed in their respective positions following the election, some of the task of compiling the list would have fallen on Vice President Lundblad, because he was at the preelection conference and saw the Union’s observers. It requires no speculation to recognize that the first names on any such list of “suspects” would have been the Union’s three observers, with the first-shift observer’s name heading the list. So whose name would have been at the top of management’s list of “suspects” in this mental roundup? None other than that of Mary K. Harris.

With this likely chain of events, and with Supervisor Batts, as I have found, having personal knowledge, it will not do for Plant Manager Hartman and Human Resource Manager Alston to claim that each was unaware of Harris’ past union activities. Not only do I find that they were aware, I also find that they, along with top management, knew that Harris was one of the employees most likely involved in any resurgent union activity. During the period of rumors, Naomi did not interrogate Harris about the Union, and there is no evidence it sought to create an artificial basis to get rid of her. But those are matters to be considered below when I discuss whether Naomi acted unlawfully against Harris on December 8, 1994. It is enough that I find, at this point, that, as of December 6, 1994, all of Naomi’s managers, including Hartman and Alston, were aware of Mary K. Harris’ prior union activities, and that she was at the top of the list of employees most likely involved in the November 1994 resurgent union activity.

b. Causal connection

(1) Introduction

For the Government to establish a prima facie violation of Section 8(a)(3) of the Act, the General Counsel must first show knowledge (which I have found) and, second, a causal connection between that knowledge and the discipline imposed. That is, an unlawful motive must prima facie be established. Frequently, animus is found as an indicium of the unlawful motive, but there is no evidence here of animus toward either the Union or, more particularly, against Harris.

Timing, a frequently misapplied factor, is argued here by the General Counsel and the Union. Timing is a factor favoring the General Counsel when, following news of recent union (or

other protected) activity, discipline is imposed over a stale infraction. When discipline is imposed immediately following the alleged infraction (as here), and any protected activity is older than the alleged infraction (as here), then timing favors the respondent unless an unlawful motive otherwise appears. As it is written, “timing” is not the witches’ general incantation from Macbeth.¹¹ *Lovejoy Industries*, 309 NLRB 1085, 1146 (1992), enfd. except remanded on different point 26 F.3d 162 (D.C. Cir. 1994).

Also frequently, pretext (advancing a false reason, hammering a minor infraction, or inconsistent or shifting reasons advanced) appears as an indicium of unlawful motivation, as does disparity of treatment, and the General Counsel and the Union argue these two indicia. That leads to the need to determine what happened at the December 6, 1994 safety meeting. Making that determination requires resolving credibility.

(2) Credibility

(a) The safety meeting

What really happened at the December 6, 1994 safety training session? It is just possible that no one knows all the details. Of all the witnesses, Bernie Farmer appears to have the least personal interest in the outcome of this case. With a background of many years in industry, Farmer now serves as a consulting instructor. He appears to be about 67 and, with his gray hair and distinguished look, I am reminded by the inspired writer that a life of discipline will lead to “wisdom with graying hair.” (Sir. 6:18.) But more than wisdom, what is needed from the witnesses are the facts.

There is some question whether Farmer is correct when he names Harris as the person being disruptive. He knows her name only because, several days after the December 6 training session, Alston told him that the person causing the disruption had been fired and that her name was Harris. (5:1014.) As Farmer and Alston have no meeting of the minds on the main incident itself (each claiming a very similar incident with Harris), I have serious doubt whether they are speaking of the same person. After all, at trial Farmer was never asked to point out which person (whether in the hearing room or in the hallway outside) was the disruptive person of December 6.

If Farmer and Alston were describing the same incident, then they apparently did not see each other and each thought that Harris was speaking to him/her. Although that is a remote possibility, at trial Naomi did not advocate that position. Given the fact that Harris (and her supporting witnesses) and Alston (and Batts) seem to agree on a common incident, but with different versions, I find that Bernie Farmer’s description lacks sufficient evidentiary support linking his incident to Harris. In this connection, I credit Harris that Farmer never came to her table. (4:738.)

[Before leaving Farmer, I must express disappointment that Naomi’s counsel, on brief, cited Farmer’s testimony as supporting that of Alston, without at least acknowledging the apparent conflict, even it counsel did not offer a suggested resolution. For example, at brief page 52 Naomi, after quoting Harris’ “I’m not going to” statement, cites, in addition to Harris, Farmer (5:1010–1012) and Alston (6:1264), as if Farmer and Alston are describing the same incident. Perhaps they are, but each has a very different perspective, and that critical difference should

¹¹ “Double, double toil and trouble; Fire burn and cauldron bubble.” Macbeth, IV, 1, 10.

have been acknowledged even if counsel could not offer a resolution. A reading of Farmer's testimony shows that the exchange was between Harris and "Me." (5:1011.) Alston's cited testimony (6:1264) merely describes the same quoted statement of Harris. It is elsewhere in Alston's testimony (and not cited in Naomi's brief) that Alston asserts that, when Harris made her quoted statement, Harris made it to "me" (6:1179, 1181), "directly to me" (6:1186, 1187), "directed to me" (6:1187), and that Harris was looking "directly at me" (6:1205, 1268). Granted, all but one of Alston's "to me" references came while she was a FRE 611(c) witness for the General Counsel, and with the last reference (6:1268) not in answer to a question asked by Naomi. But it is immaterial who asked the questions. The material point is that it is counsel who wrote Naomi's brief and cite Farmer as if he fully supports the version of Alston.]

[Again, at brief page 61, Naomi merges the apparently conflicting versions, without acknowledging the major difference, by arguing that Farmer (at the same pages of 5:1010–1012) "corroborated" Harris' rude and loud refusal statement. The only aspect corroborated by Farmer is the quoted statement, and he claims that was made to him, not to Alston, and we cannot be sure that it was our Harris who made the statement to Farmer. It is misleading for counsel to cite Farmer's "corroboration" without acknowledging the questions adhering to Farmer's version. Farmer also testified that the incident occurred while he was passing out the forms in the bottom half of the room, that Alston distributed forms in the top half (5:1009–1010), that he did not hear or see any exchange between Harris and Alston, and did not see Alston bring out a blank piece of paper for the attendees to sign (5:1022–1023). Thus, Farmer did not even hear Harris' admitted question, "Barbara, do we have to fill out," which question Harris admits was asked in a loud voice (and, initial version, an "angry way," 4:693). The duty of candor required that counsel acknowledge the very limited nature of Farmer's so-called corroboration, even if counsel did not offer a suggested resolution. I am disappointed.]

Because Barbara Alston no longer is employed by Naomi, and works elsewhere, she would not appear to labor under any perception of pressure to conform her testimony to suit the perceived needs of Naomi. Thus, Alston's personal interest apparently is limited to a natural desire to see her previous actions and professional reputation cleared of any suspicion of wrongdoing.

The witnesses having the strongest money interest are Mary K. Harris and Supervisor Batts. Because Batts remains employed by Naomi, there would be a natural tendency for him to be concerned that his testimony please Naomi—his employer and source of his livelihood. Harris, of course, stands to obtain an offer of reinstatement plus backpay. (Harris was unemployed as of the date of her testimony.) But I see no more pecuniary interest for her than for Batts.

Aside from generalities about possible perceived pressures and about financial interests, the more important considerations are the facts and the demeanor of the witnesses. Mary K. Harris was very candid. She acknowledges much which hurts her. (I do not overlook the testimony of Moore, Downey, and Canady, but their testimony, as a whole, adds only limited support for Harris.) I credit Harris to a substantial extent, but not on some key points.

Although projecting a surface sincerity, Barbara Alston's version of events suffers to some extent from her failure to include the "directly to me" aspect (about Harris' statement) in

her pretrial affidavit. I am persuaded that such omission was not from mere oversight, as omissions frequently are, particularly where the witness is not asked a direct question on the point. Moreover, I consider her overall credibility when determining what happened on December 6. Finally, I credit Harris and Mary Moore over Alston concerning their descriptions of the December 8 meeting in Alston's office. Alston tends to describe events in generalities, whereas Harris usually is more specific and usually gives more details.

With that background, I find that Alston embellished her version of the December 6 event by adding at trial the "directly to me" concept. Thus, I find that, in the report she made to Hartman, Alston did not tell Hartman that Harris had made her remark while looking directly at Alston. Neither did Alston report that Harris had made her statement "to me," although, I find, that is what Alston considered it. Crediting Harris, I find that Harris made her "I'm not going to" statement while generally facing her tablemates. However, partially crediting Alston and Batts, I find that Harris made her remark in a loud, angry, and rude tone, that Alston was standing near the end of the Harris table, that Harris, while not looking directly at Alston, was aware that Alston was standing near the end of her table, and that she knew that Alston would hear her remark. I further find that Alston (thinking that visiting instructor Farmer and most of the class heard the remark, made in the very near presence of Alston) viewed the statement as made for her benefit, that she was embarrassed and humiliated, and that Batts, who heard the remark, observed that Alston facially showed her embarrassment and humiliation. Finally, I find that Hartman viewed Harris' refusal statement as a public act of insubordination toward Alston.

There is no dispute about the second incident, that being when Harris turned, raised her hand, and, admittedly facing and addressing Alston in a loud, frustrated (and, as initially stated, an angry) tone, asked, "Barbara, do we have to fill out these forms?" As earlier noted, Alston said, "No," obtained a sheet of paper, and showing that she was greatly provoked, slapped the sheet down in front of Harris with a bang. Harris had embarrassed, humiliated, and angered Alston.

(b) The discharge decision

The parties and I have devoted great attention to Alston's testimony, including much focus on the statements in the discharge paper (GCX 76), and that is understandable given Alston's version that she and Hartman, with Batts later joining, decided on discharge because of insubordination. An important point here, however, is that Plant Manager Hartman testified at several points (cited earlier) that he made the decision to discharge (at 7:1613 he terms it a "recommendation" in which Alston concurred). Leaving aside for the moment whether union considerations were involved (Hartman denies that they were, 7:1616), Hartman asserts that his decision, made on the spot (7:1608), was based solely on Alston's report to him. (7:1378, 1380, 1602–1603.) As I have summarized, that report described only the "I am not going to" refusal. (6:1271, Alston; 7:1380, 1601–1603, 1608, Hartman). That is, Alston did not describe the second incident, that being Harris' loud and angry question on whether employees had to fill out the form. Regardless of how much the second incident added to Alston's embarrassment and anger, that episode was not part of her report to Hartman, and it was not part of Hartman's decision to discharge Harris. Accordingly, I shall not address it further.

Crediting Hartman, as I do, concerning the decision process, I also credit Supervisor Batts that Alston called him at home, told him the decision to discharge had been made, and instructed him to prepare the necessary paperwork. Batts did so, and fired Harris the morning of December 8.

As part of my crediting Harris and Moore concerning the December 8 meeting with Alston, I find that Alston spoke of an afternoon meeting with Hartman and Batts to discuss whether Harris would be rehired. What happened, I find, is that CEO Gottdiener, as he told Harris, in fact did get involved to a limited extent. Recall Hartman's testimony that, after his decision, he called Batts and Farmer. On the surface it seems strange that he would call them after his decision. Strange, that is, until we review the sequence of events. Hartman made his decision on December 6. On December 8, after Batts had fired her, Harris spoke with CEO Gottdiener who told her that he would speak with Alston. Gottdiener, I find, convened a meeting with Hartman and Alston on December 8 and, learning that Hartman had made his decision solely on Alston's report, suggested that Hartman talk to Batts and to Farmer. That, I find, is what happened, and it explains why Hartman conferred with them on the matter after his decision.

Batts apparently confirmed Alston's report to Hartman, but Farmer, as we have seen, would have done so only to a limited extent (he heard the words, but everything else is different). I do not credit Hartman's testimony (7:1608) that he does not remember whether Farmer told him that Harris' remark was directed toward Alston or to him. I find that Farmer reported the incident just as he described it at trial, including the fact that the remark had been made to him.

However mystified Hartman may have been after speaking with Farmer on December 8, it is clear, and I find, that Hartman decided that an important portion (Harris' statement) of Farmer's version matched Alston's. Hartman so reported to Gottdiener, I find, and reaffirmed his decision to Gottdiener. CEO Gottdiener then approved the decision notwithstanding the fact that Mary K. Harris, except for this one incident, had been a good worker with a near perfect attendance record (and in fact no unexcused absences in her entire 6-1/2 years with Naomi). Thus, Naomi's management, all the way to CEO Gottdiener, was willing to sacrifice this good worker, with her superb attendance record (at a time when Gottdiener was threatening to downgrade the plant if attendance did not improve), in order to soothe management's wounded dignity in the face of one insubordinate incident.¹²

Recall also Hartman's testimony that the public nature of the insubordination required swift and decisive action or management would lose its credibility, and that "What is unique to Mary Harris' case is not what she did, but it's in the presence of the people that she did it in front of." (7:1377-1378.) There is no evidence that Naomi has ever tolerated similar conduct.

But what of the discharge paper? How can the foregoing fit the statements on the discharge paper? Recall that the "insubordination" is there described by two comments. The first comment (as dictated to Batts by Alston), is "Failure to participate in Safety Training Program." The second, added by Alston, reads, "Decline[d] to complete paper work (1) form all employees was [were] asked to fill out." Recall that Harris, describing

her discharge interview with Batts, reports that Batts told her that she was going to have to think before she spoke. As Alston testified at more than one point, it was Harris' comment and the way she said it that got her fired. And in making her remark of refusal (to follow a directive to fill out the form), and in the circumstances in which she made it, Harris was insubordinate. (6:1205, 1230-1231, 1244.)

That would be clear enough were it not for Alston's tendency to obscure her position. Thus, she added (6:1244), "That, and refusing to follow through with my assignment." Recall also that, when Harris came to Alston's office on December 8, Alston held up a Wake Tech form and told Harris she had not signed it (saying nothing about any loud language or that moments later on December 6 she had answered Harris' loud question about the need to sign with a "No"). What Alston means, I find, is that the refusal portion of the insubordination was fixed as of the moment Harris uttered her "I'm not going to" statement. Never mind that Alston, moments later, said Harris did not have to do so, and that Alston brought out a blank sheet of paper. Harris' refusal had already been carved in stone. The balance of the insubordination, and no doubt the really motivating part from Alston's standpoint, consisted of the public nature of the refusal and Alston's ensuing embarrassment and humiliation. (Had Harris said nothing else after her refusal statement, and had she immediately gone ahead and signed the form, Alston can be understood to mean that possibly she would have excused Harris' temporary insubordination and never have made her report to Hartman. But that is not what happened.)

But if Alston never clearly articulated the position I have just described, Hartman was never asked to correlate his trial version with the discharge paper (GCX 76) which he signed. At their own risk (whether intended or inadvertent), the parties failed to follow up with the same questions for Hartman as were asked of Alston. Why did Hartman, the real decision maker, not send the form back to Alston with instructions to prepare one corresponding more closely to the report which she had made and on which he had based his decision? Or why had he not at least added, as his own qualifying comment, that the refusal had been loud, rude, and public? Why did he just sign it and let it go? For that matter, did he even read it? And suppose Hartman had testified that in fact he was busy, and with no time to focus on the comments, he had barely glanced at the form and had just signed it. We will never know because these questions were not asked.

As I am persuaded by Hartman, I find that, to the extent he read the discharge paper, he considered the comments about "failure to participate" and "Declined to complete" as the manner of Alston or Batts, or both, in referring to the insubordination.

The General Counsel and the Union see, on the discharge paper, not a poorly articulated explanation garbling the real reason, but the original reason which was abandoned at trial with Naomi shifting its reason to the loud, angry, and rude ground. The original reason was abandoned because, Naomi discovered, others who had not signed the form had not been fired. Therefore, in order to be successful in its effort to get rid of election observer Harris, Naomi had to shift its reliance to a different and stronger ground.

The argument of the General Counsel and of the Union really assumes that Naomi wanted to get rid of Harris because of her union sentiments and to discourage others. But that assumption bumps into the factual stone wall that there is no evi-

¹² The General Counsel and the Union essentially argue "Ruckert's Law," which is, "There is nothing so small that it can't be blown out of all proportion." A. Bloch, *Murphy's Law, Book Three* 19 (1986).

dence of such a preexisting desire (or of a desire to seize on this “minor” incident as a golden opportunity to get rid of top suspect Harris). Thus, so far as the record shows, in all the months following the October 1993 election, and through the November 1994 resurgent interest in the Union, Naomi never once interrogated election observer Harris. Not once did Naomi threaten Harris. At no time did Naomi spy on Harris by peeping around corners or peering from behind machines or by following her into the restroom. No supervisor or manager ever tried to intimidate her by standing nearby and openly staring at her for lengthy periods of time. Never did Naomi assign Harris to perform new and unpleasant duties. She was not told to sweep the floor, to clean the windows or the toilets, or to lift heavy items. She was not sent on special duties outside in the winter cold or the summer heat or the heavy rain. At no time was Harris oversupervised on her regular work. Nor was she approached with promises of new benefits or promotions. Naomi simply let Harris do her good work, accepted her superb attendance, and, instead of fabricating warnings and poor performance evaluations to create a fraudulent basis to fire Harris, Naomi gave Harris good performance evaluations.

Thus it is that Harris is not in the position of Woody Guthrie’s “*Union Maid*” (1940), for Harris, who claims no harassment, certainly was not subjected to the kind implied in Guthrie’s first verse by “goons and ginks and company finks” and by “the deputy sheriffs who made the raids.” E. Fowke and J. Glazer, *Songs of Work and Protest* 17–19 (Dover Pub., 1993).¹³

The basic fact is that Harris agrees she made her refusal statement. While she disagrees that it was loud and rude and that Alston was standing near the table, I have resolved those issues in favor of Alston. Indeed, I have found that Harris knew that Alston was standing near her table. Whether Harris intended her remark for Alston’s benefit, or simply was arrogantly indifferent to whatever reaction it would produce in Alston, is immaterial. It was natural for Alston to be greatly offended, and for her to make the report she did to Hartman. Hartman’s reaction and decision was to support his manager, and there is no evidence that, in so doing, he departed from any course he had ever taken in the past.

The General Counsel and the Union argue that the penalty of discharge was too harsh. The Union, apparently mistaking this proceeding for an arbitration, would reduce Harris’ penalty to a “verbal warning.” (Br. 30.) That might well be a reasonable decision for an arbitrator. But in the absence of any previous examples of lesser penalties for a comparable event, and there is no such evidence, a Federal agency has no authority to dictate, or even to suggest, that the penalty should have been lighter in this statutory proceeding. Naomi’s decision was either lawful or unlawful. Under the statute, there is no in-between.

2. Conclusions

Although finding that, on December 6, 1994, Hartman knew who Mary K. Harris was (both her background as a union observer and her excellent work and attendance record), I find that the General Counsel has failed to establish, *prima facie*, that Naomi was unlawfully motivated when it discharged Harris on December 8, 1994.

¹³ However, nothing prevents Harris from singing the second verse from “We Will Overcome” (id. at 33–34), which concludes with the lines, “Oh, down in my heart I do believe, We will organize some day.”

Following the October 1993 election, and into December 1994, Naomi never bothered Harris. But then came the December 6, 1994 safety meeting and, unfortunately, Harris did not control her tongue.¹⁴ The evidence strongly points to that one event as the sole cause of Harris’ discharge. No pretext is shown. What could otherwise appear as shifting reasons at trial (compared to those on the discharge form) are not. No disparity of treatment is shown, because there is no evidence of a prior similar incident in which an employee, in the presence of a guest instructor and many employees, in a loud, angry, and rude refusal that she was not going to do as directed, publicly embarrassed and humiliated a supervisor or manager.

The trial testimony of Plant Manager Hartman persuasively explains why he initially made no further investigation and why Harris’ good work and near perfect attendance record were irrelevant—it was the intensely unacceptable nature of the incident. As Hartman explains (7:1377–1378), “What is unique to Mary Harris’ case is not what she did, but it’s in the presence of the people that she did it in front of.” And (7:1602), “I mean, you lose all credibility if you don’t take that action. I mean it’s policy anyway [discharge for first offense of insubordination], but had it been another setting, it would have been entirely different, at least in my mind.” The implication is that Hartman viewed Harris’ refusal remark to be insubordination, in public, toward Alston.

Finally, Harris admits that neither Alston nor Batts ever mentioned the Union to her on December 8. What Batts did tell Harris is that she needed to think before she spoke. That advice pierces to the heart of Harris’ problem here. Thus, although some aspects of the case generate confusion, nothing shows union motivation in the decision to discharge.

In short, the evidence falls substantially short of showing, *prima facie*, that Naomi was unlawfully motivated when it discharged Mary K. Harris on December 8, 1994. Accordingly, I shall dismiss the complaint (pars. 10 and 20) as to Mary K. Harris.

IV. ALLEGED VIOLATION OF SECTION 8(A)(5) AND THE REQUESTED REMEDIAL BARGAINING ORDER

A. Discussion

Complaint paragraphs 14 through 17 allege majority status by the Union from August 26, 1993, and a request, since that date, for Naomi to recognize and bargain. Naomi denies the allegations. The complaint also alleges, in conclusory paragraph 21, that, by its refusal to recognize and bargain with the Union since August 26, 1993, Naomi has violated Section 8(a)(5) of the Act.

Complaint paragraph 23 states that the unfair labor practices alleged in paragraphs 9 [the independent 8(a)(1)], 10 [the Mary K. Harris discharge], 11 [labor organization status of the Design Team and subcommittees], and 12 [unlawful domination]:

are so serious and substantial in character that the possibility of erasing the effects of these unfair labor practices and of conducting a fair [rerun] election by the use of traditional remedies is slight, and the employees’ sentiments regarding representation, having been expressed through authorization

¹⁴ As the sage Amenemope instructed about 1250 B.C., “Keep your tongue from answering your superior, and take care not to insult him.” M. Lichtheim, *Ancient Egyptian Literature* 146, 153 (1976, Univ. of Calif. Press).

cards, would, on balance, be protected better by issuance of a bargaining order than by traditional remedies alone.

Naomi denies. In short, the General Counsel and the Union seek a bargaining order based on the authority of *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).

B. Dismissed

At trial the General Counsel moved to withdraw the 8(a)(5) allegation. The Union objected, but Naomi, not surprisingly, did not object. (7:1397–1403.) I reserved ruling. (7:1403.) On brief (Br. 36–37 fn. 33) the General Counsel seeks to withdraw its trial motion. That is, the General Counsel now argues in support of an 8(a)(5) violation. Naomi makes no argument that it would be prejudiced (that is, misled into not presenting evidence or witnesses) by my permitting the General Counsel to withdraw the Government's trial motion. I now grant the General Counsel's request to withdraw from the Government's trial motion. Thus, the 8(a)(5) allegation remains part of the complaint, and I turn now to the merits of that allegation.

As noted much earlier, Naomi concedes (Br. 90–91) the issue of card majority as of August 26, 1993. However, because I have dismissed most of the 8(a)(1) allegations and the sole 8(a)(3) allegation, I find that the violations of Section 8(a)(1) found [granting the benefits of picnic tables and a larger refrigerator, and threats to withhold benefits and a scheduled pay increase], and the violation found of 8(a)(2) [domination of the Design Team], are too limited in scope and nature to justify an 8(a)(5) finding and the issuance of a bargaining order. Accordingly, I shall dismiss the complaint as to the 8(a)(5) allegations [pars. 17 and 21], and I shall deny the Government's request for a remedial bargaining order.

V. THE UNION'S ELECTION OBJECTIONS

A. Introduction

Recall that we are concerned here with Objections 1–5 and 7–8. Objections 1–5 and 7, largely coextensive with some of the 8(a)(1) allegations of the complaint, are specific. Objection 8 is an “other acts” objection. During the Region's investigation of the Union's objections, the Union presented evidence concerning three additional matters, including an allegation that Johnny Wayne Holder (whose supervisor status is disputed) surveilled union meetings on September 16 and 22, 1993. (GCX 1g.) As no evidence was presented at trial on the two “other acts,” Objection 8 now is limited to the surveillance allegation.

A salaried mechanic, Holder assumed his disputed supervisory or lead position in early July, and served in that position, plus handling his mechanic's duties 90 percent of his time (7:1522, Holder), until, as former Plant Manager Miller testified (4:944), August 16, 1993. As I noted earlier when considering the allegation of a threat by Holder on August 13, it is sufficient if the evidence establishes that during the 6-week period that Holder served in his lead or supervisor capacity, he was a statutory agent. At that time I did not reach the merits of the agency allegation. Nor will I reach it here.

I have found merit to portions of complaint paragraph 9(b) (purchase of refrigerator and picnic tables), complaint paragraph 9(e) (threats by Gottdiener and Lundblad to withhold a scheduled pay increase), and complaint paragraph 9(g) (November 9 letter threatens to withhold benefits). The first two of these findings, particularly as they show that the conduct af-

fecting the entire bargaining unit during the critical preelection period of August 26, 1993 (the date the petition was filed),¹⁵ to October 21, 1993 (the date the election was concluded),¹⁶ constitute interference with the election and require that the election results be set aside and a new election directed. (Because the November 9 letter came after the election, it does not constitute a ground for setting aside the election. *Mountaineer Bolt*, id.) Because of these findings, I need not write extensively on the surveillance allegation.

B. Alleged Surveillance

1. Facts

Beginning in early August 1993, union representatives met after work with groups of employees at Zebulon Park, a public park a mile or so from the plant. Annie White testified that there was one meeting a week until the election. The alleged surveillance is that, on leaving the plant after work, Holder, on at least three occasions, drove by the park where the employees were meeting, and that, on at least one of these occasions, turned around, and drove slowly by again before leaving.

To fit into the “critical” preelection period, any incident involving Holder must have occurred on or after August 26. Because Holder ceased being a possible agent on August 16, any surveillance by him would be too late to impute to Naomi if it occurred after August 16, and too early if it occurred before August 26. The Union does not articulate a theory on how its surveillance objection can get around this time warp. The only testimony relied on by the Union points to two specific dates in September by employee Gordon D. Driver. (2:324, 329–330.) Ruth Ann Evans is unable to say whether the two drive-bys she observed occurred before or after mid-August. (2:301.) Annie White describes three incidents, but is unable to put a time frame on any of them beyond the fact that all were before the election. (1:167–169.)

Although the evidence clearly falls short of a prima facie case in support of the surveillance objection, I nevertheless shall give a brief summary of Holder's key points. Testifying that he periodically takes the park route from the plant, Holder acknowledges seeing an employee group there on one occasion when, on leaving work, he was proceeding to a nearby car wash. (7:1524.) Holder denies (7:1535) seeing employees there on any other occasion, and he denies (7:1524) ever turning around to drive past. As it is a park area, Holder recalls that the speed limit on the street is 25 miles per hour (7:1524), and Annie White appears to concur (1:176). On August 26 Plant Manager Miller told Holder that the Union left a petition at the front, and he asked if Holder knew anything about a union. Holder said no, but “maybe that's the reason why the people was [were] in the park.” (7:1519–1520, 1536, 1539.)

2. Conclusions

I need not reach the agency matter. Assuming that the evidence, somehow, meets the threshold requirement of a prima facie case (and it does not do so because there is no evidence that Holder served as a leadperson or disputed supervisor beyond August 16 and, more in point, beyond August 26), I credit Holder that he only saw the employees on the one occasion before August 26. Even if he turned around and drove slowly back by, a matter I do not resolve, there would be no objection-

¹⁵ *Royal Laundry*, 277 NLRB 820, 822 fn. 3 (1985).

¹⁶ *Mountaineer Bolt*, 300 NLRB 667 (1990).

able conduct because there is nothing to indicate that this incident was anything more than idle curiosity. The Union chose to meet with the employees at a public park, about 100 feet off the street, about a mile from the plant, and in open view of anyone driving by. Holder did not usually go that way, but two or three times a month he did. When a union elects to hold an employee meeting in a public place, it may not complain if a supervisor, as a matter of coincidence and from curiosity (as Holder here, I find), observes what is happening. *C.P.F. Corp.*, 303 NLRB 316, 321 fn. 25 (1991). Accordingly, I shall recommend that the Board overrule the Union's Objection 8.

C. Recommendations

Based on the foregoing, I recommend that the Board overrule Objections 1, 4, 5, and 8, and that it sustain Objections 2 (threat of loss of benefits), 3 (granted benefits of picnic tables and refrigerator), and 7. Although Objection 7 alleges a promise of a COLA, the Regional Director's report (GCX 1g at 4) treats the allegation as a threat of withholding. The evidence in support of complaint paragraph 9(e) shows a threat to postpone a scheduled COLA. With these recommendations, I further recommend that the Board set aside the October 20–21, 1993 election in Case 11–RC–5954 and direct that a second election be conducted.

CONCLUSIONS OF LAW

1. By engaging in certain conduct from mid-October 1993 to November 9, 1993, constituting interference, restraint, and coercion of its employees, Respondent Naomi Knitting Plant, a Division of Andrex Industries Corporation, has violated Section 8(a)(1) of the Act.

2. By initiating, forming, assisting, and dominating the Design Team committee beginning about December 1994, and continuing thereafter, Respondent Naomi has violated Section 8(a)(2) and (1) of the Act.

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

4. Naomi has not violated Section 8(a)(1) as additionally alleged, nor Section 8(a)(3), nor Section 8(a)(5) as alleged.

5. There is an insufficient basis for granting the General Counsel's request for an order requiring Naomi to recognize and bargain with the Union.

REMEDY

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

[Recommended Order omitted from publication.]