

**Eby-Brown Company L.P. and Robert W. Burnett, Petitioner and Chauffeurs, Teamsters, Warehousemen and Helpers Local Union No. 135, a/w International Brotherhood of Teamsters, AFL-CIO**

**Eby-Brown Company L.P. and Chauffeurs, Teamsters, Warehousemen and Helpers Local Union No. 135, a/w International Brotherhood of Teamsters, AFL-CIO and Douglas A. Jones.** Cases 25-RD-1171, 25-CA-22530-1 Amended, 25-CA-22640, 25-CA-22782 Amended, 25-CA-22862-1-2 Amended, 25-CA-22885 Amended, and 25-CA-22983

May 26, 1999

DECISION, ORDER, AND DIRECTION OF  
SECOND ELECTION

BY CHAIRMAN TRUESDALE AND MEMBERS FOX  
AND HURTGEN

On July 26, 1996, Administrative Law Judge Nancy M. Sherman issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief. The General Counsel filed limited cross-exceptions with a supporting brief, 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<sup>1</sup> and has decided to affirm the judge's rulings, findings,<sup>2</sup> and conclusions<sup>3</sup> and to adopt the recommended Order as modified.<sup>4</sup>

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

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

<sup>3</sup> We agree with the judge's conclusion that the Respondent engaged in bad-faith bargaining in and after March 1994, but, in reaching this conclusion, we find it unnecessary to rely on the Respondent's statement to the Union that any agreement reached would be void if the Union lost the upcoming decertification election.

In finding that the Respondent had no right to deny off-duty employees access to its outside property, Member Hurtgen relies solely on the basis that even had the Union contractually waived employees' off-duty access rights, this waiver ceased at contract expiration. *Southwestern Steel v. NLRB*, 806 F.2d 1111, 1114 (D.C. Cir. 1986).

<sup>4</sup> The Respondent filed a motion to reopen the record to introduce evidence that it would be unduly burdensome for the Board to require it to restore, to Indianapolis, its operations as they existed in March 1994 and, further, that restoration is not necessary to effectuate the purposes of the Act. In denying this motion, we note that the Respondent is permitted, at the compliance stage of this proceeding, to introduce any evidence not available at the time of the hearing that restoring these

1. In adopting the judge's findings that the Respondent violated Section 8(a)(1) by informing employees that: (1) it had spent so much money on the decertification campaign that it had nothing left with which to bargain; and (2) employees did not have a profit-sharing or 401(k) plan because it had spent so much on arbitrations, we find that these statements also unlawfully implied that bargaining would be futile. See, e.g., *R. L. White Co.*, 262 NLRB 575, 589 (1982).

2. The judge found, and we agree, that the Respondent violated Section 8(a)(1) by informing employees who were handbilling outside the Respondent's gate on June 30, 1993, that they could not handbill on company property, by asking if they wanted their names given to the police, and by calling the police. In addition to the rationale relied on by the judge, we note that, regardless whether the employees were on or off company property when handbilling, their conduct was protected, and the Respondent's actions unlawfully chilled their Section 7 rights. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945).

3. In finding that the Respondent violated Section 8(a)(1) by disparately prohibiting employees from displaying union slogans on company-owned back belts, and Section 8(a)(3) by disciplining employees Douglas Jones, Danny Rakes, and Randy Jewell for displaying the Union's name on their belts, we find that *NLRB v. Windemuller*, 34 F.3d 384 (6th Cir. 1994), is distinguishable. In the instant case, the Respondent *discriminated* with respect to company-owned back belts. That is, the Respondent permitted the display of some markings on company-owned back belts, but it would not tolerate union markings on those belts. By contrast, in *Windemuller*, *supra*, there is no showing of such discrimination. Further, in the instant case, the Respondent did not permit the wearing of union insignia on employee-owned property (i.e., employee-owned back belts). In *Windemuller*, this conduct was permitted.

4. In adopting the judge's finding that the Respondent unlawfully withdrew recognition from the Union in about late August 1993, we do so on the basis that the Respondent was precluded from withdrawing recognition during the pendency of the decertification proceedings. *W. A. Krueger Co.*, 299 NLRB 914 (1990); *Underground Service Alert*, 315 NLRB 958 (1994). Further, although the judge did not cite the "causally related" test in *Lee Lumber & Bldg. Material Corp.*, 322 NLRB 175 (1996), *affd.* in relevant part 117 F.3d 1454 (D.C. Cir. 1997), we find that the employee disaffection from the Union was causally related to the antecedent unfair labor practices and, thus, Respondent could not rely on such disaffection as a basis for withdrawing recognition. Thus, as stated in *Pirelli Cable Corp.*, 323 NLRB 1009, 1010 (1997), the

operations would be unduly burdensome. *Q-1 Motor Express, Inc.*, 323 NLRB 767 (1997); *Lear Siegler, Inc.*, 295 NLRB 857 (1989).

Board considers the following factors when determining whether there is a causal connection between an employer's unlawful conduct and the subsequent expression of employee disaffection:

- (1) The length of time between the unfair labor practices and the withdrawal of recognition; (2) the nature of the illegal acts, including the possibility of their detrimental or lasting effect on employees; (3) any possible tendency to cause employee disaffection from the union; and (4) the effect of the unlawful conduct on employee morale, organizational activities, and membership in the union.

Here, the unfair labor practices relied on by the judge satisfy this test. Thus, throughout the months immediately preceding the withdrawal of recognition, the Respondent committed numerous 8(a)(1), (3), and (5) violations, including (as relied on by the judge): unlawfully denying off-duty employees access to its property to engage in protected concerted activity; denying the Union plant access for, among other things, grievance processing; advising employee union stewards and activists that adverse action was taken against them because of their union activity; and promising employees that company supporters would receive preferential treatment and implementing that promise through discriminatory evaluations and bonuses. We find that the cumulative effect of these violations (coupled with the other prewithdrawal violations) reasonably would cause employee disaffection from the Union such that the Respondent could not rely on the August 1993 petitions to establish good-faith doubt that the Union continued to represent a majority of unit employees.<sup>5</sup>

5. For the reasons stated by the judge, we find that the Respondent violated Section 8(a)(5) by failing to provide the Union with notice and an opportunity to bargain over its decision to transfer bargaining unit work from Indianapolis, Indiana, to its Springfield, Ohio facility during March to May 1994. Thus, we agree that the work transfer was a mandatory subject of bargaining under *Dubuque Packing Co.*, 303 NLRB 386 (1991), enfd. 1 F.3d 24 (D.C. Cir. 1993), cert. granted 511 U.S. 1016 (1994), writ dismissed 511 U.S. 1138. In this regard, we adopt the judge's findings and analysis that that the work trans-

<sup>5</sup> Although Member Hurtgen agrees with his colleagues that the Respondent unlawfully withdrew recognition from the Union, he does so on the basis of the unremedied unfair labor practices which were causally connected to the employee disaffection. *Lee Lumber*, supra. Member Hurtgen does not rely upon *Krueger*, supra. In *Krueger*, the Board majority held that where a union loses a decertification election, the employer *must* nonetheless continue bargaining with the Union until the validity of the election is proclaimed (by the certification of results). Consistent with the dissent in *Krueger*, Member Hurtgen believes that in those circumstances the employer should be privileged to withdraw recognition, assuming that the election results are ultimately certified. In any event, because the decertification election in this case—unlike *Krueger*—was not valid, Member Hurtgen finds that the *Krueger* issue is not presented.

fer did not involve a fundamental change in the nature of the Respondent's operations, that labor costs were a factor in the decision, and that the Respondent failed to establish that the Union could not have offered sufficient concessions to affect the transfer decision. With respect to the issue of labor costs, we note that when analyzing whether labor costs factor in an employer's decision to relocate unit work, the Board has interpreted labor costs broadly to include indirect as well as direct costs. See *Stroehmann Bakeries*, 318 NLRB 1069, 1078 (1995), enfd. in part 95 F.3d 218 (2d Cir. 1996); *Furniture Renters of America*, 311 NLRB 749, 751 (1993), enfd. in part 36 F.3d 1240 (3d Cir. 1994). See also *Elliott Turbomachinery Co.*, 320 NLRB 141, 156–157 (1995) (vacated pursuant to a settlement by unpublished Executive Secretary Order dated Sept. 30, 1996).

#### AMENDED REMEDY<sup>6</sup>

##### 1. Bonuses

The judge found, and we agree, that the Respondent violated Section 8(a)(3) and (1) in August 1993 by unlawfully denying bonuses, or granting reduced bonuses, to employees Donald Hall, Arnie Ray Goens, and Douglas Jones because of their union support and activities. We further agree with the judge that the Respondent simultaneously, and unlawfully, granted excessive bonuses to antiunion employees Robert Burnett, Clyde Ervin, and Mark Mayfield in order to discourage employees' union activities.<sup>7</sup>

To remedy these violations, the judge ordered the Respondent to pay all unit employees who were eligible for a bonus in August 1993 (including Goens, Jones, and Hall), the difference between their actual bonuses, if any, and the \$850 bonus the Respondent unlawfully paid Burnett. In fashioning this remedy, the judge relied on cases where the Board found that employers unlawfully granted bonuses to employees crossing union picketlines and denied similar bonuses to striking employees. In those cases, the Board required the employer to pay the bonus. *Aero-Motive Mfg.*, 195 NLRB 790 (1972), enfd. 475 F.2d 27 (6th Cir. 1973), cert. denied 414 U.S. 992; *Rubatex Corp.*, 235 NLRB 833 (1978), enfd. 601 F.2d 147 (4th Cir. 1979), cert. denied 444 U.S. 928 (1979). Thus, in *Aero-Motive*, supra, the employer was ordered to pay the same \$100 bonus to strikers that it had paid to crossover employees.

In the instant case, unlike *Aero-Motive* and *Rubatex*, the amounts of employee bonuses are not uniform. They are linked to individual performance appraisals and, therefore, vary accordingly. In these circumstances, we find that awarding all eligible employees the difference between their actual bonuses and Burnett's \$850 may

<sup>6</sup> Except as set forth below, we adopt the judge's proposed remedy.

<sup>7</sup> We further find that the Respondent's grant of excessive bonuses implemented its earlier unlawful promise to employees that company-minded workers would receive preferential treatment.

constitute a windfall as to some employees. In order to tailor the remedy more closely to the unlawful conduct, we substitute the following for the judge's remedy. First, we leave to compliance the issue of the bonuses, if any, Goens, Hall, and Jones would have received in August 1993, but for the Respondent's discrimination against them.<sup>8</sup> Second, as to the unlawful grant of inflated bonuses to Burnett, Ervin, and Mayfield, we order the Respondent to pay all eligible unit employees (including Goens, Hall, and Jones) \$353. This amount, as tabulated below, represents an average of the amounts that Ervin's, Mayfield's, and Burnett's August 1993 bonuses exceeded those which these three employees previously received in the 1992–1993 evaluation periods.<sup>9</sup>

## 2. *Gissel* bargaining order

The judge found, and we agree, that the Respondent engaged in unlawful and objectionable conduct during the critical period between the filing of the decertification petition and the election and that this conduct prevented a fair election. Rather than impose the traditional remedy of setting aside the election and ordering a second election once the Respondent had remedied its unfair labor practices, the judge recommended that the decertification petition be dismissed and that a *Gissel* bargaining order be imposed. *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 582, 610–616 (1969).<sup>10</sup> Thus, the judge con-

<sup>8</sup> As the Board recognized in *Nello Pistoresi & Son, Inc.*, 203 NLRB 905, 906 (1973), enf. denied on other grounds 500 F.2d 399 (9th Cir. 1974):

Although some difficulty may be encountered in computing the employees' losses, this is not a legitimate reason for denying them compensation. We are not required at this stage of the proceeding to decide the detailed formula to be used in determining the amounts of compensation due to the employees; the formula to be used in fixing the amount of compensation can be determined by agreement of the parties or, if necessary, in a backpay proceeding. [Footnote omitted.]

<sup>9</sup> The 1992–1993 bonuses were the only ones introduced into evidence.

<sup>10</sup> We agree with the judge that in certain decertification elections involving substantial employer misconduct, a *Gissel* order, which establishes the Employer's affirmative duty to bargain in good faith and dismisses the decertification petition, may be a more fitting remedy than an order which establishes the Employer's affirmative duty to bargain pending the results of the second decertification election. See, e.g., *Angelica Corp.*, 276 NLRB 617 fn. 2 (1985). However, based on the presence of the consent decree in this case, we conclude, as ex-

cluded that this was a "Category II" *Gissel* case because the nature of the Respondent's unlawful conduct was such that the possibility of erasing its effects by traditional means was comparatively slight. See, e.g., *Texaco, Inc. v. NLRB*, 436 F.2d 520 (7th Cir. 1971), cert. denied 409 U.S. 1008 (1972). In recommending a bargaining order, the judge relied particularly on the Respondent's persistent unlawful conduct towards Union Stewards Arnie Ray Goens and Douglas Jones, its denial of plant access to the Union and off-duty employees, its unlawful promise of preferences to company supporters,

and its statements that employees did not receive profit-sharing or 401(k) benefits because of the costs of arbitration and the decertification campaign. The judge further relied on the facts that the unlawful and objectionable conduct occurred at all levels of the Respondent's managerial hierarchy, and persisted after the decertification election. Finally, the judge found that evidence of employee turnover between the election and the hearing did not negate the propriety of a bargaining order.

Contrary to the judge, we do not find that a *Gissel* bargaining order is appropriate. After the hearing in this case, the Region petitioned the Federal District Court, Southern District of Indiana, for 10(j) injunctive relief against the Respondent.<sup>11</sup> In April 1995, the district court entered a consent decree in the 10(j) proceeding redressing many of the alleged violations. Under the decree, which remains in effect until issuance of this Decision and Order, the Respondent was ordered to cease and desist from conduct including: threatening employees because they distributed union literature; surveilling employees' union activities; ordering employees to remove union insignia; promising benefits to company supporters; interrogating employees; discriminating against employees in order to discourage union activities; unilaterally changing terms and conditions of employment; and withdrawing recognition from the Union.<sup>12</sup>

plained below, that a *Gissel* bargaining order is not required in this case.

<sup>11</sup> Civil No. 1P94-1872-C-G.

<sup>12</sup> The consent decree required the Respondent to cease and desist from:

The consent decree also affirmatively required the Respondent to: recognize and bargain in good faith with the Union as to the Indianapolis employees—including bargaining over any decision to transfer unit work from Indianapolis, and the effects of that decision; provide the Union access to its facility; and post the consent decree until issuance of this Decision and Order.

Based on the broad terms of this consent decree, which no party claims have been violated, we find that traditional remedies are sufficient to eliminate the effects of the Respondent's unfair labor practices. Accordingly, once the Respondent has remedied its unfair labor practices the Regional Director shall direct a new election.<sup>13</sup>

(1) actually or impliedly threatening employees with discipline, arrest, job loss or reduced benefits because of their union activities and support, including because they distribute union literature and materials on the Respondent's premises on non-work time in non-work areas, or post union materials on public property or attend union rallies;

(2) surveilling or implying that employee union activities are under surveillance;

(3) ordering employees to remove union insignia from their person inclusive of back belts and threatening them with discipline if they fail to do so;

(4) disparately applying a rule prohibiting employees from wearing or displaying on their person inclusive of back belts non-Respondent insignia to prohibit the display of union insignia;

(5) informing employees that it rewards employees who oppose the Union and that employees who support the Union receive lower than normal bonuses and job evaluations;

(6) prohibiting employees from distributing union literature on the Respondent's premises during non-work time in non-work areas;

(7) interrogating employees regarding their union sympathies and instructing employees to ascertain and report to the Respondent the union sympathies of other employees;

(8) disciplining, granting reduced bonuses or job evaluations, or in any other manner discriminating against employees with regard to their terms and conditions of employment to encourage or discourage employee union activities;

(9) withdrawing recognition from the Union as the exclusive collective-bargaining representative of its unit employees at the Respondent's Indianapolis, Indiana facility;

(10) failing or refusing to meet and bargain in good faith with the Union;

(11) unilaterally discontinuing or changing terms and conditions of employment, including, but not limited to, relocating unit work or the provision of the parties' most recent collective-bargaining agreement according the Union access to the Respondent's premises, without giving the Union notice and an opportunity to bargain;

(12) in any other manner failing or refusing to recognize and bargain in good-faith with the Union as the exclusive collective-bargaining representative of its unit employees;

(13) in any other manner interfering with, restraining, or coercing its employees in the exercise of their Section 7 rights or refusing to bargain in good faith with the Union[.]

<sup>13</sup> We note that, consistent with *Caterair International*, 322 NLRB 64, 65 (1996), the Respondent is obligated to bargain with the Union for a "reasonable period." Further, pursuant to *W. A. Krueger Co.*, 299 NLRB 914 (1990), the Respondent is precluded from withdrawing recognition from the Union until such time as the Union loses an election and those results have been certified. As stated, *supra*, in fn. 5, Member Hurtgen would not apply *Krueger*.

### 3. "Broad" order

In addition to the remedying the specific violations, the judge required the Respondent in the proposed Order and notice to cease and desist "in any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights under the Act." The General Counsel cross-excepts arguing that, because of the serious nature of the Respondent's violations, a "broad" order is warranted. *Western Plant Services*, 322 NLRB 183 fn. 1 (1996). We agree. Applying the principles of *Hickmott Foods*, 242 NLRB 1357 (1979), we find that the Respondent has engaged in such egregious and widespread misconduct as to demonstrate a "general disregard for the employees' statutory rights." Accordingly, we will order the Respondent to cease and desist from "in any other manner restraining employees in the exercise of their Section 7 rights."<sup>14</sup>

#### ORDER<sup>15</sup>

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Eby-Brown Company L.P., Indianapolis, Indiana, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

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

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

2. Substitute the following for paragraph 2(a) and insert 2(b) and reletter the succeeding paragraphs.

"(a) Pay each unit employee who was eligible for consideration for a bonus in August 1993, \$353 in addition to the bonus (if any) he or she received, as set forth in the amended remedy section of this Decision and Order.

"(b) Make whole Arnie Ray Goens, Douglas Jones, and Donald Hall for any bonus they were entitled to but did not receive in August 1993 because of the Respondent's unlawful conduct, as set forth in the amended remedy."

3. Substitute the following for the final (unlettered) paragraph in the Order.

"IT IS FURTHER ORDERED that the July 8, 1993 election is set aside and that Case 25-RD-1171 is remanded to the Regional Director for Region 25 for the purpose of conducting another election at such time as the Regional Director finds that the circumstances will permit employee free choice."

[Direction of Second Election omitted from publication.]

<sup>14</sup> We note that this "broad" order language is consistent with that imposed in the 10(j) proceeding.

<sup>15</sup> We have also substituted the attached notice for that proposed by the judge.

MEMBER HURTGEN, dissenting in part.

I do not agree that the decision to relocate a portion of the business from Indianapolis to Springfield was a mandatory subject of bargaining. Thus, I would dismiss the 8(a)(5) allegation pertaining to this decision.

In *First National Maintenance Corp. v. NLRB (FNM)*, 452 U.S. 666, 679 (1981), the Supreme Court set forth the following test for determining whether certain management decisions are mandatory subjects:

[I]n view of an employer's need for unencumbered decisionmaking, bargaining over management decisions that have a substantial impact on the continued availability of employment should be required only if the benefit, for labor-management relations and the collective-bargaining process, outweighs the burden placed on the conduct of the business.

In *Dubuque Packing Co.*, 303 NLRB 306 (1991), enf. 1 F.3d 24 (D.C. Cir. 1993), cert. granted 511 U.S. 1016 (1994), writ dismissed 511 U.S. 1138, the Board applied *FNM* principles, and fashioned a test for determining whether a particular relocation decision is a mandatory subject. In relevant part, that case teaches that a relocation decision would not be a mandatory subject if "labor costs" (direct or indirect) are not a factor in the decision. The reference in that case to "indirect labor costs" is particularly elusive and not susceptible to a uniform application.

In my view, "labor costs" includes the cost of wages, hours, and working conditions.<sup>1</sup> Thus, if the employer's decision is based on the high costs of these factors, the potential benefits of bargaining would outweigh the burdens on entrepreneurial freedom, and bargaining would be required. However, if the relocation decision is based on other economic considerations, the balance would tip the other way. Thus, for example, if the employer's decision was based on cheaper rental costs at the new location, bargaining would not be required.<sup>2</sup>

In the instant case, the Respondent's decision was not based upon the wages, hours, and working conditions at Indianapolis. Rather, the Respondent could better service its customers in West Virginia, Kentucky, and Ohio from Springfield than it could from Indianapolis. In ad-

<sup>1</sup> I agree with the Third Circuit in *Furniture Renters v. NLRB*, 36 F.3d 1240 (1994), that merely because an issue may be designated a "labor cost" in some broad sense, "is no reason to expand the term beyond its ordinary meaning as used in *Fibreboard* and *First National*, which contemplates subjects such as wages, fringe benefits, overtime payments, size of workforce and production goals." See also *Arrow Automotive Industries v. NLRB*, 853 F.2d 223 (4th Cir. 1988).

<sup>2</sup> I recognize that union concessions on wages (for example) could be sufficient to counterbalance the rental advantage to be reaped. However, it does not follow that the decision would be a mandatory subject. If such reasoning were used, virtually all decisions would be mandatory, for virtually all of them are driven by economics, and wages theoretically could offset the economic benefit. Clearly, the Supreme Court did not intend this result.

dition, it could minimize inventory expenses, and reduce rent and utility expenses, reduce the expense of cigarette tax stamps, save on the costs of overnight delivery and lodging, eliminate the problems of partial loads, and provide next-day service to its customers.

In my view, although these factors are economic in a broad sense, they are not labor costs. As stated above, the balance tips in favor of bargaining only if the decision is driven by labor costs. As this is clearly not the case here, I would find that the decision was not a mandatory subject.

I also do not agree that the statements set forth in section 1 of the majority opinion are unlawful. In my view, the Respondent was simply telling its employees that: (1) it had spent substantial sums of money in connection with the decertification campaign and in regard to arbitration proceedings; and (2) because of this, (a) there were insufficient funds to have a profit-sharing plan or a 401(k) plan, and (b) there would be less money available to meet union demands in collective bargaining. Of course, the Respondent had a right to spend these moneys in connection with decertification and arbitration. In my view, the Respondent was simply pointing out the economic consequences of same. It was not saying or implying that benefits would be withheld *in retaliation for* Section 7 activities.

Similarly I do not agree that the Respondent's letter of November 12, 1993, was unlawful. There is no evidence that the Respondent had decided to grant a wage increase. Thus, there can be no valid argument that a wage increase was being taken away for unlawful reasons. Further, the Respondent was not conditioning a future wage increase on employee rejection of the Union or on the withdrawal of charges. The Respondent was simply saying that it would follow the prudent course of postponing "wage increase" decisions until all legal proceedings were over.

## 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 tell you that we have called the police, are going to press charges, and intend to take other action against employees because the stickers which they had affixed to a public stop sign urged a vote in favor of Chauffeurs, Teamsters, Warehousemen and Helpers Local Union No. 135, a/w International Brotherhood of Teamsters, AFL-CIO.

WE WILL NOT tell you that the reason you have no retirement plan is that we spent so much money fighting grievances.

WE WILL NOT promise you that we will give preferential treatment to employees who support us by opposing Local 135.

WE WILL NOT tell you to choose between perceived continued discrimination based on union activity and quitting your jobs.

WE WILL NOT tell you to choose between describing Local 135 in favorable terms and remaining in our employ.

WE WILL NOT tell you that we spent so much money on the decertification campaign that we do not have anything with which to sit down at the bargaining table.

WE WILL NOT maintain or enforce a rule, with respect to areas other than in company buildings or working areas, which prohibits off-duty employees' presence on company property for the purpose of engaging in activities protected by the Act.

WE WILL NOT tell you that you cannot pass out union hats or buttons on company premises.

WE WILL NOT tell you that you are not allowed to distribute union literature: (1) anywhere on company property at any time; (2) anywhere in company buildings; or (3) on company property on company time.

WE WILL NOT tell you, when you are distributing union handbills in nonworking outdoor areas on company property, that you cannot pass out handbills on company property.

WE WILL NOT ask you, when you are engaged in protected union activity, whether you want your names to be submitted to the police.

WE WILL NOT call the police when you are engaged in protected union handbilling.

WE WILL NOT forbid you to wear union insignia on back belts owned by you.

WE WILL NOT forbid you to display union insignia on company-owned back belts, while permitting you to display other messages on such belts.

WE WILL NOT solicit you to resign because of your protected union activity.

WE WILL NOT tell you that you are being denied disability pay because of your union activity.

WE WILL NOT blame Local 135 for possibly preventing or delaying past and future wage increases by filing charges and election objections with the Board.

WE WILL NOT discipline you; require you to go home without pay; withhold, lower, or increase bonuses; trans-

fer you to new routes; lower your evaluations; lay you off; deny you disability pay; direct you to return to work prematurely from medical leave; give you onerous work assignments; transfer you between shifts; deny you a longer workweek; or otherwise discriminate with respect to hire, tenure of employment, or any term or condition of employment, to discourage membership in Local 135 or any other union.

WE WILL NOT lower your evaluations; withhold bonuses from you; discipline you; lay you off; deny you disability pay; direct you to return to work prematurely from medical leave; give you onerous work assignments; transfer you between shifts; deny you a longer workweek; discharge or otherwise discriminate against you because you have filed charges or given testimony under the Act.

WE WILL NOT fail or refuse to bargain with Local 135 as the exclusive bargaining representative of the following unit:

All delivery men, warehousemen, janitor(s) and maintenance employees employed by us at our Indianapolis, Indiana facility; but excluding salesmen, vending machine department employees, office clerical employees, and all guards, professional employees and supervisors as defined by the Act.

WE WILL NOT, without giving Local 135 prior notice and an opportunity to bargain, unilaterally withdraw Local 135 representatives' access to our Indianapolis, Indiana facility, or change the conditions under which access can be obtained.

WE WILL NOT unilaterally transfer work out of the above unit, without giving Local 135 notice and an opportunity to bargain about the decision to transfer and its effects on employees.

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

Except for those employees whom we paid unlawfully inflated bonuses, WE WILL pay each unit employee who was eligible for consideration for a bonus in August 1993 \$353, with interest.

WE WILL additionally pay Arnie Ray Goens, Donald Hall, and Douglas Jones any additional bonus (if any) they would have received in August 1993.

WE WILL make employees James Edmond, Sr., Arnie Ray Goens, and Douglas Jones whole, with interest, for any other loss of pay they may have suffered by reason of the action against them.

As to all employees who transferred at any time from our Indianapolis, Indiana facility to our Springfield, Ohio facility in anticipation of, or in consequence of, the transfer of work from the Indianapolis facility to the Springfield facility in March, April, and May 1994:

WE WILL, within 14 days from the date of the Board's Order, offer each such employee reinstatement, with

moving expenses from the Springfield to the Indianapolis area, to the job which he held before his transfer or, if such a job no longer exists, to a substantially equivalent position, without prejudice to their seniority or other rights or privileges previously enjoyed.

WE WILL make each such employee whole, with interest, for any loss of pay he may have suffered by reason of the transfer to our Springfield facility, including moving expenses from the Indianapolis to the Springfield area.

WE WILL, within 14 days from the date of the Board's Order, remove from our personnel records of Arnie Ray Goens, Donald Hall, Randy Jewell, Douglas Jones, and Danny Rakes the documents which reflect the action against them, and WE WILL, within 3 days thereafter, notify these employees in writing that this has been done and that the material set forth in these documents will not be held against them in any way.

Except as to company buildings and in working areas WE WILL rescind our rule which prohibits off-duty employees' presence on company property for the purpose of engaging in activities protected by the Act.

WE WILL, on request by Local 135, recognize and bargain collectively with Local 135 as the exclusive representative of the employees in the unit, with respect to wages, rates of pay, hours of employment, and other terms and conditions of employment and, if an understanding is reached, embody it in a signed agreement.

WE WILL, on Local 135's request, afford its representatives the same access to our Indianapolis facility which they were afforded as of March 1993.

WE WILL, on Local 135's request, transfer back to our Indianapolis facility the bargaining unit work which we transferred to our Springfield, Ohio facility from March to May 1994.

Because of conduct between the filing of the decertification petition and the decertification election held on July 8, 1993, the results of that election have been set aside. After we have complied with the Board's Order and, after a reasonable time for bargaining has passed, the Regional Director shall direct a second election, at such time as the Director deems appropriate.

EBY-BROWN COMPANY L.P.

*Richard J. Simon, Esq.* and *Joanne C. Mages, Esq.*, for the General Counsel.

*Gerald A. Golden, Esq.* and *Eugene A. Boyle, Esq.*, of Chicago, Illinois, for the Respondent.

*Steven J. Chestnut, Esq.*, of Indianapolis, Indiana, for the Union.

*Robert W. Burnett*, of Indianapolis, Indiana, pro se.

#### DECISION

#### STATEMENT OF THE CASE

NANCY M. SHERMAN, Administrative Law Judge. These consolidated cases were heard before me on 28 days between

July 25 and October 28, 1994. Case 25-RD-1171 was initiated by a decertification petition filed on May 28, 1993, by employee Robert W. Burnett with respect to Chauffeurs, Teamsters, Warehousemen and Helpers Local Union No. 135, a/w International Brotherhood of Teamsters, AFL-CIO (the Union); an election pursuant to this petition and to a Stipulated Election Agreement was conducted on July 8, 1993, and was lost by the Union, which thereafter filed timely objections thereto. The charge in Case 25-CA-22530-1 was filed on May 14, 1993, and amended on June 28, 1993; the charge in Case 25-CA-22640 was filed on July 26, 1993; and a consolidated complaint based on these charges was issued on September 21, 1993. The charge in Case 25-CA-22782 was filed on October 1, 1993, and amended on October 19, 1993; the charges in Cases 25-CA-22862-1 and 25-CA-22862-2 were filed on November 9, 1993; the charge in Case 25-CA-22885 was filed on November 16, 1993, and amended on February 16, 1994; and a consolidated complaint based upon all six of these charges (Cases 25-CA-22530-1, 25-CA-22640, 25-CA-22782, 25-CA-22862-1, 25-CA-22862-2, and 25-CA-22885) was issued on March 1, 1994. The charge in Case 25-CA-22983 was filed on January 26, 1994; and a consolidated complaint based upon all seven of these charges (Cases 25-CA-22530-1, 25-CA-22640, 25-CA-22782, 25-CA-22862-1, 25-CA-22862-2, 25-CA-22885, and 25-CA-22983) was issued on March 23, 1994. Most of the unwithdrawn objections to the decertification election having tracked unfair labor practice allegations in the March 23, 1994 complaint, on March 24, 1994, the unfair labor practice cases were consolidated with the decertification case. The charge in Case 25-CA-23120 was filed on March 31, 1994, and amended on April 15, 1994. A consolidated complaint based upon all eight of these charges, with which proceeding the decertification-election objections case was also consolidated, was issued on June 3, 1994. This last complaint was amended on August 25, 1994. The Union is the Charging Party in all the unfair labor practice charges except Cases 25-CA-22885 and 25-CA-22983, where the Charging Party is employee Douglas A. Jones.

The complaint in its final form alleges various independent violations of Section 8(a)(1) of the National Labor Relations Act (the Act) before and after the decertification election. In addition, the complaint in its final form alleges that before the election, Section 8(a)(3) and (1) of the Act was violated with respect to employees James Edmond Sr., Douglas A. Jones, Danny Rakes, and Randy Jewell. In addition, the complaint alleges that after the election, Section 8(a)(3) and (1) was violated with respect to employees Don Hall, Arnie Ray Goens, Robert Burnett, Mark Mayfield, Clyde Ervin, and Teresa Deutscher; and Section 8(a)(3), (4), and (1) was violated with respect to Douglas Jones. Further, the complaint in its final form alleges that the transfer of work between facilities since about March 1994 violated Section 8(a)(3) and (1). Finally, the complaint in its final form alleges that Section 8(a)(5) and (1) was violated by the withdrawal of recognition from the Union in August 1993, by the subsequent refusal to recognize it, by direct dealing with unit employees about December 11, 1993, and by taking certain unilateral action (including the previously mentioned transfer of work) without giving the Union prior notice and an opportunity to bargain. The complaint in its final form claims that the alleged unfair labor practices (most of which allegedly occurred after the filing of the decertification petition) were so serious and substantial in character that the

possibility of erasing their effects and of conducting a fair election by the use of traditional remedies is slight, and the employees' sentiments regarding representation, having been expressed through the years through successive collective-bargaining agreements, would, on balance, be protected better by issuance of a bargaining order than by traditional remedies alone.

On the basis of the record as a whole, including the demeanor of the witnesses who testified before me, and after due consideration of the posthearing briefs filed by counsel for the General Counsel (the General Counsel), Eby-Brown Company L.P., and Robert Burnett (the Petitioner in Case 25-RD-1171), I make the following

#### FINDINGS OF FACT

##### I. JURISDICTION; THE IDENTITY OF THE EMPLOYER

This case centers on a warehouse facility located in Indianapolis, Indiana. Between about 1989 and December 20, 1993, this facility was owned by a corporation called Indiana Eby-Brown Co., which was the employer of the employees who worked at that facility. All of the formal papers filed before the outset of the hearing named that corporation in the caption and as the Respondent. On December 20, 1993, the then assets of Indiana Eby-Brown Company were purchased by a limited partnership called Eby-Brown Company L.P., which consists of Indiana Eby-Brown Company, Aurora Eby-Brown Company (which is also a general partner), and Elgin Eby-Brown Company. The parties stipulated that the limited partnership continued operating the business in basically unchanged form at the same location with the employees who were employed at that location as of December 20, 1993. Further, the parties stipulated that the limited partnership would be obligated under the collective-bargaining agreement executed by the Union and Indiana Eby-Brown Company in 1990, which contract expired by its terms in August 1993, and that the limited partnership was answerable for the unfair labor practices which may have been committed by the Indiana Eby-Brown Company. Thereafter, the General Counsel's motion to substitute the name of the limited partnership (Eby-Brown Company L.P.) for the name of the corporation (Indiana Eby-Brown Company) in the caption and pleadings was granted without objection. The employer of the employees at the Indianapolis facility is hereafter referred to as the Company.

The Company is engaged in the wholesale sale and distribution of tobacco and sundry goods to convenience stores. During the 12-month periods which preceded the issuance of each of the complaints, the Company purchased and received at its Indianapolis, Indiana facility goods valued in excess of \$50,000 directly from points outside Indiana. I find that, as the Company admits, the Company is engaged in commerce within the meaning of the Act, and that assertion of jurisdiction over its operations will effectuate the policies of the Act.

##### II. THE UNION'S STATUS

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

##### III. THE ALLEGED PREELECTION UNFAIR LABOR PRACTICES

###### A. Background

As previously noted, the Company took over the operations of the Indianapolis warehouse facility in 1989. During an un-

disclosed prior period which included 1957, the facility was operated by the Hamilton-Harris Company. In 1957, the Board certified the Union as the representative of an admittedly appropriate unit which is described *infra*, in Conclusion of Law 6, and which consists basically of warehousemen and drivers at the Indianapolis facility. On an undisclosed subsequent date prior to 1989, the operation of the facility was taken over by a corporation called Smith-Harris, which in 1989 sold its assets (including the Indianapolis warehouse) to the Company. The parties stipulated that Hamilton-Harris was a predecessor of Smith-Harris, and that Smith-Harris was a predecessor of the Company.

The last collective-bargaining agreement between Smith-Harris and the Union with respect to the Indianapolis facility included a clause which at least purported to bind any successor to Smith-Harris. Upon acquiring the facility in 1989, Respondent agreed to be bound by that bargaining agreement. On January 3, 1991, the Company and the Union executed a collective-bargaining agreement which was effective on August 26, 1990, and expired by its terms on August 25, 1993.

###### B. *Alleged Interrogation (Complaint Paragraph 5(q), Added August 25, 1994)*

Former company employee Larry Thomas Benefiel Jr. (whose name is variously spelled in the record) testified to the following effect: About mid-June 1993, he went to the office of Patricia Reynolds, who is the branch manager of the Company's Indianapolis warehouse and is admittedly a supervisor and agent of the Company, to talk with her about taking a few hours off to spend with his family, because he had been working 15 or 16 hours a day. She asked him which way he was going to vote in the forthcoming representation election. He told her that he was afraid of being fired if he voted yes, but was afraid of antagonizing his fellow workers if he voted no. She asked him how the others around him felt; he replied that he was not really sure. She asked him whether he could get "input" from his fellow workers and report it to employee Robert Burnett (the decertification petitioner) or his brother, employee Tim Burnett; Benefiel replied that he would. Thereafter, he checked with about four other unit employees about how they planned to vote, and reported the results to Tim Burnett.

The Company's payroll records show that Benefiel very seldom worked as many as 15 hours a day, and that the last dates prior to mid-June 1993 when he worked that many hours were May 24 and 25. Moreover, Benefiel's demeanor did not impress me favorably. Accordingly, I accept Patricia Reynolds' denial that this conversation occurred. Therefore, I shall dismiss that portion of the complaint which alleges that by such alleged conduct by Reynolds, the Company violated Section 8(a)(1) of the Act.

###### C. *Alleged Unfair Labor Practices in Connection with Union Stickers on Public Stop Signs (Complaint Paragraph 5(c))*

###### 1. Facts

The Company's Indianapolis warehouse is located in an industrial park, near the Indianapolis airport, which is called Park Fletcher. In August 1994, employee Ronald Watt, who had lived in the area since 1969 (except for 1984-1988), credibly testified as follows: At least on a monthly basis, he had seen yard-sale notices, garage-sale notices, "Mr. Yuck" signs, and bumper stickers attached to public signs in the area, including

stop signs. Some of these private signs included addresses. At least ordinarily, these private notices were attached to the public signs in such a way as not to obscure the message on the public signs. Among the stop signs to which such private messages were attached, in a manner which did not obscure the printing on the sign, was a public stop sign (an equilateral octagon with a maximum breadth of 2 feet) which is a block from and controls virtually all vehicular traffic leaving the Company's warehouse. This sign is the stop sign nearest the Company's warehouse, and is referred to herein as the nearest stop sign.

Day Warehouse Manager Michael Kramer, who is admittedly a supervisor and an agent of the Company and has been working at the Indianapolis warehouse since April 1992, and Patricia Reynolds, who has been the Indianapolis branch manager since 1987, both denied ever seeing any such private notices in the area. For demeanor reasons, I do not credit such testimony.

Reynolds and Kramer credibly testified that throughout June 1993, at least, they observed orange and black stickers, 2- or 3-inches high and 5- to 7-inches long, which urged a vote for the Union and had been affixed to the curb in front of the Company's warehouse, on the bumpers of company trucks, on the company fence, on beams and dumpsters in the Company's warehouse, and on several stop signs in the Park Fletcher area. The credible testimony of employee Arnie Ray Goens shows that the union stickers were also placed on telephone poles, "no parking" signs, and fire hydrants.

The employees who posted the union stickers included Arnie Ray Goens (whose surname is variously spelled in the record) and Watt. About June 23, 1993, employee Watt affixed one union sticker to the nearest stop sign, on the same side as the printing on the sign but in a location where such printing was not obscured. This was the only union sticker which Watt affixed to a stop sign. On a date not shown by the record, this sticker was torn down by an unidentified person connected to the Company.

About June 24, 1993, the Company's accounts-receivable manager, DeeDee (also spelled "De De" in the record) Knapp, told Patricia Reynolds that Knapp had seen Watt and Arnie Ray Goens putting "stickers" on the nearest stop sign, and that Knapp was "quite upset."<sup>1</sup> Reynolds said that she would check with Park Fletcher's management. When she spoke to a representative of Park Fletcher's management, he told her that Park Fletcher had no control over the matter, and suggested that she get in touch with the Marion County sheriff's department. At this point, Reynolds advised Kramer that Knapp had seen Watt and Goens put union stickers on the nearest stop sign, and told him to report to the Marion County sheriff's department that "some" of the Company's employees had been putting things on stop signs. According to Reynolds' testimony, she told Kramer to ask the sheriff's department "what should be done or what could be done." Kramer thereupon telephoned the sheriff's department that a manager at the Company had witnessed two of the Company's employees placing stickers on the stop sign. Kramer was told that someone would be sent out to take a report.

<sup>1</sup> This finding is based upon Patricia Reynolds' testimony, received without objection or limitation. This is the only evidence that Goens affixed anything to the nearest stop sign. Knapp did not testify. Goens testified for the General Counsel, but was not asked whether he had affixed a sticker or stickers to this particular stop sign. Cf. *infra*, fn. 41.

Kramer has a practice of conducting a meeting about every week, among the day warehouse crew, to discuss job-related problems. During the meeting (about June 24) which he conducted after telephoning the police, he said that someone had been seen placing union stickers on stop signs in the Park Fletcher area; that the Company had called the police and was going to press charges; that the employees should not be doing this, and that if anyone was caught doing it, other actions would be taken. Employee Watt raised his hand and said that he was the one who placed "the stickers" on the stop sign in question. Kramer thanked Watt for his cooperation, and said that now the Company knew whom to send the police to. Watt remarked that because Kramer knew where Watt lived, Kramer knew where to send the police.<sup>2</sup>

Later that day, someone from the sheriff's department came out to the warehouse. Kramer told her that he was the one who had telephoned the police, and that Knapp had witnessed two people placing stickers on the stop sign. The sheriff's representative asked to speak to Knapp and take a statement from her. After talking with Knapp, the sheriff's representative left the warehouse without any further conversation with Kramer. Kramer testified that as far as he knew, the sheriff's department took no further action about the matter; and there is no evidence otherwise.

That evening, employee Teresa Goens, who had attended Kramer's meeting, told her husband, employee Arnie Ray Goens, that Kramer had said the police had been called and were going to arrest "the vandals that's been . . . sticking stickers on signs."<sup>3</sup>

Neither Watt nor Arnie Ray Goens was ever disciplined by the Company in connection with their sticker activity.

## 2. Analysis and conclusions

The foregoing evidence was received in connection with paragraph 5(c) of the complaint, which alleges that the Company violated Section 8(a)(1) when Kramer "told [the Company's] employees that it had filed criminal charges against two employees [whom] it had observed placing Union insignia on a stop sign located on public property." In attempted support of the General Counsel's contention that the evidence supports an unfair labor practice finding on the basis of this allegation, the General Counsel's posthearing brief cites (without a spot citation) the 18-page Decision in *Roadway Package System*, 302 NLRB 961 (1991), presumably referring to pages 961 fn. 1, 963-965, and 973-974; the Board there based an 8(a)(1) finding upon the employer's threat to call the police because of its

<sup>2</sup> My findings as to what was said at this meeting are based on a composite of credible portions of the testimony of Watt, Arnie Ray Goens, employee Teresa Goens (whose given and surnames are variously spelled in the record), Kramer, and employee Bill Albright. For demeanor reasons, I do not credit Kramer's denial that he told Watt that the Company now knew where to send the police. Also for demeanor reasons, I do not credit Albright's uncorroborated testimony that Kramer said he did not want to know who had put up the stickers, or Albright's testimony that in response to Watt's admission of responsibility, Kramer said he was not interested in who did it, but only that it was not done again, because it was considered destruction of public property.

<sup>3</sup> This finding is based on Arnie Ray Goens' testimony, which was offered, and received without objection, for the purpose of (1) showing dissemination of Kramer's remarks and (2) corroborating the testimony of Teresa Goens, who was present during Kramer's remarks, about what was said. See *Tome v. United States*, 513 U.S. 150 (1995).

employees' "protected union activities" of handbilling on the employer's property. The flaw in the General Counsel's reliance on *Roadway Package* is that employee action in affixing union stickers to public stop signs (unlike employee distribution of union handbills on company property) is not an activity protected by Section 7 of the Act.

Nonetheless, I agree with the General Counsel that the Company's statement (through Kramer) violated Section 8(a)(1) of the Act. I so find because this statement could reasonably be interpreted by the employees as an assertion that the Company had called in the police, was going to press charges, and intended to take "other actions" against the sticker-affixing employees, not because the stickers had been affixed to a public stop sign, but because the stickers contained the Section 7 protected message of urging a vote in favor of the Union. Thus, for some days the Company had been urging the employees to vote against the Union (see *infra*). Further, Kramer's remarks to the employees made no reference at all to the Company's explanation at the hearing as to why the Company was concerned about the employees' sticker activity—namely, that the affixing of the stickers to the stop sign presented safety concerns. Any employee inference that safety was nonetheless the Company's real concern was belied by the Company's failure to take substantial action to bring about the removal of the stickers. Although such antiunion motives would not have affected the Company's right to draw to the attention of the police the placing of union stickers on public stop signs, the Company did violate the Act by representing to the employees that such company action was motivated by the message on the signs, and that such a message would lead to "other actions" if the Company ascertained the identity of the perpetrators. See *Roadway Package*, *supra*, 302 NLRB at 961 fn. 1, 963–965, 973–974; *Carborundum Co.*, 286 NLRB 1321, 1323 fn. 8 (1989); and *Prime Time Shuttle International*, 314 NLRB 838, 842–843 (1994).

Although the test of interference, restraint, and coercion does not ordinarily turn on the employer's motive, it might be appropriate to note my disbelief of Patricia Reynolds' testimony that her mid-June action in telling Kramer to call the police was motivated by a belief that "anything that obstructs or obscures any part of any traffic sign is a potential safety hazard." By Reynolds' own admission, for a period of 10 days before issuing these instructions, she had been seeing union stickers on more than 10 stop signs in the area. However, by her own admission, she took no action whatever in connection with any stop signs at all until Knapp reported to her the identity of two company employees who had placed union stickers on a particular stop sign. Further, although there is no evidence that Knapp told Reynolds that the printed instruction on the stop sign was obscured by union stickers, there is no evidence or claim that before telling Kramer to tell the police that employees had been seen to affix union stickers, Reynolds made any attempt to ascertain whether the complained of union sticker or stickers obscured the nearest stop sign. Further, by Reynolds' own admission, she never made any attempt to remove, or cause anyone else to remove, the stickers from any of the stop signs, although the prompt removal of such stickers would have contributed far more to safety than awaiting possible identification of whoever had affixed some of them. Similarly, Kramer testified that so far as he knew, no company representatives removed the stickers from the stop sign. The Company's inaction in this respect, Kramer's testimony that he did not recall

whether the stickers remained on the nearest stop sign for a long period of time after his meeting about the matter, and his further testimony that he did not know whether he would have taken the same action if a garage sale notice rather than a union sticker had been affixed to the stop sign, are likewise almost impossible to reconcile with Kramer's testimony (on which the Company's posthearing brief does not rely) that he brought the matter up at the meeting because the stickers were defacing public property.

*D. Alleged Unlawful Statements by Copresident Thomas Wake (Complaint Paragraphs 5(d), (l))*

1. Facts

The Company has two officials with the title of copresident—Thomas Wake and Dick Wake. Prior to the election, Thomas Wake, who is admittedly a supervisor and an agent of the Company, came to the Indianapolis facility on June 17 and 30 and July 6, 1993, during each of which days he attended management-arranged meetings with employees who were there urged to vote against the Union.

On June 17, Wake conducted a meeting which was attended by mostly day warehouse employees and by some drivers. Wake told the employees that a petition had been filed to vote out the Union, that it was going to be a very important vote, and that it would have great impact on the lives of all the employees. He said that he wanted everyone to trust him and give him a chance, and that if the employees did not like the way things were going for a year, the employees could always vote the Union back in. Then, he asked whether any of the employees had any questions or had anything to add. Employee Teresa Goens, who is union steward Arnie Ray Goens' wife and was wearing a union hat and a union button, said that she felt the main problem at the Company was "favoritism." Wake said that he was all for "favoritism," and that anyone that was "company minded" would get better treatment than anyone who was not. Teresa Goens asked whether he would not agree that the employees' attitudes were a direct response to how the employees were treated by their managers. Wake said that that would be like the employees' blaming their parents for how the employees were raised. Goens asked Wake to pull her personnel file and look at her reviews by her supervisor; and said that Personnel Director Stephen Reynolds had complimented her on her attitude, but that the previous December she had been demoted to a lower paying job on the stated ground that she was not a team player.<sup>4</sup> Wake said that he was very aware of what was going on at the Indianapolis branch, and that if she was so unhappy and dissatisfied in her job, she could find another job; that attitude was 51 percent of the job; that he would rather have a worker that did an okay job with a good attitude than a worker that did a good job with a bad attitude; that he was all for favoritism; and that if the employees did not like it there, they could go find a job elsewhere. One of the warehouse employees asked about profit sharing. Wake said that "if the people hadn't got up there and fabricated their stories in arbitration, then he wouldn't have had to spend that much money on grievances and arbitrations and things like that."<sup>5</sup>

<sup>4</sup> The complaint does not allege that this action with respect to Goens was unlawful.

<sup>5</sup> My findings in this paragraph are based on a composite of credible parts of the testimony of Teresa Goens, employee Carla Wiggam, and Patricia Reynolds. For demeanor reasons, I do not credit the testimony

Goens continued to work for the Company until August 1994, when she obtained a job with another firm.

Later that same day (see *infra*, fn. 8), Wake conducted another meeting attended mostly by night-shift employees. Wake said, among other things, that the way things were being done in the warehouse was not the democratic way, because the union leaders were chosen for the employees.<sup>6</sup> Employee Wilke said that she believed he was mistaken, and that the employees had voted on the stewards. Wake said that if she checked her facts, she would find out that they were appointed for the employees. She again disagreed with him.<sup>7</sup> At this point, Wake said that Wilke had been running her mouth since the Christmas party, and she should shut up or get out of the Company, a remark which put Wilke “in shock.” Wilke then turned to Jones and said, “I thought this was a question and answer forum,” to which Jones replied, “Well, it sounds like he answered your question.” Then, driver Michael Mitchell asked why the Company did not have a profit-sharing or retirement plan. Wake said that because the Company had spent so much money on arbitrations, the Company could not give the employees any 10(k) plans or retirement plans (see *infra*, fn. 9). He further said that as to those that did right by the Company and wanted to be company people, he intended to play ball with them and have them as his favorites.<sup>8</sup>

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of Wake and Patricia Reynolds, credibly denied by Teresa Goens, that he said he believed in “favoritism” for employees with a good work ethic and a positive attitude, Goens said she had a bad attitude even after talking to a number of managers, Wake thereupon suggested that she look for a job elsewhere, and she said that it was not easy to find a job with the pay and benefits she was receiving from the Company. Also for demeanor reasons, I do not credit Patricia Reynolds’ testimony that in reply to the question about profit sharing, Wake said that the Company gave the benefits which had been included in the contract negotiated between the Company and the Union.

<sup>6</sup> This finding is based on the testimony of employee Douglas Jones. He impressed me as having a better memory than employee Beverly Wilke, who testified that Wake said the employees could not get rid of their stewards.

<sup>7</sup> In filling vacant stewards’ positions, Union Business Representative Brian Buhle (whose given name is variously spelled in the record) intended to follow the practice of asking employees who were willing to be stewards to sign a document, and then conducting an election among the employees to determine who would be the steward. As to each of the two steward vacancies which arose between Buhle’s beginning to service the Indianapolis warehouse in May 1992 and late July 1994, only one employee signed the document, and Buhle appointed that employee as steward without conducting an election.

<sup>8</sup> My findings as to this June 17 meeting are based on a composite of credible parts of the testimony of Wilke, Jones, and (to a very limited extent) Patricia Reynolds, and employee James A. Edmond Sr. (also spelled “Edmund” in the record). For demeanor reasons, I do not credit Wake’s or Patricia Reynolds’ testimony that Wake did not exchange remarks with Wilke, nor tell her that she had been running her mouth since Christmas and she should shut up or get out of the Company. Also for demeanor reasons, I do not accept Reynolds’ denial that Wake and Wilke exchanged remarks on the subject of removing stewards. My finding that the meeting described by Wilke and Edmond took place on June 17, rather than on June 23 as she testified (“I think”) or after the June 30 rally, as he testified, is based (1) on Reynolds’ credible testimony that Wake’s speeches were given on June 17 and 30 and July 6; (2) on Wilke’s failure to link the date of this speech to the June 30 rally, in which she actively participated; and (3) on her failure to testify that the speech occurred just a few days before the July 8 election.

At another such meeting, on June 30, employees from other company warehouses, whom (inferentially) the Company had brought to the meeting for this purpose, made favorable comments about their jobs and and benefits to the assembled Indianapolis employees. Then, Wake asked if anyone had any questions. No hands were raised. Wake said, “I know you people with the funny little green hats have got to have questions.” Employee Donald Hall, a driver who was wearing a green union hat and a union button, said that the employees from other warehouses had just been saying that they had a retirement program, which the Indianapolis employees did not have after 3 years of company ownership; that the drivers’ trucks were not equipped with radios, which could alert them to bad weather conditions; and that the Company had turned down a “deal” where trucks could be equipped with CB radios at a cheap price. Hall went on to say that “Those things, there, showed to me personally how you care about the employees.” Hall further said that his prounion sympathies did not mean that he was a bad worker, that he felt he did his job well, and that he was afraid he would be treated differently because of his union sympathies. Wake replied that Hall was on the wrong side, that he needed to come over to the right side, and that he needed to take off his funny green hat and get on the winning team. Wake said that the employees had no retirement program because of the money the Company had to spend to fight the grievances being filed.<sup>9</sup> A female employee brought up the question of favoritism.<sup>10</sup> Hall remarked that the Company was promoting to the foreman classification employees who were relatively unfamiliar with the job at the warehouse, and asked about favoritism, to which Wake replied, “Damn right I’m going to show favoritism to people who are behind the Company and who want to make the Company work.”<sup>11</sup>

## 2. Analysis and conclusions

I agree with the General Counsel that the Company violated Section 8(a)(1) when Copresident Wake told the employees that the reason they had no retirement plan was that the Company had spent so much money in fighting grievances. *Adco Electric*, 307 NLRB 1113, 1119 (1992), *enfd.* 6 F.3d 1110 (5th Cir. 1993).<sup>12</sup> Further, I agree with the General Counsel that the

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<sup>9</sup> This finding is based on Hall’s testimony. For demeanor reasons, I do not credit Wake’s or Patricia Reynolds’ denials. During the 1990 bargaining negotiations, the Union had not requested a retirement plan. The Company maintained at least two benefits which were not set forth in the bargaining agreement—a bonus plan and a disability payment plan.

<sup>10</sup> Hall testified to being thereafter told by other employees that this female employee was Wilke. She testified for the General Counsel, but was not asked about this matter, as to which there is no other evidence.

<sup>11</sup> My findings as to this June 30 meeting are based on a composite of credible parts of the testimony of Hall and Carla Wiggam. Wiggam’s direct testimony attached Hall’s remarks to the day—warehouse June 17 meeting described *supra*. However, on cross-examination she testified that she had also attended a later meeting at which employees from another company facility were also present; and Hall credibly testified that the June 30 meeting was the only meeting with Wake which Hall attended; I infer that Wiggam’s recollection merged the June 17 and 30 meetings. Further, I believe that Patricia Reynolds and Wake were mistaken in testifying that Hall attended and made remarks at the June 17 meeting; and, for demeanor reasons, I do not accept their testimony about the contents of the Wake-Hall exchange.

<sup>12</sup> *Cf. Dow Chemical Co. v. NLRB*, 660 F.2d 637, 646–647 (5th Cir. 1981), *relied on by the Company*. In *Dow Chemical*, the employer merely stated that the amounts paid by the employee for processing

Company violated Section 8(a)(1) when Wake told the employees that the Company would give preferential treatment to the people who were company minded, did right by the Company, were behind the Company, and wanted to make the Company work; in the context of employee meetings called by the Company and during which employees were urged by the Company to vote against the Union, Wake was plainly promising preferential treatment to the employees who supported the Company by opposing the Union. In addition, I agree with the General Counsel that the Company violated Section 8(a)(1) of the Act when, immediately after there using the term “favoritism” (“company minded”) and thereupon receiving a complaint from employee Teresa Goens (who was wearing a union hat) that she was a “favoritism” victim, Wake told her that he was all for “favoritism,” and that unhappy employees could find another job; in context, Wake was telling the employees to choose between perceived continued discrimination and quitting their jobs with the Company. Rather similarly, I agree that the Company violated Section 8(a)(1) when, after Wilke repeatedly stated during the second June 17 meeting that Wake was factually mistaken in stating that the employees had no voice in the selection of union stewards, Wake told her to stop running her mouth and shut up, or else to get out of the Company. Wake was thereby directing employee Wilke to choose between continuing to exercise her statutorily protected right to describe the Union in favorable terms, and leaving the Company’s employ.<sup>13</sup>

*E. Alleged Unlawful Statement about Forthcoming Contract Negotiations (Complaint Paragraph 5(e); see Objection 2)*

Teresa Goens testified to the following effect: During a regular weekly meeting of the 20 to 25 day warehouse employees in late June 1993, Day Warehouse Manager Kramer told the employees that some signs and banners would be going up, and that he did not know what the employees expected from the Company, because the Company had spent so much money on the decertification that the Company did not have anything to sit down at the bargaining table with. When Goens asked fellow employee Mark Jones whether he had heard what Kramer had just said, Jones remarked, using an obscene verb, that it looked as if the employees were going to get cheated again.

Kramer testified that he did not recall making the remark which Goens testimonially attributed to him about the decertification campaign. Day warehouse employee Bill Albright, who attended the weekly meetings of the day warehouse employees, denied that Kramer made this remark, and also testified that he had no recollection of Mark Jones’ making the remark attributed to him by Goens. Mark Jones (not to be confused with Douglas Jones) did not testify. For demeanor reasons, I credit

grievances were not available for employee benefits; the employer did not (as did Wake) state that if such amounts had not been so spent, they would have been spent for employee benefits.

<sup>13</sup> See *NLRB v. Almet, Inc.*, 987 F.2d 445, 451–452 (7th Cir. 1993); *Gauche Food Products*, 311 NLRB 1270, 1272 (1993); *Stoody Co.*, 312 NLRB 1175, 1181–1182 (1993); *Tualatin Electric*, 312 NLRB 129, 133–134 (1993), enfd. 84 F.3d 1202 (9th Cir. 1996); *HarperCollins Publishers*, 317 NLRB 168, 180 (1995), enfd. in relevant part 79 F.3d 1324 (2d Cir. 1996); and *Paper Mart*, 319 NLRB 9 (1995). Cf. *Yaohan of California*, 280 NLRB 268, 268 fn. 2, 275 (1986), where the employer’s remarks that the employee could find another job if she wanted more money were not made in a context where the union was explicitly or impliedly referred to.

Goens.<sup>14</sup> I find that when Kramer made this statement about the decertification campaign, the Company violated Section 8(a)(1) of the Act. *Adco Electric*, supra, 307 NLRB at 1119, 6 F.3d at 1119; *NLRB v. E. I. du Pont*, 750 F.2d 524, 528 (6th Cir. 1984); and *Evans Bros. Barber & Beauty Salons*, 256 NLRB 121, 128 (1981).

*F. The Allegedly Unlawful Rule Restricting Off-Duty Employees Access to Company Property (Complaint Paragraph 5(i))*

About October 1, 1991, the Company and the Union agreed to a set of rules which included the following: “If not on company business, employees are not allowed on company property.” An initial violation of this rule was subject to a letter of reprimand; a second violation, to a 3-day layoff; and a third violation, to discharge. The Company’s June 1994 answer admits that “since October 1, 1991, the Company has maintained a rule prohibiting employees from being present on Company premises during non-work hours or when not otherwise engaged in company business.” Moreover, the record shows that the Company in fact enforced this no-access rule from time to time both before and after the decertification petition was filed. Indeed, such enforcement is conceded in the Company’s posthearing brief (pp. 41–46).<sup>15</sup>

The maintenance and enforcement of such a rule, at least if unilaterally promulgated, presumptively violate Section 8(a)(1) to the extent that it prohibits employees’ presence on company property, other than in company buildings and in working areas, for the purpose of engaging in activities protected by Section 7 of the Act. *Fairfax Hospital*, 310 NLRB 299, 308 (1993), enfd. 14 F.3d 594 (4th Cir. 1993), cert. denied 512 U.S. 1205 (1994); *United Parcel Service*, 318 NLRB 778 (1995); *Yukon Mfg. Co.*, 310 NLRB 324, 334–335 (1993); *Tri-County Medical Center*, 222 NLRB 1089 (1976).<sup>16</sup> Such a rule is invalid unless justified by legitimate business reasons, none of which the Company cites in the instant case. *Tri-County*, supra; *United Parcel Service*, supra.

The Company contends that its maintenance and enforcement of the rules were lawful because the Union agreed thereto during the life of the August 1990–August 1993 bargaining agreement and the rule was made part of that agreement. However, in the absence of special circumstances not claimed to be present here, the bargaining representative cannot effectively waive the right that unit employees would otherwise possess to engage, on their employer’s premises, in activity protected by Section 7 of the Act. See *Harper-Grace Hospitals*, 264 NLRB 663 (1982), enfd. 737 F.2d 576 (6th Cir. 1984). In any event, to the extent that the rule may have effectively waived employees’ statutory rights during the contract term, that waiver became ineffective upon the expiration of the agreement in August 1993. See *Southwestern Steel & Supply v. NLRB*, 806 F.2d

<sup>14</sup> Kramer testified that in his position as day warehouse manager, he played no role in the Company’s bargaining positions, and that he had no idea how much money the Company was spending on the decertification campaign. Kramer is the brother-in-law of Copresident Thomas Wake and represented the Company (although there is no evidence that he said anything) during an April 1994 conference with the Union (see infra, part V.F.8).

<sup>15</sup> The Company contends that the rule was not discriminatorily enforced against union adherents and/or union activities. However, the General Counsel’s posthearing brief does not appear to contend otherwise.

<sup>16</sup> *Tri-County* narrowed the at least seeming scope of *GTE Lenkurt, Inc.*, 204 NLRB 921 (1973), relied on by the Company (Br. 41).

1111, 1114 (D.C. Cir. 1986). Accordingly, I find that the Company violated Section 8(a)(1) of the Act by maintaining and enforcing a rule which prohibited off-duty employees' presence on company property, outside company buildings, and working areas, for the purpose of engaging in activities protected by Section 7 of the Act.

*G. Alleged Unfair Labor Practices in Connection with Employee Distribution of Union Material (Complaint Paragraphs 5(b), (h); see Objections 6 and 8))*

#### Facts

##### *a. Introduction*

Branch manager Patricia Reynolds testified that in 1993 employees were not to solicit on company time (including paid breaks) on company property. Similar testimony as to his entire tenure of employment was given in 1994 by Michael Grigdesby, who had been the night warehouse manager continuously since at least 1984, before the Company took over the warehouse, and is admittedly a supervisor and an agent of the Company. Reynolds further testified that prior to July 8, 1993 (the date of the election), there was no restriction imposed by the Company on employees' right to engage in solicitation or distribution on company property during lunchtime, which is unpaid.

##### *b. Incident involving Day Warehouse Manager Kramer and employee Teresa Goens*

During the month before the July 8, 1993 election, employee Teresa Goens (the wife of Steward Arnie Ray Goens) wore a union hat to work every day. In June 1993, on a date not shown by the record, employee Cecil Hooker asked Teresa Goens about getting a union hat and a union button. Goens said that she had them in her car. Hooker asked if he could have one; she said yes. Later that day, while both employees were on their lunchbreak, they went out to the company parking lot to Goens' car. She took a union hat and button from her car and gave them to Hooker, who took them to his truck. When Goens started back across the parking lot, Day Warehouse Manager Kramer came outside and told her that she could not pass "that stuff" out on company premises. Prior to this conversation, Goens and other employees had regularly walked out to their cars, and engaged in social conversations, during their lunchbreaks. After this conversation, she always went outside the plant gates to pass out such material. She handed out such items to anyone who asked for them. Some employees who received this material wore it to work.

On another occasion whose date is not shown by the record, Kramer approached a group of employees (including Teresa Goens) at the timeclock and said that employees could not pass out union hats and buttons on company property.

##### *c. Incidents involving Night Warehouse Manager Michael Grigdesby*

###### (1) Incidents involving employee Wilke

On a couple of occasions about late June 1993, employee Wilke passed out union literature in the breakroom. Thereafter, while Wilke was standing near the health and beauty line, with some union literature in her hand but not distributing it, Grigdesby told her that she could not pass it out "within the Company property, anywhere, at any time"; and that the only place the employee could pass out any kind of literature would be

"off Company time, off Company property." She said that she would not pass any more out.

On the day before the election, while Wilke was passing out union literature in the breakroom on breaktime, Grigdesby came in and informed her that the employees could not pass out literature, that this was the second time he had told her this, and that she was not allowed to pass out union literature anywhere in the building. About 15 or 20 other employees were in the breakroom at that time.<sup>17</sup>

In September–November 1992, Wilke had sold candy, for the benefit of a swim team, in the breakroom during breaks. Among those who bought candy from her was Supervisor Grigdesby, who never said anything about the time period when she was selling candy.<sup>18</sup>

###### (2) Incidents involving employee Douglas Jones

During the first rest break about June 23, 1993, Union Steward Douglas Jones ate his lunch in the breakroom with a stack of union handbills on the table near his seat. While Jones was eating, Grigdesby came into the breakroom and told him that he could not pass out union literature on company property.<sup>19</sup> Jones replied that he was eating his lunch, was not passing anything out, and had not been passing anything out at that time. Grigdesby again said that Jones could not distribute this material on company property, and then left the breakroom. Jones continued to eat his meal. However, employee Edmond, who had overheard the conversation, grabbed a few union handbills off the stack and handed them to a few employees who were sitting at the tables nearby. Jones said to Edmond, "I'm not supposed to be passing that out." Edmond smiled and said, "[W]ell, you weren't." At that time, 20 to 35 employees were in the breakroom, which is about 20 by 40 feet, and at least 5 were within earshot of the Grigdesby-Jones conversation.

On July 5, 1993, Jones obtained from the Union a stack of handbills which purported to reproduce a letter from former bargaining unit employee Terry Keller. This letter, which bore a purported facsimile signature by Keller, stated that the Company had discharged him because he had an alcohol problem, that the Company had been unable to understand his problem, and that the employees should vote for the Union because the Company was going to treat other employees with problems in the same way Keller had been treated. At the beginning of the first break, Jones gave a stack of these handbills to Wilke, who began passing them out to others in the breakroom while Jones was fetching his lunch from the refrigerator. Then, Jones gave a handbill to Working Foreman Danny Cooper, a unit employee, who thereupon went to Grigdesby's office, showed him

<sup>17</sup> My findings as to these conversations are based on Wilke's testimony, which is to some extent corroborated by Grigdesby's testimony that employees were not permitted to distribute or solicit during paid breaks. For demeanor reasons, I do not credit Grigdesby's testimony that he never told her she could only pass out literature off company property and off company time; and that as to literature distribution, his only conversation occurred when he saw her in the health and beauty area during worktime with a handful of flyers (which he could see were not work orders) and told her not to pass them out on company time.

<sup>18</sup> My findings in this paragraph are based on Wilke's testimony. For demeanor reasons, I do not credit Grigdesby's denial.

<sup>19</sup> My finding that Grigdesby said "company property" is based on the testimony of Jones, whose recollection impressed me as being superior to that of employee Edmond. Edmond, who overheard the conversation, testified that Grigdesby said, "[C]ompany time."

the handbill, and said that the signature was not that of Keller, who was Cooper's longtime friend.<sup>20</sup> Grigdesby thereupon headed for the breakroom, which he had left less than a minute earlier, and which he reentered just behind unit employee Brian Hammer, a working foreman. Grigdesby got Hammer by the arm and said, "I need a witness." Grigdesby saw Jones with handbills in his hand, handbills lying all over the table in the breakroom, and almost everybody reading a copy. Grigdesby told Jones, within the hearing of 6 to 8 employees including Hammer, that Jones could not distribute literature on company property or company time, that he was to do it on his own time and his own property, and that Jones would have to put the handbills away. Jones said that he was not passing out these handbills. Grigdesby said that this was not the way he understood it, and that Jones and Wilke could not pass the union literature out. Jones asked whether Grigdesby was sure that he did not want Jones to pass out these handbills, and said something about filing charges against the Company. Grigdesby repeated his instructions about the handbills, and Jones said, "Okay." Then, Grigdesby and Hammer walked toward Grigdesby's office. During the Grigdesby-Jones conversation, Grigdesby spoke in a loud tone, in a manner which he customarily used in giving work orders, and within earshot of about 40 people. While walking to Grigdesby's office, he and Hammer encountered several nonunit persons on the Company's payroll, one of whom (an office employee) asked what was going on.

After Hammer and Grigdesby reached Grigdesby's office, Hammer showed Grigdesby the handbills which Jones had been distributing, and commented that this was not really a "big thing." Grigdesby said that he did not care, that it was union literature, and he did not want it passed around. Then, Grigdesby compared the signature on the handbill with Keller's signatures in company files, and decided that the signature on the handbill had not been written by Keller (see *infra*, fn. 21). Grigdesby returned to the breakroom, showed those present the file signature and the handbill signature, and told everyone there (although many of them may not have heard him) that this was a forgery, it was not really Keller's signature.<sup>21</sup> Jones credibly testified that before Grigdesby's statement to this effect, Jones had believed the purported Keller signature to be genuine. After being so advised, Jones and Wilke did not pass out these handbills any more.

Jones thereafter obtained another stack of handbills (not the Keller handbills) from Union Business Representative Buhle. During the first break on July 6, 1993, Jones started passing them out in the breakroom to a number of other employees. Grigdesby thereupon came into the breakroom and told Jones that he could not pass out union literature on company time or company property, that he had been warned about this, and that he was not to be doing it. Referring to "the rules of the NLRB," of which Buhle had advised him, Jones said that "that was a very serious violation." Grigdesby said that this was not

a violation, this was a direct order from management. Grigdesby said that Jones could put the handbills in the closet or leave them in Grigdesby's desk. Jones said that if he did this, they would not be there when he got ready to leave for lunch, so he was going to take them to his car immediately. Grigdesby agreed, and, still during the break period, Jones took the literature out to his car. The Jones-Grigdesby conversation described in this paragraph took place within earshot of 20 to 30 other employees.

On an occasion whose date is not shown by the record, Grigdesby told Jones that if he was off the property and on his own time, there was nothing Grigdesby could do about Jones' distribution of union literature, and that Grigdesby had no objection to such activity by Jones if, for example, he engaged in it off company property on his lunchbreak.

My findings as to these incidents are based on a composite of credible portions of the testimony of Jones, Wilke, Hammer, and Grigdesby. For demeanor reasons, I do not credit Grigdesby's testimony that aside from perhaps being in the breakroom when Grigdesby talked to Jones, Hammer was not involved in these incidents; Grigdesby's denial that Jones said he was permitted to pass out union literature; Grigdesby's denial that office employees were involved in this incident; Grigdesby's denial that he told Jones not to distribute his union literature on company time or company property; or Grigdesby's denial that he told Hammer the Keller letter amounted to union literature and Grigdesby did not want it passed around.

#### *d. Analysis and conclusions*

I agree with the General Counsel that the Company violated Section 8(a)(1) of the Act (1) when Day Warehouse Manager Kramer stated to employee Teresa Goens (who had been distributing union paraphernalia to another employee in the company's parking lot while both of them were on their lunchbreak) and other employees that they could not pass out union hats or buttons on company premises; (2) when Night Warehouse Manager Grigdesby told employee Wilke that she could not distribute union literature (which she had previously distributed in the breakroom) anywhere on company property at any time; (3) when he told her (while she was distributing union literature in the breakroom on breaktime) that she was not allowed to distribute union literature anywhere in the building; and (4) when he told employee Jones, during his breaktime in the breakroom on two different occasions, that he could not pass out union literature on company property or company time. *NLRB v. General Thermodynamics, Inc.*, 670 F.2d 719, 721 (7th Cir. 1982); *Anderson Co.*, 305 NLRB 878, 880 (1991); and *Goldtex, Inc.*, 309 NLRB 158, 160 (1991), *enfd.* 16 F.3d 409 (4th Cir. 1994). Such statements to employee Jones were not rendered lawful by the fact that Edmond, one of the employees in whose presence Grigdesby made one of his unlawful statements to Jones about literature distribution, nonetheless distributed union literature during Edmond's break period. *NLRB v. Almet, Inc.*, 987 F.2d 445, 451 (7th Cir. 1993); and *Waco, Inc.*, 273 NLRB 746, 748 (1984). Nor was Grigdesby's conduct as to the Keller letter rendered lawful by the possibility that Keller had not authorized the letter, particularly because Grigdesby's remarks to Hammer, and Grigdesby's testimony (which I have discredited) that his signature comparison was not made until after the end of the break during which he told Jones not to distribute the handbills, show that Grigdesby was motivated by the fact that the letter constituted union literature

<sup>20</sup> My finding as to Cooper's statement is based on Grigdesby's testimony, which on timely objection was not received to show the truth of the contents.

<sup>21</sup> In view of these remarks by Grigdesby, I do not credit his testimony that he did not compare these signatures until after the break was over. Grigdesby credibly testified that the two purported signatures appeared to him to have been written by two different people. However, the record does not include either signature, nor any evidence as to whether Keller had authorized the Union to sign the handbills on his behalf.

rather than by any lack of Keller's authorization. Jones believed Keller's signature to be genuine, and Jones did not distribute the letter after having been put on notice that Keller's purported signature may have been forged. See *HCA/Portsmouth Regional Hospital*, 316 NLRB 919 fn. 4 (1995); *KBO, Inc.*, 315 NLRB 570 (1994); *A. O. Smith Automotive Products Co.*, 315 NLRB 994, 1008-1009 fn. 34 (1994).

*H. Alleged Unfair Labor Practices in Connection with Union Rally (Complaint Paragraphs 5(f), (g), (j), and (k); see Objection 3)*

1. Events in front of the warehouse

The Company's Indianapolis warehouse is located on the north side of Fortune Circle Drive, a public road which runs east and west. The Company owned land on which this warehouse is built is surrounded by a chain link fence with only one opening, which is on the south side of the Company's property and is controlled by a gate, and into which enters the only driveway from the Company's property to a public road (Fortune Circle Drive). The parties stipulated that between the southern edge of the Company's property and the northern edge of the Fortune Circle Drive pavement is a public easement which is about 6 feet wide.<sup>22</sup> The Company's fence is about 22 feet north of the Company's property line.<sup>23</sup>

At a union meeting on June 27, 1993, those present were advised that a union rally would be conducted on June 30 in the public area in front of the Company's property. On June 28, the Company learned about these plans.

At about noon on June 30, Union Business Representative Buhle drove his automobile to the neighborhood of the Company's warehouse, and parked his car on the north side of Fortune Circle Drive and in front of the Company's property. A few minutes later, employee Douglas Jones parked his personal van directly behind Buhle's automobile. Jones' van contained some canned and/or bottled soft drinks, an outdoor barbecue grill, and (perhaps) beer.

Ordinarily, the Company's trucks, when not in use, are parked on company property behind the warehouse fence. Shortly after Buhle and Jones parked their vehicles on the public street in front of the warehouse and began to distribute union literature, the Company's managers, at Patricia Reynolds' instructions, drove company trucks outside of the facility and parked them in such a way that they may have boxed in Buhle's and Jones' vehicles. When truckdrivers Mark Mayfield and Clyde Ervin, both of whom wore "vote no" buttons, returned from their delivery routes, at Patricia Reynolds' instructions they parked their respective trucks on opposite sides of the gate, leaving a passageway which was too narrow for a truck to use. Eventually, pursuant to management's instructions, 8 to 18 company trucks, each of them 24-foot long, were parked on

<sup>22</sup> Before this stipulation was entered into, Patricia Reynolds testified to the belief that the Company's property extends to the northern edge of the Fortune Circle Drive pavement. I am doubtful about the sincerity of this testimony, which (if true) would mean that this public road had no northern shoulder. However, whether she was sincere in this respect does not affect the issues presented.

<sup>23</sup> Using the same sketch map which partly underlies my description of the relationship between the Company's property and Fortune Circle Drive, employee Jones testified that the warehouse faces west onto Fortune Circle Drive. Such an assumption would make no material difference here.

both sides of Fortune Circle Road in front of the Company's warehouse.

At about 1:30 p.m., Buhle and Jones began to distribute at but outside the gate some handbills which urged the employees to vote for the Union. Others then joined the handbilling activities. While the handbilling was taking place, Kramer left the warehouse and came out to the gate. He saw about 50 people in the area, most of whom were not employees of the Company. In addition, he saw night-shift employee Wilke drinking beer with someone else whom Kramer did not recognize.<sup>24</sup> Kramer told the handbillers that they were on company property, that they had to get off company property, and that they could not distribute handbills on company property. Buhle asserted that he and Jones were standing on the easement—an assertion which was accurate as to Buhle, at least.<sup>25</sup> Buhle went on to say that he believed they were within their Federal rights to handbill, and told Kramer to call the sheriff's department if Kramer wanted Buhle and Jones removed.

At this point, Kramer reentered the warehouse and discussed the handbilling matter with Patricia Reynolds, who said that she thought Buhle and Jones were on company property and told Kramer to call the police. Kramer then telephoned the police. He told them that a prounion rally was being held outside the Company's building, that he thought a number of people were trespassing on company property, that he had asked them once or twice to leave and they had refused, that a crowd was gathering, and that he would like the assistance of the police in removing the people from company property. Kramer interpreted the response as an assurance that the police would be on their way shortly. At that time, 90 to 100 persons were present at the rally, and safety concerns had been expressed to Kramer by some warehouse employees who were returning from lunch and by some clerical employees who were about to leave work for the day. Kramer testified to his own concern at their safety, particularly because he had seen two persons drinking beer at the rally. Fifteen or twenty minutes after thus telephoning the police, Kramer remarked to Patricia Reynolds that they had not arrived yet. She told him to call them again. In doing so, he used his office telephone, and was overheard by employee Teresa Goens.<sup>26</sup> He told the police that 100 people were in

<sup>24</sup> The record identifies five employees who drank beer during the rally, including Thomas Hawk (who drank one beer) and Wilke. Wilke drank two or three beers, and ate several hot dogs, during her 6-hour stay at the rally, during which she also distributed handbills and grilled frankfurters for others at the rally. Because Supervisor Grigdesby permitted Wilke to work her full shift that evening and testified that on that day "she did her job," because he testified that employees violated company rules if they report to work too intoxicated to do their job, and for demeanor reasons, I do not credit his or Hawk's testimony that she was intoxicated. Because Edmond was initially accompanied at the rally by his small daughter and was later present awaiting the start of his shift, and for demeanor reasons, I credit his denial of Hawk's testimony that he saw Edmond drinking beer at the rally.

<sup>25</sup> My finding that Buhle was standing on the easement is based on the stipulation that the easement extended about 6 feet north of the north side of Fortune Circle Road, on Kramer's testimony that the change in the pavement as shown by a photograph of the area (G.C. Exh. 58) is where the side of the road ends, and on Kramer's testimony that during their conversation Buhle was standing roughly where he was standing in the photograph, which shows him to be standing less than 6 feet north of the north side of the pavement change.

<sup>26</sup> My finding that he used this telephone is based on her testimony, which gains corroboration from employee Carla Wiggam's credible testimony that on the following day, Teresa Goens said that Kramer had

front of the building, and that he feared for the company employees' safety. In addition, because the police had not responded to his first call and he wanted them to respond to this one, he told the police that he had seen people throwing rocks at the Company's trucks, an assertion which (he testimonially admitted) was not true.<sup>27</sup>

About 10 to 25 minutes after Kramer's second telephone call, four squad cars from the sheriff's office drove up. The police parked their vehicles some distance down the road, and for about 20 minutes watched what was going on. Then, the police approached Buhle, stated that they had been called by Kramer, and asked to speak to a representative of the Company and a representative of the Union. After that, the police car drove in front of the warehouse. Kramer thereupon left the warehouse and walked out of the gate toward the police car. En route, he turned around and asked a group of employees who were distributing handbills outside the fence (Arnie Ray Goens, Teresa Goens, and Douglas Jones) if any of them wanted their names given to the police.<sup>28</sup> Jones and Teresa Goens responded by laughing. An unidentified person who was sitting in a lawn chair told Kramer that he ought to have an "[obscenity] Russian flag up there," inferentially referring to an American flag displayed on the exterior of the warehouse.

The sheriff conferred with Kramer, Buhle, and Shirley Green, who is the director of the Indiana Conference of Teamsters. In response to the sheriff's inquiries, Kramer said that he had called the police, that he had told the police that people were throwing rocks at incoming company trucks, and that in point of fact, nobody was throwing rocks. The sheriff said that this conformed with the police's own observation. Kramer said that he was concerned that "these people were on our property. People were drinking beer. It was a nice sunny hot day and things were getting loud." The sheriff walked over to the driveway, looked at the people standing around the driveway, and then said that they might be standing on company property but that he did not know whether it was company property, he was "not going to make that call," and they had a right to be there as far as he was concerned. Then, the police told Kramer that this was a Federal dispute and outside their jurisdiction. As the police walked away, Kramer remarked that the Teamsters must have friends in high places, since the Company could not get the sheriff to do anything about the handbilling.<sup>29</sup>

Employee Edmond credibly testified that he left the rally, and did not return to the area until the time his work shift normally began, because he was rendered uneasy by the Company's action in calling the police "for no reason." After the police had left, employee Hall, who had been inside the fence,

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called the police and accused people of throwing rocks—the report admittedly made by Kramer. For demeanor reasons, I do not credit his testimony that for privacy purposes, he used the conference room telephone.

<sup>27</sup> A number of other witnesses credibly denied seeing any rock throwing. There is no evidence that any rocks were thrown.

<sup>28</sup> This finding is based on the testimony of Teresa Goens, Jones, and Buhle. Although their testimony in this respect was not corroborated by Arnie Ray Goens, he is hard of hearing, was about 15 feet from Kramer when he walked by, and testified that Kramer may have said something which Goens did not hear. For demeanor reason, I do not credit Kramer's denial.

<sup>29</sup> My findings in this paragraph are based on a composite of credible portions of Buhle's and Kramer's testimony. For demeanor reasons, I do not credit Kramer's denial of the remark about Teamster friends in high places.

left the Company's premises, at which time Buhle told him that the police had been called in with the representation that the people at the rally were throwing rocks, and that the police had left upon being told that nobody had been throwing rocks. On the following day, employee Teresa Goens made a similar statement to employee Carla Wiggam when she asked why the police had been there.

The rally lasted between about 12:30 and 8:30 p.m., at which time Buhle left the area because the evening-shift employees had reported to work and most of the other participants had left the area. The persons who were distributing union literature were able to offer literature to all the individuals who entered or left the company gate during this period. The witnesses' estimates of the maximum number of persons who were present at the rally at any one time ranged between 50 and 200, with most of the estimates being about 100. A majority of those present were not company employees; some of them were members of such employees' families, and others were affiliated with the UAW, which has an office next door to the Company's warehouse. During the rally, the persons outside and the persons inside the fence engaged in a good deal of yelling.<sup>30</sup> At about 2 p.m., an automobile occupied by the two Wakes (the Company's copresidents, whose offices are in Illinois), Patricia Reynolds, and employees from company facilities in Illinois and Michigan, all of whom were returning from lunch, drove into the facility. As the car was driven into the facility, some of the participants in the rally yelled, "Go back to Illinois." After the car had been parked in the company parking lot, Buhle yelled something to Reynolds about being a dictator, someone else yelled something about raising the communist flag, and someone (not connected with the Company) yelled a racial epithet. One of the Illinois employees in the car, who is black, told Reynolds that he wanted to go face-to-face with the person who had used the racial epithet, but she induced the black employee to go into the facility.<sup>31</sup> An obscene gesture was made by an office employee with a "union free" sign on her car, as she went out the gate. Many persons who attended the rally wore union insignia, and some of them displayed signs with such messages as "Vote Yes," "We want a contract" (the current union contract was due to expire by its terms in a few weeks) or "Go back to Illinois."

By his own admission, Kramer never made any effort to ascertain the location of the Company's property line parallel to Fortune Circle Road. From the circumstances noted supra, footnote 22, I infer that no such efforts were ever made by Patricia Reynolds either.

Driver Manager Paul Lodics (whose surname is variously spelled in the record, and who is admittedly a supervisor and an agent for the Company) and Branch Manager Patricia Reynolds testified that the trucks were positioned around the Company's gate on June 30 to avoid or minimize confrontations between the ralliers and persons leaving or entering the property, and to prevent such departing or arriving persons from having to face "a gauntlet of people outside." The Company similarly positioned the trucks on July 7, when employee Arnie Ray Goens, and Union Business Agents Buhle, Trader, and BuckClifton, began to distribute union literature (the "Keller letter" de-

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<sup>30</sup> This finding is based on the testimony of Union Steward Arnie Ray Goens (who is hard of hearing).

<sup>31</sup> My finding as to the racial epithet is based on Kramer's and Patricia Reynolds' testimony. The witnesses who denied hearing it were not necessarily in a position to hear it.

scribed supra, part III,G,(c),(2)) outside the gate. The trucks did not prevent the literature distributors from doing anything they wanted to do. The Company has offered no explanation for this July 7 conduct. Buhle testified that he had no idea why the trucks were out there.

## 2. Events on the warehouse roof

For a number of years, for the purpose of preventing theft and vandalism, the interior and exterior of the warehouse have been equipped with videocameras, and the outside of the warehouse has been equipped with floodlights. For a continuous period beginning before the Company acquired the warehouse, this equipment has been serviced by an electrical contracting firm whose partners are Steven Swallow and David Vandergriff, and by James L. Douglas (whose firm sells and services closed-circuit television cameras), respectively.

Between January and April 1993, Douglas and Lodics engaged in a series of conversations looking (1) toward the installation of additional videocameras in the warehouse, including videocameras to cover the south side of the exterior property and (2) toward the realignment or repositioning of existing interior videocameras because of a recent remodeling of the warehouse.<sup>32</sup> In April 1993, Lodics instructed Douglas to reposition existing videocameras, and install new ones, to cover various interior areas, and also to install new videocameras to cover exterior areas which included the south side of the property.

Over a fairly continuous period which began in early May 1993, Douglas installed the videocameras ordered by Lodics. Most of this work was performed within the warehouse. However, no later than late May, Douglas installed on the roof, for the purpose of covering exterior areas of the property, several videocameras to replace the single videocamera which had previously been directed to such areas. One of these newly installed videocameras, referred to in the record as videocamera E, was supposed to cover the gate area. While the installation of the interior videocameras was still in progress, Douglas ascertained that videocamera E provided an unsatisfactory picture in the evening and at night. Douglas believed that the problem was related to a possibly defective lens on the camera and to insufficient lighting in the gate area. He asked Lodics to have Swallow install an additional floodlight to illuminate the gate area. In addition, Douglas repeatedly went up to the roof and attempted to correct the problem by physically manipulating videocamera E. In mid-June, during one of these visits to the roof, he broke the plastic housing around the lens and thereupon ordered a replacement part, consisting of a new lens in a new housing. However, videocamera E still worked properly during the day, Lodics never told Douglas that there was a problem with videocamera E, and Douglas never told Lodics about the broken lens housing or the need to install a new part. Nor did the Company ever tell Douglas that the job had to be completed by June 30, or by any other particular date.

In mid-June, before finding out that the Union planned a rally for June 30, Lodics asked Swallow to install the new floodlight requested by Douglas in connection with videocam-

era E. Lodics did not give Swallow a date by which the new floodlight had to be installed. Swallow did not have the necessary fixture in stock, and had to order it from an electrical supply company called Graybar. On June 29, Graybar telephoned Swallow that the new fixture had arrived and he should pick it up. Swallow performed some electrical work inside the Company's warehouse on June 29. On June 30, he picked up the new fixture from Graybar and (without first advising the Company that he was planning to install the new fixture that day) immediately drove out to the Company's warehouse, together with his partner David Vandergriff, to install the fixture.

Swallow and Vandergriff reached the warehouse about 1:30 p.m. They parked their truck in the Company's parking lot, removed the appropriate tools, fixture, and fittings from the truck, and walked to the side door, where they were buzzed in by Lodics. Swallow told Lodics that the two electricians were there to install the new floodlight. Before buzzing them in, Lodics had not known that they were going to install the new floodlight on that particular day.

Carrying the material which they had removed from their truck, Swallow and Vandergriff walked across the warehouse work floor until they reached the roof access hole, through which they climbed up to the roof, and proceeded to install the new floodlight. While performing this task, which included connecting the new fixture to a junction box about 2 feet from videocamera E, they mostly stayed on the roof, although one or the other occasionally left the roof to obtain a fitting or to thread a wire. Swallow credibly testified that while he was on the roof, he did not see Douglas. Swallow and Vandergriff finished the installation job at about 3:30 or 4 p.m., and then proceeded to the interior of the warehouse, where they continued to work until 5:30 or 6 p.m.

After ordering the replacement lens assembly about mid-June, Douglas continued his videocamera repositioning work inside the warehouse, and his videocamera installation work mostly (if indeed not entirely) inside the warehouse. On June 30, Douglas reached the warehouse between 11 a.m. and noon. For the first time, someone at the gate asked him to identify himself and state his purpose in entering. After he explained that he was there to continue to work on closed-circuit TV, he was permitted to drive into the company parking lot. Douglas was buzzed into the warehouse by Lodics, who credibly testified that Douglas "said something about changing a lens on a camera."

After entering the warehouse on June 30, Douglas initially worked inside the warehouse repositioning some internal videocameras. However, at some time between 1 and 4 p.m., he decided to install the replacement lens assembly. Using the access hole, he went up to the roof and (spending much of his time sitting cross-legged) replaced the lens assembly, a procedure which did not involve any change in the area to be covered by videocamera E. The installation took him 1 to 2 hours. After completing the installation, at some time before 5 p.m., Douglas returned to the interior of the warehouse, where he went to the control room to make sure that videocamera E was picking up the gate area which it was supposed to pick up, and then resumed work on the interior videocamera system. With a 30-minute break (while the rally was still in progress) when he left the warehouse in order to obtain parts, he remained inside the warehouse (where he napped for a while) until 4 a.m. on July 1. Douglas credibly testified that he did not see Swallow

<sup>32</sup> Testimony by Douglas that the Company gave problems with vandalism and theft as reasons for various installations was not offered or received to show that such incidents had actually occurred, but was offered to show that the Company made such reports to these witnesses. Cf. Fed.R.Evid. 803(3). The record contains probative evidence that such incidents had occurred.

on that day. No company representative ever complained to Douglas about the operation of videocamera E.

The persons who were participating in the June 30 rally at the time when Swallow and Vandergriff were working on the roof were able to see the two electricians when they were installing the floodlight. Douglas was visible to the participants in the rally during the period when he was standing on the roof, but not during the period when he was sitting there. Nobody testified to having inferred from such activity that the Company was using, or was preparing to use, videocamera E for the purpose of surveilling the rally.<sup>33</sup> Nor is there any evidence that any participant in the rally expressed such a suspicion. Kramer credibly denied looking at the monitor on the day of the rally, and credibly denied any knowledge that anyone else did so, nor is there any evidence that the Company used the monitor for this purpose. There is no evidence that the Company ever explained to any of the employees or to the Union why Swallow, Vandergriff, and Douglas were working on the roof that day, nor any evidence that anyone asked the Company for such an explanation.

### 3. Analysis and conclusions

I agree with the General Counsel that the Company violated Section 8(a)(1) when Kramer told the employees who were distributing union handbills that they could not distribute handbills on company property. The employees had the statutory right to distribute union handbills on company property in nonworking areas when neither they nor the employee recipients were expected to be actively working (*General Thermodynamics*, supra, 670 F.2d at 721). Further, because it was this protected activity by Jones and the Goenses which led Kramer to ask if they wanted their names to be submitted to the police, I find that this statement, too, constituted a violation by the Company of Section 8(a)(1) of the Act. See *Parents & Friends of the Specialized Living Center*, 286 NLRB 511 (1987), enf. 879 F.2d 1442 (7th Cir. 1989); *Pabst Brewing Co.*, 254 NLRB 494 (1981). Finally, because the protected handbilling activity was a substantial reason for Kramer's action in summoning the police on the admittedly false pretext of rock throwing, I find that Kramer's action in calling the police constituted an additional Company violation of Section 8(a)(1).

However, the record fails to support the complaint allegations in connection with the June 30 activities on the warehouse roof. Paragraph 5(j) of the complaint alleges that in violation of Section 8(a)(1), the Company, on "an unknown date in early June, 1993, . . . increased the number of its surveillance cameras in response to its employees' union activities." The record evidence shows that videocamera E, the only videocamera whose legitimacy was challenged at the hearing, was installed in May 1993, for reasons which had nothing to do with union activity. The General Counsel's posthearing brief contends that Douglas' June 30 activities in connection with videocamera E gave employees the impression that their union activities were under surveillance by the Company (pp. 55-56). Assuming arguendo that the complaint would permit such an unfair labor practice finding,<sup>34</sup> it would be unsupported by the evidence. Rather, the evidence shows that the temporal coincidence of the

union rally, Douglas's replacement of the lens assembly on videocamera E, and the electricians' installation of the new floodlight on the roof was wholly fortuitous, and that at no material time did the Company have any reason to anticipate that Douglas would have to perform any additional work on videocamera E. Further, there is no evidence that the Company believed that employees might attribute Douglas's June 30 work on videocamera E, or the electricians' installation of the new floodlight on June 30, to the union rally, nor (for that matter) that employees did believe it. In connection with the surveillance-camera allegations, the General Counsel's posthearing brief relies on Teresa Goens' testimony that on the day before the rally, she asked Driver Manager Lodicus what the deal was with the new front-gate security guard and the guy or two guys she saw on the roof that day, to which he replied that "that was in case [the employees] got carried away at [their] little rally the next day and decided to throw Molotoff cocktails at the building." Although I credit her testimony that Lodicus made this statement<sup>35</sup> (which is not alleged to have been unlawful), it neither undermines the credibility of the undisputed evidence as to the reasons for Douglas's and the electricians' presence on the roof during the rally, nor appreciably supports an inference that the employees who participated in the rally had reason to believe that videocamera E was being adjusted in order to spy on their rally.

#### *I. Alleged Unfair Labor Practices in Connection with Writing on Back Belts (Complaint Paragraph 5(a); see Objection 16)*

##### 1. Facts

Since at least August 1992, the Company has supplied employees with back belts (also referred to in the record as weight belts) which provide employees with back support. Patricia Reynolds testified (without contradiction or corroboration) to having instructed her managers to tell the employees, when they were issued their back belts, that they could write their names, nicknames, initials, or social security numbers on their belts. However, there is virtually no probative evidence as to what the employees were in fact told about this matter.<sup>36</sup> Moreover, as of March 31, 1993, the Company had no written policy about what could be written on the belts; Reynolds gave no oral instructions that the names of organizations were not to be written on the belts; and there is no evidence that such instructions were actually given to any employees.

About March 29, 1993, during a grievance discussion unrelated to the belts, Patricia Reynolds told Union Representative Buhle that people were going to be reprimanded for having markings, other than their names, on the belts. Buhle asked what was written on the belts; she said Teamsters. (As discussed infra, other employee then had on their belts markings which were not their names but did not mention the Union.) Buhle asked who those individuals were. She replied that Jewell, Rakes, and Douglas Jones were going to get reprimanded for what was on the belts. However, she was unable to

<sup>35</sup> For demeanor reasons, I do not accept his denial of such a conversation. He did not deny that someone had in fact been on the roof on June 29.

<sup>36</sup> Employee Wilke credibly testified that when she was given her belt by Supervisor Grigdesby, he told her to "write something on it to identify that it was mine." Employees James A. Edmond Sr. and (as noted infra) Douglas Jones were given no instructions at all.

<sup>33</sup> However, Douglas Jones credibly testified to the belief that the videocamera lens was being repositioned or refocused. Further, Teresa Goens credibly testified to the belief that the camera was being positioned so as to be aimed toward the gate.

<sup>34</sup> See *Williams Pipeline Co.*, 315 NLRB 630 (1994).

answer Buhle's inquiry about what contract violation they were going to be written up for.

On March 31, 1993, each of these three employees received a written reprimand which stated, in part (emphasis in original):

You were instructed by your manager, Mike Grigdesby, to put your name on the belt, in case it was left at work, etc. You were *not* instructed to make any other markings on the belt. It has been brought to the company's attention that you have written more than your name on the belt.

... this is willful and deliberate damage to company property and equipment. According to the contract, ... Willful damage to equipment is subject to discharge.

Although more stringent discipline could be imposed for this offense, please consider this a letter of reprimand.

In early April 1993, a grievance which attacked these reprimands was filed on behalf of Jones, Jewell, and Rakes. At the first-step grievance meeting, a few days later, Patricia Reynolds said that the employees had been told by Assistant Night Manager Troy Payne that they should write only their names or nicknames on the belts. Reynolds testified at the hearing that the managers had never been instructed to forbid employees to put the name of any organization on their back belts. Payne had not given Jones any instructions about writing on his back belt, but Jones did not so advise Reynolds on this or (so far as the record shows) any other occasion.

The grievance having been denied at the first two steps, a third-step meeting was conducted about April 21, between Jones, Buhle, Union Attorney Steven J. Chestnut, and Patricia Reynolds. At this meeting, Reynolds agreed to comply with the Union's earlier request for a list of the entries which unit employees had made on their back belts. This list, which she sent to Chestnut with a covering letter dated May 6, included the entries "Jamie, IU" (see *infra*), "Coonbo," "Mo Money," "Easy Money," and "Fat Rat." During an "executive session" with Reynolds on or shortly after May 6, Chestnut said that the discipline administered to the grievants was "ridiculous" in view of the entries on other employees' back belts; that he believed the disciplinary action in connection with the writing on the back belts was motivated by the employees' union activities; that he was not going to move that grievance on to arbitration; and that if the discipline was not rescinded, he was going to file a charge with the NLRB.<sup>37</sup> No union representative reached an agreement with the Company that only an employee's name, initials, or social security number could appear on the employees' back belts.<sup>38</sup> By letter to Rakes, Jewell, and Jones dated May 11, 1993, Patricia Reynolds stated (emphasis in original):

After careful consideration, I realize there exists the remote possibility that you misunderstood the directions

<sup>37</sup> Because the Company made no claim before me that the matter should be deferred to arbitration, no deferral issue is presented.

<sup>38</sup> This finding is based on Chestnut's and Buhle's testimony. Reynolds initially testified that a written and signed agreement to this effect was reached during a meeting between herself, Buhle, and Chestnut which was held after March 31 and was occasioned by step two of a grievance (No. 5789) which was based on discipline for failing to wear back belts, and not for writing on back belts. Immediately after so testifying, she testified that no such document had been signed by any union representative. For this and demeanor reasons, I credit Chestnut and Buhle.

given to you when issued the back belt, purchased by Indiana Eby-Brown.

If you recall, you were instructed to put your "name" on the belt. Management approved "name" to include initials, nickname, or social security number. While implied, it was never stated that you were *not* to put the name, slogan, numerical identifier, etc. of any other club, organization, business, etc. on the belt. Therefore, I will rescind the letter of reprimand, dated March 31, 1993, provided you "ink-out" the markings currently on your belt, prior to May 17, 1993. You may identify your belt with your name, initials, nickname, or social security number, but may not mark your belt with anything identifying any organization, business, club, etc. other than Indiana Eby-Brown.

Employee Teresa Goens credibly testified that the day after these letters were received, Jewell told her that he, Jones, and Rakes had been written up for what they had written on their back belts, and that Goens talked to Jones about the matter; on timely objection, her testimony was not received to show the truth of the report. These May 11 letters constituted the first written instructions by the Company about not putting the name of an organization on their back belts. No similar letter was issued to any other company employee.<sup>39</sup>

As of May 17, 1993, neither Jones, Jewell, nor Rakes had inked out the markings on his back belt. At about 6 p.m. that day, Driver Manager Lodics told Lee Miller, who was his assistant, to retrieve the back belts which had writing on the back other than names or initials, to mark off what was on the belts, and to put on each belt the initials or name of the employee to whom it was assigned. Miller thereupon retrieved the back belts assigned to Jewell and Rakes; inked out the existing writing on these belts; and wrote these employees' respective names or initials thereon, and returned the belts.<sup>40</sup>

Jones had received his belt in August 1992 from Assistant Night Warehouse Manager Troy Payne, who said nothing at all about what, if anything, was to be written on the belt. Initially, Jones wrote nothing on the belt. However, when he saw other employees writing their names on the belts which they had received, and saw others writing on these belts the words "Untouchable," "Bull Dog," "Fishin Man," "Easy Money," "Mo' Money" (written by two employees), and "10," Jones (the steward on the second shift) wrote his own name on the inside of the belt, and "Teamsters Local 135" on the outside. At that time (August 1992), management said nothing to him about what he had written on the belt. Jones' March 31, 1993 letter of reprimand was delivered to him by Grigdesby, who made an obscene comment to the effect that he believed the reprimand to be nonsensical but that Patricia Reynolds "didn't see it that way." Immediately before receiving his reprimand letter, Jones, who was then at his work station, was photographed by Payne from the rear. Jones received his May 11, 1993 "rescission" letter from Payne or, perhaps, Grigdesby.

On the evening of May 17, Miller told Jones that Miller needed Jones' back belt to make some adjustments on it. Jones

<sup>39</sup> This finding is based on the testimony of Patricia Reynolds, who volunteered the explanation, "There were no other grievances pending."

<sup>40</sup> This finding is based on Miller's testimony. On timely objection, Jones' credible testimony that Jewell and Rakes had reported this to Jones was not received to show the truth of this report.

said that the belt fastened by means of a velcro strap, and could not be adjusted. Miller replied that he was just doing what he was told, and that he needed Jones' belt at that time to make some adjustments. Miller had in his hand two different, brand new belts, still wrapped in plastic. He asked Jones what size belt he wore. Jones, who had gained a little weight since receiving a belt 9 months earlier, said that he was wearing a "medium" size, but asked to try on a "large" size because the "medium" size seemed to be a little bit snug. Miller gave him the "large" size belt. Jones gave Miller the "medium" belt Jones had been wearing, put on the "large" size, and remarked that the "large" size was more comfortable. Miller walked off with the belt Jones had given him, inked out the reference to the Teamsters, and then brought the belt back to Jones. Jones, who credibly testified that the "large" size was an improvement, said that the new belt fit him better and he would like to keep it. Miller said there should be no problem, wrote Jones' name on the outside of the new belt, and told him to go ahead and use it. Twenty to forty minutes later, Miller came back to Jones and told him that Reynolds had told Miller that Jones could not have a new belt, that he had to use the original belt, and that he would have to go to her with any questions. Miller retrieved the "large" size belt, marked out Jones' name on that belt, and returned the old one to Jones.

Patricia Reynolds testified to the "understanding" that the requests to ink out the Union's name on the back belts had been "complied with," and that the letters of reprimand had thereafter been rescinded. Douglas Jones credibly testified to the opinion that because the Union's name on his back belt had been inked out by Miller, the discipline imposed on Jones in connection with this entry was "probably" no longer part of his disciplinary record. Rakes and Jewell did not testify.

My findings as to the conversation between Jones and Miller are based on a composite of Jones' testimony and credible parts of Miller's testimony. Although the Company denies that Miller was a supervisor and the record fails to show that he possessed that status, the Company did not object to Jones' testimony that Miller said Reynolds had told him Jones could not have a new belt and would have to use the original one, and such testimony was received without limitation. Accordingly, such testimony is probative of the truth of Miller's assertion.<sup>41</sup> Moreover, for demeanor reasons, I do not credit Miller's denial that he so advised Jones, or his and Reynolds' denial that she so advised Miller; and I find that she did in fact so advise Miller; *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962). Further, for demeanor reasons, I do not credit Miller's testimony that only 15 minutes elapsed between the time he told Jones he could keep the new belt and Miller's statement to Jones that he would have to use the old one; or Miller's testimony that both belts were the same size; or his testimony that this was the reason why he ultimately told Jones he would have to continue using the old one.

In March 1993, employee Edmond's immediate superior, Assistant Night Warehouse Manager Payne, issued Edmond a back belt and told him, "You need to wear the belt." Thereafter, and before May 6, Edmond put his initials on this back belt

<sup>41</sup> *American Rubber Products Corp. v. NLRB*, 214 F.2d 47, 52 (7th Cir. 1954); *Iron Workers Local 46*, 320 NLRB 982 fn. 1 (1996); and *Today's Man*, 263 NLRB 332 (1982).

and wore it in the warehouse on as undisclosed number of occasions.<sup>42</sup>

Before being hired by the Company, Edmond had purchased a back belt to assist him in performing his duties for his then employer. On an undisclosed date prior to May 18, 1993, Edmond wrote the Union's name on the outside of his own belt, and began to bring it (rather than the company-issued belt) to the Company's warehouse. Like other employees during this period, he wore a back belt irregularly while he was working. When he was not wearing it, he kept it lying next to him, sometimes in such a manner that the Union's name could be seen on it. Also, between about late April 1993 and his discharge (not alleged to be unlawful) in August 1993, he regularly wore in the warehouse a union hat and a union button.

At about 7 a.m. on May 18, 1993, while Edmond was performing his duties, Patricia Reynolds saw him wearing his back belt with the Union's name on it. She requested and obtained a marker from Lodics, gave the marker to Edmond, and told him to mark everything off his back belt. He refused. She said that it was "her belt, the company belt," and that he had to mark everything off it. He said that it was his own belt and that, therefore, he did not have to mark anything off it. She told him that she did not like "Local 135" on the belt, that she did not want that belt in "her" warehouse, that Edmond was not to wear his own belt in the warehouse any more, and that she wanted him to wear "her" belt. He said, "[F]ine."

My findings as to the content of this conversation are based mostly on the testimony of Jones (who overheard part of the conversation) and Edmond. Reynolds and Lodics testified that Reynolds approached Edmond and asked if the belt he was wearing was company issued, he said no, and she asked him to please wear the company-issued belt. Both she and Lodics denied that she told Edmond to ink out the Union's name on Edmond's belt. I credit Edmond's and Jones' testimony otherwise, and discredit Reynolds' and Lodics' version of the conversation, for demeanor reasons and in view of the following additional considerations: Reynolds testified that she told Edmond to wear the company-issued belt because "[t]his belt was the one selected by our safety administrative manager who works with our insurance company." However, she further testified that if Edmond had had nothing on the belt, it would not have "stood out"; and, even after inspecting Edmond's own belt at the hearing, that so far as she knew there were no differences between it and the company-issued belt.<sup>43</sup> Moreover, before her conversation with Edmond about his back belt, she had instructed the three employees who had been reprimanded for putting the Union's name on their respective company-issued back belts to "purchase a replacement belt identical to the company issued belt. If unable to find one locally, you may order one through your manager, for \$29. The belt you were initially issued will then become your property outside of

<sup>42</sup> My finding as to the date when Edmond put his initials on this belt and first wore it in the warehouse is based on the "JAE SN" entry attached to the name of James A. Edmond Sr. on the list of back-belt entries supplied to the Union with a May 6 covering letter. This list was offered into evidence by the General Counsel, and was received, without objection or limitation and, in any event, was likely probative under Fed.R.Evid. 801(d)(1)(A) and (B). I do not credit Edmond's testimony that he did not wear this belt in the warehouse until May 18.

<sup>43</sup> Similarly, Jones testified to the honest opinion that the two belts are "almost identical. They're the same brand . . . and they looked identical to me."

work;” as to these employees, she admitted that it was a question of the markings on the belt (“[i]t was Company property”) and not the belt itself. Furthermore, as discussed *infra*, her explanation for later requiring Edmond to clock out and go home in order to find his company-issued belt, after he reported to work with his own belt, referred to disciplinary and not safety considerations.<sup>44</sup>

Thereafter, Reynolds, who has usually left the warehouse by the beginning of the night shift, wrote a note to Night-Shift Warehouse Manager Grigdesby (Edmond’s immediate supervisor) telling Grigdesby that Edmond was supposed to wear his company-issued belt and not his personal belt when he came to work that evening; and that if he did not have his company-issued belt, Grigdesby was to send him home to get his company-issued belt and return to work. Patricia Reynolds testified that she issued these instructions to Grigdesby because she had given Edmond a direct order to wear his company-issued belt, and if Edmond chose to come in without his company belt, “then it became a matter of insubordination.”

Meanwhile, Edmond had decided that he had a right to wear his own belt at work, because it was identical to the company-issued belts, he hardly ever wore a belt at work anyway, and his belt bore no “cuss words” nor anything derogatory about the Company. When he returned to the warehouse for his next shift later that day, he consciously brought with him his own belt only, which he was wearing under a flannel shirt which was not tucked into his trousers. About a half hour after his shift began, Night Warehouse Manager Grigdesby approached him and asked to see the belt he was wearing. Edmond lifted his shirt, revealing his belt with the Union’s name on it. Grigdesby then told him he would have to go home and get the belt the Company had issued to him. Edmond, who became “very irate” at these instructions, said that he would do so, but that because he was in the process of moving, it would take him some time to go home, find the company-issued belt, and return to the warehouse. Grigdesby said, “[O]kay,” made an entry on Edmond’s timecard to show that Edmond had left work, and told him to telephone the warehouse shortly before he expected to return with the company-issued belt, so someone could unlock the warehouse door. Edmond initially went to his new address, looked for the company-issued belt but could not find it, and then went to his old address, where he found the company-issued belt. Then, he returned to the warehouse, and was admitted pursuant to his telephone call alerting the Company to his pending return. This errand caused Edmond to lose about an hour and a half of work, for which period he was not paid.

Three or four weeks later, Edmond forgot to bring a back belt to the warehouse. Edmond asked Grigdesby whether he had another belt which Edmond could use that evening, or whether he would have to leave to go home and get a back belt. Grigdesby told him not to worry about it, and just to go back to work. At that time, Edmond was performing a task which required him to lift somewhat heavier loads than did the task which he had been performing when he was sent home to get a company-issued back belt.

<sup>44</sup> In crediting Edmond, I have taken into account the inconsistency between his prehearing affidavit that on May 18 Reynolds approached him (as she testified) and his testimony that he was summoned to her office; and the inaccuracy of his admittedly uncertain recollection that he did not put his initials on the company-issued belt until after the May 18 incident.

James Groce (also spelled “Gross” in the record), who worked at the warehouse from September 1992 until his voluntary departure in August 1994, wrote the words “Indiana—Jamie—IU” on his back belt. Between the time he received this belt and his resignation, he wore it, in a place where others could see it, throughout the entire day 2 or 3 days a week. Nobody from supervision told him to remove that writing from his belt or, when he was not wearing it, to put on a back belt.<sup>45</sup> Reynolds admittedly knew Groce to be an enthusiastic supporter of Indiana University and believed the initials “IU” to represent that school; Groce credibly testified that people “pretty much” knew him to be an Indiana University fan because he talked about it and wore a hat with that school’s initials. Other employees put on their back belts such entries as “10,” “Mo Money,” “Easy Money,” “Fishin Man,” “Bulldog,” “Fat Rat,” and “Coonbo,” without being reprimanded therefor, so far as the record shows. When an employee leaves the Company’s employ, he is expected to return his back belt to the Company, which inks out whatever he may have written on his belt and issues it to a new employee.

## 2. Analysis and conclusions

At least in the absence of special considerations, the right to wear union insignia on the employer’s premises during working hours is guaranteed by Section 7 of the Act. *NLRB v. Republic Aviation Corp.*, 324 U.S. 793, 802–803 (1945). Although there may be some question about the extent of this right where the insignia are displayed on clothing or equipment owned by the employer but issued to employees for their use,<sup>46</sup> the employer’s ownership of such clothing or equipment does not privilege him to forbid display thereon of union insignia while permitting display of other messages. *C. Markus Hardware*, 243 NLRB 903, 910–911 (1979); and *Nestle Co.*, 248 NLRB 732, 734–737 (1980).

In the instant case, while forbidding employees in March 1993 to evince support for the Union by displaying its name on back belts, the Company permitted employee Groce to display his support for Indiana University, by displaying its “IU” logo on the company-issued back belt worn by him, until he left the Company’s employ in August 1994. Such disparate treatment shows that the Company’s restrictions on union insignia were not motivated by a desire to protect company property (that is, the company-issued back belts) but, instead, were motivated by a desire to interfere with the employees’ right of self-organization. *Markus Hardware*, *supra*, 243 NLRB at 910–911; see also *NLRB v. Shelby Memorial Hospital Assn.*, 1 F.3d 550, 564–565 (7th Cir. 1993); and *Fairfax Hospital*, *supra*, 310 NLRB at 312. This intent is further shown by Branch Manager Reynolds’ conduct when employee Edmond displayed the Union’s name on a back belt which was no different from the company-issued belt but which was owned by him. The Company’s letters to employees Jakes, Jewell, and Jones had previously stated, in effect, that employee-purchased belts identical

<sup>45</sup> My findings in these two sentences are based on his credible testimony, which is not directly contradicted. In view of such testimony, I do not credit Reynolds’ testimony that she told Groce’s direct line manager to tell Groce to remove the “IU” marking, or that Grigdesby (who was not asked about this matter) told her that Groce had removed it. See *Walton*, *supra*, 369 U.S. at 408.

<sup>46</sup> See *Northeast Industrial Service Co.*, 320 NLRB 977 (1996); *NLRB v. Windemuller Electric*, 34 F.3d 384 (6th Cir. 1994); see also *Machinists District Lodge 91 v. NLRB*, 814 F.2d 876, 879–882 (2d Cir. 1987), reversing *United Technologies Corp.*, 279 NLRB 973 (1986).

to the company-issued belts would be acceptable substitutes for the company-issued belts on which the addressees had inked the Union's name, thereby undermining the Company's seeming claim, in its posthearing brief, that only company-issued belts could be worn. Moreover, the Company had previously taken no action when Edmond failed to wear on the job any back belt at all. However, when Reynolds saw Edmond wearing on the job his own back belt with the Union's name, she not only required Edmond to replace his back belt with the company-issued back belt (which differed from his own back belt only by the absence of the Union's name), but also required him to return home to obtain the company-issued back belt, thus causing him lost pay and some transportation expenses; because this order to refrain from using Edmond's own back belt to display the Union's name was an unlawful order, Edmond's failure to comply therewith cannot justify the Company in sending him home. That Reynolds' actions were really directed at the prounion message on the belts, rather than at protection of company property in the form of back belts, is further shown by the Company's practice, when an employee returned his company-issued back belt upon leaving the Company's employ, of inking out whatever he may have written on the belt and issuing it to a new employee. Manifestly, as to the usefulness or even the appearance of such belts, it would make no difference what the departed employee had written on it. Further, because of this company practice, the instant case cannot fairly be distinguished from *Malta Construction Co.*, 276 NLRB 1409 (1985), enfd. 806 F.2d 1009 (11th Cir. 1986). The Board there found, with judicial approval, that because there was no evidence of any damage to company-issued hard hats by the placement thereon of union stickers, the employer violated the Act by forbidding employees to put such stickers on hard hats.

For the foregoing reasons, I find that the Company violated Section 8(a)(1) of the Act by prohibiting employees from wearing union insignia on their back belts, including individually owned back belts. Further, I find that the Company violated Section 8(a)(1) and (3) by issuing reprimands to employees Jewell, Rakes, and Jones, on the ground that they had put the Union's name on their back belts; and by requiring employee Edmond to go home during worktime, but without pay, to replace his individually owned back belt (which bore the Union's name) with the one provided to him by the Company.

#### IV. THE VALIDITY OF THE ELECTION

My unfair labor practice findings have tracked certain portions of the Union's unwithdrawn objections to the election. Moreover, the Regional Director's Report on Objections found that the investigation of the unfair labor practice charges which formed the basis of the March 23, 1994 complaint had disclosed evidence of potentially objectionable conduct which was not specifically alleged in the Union's objections, but which, if proven, would serve as grounds for setting aside the election. The election tally was 45 ballots for the Union, 51 ballots against the Union, and 3 challenged ballots, in other words, the result of the election might have been changed if two employees had voted for the Union rather than against it, and would have been changed if five employees had voted for the Union rather than against it. I conclude that the unfair labor practices which occurred (and some of which were disseminated to employees who had not been present during their commission) between the filing of the petition and the election, including

those which were not encompassed by the Union's objections, precluded the holding of a fair and free representation election in Case 25-RD-1171, and that the election should be set aside. *Pro/Tech Security Network*, 308 NLRB 655, 662 (1992), enfd. 993 F.2d 1538 (4th Cir. 1993), cert. denied 510 U.S. 1091 (1994); *Framed Picture Enterprise*, 303 NLRB 722 (1991); and *MD Railroad Corp.*, 319 NLRB 337 (1995). The ultimate disposition of the decertification petition is discussed infra, under the heading "The Remedy."

Because the unfair labor practices in connection with writing the Union's name on back belts (see supra, part III,I) occurred before the petition was filed, they are too remote in time to form the basis of objections to the election; see infra, footnote 144.

Objection 13 alleges, "During the election, office personnel were using the intercom instructing employees to vote 'no.'" Such allegations were not encompassed by the complaint. As to this objection, the credible evidence shows as follows:

The Company has a public address system which can be accessed by dialing a particular number on one of the company telephones which are located throughout the warehouse. The 1990-1993 collective-bargaining agreement included a rule stating, "Intercom is to be used for work-related communication only." The system was installed for work-related purposes, and is generally used for such purposes. However, on occasion, company personnel use the system to express support for local athletic teams. If an employee did this on several occasions, stamping Supervisor Bill King (admittedly a supervisor and company agent) would tell the employee to stop it, and this was all the discipline that was needed.

Between about 9 a.m. and 6 p.m. on July 7, the public address system carried about 30 announcements which urged a vote against the Union. During this period, unit employee Jim Dean used the intercom system on about a dozen occasions to urge the employees to vote no. On at least two of these occasions, he used the telephone on the desk and in the presence of Supervisor King.<sup>47</sup> On some of the occasions when a "no" vote, was thus urged, other employees used the intercom system to urge a vote for the Union.<sup>48</sup> Between 7 and 9 p.m. on July 7, the intercom system aired both "vote yes" and "vote no" messages. The polls were open between 2 and 9 a.m. on July 8.

I find that the foregoing conduct in connection with the intercom system did not constitute a basis for valid objections to the election. *Bro-Tech Corp.*, 315 NLRB 1014 (1994).

<sup>47</sup> My findings in these two sentences are based on Teresa Goens' testimony. For demeanor reason, I do not credit Patricia Reynolds' testimony that she heard no such message before leaving the office at 5 p.m., or King's testimony that his telephone was not used in his presence, that he told Dean to stop using the intercom if he was in fact using it, and that Dean said, "[O]kay."

<sup>48</sup> This finding is based on King's testimony. For demeanor reasons, I do not accept Teresa Goens' testimony that no such prounion messages were aired before she left the facility at 6:30 p.m.

## V. ALLEGED POSTELECTION UNFAIR LABOR PRACTICES

*A. Alleged Unfair Labor Practices with Respect to Bonuses and Douglas Jones' Evaluation (Complaint Paragraphs 5(m), (n), and (o), 6(c), (d), (f), and (g), and 7; Alleged Discriminatory Route Reassignment to Arnie Ray Goens (Complaint Paragraph 6(e))*

## 1. Facts

## a. Background

The Company has a practice, which is not set forth in the bargaining agreement, of considering for bonuses, at 6-month intervals, unit employees who have worked for the Company for more than a year and who are not on probation. Patricia Reynolds testified, and the Company's posthearing brief contends (p. 123), that bonuses are given to employees whose job performance is "above and beyond" normal expectations. However, at least in August 1993, bonuses were received by the overwhelming majority of the drivers who were eligible for consideration for bonuses.<sup>49</sup> Employees who receive bonuses are frequently, and perhaps usually, advised by the department managers that individual bonus information is not to be disclosed to anyone, and that the Company considers the bonus a confidential matter between the Company and the employee.<sup>50</sup> This injunction does not extend to communications with employees' spouses, or other family members, even where both of them are employed by the Company. The complaint alleges that among the employees who were unlawfully discriminated against with respect to bonuses was Arnie Ray Goens, whose wife, Teresa Goens, was likewise a bargaining unit employee; and that among those who were favored by unlawful discrimination with respect to bonuses was Robert Burnett, whose brother Tim is also a bargaining unit employee. The maximum bonus which can be given at a particular time is determined on a corporatwide basis; the record fails to show this maximum as of August 1993 or any other date. A nonprobationary employee with a year's service will not necessarily receive any bonus at all. At the Indianapolis warehouse, each manager submits to Patricia Reynolds at an appropriate time a list of his nonprobationary subordinates with more than a year's service, with a recommendation as to how much (if any) bonus each should receive. After reviewing each recommendation with the manager and making any changes she deems appropriate, she forwards the recommendation to Thomas Wake, who reviews it and makes the final determination after discussing it with Patricia Reynolds.

The Company also has a practice of issuing evaluations to employees at approximately 6-month intervals. The evaluations are made by the employees' respective managers and, as of August 1993, were made shortly before the bonuses were determined. Whether and how much of a bonus is to be received by a particular employee is determined by a rating be-

tween one and five (with five being the highest) of several factors. However, as of August 1993, the factor "attitude" was given the weight of at least 50 percent. Patricia Reynolds credibly testified that as of August 1993, the term "attitude" meant the same in the employee evaluation and in the bonus determination; I infer that at least in August 1993, substantially the same employee conduct governed management's "attitude" judgment as to both the evaluations and the bonuses. Patricia Reynolds credibly testified that as to the August 1993 bonuses, the employees were told at the time of their respective evaluations what their respective bonuses would be.

## b. Alleged unfair labor practices involving Hall's bonus

As previously noted, in June 1993 Thomas Wake stated at meetings of employees, whom the Company had assembled to hear him urge a vote against the Union, that he was going to display favoritism to people who were "Company minded" and wanted to be company people, referring to those who opposed the Union. During one of these meetings, employee Donald Hall, who was wearing a union hat and union button, told Wake that the absence of a retirement program and the Company's failure to equip trucks with CB radios showed that the Company did not really care about the employees; whereupon Wake told him that he was on the wrong side, and that he needed to take off his union hat, come over to the right side, and get on the winning team.

The evaluation form used for drivers calls for a "1" to "5" rating ("5" being the highest) with respect to nine factors. On August 11, 1993, Driver Manager Lodics showed Hall his evaluation form, which Lodics had prepared about 2 weeks earlier. Of the eight factors as to which Hall had been rated, Hall received a "4" rating as to six (knowledge of work, quality of work, dependability, initiative, and judgment), a "2" rating as to attendance (during the 6-month rating period, Hall had never been tardy but had been absent three times), and a "1" rating as to attitude. Under "Manager's Summary," Lodics had written, "Don does a good job as a driver and he is timely. Don needs to work on his attitude . . . Work on his attitude and become a closer member of the Eby team." The "Manager's Summary" also stated that Hall should "pay more attention to his paper work and return more boxes," the "boxes" entry referring to the Company's ongoing effort to recycle boxes; these matters were not referred to during the conversation.

Lodics said that Hall was one of Lodics' best drivers, but that Lodics did not believe in giving out five's because nobody was perfect. Lodics said that attitude was 51 percent of the grade, and that Hall had received a "1" as to attitude "because of the union thing, and the way that [he] felt about the Company." Hall said, "So you're basing my attitude grade on things that you've heard that I've said, and things that I said at union meetings?" Lodics shrugged his shoulders. Hall said, "That's what my attitude grade is based on?" Lodics said, "Yes." Hall had received a \$200 bonus in February 1993 (the amount recommended by then Driver Manager Doty) and August 1992, and a \$250 bonus in February 1992. Lodics said that in August 1993 Hall would be receiving a \$100 bonus (the amount which Lodics had recommended to his superiors).<sup>51</sup> After using a scatological expression, Hall said that it was not

<sup>49</sup> In August 1993, bonuses were given to about 40 unit employees who were not drivers. As of the payroll week ending August 21, 1993, the unit included about 79 employees who were not drivers. The record otherwise fails to show how many nondrivers in the unit were eligible to be considered for August 1993 bonuses.

<sup>50</sup> The complaint does not allege that this confidentiality policy violates the Act, cf. *Radisson Plaza Minneapolis*, 307 NLRB 94 (1992), enfd. 987 F.2d 1376 (8th Cir. 1993); and *Handicabs, Inc.*, 318 NLRB 890 (1995).

<sup>51</sup> See Patricia Reynolds' testimony (*supra*, part V,A,1) as to when employees were advised as to the amount of their August 1993 bonus.

“right” for Lodics to knock Hall’s bonus down, because of “the way that [he] felt, and something that [he was] standing for,” after Lodics had said Hall was one of Lodics’ best drivers. Lodics responded by telling Hall to sign his evaluation.<sup>52</sup> The size of the bonuses received by other employees is discussed *infra*, part V.A.1.e.

Hall credibly testified to concluding from this conversation that he was a “marked man” and had better find another place to work. After giving 1 week’s notice to the Company, he started working elsewhere on September 20, 1993, at the same pay he had been receiving from the Company. Although he believed his new job to be a better job than he had performed with the Company, he credibly testified that he did not consider these perceived improvements when he decided to seek other employment.

My findings as to the August 11 conversation are based almost entirely on Hall’s testimony. Lodics testified, in effect, that Hall’s low “attitude” rating was based partly on Hall’s failure to attend quality control meetings, and that Lodics brought this matter up during the evaluation conference. Lodics testified that attendance at such meetings is voluntary. Hall testified without contradiction that initially, the quality control meetings were held at some time between 5 and 7 p.m. on Mondays, and that he had to start work at 1 a.m. on Tuesdays; and that when he pointed this out to Lodics, he said Hall would not have to attend these meetings. Hall further testified without contradiction that the quality control meetings were later moved to Tuesday nights, and that he could not attend these Tuesday meetings because his work schedule called for an overnight run which put him in Cleveland, Ohio, on Tuesday nights. I credit Hall’s testimony that Lodics excused him from the Monday meetings because of his Tuesday schedule, for demeanor reasons and because I regard as improbable Lodics’ testimony that Hall never brought up to Lodics either the unresolvable conflict between Hall’s work schedule and the Tuesday meetings, or the sleep problem which was created by the Monday meetings and his Tuesday work schedule.

Lodics also testified that Hall’s low “attitude” rating was based partly on Hall’s alleged refusals to comply with Lodics’ alleged requests that Hall perform an additional run (at least mostly on Fridays), after he had completed his regular runs. Lodics testified that he had made such requests of Hall with respect to at least 15 Fridays between March and the end of July (a period which included about 22 Fridays), and that so far as Lodics could recall, Hall did not agree to perform such a run on any such occasion. Although Lodics testified that Hall was first on the “checklist” and Lodics called him first every time, Hall was in fact in the middle of the drivers’ seniority list. Hall testified that Lodics had made such requests on about three Fridays before Hall’s August 11 evaluation; that he had complied with such a request on one occasion and refused on the other two occasions; and that on both such occasions, Lodics later told him that Lodics had been able to find a driver to run the route in question. The Company failed to produce any records showing whether Hall ran more than his scheduled routes during the period in question or, for that matter, whether anyone ran more than his scheduled routes. Lodics went on to testify that Hall’s low “attitude” rating was based partly on

<sup>52</sup> The form states on its face that the employee’s signature does not indicate agreement, but indicates only that the review was discussed with him.

Hall’s having “badmouthed” the Company. However, Lodics went on to testify that he could not remember when Hall made these remarks (except that it was within the February–July 1993 review period), or how many times he made them (except “I guess, five, ten. I really don’t know”); and that all of such comments by Hall were made in the employee breakroom rather than to customers.

Because Lodics’ recital of lawful alleged reasons for Hall’s low “attitude” rating relied partly on conduct which resulted entirely from the work schedule to which the Company assigned him, partly on conduct for which Lodics had previously given permission, and partly on conduct whose significance Lodics exaggerated, because the Company failed to produce records which would have shown whether Hall in fact ran an extra route one Friday and how often extra routes were in fact run (see *infra*, fn. 58), and for demeanor reasons, I credit Hall as to Lodics’ requests that Hall perform additional runs and Hall’s response, and also Hall’s version of his conference with Lodics; and I do not credit Lodics’ testimony that during this conference, the subject of the Union came up only when Hall claimed that his union activity motivated his low “attitude” evaluation and Lodics denied this.

### *c. Alleged unfair labor practices involving Arnie Ray Goens*

#### (1) Background

Arnie Ray Goens was the Union’s chief steward between the Company’s 1989 acquisition of the warehouse and February 1994, when he quit for a better paying job elsewhere. In February and August 1992 and February 1993 he received a bonus of \$100, \$150, and \$50, respectively; in each case, no other driver who received a bonus received a lower bonus than he did. In February 1993, then Driver Manager Larry Doty, who was admittedly a supervisor, told Goens that if he had not given Doty so many grievances Goens would probably have received a better bonus than he had in fact received, but that Doty had no problems with Goens’ work performance.<sup>53</sup>

After this interview, Goens continued to sign grievances on other employees’ behalf, and to present them to management. As previously noted (*supra*, part III,D), about a week before the election, Copresident Thomas Wake told the employees that the reason they had no retirement program was the money the Company had to spend to fight the grievances being filed. Goens wore a union hat to work every day, and wore a union button to work almost every day between the first week in June and about the end of June, when the Company instructed employees not to wear pronoun or antiunion buttons on deliveries. As previously noted (*supra*, part III,H,1), on June 30, 1993, Supervisor Kramer threatened to report him to the police because he was distributing union literature outside the warehouse fence on his own time.

#### (2) Alleged exceptionable conduct by Goens before Lodics became driver manager in March 1993

A letter to Goens from Patricia Reynolds dated February 13, 1993, while Doty was still driver manager and before the decertification petition was filed, states as follows:<sup>54</sup>

<sup>53</sup> The complaint does not allege that the Act was violated either through Doty, or in connection with bonuses to Goens before August 1993.

<sup>54</sup> My finding that Goens received this letter is based on Lodics’ testimony. For demeanor reasons, I do not credit Goens’ testimony that he never saw the letter before the hearing.

Recently, I learned that you may have advised a customer of Indiana Eby-Brown Company that a strike will occur this summer and that the customer should consider alternative sources for its product needs.

While you certainly are free to have your own opinion regarding the outcome of negotiations this summer, we hope you will bear in mind that anything you say or do which damages the Company in the eyes of the customers also affects the job security of every employee of the Indiana Eby-Brown Company.

In this regard, I bring to your attention the following portion from the current bargaining agreement:

*Article XXII*

Section 1. The union, as well as the members thereof, agree at all times as fully as may be within their power to further the interests of the Company.

It is hoped in the future that regardless of your personal opinions and desires, you will consider how your statements to customers may affect the Company and all its employees, including those in the bargaining unit.

Goens testimonially admitted that during discussions with customers about the representation election campaign, he "probably" told the customers that they should buy their "stuff" from somewhere else.

On April 30, 1993, the Regional Director for Region 25 issued a complaint against the Union, alleging, inter alia, that in December 1992, Goens had threatened employees with reprisals if they did not support the Union, and that in January 1993, Goens had threatened employees that in the event of a strike among the Company's employees, the Union's agents would assault company supervisors. The record fails to show the ultimate disposition of this complaint.<sup>55</sup> There is no evidence as to whether Goens in fact engaged in any of the conduct alleged in this complaint.

Lodics became the Company's driver manager in March 1993. He testified, in effect, that the employee evaluations drawn up by him were based solely on events which occurred after he became drivermanager.

(3) Goens' evaluation and his failure to receive a bonus

Lodics gave Goens his evaluation on August 12, 1993. As to the eight items which Lodics checked on the evaluation form, Goens received a "5" on attendance (he had not been absent or tardy during the period covered), a "4" (the highest mark Lodics gave anyone) as to four items (knowledge of work, quality of work, dependability, and judgment), a "3" as to two items (quantity of work, and initiative), and a "1" as to attitude. Lodics said that he had no problem with Goens' work or his paperwork, and that he met or exceeded what was expected of him. Lodics went on to say that Goens had a bad attitude, and that attitude was 51 percent of his evaluation. Goens asked what Lodics meant by saying that Lodics had a bad attitude. Lodics said that other drivers had told him that Goens had been "bad mouthing" the Company. Goens asked who had said this. Lodics said that he could not tell Goens. Goens asked him to

<sup>55</sup> Lodics' testimony that these charges "were found to be founded" was received only to show his mental processes. The Company's post-hearing brief states (p. 122) that Goens "was personally named in an unfair labor practice charge by the Company;" and that the Union agreed to settle the case by posting a notice.

bring in the driver who had said this. Lodics said that he could not do that either. Goens asked what statements the drivers had attributed to him. Lodics did not answer this question, but said (in accordance with Lodics' recommendation) that Goens would not be receiving a bonus in August 1993.<sup>56</sup> Of the approximately 32 drivers who were eligible for consideration for a bonus in August 1993, 29 received a bonus.

After Goens had signed his evaluation (see supra, fn. 52) and left the office, Lodics wrote on Goens' evaluation, where the form called for "Manager's summary," the words: "[Goens] does a good job as a driver, and does very well on his paper work but has an attitude problem. Attitude is 51 % of your job and [Goens] has yet to learn that." Where the form stated, "Identify any areas for improvement that [employee] should concentrate on to become more effective in his/her present position," Lodics wrote, "Attitude Attitude Attitude! Returned boxes."

Notwithstanding Lodics' "Returned boxes" entry on Goens' evaluation form, Lodics testified that he told Goens during the evaluation interview that he should "improv[e] his participation" in the box-return program, and that Lodics gave him a low "attitude" rating partly because he "didn't participate" in that program. However, Patricia Reynolds testified that he received a quarterly honorable mention in the box-return program sometime in 1993, although (she testified) she could not recall whether he received this recognition before or after his August 1993 evaluation. Laying to one side Lodics' testimony about the evaluation interview, there is no evidence that Goens was ever reproached by management in connection with the box-return program. Moreover, the Company produced no records to show how many boxes were brought in by Goens, although the Company's on-going box-return competition must have caused it to keep records as to how many were brought in by each driver.<sup>57</sup> I infer that such records, if produced, would have corroborated his testimony that he brought in 45 to 60 boxes a week<sup>58</sup>—a number which at least sometimes reached (and, perhaps, exceeded) the Company's "goal."<sup>59</sup> Nor did the Company produce any records showing how many drivers (if any) achieved this "goal."

Lodics testified that he gave Goens a low "attitude" rating partly because Goens repeatedly told him, when Goens was leaving for the day, that Lodics should be careful driving home, things can happen out there. Lodics testified that he interpreted these remarks as threatening, but he testified, in effect, that he did not know the purpose of these alleged threats. In view of Lodics' testimony in this respect, and for demeanor reasons, I credit Goens' testimony that he told Lodics to "have a nice evening, good night, and be careful going home," and did not tell him that "things can happen out there." Accordingly, and

<sup>56</sup> See Patricia Reynolds' testimony (supra, part V,A,1) as to when employees were advised about the size of their bonuses.

<sup>57</sup> Patricia Reynolds testified that since late 1993, the Company "started tabulating the [box-return] information on a monthly basis."

<sup>58</sup> *Golden State Bottling Co. v. NLRB*, 414 U.S. 168, 173-174 (1973); *NLRB v. Dorothy Shamrock Coal Co.*, 833 F.2d 1263, 1269 (7th Cir. 1987); *Zapex Corp.*, 235 NLRB 1237, 1239 (1978), enf'd. 621 F.2d 328 (9th Cir. 1980).

<sup>59</sup> The Company's "goal" was 20 "points" per route, 2 "points" for each Eby-Brown box, and 1 "point" each for other boxes. Goens drove three routes a week. The record fails to show how many of the 45 to 60 boxes he returned each week were one "point" boxes and how many were two "point" boxes.

because Lodics did not mention this matter on Goens' evaluation form, I do not credit Lodics' testimony that he bought up such remarks during Goens' evaluation interview.

Lodics testified that Goens' low "attitude" evaluation was due partly to the fact that an accounts receivable manager who introduced herself as "Dee Dee Knapp" was constantly addressed by Goens as "Fifi," even though she had told Lodics that she was upset by such conduct and had told Goens that she did not want to be called "Fifi."<sup>60</sup> Lodics testified that he believed Goens so addressed Knapp because he believed it annoyed her, and that he was thereby acting disrespectfully toward her. The record fails to show that Lodics mentioned this matter to Goens, and there is no probative evidence that Knapp ever mentioned the matter to Goens. Goens credibly testified to an incident in early 1993 where he referred to Knapp as "Fifi."<sup>61</sup> Shortly thereafter, according to his credible testimony, Patricia Reynolds asked him what he had against the Knapps, he said he had nothing against them, Reynolds asked him to refrain from saying anything to Dee Dee Knapp, and he said he would; there is no evidence or claim that he ever called her "Fifi" again. After becoming driver manager, Lodics "quite a few times" called Goens by the nicknames of "Whore Dog" and "Playboy."<sup>62</sup> Goens' conduct in addressing Knapp as "Fifi" was sometimes preceded by Knapp's calling him "Gonads"; but this was not known to Lodics. Also, both before and during Lodics' service as driver manager, employee Mark Mayfield also used to call Goens "Gonads," and he in turn used to call Mayfield "Fairfield," in Lodics' presence and without any comment from him. In addition, Goens and Mayfield used to call Lodics "Low Dick;" the record fails to show whether this nickname was used after he became driver manager.

Lodics testified that he gave Goens a low "attitude" rating partly because of Goens' conduct, shortly after Lodics became driver manager in March 1993, in connection with some at least arguably humorous cards. On this occasion, then company employee Charlie Lodics, who is the wife of Paul Lodics, remarked to Goens that her husband had said Goens had a couple of funny cards—a stud card and a union card.<sup>63</sup> Goens thereupon gave her two cards. The card thus described as a stud card had been given Goens by his wife, and states, in part, "The Stud Club, long standing member. . . . This card is carried by sexy men all over the world." The card thus described as a union card states:

I'm the Sonofabitch from the Teamsters who Burns  
Warehouses, Slashes Tires, Bankrupts Businesses . . . and  
Makes \$100,000 a Year! May I serve you?

Charlie Lodics read the union card and laughed. Then, she gave the cards to a fellow employee, who in turn passed them on to another fellow employee. Eventually, one of the em-

ployee recipients of these cards took them "up front." There is no evidence that Goens was ever disciplined in connection with this incident.<sup>64</sup>

Lodics testified that he gave Goens a low rating about "attitude" partly because Goens attended only about one of the monthly drivers' meetings (which are mandatory) and none of the monthly quality control meetings (which are nonmandatory). Goens testified that Lodics had excused him from attending the meetings in question, because Goens' part-time work schedule for another employer called for him to work during the hours when these meetings were to be held; and that he always asked Lodics what Goens had missed during a drivers' meeting he had not attended. Lodics denied that Goens asked to be excused from these meetings. I credit Goens, for demeanor reasons and because Goens' testimony is uncontradicted that Lodics never said anything to Goens about his not having attended drivers' meetings.<sup>65</sup>

Lodics testified that he gave Goens a low rating as to "attitude" partly because employee John Ashby, who had run one of Goens' routes during the week of July 30, 1993, when Goens was out sick, had reported to Lodics that some customers on that route had told Ashby that Goens had urged them to patronize other suppliers, and other customers on that route had told Ashby that by slamming down boxes and other conduct, Goens had indicated that the Company did not appreciate having them as customers. On timely objection, Lodics' testimony in this respect was not received to show that the customers had in fact made these reports to Ashby. Ashby, who still works for the Company, was called by it as a witness, but was not asked whether customers had complained to him about Goens or whether Ashby had made such reports to Lodics. Lodics testified that although at least one of the allegedly complaining customers was identified in the reports allegedly made to Lodics about Goens' advice that they should buy from another company, Lodics did not ask the customer whether the report was true (because "I don't have any contact with customers") and that Lodics did not know whether anyone else had attempted to verify the report. Lodics further testified that as to Ashby's alleged box-slaming report, Lodics did not contact the customer to find out whether the report was accurate; and he testified that he did not recall if he relayed the report to anyone else in management. Lodics testimonially attributed to Patricia Reynolds the report that customers had said Goens suggested they buy from another company. Reynolds testified that the Company had received some customer complaints about Goens, but that she did not recall the details of any of these complaints and (in effect) that any reports to Goens about such complaints would have been made by Lodics. Lodics testified that he did not believe Goens was ever disciplined as a result of the reports allegedly made by Reynolds, and there is no evidence that any such discipline was administered. Goens testified that he did not remember whether he had told any cus-

<sup>60</sup> On timely objection, Lodics' testimony in this respect was not received to show that Knapp had in fact so advised Goens.

<sup>61</sup> He credibly denied that he was using that name in the sense that it would be used for his pet.

<sup>62</sup> In addition, when Goens was wearing his hair in a pony tail, Lodics repeatedly said that Goens' hair "turned [Lodics] on."

<sup>63</sup> This finding is based on Goens' uncontradicted testimony, which was received without objection or limitation. Moreover, Lodics, who testified for the Company, did not deny telling his wife that the cards were funny. Accordingly, I find that Lodics did so describe these cards to his wife. See fn. 41, supra.

<sup>64</sup> Patricia Reynolds testified to the belief that this incident was a subject of the April 1993 unfair labor practice complaint against the Union. That complaint alleged threats by Goens in December 1992 and January 1993. The card incident occurred in March 1993.

<sup>65</sup> In response to a leading question by company counsel which included whether Lodics had mentioned the drivers' meetings matter to Goens during his evaluation interview, Lodics' "yes" response was stricken on objection. Immediately thereafter, Lodics was asked what he told Goens during his evaluation interview. Goens' response did not include the drivers' meetings.

tomers that the Company was no good. He further testified that lots of customers had asked him what was going on in connection with the "Union-free" or "Vote Teamsters" insignia, he told them that the Company was going through a vote about whether to keep the Union, the customers asked which would be best, and he said they could buy their stuff from somewhere else. Goens credibly denied without contradiction that he ever slammed down boxes, or told a customer that it was an inconvenience for him to deliver the Company's products to the customer. I do not credit Lodics' testimony that he received these reports from Ashby, for demeanor reasons, because Ashby did not corroborate such testimony, because Lodics rejected Goens' request to tell him what drivers had reported to Lodics about what customers, because Lodics admittedly failed to investigate such reports, and because the undisputed evidence shows that any such reports would have been largely groundless.

Lodics testified that he gave Goens a low rating about "attitude" partly because, when other drivers were running Goens' routes, the other drivers completed them faster than Goens did. However, Lodics was testimonially unsure whether he came to this conclusion before preparing Goens' evaluation. It is uncontradicted that nobody ever told Goens that other drivers were operating his routes faster than he, or that Goens was running his routes too slowly, or that it took him too long to run his routes. The Company failed to submit any records showing how fast these routes had been run by either Goens or others (see *infra*, fn. 69). As previously noted, Lodics rated Goens as a "3," which Lodics characterized as "medium," with respect to the factor "Quantity of Work/Accuracy—Errors."

#### (4) Allegedly unlawful change in Goens' route assignment

Prior to August 1993, Goens delivered products to customers on route 270 on Tuesdays and Wednesdays; delivered products to customers on route 480 on Thursdays; and, on Fridays, drove a route consisting of customer stops in Lebanon and Lafayette, Indiana. Goens had been assigned to route 270, an overnight route, since about 1988, and had been assigned to route 480 since about 1991.

On Friday, August 20, Goens saw a posted schedule which stated that he was being assigned to routes other than 270 and 480. Goens thereupon approached Lodics, protested the change, and asked why Goens had been moved to different routes. Lodics replied that "they didn't want [Goens] to be burned out."<sup>66</sup> Goens had never told the Company that he was burned out on any of his routes; rather, Goens had repeatedly told Lodics (even before Lodics became driver manager) that Goens liked running route 270.<sup>67</sup> Goens credibly testified that he preferred the routes he had been driving before late August 1993 to the routes he was assigned thereafter.<sup>68</sup>

<sup>66</sup> This finding is based on Goens' credited testimony. When asked whether Goens ever complained to Lodics about the route changes, Lodics testified, "No. Not that I remember." I credit Goens, for demeanor reasons and because it seems unlikely that he would not have complained about an assignment change that displeased him.

<sup>67</sup> This finding is based on Goens' testimony. For demeanor reasons, I do not credit Lodics' denial.

<sup>68</sup> Goens testified to the belief that route 270 was easier than the route to which he was transferred because the new route required him to take off more product than did route 270. At the hearing and in the Company's posthearing brief, company counsel contended that Goens' belief was erroneous. However, it is significant that he preferred his old route and so advised Lodics.

Ordinarily, drivers are assigned to particular routes for relatively long periods of time. Moreover, Patricia Reynolds testified (although Lodics denied) that ordinarily, overnight routes are assigned on the basis of seniority. However, drivers are in fact transferred between routes from time to time, both permanently and temporarily, and not necessarily with any consideration for seniority. Lodics testified, in substance, that he transferred route 480 to John Harris (who was junior to Goens) because Lodics wanted to transfer route 270 to driver Ashby (also junior to Goens), the route to which Goens was transferred in lieu of route 270 called for a different number of hours than route 270, and Lodics did not want Goens' total hours to be affected by his transfer from route 270.

As to why Lodics removed Goens from route 270, Lodics testified that he took this action partly because Ashby, who had run route 270 during the week ending July 30, 1993, when Goens was out sick, had reported to Lodics that some customers on that route had made some adverse comments about Goens. For reasons summarized *supra*, part V,A,1,c,(3), I find that Ashby never made such reports. The week after Goens was out sick, and after he had resumed running route 270, Goens told Lodics that one of the customers on route 270 had told Goens to advise his superiors to never send Ashby there again, and that another customer on that route had said that she would prefer not to have Ashby sent there again. In addition, Goens told Lodics that a customer on another route which Goens usually ran, and which had been run by John Harris when Goens was out sick, had said that the Company should never again send "that little idiot," referring to Harris. In response to these reports, Lodics laughed at Goens and walked away. In addition, Goens reported to Lodics that one customer had said that she did not like either Harris or Ashby.

Lodics testified that he transferred Goens from route 270, and assigned that route to Ashby instead, for the further reason that when Ashby ran that route in Goens' absence for medical reasons, Ashby was able to complete all the deliveries on that route in one day (Tuesday), thereby accomplishing service the next day after the customers' orders; whereas Goens had been making some of the route 270 deliveries on Wednesday. Lodics testified that because of Department of Transportation regulations regarding truckdrivers' hours, when running route 270 both Ashby and Goens had had to spend Tuesday night in an out-of-town motel and return to the Indianapolis warehouse on Wednesday. Lodics testified that Ashby reached Indianapolis at about 9 a.m. on Wednesday, July 27, "more than" or "almost" 4 hours earlier than Goens usually returned. However, Lodics elsewhere testified that he did not really care at what hour in the morning on Wednesday the driver chose to leave for Indianapolis. Ashby and Goens were both paid on an hourly basis (Goens likely receiving 35 cents an hour more), with no pay for layover time. Lodics testified that a factor which contributed to his decision to transfer route 270 from Goens to Ashby was "probably, to save money, because [Ashby] would get back sooner," and that Ashby's at least alleged relatively early return advantaged the Company because Ashby (who was a part-time warehouseman and a part-time driver) thereupon became available for other work assignments. There is no evidence that the Company ever sought to assign Goens to any work other than work as a driver.

Ashby testified that before being regularly assigned to route 270 in August 1993 he had run it on 20 to 25 occasions since June 1992, both before and after Lodics became driver man-

ager. The Company's records show that Ashby drove route 270 on one occasion between May and August 1993, but the Company failed to offer any records to show how often he drove route 270 before May 1993, or the hour or date of his return to Indianapolis. Ashby testified that when he ran route 270, he would leave the warehouse at 1 a.m. on Tuesday (as Goens also did), and that except on one or two occasions when Ashby returned to the Indianapolis warehouse about 9:30 a.m. on Wednesday, he returned to the Indianapolis warehouse between 3:30 and 4:30 p.m. on Tuesday, the same day he left. As previously noted, Lodics testified that because of DOT regulations, a driver who ran route 270 could not return on the same day he left. The General Counsel offered into evidence an exhibit which, when read in light of Goens' testimony that when running route 270 he always laid over for the night, shows that the last time he ran that route he clocked in at 3:42 a.m. on Tuesday, August 17, went off duty at 5:31 p.m. that day, went back on duty at 4:45 a.m. on Wednesday, August 18, and got back to the Indianapolis warehouse at 2:50 p.m. that day. This exhibit also contains such entries for Tuesdays and Wednesdays during the period when Ashby ran route 270 until its composition was changed, about the end of 1993. These exhibits show that on approximately 11 occasions when Ashby probably ran route 270 between the week ending August 28, 1993, and the end of that year, he left the Indianapolis warehouse earlier than 2 a.m. on 3 occasions, and after 3 a.m. on 3 occasions. However, with the exception noted in the margin,<sup>69</sup> it is impossible to determine from the exhibits the hour or date when Ashby returned to Indianapolis.<sup>70</sup>

By his own admission, Lodics never asked Goens to finish all of the route 270 deliveries on Tuesdays. Lodics further testified that so far as he knew, no customer on route 270 ever asked Goens or the Company to deliver product on Tuesdays and not on Wednesdays. Lodics never asked Goens why Ashby could at least allegedly run route 270 faster than he, nor complained to Goens that he was running his route too slow, or that it took him too long to run his route.<sup>71</sup> Lodics testified to being unaware of any complaints from customers that deliveries were untimely before August 1993. When giving Goens his periodic

<sup>69</sup> As to one of these weeks, the exhibit consists of timecards rather than payroll lists. Because both the clock-in and the clock-out times appear to have been entered by a timeclock, I infer that on Tuesday, November 2, Ashby returned to the Indianapolis warehouse at the clock-out time of 5:31 p.m. Although Ashby's driving logs would show whether he took a layover period and the beginning and end times of any such period, the Company is legally required to retain such logs for only 6 months, and the record suggests that it routinely destroys them shortly thereafter. Patricia Reynolds' testimony suggests that the Company may maintain and keep "trip cards" which show the time that the driver leaves on and returns from his route. A charge received by the Company on November 12, 1993, alleges that the Company had "discriminated against [Goens] regarding employees bonuses and other conditions of employment" because of his union activities. A complaint which alleges discrimination against Goens in August 1993 with respect to a bonus and reassignment of routes was received by the Company on March 3, 1994.

<sup>70</sup> More specifically, these records fail to show whether Ashby's Tuesday off-duty and Wednesday on-duty times were in Indianapolis or at a layover point, and fail to show whether his Wednesday hours involved driving, warehouse work, or both.

<sup>71</sup> This finding is based on Goens' testimony. I do not accept Lodics' testimony that he asked Goens why Ashby was able to return so much earlier than Goens, for demeanor reasons and in view of Lodics' testimony that he did not recall what Goens said in reply.

evaluation in August 1993, Lodics rated his productivity (which included how fast he made his deliveries) as "medium"—3 on a scale of 1 to 5. Goens never received any customer complaints with respect to the timeliness of his deliveries on route 270. Goens testified that he did not complete all the route 270 deliveries on Tuesdays because (1) as to the Clark station in Jasper, Doty (Lodics' predecessor as driver manager) had told him never to deliver after 1 p.m., because there had been a big mixup on cigarettes while Goens was on vacation, and he could not reach Jasper by 1 p.m. on Tuesday; (2) the Crane Naval Weapons base in Crane, Indiana, had a cutoff time for deliveries of 2:30 p.m., and he could not reach Crane by 2:30 p.m. on Tuesday; and (3) Boyle's IGA in Petersburg wanted to receive deliveries early in the morning, and he could not reach Petersburg early in the morning on Tuesday.<sup>72</sup> Lodics testified that he did not recall specifically whether, as of August 1993, any of the customers on route 270 had any restrictions as to the time of day of deliveries. Ashby testified that before August 31, 1993, he never reached Crane later than 2:30 p.m. on Tuesday, and never experienced any problem delivering at any customer on route 270 because of the time of day.<sup>73</sup>

*d. Alleged unfair labor practices in connection with Douglas Jones' evaluation and his failure to receive a bonus*

(1) Background

Douglas A. Jones was hired on June 27, 1990, for the night warehouse. The night shift is serviced by an employee whose title is "alternate steward," but whose duties are much the same as those of the steward, who services the day shift. About October 1992, when the incumbent alternate steward resigned his employment, Union Business Representative Buhle posted a notice asking that it be signed by anybody wishing to run for steward. Buhle had intended to conduct an employee election to determine which of the signatories would become alternate steward. However, Jones was the only employee who signed the notice, and Buhle appointed him as alternate steward. He served in this position until February 1994, when the chief steward (Arnie Ray Goens) quit the Company's employ and Jones became chief steward.

Between his June 1990 hire and August 1994, Jones filed three to five grievances on his own behalf. In November 1991, Patricia Reynolds escorted Copresidents Thomas and Dick Wake to Jones' work station and said, "[Y]ou'll note Doug, his name appears as a witness on all the grievances of Charles Elliott that's been filed."<sup>74</sup> One of the Wakes thereupon remarked that Jones always seemed to be caught in the middle of everything, and that being caught in the middle was a really bad place for him to be. In 1992, he testified at two July arbitrations, inferentially in the grievants' favor, and represented the grievant in a December arbitration. As steward, he handled more than 10 grievances on behalf of the other employees.

Jones did not receive a bonus in mid-1992, the first time his length of service made him eligible for consideration for a bo-

<sup>72</sup> Copresident Thomas Wake testified that a significant number of accounts want deliveries made before a particular hour (for example, by 10 a.m., by noon, or by 2 p.m.), and that it was very common for customers to have specific requirements for delivery time.

<sup>73</sup> Ashby testified that after route 270 was changed, about the beginning of 1994, he became aware that Crane Naval Weapons would probably not take any deliveries after 4 p.m.

<sup>74</sup> Arnie Ray Goens' testimony suggests that Elliott was a union steward who had been discharged.

nus, nor did he receive one in early 1993. When giving Jones his evaluation in February 1993, Grigdesby told him that he was not a team player, that he needed to be more company supportive and company oriented, and that he had a bad attitude.<sup>75</sup>

Charges filed by the Union on May 14 and June 28, 1993, alleged, among other things, that the Company was discriminating against Jones, Rakes, Jewell, and Edmond because of their union activity and their wearing of union insignia (inferentially, referring to the back-belt matter discussed supra, part III,1). On June 10, 1993, Jones gave an affidavit to the Board's Regional Office in connection with the back-belt matter. As previously noted, during a June 30, 1993 speech urging the employees to vote against the Union, Thomas Wake told employees that they had no retirement plan because of the Company's expenses in processing grievances (supra, part III,D). Jones served as the Union's observer at the election on July 8, 1993. On July 14, 1993, the Union filed objections to the election alleging, among other things, that on July 7, Supervisor Grigdesby had ordered Jones and employee Wilke "to stop passing out union literature on their breaks, lunch, before and after work under threat of termination."<sup>76</sup>

(2) Jones' July 1993 evaluation, and his failure to receive a bonus in August 1993

On July 29, 1993, Supervisor Grigdesby called Jones into Grigdesby's office and instructed Jones to close the door, a somewhat unusual procedure in connection with issuing an evaluation. Then, Grigdesby gave Jones his latest evaluation form, which had been prepared by Grigdesby. One side of the form calls for the supervisor to insert a check mark after each of eight or nine factors, in one of five columns. A check in column 2 means "Meets Majority of Job Requirements;" in column 3 means "Satisfactorily Meets Job Requirements;" and in column 4 means "Consistently Meets or Exceeds Job Requirements." Jones received a check mark in column 2 for 5 factors (quantity of work, initiative, attitude, judgment, and advancement potential); in column 3 for 3 factors (knowledge of work, quality of work, and dependability); and in column 4 for attendance.

After showing Jones this side of the evaluation form, Grigdesby turned the form over and read to him Grigdesby's entry under "Manager's Summary"—namely, that Jones "seems intent on only doing a mediocre job. He has negatively influenced coworkers & has no sense of company loyalty. He is dishonest & I feel would rather pursue other career interests." Under the printed words "Identify any areas for improvement this member should concentrate on to become more effective in his/her present position," Grigdesby had written, "Productivity & become 100% company supportive or find an employer that you can be happy with." Jones asked Grigdesby exactly what he meant by dishonest. Grigdesby said that Jones "had been going around here telling everybody that [Grigdesby] wouldn't let [Jones] pass out union literature on and off the clock, on or

off company property;" and that Grigdesby had not said that. Jones said, "[W]ell, that's funny . . . because I didn't say that, either." Grigdesby went on to say that the Company was very fair, and from that point on, everyone was going to start out with a clean slate. Jones said that this might be true for most people, but that Grigdesby knew as well as Jones did that this was not the case with Jones. Grigdesby said, "[W]ell, what do you mean? Due to all this union business?" Jones said, "[Y]es." Grigdesby said that he did not care what Jones did as long as he came to work on time and got the merchandise out the door to the customers. Jones said that Grigdesby might feel that way, but he was not in charge there. Grigdesby said that it was true he was not in charge. Jones said that Patricia Reynolds was Grigdesby's boss. Grigdesby said, "[T]hat's true, and women never forget." Grigdesby said that Jones had burned a few bridges along the way. Jones "kind of laughed" and said, "[Y]es, I think I torched them." Grigdesby told Jones that he would not be receiving a bonus in August 1993,<sup>77</sup> and ended the conversation by saying, "[T]here's one thing you're going to have to learn in life, Doug, you can't fight city hall."

Although Jones told several fellow employees about his evaluation and his evaluation interview, he merely advised them that he had received a review which was "typical of the type of review that he would get from the Company."

Grigdesby testified that the reason why he had included in the evaluation the statement that Jones was dishonest was that Jones allegedly had lied to the NLRB about Grigdesby's threatening him with termination, and that if Jones had not filed the "charges" (inferentially, referring to the allegations in the election objections about Grigdesby's statements to Jones; Jones had not yet filed any unfair labor practice charges), the "dishonest" entry would not have been in the evaluation. Grigdesby further testified that Jones' alleged lying to the NLRB played no role at all with respect to the numerical marking. As to what Grigdesby meant by the term in Jones' evaluation "100 percent company supportive," Grigdesby testified, "To be a team player and help us as a team get the job done out there instead of persisting on only doing a mediocre job." When asked whether he considered Jones a team player when Jones allegedly lied to the NLRB in the charge he had filed relating to Grigdesby, he replied, "What I'm talking about by team player is his work performance. The way he had no interest in trying to get the job done. He was more interested in socializing, talking when he shouldn't have been talking, being out of his work area, going to the bathroom, working ultra slow." Grigdesby further testified that he did not know what Jones was talking about when Grigdesby thought Jones should have been working, and that Grigdesby knew Jones to be the alternate union steward and "would imagine" he had occasion to discuss grievance matters with other employees.<sup>78</sup> Jones credibly testified that he had never told anyone that Grigdesby had threatened him with discharge if he did not stop handbilling, that this matter did not come up at all in his conversation with Grigdesby, and that Grigdesby never did threaten him with discharge.

<sup>75</sup> The complaint does not allege that the Company violated the Act by failing to pay Jones a bonus in 1992 or in early 1993, or by any statements to Jones in February 1993.

<sup>76</sup> Par. 5(h) of the initial complaint herein (issued on September 21, 1993) and the subsequent complaints alleges that about July 1, 1993, and thereafter, Grigdesby unlawfully "prohibited employees from distributing literature published by the Union, to other employees during nonwork time in nonwork areas." See supra, part III,G,b.

<sup>77</sup> See Patricia Reynolds' testimony (supra, part V,A,1) as to when employees were advised about the size of their bonuses.

<sup>78</sup> Unless no steward or alternate steward was on the job, the bargaining agreement required employees to submit grievances through the steward. The bargaining agreement suggests that the shop steward was entitled to use working time to investigate grievances, collect dues, and transmit union messages to employees.

Grigdesby testified that he recommended to Patricia Reynolds that Jones receive no bonus. Grigdesby testified to telling her, with respect to his recommendation, that Jones “didn’t show any signs of enthusiasm as to trying to get the work done . . . that he seemed intent on just doing a mediocre job. Disruptive with constant . . . conversations here and there and going to the bathroom and just picking slow.” When asked whether Grigdesby referred to Jones’ alleged dishonesty in making Grigdesby’s bonus recommendation, Grigdesby testified, “I really don’t know. . . . I don’t know. . . . I don’t believe so.” Reynolds was not asked for the specifics of her discussion with Grigdesby about Jones’ bonus; she testified that she could not recall the discussion she had with Thomas Wake about Jones’ bonus, and Wake was not asked about the matter.

*e. Alleged discrimination in favor of Robert Burnett, Mark Mayfield, Clyde Ervin, and Teresa Deutscher with respect to bonuses*

In February 1992, the Company’s drivers who were eligible to be considered for bonuses received bonuses which ranged between nothing and \$300; in August 1992, their bonuses varied between nothing and \$300; and in February 1993, their bonuses varied between nothing and \$350.

Before Lodic drew up his recommendation as to how much bonus (if any) each driver should receive in August 1993, he asked Patricia Reynolds what the range of bonuses was. She said that there were no real limits on bonuses, but that drivers usually ranged between nothing and \$350. The highest specific amount which he set forth in his written recommendations to Reynolds was \$350. After the names of David Oylar (whose name is also spelled “Oiler” in the record, and whom the complaint does not allege to be a discriminatee), Robert Burnett, Mayfield, and Ervin, Lodic merely entered question marks. As to the content of his discussion with Reynolds about the bonus matter, Lodic testified that he told Reynolds that there was no definite cap or range which he had to work with, “expressed to her the thanks [he] had for these individuals, . . . how much [he] appreciated their help,” and asked what was available which Lodic could give them. Reynolds testified to telling Lodic that customers had commented favorably with respect to Burnett, but that she could not recall anything else which was said by either her or Lodic during this conversation. Eventually, they agreed to recommend a bonus of \$450 to Oylar, bonuses of \$550 to Mayfield and Ervin, and a bonus of \$850 to Robert Burnett. Reynolds testified that she discussed these recommendations with Thomas Wake; she testified that she did not remember what was said, and he was not asked about the matter. Wake approved all these recommendations: such recommended bonuses were in fact paid. As to the bonuses which had been granted in February and August 1992 and in February 1993, the highest amount given to any driver had been \$350 (to Robert Burnett, Ervin, Mayfield, Oylar, and one other driver in February 1993). At the time Reynolds discussed the bonus matter with Lodic, she admittedly knew that Burnett was the employee who had filed the decertification petition, and knew that Mayfield and Ervin also opposed the Union. In early June 1993, Burnett and Ervin had helped the Company’s supervisors in hanging outside the facility at least two banners which urged a vote against the Union. On June 30, 1993, Mayfield and Ervin, both of whom were then wearing antiunion buttons, had parked company trucks on opposite sides of the entrance gate to the Company’s facility, pursuant to Lod-

ics’ instructions (see supra, part III,H,1). On July 23 or 24, Supervisors Kramer or Lodic received from employee Hammer copies of a petition, signed by a number of employees and requesting the Union to withdraw its objections to the election, with the request that it be given to Robert Burnett, an initiator of this activity (see infra, part V,D,1,a).

On August 13, 1993, Lodic advised Burnett that he would receive an \$850 bonus (see supra, fn. 77) and reviewed his evaluation with him. This evaluation rates him as a “4” as to all factors except attendance (where he was rated as “2;” he had been absent twice and tardy once) and advancement potential, where he was rated as “3.”<sup>79</sup> Attached to these numerical ratings were various notations by Lodic which included, “can run any route faster than anyone else . . . does a good job 90 percent of the time . . . always there when I need him . . . always asking what he can do to help . . . 110% every day [after “attitude”] . . . needs to watch what he says.” On the other side of the evaluation sheet, Lodic wrote that Burnett “is very company minded employee . . . he has full understanding of the Company’s success are his successes [sic]. He works well with other [employees] and is the first to offer help. . . . Like most drivers [Burnett] needs to pay more attention to his paperwork. He has improved greatly but still needs to watch what he says to customers.”<sup>80</sup> The record fails to include the evaluations given to Ervin or Mayfield (or Oylar).

Lodic and Reynolds testified that they had agreed on a high bonus for Burnett, who was at the top of the drivers’ seniority list, partly because he was constantly offering to do work in addition to his regularly assigned work, and accepted extra assignments even at great personal inconvenience. Reynolds testified that Burnett had been a “go-getter,” who regularly offered to perform extra work, throughout Burnett’s tenure as a driver. Reynolds had participated in bonus determinations of \$200 for Burnett in February 1992 (10 drivers received more), \$200 in August 1992 (nine drivers received more), and \$350 in February 1993 (the same amount was received by six others, including Ervin, Mayfield, and Oylar). Although the evidence shows that Respondent maintained business records which showed as to each driver the number of hours worked and any extra routes run, Respondent produced no such records as to Burnett during any of the weeks covered by his evaluation. Lodic and Reynolds both testified that they had agreed on a high bonus for Burnett partly because he had received favorable comments from customers, including favorable comments on questionnaires distributed in connection with periodic company surveys regarding customer satisfaction. These surveys were not produced, but it is unclear whether they were still in company files at any material time.<sup>81</sup> Because the Company has a practice of inserting into the Employee’s personnel file any complimentary letters from customers, but no such letters appear in Burnett’s file, I infer that no such letters were received.

<sup>79</sup> As of March 1994, Burnett was going to be involved in training drivers at the Company’s facility in Springfield, Ohio.

<sup>80</sup> The copy of this evaluation which was eventually received into evidence is Burnett’s own copy. The record otherwise fails to show why Burnett’s signature does not appear thereon.

<sup>81</sup> The first pleading which specifically referred to the bonus issue was a charge received by the Company on November 12, 1993. During the Region’s investigation of the case and pursuant to a subpoena issued in early July 1994, company counsel supplied to the General Counsel all the customer surveys which were still in the Company’s files. No such surveys were put into evidence by any of the parties.

The Company does not make file notes of oral compliments from customers. Lodicis was not asked to explain his notation, on Burnett's evaluation, that Burnett "needs to watch what he says to customers." Lodicis testified that he joined in recommending a high bonus for Burnett partly because Burnett always came in first or second place in the box-return recycling program. The Company submitted no records in this connection (see *supra*, fn. 41, 57). Lodicis gave, as an additional reason, that Burnett regularly advised the sales department in writing about customer concerns. No such letters were produced.

On April 30, 1993, Burnett caused about \$3500 worth of damage to a company truck, and caused it to be tied up for 2 to 4 weeks, by driving it under an overpass with insufficient clearance. Similar accidents involving company trucks had occurred on three or four prior occasions. The Company classified the Burnett incident as a minor chargeable accident within the meaning of the bargaining agreement, and on May 4, 1993, issued him a letter of reprimand therefor, which letter was not contained in his personnel file.<sup>82</sup> Lodicis testified that this incident did not affect Burnett's evaluation, because the incident was not something which was done on purpose.<sup>83</sup> According to Lodicis, in performing the evaluations he did not consider accidents. In December 1992, truck driver Watt was involved in a traffic accident which (Watt was advised) cost the Company about \$224,000, including injury to another person, damage to another vehicle, and \$5000 worth of damage to the company vehicle driven by Watt. Watt was disciplined by a 2- or 3-day layoff and was transferred to another job for about 2 months. He did not receive a bonus in February 1993, when Doty was still the driver manager.

On an undisclosed date in early 1993, Burnett was removed from two routes because the Company's sales department reported an allegation that he had harassed a customer. The Company investigated this allegation, but never made a determination as to whether it was true. The record fails to show whether he was restored to the routes in question.

Lodicis testified that the basis for his bonus recommendation for Mayfield was that he went "the extra mile for the customers." Lodicis testified that he had received a written report and oral reports from Sales Representative Ron Koppel and, perhaps, oral reports from other sales representatives that Mayfield would take it on himself to put in orders for products which were out of stock and, where he had been unable to fill part of a particular order because the Company was out of stock as to that item, made sure that the item was delivered to that customer after he had run his regular route. On timely objection, this testimony was not received to show that Mayfield in fact engaged in this activity. Koppel did not testify, nor was any written report from him offered into evidence. Lodicis testified that he gave Ervin a high score on "attitude" because he was "very customer oriented," "was always willing and able to go the extra mile for me," volunteered to help Lodicis out, and was always willing to work beyond his usual quitting hour. The Company failed to offer records showing how often, if ever,

<sup>82</sup> If the accident had been classified as a major chargeable accident under the bargaining agreement, Burnett would have been subject to discharge.

<sup>83</sup> The Company's posthearing brief (p. 124) describes this incident as an "unintentional accident." I can find nothing in the record to support the assertion in that brief (p. 124) that "employees who had had similar accidents had not been denied bonuses if they were otherwise eligible to receive them."

Ervin worked beyond his regular quitting hour between March and August 1993.<sup>84</sup> Lodicis further testified that he gave Ervin a high score on "attitude" because of oral reports from Sales Representative Brent Shay and, perhaps, other sales representatives that Ervin was helpful to him or them. Shay did not testify.

About 31 or 32 drivers were eligible for consideration for a bonus in August 1993. Of these, Goens and one or two others failed to receive a bonus in August 1993. Of those drivers who did receive bonuses, about 13 (including alleged discriminatee Hall) were considered by Lodicis to be union supporters.

In August 1993, night warehouse employees Clell Groover (not alleged to be a discriminatee) and Theresa Deutscher each received a bonus of \$550; both of them had received \$350 bonuses in February 1993. The highest bonus received by other night warehouse personnel in August 1993 was \$400 (Danny Cooper), and the next highest was \$350 (Brian Hammer). The Company put in no evidence as to why Deutscher was one of the two night warehouse employees who received the highest bonus in August 1993. Grigdesby, who is Deutscher's immediate supervisor, testified for the Company, but was not asked about her. Deutscher is the daughter of Patricia Reynolds, who testified that when bonuses were awarded in August 1993, she believed Deutscher opposed the Union. In February 1993, Deutscher had been one of the three night warehouse employees who received the highest bonus (\$350).

## 2. Analysis and conclusions

### *a. Alleged unfair labor practices in connection with bonuses and Douglas Jones' July 1993 evaluation*

The evidence summarized above shows as follows: The Company disliked operating the Indianapolis warehouse on a unionized basis, earnestly desired to rid itself of the Union, and hoped that the employees would vote against the Union in any election conducted pursuant to the decertification petition filed by employee Robert Burnett. As to how much (if any) bonus each employee was to receive, the ultimate decision was made by Copresident Thomas Wake, on the basis of recommendations made to him by Branch Manager Patricia Reynolds, whose recommendations as to the night warehousemen and the drivers were based on those made to her by Night Warehouse Manager Grigdesby and Driver Manager Lodicis, respectively; all four of these members of management had participated in the Company's preelection unfair labor practices. During the preelection campaign, Thomas Wake had publicly advised an assembly of employees that Wake was going to display favoritism toward the employees who opposed the Union, and told Hall (who was wearing union paraphernalia and had attributed to company indifference toward employees' welfare the absence of a retirement plan) that Hall was on the wrong side. Further, Wake publicly advised an assembly of employees that the absence of a retirement plan was in fact due to the expense the Company had undergone in opposing grievances; the bargaining agreement required all grievances to be filed by the steward (Arnie Ray Goens) or the alternate steward (Jones); Goens and Jones processed a number of grievances and received no bonus; Hall received the lowest bonus received by any driver who received a bonus, although his immediate su-

<sup>84</sup> An exhibit introduced by the General Counsel shows that during the payroll week ending August 28, Ervin worked about 10 hours of overtime during a 4-day week.

pervisor, Lodics, told Hall that he was one of Lodics' best drivers; Jones was introduced by Patricia Reynolds to the Wakes in November 1991 as a witness on several grievances; and one of the Wakes thereupon told Jones that he seemed to be caught in the middle of everything, and being caught in the middle was a really bad place for him to be. Moreover, in February 1993, then Driver Manager Doty (Lodics' predecessor in that position) told steward Goens that if he had not filed so many grievances, he would probably have received a better bonus than he in fact received. Furthermore, at the hearing Lodics included, as a reason for giving Goens a low evaluation, an allegation refuted by the Company's own evidence (including the evaluation form prepared by Lodics with respect to Goens)—namely, Goens' alleged nonparticipation in a box-return program in which he had in fact received honorable mention.

The evidence further shows as follows: At least half of the factors leading to the bonus determinations consisted of the respective employees' "attitude," a factor which meant the same in bonus determinations and in employee evaluations. Further, during the period here in question, employees were advised during their evaluation interview how much (if any) bonus they would receive. During the same interview when Hall was advised that he would receive only a \$100 bonus (the lowest amount received by any driver who received a bonus), Driver Manager Lodics showed Hall his evaluation (which gave him Lodics' highest rating as to six of the eight listed factors), and told him that "attitude" was 51 percent of the grade, and that Hall's lowest possible grade as to "attitude" was based on his union activity. In addition, when giving Goens his evaluation, and telling him that he would receive no bonus, Lodics admitted that he had no problem with Goens' work, but that 51 percent of his evaluation was "attitude" and Goens had a bad "attitude" (the evaluation form stated that Goens should concentrate on improving his "attitude attitude attitude!"); Lodics' conference with Hall on the previous day shows that by "attitude" Lodics meant union sympathies, and Goens was the chief steward and in management's presence had distributed union literature at the union rally about 6 weeks' earlier. Of the 31 or 32 drivers who were eligible for consideration for a bonus, Goens was one of only 2 or 3 drivers who received no bonus; and the lowest bonus received by any driver, \$100, was received by Hall and three others. When Night Warehouse Manager Grigdesby gave Jones his July 1993 evaluation form, and told him that he would receive no bonus, Grigdesby read to him an entry on the form which alleged that Jones was "dishonest"; attributed this entry, in effect, to an inaccurate version of Jones' report in support of the Union's objections to the election—namely, that Grigdesby had allegedly ordered Jones "to stop passing out Union literature on [his] breaks, lunch, before and after work;" and showed Jones an entry, on his evaluation form, associating his alleged dishonesty with a preference for getting a job elsewhere.<sup>85</sup> Further, during

<sup>85</sup> Although company counsel was supplied with Jones' prehearing statements to the Board for use in cross-examination, there is no evidence inconsistent with Jones' representation to Grigdesby that Jones had not accused him of forbidding distribution of union literature off the clock and off company property. Although Jones testified that Grigdesby did not threaten Jones with discharge for distributing literature, whereas the Union's objections alleged that Grigdesby threatened discharge for this reason, the objections alleged that Grigdesby had issued no-distribution "orders" to Wilke as well as Jones. Because

this interview, Grigdesby tacitly admitted that Patricia Reynolds entertained an unalterable dislike of then alternate Steward Jones because of his union activity;<sup>86</sup> and showed Jones entries, on his evaluation form, that Jones should "become 100% company supportive or find an employer that [he] could be happy with"—in context, that Jones should abandon the Union or quit his employment with the Company.

In addition, the record shows as follows: driver Robert Burnett, who is the petitioner in the decertification proceeding, received an \$850 bonus in August 1993; this bonus exceeded by \$300 the highest bonus awarded since at least February 1992, and exceeded by \$500 the highest bonus given any other driver between February 1992 and February 1993. Burnett received this bonus (whereas Hall received only \$100) after receiving a numerical evaluation which was identical to Hall's except for "attitude," where Burnett received the highest rating Lodics gave (a "4") and Hall received the lowest rating possible (a "1"); further, Burnett received his \$850 bonus notwithstanding a chargeable April 1993 accident which caused \$3500 worth of damage and several weeks' inactivation of his truck, and which consisted of driving his truck under an overpass with insufficient clearance. In my view, the Company's explanation for admittedly disregarding this accident in determining the size of Burnett's bonus adds to the weight of the General Counsel's case. More specifically, I regard as inherently implausible driver manager Lodics' testimony that in performing drivers' evaluations he did not consider accidents, and that this accident did not affect Burnett's evaluation "because it was something that was not done on purpose." I note that the bargaining agreement differentiates between "willful damage to equipment," which is subject to discharge for the first offense, and a "minor chargeable" accident,<sup>87</sup> which is subject to a reprimand for the first offense, and is not subject to discharge until the third offense. I note, moreover, that the evidence refutes the Company's claim that Burnett received written compliments from customers, another explanation which the Company has tendered for his receiving a large bonus.

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Grigdesby would have been in error in believing that Jones had misstated to the Board Grigdesby's remarks about distribution of union literature, I need not and do not consider whether any such misstatements would have affected the statutory protection ordinarily afforded to employee statements to the Board in support of objections to an election (see *infra*, fn. 88). See *NLRB v. Burnup & Sims*, 379 U.S. 21, 22-24 (1964); and *Bituma Corp.*, 314 NLRB 36 fn. 3 (1994).

<sup>86</sup> Although Grigdesby denied that Jones' statements to the Board affected his numerical score on his evaluation, Grigdesby did not deny that such statements affected his recommendation that Jones receive no bonus. My inference that such perceived "dishonesty" did affect Grigdesby's recommendation is based on Grigdesby's remarks during the interview regarding Jones' evaluation, and on the likelihood that supervisors' recommendations as to their subordinates are affected by resentment of such subordinates' perceived unjustified unfavorable comments about them. Because Jones' failure to receive a bonus was due partly to Grigdesby's recommendation to Patricia Reynolds, the absence of evidence that she knew about Grigdesby's resentment of Jones' statements to the Board is immaterial to the legality of Jones' failure to receive a bonus. *NLRB v. E.D.S. Service Corp.*, 466 F.2d 157, 158 (9th Cir. 1972); and *Boston Mutual Life Insurance Co. v. NLRB*, 692 F.2d 169, 171 (1st Cir. 1982), and cases cited.

<sup>87</sup> The Company's evidence indicates that at least where no personal injury resulted, the difference between a "minor chargeable" and a "major chargeable" accident depends at least mostly on the dollar amount of the damage. However, the critical amount has never been specifically determined.

Finally, the record shows as follows: In August 1993, Mayfield and Ervin were given higher bonuses than any of the other drivers except Burnett and Oyler, and higher than anyone had received during, at least, the three preceding bonus periods. The Company admittedly believed that Mayfield and Ervin opposed the Union; Ervin had assisted Burnett and management in hanging antiunion banners; and while wearing “vote no” buttons, Ervin and Mayfield had assisted in the truck-parking procedure which Patricia Reynolds had devised in response to the union rally.

For the foregoing reasons, I conclude that the General Counsel has shown, by a preponderance of the evidence, that the Company lowered Jones’ evaluation, withheld a bonus from Jones and Goens, and lowered Hall’s bonus, at least in part because of their union activity and because Jones had given a statement to the Board in support of the Union’s objections to the election.<sup>88</sup> I further conclude that the General Counsel has shown, by a preponderance of the evidence, that the Company gave relatively high bonuses to Burnett, Ervin, and Mayfield at least in part because of their activity in opposition to the Union. Upon such a showing, the Company can avoid being adjudged a violator of the Act only if the Company can prove by a preponderance of the evidence that its actions were based on legitimate reasons which, standing alone, would have induced the employer to take the same personnel action. *NLRB v. Advance Transportation Co.*, 979 F.2d 569, 574 (7th Cir. 1992); *Care Manor of Farmington, Inc.*, 318 NLRB 725 (1995); *American Ambulette Corp.*, 312 NLRB 1166, 1169 (1993); *Manno Electric*, 321 NLRB 278 fn. 12 (1996).<sup>89</sup> The Company has failed to sustain this burden.

As to Hall, the Company contends that he received a low bonus partly because the number of boxes he brought in for recycling purposes was “below goal.” However, the Company produced no evidence whatever as to how many other drivers failed to meet the Company’s “goal,” “which was 20 “points” per route (2 “points” for each Eby-Brown box and one “point” each for other boxes). Moreover, the Company brought in no records to show how many “points” were credited even to Hall, although the Company’s on-going box-return competition must have caused it to keep records as to how many “points” were credited to each driver; rather, the Company relies solely on Hall’s testimony that he “would assume [as] I recall” he brought back three or four boxes a day (he was not asked

whether they were one-point or two-point boxes) and that he was “sure that other drivers brought in more.” I infer that the Company’s box-return records, if produced, would have shown either that Hall in fact met the Company’s “goal,” or that this “goal” was not attained by a significant number of drivers who did receive bonuses (see *supra*, fn. 41, 57). The Company also relies upon Hall’s testimony that occasionally, he failed to return a few signed receipt stubs. However, there is no evidence that this particular alleged shortcoming was mentioned to him at the evaluation meeting, his testimony is undenied that “occasionally, there would be a few stubs missing from every driver,” and Burnett received a bonus of \$850 (as compared to Hall’s \$100) even though Burnett’s evaluation, like Hall’s, stated that the evaluated employee needed to pay more attention to his paper work.

The Company contends that Driver Manager Lodic gave Goens a low “attitude” rating partly because he allegedly failed to participate in the Company’s box-return program. However, this contention not only is unsupported by any company records offered into evidence (see *supra*, fn. 41, 57), but also is contradicted by the evaluation prepared for Goens by Lodic, and by Patricia Reynolds’ testimony that he received “honorable mention” for his box-return performance.

The Company further contends that the driver manager who manages Lodic gave Goens a low “attitude” rating partly because of complaints from customers about him and because he failed to attend certain drivers’ meetings. However, the credible evidence shows that Lodic had received no such complaints and had excused Goens from attending such drivers’ meetings. The Company further contends that Lodic gave Goens a low “attitude” rating partly because he repeatedly addressed Dee Dee Knapp as “Fifi” over her objections. However, there is no evidence that Lodic ever mentioned this matter to Goens, and both Lodic and other drivers (as well as Knapp herself) had repeatedly addressed other company personnel by using derogatory and even obscene nicknames. The Company also contends that Driver Manager Lodic gave Goens a low “attitude” rating partly because, at the request of other employees including Driver Mmanager Lodic’s wife, Goens had passed around a couple of cards which Driver Manager Lodic himself regarded as funny, a reaction shared by Mrs. Lodic. However, there is no evidence that Goens was ever disciplined in connection with this incident. Further, the Company contends that Lodic gave Goens a low rating as to “attitude” partly because his routes were completed more rapidly by driver Ashby. However, it is uncontradicted that Lodic never mentioned this matter to Goens, although an evaluation meeting would appear to be a particularly appropriate occasion on which to discuss any such problem. Furthermore, as discussed *supra*, part V,A,1,c,(4), the Company’s evidence in attempted support of its claim about the relative promptness of Goens and Ashby has various peculiarities. In addition, Lodic in effect admitted that any shortcoming about prompt completion of routes would be reflected in the rating attached to the factor—which the evaluation form listed separately from “attitude”—of “quantity of work/accuracy—errors” where Goens received a “3” (medium). Finally, the Company’s posthearing brief at least implies (p. 122) that Goen’s low “attitude” rating had something to do with misconduct which was attributed to him in unfair labor practice complaints issued against the Union by the Regional Office. However, these complaints alleged misconduct by Goens in December 1992 or January 1993, and

<sup>88</sup> As the Company does not appear to question, to lower Jones’ evaluation, and/or deny him a bonus, because he had given a statement to the Board in support of the Union’s objections would violate Sec. 8(a)(4). See *Pinter Bros., Inc.*, 233 NLRB 575 (1977); *Heritage Nursing Homes*, 269 NLRB 230, 234 (1984); *Climate Control Corp.*, 251 NLRB 751, 752–754 (1980); *Fry Foods, Inc.*, 241 NLRB 76, 89 (1979), *enfd.* 609 F.2d 267 (6th Cir. 1979); and *Operating Engineers Local 302*, 299 NLRB 245, 249–250 (1990).

<sup>89</sup> Accord: *NLRB v. Horizon Air Services*, 761 F.2d 22, 27 (1st Cir. 1985). In *Fields v. Clark University*, 817 F.2d 931, 936–937 (1st Cir. 1987), the First Circuit pointed out that *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 400–401 (1983), approved the Board’s position that where there is proof of a forbidden motive with respect to an employer’s personnel action, as to whether the employer would nonetheless have taken the same action for lawful reasons the burden of persuasion rests with the employer. The First Circuit stated, in effect, that *Transportation Management* had thereby overruled the First Circuit’s contrary position in *NLRB v. Wright Line*, 662 F.2d 899, 905 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982), on which the Company relies in its brief to me (p. 114).

Lodics testified that the evaluation forms filled out by him were based solely on events which occurred after he became driver manager in March 1993.

As to Jones, although the Company contends that he would have been denied a bonus anyway (and, the Company at least impliedly contends, would have been given a similar evaluation because of his allegedly slow work), even Grigdesby's descriptions of Jones' allegedly slow work—both on his evaluation forms and on cross-examination—connected these alleged deficiencies to his grievance and other union activity. Moreover, I note that the only other witness who was asked about Jones' work—working foreman, Hammer, who opposed the Union and “by no means” liked Jones—testified that Jones not only worked at a steady pace, but also worked at a pace which required the Company to transfer other employees to work stations beyond Jones' work station, in order to keep up with him.

For the foregoing reasons, I find that the Company violated Section 8(a)(3) and (1) of the Act by denying Goens a bonus and giving Hall a lower bonus than he otherwise would have received, and violated Section 8(a)(3), (4), and (1) by giving Jones a low evaluation and denying him a bonus.

Furthermore, I find that the Company violated Section 8(a)(1) of the Act when Lodics told Hall that because of his union activity his evaluation had given him the lowest possible rating as to “attitude,” and concomitantly told him that he was receiving a bonus of only \$100 even though his evaluation gave him Lodics' highest possible rating as to all other factors.<sup>90</sup> Unlike the Company (Br. 119, fn. 27), I believe this evidence is encompassed by paragraph 5(n) of the complaint, which alleges that Lodics “told employees that the [Company] had awarded smaller bonuses than they otherwise would have received, because said employees joined, supported and assisted the Union.” Also, unlike the Company, I believe that Lodics' statement to Goens that he would receive no bonus, and (concomitantly) that he had received a low rating on his evaluation because of his “attitude,” is encompassed by paragraph 5(o) of the complaint, which alleges that Lodics “told employees that [the Company] had not awarded certain employees any bonus because they had joined, supported, and assisted the Union.” However, I do not find that Lodics' statement to Goens violated Section 8(a)(1). While the record as a whole does show that whether an employee received a bonus turned largely on his “attitude,” that by “attitude” Lodics meant union activity, and that Goens may well have suspected that Lodics meant this, the record fails to show that Goens knew about circumstances which would reasonably have caused him to reach this conclusion. See *Van Leer Containers v. NLRB*, 943 F.2d 786, 790 (7th Cir. 1991).

In addition, I find that the Company violated Section 8(a)(1) when Grigdesby told Jones that he was receiving a reduced evaluation because of his union activity, and solicited him to resign his employment because of such activity. See cases cited supra, footnote 13.

Further, I find that the Company has failed to sustain its burden of showing that Burnett, Mayfield, and Ervin would have received the same level of bonuses which they did in fact receive, even if they had not engaged in antiunion activity. The company witnesses' rather generalized testimony about the alleged virtues of these three antiunion employees was not sup-

ported by company records (including, as to Burnett, written compliments from customers and records of box returns, as to which he allegedly excelled) or testimony from company personnel who allegedly made favorable reports about Mayfield and Ervin. However, I conclude that the General Counsel has failed to show that Teresa Deutscher's relatively high bonus was partly motivated by her known antiunion views. It is true that her bonus resulted partly from the recommendations of Grigdesby and Patricia Reynolds (her mother), both of whom had been instrumental in the discriminatory withholding of a bonus from Jones. However, the record is barren of any evidence that Deutscher was particularly active against the Union, another night warehouse employee (not alleged to be a discriminatee) received as high an August 1993 bonus as she did, and both of them had been among the three employees who received the highest bonuses during the previous bonus period. The complaint will be dismissed as to Deutscher. Nevertheless, I note that the Company has put in no evidence whatever as to the reasons for her relatively high bonus.<sup>91</sup>

*b. Goens' transfer to new routes*

In addition, the General Counsel has shown by a preponderance of the evidence that Chief Steward Arnie Ray Goens was transferred between routes at least partly because of his union activity. Thus, the management representative who decided on this transfer, Driver Manager Lodics, had also participated in the unlawful decision to deny Goens a bonus even though Lodics admittedly believed that Goens did a good job as a driver and did very well on his paper work. Further, Lodics knew that Goens liked running route 270, from which Lodics transferred him, and gave him as the sole reason for the transfer the claim that “they didn't want [Goens] to be burned out”—an assertion which had no basis whatever in fact and on which the Company did not rely before me. Furthermore, after removing Goens from route 270 over his protests, the Company transferred that route to Ashby, although customers had complained about him when he was performing it while Goens was out sick. In addition, although the Company contended before me that Ashby was put on the route because he had been able to complete it on Tuesdays whereas Goens had performed part of it on Wednesdays, the Company did not so advise Goens, who might have been able to explain his own performance and/or to equal Ashby's alleged performance; for example, Goens' failure to make certain deliveries on Tuesday may have been based on outdated information concerning these customers' requirements. Indeed, Lodics testified that he had never asked Goens to finish all of the route 270 deliveries on Tuesday, nor knew of any requests from customers to deliver products on Tuesdays and not on Wednesdays. Finally, according to Lodics' testimony, Ashby's claimed return from route 270 to the Indianapolis warehouse without an intervening layover could have been achieved only if Ashby had disregarded DOT regulations. In short, as shown, the Company's explanations for putting Ashby on route 270 in place of Goens, far from satisfying the Company's burden of showing that Goens would have been removed therefrom even if he had not engaged in union activity, reinforce the evidence that he was transferred for this reason. Accordingly, I find that Goens' transfer from route 270 violated Section 8(a)(3) and (1) of the Act. Moreover, because his

<sup>90</sup> See *Sertafilm, Inc.*, 267 NLRB 682, 687 (1983), *enfd.* 753 F.2d 313 (3d Cir. 1985).

<sup>91</sup> No contention is made that the size of her bonus was affected by her kinship to Patricia Reynolds.

transfer from route 480 was admittedly due to his transfer from route 270, his transfer from route 480 likewise violated Section 8(a)(3) and (1).

*B. Further Alleged Unfair Labor Practices Directed to Union Steward Jones (Complaint Paragraphs 5(p), and 6(h-r))*

1. Background

In March 1991, Douglas A. Jones incurred a lumbosacral strain while lifting coolers on the job. Night Warehouse Manager Grigdesby, who was then Jones' immediate supervisor, sent him to the Methodist Health Care Centers, Inc., a clinic which is near the Company's Indianapolis facility and to which the Company sends all employees who are injured on the job, and authorized payment by the Company for his visit. The examining physicians from Methodist stated that for a 2-week period, Jones' bending and stooping should be reduced, and the weight which he lifted should be limited (10 to 15 pounds at the beginning of this period, and 25 pounds toward the end). Upon incurring this injury, he missed about 1 week's work. Eventually, he received from the Company's workmen's compensation insurer, workmen's compensation totaling about \$62.<sup>92</sup>

2. The September 1993 leave-early incidents

*a. The September 7 incident and the letter of reprimand dated September 12*

Jones has had back problems since March 1991. In the late winter or early spring of 1993, his back pain became more persistent, and by the summer of 1993, his back pain reached the point where the pain was radiating into his hips and back and numbing his left leg, and he could not stand on his feet for many hours at a time. Jones' job as a warehouseman kept him on his feet for up to 15 hours a day, and required him to bend, stoop, and lift. On August 13, 1993, he consulted his personal physician, Dr. R. Daniel Pollom (whose surname is variously spelled in the record), about the problem. The tests initially scheduled by Dr. Pollom came back negative.

During a consultation on August 27, 1993, Dr. Pollom scheduled Jones for an "MRI" to take place about September 3. During this consultation, Jones said that he was required to wear a back belt at work and the belt was irritating his back more than helping it. Dr. Pollom told Jones not to wear any restrictive belts until the MRI results came down, which Dr. Pollom said would take a week or two, because he did not know what was wrong and, if Jones had a pinched nerve, the belt would only make it worse.<sup>93</sup> About August 27, Jones gave Grigdesby a note signed by Dr. Pollom which was dated August 27 and said (emphasis in original), "Diagnosis Neuralgia Paresthetica. Do not wear [weight] belt or constricting belts

around waist for one week." Patricia Reynolds admittedly read this note about August 28; for demeanor reasons, I do not credit the testimony of Reynolds (a very intelligent woman) that this note raised no question in her mind with respect to Jones' having some type of medical problem relating to his back. When giving this note to Grigdesby, Jones stated that he was not going to wear his back belt. Grigdesby acknowledged that Jones had handed him the note, and said, "Okay." Jones' MRI examination was conducted on September 3, but he did not receive a diagnosis based thereon until September 17. Meanwhile, he did not wear his back belt.

Warehouse employees on the night shift, on which Jones was working at this time, start work at 6 or 7 p.m. and are expected to continue working until all the trucks are loaded, the drivers are out on the road, and management calls a "general dismissal." On September 6, 1993, Jones clocked in at 7 p.m. Shortly after 7 a.m. on September 7, and before general dismissal had been called, Jones told Assistant Night Warehouse Manager Troy Payne (who was then in charge, Grigdesby having left for the day) that Jones was suffering extreme back pain and could no longer stand on his feet. Payne said, "[I]f you gotta go, you gotta go." Payne did not comment about whether he believed that Jones' back hurt, said nothing about needing a doctor's excuse, and did not say that Jones would receive a reprimand. Jones clocked out at 7:16 a.m.

At 6 a.m. on September 15, 1993, Grigdesby gave Jones, without comment, a letter of reprimand, dated September 12 and signed by Grigdesby, which was at least purportedly based on Jones' having left work on September 7 before general dismissal was called by management. The letter stated that Jones' conduct violated article V, sections 1 and 2 of the bargaining agreement, which provisions state, in part, "Employees have an obligation to work necessary overtime, subject to being excused or subject to their unavailability for good cause." In addition, the letter states that Jones' conduct violated certain contractual provisions (appendage B, rules and regulations, sec. 3, conduct F) which call for discipline for "Failure to carry out orders from qualified personnel." Upon receiving the letter of reprimand, Jones asked why he was being written up. Grigdesby said that Jones had left before the general dismissal. Jones said that he was awaiting the results of an MRI, and that he had left early because he had severe back pain. Further, he asked what his orders were which (according to the letter of reprimand) he was being disciplined for failure to carry out, and said that he was not failing to carry out any orders. So far as the record shows, Grigdesby did not reply. During this conversation, Grigdesby said nothing about a doctor's excuse.

*b. The September 17 incident, the letter of reprimand dated September 17, and the September 28-30 disciplinary layoff*

In the morning of September 17, 1993, Jones approached Assistant Night Warehouse Manager Payne, who at that time was in charge. Jones said that his back was "killing" him and he had to rest his back and get off his feet. Payne said that he could not authorize Jones to leave, but neither could Payne tell him that he could not leave. Jones said, "[T]hat's cool. . . I'm going to go ahead and leave right now." Payne said, "Okay." Jones credibly testified to the opinion that at that time, it appeared that the shift's work would be finished, and general dismissal called, in 30 to 45 minutes. Jones clocked out at 5:44 a.m., and went out into the parking lot. Then, he noticed that the gate from the parking lot to the street was locked, and that

<sup>92</sup> My findings in connection with Jones' 1991 injury and his receipt of workmen's compensation are based on his testimony after being shown the Company's records. Before being shown these records, he testified in 1994 that in connection with this injury, he did not file a claim against or seek a recovery from the Company, on the ground that his back problems were the result of an on-the-job injury. After reviewing the Company's records, Jones testified that he understood counsel to be asking whether Jones had hired an attorney and gone in front of a workmen's compensation board. There is no evidence that in connection with this matter, Jones himself had any contact with the Indiana workmen's compensation board. In assessing his credibility, I have taken this matter into account.

<sup>93</sup> During this consultation, Jones said that his back belt was too small.

two cars were then waiting to get in and one to get out.<sup>94</sup> Jones, who does not have a key to the parking lot gate, noticed that fellow Union Steward Arnie Ray Goens, who as a truck-driver did possess a key to that gate, was sitting with his wife, employee Teresa Goens, in the Goens' personally owned van, which was parked in the company parking lot. Jones tapped on the window, whereupon steward Goens opened up the side door of the van. Jones, who knew that steward Goens had a key to the gate, asked him to unlock it. Goens, who was preparing his pretrip paperwork, replied that if Jones would wait a few minutes until it was finished, Goens would unlock the gate and they could all leave at the same time. Jones thereupon entered the van, sat down, and remarked that it really felt good to get off his feet. Steward Goens asked Jones whether his back had been bothering him; he said yes. Jones handed to Teresa Goens, who was sitting in the driver's seat, a written reprimand (at least purportedly for "ultra slow productivity" and socialization) which Grigdesby had given him at the beginning of the shift (see *infra*, part V,B,3). After reviewing the letter of reprimand, she gave it to her husband. As he was reading it, Payne walked by the van, jingling his keys at Jones, and motioned Jones toward the gate. Then, Payne unlocked the gate, whereupon Jones exited the Goens' van, got into his car, and left the premises. Inferentially, Payne permitted the waiting cars to pass through the gate, and then relocked it. Meanwhile, Steward Goens walked over to the company delivery truck which he was supposed to drive that day, drove it out of the parking space it had occupied while being loaded, unlocked the gate to permit his wife to drive the Goens' van out, relocked the gate, returned to the building to hit his trip ticket, put his two-wheeled cart into the truck, unlocked the gate, pulled the truck through the gate, relocked it, and drove the truck away. He drove away at about 6 a.m., and before the night shift had begun to exit the building upon the calling of general dismissal. Jones was in the Goens' van for less than 10 minutes.

My findings in the preceding paragraph are based upon a composite of credible parts of the testimony of Arnie Ray Goens (based partly on his trip logs, which he had retained for his own files) and Jones. Payne was no longer working for the Company at the time of the hearing, and he did not testify. Grigdesby, who was Jones' regular supervisor during this period, testified for the Company, but was not asked what he was told about this incident.

After leaving work before general dismissal (but after working 14 hours) on September 17, a Friday, Jones went to Dr. Pollom's office. When Jones arrived, the receptionist gave him a note, signed by Dr. Pollom, which restricted Jones to an 8-hour shift. Jones told her that the 8 hours "would not work" because of the language in the union contract. She then brought him into the training room, where Dr. Pollom brought him into the examining room, sat him down, and (without examining him) told him that he had a disc bulge in the lumbar region, fifth vertebra, and would probably have to go through some type of physical therapy. Dr. Pollom asked Jones what he needed for his employer. Jones said that the union contract called for regular shifts of 10 hours, and that for financial reasons he needed the overtime pay contractually specified for work beyond 10 hours a shift. Dr. Pollom asked whether most of Jones' problem with his job came from his lifting or from

something else. Jones said that his back belt was too small and too constrictive, but that the lifting of the product did not aggravate his back nearly as much as being on his feet for as long as 14 or 15 hours a shift. Dr. Pollom said that he would write a note limiting Jones to 10 hours a shift. Jones asked Dr. Pollom to post date the note to September 22 (the following Tuesday), because Jones would probably be expected to work more than 10 hours on Monday and Tuesday (which were heavy days), he was afraid of receiving another disciplinary layoff if he left before general dismissal, and he needed to receive some overtime pay. Dr. Pollom destroyed the note which the receptionist had shown to Jones, and gave him a note, post dated September 22, whose contents are described, *infra*.

About 7 p.m. the following Monday, September 20, Grigdesby asked Jones whether he had a doctor's note for leaving early on September 17. Jones untruthfully said that he did not then have a note, that he was awaiting the MRI results, and that when he got those results he would provide that documentation to the Company. Immediately after Jones so stated, Grigdesby gave Jones a typewritten letter of reprimand which is dated September 17, 1993, and covers most of one letter-sized page. This letter reads in part as follows:

... at approximately 5:42 a.m. Friday morning, September 17, [you] stated [to Payne] that you had to leave early because your back was hurting (from a non-work related problem) and had allegedly been told by a physician (unknown) to "rest." You then clocked out at 5:44 a.m. However, you were observed approximately 20 minutes later conversing with non-night warehouse employees, not more than 55 feet from the back door[.] At this point, Payne went out and informed you to leave the premises.

Payne returned to the building and announced the end of shift at approximately 6:08 a.m. ... there was obviously no urgent need for you to leave before the end of shift was called.

The letter went on to say that since this was Jones' second violation (referring to his September 12 reprimand, purportedly for violating appendage B, rules and regulations, sec. 3, conduct F—"Failure to carry out orders from qualified personnel," and leaving before shift dismissal, on September 7), he was being laid off from September 28–30, inclusive; and that his next violation would result in a 1-week layoff. (As discussed *infra*, part V,B,5, on September 27 Jones went on a leave of absence which included what otherwise would have been the effective period of his 3-day layoff.) Grigdesby testified that "possibly" an employee's leaving early because of a medical problem might be excused if he went to a doctor sometime thereafter; Grigdesby testified that he was unable to describe the circumstances under which such an absence might be excused.

*c. The September 21 incident and the September 23 letter of disciplinary layoff on October 11–14*

On September 21, 1993, after working for about 14 hours, Jones developed severe back pain. As he was walking toward the timeclock, he encountered Patricia Reynolds, who asked him where he was going. He said that he was going home. She asked why. He said that his back hurt, it was for medical reasons. She asked whether he had a doctor's note. He untruthfully said no. She said that he had to have a doctor's note before he could leave. He said that when he got the doctor's note,

<sup>94</sup> For security purposes, the gate is locked between 8 p.m. and 5:30 or 6 a.m.

he would give the Company a copy. Then, he clocked out, at about 9:17 a.m., and left.

On September 22, Jones gave Grigdesby the note which on September 17, Dr. Pollom had postdated September 22. The note read as follows:

(1) [Back] belt to be used at [patient's] discretion due to [illegible] Nerve Compression Syndrome.

(2) Restrict work to 10 HR/Day due to [patient's increase in] lower back pain with prolonged work hrs. [Patient] has an abnormal MRI scan which demonstrates an [illegible] disc bulge and a [right] sided annular [illegible]. A neurosurgical consult is pending with David Hall M.D.

(3) Send records from original Back injury (Winger from Methodist).

Jones told Grigdesby that Jones would be leaving after 10 hours, at 5:30 a.m. on September 23; Grigdesby said, "Okay." Jones made boxes throughout that shift. At 5:30 a.m. on September 23, Grigdesby approached Jones, and told him his 10 hours were up and he could go.

Personnel Assistant Kathy Sizemore testified that when showing her this document, Patricia Reynolds said that Jones had mentioned that his back problem might be related to a previous injury. Patricia Reynolds testified that if Jones had submitted this document to his supervisor and stated that the medical problem described therein referred back to an injury which had already led to the employee's discipline, the discipline would have been rescinded if Jones' representation was verified; and that in order to have such discipline removed, Jones' responsibility was limited to orally drawing this to his supervisor's attention.

Patricia Reynolds testified that in the Company's experience it was "highly unusual" that an employee "with back pain to have no weight restriction, but to be able to work 10 hours a day. I don't think there has been any employee . . . that has been able to work with back problems, and no weight restrictions, wearing no [back] belt." According to Reynolds, she asked Sizemore to call Dr. Pollom and clarify the matter. Sizemore testified that when she called Dr. Pollom, he told her that there were no weight-lifting restrictions, that Jones knew what his limits were and what he was capable of doing, and that that was why the note specified a 10-hour restriction but no restrictions for weight. Reynolds testified that Sizemore told her that according to Dr. Pollom, the hours restriction had been told to him by Jones. Sizemore testified for the Company, but was not asked what she told Reynolds.

Sizemore testified that after her conversation with Dr. Pollom, Reynolds told her to schedule an appointment for Jones at the Methodist Clinic, to which the Company sends employees with work-related injuries.<sup>95</sup> On September 23, Sizemore telephoned the Methodist Clinic and set up an 8:45 a.m. appointment for Jones on September 24.

<sup>95</sup> On direct examination, and before testifying on cross-examination that she made this call pursuant to Reynolds' instructions, Sizemore was asked, "Do you recall anything in particular that prompted you to set up that appointment?" She replied, "I think basically because there had been some referral made that . . . the injury may be related to a previous workmen's comp injury." She did not modify this answer after her attention was drawn to the reference to the Methodist Clinic at the end of the note and she was asked whether this was the clinic where the Company sent employees with work-related injuries. The record otherwise fails to show the source of this "referral."

On September 24, Grigdesby gave Jones a letter, dated September 23 and signed by Grigdesby, which stated that Jones would be laid off without pay on October 11, 12, 13, and 14, 1993, because he had left work at 9:17 a.m., before general dismissal was called, in violation of appendage B, rules and regulations, section 3, conduct F ("Failure to carry out orders from qualified personnel") and that this was his third offense of that nature; although attributing this incident to Monday, September 20, the letter was in fact directed to the Tuesday, September 21, incident.<sup>96</sup> (As discussed *infra*, part V,B,5, on September 27 Jones went on a leave of absence which included what otherwise would have been the effective period of his 4-day layoff.) Grigdesby told Jones that his doctor's note dated September 22 was "invalid" because Jones had told the doctor what to write on the note and had not seen the company doctor. Grigdesby said that "the Company had called and that [Jones] had told the doctor that [Jones] didn't want to work more than 10 hours or to wear a back belt." Jones told Grigdesby that when Jones arrived at Dr. Pollom's office to obtain a note, he had been given a note which had been written by Dr. Pollom before Jones' arrival, and which had set forth a maximum workday of 8 hours. Jones went on to say that because he thought there might be a problem with the language in the bargaining agreement, he had prevailed on Dr. Pollom to increase the hours from 8 to 10. Jones said that he did not have to go to the company doctor unless it was a work-related injury, and that Jones had not filed it under a workmen's compensation claim. Grigdesby told Jones that the Company had set up an appointment for Jones at the occupational clinic for 8:45 a.m. on September 24, and that if he went to the "Company doctor" there was a "good chance" that Jones could get "those reprimands" rescinded.<sup>97</sup> Personnel Director Stephen Reynolds and Branch Manager Patricia Reynolds both testified that except as to injuries covered by workmen's compensation, the Company had no requirement that an employee be examined by a doctor selected by the Company rather than the employee. Moreover, a note prepared by Patricia Reynolds on September 27, 1993, memorializing part of a conference that day during which Jones requested a leave of absence (see *infra*, part V,B,5), states, in part, that "[i]f" Jones had claimed that his medical problem during the September 23-24 shift had been work related, "Doug would have been required to go to [Methodist] Health Clinic—did not keep appointment of 9/24/93 at 8:45 p.m. [sic]."

On the morning of September 24, Jones telephoned Dr. Pollom and asked whether Jones had to go see the company doctor. Dr. Pollom said that Jones was his patient and did not have to see another doctor if he did not want to. Dr. Pollom said that he had once been an "occupational doctor,"<sup>98</sup> and that "they pretty much do what the company tells them to do." Dr. Pollom asked if Jones' injury was a work-related injury. Jones said that it probably was not, and that he had not filed a workmen's compensation claim based thereon. Dr. Pollom replied

<sup>96</sup> The letter stated that he had clocked out at 9:17 a.m. on September 20; he was not scheduled to and did not in fact work between the morning of Friday, September 17, and the evening of Monday, September 20, and he clocked out at 9:17 a.m. on September 21.

<sup>97</sup> Jones believed that "those reprimands" consisted of the 4-day layoff, the 3-day layoff, and the original letter of reprimand, all of them at least purportedly based on his leaving before general dismissal.

<sup>98</sup> The quotation is from Jones' testimony, on which I have based my findings as to the content of this conversation.

that if Jones had not filed such a claim, the Company could not require him to go to the occupational clinic. Jones did not keep the appointment which Sizemore had made for him at the Methodist Clinic. Nor did he tell anyone from the clinic or (laying to one side his September 24 remarks to Grigdesby) anyone from the Company that he would not be showing up.

Sizemore testified that although she had no specific recollection as to Jones, she normally notified an employee's manager (as to Jones, this would have been Grigdesby) and Patricia Reynolds that an employee had missed an office visit and needed to go back to the clinic. Sizemore explained that she followed this practice because "we generally don't want the person back at work . . . if they have not been released or we don't have some updated documentation from the doctor." Nobody told Sizemore to reschedule another appointment for Jones. As discussed *infra*, part V,B,5, on the next working day (September 27), Jones initiated arrangements for a leave of absence to begin that day.

Patricia Reynolds testified that if Dr. Pollom's note dated September 22 had addressed the September 7 and 17 incidents when Jones left early, the Company would have rescinded the discipline issued on the basis of these incidents. She testified that "the only time personnel would go back and address prior absences would be if it were so notated on the doctor's excuse." However, she went on to testify, in effect, that the Company would have rescinded the discipline based on such incidents if Jones had advised his supervisor (orally or otherwise) that the note dated September 22 referred back to such events. She testified that about September 23 (the day that Grigdesby told Jones his doctor's note dated September 22 was "invalid"), she had received and reviewed both that note and Grigdesby's September 23 letter to Jones stating that he was to be given a 4-day disciplinary suspension for leaving work on September 20 (see *supra*, fn. 96) before general dismissal, that she did not recall having a feeling that she should ask Grigdesby why Jones had left early on that occasion, and that she did not recall checking with Grigdesby about the matter. She further testified that after reviewing the doctor's note dated September 22 that Jones was to wear his back belt at his discretion, she drew no conclusion about whether Jones may have been justified in not wearing his back belt on September 17, the subject of an allegedly discriminatory reprimand dated September 17 and given to Jones on September 20 (see *infra*, part V,B,4). In addition, she testified that she did not direct anyone on September 23 to contact Dr. Pollom's medical clinic regarding Jones' medical condition before September 23. However, she further testified that she believed the note (dated September 22) from Dr. Pollom which Jones gave the Company on September 23 was genuine, and that when she received and reviewed it, she concluded that Jones had some sort of back problem.

In May or June 1992, Patricia Reynolds stated to the night crew (including Jones), whose shift started at 6 or 7 p.m., "[I]f it gets to be 5:30 in the morning and you are deathly ill, we are not going to keep you here"; she told the employees to advise Grigdesby that they were leaving, but said nothing about a doctor's note. On various occasions between September 1992 and mid-July 1994, employees received discipline from their immediate supervisors for leaving before general dismissal. During a grievance meeting on September 23, 1992, the Company and the Union agreed that discipline imposed on employees Jones and Eugene Bushrod, for leaving before general dismissal, would be

rescinded if they could produce documentation for their respective explanations for leaving. The discipline was later rescinded as to Jones, who produced documentation for his explanation (need to retrieve his car, which he needed to get to work), but not as to Bushrod, who produced no documentation for his explanation (need to pick up a sick child).<sup>99</sup> During a conference between Chestnut and Patricia Reynolds immediately after the September 23 grievance meeting, they orally agreed that child care, medical situations, higher education, and nonrecurring emergency situations were all excusable by management where an employee left before general dismissal.<sup>100</sup> In the spring of 1993, Jones was not disciplined when he left before general dismissal (but after working more than 10 hours on the night shift) because of an upset stomach, and failed to bring in a doctor's excuse.

### 3. The September 16, 1993 letter of reprimand, purportedly for slow productivity and excessive socializing

On September 16, 1993, Grigdesby gave Jones a letter of reprimand which stated that on the evening of September 15, Grigdesby had received "numerous complaints from crew members about your ultra slow productivity and your constant stopping to socialize with Eric Johnson." The letter of reprimand further said:

. . . this kind of behavior is totally unacceptable . . . . Your work is in direct opposition to the 6-month goal that you should be trying to achieve, and discussions that we have had on [your] performance. . . . in the future, I suggest that you strive to be a team player by doing your part and giving the effort that you are capable of. If no improvement is noted over the course of the next week, further [disciplinary] action will follow.

Eric Johnson received an identical letter on this occasion; the complaint does not allege that this letter to Johnson was unlawful.

The Company does not have any written productivity standards for employees working in the warehouse, or any written definition of what constitutes ultra slow productivity. Patricia

<sup>99</sup> Also, Patricia Reynolds rescinded "leave-early" discipline imposed on a married couple who left for a vacation trip presented to them by their family. It is unclear whether they presented any documentation.

<sup>100</sup> This finding is based on Chestnut's testimony, which is corroborated by the testimony of Buhle and Jones that Chestnut so advised them shortly after this conference; see *Tome v. United States*, 513 U.S. 150 (1995). I do not credit Patricia Reynolds' denial, for demeanor reasons and in view of May 1994 documents, involving employee Kris Starks, which indicate that leaving before general dismissal would be excusable if due to sickness and with submission of a doctor's excuse. A May 1993 letter to Chestnut from Patricia Reynolds, received in evidence without objection or limitation, states that about the previous summer, "We had several discussions regarding acceptable excuses and finally agreed to continue with the current contract language until the next negotiations." Although this letter was delivered to Chestnut's office, he made the professional representation that he had never seen it before it was marked for identification on October 11, 1994. I credit Chestnut's testimonial denial that such an agreement was reached, for demeanor reasons and because Reynolds' letter was written in the context of a request that the Union discuss with the employees their "contractual responsibilities" in view of "another rash of" employees who "once again" were leaving before the end of their shift. Also for demeanor reasons, I credit Chestnut's denial of Grigdesby's testimony indicating that Chestnut said that employees would not be disciplined for leaving early if they documented a need to go to court or to a doctor's appointment.

Reynolds testified that she could not recall any employee, other than Jones, who had been disciplined for “ultra slow productivity” or on the basis of employee complaints to the Company; and did not know whether any such complaints about Jones had been documented in any way other than in the reprimand itself. Laying Johnson and Jones to one side, the only employee (so far as the record shows) disciplined for such a reason was an employee who fell asleep on the job.

The Company has no rule forbidding employees to discuss matters unrelated to work while the employees are working, and such discussions occur on a daily basis. Laying Johnson and Jones to one side, no employee has ever been disciplined for socializing on the job, so far as the record shows. During the shift specified in the reprimand, nothing about socializing was said to Jones or (so far as the record shows) to Johnson. During that shift, working Foreman Thomas Hawk, a unit employee, looked down toward the beginning of the line, where Jones was working, and orally chastised employees in the plural, and without naming anyone, about not working; such remarks by Hawk were not usual. Laying this incident to one side, nothing was said to Jones that night regarding lack of productivity. Hawk testified for the Company, but was not asked whom this remark was directed to, or whether he made any reports about the matter to Night Warehouse Manager Grigdesby. Grigdesby testified for the Company and (as an adverse witness) for the General Counsel, but was not asked about Jones’ conduct during the September 15–16 shift. Then working foreman, Hammer, who described himself as “by no means” a friend of Jones, credibly testified that in 1993, when Hammer was cigarette foreman and Jones worked on the oil line (on September 15–16, Jones was working on the candy line), Jones was a consistent worker whose work pace usually required the assignment of backup workers further down the line in order to keep up with him. In connection with Jones’ discipline on September 16, 1993, the Company’s posthearing brief (pp. 141–142) relies on Grigdesby’s testimony, as to his comment on Jones’ July 29, 1993, evaluation that Jones should become “100% company supportive,” that Jones “[h]ad no interest in trying to get the job done. He was more interested in socializing, talking when he shouldn’t have been talking, being out of his work area, going to the bathroom, working ultra slow.” Particularly because Grigdesby was not asked about Jones’ conduct during the shift of September 15–16, 1993, I credit Jones’ testimony that during that shift, he talked no more than he usually did and his productivity was no different that night than it was other nights.

4. The September 17, 1993 discipline purportedly in connection with Jones’ back belt

As previously noted, about August 27, 1993, Jones gave Grigdesby an August 27 note from Dr. Pollom which stated, in part, that Jones was not to wear a back belt for 1 week. Also, Dr. Pollom told Jones not to wear any restrictive belts until the MRI results came down, which Dr. Pollom said would take a week or two, because he did not know what was wrong and, if Jones had a pinched nerve, the belt would only make it worse. When handing the note to Grigdesby, Jones said that he was not going to wear his back belt, and Grigdesby said, “Okay.” Jones did not receive a diagnosis based on his MRI examination until September 22. Meanwhile, he did not wear his back belt.

Patricia Reynolds testified that she was not aware of any specific number of days that an employee may fail to wear his

back belt without being disciplined. She further testified, without corroboration, that she asked Grigdesby if there had been any followup on Dr. Pollom’s August 27 note or if Jones was wearing his back belt; that Grigdesby said that he had received no followup; and that she and Grigdesby determined that Jones should be advised that he had to wear his back belt “since we’d had no follow-up in several weeks after the expiration of the doctor’s note.” About September 20, at 7 p.m., working foreman, Eugene Groover, a unit employee, approached Jones and told him that he needed to wear his back belt. Jones said that his doctor did not want him to wear a back belt pending the MRI result, that the belt issued to Jones was too small, and that he was not going to wear it. A few minutes later, working foreman, Tim Burnett, a unit employee, approached Jones and asked if he had his back belt. Jones said that he was not going to wear it until his doctor got the MRI result back. Burnett said that Grigdesby wanted to see Jones.

When Jones and Burnett approached Grigdesby, he gave Jones a letter signed by Grigdesby, and dated September 17, 1993, which directed him to wear his back belt “at all times during working hours; unless medically excused. Per the attached doctor’s slip of 8/27, you were excused from wearing same only until September 3, 1993. . . . The next violation will result in a 1-week lay-off.” Jones said that his doctor did not want him to wear a back belt until he got the MRI results back, and that if he had a pinched nerve the back belt would make it worse. Grigdesby said that the doctor’s note was only good for about 1 week, until about September 3, and that Jones was to wear the back belt. Jones said that he was not going to wear a back belt which was too small for him when his doctor did not want him to wear it anyway. Jones said that he had requested a larger size belt on May 17 and that Patricia Reynolds had said he could not have one.<sup>101</sup> At Grigdesby’s request, Jones fetched his back belt from his car, put it on, and showed Grigdesby that it was too small. Grigdesby told him not to worry about it. Jones said, “[S]o you don’t want me to wear the [back] belt.” Grigdesby said, “[N]o, don’t worry about it. Just go back to work.”

As previously noted, on September 22 Jones gave Grigdesby a note from Dr. Pollom, dated September 22, which stated, inter alia, that because of lower back pain and a disc bulge, Jones was to use a back belt at his discretion. As an adverse witness for the General Counsel, Reynolds testified on the second day of the hearing that after reading this note, about September 23, she drew no conclusion about whether Jones may have been justified in not using his back belt on September 17. The Company never took any action with respect to Patricia Reynolds’ September 17 letter. About 2 months after testifying as an adverse witness, as a witness for the Company she testified on cross-examination that as to this September 17 letter (which stated, in effect, that he had had no medical excuse for not wearing a back belt after September 3, and would be laid off for a week for the “next violation”), she never “thought about” it “as being discipline. I thought the issue had been resolved. He brought in his doctor’s note dated September 22, [which said] that [Jones] could wear [his back belt] at patient’s discretion. So that meant exactly that.”

Jones did not wear a back belt again until March 1994, when Day Warehouse Manager Kramer told him that he was being assigned to work in the cigarette stamping department, stated

<sup>101</sup> See supra, part III, I, 1.

that he needed to wear his back belt, and asked whether there was a problem with that. Jones said that there was a problem, that his back belt was too small. Kramer told him to bring the belt in, and gave him a larger size when he reported to the cigarette stamping department. Thereafter, and at least until the time he testified in August 1994, he regularly wore his back belt while at work. Jones and several other employees credibly testified in 1994 that at all relevant times, quite a few employees failed to wear a back belt at work; so far as the record shows, no action was taken against any of them but Jones and Edmond (see *supra*, part III,I). In consequence of a grievance filed by Jones in March 1993, Patricia Reynolds advised Buhler after a second-step grievance meeting that in the absence of a doctor's note stating that wearing a back belt would be injurious to the employee's health, an employee who reported to work would be sent home to get one, and would be disciplined. The Union took this grievance to the third step of the grievance procedure. The ultimate disposition of the grievance is not shown by the record.

##### 5. Allegedly discriminatory denial of disability pay

On an occasion between August 13 and September 27, 1993, but whose date is not otherwise shown by the record, Dr. Pollom suggested that Jones take a leave of absence, and Jones replied that he could not really afford it. On September 24, 1993, the Company received the first complaint in the instant proceeding, which complaint alleged, among other things, that about March 31, 1993, the Company had reprimanded Jones because of his union activity and (through Grigdesby) had unlawfully restricted the distribution of union literature; as shown *supra*, part V,A,1,d,(2), Grigdesby knew that Jones had told the Board's Regional Office about such conduct. On September 27, 1993, Jones telephoned Personnel Director Stephen Reynolds (Patricia Reynolds' husband, who is admittedly a supervisor and agent of the Company), told him that Jones' doctor wanted him to take a leave of absence but for monetary reasons Jones could not afford to do this, and asked whether arrangements could be made for Jones to leave after working for 10 hours. Without mentioning the 10-hour matter, Reynolds said that all Jones had to do to take a medical leave of absence was to get a doctor's slip stating that the doctor wanted him to take a medical leave of absence. Jones said that if he could see his doctor that day, Jones would present the Company with a leave of absence slip that same day.<sup>102</sup> Jones credibly testified to deciding that a leave of absence would be his best option, because if he again left before general dismissal he would be terminated and would lose his health insurance while still having back problems, he believed Stephen Reynolds had been unresponsive to a 10-hour limitation but very receptive to a leave of absence, and Jones did not believe that the Company would

<sup>102</sup> My findings as to this conversation are based on Jones' testimony. Stephen Reynolds testified that he had no recollection of any telephone conversation with Jones before their September 27 conference in Patricia Reynolds' office (see *infra*), and that Stephen Reynolds did not recall any conversation with Jones as of September 27 about working up to 10 hours a day. Stephen Reynolds denied that prior to the September 27 conference, Jones ever said that he wanted to take a medical leave of absence but could not afford one. To the extent that Stephen Reynolds' testimony may amount to a denial, for demeanor reasons I credit Jones.

would rescind his discipline, ostensibly for leaving early, even if he did go to a company doctor.<sup>103</sup>

Later that same day, Jones told Dr. Pollom that the Company required a doctor's slip stating that the patient should take a leave of absence. After giving Jones a physical examination, Dr. Pollom wrote out a slip which read, in part:

[Illegible] Disc bulge with [left] sciatic pain mid and lower Back Pain. I recommend [patient] take a medical leave pending his neurosurgical evaluation by Dr. David Hall on 10.22.95.

At about 5:15 p.m., that day, September 27, Jones brought this slip to Stephen Reynolds' office. His receptionist said that he was on the phone, and took Jones to Patricia Reynolds' office. Jones told Patricia Reynolds that his doctor wanted him to take a leave of absence pending a neurosurgical evaluation with the neurosurgeon at the Methodist Clinic. At this point, Stephen Reynolds came into the room. Patricia Reynolds said that there were two types of leave. Purportedly correcting her, Stephen Reynolds said that there were three types of leave (two of which she had mentioned)—a family leave, a personal leave, and a medical leave. Patricia Reynolds said that Jones would be required to use up any unused sick time or vacation time. Purportedly correcting her, Stephen Reynolds said that under the medical leave, Jones did not have to do that. Jones said that he was out of paid sick leave, and that as to the vacation he had left, he wanted to exercise his right to be paid for that period rather than taking it. Patricia Reynolds asked Jones why he had failed to keep the September 24 doctor's appointment which Sizemore had made for him at the medical clinic. He replied that he did not have to go to the company doctor, since it was not a work-related injury and he had submitted all his bills to Blue Cross/Blue Shield. At this point, Patricia Reynolds fetched Kramer, and then obtained a repetition from Jones of this last statement. Jones said that he wanted a medical leave of absence. Stephen Reynolds said that there would be no problem, and Jones was granted an immediate leave of absence extending to October 22, 1993. During this conference, no management representative asked Jones if there was any work he could perform at the Company.

The 1990–1993 bargaining agreement provides for an unpaid leave of absence if an employee is “unable to work by reason of illness, injury or other disability.” During the September 27 conference, disability pay was not mentioned. At that time, the Company had a benefit of paying employees disability pay, with the only requirement being an appropriate doctor's slip. This benefit is not set forth in the bargaining agreement; and as of September 27, 1993, the date that Jones began his leave of absence, he was unaware that this benefit existed. Thereafter, Jones learned from other unit employees that they had received disability pay while off on a nonwork injury. On October 14, Jones called the office number of Stephen Reynolds and asked to speak to him. Jones was ad-

<sup>103</sup> Jones did not trust Grigdesby's honesty in stating that the discipline might be rescinded if Jones went to a company doctor, believed that the Company “was trying to put [him] in the trick bag,” and believed that without the MRI scan, the company doctor would not be able to tell if there was anything wrong. As previously noted (*supra*, part V,B,2,a), Jones' own doctor had said that without an MRI scan, he could not determine what was wrong. As discussed *infra*, part V,B,10, thereafter the Company did in fact put Jones into a “trick bag” as to other matters.

vised that Reynolds was not in the office that day, and was referred to personnel assistant Sizemore. Jones then asked Sizemore about receiving disability pay. Sizemore said that "they told me that it was going to be an unpaid leave," without specifying the identity of "they." She told Jones that Stephen Reynolds could be reached in his office the following week.

On Monday, October 18, Jones telephoned Stephen Reynolds. Jones asked Reynolds if Jones was eligible to receive disability pay while off on his leave of absence. Reynolds replied that Jones was not on a medical leave, that he was on a personal leave, and that Jones was not entitled to temporary disability benefits under personal leaves. Reynolds said, however, that a prearranged leave of absence would not be counted as an occurrence under the Company's absenteeism policy (see *infra*, part V,B,9). Jones said that his leave was indeed a medical leave,<sup>104</sup> said that Jones had given the Company "documentation prior," and again asked why he was not receiving any disability pay. Raising his voice, Reynolds said that Jones was always trying to cause trouble for the Company, and if he did not like the Company, he should just get out. Jones asked whether Blue Cross/Blue Shield picked up the temporary disability. Reynolds said no, it was the Company which had this benefit. Jones said that other people had received disability pay and he could not understand why he was not receiving it. Reynolds replied that Jones had not gone to the Company doctor when the Company had scheduled an appointment for him, and that if he wanted to receive disability pay, he would be required to go to the company doctor; as previously noted, Reynolds testified before me that except for injuries covered by workmen's compensation, the Company had no requirement that employees see a doctor selected by the Company. Reynolds said, "[Y]ou are on a personal leave, not a medical leave. I didn't have to give you a leave of absence if I didn't want to . . . if you go to our Company doctor, I will be more than glad to give you a medical leave of absence." Then, Reynolds slammed down the phone.<sup>105</sup>

By letter to Stephen Reynolds dated October 19, 1993, Jones stated:

On September 27th per our phone conversation, I inquired about the procedures to obtain a medical leave of absence. It was my understanding that I was required to obtain a medical leave of absence statement from my physician. This statement was delivered to your office on the same day. This letter is to confirm that my absence is a medical leave and not a personal leave.<sup>106</sup> If this is not

<sup>104</sup> As shown in the text attached to fn. 108, *infra*, on October 26, 1993, Patricia Reynolds advised Jones that he had been on a medical leave of absence since September 27. Further, at the July 1994 hearing she testified that Jones had been given a medical leave of absence.

<sup>105</sup> My findings as to this telephone conversation are based on Jones' testimony, which I credit for the reasons summarized *infra*, fn. 106.

<sup>106</sup> Because Jones' testimony as to the September 27 telephone conversation is the only record explanation for this sentence, and for demeanor reasons, I credit his version of that telephone conversation. Reynolds denied that the subject of personal leave was mentioned during the September 27 conversation or on any other prior occasion; and the testimony of Sizemore (who shares Reynolds' office and was allegedly there during the September 27 telephone conversation) contains no reference to personal leave. However, Sizemore was a demonstrably untruthful witness in other respects (see *infra*, part V,B,10). I do not credit her testimony regarding Reynolds' conduct and tone of voice during this telephone conversation, nor her uncorroborated testimony as to what he told her about it immediately thereafter.

your understanding of the matter, please contact me at the address below.

Enclosed with this letter was a copy of the September 27 slip issued by Dr. Pollom, which, as noted, stated, in part, "I recommend a medical leave pending [Jones'] neurosurgical evaluation by Dr. David Hall on 10-22-93." After this consultation, Dr. Hall, who is a neurosurgeon, advised Jones that he did not need surgery at that time, and referred him to Dr. John Lomas, a rehabilitation specialist.

The Company received Jones' October 19 letter on October 21. By letter to Jones dated October 22, 1993, Stephen Reynolds stated:

On Monday, October 18, 1993, per our phone conversation, you inquired about receiving disability pay while off on your leave of absence.

In order to receive disability pay you must bring in a doctor slip stating that you are unable to do any work at all. Upon receipt of this statement you will be paid disability pay for non-vacation weeks and the week of your three-day layoff.

Stephen Reynolds initially testified that in order to receive disability pay, an employee must meet the requirement, and only the requirement, of a doctor's slip saying that the employee is "totally unable to work—light duty or regular work." He testified that this requirement was included in the company handbook, but the Company did not offer this handbook into evidence. Stephen Reynolds further testified, "The doctor is the key—we go by whatever the doctors' slips say." Disability pay was received by employee Michael Lundy in April 1991, by employee Dixie Deaton in April and May 1992, and by employee Carla Wiggam in November 1992, although none of them submitted a doctor's statement to the Company containing the statements which (according to Stephen Reynolds) were required in order to receive disability pay.<sup>107</sup> Patricia Reynolds testified that when an employee is on a medical leave, that normally indicates to her that the employee is unable to perform any work at the Company.

The expired bargaining agreement states that to retain seniority while on leave of absence, an employee on leave for illness, injury, or other disability "shall be required to furnish a current report from the attending doctor at the end of each thirty (30) day period or as otherwise required by the Company." By letter to Jones dated October 26, 1993, Patricia Reynolds stated, in part, "[T]he doctor statement you brought in on September 27, 1993, stated that your leave would be from 9/27/93-10/22/93. Since that time has expired we need for you to bring in an updated slip by 10/29/93—in order to continue to be off work on a medical leave of absence."<sup>108</sup> On November 1, Jones consulted Dr. Pollom, who recommended that Jones stay off work for 2 more weeks and set up an appointment for him with Dr. Lomas. In addition, Dr. Pollom gave Jones a note, which Jones gave to Grigdesby, stating, in part, "Off work through 11-15-93. . . . Mr. Jones is physically unable to return to work at this time due to persistent lower back and [left] leg pain." Jones told Grigdesby that the doctor's note put Jones off work

<sup>107</sup> Deaton may not have been a unit employee. However, as to disability pay, the Company's policy is the same for both unit and nonunit employees.

<sup>108</sup> See *supra*, fn. 104.

through November 15, at which time he was going to start seeing another doctor, Dr. Lomas. Grigdesby said, "Okay."

Patricia Reynolds testified that she read this November 1 doctor's note about that same date, and that "from the face of the document" it indicates that Jones was unable to do any work. Jones never received any disability pay.

6. Allegedly discriminatory direction that Jones return to work and assignment of allegedly onerous work

On November 1 or 2, Sizemore saw Dr. Pollom's November 1 note regarding Jones, and received instructions from Patricia Reynolds to telephone Jones and find out what his work restrictions were and if he could do any work at all. Patricia Reynolds testified that she issued these instructions because the September 27 note from Dr. Pollom enclosed in Jones' October 19 letter had stated that Jones was scheduled to see Dr. Hall on October 22, and the Company had not received any "followup" from Dr. Hall; however, she testified that she could not remember what, if anything, she said to Sizemore about Dr. Hall, or whether he was contacted, and Sizemore's testimony does not mention him.

At 9 or 9:30 a.m. on November 2, Sizemore telephoned Jones and asked whether he could perform "like desk work, sitting down." He replied no. Sizemore said that Reynolds had instructed her to call Jones and tell him that "we do have that available"; Sizemore went on to say, "So you're not able to do that either?" Jones said no.<sup>109</sup> When Sizemore told Patricia Reynolds what Jones had said, she instructed Sizemore to call the doctor's office, which is located at the Aegis Medical Clinic, and find out what Jones' work restrictions were; prior to this occasion, and while Jones was on a medical leave of absence, Reynolds had not instructed anyone at the Company to make contact with Aegis about Jones' medical condition. On November 2, Sizemore telephoned Aegis and was referred to a nurse. When Sizemore asked the nurse what Jones' work restrictions were, the nurse said that he was to do no lifting, bending, or stooping. Sizemore asked whether he could do work which was not within these restrictions. The nurse said yes, but it would have to be something that would be a sitting job, something like a desk job. Sizemore asked her to fax an updated doctor's note which included the restrictions of no lifting, bending, or stooping. Immediately after hanging up the phone, Sizemore told Patricia Reynolds that "the nurse" had said Jones could perform work which did not call for lifting, bending, or stooping, and that "it would have to be something that

<sup>109</sup> My findings as to the content of the Jones-Sizemore conversation are based on Jones' tape of the conversation, which was recorded by his answering machine. I hereby deny the Company's motion to strike this recording, which motion is grounded on the claim that Jones violated Indiana law by recording this conversation without Sizemore's knowledge. *NLRB v. Plasterers Local 90 (Southern Illinois Builders Assn.)*, 606 F.2d 189, 191-192 (7th Cir. 1979), enfg. 236 NLRB 329, 330 (1978); *East Belden Corp.*, 239 NLRB 698, 711 (1994), enfd. 634 F.2d 635 (9th Cir. 1980); and *Wellstream Corp.*, 313 NLRB 698, 711 (1994). No contention is made that the taping of the conversation violated Federal law; see *Southern Illinois*, supra, 606 F.2d at 192; 236 NLRB at 330. The Company has offered no legal authority for its claim that the taping violated Indiana law, and I have made no effort to determine the validity of this claim.

would be a sitting job, something like a desk job."<sup>110</sup> Reynolds said, "Okay."<sup>111</sup>

A little later that same day, Sizemore received over the fax machine a note as to Jones and bearing at least a purported signature by Dr. Pollom, which was dated November 1 (the previous day) and stated, "Work Restrictions/No lifting, bending, stooping"; Jones did not see this note until preparing for the July-October 1994 hearing.<sup>112</sup> Upon receiving it, Sizemore showed it to Patricia Reynolds, who told Sizemore to call Jones and tell him to report to work that night. Sizemore and Reynolds both testified that Reynolds told her to tell Jones that he was to be there at 7 p.m. and that the Company had light duty work for him.

Sizemore thereupon telephoned Jones' home, and was connected with Jones' answering machine. She left a message which stated that she was "calling back on the light duty with the desk work." The message left by Sizemore went on to say that she had called Jones' doctor, that the doctor had sent to the Company "an updated doctor's statement, dated 11-1, saying that the light duty desk work would be okay for [Jones] to do," and that Reynolds had said that "in that case" Jones was expected to return to work that evening, November 2.<sup>113</sup> Immediately after completing this call, Sizemore made the following note to herself: "Left message on [Jones'] answering machine at 9:54 a.m. Tuesday 11-2-93/Report to work at 7 p.m. . . . Lt. duty desk work."

At about 1 p.m., immediately after listening to this message on his answering machine, Jones telephoned Dr. Pollom's office and asked his nurse whether the Company had called. She said yes, and that she had faxed to the Company the restrictions of no lifting, no bending, no stooping. Jones said that he would go back to work unless Dr. Pollom had any objections to it.

At 7 p.m. that evening, November 2, Jones reported for work to Grigdesby. Grigdesby said that Jones would be working for 4 hours, and told him to sweep certain areas with a push broom. Jones asked what had happened to the light duty desk work that the Company had said he was going to be doing. Grigdesby said that he was not aware of any light duty desk work, and that

<sup>110</sup> My findings as to what Sizemore told Reynolds are based on Sizemore's testimony (1) as to what the nurse told Sizemore; and (2) that Sizemore "probably did make [Reynolds] aware that [Jones'] job would have to be within those restrictions and something that he would have to do sitting." Reynolds testified that she did not recall if Sizemore said the nurse at Dr. Pollom's office said Jones could do desk work.

<sup>111</sup> My findings as to Sizemore's call to the Aegis Clinic are based on her testimony. She testified, in effect, that the telephone was answered by a receptionist who stated that the call was being received by the office of "Dr. Paul Linville," and that the receptionist had connected Sizemore with a nurse. Dr. Linville's name does not appear on the Aegis letterhead, and the record does not otherwise mention him. Reynolds testified that Sizemore attributed her message to "Dr. Pollom's office."

<sup>112</sup> Jones testified (without objection or limitation) to having been advised by Dr. Pollom's nurse that the Company had asked for a list of Jones' work restrictions and she had faxed a "no lifting, no bending, no stooping" list to the Company. He initially dated this conversation with the nurse as November 1, but he later testified that he reported to work on the evening of the day when he had this conversation, and it is undisputed that he returned to work on November 2.

<sup>113</sup> My finding in this sentence is based on the message taped by Jones' answering machine. The Company's motion to strike did not include the recording of this conversation.

“they” (without specifying who) had told him that Jones was going to be sweeping.

My finding that Jones was told at the beginning of his November 2 shift to perform a sweeping job is based on his testimony. Grigdesby testified that he initially told Jones to make boxes, and did not assign him to sweep the floor until after Jones said he was not able to make boxes. Grigdesby testified that the determination to assign Jones to making boxes was made by Grigdesby, that Grigdesby did not consult with anyone else before making this determination, and that he did not consult with anyone else before assigning Jones to sweep the floor. Patricia Reynolds testified that before Jones reported for work on November 2, Grigdesby told her that he intended to assign Jones to box making and she said this would be fine; and that that evening Grigdesby advised her by telephone that Jones had said he could not make boxes because it involved repetitive bending, and that Grigdesby was going to assign Jones to sweeping the floor.<sup>114</sup> In view of these inconsistencies between Grigdesby’s and Reynolds’ testimony, and for demeanor reasons, I credit Jones.

The sweeping operation assigned to Jones required him to stoop and bend in order to remove the accumulated piles of debris from the floor and throw them into the trash. In addition, the push broom, which weighs about 2 pounds and whose 30-inch brush does not swivel on the handle, must be lifted every 6 to 10 feet while in use. Also, the sweeping operation required Jones to stoop and bend in order to dip floor sweep with a 32-ounce cup from a box about 3-feet high onto the floor.

Jones performed the sweeping work for 4 hours each night on November 2, 3, and 4. After his initial conversation with Grigdesby, Jones did not state to any other company representative that he had been told that he would be assigned light duty desk work and was not getting that assignment. Meanwhile, about November 4, he received a letter from Patricia Reynolds, dated November 2, which stated:

On November 2, 1993, we contacted Dr. Daniel Pol-lom’s office, requesting more specific information on your work restrictions. We were told that you could not do any lifting, bending or stooping, but you could do any other light duty work we may have available which did not require you to lift, bend or stoop.

[Y]ou are expected to report to work on Tuesday, November 2, 1993 at 7:00 p.m. at which time you will be assigned light duty work.

Notwithstanding Sizemore’s November 2 telephone message to Jones stating (in effect) that he would be assigned “light duty desk work,” Reynolds testified that he was not assigned such work because it was a nonunit job which he did not have the knowledge to perform, and because the Company already had other people who were doing it. On three occasions when unit employee Carla Wiggam was on light duty because of an injury (two of them on-the-job injuries)—in 1991 for about a month, in May or June 1992 for about a month, and in March 1993 for about 6 weeks—she performed nonunit work in the clerical night office. She credibly testified that it took her about a week to learn these duties when she first performed them, in 1991, and took her a couple of weeks to learn “every little detail that

<sup>114</sup> On timely hearsay objection, Reynolds’ testimony was not received to show the truth of Grigdesby’s report to her.

had to be taken care of.”<sup>115</sup> In addition, in about 1992 unit employee Larry Hunt had worked in the night office during a temporary shortage of warehouse work.

On 40 days between November 29, 1993, and the week ending March 6, 1994, the Company used 1 to 10 temporary employees, obtained from an agency which furnishes such personnel, to work 4 to 8 hours a day. On all but about 2 of these days, the temporary employees were used for making “deals”—that is, removing cigarette packages from cartons, and packaging them together (sometimes with a premium gift), to be sold to the consumer as a unit. One stage in such “deal” making merely requires the worker to assemble and package the “deals” after all the components had been set out on the worker’s work table. Such work limited to the assembly tables was performed by unit employee Carla Wiggam during a period which began about mid-January 1994, under a 10-pound restriction while she was limited to light-duty work. Jones made “deals” in May and June 1994, after he was no longer under a 10-pound restriction. However, he was not assigned such work when it was being performed by temporaries while he was restricted to light duty.

After being off work for about 2 weeks because of a work-related injury, employee Carla Wiggam returned to work on the day shift on January 17, 1994, subject to a 10-pound weight limit (later raised to 25 pounds), a 6 to 8 hour day, and “No overhead work.” Then stamping department manager, King, assigned her to writing up cigarette receiving, totalling cigarette inventory, preparing stamp inventory, and making “deals.” All of these jobs were normal assignments for stamping department employees. About February 14, 1994, King transferred to the Company’s Ypsilanti warehouse; at that time Mike Brown (who did not testify) was put in charge of the day-to-day operations of the stamping department, and day warehouse manager Kramer (to whom Brown reported) was in charge of that department for any other purpose. King testified that there was not enough of the type of work, which was assigned to Wiggam while she was on light duty, to have another employee do it at the same time. As previously noted, Jones was recalled to work, under a light-duty restriction, more than 2 months before Wiggam returned to work under a light-duty restriction; he was transferred to the day shift (under Kramer) a few days later.

When called as an adverse witness by the General Counsel, Patricia Reynolds testified that “making boxes requires you to repetitively bend over and pick up the boxes . . . if the skid was on the ground level.” However, as a company witness, she testified to the belief that when Jones returned to work on the night shift on November 2, his medical restrictions would not have precluded him from making boxes. Although she testified that it would be “very possible” that night-shift operations would be interfered with by the full-time assignment of a single employee to make boxes in a single area, Night Warehouse Manager Grigdesby testified that such an assignment would present no problem. For a period of at least a week after July 1992, when unit employee Eric Johnson was on light duty, he had been assigned to the sole duty of making boxes on the night shift. When considered in light of Grigdesby’s testimony that

<sup>115</sup> Her light duty assignment in 1991 was due to a back injury. Later on in 1991, after some additional medical difficulties, she underwent about a month of training in anticipation of a permanent transfer to the night office, where her duties would have been different from those which she performed shortly after her back injury. She eventually decided against a permanent transfer to the night office.

most of the 45 night warehouse employees spend 45 minutes to an hour and a half each day cleaning up trash and making boxes, the evidence that night warehouse employees were working between 114 and 199 hours of overtime per week in November and December 1993 indicates that the total overtime hours could have been reduced by assigning Jones up to 40 hours per week making boxes.

7. Allegedly discriminatory transfer to day shift and assignment of allegedly onerous work

As an adverse witness called by the General Counsel, Patricia Reynolds testified that on an undisclosed date and hour before 7 p.m. on November 3, she and Grigdesby decided that because of Jones' work restrictions and because more light-duty work was available on the day shift than on the night shift, it would be to the Company's best interest if Jones were able to do his particular light-duty assignment on the day shift.<sup>116</sup> As previously noted, on November 2 Sizemore had relayed to Patricia Reynolds the statement from Dr. Pollom's nurse that the only work which Jones could perform consistent with his medical restrictions was a sitting job. Patricia Reynolds testified, in effect, that the only such jobs performed on the day shift were receiving work and inventory counter; she did not refer in her testimony to making "deals." Jones was not given any such assignments. Day Warehouse Manager Kramer testified that the two jobs in his area on the day shift which employees could do on light duty were making boxes and running the floor scrubber. He further testified that about November 5, Patricia Reynolds told him that Jones had been making boxes at night; testified that "they" told him Jones would be coming to the day shift (without identifying "they"); and testified to the understanding that Jones was being transferred to the day shift because he was not able to "continue" making boxes. As previously noted, Grigdesby (as well as Jones) testified that Jones did not make any boxes on the night shift after his November 2 return to work; and Reynolds testified to having been so advised by Grigdesby. Kramer went on to testify that during this conversation with Reynolds about November 5, she told him that Jones was subject to the limitations of no stooping, no bending, and no lifting over 10 pounds; she asked whether he had any work for Jones; Kramer said Jones could run the floor scrubber; and she told Kramer on a date which he did not specify that Jones would be working 20 hours a week. As previously mentioned, the note from Dr. Pollom's office dated November 1, faxed to the Company on November 2, and inspected by Patricia Reynolds that same day, had forbidden lifting without specifying any exception. At the beginning of the night shift on Wednesday, November 3, Grigdesby told Jones that starting the following Monday, November 8, Jones would be going to days, and would report to Kramer. Grigdesby did not

<sup>116</sup> About 2-1/2 months later, as a witness for the Company, Patricia Reynolds testified, in substance, that she decided to transfer Jones to the day shift because Grigdesby told her that while performing the sweeping work on the night shift, Jones was engaging in excessive socializing and was thereby slowing down other employees in the performance of their jobs. I do not credit her testimony in this respect, because it is difficult to square with her earlier testimony, because Grigdesby was not asked about the matter, and because of Jones' uncontradicted and credible testimony that Grigdesby did not reprove him for excessive socializing after he returned to work on November 2, and that after his return he socialized no more nor less than previously.

tell Jones what duties he would be performing, or indicate any reason why he was being transferred to days.<sup>117</sup>

On the morning of November 8, Jones reported to Day Manager Kramer, who told him that he would be operating the floor scrubber. This piece of machinery weighs about 200 pounds, and is about 3-feet deep, 2-feet wide, and 4-feet long. The floor scrubber moves around on swiveling wheels, has a speed-control lever, and operates somewhat like a self-propelled lawn mower. The operator exerts hand pressure on one of the two handles, which are at about waist-high level, to cause the scrubber to move or stop and to release water. The operator must guide the scrubber around any obstacles which may be in the aisles, guide it around corners, and also guide it to make a U-turn in each aisle, because the width of the aisles requires two trips down each aisle in order to scrub the entire aisle. When such maneuvers require putting the floor scrubber in reverse, the operator must also lift a squeegee. The aisles must also be swept before scrubbing. Jones was expected to, and did, sweep the aisles. If the swept-up debris could be left in locations where it was not in the path of the floor scrubber, Jones left the little piles of debris to be put into the trash by someone else; otherwise, he himself deposited the piles into the trash, an operation which required him to stoop and twist.<sup>118</sup> Before Jones' assignment to the floor scrubber, it had been operated about once every 3 weeks. Jones performed these tasks 4 hours a day between Monday, November 8 and Thursday, November 11, inclusive.<sup>119</sup> During this period, he did not advise anyone from the Company that these duties were aggravating his back problems; nor did he ask anyone from the Company about performing desk work.

On November 15, 1993, Jones kept an appointment with Dr. John Lomas, a rehabilitation specialist to whom Dr. Hall had referred Jones.<sup>120</sup> During this consultation, Jones told Dr. Lomas that taking the corners and moving around obstacles with the floor scrubber agitated Jones' back. Dr. Lomas gave Jones a note which stated, "Limit work to 4 hours. 20 [pounds] no bend or twist. No floor scrubber." That same day, Jones took the slip to Kramer, and told him that Jones found it physically difficult to wrestle the floor scrubber around tight corners. Kramer looked at the doctor's note and said, "[N]o floor scrubber? Well, what can you do?" Jones replied, "[Y]ou're the manager. You tell me." Kramer thereupon telephoned Dr.

<sup>117</sup> Working Foreman Hammer testified that upon noticing Jones was not listed on the personnel schedule for the night shift, Hammer asked Patricia Reynolds where Jones was, she said he was on the day shift, Hammer asked why, and she said, "[T]hat by placing Doug Jones on days, this would weaken union backers on nights." Hammer's prehearing affidavit dates this alleged conversation as having occurred before the July 8 election, more than 3 months before Jones' transfer to the day shift. Moreover, on direct examination, Hammer testified that their conversation was conducted in Grigdesby's presence; on cross-examination, Hammer testified that Grigdesby was not there. Accordingly, I credit Reynolds' denial.

<sup>118</sup> My finding that Jones sometimes himself deposited the piles into the trash is based on his credible testimony. For demeanor reasons, I do not credit Kramer's denial.

<sup>119</sup> His days and hours of work are shown by company records in evidence.

<sup>120</sup> By certified letter dated November 5, 1993, Jones had asked Patricia Reynolds to accommodate his November 15 schedule to his appointment with Dr. Lomas at 9:15 a.m. that day. The Company permitted him to delay the start of his 4-hour shift that day in order to enable him to consult Dr. Lomas.

John Lomas' office. A female voice answered the phone. Without asking for her name, Kramer said that he was the supervisor of one of Dr. Lomas' patients, Douglas Jones; that Dr. Lomas had written a note saying that Jones could not run the floor scrubber, and that Kramer would like to explain what the floor scrubber was because it was definitely light-duty work. She said that Dr. Lomas was not available at the time and she could get any message to him. Kramer said that the floor scrubber was a self-propelled machine, that all the operator had to do was to walk behind it and guide it, and that the operator did not have to do any lifting, bending, or twisting. She said that she would explain this to Dr. Lomas, but she saw no reason to restrict Jones from running the floor scrubber. Kramer asked her to fax "a copy of the release similar to the one [he] had in front of [him] getting [Jones] off the restriction of running the floor scrubber." She said she would. Kramer asked whether Jones could run the floor scrubber that day; she said yes. Kramer hung up and, without awaiting the promised fax, told Jones to start operating the floor scrubber at once. Kramer made no effort to find out the name of the woman he was talking to, or to ascertain whether she was a nurse or a receptionist. Kramer testified that he believed she must have been a nurse rather than a receptionist, because a receptionist would not have taken it upon herself to remove a restriction imposed on a patient by Dr. Lomas. Patricia Reynolds testified that Kramer's call to Dr. Lomas' office was not "normal procedure."

That day or the next day, the Company received on Dr. Lomas' prescription blank letterhead a faxed note, which was dated November 15, named Jones, and stated, "May work with floor scrubber."<sup>121</sup> On November 16, Jones telephoned Dr. Lomas' office. A female answered the phone. Jones asked why he was continuing to run the floor scrubber even though the doctor's note he had received the previous day had said not to. She said that Kramer had told her that all Jones had to do was walk behind it and there was no bending, lifting, or twisting involved; that it did not sound to her as if operating the floor scrubber would be further damaging to his health; and that she had faxed such a message to the Company. Jones did not complain to Dr. Lomas' office about the fact that she was changing Dr. Lomas' written orders. Jones did not see the November 15 note until preparing for the August 1994–October 1994 hearing. Jones' personnel folder includes another note, on a prescription-blank form (under the same logo as Dr. Lomas' previous notes but bearing no letterhead) which names Jones, is dated November 17, and states, "May use floor scrubber." The signature blank contains what may be a purported signature; underneath are written the words "Dr. Lomas."<sup>122</sup> Jones never

<sup>121</sup> The record contains several documents which bear Dr. Lomas' purported signature. The record fails to show whether any of them was his original (rather than his authorized) signature, and most of these signatures are illegible. However, the signature blank on the November 15 document contains what appears to be merely a large check mark, which is unlike any of his purported signatures on other documents.

<sup>122</sup> Kramer testified that he first saw this document a few days after his conversation with the female who answered Dr. Lomas' telephone, that the document received in evidence appeared to be the way it was when he first saw it, and that he believed it had been mailed to the Company. Company counsel expressed the belief that this document had been faxed to the Company, and stated that he had never seen a copy without the "Dr. Lomas" entry. The exhibit as received is a photocopy of the document in Jones' file. I cannot determine from this exhibit whether the "Dr. Lomas" was written by someone who wrote

saw this document prior to the unfair labor practice proceedings. Patricia Reynolds, who testified that this November 17 document was received by the Company and was part of Jones' personnel file, testified that she did not know why this document was received by the Company, that she did not recall asking anyone to obtain such a document, that she did not know whether any other representative of the Company had requested it, and that she did not know why the Company had received the November 17 document when the November 15 document said essentially the same thing. Kramer testified that both the November 15 and 17 notes were in his envelope where he receives the mail which is sent to him at the Company, but that he did not know why there were two documents which said essentially the same thing.

During Jones' next appointment with Dr. Lomas, on December 20, Jones said that the floor scrubber was aggravating his back, to which Dr. Lomas replied that it was his information that operating the floor scrubber did not take a lot of physical effort and from the information he had received, he did not think operating the floor scrubber would be harmful to Jones' health. Dr. Lomas did not state where he had received this information. As discussed *infra*, on the day after this appointment, the Company transferred Jones from the floor scrubber to making boxes.

On November 18, 1993, the Company received a copy of the original charge filed by Jones in Case 25–CA–22885, alleging that because of his union activity, he had been reprimanded several times since about July 8, 1993, and had been suspended about September 28–30 and October 11–14. By letter to Jones dated December 2, 1993, Patricia Reynolds stated that he was "required" to submit an updated medical report from Dr. Lomas every 30 days; and requested Jones to ask his physician to notate the nature of Jones' disability and the estimated length of time he would be restricted to limited work activity. The letter went on to say that since his last visit to his doctor was November 15, 1993, a current report was due on December 15. Article XXIII, section 2 of the expired bargaining agreement required a doctor's report every 30 days from an employee on leave of absence, but Jones was not on a leave of absence. Patricia Reynolds testified that it is "standard procedure" for the Company to request an updated medical document from an employee on "any type of long-term restriction," if the employee has failed to submit such documentation of his own volition.

After receiving Reynolds' December 2 letter, Jones called Dr. Lomas' office and asked it to provide the Company with an updated medical document. Jones' personnel folder contains a note dated December 15, 1993, which is on Dr. Lomas' prescription-blank letterhead, names Jones, and states, "Current light duty—plan FCE this week and final determination Monday." Patricia Reynolds testified that she considered this document responsive to her letter of December 2. Jones did not see this document prior to the unfair labor practice proceedings.

#### 8. Allegedly discriminatory denial of 40-hour week; allegedly discriminatory discipline about December 27, 1993

Toward the end of the week ending Saturday, November 20, Patricia Reynolds told Kramer that the Company did not need someone running the floor scrubber 20 hours a week, and instructed him to put Jones on a 2-day schedule. Thereafter, Jones operated the floor scrubber for 4 hours a day 2 days a

part or all of the rest of the document, or at the same time that part or all of the rest was written.

week. Jones' personnel folder contains a note on a prescription blank bearing Dr. Lomas' printed name (among others), and with an indecipherable signature, which is dated December 16, 1993, and reads in its entirety, "10 lb. wt. limit." A few days after the issuance of this note, Jones told Kramer that the doctor's note said nothing about bending, lifting, or twisting. However, Jones did not complain about his 2-day schedule until Tuesday, December 21, when he told Kramer that Jones wanted to work a 40-hour week. Kramer said that the Company did not have that much light-duty work available for Jones. Jones, who had been undergoing physical therapy since about October 1993, accurately said that his most recent doctor's note had upgraded him to a straight 10-pound weight limit, and that he had previously picked groceries on a 10-pound weight limit. Kramer said that the Company did not pick groceries on days. Jones asked whether the Company still picked groceries on nights; Kramer said, "[Y]es. Jones said that he had come from the night shift and saw no reason why he could not pick groceries at night on a 10-pound weight limit, as he had done before. Kramer said that the Company did not have that much light duty work available for Jones.

Patricia Reynolds testified that the Company denied Jones' request for a 40-hour week because he was still under a 10-pound weight restriction from his doctor, and an employee on disability needs a full release from his doctor before he is returned to full-time status. On January 17, 1994, employee Carla Wiggam, who had been undergoing treatment by a Methodist Clinic doctor for a work-related shoulder injury, returned to work subject to a limit of 6 to 8 hours a day, a 10-pound weight limit, and "No Working Overhead." At the time that she testified in late August 1994, she was still under these restrictions, except that the weight limit had been raised to 25 pounds.<sup>123</sup> Between the payroll week ending January 22, 1994, and the payroll week ending March 26, 1994, she worked 41 hours or more during each of 7 weeks, 35 hours during 1 week, and about 27 hours during each of 2 weeks; during each of these 10 weeks except a 27-hour week, she worked 5 days.

During this Tuesday, December 21, conversation, Kramer told Jones that thereafter, instead of working Tuesdays and Fridays running the floor scrubber, Jones would be working Tuesdays and Wednesdays making boxes.<sup>124</sup> Kramer said that Mondays and Tuesdays were the heaviest nights for picking customer orders, so that after a heavy Monday night, the Company needed someone to come in Tuesday morning and make boxes, and after a heavy Tuesday night, the Company needed someone to come in Wednesday morning and make boxes.

Jones worked about 4 hours on Tuesday, December 21, and on Wednesday, December 22. By letter to Patricia Reynolds dated December 23, 1993, Jones enclosed a note, under Dr. Lomas' prescription-blank letterhead, which was dated December 16, 1993, named Jones, and stated "10 lb weight limit." Jones' covering letter stated that the enclosed note was "per the company's letter dated December 2, 1993 [see supra, part

<sup>123</sup> Her shoulder injury was classified as a "permanent partial impairment."

<sup>124</sup> This finding is based on Jones' testimony, credible parts of Kramer's testimony, and the Company's payroll records, which show that Jones worked on Tuesday, December 21, and Wednesday, December 22. Although Kramer testified to being uncertain whether Jones' second day under his new schedule was to be a Wednesday or a Thursday, Kramer testified to being certain that Jones' first day of work was to be a Tuesday.

V,B,7]. Please be advised that I am currently available to work a full-time shift consisting of a 40-hour work week. Please consider this written notification that I am requesting a full-time (40-hour work week), at this time."

Jones did not report to work on Monday, December 27. At 2 or 2:30 p.m. that day, Patricia Reynolds telephoned Jones.<sup>125</sup> She said that she had received Jones' December 23 letter requesting a 40-hour week, and that the Company did not have that much light duty work which did not require him to bend, twist, or lift. Without denying that he was under a light duty restriction, he said that the doctor's note had said nothing about lifting, bending, or stooping, but only indicated a 10-pound limit. She said that the Company did not want him to create further injury until the Company had some directive as to what the injury was and what his restrictions or treatment would be. Jones said that he had picked groceries (in 1991) on a 10-pound weight limit. She said that she could not go up and down the grocery line and weigh every item; and went on to say that after Jones had concluded his 1991 grocery picking assignment under a light duty restriction, the Company had begun the practice of putting at the end of the grocery picking line some bulk items which had previously been picked on another line.<sup>126</sup> (However, the Company followed the practice of assigning each picker to a given section of the line.) She said that Kramer had told Jones the week before to work Mondays and Tuesdays, that Jones was supposed to be in at work that day, a Monday, and that he was considered a no-call, no-show for that Monday. Jones accurately said that Kramer had told him to work Tuesdays and Wednesdays. She said that this was ridiculous, that it made no sense, that the heavy nights were on Mondays and Tuesdays, that the Company needed box makers on Mondays and Tuesdays, and that this is what Kramer had told him. Jones said that this is not what Kramer had told him, and that Kramer had told him that he wanted Jones to come in after the heavy night on Monday and make boxes on Tuesday morning, and to come in after the heavy night on Tuesday and make boxes on Wednesday. Reynolds told Jones that thereafter, he would be working on Mondays and Tuesdays, 8 hours a day.

When Jones reported to work on Tuesday, December 28, Kramer asked where he had been yesterday. Jones said that he was not supposed to be there yesterday. Kramer said that Jones was indeed supposed to be there, that the matter had been discussed the previous Wednesday. Jones truthfully denied having any such discussion. Kramer said that during this Wednesday discussion, Jones had agreed to change his schedule to Mondays and Tuesdays. Jones worked at making boxes, on a Monday/Tuesday schedule, from that day on, until the week ending March 12, 1994.

As to Jones' assigned schedule for the calendar week which included Monday, December 27, Kramer testified as follows: Before lunch on Wednesday, December 22, Patricia Reynolds told him to change Jones' shift from Tuesday/Wednesday to Monday/Tuesday. Later that same morning, Kramer told Jones that beginning Monday, December 27, Kramer needed him to

<sup>125</sup> My finding that she initiated this call is based on Jones' testimony, and on her testimony as a company witness. As an adverse witness called by the General Counsel, she testified that the call was initiated by Jones.

<sup>126</sup> This finding is based on a composite of credible parts of Jones' and Reynolds' testimony. For demeanor reasons, I do not credit her testimony that she said the heavier items were scattered throughout the grocery line.

work on Mondays and Tuesdays; Jones replied, “[O]kay.” When Jones failed to report to work at 7:30 a.m. on Monday, December 27, Kramer wrote him up as a no-call, no-show, on a document not offered into evidence, and at an undisclosed hour, gave the document to Patricia Reynolds. Kramer initially testified that it was “probably” Monday, December 27, when he told her that Jones claimed he had not been told to report to work that day, but immediately after so testifying, Kramer said that he so advised her on Tuesday, December 28.

I credit Jones’ denial of any such conversation with Kramer during the week preceding December 27, for demeanor reasons and in view of the following additional considerations: Kramer’s testimony that Jones worked a Tuesday/Wednesday schedule (making boxes) for 2 or 3 weeks before the change in his schedule is impeached by the Company’s records, which show that the payroll week ending December 25 was the only week during which Jones worked a Tuesday/Wednesday schedule; however, these records are consistent with Jones’ testimony that his schedule was changed to Tuesday/Wednesday immediately upon his being changed from the floor scrubber to box making. Moreover, Patricia Reynolds’ assertion to Jones that his claim of being assigned to a Tuesday/Wednesday schedule was “ridiculous” because the Company’s heaviest nights were on Mondays and Tuesdays is belied by (1) Kramer’s testimony that he initially assigned Jones to a Tuesday/Wednesday or Tuesday/Thursday boxmaking schedule and that it was adhered to for 2 or 3 weeks, although Kramer had been the day warehouse manager for 2 years and must have known what times the Company particularly needed boxes; (2) the undisputed evidence that boxmaking was performed by the Sunday night warehouse crew, although Sunday is a light day; and (3) Kramer’s explanation to Jones (as shown by the undisputed evidence) about the reasons for Jones’ initial Tuesday/Wednesday schedule. Finally, Reynolds’ assertion to Jones (as shown by the undisputed evidence) that a Monday/Tuesday schedule had been assigned to Jones by Kramer (although there is no evidence or claim that she was present during any such assignment) is difficult to square with Kramer’s testimony that it was Reynolds who told him to reschedule Jones, a claim which she did not advance to Jones when he denied having been rescheduled to Mondays.

The Company has a policy of putting on absenteeism probation an employee who has five “occurrences” of absence (one “occurrence” may extend over more than 1 day) in a calendar year. According to the Company’s witnesses, this policy is applicable to all absences, whether or not excused, including paid sick leave days specified in the expired bargaining agreement, except for absences due to injuries covered by workmen’s compensation, absences for medical appointments which cannot be scheduled during nonworking hours, funeral leave, vacation days, and absences covered by the Family and Medical Leave Act of 1993, 29 U.S.C. §§ 2601–2654 (the FMLA). Absenteeism probation lasts for 6 months after the fifth “occurrence,” a probation period which may extend into the calendar year after the calendar year during which the five absences occurred. While on absenteeism probation, an employee is subject to a 3-day layoff for a sixth absence and discharge for a seventh absence, and is ineligible for consideration for a bonus.

On January 3, 1994, Jones received a “Written Warning—Excessive Absenteeism.” This document put Jones on absenteeism probation until June 27, 1994, on the basis of five specified instances of absenteeism. These five instances included

his failure to report to work on Monday, December 27, 1993, and his leave of absence between October 4 and 27, 1993 (supra, part V,B,5). When Jones received this document, he told Kramer that (as Stephen Reynolds had said on October 18, according to Jones’ uncontradicted testimony) the October 4–27 leave of absence should not have been charged as an occurrence.

Inferentially about January 4, 1994, Kramer advised Patricia Reynolds that Jones had refused to sign the absenteeism-probation document on the ground that his leave of absence should not count as an occurrence. By letter to Jones dated January 7, 1994, Stephen Reynolds stated that under a 1991 arbitration decision, leaves of absence were considered absenteeism occurrences.<sup>127</sup> The letter went on to say that the Company was willing to consider the “leave period of 9/27/93–11/15/93” (Jones had returned to work on November 2) as an absence under the Family Medical Leave Act, and to rescind Jones’ absenteeism probation, provided he had Dr. Pollom fill out and return the attached FMLA forms before January 17, 1994. Jones never asked Dr. Pollom to fill out these forms. Jones credibly testified that he made no such request of Dr. Pollom because Jones believed that the occurrence charged on December 27 was “bogus” and should not have been counted; that his October–November leave of absence should not have been counted because it had been preapproved; and that he did not want to claim that this leave of absence was covered by the FMLA because that law calculates the entitlement to 12 weeks of leave on a rolling basis and he did not want his October–November leave to be deducted from that entitlement and, in consequence, to affect his anticipated need therefor to undergo advanced physical therapy in 1994.<sup>128</sup> Nobody from the Company ever asked him for these reasons, and he never volunteered them.

For the next 11 weeks, Jones worked less than a full-time schedule.<sup>129</sup> Meanwhile, at the Company’s request (by letter to Jones dated January 7, 1994) for an updated medical report, he arranged for Dr. Lomas to fax a note on a prescription blank, with Dr. Lomas’ letterhead, which was dated January 12, 1994, and stated that Jones was subject to a 10-pound weight limit. Pursuant to a letter to Jones from the Company dated February 15 requesting an updated medical report, Dr. Lomas faxed to the Company on February 21 a note stating that Jones was subject to a 20-pound restriction.

As previously noted, Jones became chief steward in February 1994. In late January or early February 1994, the Company received the charge filed by Jones in Case 25–CA–22983, alleging that because of Jones’ union activities, and because he had filed charges and given testimony under the Act, the Company had given him a low rating, and denied him a bonus, on July 30, 1993; had required him about September 21 to obtain a doctor’s statement in order to leave early without being disciplined; had denied him a 40-hour week since about November 2; and had placed him on a 6-month attendance probation in late December. On February 18, 1994, the Company received

<sup>127</sup> The complaint does not allege that the Company violated the Act by thus retroactively reclassifying Jones’ leave of absence as an occurrence.

<sup>128</sup> For a period which included February 1994, he did in fact go to the rehabilitation hospital three times a week for physical therapy.

<sup>129</sup> During this period, he usually worked 2 days a week and 4 or 5 hours a day. However, on occasion he worked 1 or 3 days a week, and 8 or 9 hours a day.

the first amended charge filed by Jones in Case 25-CA-2885. This charge alleged that because of "Jones' union and other protected activity including his testimony in NLRB proceedings," the Company had reprimanded him on September 12 and 16, 1993; had reprimanded him, and issued him a 3-day layoff, on September 17; had reprimanded him, and issued him a 1-week layoff effective in October, on September 23; and since November 1 had required Jones to return from a leave of absence, denied him paid medical leave, and assigned him to onerous work assignments. On March 3, the Company received the consolidated complaint, which was based in part on Jones' charges as amended in Case 25-CA-22885. In addition to including the above-described allegations in the first complaint, this complaint alleged, among other things, that the Company, through Patricia Reynolds, had forbidden employees to wear union insignia on their back belts (at the hearing, she admitted to directing such conduct to Jones), and had unlawfully discriminated against Jones in a number of other respects.

By letter to Patricia Reynolds dated March 9, 1994, Jones stated that he was again requesting a 40-hour work week, requested his 6-month review and evaluation, and enclosed a photocopy of a note from Dr. Lomas, on a prescription blank with his letterhead, which stated, "May work as tolerated/8-hour days." The note was dated March 9, a Wednesday, and was received by Jones on that day. At that time, Jones was working a Monday/Tuesday schedule. He credibly testified to the apprehension that if he gave the Company this note from Dr. Lomas, management would say that he was supposed to come to work the next day, Thursday, March 10. He went to Dr. Lomas' receptionist and had her add the entry "Return on 3/14" (a Monday). Then, he hand-delivered this note to the Company.

By letter to Jones dated March 9, and received by him on March 12, 1994, Reynolds stated:

Please be advised that you are required to submit an updated medical report from Dr. Lomas every 30 days. Per the contract, please request that your physician note "the nature of your disability, estimated length of time that you will be restricted to light duty, along with the specific restrictions." This is the company's 14th request for this information and to date it has not been provided.<sup>130</sup> Before returning to work March 21, 1994, you must [submit] the complete information.

Jones worked half-days on March 14 and 15. On March 14, Kramer called him in and said, "I understand that you requested your review and evaluation." Jones said, "[Y]es."<sup>131</sup> Kramer said that Jones was considered part time, and part-timers did not get reviewed or evaluated. Jones asked about getting a 40-hour work week. Kramer said that he knew nothing about this. Jones said that because both the request for review and evaluation and for a 40-hour week were in the same certified letter, if Kramer knew about the review he must also know about the 40-hour work week. Kramer said that he would have to check with Patricia Reynolds.<sup>132</sup>

<sup>130</sup> This was in fact the first such request from the Company since February 21, when Dr. Lomas had faxed to the Company a note stating Jones was subject to a 20-pound weight restriction.

<sup>131</sup> Jones credibly testified that he was referring to the review and evaluation which (in his opinion) should have been given in January or February 1994.

<sup>132</sup> My findings as to this conversation are based mostly on Jones' testimony. Kramer testified that he "informed" her that Jones had

Later that day, after checking with her, Kramer advised Jones by telephone that on the following day, he would start working a full-time schedule in the stamping department under King. Kramer told Jones that he would have to wear a back belt, and asked if this would present any problem. Jones said yes, because the Company had been requiring him to wear a belt which was too small. Kramer said that this would not be a problem, and that the Company would fix Jones up with a larger size.

Jones began to work in the stamping department on March 16. On March 18, he developed tendonitis in his left wrist owing to the repetitive motion required in his stamping department job. He was then transferred to the tobacco department, which required bending, stooping, and lifting products which weighed up to 50 pounds. On March 30, after he was returned to the stamping department, Stamp Manager King told him that he had to have an updated doctor's note or he would not be allowed to work. After telling King that this was "ridiculous," Jones left work and came back with a note from Dr. Lomas on a prescription blank bearing his letterhead and dated March 30, 1994, which states, "No wt. restrictions/May work up to 10 hours QD."

On April 6, 1994, Jones hand-delivered to Stamping Manager King or working foreman Mike Brown a typewritten document, based on an April 5 physical examination and signed by Dr. Lomas, which stated, inter alia, that Jones was working 8 hours a day without weight restriction, that he was doing "quite well" in his present job, that "at this point I would like to increase him to 10 hours a day," and that "I feel that he is going to progress without significant incident. I plan to see him in 4-6 weeks. If he does well at that I will probably release him from an hourly restriction in addition to the weight issues." By letter to Jones dated April 21, Patricia Reynolds asked Jones to submit an updated medical report from Dr. Lomas by April 30. About May 3, someone from the Company told Jones that the Company had not yet received an updated doctor's note. Jones thereupon hand-delivered to Brown a second copy of Dr. Lomas' April 6 note. By letter dated May 27, Reynolds advised Jones that "per the contract" he was required to submit an updated medical report from Dr. Lomas every 30 days, stated that the last medical report the Company had received was dated April 5, and stated that Jones would have to submit an updated medical report before he could return to work. Also about May 27 (a Friday), Working Foreman Brown told Jones that he could not come back to work on Monday without a doctor's note. Jones said that this was "ridiculous," that he had been working for 40 hours without any problem, and that he was not scheduled to see the doctor for another week. Jones was not allowed to work again until after his scheduled visit on June 6 with Dr. Lomas, who gave Jones a note bearing that date and stating "work as tolerated." Jones gave this note to Brown, and asked him to copy the document and return the original to Jones. However, Brown returned only a copy to Jones, explaining that the original was needed by the Company "for workmen's compensation purposes" (although Jones had never filed a workmen's compensation claim based upon his 1993-1994 back problems). As of August

requested a 6-month evaluation. Because Jones' letter to her dated 5 days previously had contained such a request, I credit Jones. However, I regard the issue as immaterial.

1994, Jones was still working 40 hours a week in the stamping department.

Jones remained on absenteeism probation until June 27, 1994, the date specified on the document issued by Kramer on January 3, 1994. During this period, Jones was not absent. He did not file a grievance protesting his having been charged with an occurrence on December 27, 1993. As discussed *infra*, part V,D,1,b and F,3,5, and 7, the Company did not purport to recognize the Union between August 1993 and March 1994. Under the expired bargaining agreement, grievances had to be filed within 10 days of the occurrence of the event out of which the grievance arose. On January 26, 1994, he filed a charge with the NLRB in which he complained, among other company conduct, of the December 27 incident and his consequent attendance probation.

#### 9. Analysis and conclusions

The General Counsel's contention that the Company unlawfully discriminated against alternate steward Jones on various occasions after August 1993 must be considered in light of the evidence (summarized *supra*, parts III,V,A,1-9) that the Company not only wanted to rid itself of the Union, but also wanted to rid itself of alternate steward Jones because of his union activity and because of his communications with the NLRB about the Union's objections to the election; and that for these reasons the Company unlawfully lowered his July 1993 evaluation and withheld an August 1993 bonus. Further, the allegations of subsequent discrimination against Jones must also be considered in light of his actions in filing charges and an amended charge against the Company in November 1993; particularly in view of the Company's resentment at Jones' July 1993 statements to the NLRB in support of the Union's objections, I infer from the probabilities of the case that the Company likewise resented Jones' subsequent unfair labor practice charges. Further, the Company's personnel action with respect to Jones must be assessed in light of the Company's so-called "absenteeism" policy, under which an employee with five occurrences of absence during a calendar year is placed on a 6-month absenteeism probation during which he is subject to a 3-day layoff for a sixth occurrence and discharge for a seventh occurrence.

This absenteeism policy assumes particular significance in light of the incidents on November 2 and December 27, 1993. Since September 27 and as of November 2, Jones had been on a leave of absence because of back problems. According to the Company's eventual position (although Stephen Reynolds had otherwise advised Jones before he began his leave), this leave of absence constituted Jones' fourth absenteeism occurrence for 1993. Initially, this leave of absence was to have expired on October 27, more than 2 months before the expiration of the calendar year would have wiped out up to four absenteeism occurrences in 1993. However, on November 1, the Company received a note from Jones' doctor which stated that Jones would be physically unable to return to work until November 16—a date which would have left only 6 weeks for Jones to accumulate a fifth 1993 absenteeism occurrence and thereby be subject to absenteeism probation which would render him subject to discharge for two more occurrences even if they did not take place until 1994. Accordingly, the Company decided to entrap Jones into another absenteeism occurrence in 1993.

Thus, after Sizemore was advised on November 2, 1993, by the office nurse of Jones' personal physician that Jones was to do no lifting, bending, or stooping but could do a "sitting job,

something like a desk job," Sizemore merely asked for a doctor's note which included the restrictions of "no lifting, bending, or stooping." Although Sizemore told Patricia Reynolds that the office nurse had said (*inter alia*) that Jones would have to be given something that would be a sitting job, something like a desk job, and although Reynolds testified that at that time the Company had no desk work which Jones was capable of performing (although see *supra*, part V,B,6), Reynolds told Sizemore to tell him to report for work that night. Sizemore thereupon left on Jones' answering machine a message directing him to report to work that evening. She inaccurately told him that his doctor's updated written statement said it would be all right for Jones to do light-duty desk work, and in effect told him that he would be assigned to such work (as he was not). Before Jones revealed as a rebuttal witness that he had retained the answering-machine tape of her message, Sizemore sought to obfuscate her trickery in making this statement, by testifying (inconsistently with her own contemporaneous notes) that she did not tell him the Company had desk work available. When Sizemore's proffer of light-duty desk work induced Jones to return to the facility (thereby terminating his at least alleged fourth absenteeism occurrence), the Company did not give him the desk work to which his doctor had restricted him and which Sizemore had promised him, although such work had been assigned to Carla Wiggam (without prior training) when she injured her back, and to unit employee Hunt (also without prior training, so far as the record shows) during a temporary shortage of warehouse work. Further, the Company's written representations to Jones about the information which it had received from his doctor's office made no mention of Jones' limitation to a sitting job, but, instead, untruthfully attributed to the doctor's office the statement that he could perform any light-duty work which the Company had available, provided it did not require him to lift, bend, or stoop.

Moreover, the Company did not even assign Jones the job of making boxes, although other employees' overtime hours at premium pay could have been reduced by assigning him to such work, Patricia Reynolds at one point testified to the belief that his medical restrictions would not have precluded him from performing such work, and on an earlier occasion another warehouseman on light duty had been assigned box making on a full-time basis. Nor is there any evidence that the Company sought to limit its need to hire temporary employees to assemble "deals"—some steps of which require no lifting, stooping, bending, or twisting—by assigning Jones to such work. Instead, and notwithstanding Jones' truthful assertions to Supervisor Grigdesby that the Company had said Jones was to be performing light-duty desk work, he was initially assigned a sweeping job on the night shift (his shift before he began his leave of absence) which required him to lift, stoop, and bend. When he continued to report for such work on the night shift notwithstanding his need to perform motions forbidden by his doctor, the Company transferred him to the day shift in order to assign him to another job (operating the floor scrubber) which also required him to perform proscribed motions and which he was directed to operate on much more frequent occasions than it was operated during periods when he was not assigned to this job. When Jones thereupon obtained a note from his doctor which forbade him to operate the floor scrubber, Supervisor Kramer procured a rescission of this note by incompletely describing the job to someone in the doctor's office who he knew was not a doctor, without even attempting to find out whether

she was a nurse or a receptionist. When Jones nevertheless continued to work his scheduled hours and days on the floor scrubber, and with the approach of 1994 when Jones' four absentee occurrences in 1993 would be erased, the Company engineered a fifth occurrence on the next to last day of his 1993 work schedule, and thus put him on attendance probation, by telling him that his then Tuesday/Friday schedule had been changed to Tuesday/Wednesday and then charging him with a fifth occurrence when he failed to report to work on the following Monday, December 27. Thereafter, Jones' December 23 request for a 40-hour week picking products, instead of the short weeks (between about 8 and about 16 hours) he had been working, was denied by Patricia Reynolds on the stated ground that the weight of some of these products exceeded his 10-pound weight limit, although the 10-pound restriction could have been obviated by giving him a work station which was not at the end of the pick line and on previous occasions the Company had given him work assignments which were inconsistent with his medical restrictions; moreover, at the hearing before me, Reynolds explained her denial of a 40-hour week on a ground not voiced to Jones and proved false by Carla Wiggam's work schedule while on light duty namely, that a 40-hour schedule could not be given to an employee on medical restriction. Moreover, as discussed *infra*, part V,F,7-12, and G, during discussions with the Union between April and June 1994, some of them participated in by Jones, the Company advanced and adhered to a proposal which would have had the effect of reactivating Jones' absenteeism occurrences, and rejected union proposals which at least arguably would have had the effect of excising his attendance probation.

The foregoing evidence preponderantly shows that Jones' union activity, and his action in giving the Board an affidavit in support of the Union's objections (which affidavit also supported the Union's subsequent unfair labor practice charges), at least partly motivated the Company's action in (1) directing him on November 2 to return from his medical leave of absence on the false representation that he would be assigned desk work; (2) assigning him on November 2 to a sweeping job which was inconsistent both with the Company's prior assurances and with his medical restrictions; and (3) transferring him on November 8 to the day shift in order to assign him to a floor-scrubber job which was inconsistent with his medical restrictions. Such evidence also preponderantly shows that his union activity, his affidavit, and the charge which he filed with the Board in mid-November 1993, at least partly motivated the Company's action in (1) denying him a 40-hour week on December 21, 1993, and (2) charging him with an attendance occurrence on December 27, 1993, which resulted in his being put on attendance probation, although his December 27 "absenteeism" was due to his having adhered to the schedule which his supervisor had told him to observe. Accordingly, the burden rests on the Company to prove, by a preponderance of the evidence, that the Company would have taken the same actions against Jones even if he had not engaged in protected union activity or given statements to and filed charges with the Board; see cases cited *supra*, footnote 68 and attached text. Having offered for such actions various explanations all of which are demonstrably false or pretextuous, the Company has failed to discharge that burden. *Aero Metal Forms*, 310 NLRB 397, 399 (1993); and *Asphalt Paving Co.*, 310 NLRB 1109 (1993).

Further—and in light of the Company's motivation and conduct in connection with these work assignments, with Jones'

request for a 40-hour week, and with his December 27 "absenteeism occurrence"—I conclude that the evidence preponderantly shows that Jones' union activity, and his statements to the Board in connection with the Union's objections to the election, constituted at least part of the Company's motivation in issuing reprimands to Jones dated September 12, 17, and 23, ostensibly for leaving work before general dismissal; in administering a layoff effective on September 28, 1993, on the ground that the leave-early event which was the subject of the reprimand dated September 17 was his second offense of that nature; and in administering a 4-day effective on October 11, on the ground that the leave-early incident which was the subject of the reprimand dated September 23 was his third offense of that nature. Thus, the reprimand dated September 17 contains an incomplete, inaccurate, and misleading account of the events on that day—more specifically, the reprimand alleged that his claim of back pain was untruthful because he had conversed with other employees for 20 minutes after leaving and 22 minutes before general dismissal; whereas he had been sitting down during this conversation, he had told the assistant night warehouse manager that what Jones needed was to rest his back and to get off his feet, the conversation had lasted less than 10 minutes, and his delay in leaving the premises was due to a locked gate to which Jones had no key. Further, all of these reprimands were untruthful in alleging that when leaving early, Jones was failing to obey orders—more specifically, in each such incident, his immediate superior had at least tacitly given him permission to leave. Moreover, in May or June 1992, Patricia Reynolds told the night crew that they could leave before general dismissal if they became ill, and to tell their immediate superior they were leaving (as Jones had done), but said nothing about a doctor's note; in September 1992, the Union and management had reached an agreement that leaving before general dismissal would be excused by management when due to medical situations; and in the spring of 1993 (about 6 months before the September 1993 reprimands here in question), when Jones left early because of an upset stomach, he was not disciplined therefor even though he failed to bring in a doctor's excuse. Furthermore, in connection with the doctor's—note matter, the Company gave mutually inconsistent statements and engaged in equivocal conduct. Thus, Patricia Reynolds told Jones on September 21 that he had to have a doctor's note before he could leave early, whereas on September 20, Grigdesby at least implied that a doctor's note obtained after Jones had left early but before he was reprimanded would have obviated the reprimand, and Patricia Reynolds testified that an otherwise sufficient postreprimand doctor's note would have caused the reprimand to be rescinded. Moreover, as to Jones' September 22 doctor's note, Grigdesby told Jones that it was "invalid" because Jones had told the doctor what to write (although the Company honored as to Carla Wiggam a doctor's note in which she had played a similar role), whereas Patricia Reynolds testified that she believed the September 22 note to be genuine and concluded therefrom that Jones had some sort of back problem (although she also testified, in effect, that it did not suggest to her any reason why Jones had left early on September 7 or 17). In short, the evidence regarding the Company's proffered explanations for Jones' leave-early reprimands dated September 12, 17, and 23—and, therefore, his 3-day layoff effective September 28 and his 4-day layoff effective October 11—supports the General Counsel's contention that such reprimands were at least partly motivated by unlawful considerations. *A fortiori*,

such explanations do not satisfy the Company's burden of preponderantly showing that even in the absence of Jones' protected activity, the Company would for lawful reasons have reprimanded him and given him a disciplinary layoff.

Also, and in light of the Company's unlawfully motivated action against Jones in other respects, I conclude that the General Counsel has shown by a preponderance of the evidence that the Company was motivated, at least in part, by his protected conduct in denying disability pay to Jones. Thus, Stephen Reynolds initially gave Jones a false explanation—namely, that he was not on a medical leave of absence—for denying him disability pay, concomitantly remarking that he was always trying to cause trouble for the Company, and if he did not like the Company, he should just get out. Then, Stephen Reynolds gave Jones a second untruthful explanation for his failure to receive disability pay—namely, that he had not gone to a company doctor, a claim inconsistent with the testimony of both Stephen and Patricia Reynolds that except for injuries covered by workmen's compensation (which Jones had expressly disclaimed in their presence), the Company had no requirement that the employees consult a company doctor. At the hearing, Stephen Reynolds testified that in order to receive disability pay, an employee must meet the requirement, and only the requirement, of a doctor's slip stating that the employee is totally unable to work. However, several other employees received disability pay without submitting such a slip, the Company failed to offer into evidence the company handbook which allegedly set forth this requirement (see cases cited *supra*, fn. 58), Patricia Reynolds testified that an employee who is on medical leave is normally unable to perform any work at the Company, and as soon as Jones received from his doctor a statement that Jones was "physically unable to return to work at this time" (by which time, Jones had learned and inquired about disability pay) the Company recalled him to work with the false representation that he would be given desk work. Because the Company's tendered lawful reasons for denying Jones disability pay are pretextuous, the Company has failed to meet its burden of showing by a preponderance of the evidence that Jones would have been denied disability pay for lawful reasons even if he had not engaged in protected activity. Accordingly, I conclude that the Company violated the Act by failing to give him disability pay.

In addition, I conclude that the General Counsel has preponderantly shown that Jones' never-rescinded reprimand dated September 17, 1993, and referring to his failure to wear a back belt, was motivated—like his reprimands dated September 15, 20, and 23—at least partly by his union activity and his statements to the Board. When Jones demonstrated to Grigdesby (who had signed the letter of reprimand) that the belt issued to Jones was too small, Grigdesby told him not to worry about whether to wear the back belt; moreover, when Jones advised Day Warehouse Manager Kramer about 5 months later that Jones' back belt was too small, Kramer arranged for him to receive a larger size belt. Furthermore, a number of employees had failed to wear their back belts without incurring any discipline therefor. Moreover, although the Company does not normally require an employee to wear a back belt if his doctor forbids it, Grigdesby gave Jones a previously prepared reprimand letter for failure to wear a back belt even though Jones had advised Grigdesby that as to the MRI scan the results (whose pendency had formed the basis of the doctor's note forbidding Jones to wear a back belt) had not yet come back;

and Reynolds never took any action with respect to either this reprimand letter or her September 17 letter stating that Jones would be given a disciplinary layoff for the "next" back belt violation, even though she admitted (in effect) that a medical excuse therefor had been supplied by Dr. Pollom's September 22 note that Jones was to wear a back belt at his discretion. In short, the circumstances surrounding the explanation given by the Company for the September 17, 1993 disciplinary letter serve to reinforce, rather than to detract from, the General Counsel's affirmative case. A fortiori, the Company has failed to discharge its burden of preponderantly showing that for lawful reasons it would have administered the reprimand, and failed either to rescind it or to issue Jones a larger back belt upon learning that Jones' back belt was too small, even if he had not engaged in protected activity.

Additionally, and in light of the Company's motivation for other reprimands and adverse action directed against Jones, and in light of the September 16 reprimand's reliance on the discriminatorily motivated comments on his July 1993 evaluation (see *supra*, part V,A,1,d, and 2,a), I find that the evidence preponderantly shows this September 16 reprimand was at least in part similarly motivated. Although this September 16 reprimand was ostensibly based on alleged socializing and low productivity by Jones on September 15, the supervisor who signed it, Grigdesby, was not asked to testify about the events allegedly described in this letter, whereas Jones gave honest testimony that during the shift in question, he worked at his usual pace and socialized no more than usual. Nor did the Company present testimony from anyone else, in a position to observe Jones' conduct during the shift in question, as to his work pace or socializing. In short, the Company has failed to sustain its burden of showing, by a preponderance of the evidence, that Jones would have received the September 16 reprimand for lawful reasons even if he had not engaged in protected activity. In addition, I conclude that the evidence preponderantly shows that the Company was motivated at least in part by Jones' protected activity when, in response to Jones' December 21, 1993 request for a 40-hour week, the Company refused to assign him such a schedule until March 16, 1994, and revoked this assignment after May 27, 1994, and until on June 6, 1993, he complied with the Company's demand for an updated doctor's note. I so conclude because of the Company's prior and subsequent other acts of discrimination against Jones, and in view of the demonstrated falseness of the Company's explanations for such action. More specifically, his 10-pound weight limit would have permitted him to pick groceries on the night shift if he had been assigned to any one of the several work stations before the last work station on the pick line, employee Carla Wiggam had been given a 40-hour week while she was under medical restrictions which included a 10-pound weight limit, and the contract contained no requirement for updated doctor's notes from employees who were actively working. Further, the pretextuousness of these explanations establishes that the Company has failed to sustain its burden of preponderantly showing that for lawful reasons Jones would have been denied a 40-hour week even if he had not engaged in protected activities.

For the foregoing reasons, I find that the Company has violated Section 8(a)(1), (3), and (4) of the Act by: (1) issuing disciplinary documents to Jones dated September 12, 16, 17, 20, and 23, 1993; (2) laying Jones off between September 28–30 and October 11–14, 1993; (3) denying Jones disability pay between September 27 and November 2, 1993; (4) telephoning

Jones' doctor, and then directing Jones to return to work, on November 2, 1993; (5) giving Jones onerous work assignments effective November 2, 1993, and November 8–December 16, 1993; (6) transferring him between shifts on December 8, 1993; (7) denying Jones a 40-hour week between December 27, 1993, and June 7, 1994; (8) determining the existence of an absenteeism occurrence on December 27, 1993; and (9) putting Jones on attendance probation between December 27, 1993, and June 27, 1994. Furthermore, in the context of the Company's concomitant discriminatory denial of disability pay, and in view of the Company's prior unfair labor practices against Jones, I conclude that Jones could reasonably believe that in remarking that he was always trying to cause the Company trouble and should get out if he did not like the Company, Stephen Reynolds was attributing to Jones' protected activity his failure to receive disability pay, and because of his protected activity was soliciting him to resign. Accordingly, I find that such remarks violated Section 8(a)(1); see cases cited *supra*, footnote 13.

*C. Alleged Unfair Labor Practices Regarding Union Access to Plant (Complaint Paragraphs 7(e), and (f))*

1. Allegedly relevant provisions of collective-bargaining agreement

The August 1990–August 1993 collective-bargaining agreement included the following provisions:

Authorized agents of the Union shall have access to the Employer's establishment during working hours for the purpose of adjusting disputes, investigating working conditions, collection of dues and ascertaining that the Agreement is being adhered to, but this shall not unduly interfere with the performance of necessary work.

2. Alleged unlawful restriction of access in May and June 1993<sup>133</sup>

*a. Facts*

Before May 1992, the Indianapolis warehouse was serviced by then union business representative, Pat Trader. In May 1992, when Buhle was about to take over the account, Trader took him directly to the warehouse door, which is on the side of the building. The two of them were buzzed in by someone inside the warehouse, and then proceeded directly to the breakroom, where they talked to a few people. Then, Trader took Buhle to the warehouse and introduced him to several people. After that, Trader took Buhle to Patricia Reynolds' office and introduced him to her. After a 5- or 10-minute conversation with Reynolds, Buhle left the premises. On at least three occasions during the first month when he was servicing the Indianapolis warehouse, Buhle used in entering the facility the same procedure which had been used during his first visit, when he was accompanied by Trader.<sup>134</sup>

<sup>133</sup> The events discussed under this heading occurred before the representation election. However, for convenience, they are discussed under the instant heading "Part V, Alleged Post Election Unfair Labor Practices."

<sup>134</sup> My findings in this paragraph are based on Buhle's testimony, on which both the Company's (pp. 258–259) and the General Counsel's (p. 25) posthearing briefs rely. Patricia Reynolds' and Lodic's testimony is susceptible to the interpretation that a different practice was in effect at all times until late August 1993.

About a month after Buhle began to service the Indianapolis warehouse, Patricia Reynolds told him that if he was going to be visiting the warehouse, he would first have to check in at the lobby, sign in, obtain a visitor's pass, and then wait at the side door (which gives direct access to the warehouse) until he was buzzed in by management. Buhle did not file a grievance alleging that this change violated the bargaining agreement. Rather, he accepted the new arrangements (according to his testimony), and usually followed them.<sup>135</sup> After entering the warehouse, he sometimes posted material on the bulletin board (which is near the warehouse entrance) and sometimes merely chatted with the employees. Some of these chats occurred while the employees were in the breakroom while they were taking their breaks. However, on various occasions up to about April 1993, he chatted with them while they were actively working, or near the drivers' room or an area called "the cage," without any interference by management.<sup>136</sup>

About March 1993, an investigator from the Indiana Occupational Safety and Health Administration told the Company and Buhle that anyone (including vendors) who entered the warehouse for the first time had to be given an explanation of the hazardous materials on the premises; however, once that explanation was given to a particular individual, it did not have to be repeated every time he returned to the warehouse unless additional hazardous material was included or incorporated.<sup>137</sup> Also, during a conference attended by Buhle, one of the stewards, or the employee wife of Steward Arnie Ray Goens, the Company identified with the IOSHA representative what hazardous materials were present in the warehouse, although not where they were physically located.

Thereafter, about late April 1993, Patricia Reynolds told Buhle that he would no longer have access to the warehouse unless, before each visit, he had a conference with her to keep abreast of all the hazardous material in the warehouse; and that absent such a prior conference, he would have access to the breakroom only. Between the date that Reynolds imposed these strictures and the date of the election, Buhle gained access to the warehouse on at least four occasions. On two of these occasions, he checked in at the lobby, was then buzzed into the warehouse, and restricted his activities to posting material on the bulletin board and conferring with employees in the breakroom while they were on break and the room was not being

<sup>135</sup> Because the lobby office is not open at night, he was unable to check in at this office before visiting the night shift at the warehouse; Patricia Reynolds testified that this was a proper procedure between 4:30 p.m. and 8 a.m., when no receptionist was on duty in the lobby. Also, on one occasion when he wanted to file a grievance on the last day when the grievance would be timely, after a 45-minute fruitless wait in the lobby he went directly to the warehouse side door and was buzzed in.

<sup>136</sup> My findings as to contacts with employees outside the breakroom are based on the testimony of Buhle and Teresa Goens. Although Patricia Reynolds testified that Buhle was not to her knowledge permitted to be present in any part of the warehouse except for the breakroom and (for the purpose of posting notices) in the warehouse area near the bulletin board, there is no record evidence that she had any first-hand knowledge of what the practice had been in fact. For demeanor reasons, I do not credit the testimony of Kramer (who according to Buhle's credible testimony was in a position to observe Buhle's contacts with employees in the warehouse but not in the breakroom) that Buhle chatted with employees in the breakroom only.

<sup>137</sup> There is no evidence or claim that such additions were ever effected.

used for other purposes; neither such errand required him to be in the area of any hazardous materials. The record fails to show whether these two visits took place before or after the representation petition was filed.

The other visits took place after the petition was filed. On one of these occasions, he did not sign in at the lobby, was buzzed into the warehouse by someone, and proceeded to the breakroom. The employees were not on break, and he talked to nobody while in the breakroom. Then, he left the breakroom and went into the warehouse proper, where he began to converse with two unit employees. Kramer and Lodicis approached Buhle and said that he had no right to be there.<sup>138</sup> He said that he believed he had a right to be there, and continued his conversation with the employees. After ending this conversation, he walked to other locations in the warehouse proper, and talked with other employees. Kramer and Lodicis walked right behind him everywhere he went. After 8 to 10 minutes in the warehouse proper, Buhle proceeded to the breakroom, whereupon Lodicis and Kramer went elsewhere. The employees were not on break, and Buhle did not talk with any employees in the breakroom.<sup>139</sup>

On his second visit to the warehouse proper, Buhle was buzzed into the warehouse by or with the knowledge of Kramer, who testified that he did not know whether Buhle had signed in at the lobby.<sup>140</sup> Inferentially, Buhle started to walk toward the mezzanine, which is a work area. He was approached by Kramer and Lodicis. Kramer said that Buhle had no right to be there. Buhle said that he needed to talk to one of the employees. Kramer asked him to wait in the breakroom. Buhle said that he needed to talk to the employee “now,” and approached Teresa Goens while she was hand-stamping cigarettes on the mezzanine. Kramer followed him to Goens’ work station, and, while she was conversing with Buhle, took him by the arm and tried to escort him downstairs. This effort proving unsuccessful, Kramer remained within 2 feet of the conversation until it had ended. During this conversation, which lasted about 5 minutes, Goens continued to work.<sup>141</sup> When Buhle had concluded his conversation with Goens and headed toward the exit, he was followed by Kramer, who in turn was followed by Lodicis. En route to the door, and still with Lodicis and Kramer behind him, Buhle stopped to chat with two more employees on the warehouse floor.<sup>142</sup>

<sup>138</sup> Kramer testified, in effect, that he never knew whether or not Buhle had signed in at the lobby. Although the lobby receptionist would have issued him a visitor’s pass, he usually failed to wear a pass when he had one.

<sup>139</sup> My findings as to this visit are based on Buhle’s testimony. For demeanor reasons, I do not credit Lodicis’ testimony that he was not present during any such incident; or—to the extent that such testimony by Kramer may amount to a denial—that he did not recall any such incident other than the one described in the next paragraph.

<sup>140</sup> Although not wholly clear, the record suggest that Buhle had in fact signed in.

<sup>141</sup> My finding that she continued to work is based on her testimony. For demeanor reasons, I do not credit Kramer’s testimony that she stopped working. While actively working, employees are permitted to converse with each other on subjects unrelated to work.

<sup>142</sup> My findings in this paragraph are based on a composite of credible portions of the testimony of Buhle, Goens, and Kramer. For demeanor reasons, I do not credit Lodicis’ testimony that he was not present during any incident of this nature, or Kramer’s testimony that on what Kramer described as the only incident when to his knowledge Buhle entered the warehouse (except for the breakroom) to converse

Lodicis and Kramer had never before stood near Buhle while he was talking with employees. Buhle credibly testified to the opinion that “[p]eople are a little bit apprehensive about opening up to you when management is standing around.”

Although Patricia Reynolds testified, in effect, that the Company’s safety director had been instructed to advise vendor James Douglas and other vendors about the presence of hazardous materials in the plant, there is no evidence that this was done, and the testimony of vendors Douglas and Swallow, both witnesses called by the Company, shows that no such explanations were given them before they entered the plant on June 30, 1993.

Buhle was present while the Board agent was counting, inside the company facility, the ballots cast in the July 8, 1993 election. Inferentially after the count had been completed, Patricia Reynolds told Kramer and Lodicis to escort Buhle from the premises. Kramer thereupon told Buhle that his services were no longer needed there. Buhle said that he had not completed his functions there, and the Board agent agreed. After Buhle had signed some election documents, Kramer once again told Buhle that his services were no longer needed, to which Buhle replied with an obscenity. Then, the two supervisors escorted him into the parking lot.

#### b. Analysis and conclusions

As the Company does not appear to question, the conditions under which union representatives are permitted access (if any) to company premises for the purposes of performing the functions of the employees’ bargaining representative are a mandatory subject of collective bargaining. *T.L.C. St. Petersburg, Inc.*, 307 NLRB 605, 610 (1992); *Colonna’s Shipyard*, 293 NLRB 136, 141 (1989), *enfd.* 900 F.2d 250 (4th Cir. 1990); and *Park Manor Nursing Home*, 318 NLRB 1085 (1995). Accordingly, an employer violates Section 8(a)(5) and (1) of the Act if he unilaterally, and without the statutory representative’s having been given prior notice and an opportunity to bargain, makes a material, substantial, and significant change in such conditions of access. See *Wil-Kil Pest Control Co. v. NLRB*, 440 F.2d 371, 375 (7th Cir. 1971); *Fabric Warehouse*, 294 NLRB 189, 192 (1989), *enfd.* 902 F.2d 28 (4th Cir. 1990); and *Peerless Food Products*, 236 NLRB 161 (1978). Moreover, there is no evidence or claim that the Union received prior notice and an opportunity to bargain about the Company’s newly imposed April 1993 limitations on Buhle’s access to the employees in warehouse areas other than the breakroom—namely, Reynolds’ requirement that he confer with her before entering areas other than the breakroom, and the supervisors’ assertion to him that he had no right to be in such areas and, when he nonetheless continued to engage in his prior practice of entering such areas, following him and standing near him when he talked to the employees, thereby tending to dampen their willingness to talk to him freely. There is no claim or evidence that the supervisors acknowledged that Buhle could continue to have access to these areas for the contractually specified purpose of “adjusting disputes, investigating working conditions . . . and ascertaining that the [bargaining] agreement is being complied with” (see *supra*, part V,C,1); rather, the supervisors added no exceptions to their assertion that he had no right to be there.<sup>143</sup>

with employees, he engaged in such activity over Kramer’s protests but was not followed by Kramer.

<sup>143</sup> Cf. *Peerless Food Products*, *supra*, 236 NLRB 161, relied on by the Company, where the unilaterally imposed limitations on visits to

Assuming *arguendo* that some newly taken IOSHA action due to the presence of hazardous materials could under some circumstances operate as a defense to the imposition (without prior notice and an opportunity to bargain) of new unilateral restrictions on access by union representatives, the record shows that the Company's newly imposed restrictions on Buhle were not called for by IOSHA's action nor motivated by an effort to satisfy IOSHA's concerns, but, instead, were motivated by a desire to impede Buhle's opportunity to consult with employees. Thus, IOSHA did not tell the Company to exclude anyone from the warehouse, but merely told the Company to give hazardous-material information to those who entered. Moreover, IOSHA merely told the Company to give such information to persons who were entering the warehouse for the first time; and during one of the IOSHA conferences the Union had been advised what hazardous materials were in the warehouse. Furthermore, although the Company did not require its vendors to receive such information on each occasion before they entered the warehouse (indeed, there is no evidence that they ever received such information), Patricia Reynolds had told Buhle that he had to have a hazardous-materials conference with her on each occasion before he entered the warehouse; even in the absence of other considerations, the addition of this requirement meant that Buhle could never enter the warehouse (except for the breakroom) unless and until Patricia Reynolds was asked and willing to confer with him, although the warehousemen in the unit worked in two consecutive 10-hour shifts and the drivers in the unit sometimes left the warehouse in the small hours of the morning on overnight runs. See *Ernst Home Centers*, 308 NLRB 848, 849 (1992). In addition, when Kramer and Lodics saw Buhle speaking to unit employees in the warehouse, they did not mention Buhle's failure to have a prior conference with Patricia Reynolds, or (so far as the record shows) caution him about the hazardous materials in the warehouse; rather, they dogged his footsteps and overtly stationed themselves in a position where they could overhear his conversations with unit employees. Moreover, the Company's unfair labor practices for the purpose of rendering the warehouse a nonunion facility included actual and threats of discrimination against union stewards and a statement attributing the absence of an employee retirement plan to the expense of processing grievances. Such concomitant conduct renders insupportable the contention that the newly imposed limitations on union representatives' access to the warehouse were too insignificant to violate the Act. See *Xidex Corp. v. NLRB*, 924 F.2d 245, 253 (D.C. Cir. 1991). Accordingly, I find that the Company violated Section 8(a)(5) and (1) of the Act in late April 1993 by unilaterally altering the conditions under which union representatives could gain access to the warehouse.<sup>144</sup>

the production floor did not extend to visits for the purposes of investigating or processing grievances or discussing with employees matters related to the bargaining agreement.

<sup>144</sup> However, because Buhle was advised of this change (effective immediately) before the petition was filed, I do not rely on the change as a basis for setting aside the election even though there is no evidence that Buhle visited, or wanted or tried to visit, the warehouse proper during the interval between when he was advised of the change and when the petition was filed. See *Kokomo Tube Co.*, 280 NLRB 357, 358 (1986); cf. *Advo System, Inc.*, 297 NLRB 926, 934-935, 941 (1990); and *Scott Glass Products*, 261 NLRB 906, 919-920 (1982).

### 3. Denial of access after the bargaining agreement expired

#### a. Facts

The collective-bargaining agreement expired by its terms on August 25, 1993. By letter dated September 8, 1993, Sizemore advised Buhle that because the contract had expired, the Company would no longer deduct union dues from employee paychecks. About September 10, upon receiving this letter, Buhle telephoned Patricia Reynolds and asked her whether she concurred with Sizemore as to the dues—deduction matter. Reynolds said, “[Y]es.” Then, Buhle asked if he had access to the facility. Reynolds said that access, too, had ended when the contract expired.

Thereafter, Buhle consulted Union Attorney Chestnut, who advised Buhle that he had better go out to the warehouse and attempt to gain access to the facility. About September 14, Buhle entered the warehouse lobby at some time between 9 and 10:30 a.m., and asked to speak to Reynolds. When she came out into the lobby, he asked her if he had access to the warehouse that day. She said that he did not have access, that she had checked with her attorney, that access was a negotiated benefit of the contract, and that if Buhle was caught or seen inside the facility, the Company would have him arrested for trespassing.<sup>145</sup> Buhle credibly testified on July 28, 1994, that because he did not want to be arrested, since that September 1993 conversation with Reynolds he had made no further attempt to gain access to the Company's facility. As discussed *infra*, part V,D,1,b, about late August 1993 the Company withdrew recognition from the Union, and no contention is made that the Company resumed recognition until March 1994 at the earliest.

#### b. Analysis and conclusions

It is well settled that where (as here) an employer has permitted his employees' statutory representative to obtain access to his facility for the purpose of discharging the representative's statutory duties, pursuant to the provisions of a collective-bargaining contract and/or a practice, the employer violates Section 8(a)(5) and (1) of the Act by unilaterally withdrawing such access, without giving the statutory representative prior notice and as opportunity to bargain, whether or not the bargaining agreement has expired. *Park Manor*, *supra*; and *Campo Slacks, Inc.*, 250 NLRB 420, 429 (1980), *enfd.* 659 F.2d 1067 (3d Cir. 1981), *cert. denied* 454 U.S. 941 (1981). The Company's principal defense to its unilateral withdrawal of such access—namely, that upon the expiration of the contract the Union was no longer the employees' bargaining representative—is unmeritorious for the reasons stated *infra*, part V,D,2. Nor can the Company fairly rely on Buhle's failure again to seek access after it was denied on September 10 and 14, 1993; particularly in view of the Company's threat to have him arrested if he entered the facility and the Company's failure—between about August 1993 and March 1994—to recognize the Union for any purpose, the Union can hardly have forfeited its statutory rights by taking at its word the Company's refusal to

<sup>145</sup> This finding is based on Buhle's testimony. Reynolds replied in the negative to the question, “At any time did you ever threaten Brian Buhle that the Company would call the police if he obtained access in any manner other than what the Company deemed acceptable?” To the extent that this may constitute a denial, for demeanor reasons I credit Buhle.

honor them.<sup>146</sup> The Company's contention that its April 1994 conversations with the Union about the access subject either negated the Company's September 1993 denial of such access, or render a remedial order inappropriate, is unmeritorious for the reasons discussed infra, under "The Remedy." I find that the Company violated Section 8(a)(5) and (1) in September 1993 by unilaterally withdrawing the Union's access rights, without giving it prior notice and an opportunity to bargain.

#### D. Allegedly Unlawful Denial of Recognition

##### 1. Facts

###### a. Circulation of petitions requesting the Union to withdraw its objections to the decertification election

The Union filed its objections to the July 8 decertification election on July 14, 1993. About July 21, unit employee Robert Burnett, who had filed the decertification petition, began to circulate among the other unit employees several copies of a typed petition (the objections petition) which read, "We . . . respectfully request that (the Union) withdraw their . . . objections to the . . . election. . . . In our opinion, the campaign was legal and fair." At the request of Burnett, a driver who worked during the day, night warehouse unit employees Hawk, Hammer, and Mitchell (all of whom were working foremen) and night warehouse unit employee Benefiel accepted copies of the petition and, during working hours, solicited other employees to sign such copies.<sup>147</sup>

More specifically: On July 21, Benefiel signed a copy at the solicitation of Burnett, who said that "this is one of the ways that we can get the Union out of here . . . when you know somebody that doesn't want you around, maybe you will leave." Then, Burnett gave this copy to Benefiel to pass around for other employees' signatures. Benefiel devoted 10 to 15 minutes of working time to obtaining the signatures of five other unit employees on the night shift, with the representation that the document was going to be turned over to the Union and that it was "to get the Union out, so that [the employees] would no longer be represented" by the Union. Benefiel then gave this document to unit employee Hatfield. At an undisclosed time thereafter, Burnett returned this document to Benefiel with the instructions to obtain the employees' addresses. Benefiel did this, during working time, and then gave the document to Burnett. The record fails to show whether management was aware of Benefiel's use of working time in connection with the petition.

On July 21, Robert Burnett also gave a copy of the petition to unit employee Mitchell, a working foreman; asked him to get as many signatures as he could; and told him that if anyone asked who started the petition, Mitchell should give the names of unit employees Hatfield or Dean. During the shift which began that day and ended on July 22, Mitchell signed this copy of the petition and used 1 to 3 hours of working time inducing 16 other unit employees to sign. Among the employees whose signatures were obtained by Mitchell on July 21 was Randy Jewell, who on March 31 had been unlawfully disciplined for putting the Union's name on his back belt (see supra, part III,I).

Mitchell credibly testified, in effect, that while he was engaging in this solicitation activity, he had no urgent tasks to perform, but that he could have performed other needed work or assisted the employees under him in performing their work. In order to obtain these signatures, Mitchell had to leave his usual work area, the loading dock, and proceed into the warehouse itself, an area in which he did not customarily work. Mitchell returned to Burnett the copy of the petition on which Mitchell had obtained these signatures. The record fails to show whether any member of management was aware of Mitchell's use of working time in connection with the petition.

The copies of the "objections" petition received into evidence contain about 51 signatures dated before July 24; the unit as of the July 8 election had consisted of about 97 employees. At all times relevant here, unit employee Hammer was on the night shift, which begins in the evening and ends the following morning. Toward the beginning of his shift (probably, a shift which began on Friday, July 23, 1993; see infra), Hammer was paged by Robert Burnett, the bargaining unit driver who had filed the decertification petition, to go to the office of driver manager, Paul Lodics, where Burnett gave Hammer a copy of an "objections" petition. Hammer then walked into the office of Night Warehouse Manager Grigdesby, showed him the paper Hammer had received from Burnett, and said, "I've got to get my John Hancocks tonight." Grigdesby looked at the paper and said, "Okay." Prior to that evening, Hammer had induced about six other employees to sign other copies of the petition. During that shift, he signed this copy of the petition himself and spent about 8 hours on a 10-hour or 12-hour shift trying to induce other employees to sign. Eventually, he obtained about four more signatures. While Hammer was getting the signatures, Grigdesby was in the area, in a position to observe what Hammer was doing, and made no attempt to stop Hammer from soliciting. During an attempt by Hammer to obtain a signature from employee Gary Phillips, employee Jones told Grigdesby that it was wrong for Hammer to pass "this literature" around in the warehouse. Grigdesby then approached Hammer; said, "You were caught once, don't let it happen again"; and walked away. Thereafter, Hammer continued to solicit signatures, but more cautiously. Prior to this occasion, Grigdesby had not permitted Hammer to perform over a period of 8 hours during the shift something which was not related to work; rather, when Grigdesby observed Hammer standing and talking with others, or "find[ing] his own free time," Grigdesby ordered Hammer to return to work.<sup>148</sup> Hammer also asked unit employees Hawk and Mitchell to obtain signatures, "Because they are working foremen," and they did so during regular worktime; the record fails to show whether management was aware of this activity by Hawk and Mitchell. As to the various copies on which Hammer had obtained signatures, he returned some to Burnett and, in Burnett's absence, gave the others to Lodics or Kramer, with the request that such documents be given to Burnett; both supervisors said, "Okay."<sup>149</sup> While Hammer was soliciting signatures on this document, about 10 of the employees whom he solicited remarked that they were not sure that they would be making a good decision to vote the Union out, that they were

<sup>146</sup> Far from sleeping on its rights, on November 9, 1993—about a month after being denied access rights—the Union filed a charge complaining of such conduct.

<sup>147</sup> As to Hawk, my finding that Burnett asked him to engage in such activity is based on inference.

<sup>148</sup> Moreover, Grigdesby testified that when he saw alternate steward Jones engaging with other employees in conversations whose subject Grigdesby did not know, "I go over and say you need to get back to work."

<sup>149</sup> This finding is based on Hammer's testimony. For demeanor reasons, I do not credit Kramer's and Lodics' denials.

not quite sure whether, with the Union out, they could trust the Company. To these remarks, Hammer replied that if the employees got the Union out, they could see what benefits and options were offered by Thomas Wake and the Company and from that point decide whether to “reorganize.” Among the employees who signed this document was employee Watt, whom Supervisor Kramer had unlawfully threatened because Watt had put a prounion sticker on a stop sign (see *supra*, part III,C).

By letter to the Union dated July 28, 1993, with courtesy copies to (among others) Thomas Wake, Patricia Reynolds, and an NLRB field examiner, unit employees Dean and Hatfield stated, “Please accept the enclosed request that the [Union] withdraw their objections and charges to the July 8th election . . . our signatures signify that we feel the election was legal and fair.” Attached to this letter were copies of the petition previously described, with the at least purported signatures of about 72 employees.<sup>150</sup> After receiving this document, in her “in” basket or under her door, Patricia Reynolds alerted Thomas Wake to its existence by telephone, sent him a copy, and may have sent a copy to Company Attorney Gerald A. Golden. The record fails to show the Union’s response, if any, to this letter. The complaint does not allege that the circulation of this petition constituted an unfair labor practice by the Company.

*b. The circulation of petitions disavowing the Union; the withdrawal of recognition*

By letter to Patricia Reynolds dated August 18, 1993, Union Business Agent Buhle requested the commencement of bargaining negotiations for a contract to replace the current agreement, which was to expire on August 26, 1993.

On a date not clear in the record, Burnett was advised by an unidentified person or persons that the “objections” petitions were ineffective. About August 25, Burnett began to solicit employee signatures on, and asked Hammer and (perhaps) Mitchell to solicit signatures on, copies of a petition (the “declaration” petition) which read, “We . . . of our own declaration, no longer wish to recognize or be represented by the [Union] on or after this date August 26, 1993, effective 12 a.m.” On that day, Mitchell (who may have received a petition from Hammer) asked Grigdesby “if he minded if we passed around the petition during working hours.” Grigdesby said that as long as he did not know about it, he did not care what they had done. Later that evening, during working hours, Mitchell solicited between 16 and 28 employees to sign the petition. Five of them did so, eight to twelve said that they had signed the “objections” petition, and two or three refused to sign. Mitchell himself also signed. Then, Mitchell gave the “declaration” petition to Burnett. Either at that time or when giving the petition to Mitchell, Burnett said, “[T]o hurry up and get it by the next [day] so they could send it to wherever it needed to go.” As to Mitchell’s location and the status of his work duties when he was soliciting signatures on this August petition, he gave the same credible testimony which he gave in connection with the July petition. Hammer obtained the signatures of four employees on a copy of the “declaration” petition, and gave it to Kramer, Lodics, or Robert Burnett about August 27. This copy

<sup>150</sup> A number of these signatures were authenticated by testimonial evidence. There is no claim or evidence that any of the petitions was signed by anyone who was not in the bargaining unit, or that any of the signatures is not authentic.

in its final form contains several signatures after the last one obtained by Hammer.

The “declaration” petitions contain about 62 signatures. A number of these are authenticated by testimonial evidence, and there is no contention or evidence that any of them is not authentic. Some employees signed both petitions; but because many of the signatures are not very legible, it is not easy to determine the number of duplications. Among the employees who signed this document, at Robert Burnett’s instance, was Ronald Watt, who had also signed the “objections” petition (directed to the Union) and whom Supervisor Kramer had unlawfully threatened for putting a union sticker on a stop sign (see *supra*, part III,C). Watt testified that he signed the “declaration” document because “I have no idea who’s going to see this form after I sign it . . . if you take into account that the Company may see this after I had signed it, then you could call that coercion if you wish. I certainly do. . . . how do I know that [Robert Burnett is] not going to show this document to Pat Reynolds when he goes up to see her. If my name is on that document, then I have insured that she knows that I have signed it and, therefore, I am not a threat to her.”<sup>151</sup> The complaint does not allege that the circulation of these petitions constituted an unfair labor practice by the Company.

On or after August 27, Patricia Reynolds found copies of these “declaration” petitions under her door or in her “in” basket. On the day she received them, she faxed copies to Thomas Wake and (perhaps) Golden.

About late August or early September, Buhle telephoned Patricia Reynolds and asked her about a negotiation date. She informed him that a decision on whether or not to bargain was in the hands of the Company’s attorney, and that she would have to get back to Buhle. She never did get back to him. As previously noted, in mid-September 1993, Reynolds advised Buhle that because of the expiration of the contract on August 27, the Company would no longer afford him access to the plant or checkoff dues. On October 1, upon seeing Reynolds and Sizemore at an unemployment compensation hearing, he asked Reynolds if she had received any response from the company attorney regarding bargaining. Reynolds responded that if the Company had intended to bargain, it would already have contacted the Union.<sup>152</sup> The Company did in fact stop checking off dues; the complaint does not allege that this conduct violated the Act. Thereafter, only one employee kept his dues up.

On October 5, 1993, the Company received a charge (docketed as Case 25–CA–22782) which the Union had filed on October 1, and which alleged that the Company had violated Section 8(a)(1) and (5) by refusing to bargain with the Union.<sup>153</sup> By letter dated October 12, 1993, with respect to Case 25–CA–

<sup>151</sup> Hatfield obtained Watt’s signature while Watt was out of his regular work area because he was returning from a bathroom break which would normally have lasted less than 5 minutes. The Hatfield-Watt conversation which preceded Watt’s signature took 10 to 15 minutes. When Watt left for his break, he complied with the Company’s requirement that he so notify his superior. Company policy did not require Watt to notify his superior of Watt’s return, and he did not do so.

<sup>152</sup> My findings as to this October 1 conversation are based on Buhle’s testimony. Because Sizemore and Patricia Reynolds were unreliable witnesses in other respects, and for demeanor reasons, I do not credit their denials.

<sup>153</sup> This charge is among those which underlie the amended complaints issued on March 1, 1994, and thereafter.

22782, Company Counsel Gerald A. Goldman advised the Board's Regional Office that it was the Company's position that it had lawfully suspended bargaining with the Union. The letter further stated that the Company's "last" collective-bargaining agreement with the Union had expired on August 27, 1993; and that in a July 8 Board decertification election, "a majority of employees voted not to be represented by the . . . Union. The Company acknowledges that the Union has filed unfair labor practice charges and objections to the election [some of which] are pending hearing." Further, the letter referred to, and enclosed photocopies of, the August 1993 "declaration" petitions described supra. The letter went on to say:

In view of the above, and despite the fact that the results of the decertification election have not yet been certified, it is the position of the Company that the Union no longer enjoys the presumption of majority support. As a result, it is the position of the Company that it lawfully suspended bargaining.

Patricia Reynolds testified on July 27, 1994, that "it was the Company's position that, based on the results of the July 8 election where the majority of the employees had voted to decertify and based on two subsequent petitions [of which] the Company had received copies . . . on or about the end of July and on or about the end of August—that there was not a need to negotiate with the Union." All parties stipulated on July 27, 1994, that this had been the Company's position since receipt of the two petitions by late August 1993.

*c. Credibility in connection with solicitation activity*

My finding that Mitchell circulated copies of the "declaration" petition during working hours with Grigdesby's tacit consent is based upon Mitchell's uncontradicted testimony. Grigdesby was still employed by the Company as a supervisor at the time of the hearing, and testified on its behalf, but was not asked about this incident. Nor was Grigdesby asked about Hammer's testimony that with Grigdesby's knowledge, Hammer solicited signatures on copies of the "objections" petition during periods when he would normally be expected to be actively working. Further, Bill Albright testified for the Company, but he was not asked about Hammer's testimony that he obtained a signature from Albright on the "objections" petition on July 24, and Albright's signature with that date appears on the petition. Robert Burnett (the decertification-case petitioner) made a formal appearance on his own behalf, and was physically present during Hammer's testimony and during most of the hearing; but Burnett did not testify, even though Hammer testified that he received a copy of the "objections" petition from Burnett toward the beginning of the shift during which Hammer solicited signatures on that petition.

Contrary to Burnett's posthearing brief, the fact that Hammer attended a company picnic on July 24 (a Saturday) does not call for the inference that this was the period when he obtained on copies of the "objections" petition the signatures dated July 24, and that he was untruthful in testifying that he obtained them in the warehouse during his shift. Hammer worked a night shift which sometimes began on Friday and ended on Saturday. Further, neither Bill Albright (a company witness who dated his signature July 24), nor Robert Burnett (who attended the picnic), nor Hawk (a company witness who signed the "objections" petition), nor any member of management (some of whom attended the picnic) testified that Hammer engaged in

any solicitation activity during the picnic. Moreover, although Hammer's wife also attended the picnic, the presence of the Hammers' four children (between 4 and 8 years old) indicates that he might have experienced some difficulty if he had solicited signatures during the picnic. Furthermore, as Hammer in effect pointed out at the hearing, if the first signatory on a particular page (Albright) had erred in dating his signature July 24, subsequent signatories may have also misdated their signatures because they copied Albright's date. For the foregoing reasons, and after considering Hammer's demeanor, to the extent previously indicated I accept his testimony about his circulation of the petitions during periods when he would ordinarily have been expected to be actively working and with Grigdesby's knowledge, and Hammer's denial that his solicitation activity occurred during the picnic. Nor is there merit to the contention in Robert Burnett's brief that Hammer's testimony about his solicitation with Grigdesby's knowledge is unworthy of belief because of Hammer's further testimony that he also obtained several signatures dated July 21 or 22. Hammer testified that he solicited signatures on dates "around," but other than, July 24.

2. Analysis and conclusions

As the Board-certified bargaining representative of the unit employees and their recognized representative under the 1990–1993 collective-bargaining agreement, the Union enjoyed the presumption of majority status, although this presumption became rebuttable with the expiration of the bargaining agreement on August 25, 1993. *Auciello Iron Works v. NLRB*, 517 U.S. 781 (1996); and *Zim's Foodliner v. NLRB*, 495 F.2d 1131, 1139 (7th Cir. 1974), cert. denied 419 U.S. 838 (1974). This presumption of majority status is unaffected by the Union's failure to obtain a majority of the votes cast in a representation election which (like the election in the instant case) has been set aside because of employer misconduct; indeed, this presumption continues during the pendency of even unmeritorious objections. See *Underground Service Alert of Southern California*, 315 NLRB 958 (1994); *W. A. Krueger Co.*, 299 NLRB 914 (1990); *Selkirk Metalbestos*, 321 NLRB 44 (1996); and *Planned Building Services*, 318 NLRB 1049 fns. 4–5 (1995). Accordingly, to the extent that the Company's withdrawal of recognition was based (as Patricia Reynolds testified) on the Union's narrow loss in the tally of ballots, such withdrawal was unlawful.

Nor can the Company justifiably rely on the employee petitions given to the Company in late July and late August 1993. Because the Company made no efforts whatever to remedy the unfair labor practices which rendered the July 8 election unreliable as to the employees' choice, the petitions in late July and late August were likewise unreliable evidence. Indeed, after the election the Company continued to maintain and enforce its unlawful no-access rule with respect to off-duty employees and (so far as the record shows) failed to advise the Union that the Company had forsworn the unlawful alterations in its practice with respect to access by union representatives. Moreover, after the election and before the "declaration" petitions were signed, the Company unlawfully withdrew union representative Buhle's access to the facility for the purpose of, among other things, processing employee grievances; advised both of the union stewards and union activist Hall of bonus decisions which were adverse to them because of their union activity; issued to alternate Union Steward Jones an evaluation which had been lowered because of his union activity; and advised decertification petitioner Robert Burnett of the unprecedentedly

high bonus he would receive because of his antiunion activity. Because the signatures on the petitions were thus tainted not only by the same conduct which tainted the election and whose effects the Company had made no effort to dispel, but also by the Company's postelection unfair labor practices, such signatures were not a reliable indicator of employee sentiment. See *Hi-Tech Cable Corp.*, 318 NLRB 280 (1995); *Beltway Transportation Co.*, 319 NLRB 579 (1995); *Selkirk*, supra. The Company's right to rely on the "declaration" petitions is further impugned by their circulation, during times when the employees were expected to be actively working, with the knowledge of Supervisor Grigdesby, notwithstanding his testimony that the Company forbids employees to solicit or distribute "on the clock." See *Crispus Attucks Children's Center*, 299 NLRB 815, 838 (1990). I note, moreover, that although the second election which the Union was then seeking would entail the use of secret ballots, the petitions disclosed the identity of the signers, a consideration to which at least one-time union activist Watt testimonially attributed his signature on the August petition.

For the foregoing reasons, I conclude that the Company violated Section 8(a)(5) and (1) of the Act by withdrawing recognition from the Union about late August 1993.<sup>154</sup>

*E. Allegedly Unlawful November 1993 Letter to Unit Employees (Complaint Paragraph 8(j))*

1. Facts

On October 1, 1993, the Union filed a charge (docketed as Case 25-CA-22782, one of the charges underlying the instant consolidated complaint) alleging that the Company had violated Section 8(a)(1) and (5) by refusing to bargain with the Union. On October 19, this charge was amended so as to seek a bargaining order, on the ground that the Company's unfair labor practices had "created an atmosphere which has interfered with and prevented a subsequent free choice election."

A letter dated November 10, 1993, from the Union to the Company (attention Patricia Reynolds) stated that for 4 months the Union had "consistently heard rumors that [the] Company would immediately raise the wages of the bargaining unit employees, if not for possible Union objections." The letter went on to say that if the Company in fact wanted to give across-the-board pay increases to unit employees, "please consider this letter our waiver of any rights to file any future objections and/or legal actions with the [NLRB] or any Local, State or Federal agency over this pay raise." The letter stated on its face that courtesy copies were being sent to, inter alia, all bargaining unit employees and the Board's Regional Office.

By reply letter to the Union dated November 12, 1993, and posted by the Company on the employee bulletin board, Reynolds summarized the Union's November 10 letter and then went on to state (emphasis in original):

<sup>154</sup> No different result is suggested by *Master Slack Corp.*, 271 NLRB 78, 78 first fn. 1, 85 (1984), on which the company relied before the Regional Director. In that case, the employer's unfair labor practices had occurred 8 or 9 years before the employee petition, and, well before its circulation, the employer had complied in many significant respects with the Board's remedial order. In *Hotel & Restaurant Employees Local 19 (Burger Pits) v. NLRB*, 785 F.2d 796 (9th Cir. 1986), affirming 273 NLRB 1001 (1984), also relied on by the company before the Regional Director, the employer's only unfair labor practice was prematurely (before contract expiration) withdrawing recognition from the bargaining representative and related unilateral conduct.

We appreciate the Union's assurance that in this one instance the Union will not file a charge with the NLRB or other government agency. I am sure the employees also appreciate your Union's concern for their welfare. However, as you know, a majority of the employees voted last summer *not* to be represented by your Union. Thereafter, your Union filed and continues to file numerous objections and unfair labor practice charges with the NLRB seeking to overturn that election. The Union apparently intends to do everything it can to avoid having to abide by the results of the election. The Union, obviously, could not care less that this puts all parties, including the employees, in the position of having this important decision unresolved for months or even years. While the Company has denied the Union's allegations and argued that the NLRB should certify the results of last summer's election, in an effort to clear the air and permit all parties to know where they stand as soon as possible, the Company has offered to waive further defense and agree to a second NLRB secret ballot election as soon as possible.

Your Union, however, apparently fears the outcome of a second secret ballot election because it has done everything possible to prevent a re-run election. The Union has even gone so far as to request that the NLRB issue a bargaining order thereby forcing the Union down the employees' throats without the employees even getting a chance to vote. So much for Union concern over the welfare of Eby-Brown's employees.

I firmly believe that it is in the best interests of all parties, particularly the employees, that the NLRB issues be resolved as quickly as possible and that the *only* fair way to resolve it is to agree to permit the NLRB to hold a second secret ballot election as soon as possible. Once the question of representation by your Union is resolved, issues like wage increases can be determined without any party having to consider and weigh the potential legal consequences of those decisions.

Therefore, if the Union truly wants to do what is in the best interest of the employees, it will agree to a second election as soon as possible.<sup>155</sup>

2. Analysis and conclusions

Paragraph 8(j) of the complaint in its final form alleges that the Company "bypassed the Union and dealt directly with its employees in the unit by disseminating to unit members a letter addressed to the Union;" such conduct is alleged to have violated Section 8(a)(1) and (5) (complaint par. 13).

As to the 8(a)(5) allegation, the General Counsel's posthearing brief alleges that the November 12 letter "solicits employee sentiment regarding their satisfaction with benefits negotiated by the Union and the impact of any delay in processing the decertification petition on such benefits," citing *Allied-Signal*,

<sup>155</sup> At the hearing, company counsel objected to the receipt of all portions of this letter after the words in the first quoted paragraph "or even years," on the ground that they constitute material of a settlement nature. I received the entire letter subject to a contention by company counsel, if he chose to make one subsequently, that all or part of it should be stricken on the grounds that he cited at the hearing. Further, I asked him to include in any such subsequent argument a discussion of what significance (if any) should be attached to the fact that the entire letter was publicized by the Company to the employees. Counsel's posthearing brief does not ask me to strike this exhibit.

*Inc.*, 307 NLRB 752, 753–754 (1992). However, the General Counsel's contention in this respect misconceives the basis for the *Allied-Signal* line of cases—namely, that solicitation of employee views with respect to a mandatory subject of collective bargaining (in *Allied-Signal*, workplace smoking limitations) is unlawful where such solicitation is likely to erode the stated position of the bargaining representative with respect to that issue. See *Alexander Linn Hospital Assn.*, 288 NLRB 103, 106 (1988), *enfd.* 866 F.2d 632, 636 (3d Cir. 1989), cited in *Allied-Signal*, *supra*, 307 NLRB at 754. In the instant case, the Company was not soliciting the employees' views regarding a mandatory subject of collective bargaining. Rather, their views, if solicited at all, were being solicited with respect to whether the Company's duty to bargain should depend on the results of an immediate second decertification election (notwithstanding, although the Company's letter did not so concede, the unremedied unfair labor practices which invalidated the first election and the likewise unremedied unfair labor practices which had occurred thereafter); manifestly, this issue is not a mandatory subject of collective bargaining. The letter's references to wages (manifestly, a mandatory subject of collective bargaining) were directed to the possible impact thereon of the existing situation (where the Company was unlawfully refusing to recognize the Union and the pending unfair labor practice charges and complaint blocked a rerun election) and did not address the employees' views on how much they should receive.

However, in substantial agreement with the General Counsel's posthearing brief (p. 74), I find that the Company violated Section 8(a)(1) of the Act when in this letter the Company blamed the Union for possibly preventing or delaying past and future wage increases by filing charges and election objections with the Board, particularly since such charges and objections were filed because of company unfair labor practices and the Company was violating the Act by refusing to bargain with the Union notwithstanding its Board certification, the 1990–August 1993 bargaining agreement, and the pending objections. See *Centre Engineering, Inc.*, 253 NLRB 419, 420–421 (1980); *National Micronetics, Inc.*, 277 NLRB 993, 996, 1005 (1985); and *Waste Management of Utah*, 310 NLRB 883, 899 (1993).

*F. Alleged Unfair Labor Practices Connected with the Unilateral Transfer of Work (Complaint Paragraphs 6(s), 10, 11, and 13)*

1. Background

The Company is a wholesaler which distributes products to various convenience stores. As of early 1993, it owned branches (each consisting of a warehouse and trucking operation) in Aurora, McHenry, Elgin, and Galesburg, Illinois; in Ypsilanti, Michigan; and in Indianapolis, Indiana, the facility involved here. In addition, the Company operated shuttle garages (that is, facilities equipped only to accept and drive loaded trucks driven from a company warehouse/trucking operation) in several locations in Illinois and Michigan, and in Hilliard, Ohio; this Hilliard facility is sometimes referred to in the record as the Columbus facility. From these facilities, the Company serviced convenience stores in portions of Wisconsin, Illinois, Michigan, Iowa, Indiana, Kentucky, and West Virginia. After acquiring the Indianapolis facility in 1989, and until about early 1993, the Company spent about \$2.5 million on that facility, including capital improvements as well as maintenance.

A corporation identified in the record as Marathon Petroleum includes among its divisions a division referred to in the record as Emro Marketing.<sup>156</sup> Emro operates a number of petroleum stations, which are referred to in the record as convenience stores. Until the end of 1993, Emro's divisions included a division referred to in the record as Bosart, a wholesaler which bought from manufacturers in large quantities and sold such products to convenience stores, primarily those owned by Emro. Bosart conducted its operations from a warehouse/trucking facility owned by it in Springfield, Ohio, from which it provided direct delivery service to stores in Illinois, Indiana, Michigan, Ohio, and Kentucky.

In June 1993, Bosart's president asked the Company whether it would be interested in buying Bosart's assets and supplying Emro's convenience stores. At Bosart's request, in connection with the purchase and service negotiations the Company signed a letter of confidentiality on June 29, 1993, 9 days before the decertification election. Subsequent negotiations led to an agreement in which the Company undertook to purchase Bosart's assets and a second agreement in which the Company undertook to service about 1600 Emro convenience stores in Illinois, Indiana, Michigan, Ohio, and Kentucky,<sup>157</sup> although not necessarily through the Springfield facility through which Bosart had serviced Emro and which Bosart was selling to the Company.<sup>158</sup> This was the largest acquisition the Company had ever made, and the largest service contract the Company had ever entered into. The Bosart facility was one of the larger employers in the Springfield area, and was not union represented. During the negotiations which led up to the sale, Bosart expressed concern about the job security of the Bosart employees at the facility. The contracts as finally executed in written form did not require the Company to retain Bosart's personnel. However, Company Copresident Thomas Wake testified that he did not believe Bosart would have entered into these contracts absent oral assurances from the Company that the Bosart personnel would be retained, and testified, in effect, that the Company felt at least a moral obligation to retain them. As to the Company's perceived moral obligations to the Bosart personnel, similar testimony was given by Attorney Golden, who was the Company's principal spokesman in March–June 1994 discussions with the Union regarding the Indianapolis facility. In the event, all the personnel who had worked for the facility under Bosart either continued to work there under the Company or were transferred to other Emro facilities.

The purchase and service contracts in their final form were executed in mid-December, with a closing date of December 31, 1993. However, on November 4, 1993, the Company posted at its Indianapolis warehouse a notice stating that it had executed a letter of intent to acquire the Springfield operation from Bosart, and inviting the Indianapolis personnel to apply

<sup>156</sup> Marathon Petroleum is owned by a corporation referred to in the record as U.S. Exxon.

<sup>157</sup> Also included in the service contract were Emro's stores in western Pennsylvania (nonexistent at all material times) and in Wisconsin, where the Company was already servicing Emro stores. In addition, the Company took over 150 to 200 accounts at Ohio retail locations which Emro had serviced but did not own.

<sup>158</sup> Company Copresident Thomas Wake credibly testified that although each of the two contracts with Bosart called for a separate payment by the Company, his concern was the total amount due and not the allocation between the two contracts.

for “a limited number of positions” at the Springfield operation. The letter further stated:

We have learned from previous experiences that a major goal in opening a new branch is a quick and efficient transition. We’ve found the best way to achieve this is by placing a limited number of members who possess a working knowledge of our systems, policies, and procedures at the new branch. These members serve as role models and resource people for our newest members.

In the event, all personnel (including bargaining—unit employees) who asked to be or expressed an interest in being transferred from Indianapolis to Springfield were given an opportunity to transfer. With the exceptions shown in the margin, the record fails to show the number of persons who inquired about or requested transfer from Indianapolis to Springfield, the dates of their transfer requests, how many eventually transferred, the reasons why they transferred,<sup>159</sup> or their pay and jobs at Indianapolis and at Springfield, respectively.<sup>160</sup>

As of the end of 1993, the Springfield facility employed a total of 335 or 340 persons, including about 270 warehouse and driving personnel; the Indianapolis warehouse-driver unit had consisted of about 97 employees as of July 8, 1993. Pursuant to plans prepared before the end of 1993, between January and March 1994 the Company expended a little over \$2 million in capital improvements to the Springfield facility. Copresident Thomas Wake credibly testified to the opinion that the Indianapolis facility could not be further expanded without purchasing additional land; no contiguous land is for sale, although some land is available for purchase on the other side of Fortune Circle Road. On December 30, 1993, the Company executed a renewal of its lease on the shuttle garage in Hilliard, Ohio, to which unit employees had driven from the Indianapolis facility loaded trucks which were driven by nonunit employees between Hilliard and the Company’s customers; at the Company’s instance, the 1-year term proposed by the landlord was shortened to 6 months.<sup>161</sup> The Company closed down the Hilliard garage on March 29, 1994, and transferred all of these routes to the Springfield facility.

Company Copresident Thomas Wake testified that in late February or early March 1994, and before March 9, he decided to transfer from Indianapolis to Springfield the work of servicing all of the convenience stores in West Virginia, Ohio, and Kentucky. I conclude that a February date is more likely, in view of the December 30 execution date of the shortened Hilliard lease and the March 4 date on a memorandum setting forth not only the anticipated dates of shifting work from Indianapolis to Springfield, but also the anticipated dates of shifting work from Springfield to Ypsilanti, Michigan, a shift occasioned at

<sup>159</sup> As discussed *infra*, some of the employees believed that work was being moved from Springfield to Indianapolis well before March 28, 1994, when such moves did in fact begin.

<sup>160</sup> Pursuant to a request made before March 4, 1994, Robert Burnett transferred from an Indianapolis driver’s job to a Springfield drivers’ trainer job effective March 28, 1994. Indianapolis Driver Manager Lodics became the driver manager in Springfield about November 1993.

<sup>161</sup> Copresident Thomas Wake testified that he did not recall issuing instructions to anyone with the Company to enter into a lease at the Hilliard facility for any certain amount of time, and never told anyone with the Company that this lease should end by a certain date.

least partly by Springfield’s acquisition of Indianapolis work.<sup>162</sup> This March 4 memorandum anticipated a three-phase transfer of work from the Indianapolis warehouse. More specifically: During the week of March 28, Indianapolis volume was to decrease 19 or 20 percent in consequence of a transfer to Springfield of “the balance of all Big Bear/Hart Stores” and of 21 complete routes, which 21 routes served all of Indianapolis’ current customers in central and eastern Ohio, eastern Kentucky, and West Virginia. During the week of April 28, Indianapolis volume was to decrease 27 percent over its prephase I level, in consequence of the removal of all cigarettes to be sold in West Virginia and the shifting of all Super Value work plus West Virginia Phar Mors (drug stores) work. The date of “phase III” was “to be determined,” but was to be no later than May 1. The memorandum states that the Company was making the shifts described therein “to meet our commitment of providing next day delivery service to all Emros . . . and to service our customers as cost efficiently as possible.”

Copresident Thomas Wake testified that as of late February 1994 no consideration had been given to closing the Indianapolis branch, and that as of that date no decision had been made to reduce the Indianapolis operation to any particular number of employees. He further testified that as of mid to late March 1994, management had made no decision as to any particular level of operations or of employee complement that would be maintained in Indianapolis. Also, he testified that an operation of 25 employees was greater than what he would consider a shuttle garage operation (that is, an operation physically separate from a warehouse). He testified that in late February 1994, he authorized Golden to approach the Union, off the record, in order to see whether there was some possible basis of settlement of the pending objections and unfair labor practice charges and “assembling all matters of dispute.” Wake testified that at that time he believed that these issues would be best dealt with by means of a collective-bargaining agreement. He further testified that as to the provisions to be included in such a contract, he believed that the most important would be a provision affording the Company much more flexibility as to the level of bargaining unit employees than did the expired contract, whose provisions (quoted *infra*, part V,F,7) forbade transfer of unit work or services to other company facilities unless no layoff of unit employees resulted. Wake testified to the belief that the Company would obtain the desired flexibility if it obtained an agreement that the Company need not employ more than 15 bargaining unit employees, and that he authorized Golden to propose such an agreement to the Union. At that time, the bargaining unit consisted of about 87 employees.

Before March 9, 1994, the Union had not received any notice from the Company that work had recently been transferred, or was going to be transferred, from the Indianapolis warehouse. Although Buhle had received (and relayed to Chestnut) reports from employees that work had been transferred, Patricia Reynolds testified that the work transfers involved in the instant case did not begin until March 28, 1994. Moreover, before March 28, 1994, no unit work had been transferred out of the Indianapolis facility since the end of 1992 at the latest.<sup>163</sup>

<sup>162</sup> The memorandum set forth, among other things, the anticipated “changes in weekly picks” at Ypsilanti, Springfield, and Indianapolis, broken down by phases and by five classes of products.

<sup>163</sup> This finding is based on the testimony of Copresident Thomas Wake and Indianapolis Branch Manager Patricia Reynolds. The transfer of unit work to the Hilliard garage about January 1992 was the

2. The March 9, 1994 meeting between Chestnut, Neal, and Golden; and allegedly related matters

*a. Introduction*

As discussed *infra*, part V,F,2,c, on March 9, 1994, Company Counsel Golden met with Union Counsel Chestnut and Union President John Neal. At the hearing, the Company sought to exclude all evidence about what was said at this meeting, on the basis of Rule 408 of the Federal Rules of Evidence, which addresses evidence of conduct or statements made in compromise negotiations (see *infra*, part V,F,13,a). By written order dated August 5, 1994, I rejected this claim. The Company's request to the Board for special permission to appeal this ruling was denied on August 22, 1994, without prejudice to the Company's right to renewal in the exceptions process. The Company's posthearing brief renews its motion to exclude. Many of my findings in connection with this meeting have been made because of at least arguable materiality to the issues raised in that motion.

*b. Status of litigation as of March 9, 1994*

The initial complaint herein, which bears the case numbers 25-CA-22530-1 and 25-CA-22640 and issued on September 21, 1993, contained no 8(a)(5) allegations. On October 1, 1993, the Union filed a charge (Case 25-CA-22782) alleging that the Company had refused to bargain with the Union, in violation of Section 8(a)(1) and (5).

By letter dated October 20, 1993 (captioned case numbers 25-CA-22530, 25-CA-22649, and 25-CA-22782) to NLRB Field Examiner Theresa Dowling, Company Counsel Golden offered, "in settlement" of these cases, to post notices, to agree to an election within fewer than the 60 days which is the "normal . . . posting period," and to meet and bargain with the Union. About December 20, Dowling advised Golden by telephone that the Region had declined to accept his settlement offer and was going to seek a bargaining order.<sup>164</sup>

On March 1, 1994, a complaint issued on the basis of some of these and other charges, with a hearing date set for April 11, 1994. That complaint alleged, *inter alia*, that the Company had violated Section 8(a)(5) and (1) by withdrawing recognition from the Union in August 1993, and requested a bargaining order. On March 4, 1994, Company Counsel Golden telephoned the office of Attorney Edward Fillenwarth Jr. (variously spelled in the record), who had represented the Union in connection with charges filed by the Company against the Union in April 1993, and whom Golden then believed to be the Union's outside counsel.<sup>165</sup> Golden said that an unfair labor practice

subject of a union grievance which was pending arbitration as of the 1994 hearing, which the Company claimed was untimely, and which Chestnut expected to lose. Golden testified to the "understanding," at least as of March 9, 1994, that in January and February 1994, work was transferred from the Indianapolis facility to the Springfield facility and other company facilities. He did not explain why he possessed this "understanding."

<sup>164</sup> My findings in this paragraph are based on evidence put in by the Company without objection. The complaints in the instant case are not based on the charge in Case 25-CA-22649, and its contents and disposition are not shown by the record.

<sup>165</sup> Golden testified that he then (as of March 1994) assumed Fillenwarth would be representing the Union in the instant case. Attorney Chestnut, who did represent the Union during the hearing before me, signed all but one of the charges (the exception was signed by Buhle) filed by the Union on which the March 1 complaint was based.

complaint and several unfair labor practice charges were pending against the Company, that the complaint was coming up for hearing, and that he was interested in an off-the-record meeting to discuss the matter. Fillenwarth said that things could not be resolved if they were not discussed. However, he said, he was not involved in the pending cases and did not know what role, if any, Union President Neal would want him to have if there was a meeting. Fillenwarth undertook to check with Neal and then to call Golden back. Fillenwarth testified to inferring from Golden's call that Golden's purpose was to explore settlement "of something."<sup>166</sup>

Immediately thereafter, Fillenwarth telephoned Neal that Golden had called him regarding the Company, and had asked whether Neal would be willing to meet with Golden in an off-the-record conference to discuss issues relating to the Company. Neal, whose office is in Indianapolis, said that during the following week he had to come to Chicago (where Golden maintains his office) anyway on an unrelated matter, and asked Fillenwarth to have Golden call him direct.

Later that same day, Golden telephoned Neal. Golden said that he had telephoned Fillenwarth and told him that in the interests of both the Union and the Company, an off-the-record meeting should be convened in order to examine whether or not a settlement of all pending charges between the Company and the Union could be reached. Neal said that he would be glad to meet with Golden on an off-the-record basis, but Neal wanted Union Attorney Chestnut to be present. Golden said that it would be all right if Chestnut was there. Neal told Golden that Neal was going to be in a Chicago area hotel on March 9 in order to participate in negotiations for a master labor contract, which did not involve the Company here, and suggested a meeting there at 11 a.m. Golden agreed. A few days before March 9, Neal told Chestnut (who is the Union's staff attorney) that Neal was going to meet with Golden on March 9, and asked Chestnut whether he wanted to attend. Chestnut said that he did. Before going to the meeting, Chestnut asked Buhle what the major problems were and what the Union "needed to have." At the Chicago hotel, before Golden and Neal came to the appointed meeting place, Chestnut jotted down his memory of the items listed by Buhle.

*c. The March 9 meeting*

The meeting between Golden, Neal, and Chestnut took place on March 9. After some preliminary courtesies, Golden said that he was aware that there had been a lot of problems in the past at the Company, that perhaps the conferees could resolve some of these problems and maybe could even make the NLRB

Golden's answer to the original complaint was served on Chestnut (but not Fillenwarth) in October 1993.

<sup>166</sup> My findings as to the content of this conversation are based on a composite of credible parts of Fillenwarth's and Golden's testimony. For demeanor reasons, I accept Fillenwarth's denial of Golden's testimony that Golden said there had been ongoing confrontation between the Union and the Company, and proposed a conference to settle all pending matters between the Company and the Union, to which Fillenwarth agreed. In connection with Fillenwarth's testimony that the conversation did not last long enough to include the entire exchange testified to by Golden, I note that although Golden's telephone usage reports show that the first March 4 connection lasted for 6.1 minutes, there is no evidence as to either the interval (if any) between the time the telephone call reached Fillenwarth's office and the time he got on the line, or the interval (if any) between that time and the time Golden himself got on the line.

charge go away.<sup>167</sup> Neal and Chestnut replied that they were “listening.” Golden said that he wanted the conference to be “off the record” and confidential; Neal and Chestnut agreed. Golden said that the Company had completed the acquisition of Bosart’s assets and had spent a lot of money on an addition to the former Bosart facility at Springfield;<sup>168</sup> that the Company had been considering how best to integrate the Springfield facility into the Company’s system; that the Springfield, Ohio facility was larger than the Indianapolis facility and had a larger work force; and that he understood that the Company felt compelled to commit itself to maintaining the operation in Ohio and retaining the work force in Ohio as a commitment to make in order to achieve the purchase. Golden went on to say that the Company was going to move all of its Indianapolis warehouse operations to the Springfield facility; and that the Company intended to maintain only a shuttle operation in Indianapolis, probably out of a new and much smaller facility.<sup>169</sup> Golden’s statements inaccurately described the Company’s plans.<sup>170</sup> Golden said that the Company would be prepared to negotiate a closeout agreement or a severance package with respect to the employees who would not be working there any more.<sup>171</sup> Neal said that the Union was not interested in negotiating a closeout contract, that he wanted the Company to stay in town with the unit complement it had historically employed (95 to 105). Golden asked what kind of figures the Union could live with if the Company stayed in Indianapolis. Chestnut or Neal said 60 to 75. Neal said that he was aware that the Company had been transferring bargaining unit work out of the Indianapolis facility, and that he might be filing charges on that at a later date. The Company had not in fact been transferring such work; Golden neither admitted nor denied Neal’s assertion (see *supra*, fn. 163 and attached text).

Neal or Chestnut asked how big Golden anticipated the Indianapolis shuttle facility would be. Golden said that seven driv-

<sup>167</sup> This finding is based on Chestnut’s testimony, which is partly corroborated by Neal. For demeanor reasons, I do not credit Golden’s testimony that he said he wanted to try to resolve all pending issues between the parties and that Chestnut and Neal agreed; rather, I credit Chestnut’s denial.

<sup>168</sup> Chestnut, a generally reliable witness, testified that “I think [Golden] said \$30 million”; as previously stated, Copresident Thomas Wake testified that the Company had spent a little over \$2 million in capital improvements to the Springfield facility. The record contains no other evidence as to this matter.

<sup>169</sup> My findings in this sentence are based on Chestnut’s and Neal’s testimony, which I credit for demeanor reasons and for the additional reasons discussed *infra*.

<sup>170</sup> Copresident Thomas Wake testified that although “rumors were fairly rampant in our organization” that “Indiana is closing because we purchased Bosart,” no consideration had been given as of late February 1994 to closing the Indianapolis branch. The Company’s March 4 memorandum contemplated that after May 1, 1994, the Indianapolis warehouse would continue to service some Indiana customers and, perhaps, some in western Kentucky. Thomas Wake testified in September 1994 that the Company had no current plans to transfer any additional work from Indianapolis to other branches; Patricia Reynolds testified that she was unaware of any such company plan in March 1994 and would likely have had knowledge of any such plan; and, laying to one side Golden’s representations to Neal and Chestnut on March 9, 1994, there is no evidence that the Company ever had any such plans other than those described in the March 4, 1994 memorandum and completed in May 1994.

<sup>171</sup> This finding is based on Chestnut’s testimony, which I credit for demeanor reasons and other reasons discussed *infra*.

ers would be working at the facility,<sup>172</sup> and that the Company was willing to negotiate a new bargaining agreement which would cover that unit and would be retroactive to the August 1993 expiration of the previous contract. Thomas Wake testified that he had never considered offering the Union a number lower than 15; that he had come up with that number before the March 9 meeting; that he had communicated that number to Golden; and that as of September 1994, the number of employees employed by the Company at any one shuttle garage ranged between two and nine. Neal said that he wanted a contract, but that he wanted it to cover warehousemen and drivers. Using notes which Chestnut had prepared in advance of the meeting, Neal said that the Union would require certain terms to be included in any contract to which it would agree. Some of these terms consisted of (1) a \$2 hourly wage increase over the 3-year life of the contract; (2) a provision requiring job shift assignments to be bid and assigned on a seniority basis; (3) a limit on mandatory overtime; (4) the exclusion of working foremen from the bargaining unit; (5) a retirement plan; (6) a provision requiring an offer of rehiring to anyone who had quit or had been terminated after 1992; (7) the substitution of a joint union-employer committee for the third step of the grievance procedure in the expired contract; (8) discussion of the bonus system; and (9) negotiation over work rules.<sup>173</sup>

Golden stated that he did not have the authority to agree to a unit of more than seven people. He left the group and telephoned Thomas Wake. Upon returning, Golden said that he might be able to go as high as 25.<sup>174</sup> Neal asked for a guarantee that at least 75 unit employees would be employed at Indianapolis. Golden said that he would contact his client and (probably in a week or 10 days) get back to Neal, who suggested that Golden get back to Chestnut. Chestnut specified to Golden a dollar amount which (Chestnut said) constituted the Company’s liability under the pending unfair labor practice charges. Golden said that he did not believe the Company would be liable for that much. Neal said that the liability issue would have to be resolved.

This meeting, which lasted about an hour, was conducted during the lunchbreak of negotiations (unrelated to the instant case) in which Neal was participating elsewhere in the hotel. When Neal remarked that the lunchbreak had ended, the participants again agreed that their meeting was off the record, and the conference broke up.

My findings as to the substance of the March 9 conference are based on a composite of credible parts of the testimony of Golden, Neal, and Chestnut. As to conflicts in the testimony, I have credited Chestnut. Golden testified that as to the transfer of work from Indianapolis to Springfield, he told the Union that some work had already been transferred, but that the Company

<sup>172</sup> This finding is based on Neal’s and Chestnut’s testimony. For demeanor reasons, I do not credit Golden’s testimony that he gave a figure of seven delivery drivers and two or three shuttle drivers.

<sup>173</sup> My findings as to these terms are based on Golden’s testimony and contemporaneous notes, and on Chestnut’s testimony with reference to his contemporaneous notes. I believe Neal was mistaken in denying that some of these matters were referred to.

<sup>174</sup> My finding in this sentence is based on Chestnut’s testimony, corroborated by Neal as to the “25” figure. Golden testified that at the meeting he gave the figure of 15, and that he gave Chestnut the figure of 25 during a telephone conversation a few days later. In an out-of-court discussion during a break in the hearing, Golden and Chestnut agreed that it was immaterial whether Golden gave the figure of 25 at the March 9 conference or during a subsequent telephone conversation.

had not laid off and was not anticipating laying off any employees as a result of the transfers; that the Company was now considering future plans which would involve Indianapolis and Springfield; and that the Company could guarantee that during the life of a 3-year contract it would maintain at least a “shuttle garage” in Indianapolis. According to Golden’s testimony, he further said that the 1990–1993 agreement “which had remained in effect” allowed the Company to transfer work between branches as long as employees had not been laid off and that transfers had occurred at prior times under that provision (see *infra*, part V,F,7). I credit Chestnut’s denial, for demeanor reasons, for the reasons discussed *infra*, footnotes 174, 177, 178, and 180, and because Thomas Wake testified that a 25-employee complement (which Golden admittedly cited to the Union as a possible minimum guarantee; see *supra*, fn. 174) would be too large to constitute a shuttle operation. I note that as to this matter the credibility of Golden’s testimony is not enhanced by Thomas Wake’s testimony that the Company did not in fact intend to move all of its Indianapolis warehouse operations to Springfield; at the time of the March 9 conference, the Company had not yet begun to transfer work from Indianapolis to Springfield, but Golden testified (over Chestnut’s credible denial) to telling the Union on March 9 that transfers had already begun. In addition, I credit Chestnut’s denial of Golden’s testimony that he said that as a result of the Bosart asset purchase there would be some “additional work transfers occurring” which would not result in any layoffs, for demeanor reasons and because there had been no work transfers since 1992. Also, for demeanor reasons, I credit Chestnut’s denial of Golden’s testimony that Neal said there was not much to talk about, and no need to talk any further, if the Company was not willing to guarantee 80 bargaining unit jobs for the life of the contract; and that the Union said the best it would agree to would be an assurance of maintaining 75 jobs in Indianapolis, with further reduction by attrition.<sup>175</sup> Also, for demeanor reasons, I credit Chestnut’s and Neal’s denial of Golden’s testimony that Neal said the Union was going to get everything it wanted from the NLRB.

### 3. The March 22, 1994 letter to Neal from Golden about possible negotiations

By letter to Neal dated March 22, 1994, with a courtesy copy to Chestnut, Golden stated that the Company was prepared to meet with the Union to engage in negotiations over the terms of a collective-bargaining agreement. The letter asked Neal to get in touch with Golden as soon as possible to arrange times and places for meetings. The letter further stated:

The Company wishes to emphasize that by participating in negotiations with the Union, the Company has not waived its position that the results of the NLRB election conducted on July 8, 1993 should be certified. The Company has denied and shall continue to deny that it engaged in unfair labor practices as charged by the Union to the National Labor Relations Board. These negotiations, therefore, are to be viewed as without prejudice to positions the Company has taken and shall continue to take in denying the Union’s allegations of objectionable con-

duct/unfair labor practices before the National Labor Relations Board.

### 4. The first-phase and second-phase transfer of work from Indianapolis to Springfield

When the Saginaw, Elgin, and Aurora facilities were acquired by the Company on various dates, each of them was represented by the Teamsters. On various dates between 1988 and before the end of 1992, the Teamsters was decertified at each of these locations. No objections or unfair labor practice charges were filed in connection with any of these decertifications. Laying the Indianapolis facility to one side, as of March 28, 1994, and until at least July 24, 1994, none of the Company’s facilities was union represented. When taking steps to acquire the Springfield facility from Bosart, in mid-1993, the Company became aware of the pendency of a representation petition, filed by the United Food and Commercial Workers, with respect to the Springfield warehouse employees. The UFCW had lost an NLRB election in that unit, by a fairly close vote, but the Company anticipated that the NLRB would set aside that election and direct a rerun election. The UFCW withdrew its petition in August 1994, after the events involved in the instant case.

As of March 27, 1994, 117 total routes were being loaded by unit employees in the Indianapolis night warehouse. Of these routes, 103 were normally delivered by bargaining unit drivers; the rest were shuttled (mostly by bargaining unit drivers) to the Hilliard garage, from which deliveries would be made to the customers by nonunit drivers. On March 28, the Company transferred to its Springfield facility the Indianapolis bargaining-unit work of processing orders and delivering products on 21 routes in northern Ohio and eastern West Virginia. For the purpose of pulling product and loading trucks to service these 21 routes, the Company had used at least one, and sometimes as many as five, Indianapolis unit warehousemen per day; after March 28, all of these 21 routes were serviced by Springfield warehousemen. Moreover, of these 21 routes, 6 to 8 had been serviced by about 2 Indianapolis bargaining unit drivers prior to March 28, 1994, and were serviced thereafter by nonunit drivers in Springfield. Although the rest of these transferred routes were serviced prior to March 28 by nonunit drivers attached to a company shuttle garage in Hilliard, Ohio (about 160 miles from Indianapolis), the products on these routes had been loaded by one to five bargaining unit employees at the Indianapolis facility, and then driven to the Hilliard shuttle garage by about two bargaining unit shuttle drivers.

About April 16, six Super Value routes were transferred from Indianapolis to Springfield. These routes had been driven by at least two bargaining unit Indianapolis employees every week, and had been serviced by bargaining unit Indianapolis warehousemen.

The March 4 memorandum had stated that by the end of the week of April 18, 27 percent of Indianapolis business would be transferred to Springfield.

### 5. The March 31 charge; the March 31–April 14 Chestnut–Golden correspondence

On March 31, 1994, the Union (through Chestnut) filed the original charge in Case 25–CA–23120, which is among the charges underlying the complaint in its final form. That charge alleged, *inter alia*, that “within the last 6 months, and continuing to date,” the Company had violated Section 8(a)(1) and (3)

<sup>175</sup> As of March 28, 1994, the date that the transfer of work began, the unit consisted of 87 employees; as of July 26, 1994, after the transfer of work had concluded, the unit consisted of 71 employees. At the time of the July 1993 election, the unit consisted of 96 to 99 employees.

by “permanently transferring bargaining unit work from the Indianapolis warehouse to an out-of-state facility.”

By letter to Golden (with courtesy copies to, inter alia, Neal and an NLRB representative) dated that same day, Chestnut acknowledged receipt of Golden’s March 22 letter stating that the Company was prepared to meet and negotiate a new bargaining agreement. The letter went on to say (emphasis supplied, for reasons which will appear):

You then state the employer has not waived its position that the decertification election of July 8, 1993 “should be certified” which means Local 135 should not be the employees’ bargaining representative. Is your position in this letter that Local 135 is the proper bargaining unit employees’ bargaining representative? We find it difficult to believe good faith bargaining could be conducted if, as you state in your letter, your position is that Local 135 is not the proper employee bargaining agent.

Additionally, assuming the aforementioned is resolved, [is it] the position of the employer that the provisions of the expired bargaining agreement (e.g. grievance procedure, rules and regulations, check-off and dues, business representative’s access to employees on Company property, etc.) will remain in effect while bargaining proceeds?<sup>176</sup>

Lastly, *based on our conversations in Chicago*, is the employer willing to negotiate the decision to close the warehouse operations in Indianapolis or are you only willing to negotiate the effects of the rumored closure?<sup>177</sup>

I will wait for your response to these questions and also obtain dates for a possible meeting.

After receiving this letter on April 6, Golden made a number of attempts to telephone Chestnut, but was unable to reach him. Golden left messages with Chestnut’s office, but Chestnut did not return Golden’s calls, although on previous occasions Chestnut had returned Golden’s calls promptly. Thereafter, by letter to Chestnut dated April 11, and received by him on April 12, Golden stated that on several occasions since his March 18 letter to Neal, “wherein I indicated that [the] Company was prepared to meet with [the] Union over the terms of a new collective-bargaining agreement,” he had telephoned Chestnut’s office “to establish a mutually agreeable date and time to commence negotiations”; but that the Union had not contacted Golden to schedule a negotiating meeting. The letter went on to say:

<sup>176</sup> In the letter, the bracketed words were “it is.” However, Chestnut testified that he intended to use the words “is it,” and Golden stated that he so interpreted the letter when reading it.

<sup>177</sup> At the hearing on July 29, 1994, it was agreed that the underscored words would be disregarded by me pending disposition of the matter discussed *infra*, part V.F.13,a relating to the admissibility of evidence regarding the Chicago meeting. I accord such words the weight which I regard as appropriate in view of my finding (*infra*, part V.F.13,a) that such evidence was admissible for certain purposes. Accordingly, I regard this paragraph of Chestnut’s letter as corroborating his testimony that during the March 9 meeting, Golden said that the Company was going to move all of its Indianapolis warehouse operations to the Springfield facility, and to maintain only a shuttle operation in Indianapolis. See *Tome v. United States*, 513 U.S. 150 (1995). So far as the record shows, Golden never claimed to Chestnut that this inquiry was based on an erroneous recollection of what Golden had said at this Chicago meeting on March 9.

Once again, let me restate that [the] Company is [prepared] to meet with representatives of your Union to negotiate the terms of a collective bargaining agreement to replace the contract which expired August, 1993. The Company intends to propose several modifications to the prior contract and it assumes the Union intends to do the same.

If I do not hear from you by the end of this week in response to this letter, it will be assumed the Union does not desire to negotiate with the Company over the terms of a new labor contract.

Laying the quoted language to one side, Golden’s April 11 letter did not address any of the questions posed in Chestnut’s March 31 letter.

In response to Golden’s April 11 letter, Chestnut telephoned him on April 12, and a meeting was set for April 29. A short time later, Golden telephoned Chestnut and asked whether they could meet on April 22 also. Chestnut agreed.

By letter to Golden dated April 14, 1994, and received on April 21, Chestnut stated, in part:

In order to expedite the preliminaries at our meeting next Friday [April 22], I would still like an answer to the inquiries I made in my letter to you dated March 31, 1994.

Is [the Company] recognizing Local 135 as the proper bargaining representative of the Indianapolis employees? Is the Company abiding by the provisions of the expired bargaining agreement regarding work rules and regulations, hours of work, wages, etc.? Will the Local’s business representatives have access to the employees on Company property?

Lastly, I have been told bargaining work is still being transferred from the Indianapolis facility and employees from your Ohio facility have [begun] performing local deliveries that were performed by Indianapolis drivers. I would request that this cease if our scheduled meetings are to amount to more than just a “paper trail” in future litigation.

Prior to April 22, Chestnut had no other written correspondence with the Company. On April 21, Golden telephoned Chestnut that the Company would be responding to his questions when the parties met the following morning.

6. Letters to employees by President Neal on April 14, and by the Company on March 22

Meanwhile, by letter to the unit employees dated April 14, 1994 (offered and received without limitation or objection), Neal stated, in part (emphasis in the original):

With the possibility of protracted legal battles with the N.L.R.B., Eby-Brown management has contacted the [Union] and requested to meet and bargain a *new* collective bargaining agreement.

When Eby-Brown first contacted me they proposed we negotiate a close-out agreement for the warehouse employees and, in return, they would recognize an on-going seven-man shuttle operation by Teamster drivers to distribute products in the Indianapolis area from the *new* Springfield, Ohio warehouse.<sup>178</sup> I flatly rejected this pro-

<sup>178</sup> As noted *supra*, fn. 151, the witnesses were in disagreement as to whether on March 9 Golden initially proposed a 7-man shuttle operation or an operation manned by 9 or 10 drivers. Laying this matter to one side, there is no evidence that Golden ever advised the Union or the

posal, and the Company was informed that I maintained our earlier position and was prepared to abide by the NLRB's ultimate resolution. I also informed the Company that I would have additional NLRB charges filed in the event work was transferred from the Indianapolis warehouse.

Again, Eby-Brown management has contacted me requesting to negotiate a new collective bargaining agreement. I have agreed to meet with them.

A letter from the Company to the unit employees dated March 22 had stated, in part:

Given the fact that the NLRB process from this point forward can take several months, if not longer, it has been decided that the Company will engage in bargaining while the NLRB issues are under consideration. The Company has notified the Union, however, that by agreeing to bargaining pending the final resolution of pending NLRB matters, the Company has not waived its position it has not committed unfair labor practices or objectionable conduct and the results of the July 8th election should be certified.

7. The meeting between the Company and the Union on April 22, 1994

At the April 22 meeting, the Company was represented by Golden, Patricia Reynolds, and Rodney Capanash (variously spelled in the record), who is the corporate director of personnel. At the beginning of that session, the Union was represented by Chestnut and Buhle. Golden began the meeting by stating that the Company was there to negotiate. However, Golden said, it was also the Company's position that the Company was not guilty of any unfair labor practices and that the results of the decertification election should be upheld. Golden said that if the parties reached an agreement, it would all be tentative, pending resolution of the NLRB charges; and that if the Company's position and the results of the decertification election were upheld, the contract would be null and void. Chestnut asked Golden whether the Company was recognizing the Union and believed that the Union represented the employees. Golden said that basically, the Company was there to negotiate; that if the parties did reach a contract, it would remain in effect unless and until the results of the decertification election were upheld; but that if the results of the election were upheld, any contract reached would be null and void. Golden said that the contract had expired in August 1993, but that its terms and conditions remained in effect.

Chestnut asked whether the union business representative would be given access to the facility and to the bulletin board there. Golden replied that the business agent would be afforded access to the warehouse and bulletin board in accordance with the language of the contract and how it had been applied. The Company said that this would require Buhle, as a condition of access, to notify the Company by telephone that he was coming. The Union denied that this practice had been followed; as

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employees of any inaccuracy in the sentence to which this footnote is attached. Rather, Golden testified, in effect, that neither he nor (to his knowledge) the Company ever told the Union or the employees that this statement was inaccurate (see p. 3475, L. 21 to p. 3484, L. 6 of the transcript). Moreover, Chestnut credibly testified that Golden had never said to him that Golden disagreed with the accuracy of any description of the March 9 conference in that letter. See also, *infra*, fn. 180.

to Buhle's practice since taking over the account in mid-1992, this was true (see *supra*, part V,C,2,a). Patricia Reynolds said that Buhle's predecessor, Trader, had followed that practice. Reynolds further said that Trader had followed the practice of notifying someone, such as the receptionist, that he was in the building; as shown *supra*, part V,C,2,a, Buhle, too, had followed this practice. During the discussion, the parties also disagreed as to whether the business representative had previously gone directly to the side door and been buzzed into the warehouse (Buhle had occasionally done this, *supra*, part V,C,2,a), and whether Trader and/or Buhle had restricted themselves to the breakroom during work time (Buhle had not done this; *supra*, part V,C,2,a).

Chestnut asked whether the Company had any intention of closing the Indianapolis facility or reducing that operation in any way. Golden said that no decision had been finalized regarding these two issues, but that the Company would contact the Union for discussions before a final decision was made; that the Company would also bargain the effects, if it did decide to close; and that the Company would also bargain if there were any major reductions of the Indianapolis operations, or major changes in the Indianapolis operations. Indianapolis branch manager Patricia Reynolds testified in late July 1994, about 3 months after she attended this meeting, that so far as she knew, there had never been any plan to reduce the size of the Indianapolis facility, or to transfer any work from Indianapolis in addition to the transfers described in the March 4 memorandum; and that she believed she would have known of any such plans, if they existed. There is no evidence that she so advised the Union at this meeting or any other meeting.

In response to a question by Chestnut about deliveries to a Speedway convenience store about 5 miles from the Indianapolis facility, Golden stated that this customer had been obtained as a result of the Bosart acquisition; that it had previously been serviced by Bosart from the Springfield facility then owned by it; and that after acquiring the Springfield facility from Bosart, the Company had continued the servicing of this Speedway store from Springfield. The Union said that certain work was being transferred out of the Indianapolis facility, and that the size of the bargaining unit was diminishing through attrition. Golden pointed out that the last sentence in article XXI, section 1 of the expired contract (a provision more fully discussed *infra*) stated that the Company would not violate the contract by removing "work currently performed by [unit] employees . . . and reassign[ing] the work to employees at other operations of [the] Company so long as no employees are laid off as a result of said reassignment"; Golden stated that the Company considered that as a "term and condition then in place." Golden further stated that a reorganization of how customers would be serviced is always an ongoing process for the Company and the acquisition of the Bosart assets made this an additional element which was then under consideration as to the period after December 1993.

Buhle asked about the status of dues checkoff, grievance procedure, and the union bulletin board. Golden said that the checkoff and the arbitration steps of the grievance procedure were no longer in effect, because the bargaining agreement had expired; but that the Union would continue to have access to post notices on the bulletin board on the same terms as it had in the past.

Buhle asked what the current size of the bargaining unit was. Reynolds replied 82; there is no contention or evidence that this

was inaccurate. Chestnut also asked for a copy of the seniority list. Golden said it would be forthcoming. The Union received this list on May 10 or June 1, after the work transfers had been completed.

Buhle asked whether there had been any decision to transfer any work into or out of the Indianapolis facility. Golden said that no final decision had been made at that point about transferring work either to or from Indianapolis. Golden testified that at the time he made this representation, he believed it to be true. No effort to correct him was made by Reynolds, although according to Thomas Wake's credible testimony he had worked with her and with her recommendations as to what should be moved, and although as branch manager she had received shortly after March 4 and prior to March 11 a copy of the March 4 memorandum which set forth the procedures for transferring specifically described work from Indianapolis to Springfield during the weeks of March 28, April 18, and "date to be determined," and which set forth concomitant transfers of work from Springfield to Ypsilanti but said nothing about any transfer to Indianapolis.<sup>179</sup> Chestnut said that the Union would like the Company to stay and prosper in Indianapolis, and that the Union was interested in doing what it could to cause the Company to decide to remain in Indianapolis. Chestnut asked whether there was a time frame concerning a move from Indianapolis. Golden said no, but the Company would provide notification of any possible decision in a timely manner so that bargaining could take place over that decision before it was finalized. So far as the record shows, Reynolds did not reveal that so far as she knew, the Company did not intend to move from Indianapolis.

Then, Chestnut said that he was going to present the Union's proposals. Golden thereupon brought up the subject of Neal's April 14 letter to the employees, which included an assertion by Neal (emphasis in the original) that the Company had "proposed we negotiate a close-out agreement for the warehouse employees and, in return, they would recognize an on-going seven-man shuttle operation by [union] drivers to distribute products in the Indianapolis area from the *new* Springfield, Ohio warehouse." Without questioning the accuracy of this assertion by Neal, Golden heatedly asserted that the letter had breached the agreement between him and Neal to keep the March 9 meeting off the record.<sup>180</sup> Chestnut replied that the Company had breached the agreement by issuing its March 22 letter to the employees (see *supra*, part V,F,6).<sup>181</sup>

<sup>179</sup> Thomas Wake testified that within the week following March 4, copies of this memorandum were received by the "branch managers of Indianapolis or Springfield and our Ypsilanti facility and members of corporate responsible for coordination of issues pertaining to transfer of business." It is unclear whether he was referring to Capanash, the Company's corporate director of personnel, who represented the Company at this April 22 meeting but (so far as the record shows) said nothing about the work transfer matter.

<sup>180</sup> Golden's failure at this meeting to make any such claim of inaccuracy forms part of the basis for my action in crediting Chestnut's and Neal's testimony, which virtually tracks Neal's April 14 letter, as to what Golden stated on March 9 regarding the Company's plans at Indianapolis. Because Golden was admittedly "personally upset" at the letter's perceived breach of the agreement for an "off-the-record" and "confidential" meeting, I think it likely that during this conversation he would also have referred to any factual inaccuracy set forth in the alleged breach.

<sup>181</sup> In describing the Company's at least alleged willingness to engage in negotiations over the terms of a new collective-bargaining

Golden's bargaining notes state that at this point, Buhle asked whether there was a hiring freeze in place, and whether there was a plan to replace bargaining unit employees who had quit. Golden testified that he could not recall what the response was. As to the April 22 meeting, the record contains no other evidence as to this matter.

Using the expired contract as a base, Buhle then orally presented the Union's proposals. These proposals included, among many others, a provision that a minimum number of employees (82, the then number of employees in the bargaining unit) be maintained for the life of the contract; Buhle credibly testified that the Union advanced this proposal because the Union was seeing a lot of work being transferred out of the Indianapolis facility and a decrease in the size of the bargaining unit, and to the Union this was a major concern. Also, the Union proposed a provision that an employee who was displaced through no fault of his own would receive either transfer rights to another location plus moving expenses, or else severance pay; and a provision that all employees who had left the Company's service for any reason after 1992 be offered reemployment. In addition, Buhle proposed that the position of working foreman (a classification covered by the expired contract) be filled by seniority or, if the Company rejected this proposal, that the word "foreman" be deleted from the agreement and not covered by the contract;<sup>182</sup> a limit on mandatory overtime; and a provision that the number of paid sick days be increased from 6 to 8 and that an employee who took a paid sick day not be charged with an attendance occurrence. The Union also proposed various economic improvements, including a \$4 hourly wage increase over the life of the contract (\$2 to be retroactive to August 25, 1993, the expiration date of the old contract), a \$300-ratification bonus, a profit-sharing and pension proposal, shift premiums, time and a half for drivers after 8 hours a day, an increase in payments to a safety and training fund, a 1-week increase in paid vacations for 8-year employees, a paid birthday holiday, payment to employees for time spent at a clinic because of on-the-job injuries, and payment to employee negotiators for time spent in negotiations.

At this point, the parties took a lunchbreak. When the discussions resumed, Chief Steward Douglas Jones and Teresa Goens (who had become alternate steward when Jones became chief steward) joined the union team. The Company then submitted a set of written proposals which (like the Union's) used the expired contract as a base. These proposals included, among a number of others, the addition of "shuttle driver" to the job classifications covered by the contract, and certain changes in article XXII, section 3. As previously noted, in the expired contract this provision had stated:

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agreement, the Company's March 22 letter to the employees did not refer to the Company's March 9 offer to engage in such negotiations as to a unit of up to 25 employees. Chestnut testified that if anyone knew what the March 9 discussion was, he would be very much misled by the March 22 letter. However, after looking at the March 22 letter, he was unable to point to any portion which described the March 9 meeting.

<sup>182</sup> The contractual job description for "working foreman" states, in part; "able to plan and coordinate the flow of work . . . to direct the work of labor force . . . and maintain a harmonious, neat and well-organized shop. Can be assigned to bargaining unit work as the Company sees fit. Working foreman relays instructions from management and makes required reports of day-to-day operations. He has no authority to hire, fire, discipline or effectively recommend the same."

Authorized agents of the Union shall have access to the Employer's establishment during working hours for the purpose of adjusting disputes, investigating working conditions, collection of dues and ascertaining that the agreement is being complied with, but this shall not unduly interfere with the performance of necessary work.

The Company proposed that the words "The Union Business Agent" be substituted for the first five words in this provision, that the words "adjusting disputes" and "collection of dues and ascertaining that the agreement is being complied with" be deleted, and that the following sentence be added at the end: "The Business Agent shall first make a 'courtesy call' to the Branch Manager informing him/her of his visit." During subsequent discussions, Golden said that as to access by the business representative, the Company was willing to live with whatever practice had been followed, but that the Company wanted the practice put into writing and included in the next collective-bargaining agreement. The parties never did reach an agreement on what the practice had been. As of July 28, 1994, Buhle had not attempted to gain access to the facility, or the bulletin board, after this April 22, 1994, conference.<sup>183</sup>

Article XV of the expired agreement, which article neither party ever proposed to change, provides, "The Company construes and the Union recognizes the provisions of this agreement as . . . being the only limitations on management's right to continue to manage and operate its business." The Company proposed the deletion of article XXI of the expired contract, which provision read as follows:

#### *Subcontracting*

*Section 1.* Except as provided below, for the purpose of preserving work and job opportunities for the employees covered by this Agreement the Company agrees that no work or services presently performed or hereafter assigned to the collective bargaining unit will be subcontracted, transferred, leased, assigned or conveyed in whole or in part to any other plant, to any person or non-unit employees, unless otherwise provided in this Agreement. The Company may subcontract work in accordance with past practice including administrative janitor services, truck servicing, truck cleaning, conveyor repair, and facility repair, and when all of its regular employees are working except that in no event shall work presently performed or established during the life of this Agreement be farmed out. Overflow work may be performed by persons other than the Company's employees provided that this shall not be used as a subterfuge to violate the provisions of this Agreement. It shall not be considered a violation of this provision if the Company, in order to better serve the needs of the business, removes work currently performed by employees covered by this Agreement and reassigns the work to employees at other operations of Eby-Brown

<sup>183</sup> As to the discussion on access, my findings are based mostly on Golden's testimony. Buhle testified that Golden said access would be permitted under the same circumstances as prior to the election, the Union asked if that meant access to the facility, and the Company replied that this meant the breakroom only. However, Buhle's contemporaneous notes are somewhat difficult to square with his testimony.

Company so long as no employees are laid off as a result of said reassignment.<sup>184</sup>

*Section 2. Grievances.* Within five (5) working days of filing of grievance claiming violation of this Article the parties to this Agreement shall proceed to the final Step of the Grievance Procedure, without taking any intermediate Steps, any other provisions of this Agreement to the contrary notwithstanding.

After a caucus, the Union accepted some of these proposals, made counterproposals as to some, rejected some, and passed on or failed to comment on others, including the proposed deletion of article XXI. As to some of the rejected company proposals which called for changes in the provisions of the expired agreement, the Union took the position that the provisions of the expired agreement should be retained.

Then, the Company accepted one union proposal and rejected others, including the proposal that the position of working foreman be filled by seniority, the proposals for an increased number of paid sick leave days and the exclusion of paid sick leave from absenteeism occurrences, and the proposal for offers of reemployment for employees who had been separated since January 1, 1993.

#### 8. The meeting between the Company and the Union on April 29, 1994

The parties reconvened on April 29, 1994. The Company was represented by Golden and Kramer. The Union was represented by Chestnut, Buhle, Douglas Jones, Teresa Goens, and unit employee Richard Niehaus (variously spelled in the record). Buhle asked whether the Company was currently engaged in a hiring freeze, and whether the Company planned to replace certain employees who had been "displaced" during the preceding 2 weeks. Golden said that he would have to get back to Buhle with a response to these questions. Chestnut produced a letter from the Company to a customer, stating that effective May 9, 1994, the servicing of this customer was being changed from the Indianapolis to the Springfield branch. Golden said that the Company was still intending to transfer the servicing of that customer to Springfield. Chestnut asked how much work was being transferred. Golden replied, according to his testimony, "I can't respond at [this] time regarding the volume of work being transferred but I did indicate that there would be no layoffs as a result of any of these work transfers that were being discussed." Then, Buhle resumed going through the Company's April 22 proposals, accepting some, offering counterproposals as to some, and rejecting others. During the discussion of certain Company proposals to delete references to certain job classifications (which had not been filled for a long time) and to add the shuttle-driver classification, to which proposals the Union agreed, Buhle stated that the Union wanted the working foreman positions to be filled by a bid system, and that if this was not done, then the Union wanted them to be given authority which would make them "true supervisors," no longer in the unit covered by the bargaining agreement. The subject of working foremen again arose during the parties' discussion of a company proposal to alter a rule calling for discipline if an employee failed to carry

<sup>184</sup> The agreement in effect before August 1990, which the Union had negotiated with Smith-Harris, had included this section without the last sentence, which at the Company's instance was added to the section as incorporated in the 1990-1993 contract.

out orders from “qualified personnel,” so as to add “including Managers, Assistant Managers, [and] working foremen.” Buhle stated that the Union would agree to this reference to working foremen if, but only if, they were made true supervisors. Buhle took basically the same position with respect to a company proposal for a rule which required an employee to remain in his assigned work area “unless . . . with the consent of your foreman.”

As to the Company’s proposal for deletion of article XXI, Buhle proposed the deletion of only the last two sentences of section 1 of that article.

Then, Buhle went through the Union’s proposals. As to working foremen, he stated that the working foremen jobs should be filed on a seniority basis but, if the Company objected to this arrangement, they should be excluded from the performance of unit work and excluded from the bargaining unit. Further, Buhle proposed a 12-hour limit on the number of hours an employee could be compelled to work in 1 day.

After a lunchbreak, the Company withdrew some of its proposals which the Union had rejected, agreed to some union proposals, offered counterproposals as to some, and rejected some. The Company rejected the proposal that working foremen be selected on the basis of seniority, rejected a proposed limitation on mandatory overtime per day but proposed a limitation on mandatory overtime per week, and rejected the proposal for an 82-employee minimum. Golden adhered to the Company’s proposal for the deletion of article XXI, and, in addition, adhered to its admittedly related April 22 proposal for a change in the “Work Assignments” article. In the expired contract, this provision read, in part, that the Company “shall not directly require employees, or persons other than employees in the bargaining unit here involved, to perform work which is recognized as the work of the employees in said units [sic], except present practices and emergencies.” The Company proposed the insertion of the words “and past” after the word “present.”

At this point, Chestnut said that he needed to consult with Neal before going further, because it seemed to the Union that if the parties continued to negotiate, it would be for a nonwork force and, therefore, it might not be worth while from the Union’s point of view to continue bargaining. Golden said that the Company was ready and willing to continue bargaining and saw no reason to postpone further bargaining. Chestnut asked whether the Company had stated its final position. When Golden said no, Chestnut said that he was happy to hear that. Chestnut again brought up the letter which advised a customer that the servicing of his account was being transferred from Indianapolis to Springfield. Golden said that “the Company had transferred certain work out of the Indianapolis branch to other branches, that the Company had previously disclosed that to the Union and was making no attempt to hide that fact [, and] that the Company was making these transfers in order to service the customers as efficiently as possible.”<sup>185</sup>

Chestnut said that the Union and the employees were concerned about a complete shutdown of the Indianapolis facility.

<sup>185</sup> My finding that Golden said this is based upon his testimony and bargaining notes. The only evidence that the Company had previously told the Union that work had been transferred out of the Indianapolis branch is Golden’s discredited testimony that he so told the Union on March 9 (see supra, part V,F,2). No such information could have been accurately given as of March 9, 1994, because after 1992 no work transfers occurred until March 28, 1994.

Golden said that no such decision had been made, and that if the Company was close to finalizing such a decision, it intended to provide the Union notice that the Company was in the process of examining and possibly finalizing the decision, and to bargain with the Union over both such a decision and its effects. Buhle commented that it seemed to the Union that the work was all going one way. The meeting then broke up, with an agreement to meet again on May 10.

#### 9. The May 9, 1994 transfer of work from Indianapolis to Springfield

On May 9, 1994, 26 more routes were transferred from the Indianapolis to the Springfield facility. These routes had been driven by five to seven drivers in the Indianapolis unit, and serviced by an undisclosed number of warehousemen in that unit.

With this transfer, all of the routes in Ohio, Kentucky, and West Virginia which had been serviced in and operated out of the Indianapolis facility had been transferred to Springfield. Since the transfers on March 28, April 16, and May 9, 1994, the Springfield drivers have been delivering the same type of product to the same customers to which the Indianapolis bargaining unit drivers would have delivered if the work had not been transferred. Similarly, since these transfers the Springfield warehouse employees have been picking the product which is delivered to the customers whose accounts were thus transferred from Indianapolis to Springfield. As of March 27, 1994, the Company was operating 38 to 40 trucks, all of them leased, out of the Indianapolis facility. Between March 28 and June 26, 1994, the Company transferred 16 of these trucks from the Indianapolis facility to the Springfield facility. Between March 28 and July 26, 1994, the size of the Indianapolis bargaining unit decreased from 87 to 71.<sup>186</sup> Nobody was laid off from the Indianapolis facility during this March 28–July 26 period; the unit diminished because of terminations, quits, transfers, and promotions.<sup>187</sup> The average number of hours worked per unit employee did not substantially change as a result of the March 28–May 9 transfers.

#### 10. The meeting between the Company and the Union on May 10, 1994

At the May 10 meeting, the Company was represented by Golden, Patricia Reynolds, and Capanash. The Union was represented by Chestnut, Buhle, Douglas Jones, Teresa Goens, and Niehaus. Buhle asked the current number of employees in the bargaining unit. Reynolds said 77, and further said that one unit employee had given notice of his intention to resign and another was serving the probationary period required of all new employees. Buhle asked for an updated seniority list, and Reynolds said she would provide one. Buhle asked whether a hiring freeze was in effect at the Company; Golden said no. Buhle asked whether any decision had been made to close the Indianapolis facility. Golden said no, and that if a decision to close was to be finalized or was close to being finalized, the Company intended to give notice, and would bargain with the Union over such a decision and, if necessary, its effects. So far as the

<sup>186</sup> As of the July 8, 1993 election, the unit had consisted of about 97 employees.

<sup>187</sup> A memorandum from Campanash dated March 3, 1994, memorialized the transfer after March 24, 1994, of four bargaining-unit employees to other company facilities. One of these employees was Robert Burnett, who was promoted to a driver trainer job at the Springfield facility.

record shows, Patricia Reynolds did not state that she knew of no plans to close the Indianapolis facility. Buhle asked a question about the performance of unit work by a nonunit office employee; Reynolds replied that this had been necessary because of a unit employee's absence. Buhle asked what work had been transferred from the Indianapolis facility, and what the nature of that work was. Patricia Reynolds replied that work had been transferred effective May 9, and that this was the remainder of the Ohio and Kentucky work. This was the Union's first notice from the Company of any 1994 transfers.<sup>188</sup>

Then, the Union reiterated some proposals, and modified others, which the Company had previously rejected. Among the reiterated proposals were the Union's wage proposal, the proposal regarding working foremen, the proposal that an employee not be subject to discipline for an absence occurring on a day when he was eligible to receive a paid sick day, the proposed transfer rights/severance benefits clause, and the proposal requiring offers of reemployment to employees who had left the Company after 1992. As to mandatory overtime, Buhle said that the Union was willing to discuss a concept in which the Company could require unlimited overtime for 1 day a week, to be selected at the Company's discretion; Golden credibly testified that he took this to be a reference to the Company's need to assure that it could retain its work force on certain days which were predictably heavy days. Also, after being advised by Reynolds that the current number of bargaining unit employees was 77, Buhle said that he was proposing a clause which required the Company to maintain 77 employees in the bargaining unit for the entire term. Golden said that "under no circumstances" was the Company willing to agree to this minimum level of employees. Buhle asked if there were any current plans to move work either from Indianapolis or into Indianapolis from other branches; Golden replied that the Company had no plans "as of that day" to move work in or out.

Then, Buhle accepted some of the Company's outstanding proposals, rejected others, and offered counterproposals as to others. Golden thereupon rejected some of the Union's outstanding proposals, accepted others, adhered to some of the Company's outstanding proposals, and withdrew or modified others. As to article XXI, Golden stated that the Company wanted to amend the contract to provide that nothing therein would restrict the Company's right to remove or reassign work which might currently be performed by members of the bargaining unit to other branches or facilities owned by the Company. Chestnut asked if this was the Company's final position, and stated that if it was, the Union considered the parties to be at impasse. Golden stated that he did not believe the parties

were at impasse, that the Company had not taken its final position, but that it was the Company's final position as to this one item. Golden went on to say that there were still 40 or 50 open items left to be negotiated over, that the position the Company might take on any one subject could be influenced by the Union's position as to all other items that could be subject to negotiation, that he felt the parties still had a lot of negotiating to accomplish, and that it was far too premature to consider the parties to be at an impasse or to talk about final offers. Golden said that the Company was prepared to continue to bargain, and anticipated reaching and operating under an agreement with the Union. Chestnut said that the Union wanted some kind of minimum number of people, that \$100 an hour times zero was still zero. Golden said that the Company was prepared to continue to bargain; he "repeated . . . that the [Company] was unwilling to be locked into a contract restriction which totally prevented the [Company] from transferring work under any circumstances to the other branches."<sup>189</sup> Chestnut said that he did not really care what the Company proposed until the Union obtained some kind of guarantee as to the number of employees who would be in the unit. He said that until the Company was willing to give such a guarantee, the Union was not going to agree to anything. Chestnut asked Golden to give the Union the Company's final proposal next week. Golden said that the Company would decide for itself when it would present a final offer to the Union, that the Company had not yet presented anything in the nature of a final offer, that the Company continued to believe that there was a lot of bargaining to be done, and that the parties should continue the process and continued to engage in bargaining. Chestnut said that the Company would have the Union's final proposal at the next meeting, and that if the Company did not change its position with respect to a minimum number of people in the unit, the next meeting would be the parties' last meeting, because until the Union had some kind of guarantee as to this matter, the Union was not going to agree to anything.<sup>190</sup>

#### 11. The meeting between the Company and the Union on June 1, 1994

The parties met again on June 1, 1995. The Company was represented by Golden, Patricia Reynolds, and Capanash. The Union was represented by Chestnut, Buhle, Teresa Goens, Douglas Jones, Niehaus, and Harold Durham, who is the director of safety and training for the Union's parent international.

Buhle presented what he said was the Union's final offer for a collective-bargaining agreement. He said that anything not referred to which had been part of the Company's proposals was being rejected by the Union. The Union's proposals were much the same as they had been as of the end of the May 10 bargaining session. These proposals included a proposal that the Company agree to maintain, for the life of the contract, 76 bargaining unit jobs, 76 being the number of bargaining unit employees as of June 1 according to Patricia Reynolds' representations during this meeting. In addition, these proposals

<sup>188</sup> This finding is based on Buhle's and Chestnut's testimony. On direct examination, Golden testified that Reynolds "responded that the work that had recently been transferred was the remainder of Ohio and Kentucky work, which had already been disclosed to the Union previously." However, on cross-examination he testified that he did not give any notice to the Union that work was going to be transferred on May 9, and that he did not recall any such statement from a company representative to a union representative in Golden's presence. The only other evidence that transfer information had previously been "disclosed" by the Company is Golden's testimony attached to fn. 185, supra, and his discredited testimony (supra, part V,F,2) that on March 9 he told the Union that some work had already been transferred and, in effect, that the Company was now "considering" such transfers in the future. As of March 9, no work had yet been transferred to Indianapolis, but the Company had already decided to transfer such work. For this and demeanor reasons, I credit Chestnut and Buhle.

<sup>189</sup> The quotation is from Golden's prehearing affidavit, which as to this matter is substantially the same as his testimony.

<sup>190</sup> This finding is based on a composite of credible parts of Chestnut's and Buhle's testimony. For demeanor reasons, I do not credit Golden's testimony that Chestnut "in effect demanded that the Company present the Union with its final offer at the following meeting, that being . . . the meeting that [Chestnut] had said would be the last meeting the Union would participate in."

included retention of article XXI (the subcontracting clause) with the deletion of the last two sentences in section 1. Also, Buhle proposed that working foremen be excluded from the bargaining unit and that it be a contractual violation for the Company to permit them to perform bargaining unit work; a limitation on involuntary overtime except for one shift a week; that a paid sick day or 4 hours' absence for a doctor's appointment would not count as an absence for purposes of discharge; transfer rights (with moving expenses) and severance benefits for "displaced" employees; and a limitation on the number or use of temporary employees. In addition, Buhle proposed a \$2 an hour increase on the effective date of the contract, and a \$1 increase effective on each of the two anniversary dates thereafter. Buhle withdrew the Union's request for reinstatement offers to employees separated for any reason after 1992, accepted the Company's last proposal to increase the number of stewards recognized by the Company from two to three (the Union had been proposing four), and as to certain company proposals expressed agreement for the first time. Also, Buhle agreed "in principle" to the Company's proposal about tardiness as constituting an "occurrence" under the Company's absenteeism policy. Among the company proposals which Buhle rejected was a proposal that any person who reached probationary status twice within a 36-month period would be subject to discharge.<sup>191</sup>

After a break for a union caucus and for lunch, Golden orally presented the Company's counterproposal. He withdrew some pending company proposals and accepted some pending union proposals. As to the rule which stated that employees were not to be present on company property except on business, Golden said that the Company was continuing to propose that rule but was open to discussing a reasonable period of time for employees to wait for a ride, or to pick someone up, on company property. Golden said that working foremen should remain in the bargaining unit and continue to do bargaining unit work, rejected the proposal that all jobs be bid by seniority, and said that in selecting working foremen the Company would consider seniority but would also consider other factors. Golden stated that as to mandatory overtime, the Company wanted a 60-hour weekly limit on total hours; and rejected the proposal that a paid sick day not count as an absence on the attendance program. As to severance pay, he stated that the Company would make a presentation at a later time. Golden agreed to some limitations on the use of temporary employees. Golden said that the Company was adhering to its proposal to eliminate article XXI, and rejected any proposal for a minimum number of employees to be maintained in the bargaining unit for the life of the contract.<sup>192</sup> Golden said that the Company was proposing that if an employee's position was eliminated as the result of a transfer of work to another company branch, the Company would offer the employee affected the opportunity to transfer to

another company branch (but the Company would not pay for moving expenses) or, at the employee's option, 1 week's severance pay for each full year of service to a maximum of 5 weeks' severance pay. Golden also proposed an across-the-board hourly wage increase of 20 cents retroactive to August 27, 1993, and 20 cents effective August 27, 1994. He proposed a 2-year contract effective as of August 27, 1993, to "remain in effect unless and until the results of the [July 1993] election are certified and the Union is no longer designated the employees' bargaining representative."

The Union then caucused for about 15 minutes. Upon returning, Chestnut said that the employees were very concerned about job security, that they felt that if they did not have a guarantee of jobs for the life of the contract, the contract had no value. Golden said that the Company felt that it could not guarantee jobs at that time for the employees, but that the Company had not yet given the Union any final position, and that the Company was prepared to continue to negotiate with the Union and he was confident that if the Company continued to negotiate with the Union, they could reach an agreement. Chestnut said that the employees simply felt that they must have a job guarantee and without it there really was not much point in continuing to bargain. Golden said that the Company had never by contract guaranteed jobs, that this was an extraordinary commitment for the Company to make, but that the Company was prepared to keep bargaining and had not given the Union its final position. Golden said that the Company had no assurance that in the future it would have the business to support job guarantees, and that the Company felt that it had to be able to operate as efficiently as possible given the Company's various branches and its need to be able to determine how best to service its customers. Chestnut said that the employees were very concerned because of the acquisition of the Bosart assets. He said that the employees had heard rumors that other new branches would be opened by the Company, and the employees felt that they absolutely had to have job guarantees. Golden said that the Company had tried to address such concerns by offering the option of transfer rights or severance pay. Chestnut said that the Company had offered no job security to the bargaining unit employees, that \$100 an hour times zero was zero, and that work rules and wages were meaningless without some guarantee that there was going to be some job security. Golden said that the Company was trying to reasonably address these concerns over job security, but the Union appeared to be insisting on a guarantee to maintain in Indianapolis a job for every employee then employed in the bargaining unit. Chestnut responded that this was indeed the Union's position. Golden said that the Company could not agree to guarantee a minimum number of employees, and if that was the Union's condition for a contract, it presented a problem in reaching an agreement. Chestnut said that the Union had flexibility on several issues, if the Company had flexibility on the job-security issue; but that unless the Company's position changed as to article XXI and a guaranteed number of employees, the parties were at an impasse, so far as Chestnut was concerned. Golden said that he hoped the Union would reconsider that position and then get in touch with him.

Chestnut said that the Union had given the Company the Union's final offer, and would not move on that final offer as long as the Company had the right to move any and/or all bargaining unit work to any other company facility. Chestnut said that the Union was not prepared to agree to allow the Company to uni-

<sup>191</sup> As discussed supra, part V,B,9, Chief Steward Douglas Jones had been on probationary status in partial consequence of an absentee occurrence charged to him in 1993 because of his protected activity. Under the existing practice, his successful completion of probation in June 1994 would have erased the discriminatorily charged absentee occurrence for most or all purposes.

<sup>192</sup> This finding is based on Golden's testimony. Thomas Wake testified that in late March 1994 he had authorized Golden to agree to maintain a minimum of 25 bargaining unit employees for the life of the contract, but believed that the Union would insist on a minimum level of 78.

laterally transfer any or all of the bargaining unit work from the Indianapolis facility, but that if the Company changed its position on the right to make such unilateral transfers, there might be some flexibility in the Union's final offer.<sup>193</sup> Chestnut said that he hoped Golden would get in touch with him if the Company changed its position, and that the Union would notify the Company if the Union's position changed. The meeting then broke up.<sup>194</sup>

Between that time and at least the next to last day of the hearing (October 27, 1994), no company representative advised the Union that the Company's contract proposals had changed in any way. So far as the record shows, the Union did not during this period advise the Company that the Union's proposals had changed. The Union never filed a grievance with respect to the transfer of work. Chestnut credibly testified that the Union never did this because the expiration of the contract meant that the Union could not force the Company into binding arbitration<sup>195</sup> and all the Union could expect was to be able to take the grievance to the third step, which calls for "mediation" by a committee consisting of one union and one company representative and a third member selected by them.

Patricia Reynolds testified, "To the best of my knowledge, no," when company attorney Golden asked, "At any time before or after the transfers in late March 1994 . . . did the Union ask any information regarding these transfers, request to bargain over decisions over transfers or over the effects of these transfers?" I do not credit such testimony, to the extent that it may amount to a denial that during the April 1994 meetings the Union asked whether work was being transferred and received evasive replies at best, or a denial that the Union made certain contract proposals directed to preventing and remedying work transfers.

12. The parties' position as of the close of the June 1, 1994 meeting; the return of the Super Value account from Springfield to Indianapolis

During the April–June 1994 negotiations, both parties proposed that any contract agreed to would be retroactive to the August 1993 expiration of the 1990 bargaining agreement. However, the Union proposed a 3-year term (that is, an August 1996 expiration date), whereas the Company proposed a 2-year term (that is, an August 1995 expiration date). Further, the Company took the position that if the results of the July 1993 decertification election were certified, any contract agreed to would thereby be rendered null and void.

Among company proposals rejected by the Union during these March–June 1994 discussions was a rule, "If not on company business, employees are not allowed on company property"; since September 1993, the complaint has alleged maintenance and enforcement of this rule as an unfair labor practice, and an earlier part of this decision has found this complaint allegation to be meritorious (see *supra*, part III,F). Also, the

<sup>193</sup> My findings in the last two sentences are based on Chestnut's testimony and his virtually contemporaneous notes. In view of these notes, and for demeanor reasons, I do not credit Golden's denial that Chestnut said there was still some flexibility in the Union's position if the Company would give up its position on the unilateral right to transfer.

<sup>194</sup> My findings as to the events at the June 1 meeting are based on a composite of credible parts of Chestnut's, Golden's, and Buhle's testimony.

<sup>195</sup> See *Litton Business Systems v. NLRB*, 501 U.S. 190, 198–201 (1991).

Company proposed the addition of an employee rule calling for discipline for "Violation of the Company's 'No Solicitation/No Distribution rule.'" On June 1, the Company withdrew its proposal as to the no-solicitation/no-distribution rule, and modified its proposal as to the rule regarding off-duty employees' access to company property.<sup>196</sup> The Company never withdrew its proposal that an employee who reached probationary status twice within 36 months would be subject to discharge, and the Union never agreed thereto.

The Company never gave the Union any offer to return to Indianapolis any of the work transferred from that facility to Springfield between March 28 and May 9, 1994. About mid-June 1994, Super Value, a "sizable," multimillion dollar" customer to which the Company delivers product in Xenia, Ohio (about 20 minutes from Springfield), and whose servicing had been transferred from the Indianapolis to the Springfield branch on April 16, 1994, advised the Company that its service from the Springfield branch had been unsatisfactory, and that Super Value would cancel its account unless within 1 week its service was transferred back to Indianapolis (more than 3 hours from Xenia). The transfer back was effected within this 1-week period. Copresident Thomas Wake testified that the service to Super Value by the Springfield warehouse had been unsatisfactory because the Springfield warehouse personnel were not sufficiently trained or disciplined to handle the "intricacies" of that account, which as compared to other accounts receives a "more limited subsection" (mostly cigarettes and tobacco) of the products which the Company supplies to other customers. The Company never advised the Union, which had been advised on May 10 of the April 16 transfer of the Super Value accounts from Indianapolis to Springfield, that these accounts had been returned to Indianapolis. The return of the Super Value accounts to Indianapolis required the Indianapolis unit employees to resume putting state-tax stamps on cigarettes for Ohio, Kentucky, and West Virginia.<sup>197</sup> After the May 9 work transfers and before the return of Super Value, the Indianapolis unit employees had been stamping cigarettes for Indiana only. However, as to the Super Value account—unlike most of the other accounts which involve cigarettes—the Company does not maintain any "safety stock"—that is, a supply of tax-stamped cigarettes to be used if the customer orders more than usual. The Super Value account called for six routes, driven by at least two drivers, a week; and also required overtime work by five warehousemen.

Patricia Reynolds testified in late October 1994 that 67 employees were presently employed in the Indianapolis bargaining unit; that 87 employees had been employed in the bargaining unit on March 27, 1994 (the day before the Company began to transfer work from Indianapolis to Springfield); and that if this work had not been transferred in March–May 1994, but had remained in Indianapolis, either 87 bargaining unit employees would be needed to perform that work, or some customers would be unhappy and the unit employees would be working a lot of overtime.

<sup>196</sup> This modification consisted of specified exceptions for employees waiting for a ride or to pick up other employees. As shown *supra*, part III,F, such modifications would not have corrected the legal defect in the rule.

<sup>197</sup> All deliveries made by the Company to Super Value are made to an Ohio warehouse, from which Super Value distributes cigarettes to its convenience stores in Kentucky and West Virginia as well as Ohio.

### 13. Analysis and conclusions

#### a. Whether all evidence as to the March 9, 1994 conference is inadmissible on the ground that this was a settlement conference

As previously noted, the Company's posthearing brief renews its objection (advanced on July 28, 1994, during the hearing) to the receipt of any evidence regarding the conference on March 9, 1994, on the ground that this conference was a settlement conference. The Company relies upon article IV, "Relevancy and its Limits," Rule 408 of the Federal Rules of Evidence, which provides:

Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations.

This rule also does not require exclusion when the evidence is offered for another purpose such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

The General Counsel's August 1994 "Statement of Position," which was filed before the receipt of any evidence about what was said at the March 9 meeting, averred, *inter alia*, that he was offering testimony:

regarding the statements made by Golden at the March 9 meeting concerning the [Company's] intentions to transfer bargaining unit work and the Union's response thereto for a purpose other than to prove the validity or amount of any unfair labor practice claim which was the subject of a charge or complaint as of March 9. Rather, General Counsel offers said testimony . . . to establish (1) the [Company's] intention as of March 9 to transfer bargaining unit work from its Indianapolis facility to its Springfield, Ohio facility, and (2) to provide the context in which the [Company] thereafter transferred bargaining unit work from its Indianapolis facility to its Springfield, Ohio facility on March 28, April 16, and May 9.

In reaching my conclusions as to the merits of the instant case, I have not relied upon evidence as to the March 9 meeting for any purpose other than those set forth by the General Counsel. Moreover, it is undisputed that the work transfers which are a subject of the unfair labor practice allegations (discrimination and unilateral action) in the June 1994 complaint did not begin until March 28, more than 2 weeks after the March 9 meeting. Under these circumstances, I conclude that evidence as to the March 9 meeting was properly received by me.

In the first place, as to a particular claim Rule 408 only bars admission of evidence relating to settlement discussions of that same claim. See *Broadcort Capital Corp. v. Summa Medical Corp.*, 972 F.2d 1183, 1194 (10th Cir. 1992). However, because the transfers of work which were the subject of the June 1994 complaint had not even begun as of March 9, and because the Union did not learn about them until May 10, they could not have constituted part of any claim whose settlement was dis-

cussed at the March 9 meeting.<sup>198</sup> It is true that during the March 9 meeting Neal said that he would file charges regarding work transfer. However, his testimony makes clear that he was basing this statement upon reports from unit employees that work had already been transferred, and it is uncontradicted that these reports were mistaken. Moreover, Rule 408 does not require exclusion of evidence of settlement attempts where the evidence is offered for a purpose other than to prove liability for or invalidity of the claim under negotiation. *Vulcan Hart Corp. v. NLRB*, 718 F.2d 269, 276-277 (8th Cir. 1983); *U.S. v. Hauert*, 40 F.3d 197, 200 (7th Cir. 1994); *Breuer Electric Mfg. v. Toronado Systems of America*, 687 F.2d 182, 185 (7th Cir. 1982); and *Jennmar Corp.*, 301 NLRB 623, 631 fn. 6 (1991). Here, the evidence as to what Golden said about the Company's plans, and as to the context of his statements, was not offered to show the Company's liability *vel non* for the claims discussed on March 9.<sup>199</sup>

#### b. Whether the March 28-May 9 transfers of work from Indianapolis to Springfield violated Section 8(a)(3) of the Act

As the Company does not appear to dispute, an employer violates Section 8(a)(3) of the Act by transferring work between the employer's facilities in order to discourage union activity, *Lear Siegler, Inc.*, 295 NLRB 857 (1989); and *Dahl Fish Co.*, 279 NLRB 1084, 1091-1095 (1986), *enfd.* 813 F.2d 1254 (D.C. Cir. 1987). The evidence which may tend to support the General Counsel's contention that such a motive was at least a reason for the transfer of at least some routes from the Indianapolis to the Springfield facility may be summarized as follows:

The Company was anxious to rid itself of the Union; and for many months before the March-May 1994 work transfer, had engaged in a series of unfair labor practices, at all levels of supervision including a company copresident, directed toward this end. The Springfield facility to which the work was transferred was a nonunion facility at which a union representation petition was pending at the time of the transfers. The transferred work included servicing one customer whose location (Bowling Green, Kentucky) was closer to Indianapolis than to

<sup>198</sup> Although at that meeting Golden did tell the Union that the Company was planning to transfer all the Indianapolis warehousemen's work and most of the Indianapolis drivers' work to Springfield, this was not an accurate description of the Company's previously formulated and subsequently executed plans to transfer work to Springfield. Accordingly, any March 9 discussion of a "claim" arising from Golden's inaccurate March 9 statement would have been directed at a plan which never existed, rather than at the plan which had actually been formalized on March 4 and whose execution began on March 28.

<sup>199</sup> On p. 5 of my August 5, 1994 ruling rejecting the Company's objection to receipt of evidence regarding the March 9 meeting, I stated that disposition of the work-transfer allegations added by the post-March 9 charges and complaint does not depend on the disposition of the issues raised by the complaint as of March 9. This statement was in error. Later in the hearing, it transpired that the Company was contending that as of the late summer of 1993 and thereafter, it was under no duty to bargain with the Union because of events which occurred after the July 8, 1993 election and which allegedly gave the Company a right to claim a good-faith doubt of the Union's majority. As shown *supra*, part V.D.3, disposition of this contention involved consideration of unfair labor practice allegations regarding conduct prior to the fall of 1993, some of which were included in charges and/or the complaint filed before March 9, 1994. However, my August 1994 error does not affect the issue regarding the admissibility of evidence as to the March 9, 1994 meeting.

Springfield. Moreover, when Union Attorney Chestnut told the Company that one of the customers which under Bosart had been serviced by the Springfield facility was only 5 miles from the Indianapolis facility (and, therefore, at least 155 miles from the Springfield facility), the Company neither questioned the accuracy of this assertion, nor transferred the servicing of this customer from Springfield to Indianapolis, nor (so far as the record shows) even investigated the possibility of such a transfer. Such company conduct does not seem to square with a company purpose to allocate work between its only union and its only union-sought facility on the basis of cost and prompt service considerations alone. Moreover, particularly because the March 4 memorandum stated that the work transfers summarized therein were intended “to service our customers as cost efficiently as possible,” it is highly probable that the memorandum was preceded by dollar estimates and dollar discussions among management as to the relative costs of servicing particular customers, particular routes, or groups of customers in particular areas, as between the Springfield and the Indianapolis facility. However, the Company presented no documents or testimony as to what these dollar estimates were, or even any dollar evidence as to what these comparative costs turned out to be.<sup>200</sup> Moreover, neither did the Company produce any evidence as to its pretransfer estimates about anticipated changes in the promptness of service in consequence of the transfers. Furthermore, the Company over a period of more than 2 months misrepresented to the Union what the Company planned to and was doing in connection with the transfer of work from Indianapolis to Springfield; more specifically, the Company said on March 9 that it planned to transfer the entire Indianapolis warehouse function to Springfield and to retain only a few Indianapolis-based drivers (although the Company had no such plans), and the Company told the Union on April 22 that no final decision had been made to transfer any work from Indianapolis to Springfield (notwithstanding its March 4 memorandum, pursuant to which the Company transferred work to Springfield on March 28, April 16, and May 9). When Chestnut produced on April 29 the Company’s written notice to a customer about the transfer from Indianapolis to Springfield of that customer’s business, the Company merely verified that this particular transfer was to take place, without offering to bargain about it, and inaccurately asserted that the Company had previously told the Union about past transfers. Not until May 10, after all the transfers described in the March 4 memorandum had been completed, did the Company give the Union complete and accurate information about them. This concealment and misrepresentation, over a period of more than 2 months (and throughout the period when these transfers from Indianapolis were being effected), at least arguably point to apprehension by the Company that if apprised of what the Company was really doing, the Union would be able to point to at least some transfers which were not called for by normal business judgment, and whose discussion might lead to inculpa-

<sup>200</sup> I am aware that in making such estimates or ascertaining such costs, considerations not mentioned in the text (including the concomitant transfer of work from the Springfield to the Ypsilanti facility) would have to be factored in. However, the fact that such estimates would have been more sophisticated than those set forth in the text does not appreciably diminish the likelihood that management made them. The General Counsel offered documentary evidence that the rent for the Hilliard garage, which because of the work transfers was no longer leased by the Company after June 1994, was \$880 a month.

tory statements by the Company. Further, the Company never did tell the Union that the Super Value work transferred to Springfield on April 16 was transferred back to Indianapolis in mid-June—information which, if revealed to the Union, might have caused it to investigate the reasonableness (and therefore, almost inevitably the motivation) for other transfers of work. Finally, the transfer of work foreseeably contributed to a diminution in the size of the Indianapolis unit from at least 97 in July 1993 to 71 as of July 26, 1994; indeed, Patricia Reynolds testified, in effect, that absent an increase in Indianapolis overtime work, if the work had not been transferred the unit as of October 1994 would have included 20 more employees than it in fact comprised.<sup>201</sup>

I am inclined to think that the foregoing evidence preponderantly shows that a reason for the transfer of at least some work from Indianapolis to Springfield was a desire to discourage the Indianapolis employees’ effort to retain union representation and/or to encourage the Springfield employees to reject the union efforts to organize that facility. However, I further conclude that notwithstanding my finding (infra, part V,F,13,c) that whether to make the transfers was a mandatory subject of collective bargaining, the Company can effectively defend itself against a finding that the transfers violated Section 8(a)(3) if the Company can preponderantly show that if the Union had received prior notice and an opportunity to bargain about the transfers but never sought to bargain about them, the work would have been transferred even in the absence of the foregoing protected union activities.<sup>202</sup> Thus, because most of the customers whose servicing was transferred were in fact closer to Springfield than to Indianapolis, the Company could have reasonably believed that the transfers would help it to achieve its next-day-service goal; would lessen fuel costs and truck wear and tear; would limit the need to send out trucks with less than a full load in order to avoid layovers; and would lessen or eliminate layovers. Further, the Company could have reasonably believed that the work transfers would enable it to save costs by closing the Hilliard garage, which before the Springfield acquisition had serviced the Company’s then customers in the Columbus (Ohio) area, thereby

<sup>201</sup> The evidence shows that more than 11 Indianapolis employees’ work was transferred to Springfield between March 28 and May 9, 1994 (supra, part V,F,4,9). As previously noted, the record fails to show how many Indianapolis unit employees transferred to Springfield driver and warehouse jobs as a result of the November 1993 letter (see supra, part V,F,1).

<sup>202</sup> In addition to the cases cited supra, fn. 89 and attached text, see *Wisconsin Steel Industries*, 318 NLRB 212 (1995). Cf. *Transportation Management*, supra, 462 U.S. at 401–404, holding that upon the General Counsel’s showing, by a preponderance of the evidence, that an employee’s protected conduct was a substantial or motivating factor in adverse action taken against him, the employer can avoid being judged a violator by bearing the burden of showing that he would have taken the same action regardless of his forbidden motivation. *Transportation Management* was not claimed to involve personnel action as to which the respondent employer had a duty to bargain. Particularly because of *Transportation Management*’s reliance on the view that the employer could fairly be required to bear the risk of nonpersuasion as to a factual issue created by his own wrongdoing, it might be argued that the employer can never (or almost never) meet such a burden where (as here) the challenged personnel decision was a mandatory subject of collective bargaining and the possibility that such bargaining would have led to a different decision was obviated or limited by the employer’s unlawful failure to give the bargaining representative prior notice and an opportunity to bargain. However, such an argument, which is not advanced by the General Counsel, would appear to be foreclosed by *Wisconsin Steel*.

saving rent, utilities, and security expenses and enabling the Company to reallocate two trucks from shuttle service to over-the-road service. Also, the Company could have reasonably believed that the work transfers would limit the amount of its funds which were tied up in maintaining at the Indianapolis, Indiana facility (as well as the Springfield facility) a supply of cigarettes with tax stamps from Ohio, Kentucky, and other states to which, before the transfer, both facilities had delivered cigarettes. Finally, the transfer of work from Indianapolis to Springfield was a part of a plan which also involved the transfer of work from nonunion Springfield to nonunion Ypsilanti, a transfer not claimed to be motivated by unlawful considerations. Accordingly, and although I am exceedingly uneasy about the Company's total failure to produce any specific dollars-and-cents testimony or documents showing how much it anticipated in savings when it decided to transfer the work,<sup>203</sup> I conclude that the Company has borne the burden of showing that the work would have been transferred absent the union activity at Indianapolis.

For the foregoing reasons, I conclude that the General Counsel has failed to show that the transfer of work from the Indianapolis to the Springfield facility violated Section 8(a)(3) of the Act.

*c. Whether the decision to make the March 28–May 9 transfers of work from Indianapolis to Springfield constituted a mandatory subject of collective bargaining*

As previously found, after the March 28–May 9 transfers from Indianapolis of the servicing of certain customers, these same customers were serviced by Springfield employees who for such purposes performed the same picking and driving work which had previously been performed by unit employees at Indianapolis. The transfers eliminated the need at Indianapolis for the services of at least 20 unit employees,<sup>204</sup> from a unit which had consisted of about 97 employees before the Company's November 1993 invitation to transfer to Springfield, and about 87 employees just before transfers began on March 28. The General Counsel contends, but the Company denies, that the decision to effect these transfers was a mandatory subject of collective bargaining. These contentions are mostly based on the parties' respective analyses of the instant case under the standards set forth in *Dubuque Packing Co.*, 303 NLRB 386 (1991), *enfd.* 1 F.3d 24 (D.C. Cir. 1993), *cert. granted* 511 U.S. 1016 (1994), *writ dismissed* 511 U.S. 1138 (1994). The Board there stated (303 NLRB at 391):

Initially, the burden is on the General Counsel to establish that the employer's decision involved a relocation of unit work unaccompanied by a basic change in the nature of the employer's operation. If the General Counsel successfully carries his burden in this regard, he will have established *prima facie* that the employer's relocation decision is a mandatory subject of bargaining. At this juncture, the employer may produce evidence rebutting the *prima facie* case by establishing that the work performed at the new location varies significantly from the work performed at the former plant, establishing that the work performed at the former plant is to be discontinued entirely and not moved to the new location, or es-

tablishing that the employer's decision involves a change in the scope and direction of the enterprise. Alternatively, the employer may proffer a defense to show by a preponderance of the evidence: (1) that labor costs (direct and/or indirect) were not a factor in the decision or (2) that even if labor costs were a factor in the decision, the union could not have offered labor cost concessions that could have changed the employer's decision to relocate.

As the Company does not appear to question, the Company's transfer of unit work from Indianapolis to Springfield was "unaccompanied by a basic change in the nature of [the Company's] operation." Rather, the Company continued to deliver to the same customers the same products which it had delivered before the transfer. Moreover, as the Company does not appear to question, the work performed at Springfield in consequence of the transfer is the same work which had been performed at Indianapolis; the work of servicing other customers continues to be performed at Indianapolis; and a change in the scope or direction of the enterprise did not result from the Company's decision to service some of its customers through the Springfield facility rather than through the Indianapolis facility which had previously serviced them. See *Stroehmann Bakeries*, 318 NLRB 1069 (1995).

However, the Company contends that the evidence preponderantly shows "(1) that labor costs (direct and/or indirect) were not a factor in the decision or (2) that even if labor costs were a factor in the decision, the union could not have offered labor cost concessions that could have changed the employer's decision to relocate" (*Dubuque Packing*, *supra*, 303 NLRB at 391). I disagree.

Thus, the Company contends (Br. pp. 239–240) that "by condensing a branch's delivery area and reducing overlap, the Company can significantly improve its operating efficiency both in terms of asset utilization and customer service. These efficiencies are related solely to geographic factors such as the distance between the branch and the customer and the concentration of customers in the area, and are unaffected by labor costs. In other words, lowering labor costs would do nothing to eliminate the inefficiencies identified by the Company." However, Copresident Thomas Wake testified that economic efficiency related to the cost of operating the truck that travels from the warehouse facility to the customer, and that such costs include the labor costs associated with the driver operating the truck. See *Rock-Tenn Co.*, 319 NLRB 1139 *fn.* 2 (1995). Moreover, although he testified that the Company had "an objective given the capabilities of the branch" to have just one warehouse make deliveries to all customers in the Indianapolis area, when the Union inquired about the Springfield warehouse's servicing of a particular customer 5 miles from the Indianapolis warehouse, Golden by his own admission advanced as the reason the fact that Springfield had serviced this customer (at least 155 miles away) before the Company had acquired the Springfield facility. Furthermore, the work transferred from Indianapolis to Springfield included servicing a Bowling Green customer which was closer to Indianapolis than to Springfield. Also, the Company's desire to achieve prompter service was related to the relative skills of the Indianapolis and the Springfield employees. Thus, although the transfer of the Super Value account from the Springfield warehouse (20 minutes away) back to the Indianapolis warehouse (more than 3 hours away) required the Indianapolis warehouse to resume stocking cigarettes stamped for Ohio, Kentucky, and West Vir-

<sup>203</sup> Moreover, although the Company at least implies that its pretransfer calculation of savings turned out to be accurate, the Company did not submit any evidence showing how much (if anything) was saved.

<sup>204</sup> This figure does not include the April Super Value transfer, which was rescinded in mid-June.

ginia, Thomas Wake testified that this transfer back was effected because the Springfield day warehouse crew “didn’t function well enough”; such considerations constitute “labor costs” within the meaning of *Dubuque Packing*.<sup>205</sup> Indeed, as early as November 4, 1993, almost 2 months before the closing date of the sale, the Company acknowledged to the Indianapolis employees that as compared with the present Springfield work force, they had the advantage of “a working knowledge of [the Company’s] systems, policies, and procedures.” I note, moreover, that as suggested by Super Value’s return to Indianapolis and the testimony of Arnie Ray Goens as to certain customer-restricted delivery times (supra, part V,A,I,c,(4)), employees may be more aware than management as to picking and delivery problems which are peculiar to particular customers and do not appear on company records. Adjustment of work allocations in light of such problems is amenable to the collective-bargaining process. See *Torrington*, supra, 307 NLRB at 811. Nor does the Company’s failure to ask the Union for wage concessions in order to keep the work in or transfer it back to Indianapolis indicate that labor costs were irrelevant to its position. The Company withdrew recognition from the Union about August 1993, well before deciding to transfer the work; the Company did not even arguably resume recognition until March 9, 1994, several weeks after deciding to transfer the work; and the Company could not concomitantly conceal the work transfer from the Union (as the Company chose to do until the transfer had been completed) and propose wage concessions to keep the work in Indianapolis.

Furthermore, the Company has plainly failed to show by a preponderance of the evidence that the Union could not have offered labor cost concessions that could have at least partly changed the Company’s decision to transfer the work. Rather, the Company offered no evidence whatever as to the amount of money (if any) which it saved, or anticipated saving, in consequence of the transfers from Indianapolis to Springfield; and offered very little evidence as to the relative promptness of deliveries before and after the transfer. As to the possibility of such concessions, no inference can be drawn from the Union’s wage proposals in April 1994, because during this period the Company was untruthfully representing that no work transfers had taken place or were planned. Nor can any inference be drawn from the Union’s subsequent position as to wages, in view of the Union’s belatedly acquired knowledge that the work had already been transferred; manifestly, failure to make wage concessions in an effort to bring about the return of work does not preponderantly establish unwillingness to make the (probably) lesser wage concessions necessary to prevent the transfer of such work in the first place.

For the foregoing reasons, I conclude that the transfer of work from the Indianapolis to the Springfield facility constituted a mandatory subject of collective bargaining. The absence of layoffs in consequence of the work transfer does not render it a nonmandatory subject of collective bargaining, in view of the consequent substantial diminution in the size of the unit,<sup>206</sup> the fact that the work transfers limited the Indianapolis

<sup>205</sup> *Furniture Rentors of America*, 311 NLRB 749, 751 (1993), enfd. in part and remanded in part 36 F.3d 1240 (3d Cir. 1994); *Torrington Industries*, 307 NLRB 809, 811 (1992); and *Stroehmann Bakeries*, supra, 318 NLRB 1069.

<sup>206</sup> See *Auto Workers (General Motors Corp.) v. NLRB*, 381 F.2d 265, 266 (C.C. Cir. 1967), cert. denied 389 U.S. 857 (1967); *Painters*

drivers’ choice of routes (whose individual characteristics virtually controlled the days of the week and the times of the day when, and the geographical areas where, the drivers worked), and the fact that in connection with the work transfers some Indianapolis unit employees moved to Springfield, without moving expenses and to jobs and at pay rates undisclosed by the record. Although the Company does not dispute that the effects of this decision on employees constituted a mandatory subject of collective bargaining,<sup>207</sup> the Company contends that the Union effectively waived its right to bargain in 1994 about both the 1994 decision and its effects, by virtue of the Union’s agreement in the 1990–1993 contract that “[i]t shall not be considered a violation of [the subcontracting clause] if the Company, in order to better serve the needs of the business, removes work currently performed by employees covered by this Agreement and reassigns the work to employees of other operations of [the] Company so long as no employees are laid off as a result of such reassignment.” However, because the 1990–1993 contract had expired by its terms, this clause could not effectively waive the Union’s right to bargain about such matters in 1994. *Furniture Rentors*, supra, 311 NLRB at 751, 36 F.3d at 1245.<sup>208</sup>

*d. Whether the Company violated Section 8(a)(5) and (1) of the Act by unilaterally transferring the work from Indianapolis to Springfield without giving the Union prior notice and an opportunity to bargain about the decision to transfer and about its effects on employees*

As shown supra, part V,F,13,c, the Company’s decision to transfer work from the Indianapolis to the Springfield facility was a mandatory subject of collective bargaining. As also shown supra, part V,F,13,c, regardless of whether the decision to transfer was a mandatory subject, the effects on employees of the transfer were a mandatory subject. Accordingly, the Company could not lawfully effect such a unilateral transfer without the Union’s being afforded prior notice and an opportunity to bargain about the decision and its effects. *Wil-Kil*, supra, 440 F.2d at 375; *Jay Henges Enterprises v. NLRB*, 14 F.3d 1258, 1261 (8th Cir. 1994); and *John R. Cowley & Bros., Inc.*, 297 NLRB 770 (1990). The credible (and mostly undisputed) evidence shows that the Company gave the Union no notice whatever, before actually transferring the work, about any plans to transfer; indeed, while the transfers were in progress and before they had been concluded, the Company repeatedly made untruthful representations to the Union that no transfers were being effected or had been finally decided on. However, the Company contends

*District Council 51 (Manganaro Corp., Maryland)*, 321 NLRB 158 (majority opinion), 171 (dissenting opinion) (1996).

<sup>207</sup> *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 678 fn. 15 (1981).

<sup>208</sup> In so concluding, both the Board and the court of appeals relied on *Control Services*, 303 NLRB 481, 484 (1991), enfd. 961 F.2d 1568 (3d Cir. 1992). Without referring to either the 1993 or the 1994 opinions in *Furniture Rentors*, supra, the Company’s January 1995 posthearing brief seeks to distinguish *Control Services*, supra, by arguing (1) that the alleged waiver clause in *Control Services* was less specific as to subject matter than is the instant clause; and (2) that *Control Services* erred in relying on a case where a successor employer which had not adopted the predecessor’s labor agreement sought to defend its own unilateral action by citing the management-rights clause in that agreement. Distinction 2 was not present in *Furniture Rentors*; and I make no finding as to the effect of the relied-on clause during the term of the contract. See also *Blue Circle Cement Co.*, 319 NLRB 954 (1995).

that its concealment and misrepresentations at the bargaining table are immaterial to the legality of its conduct in connection with the transfers, on the ground that unit employees gave the Union prior notice of the transfers—in other words, that the Company was excused from its bargaining obligations because the Company's misrepresentations may have led the Union to believe that the employees were mistaken. The difficulty with the Company's reliance on the employees' reports is that almost all these reports were indeed mistaken; more specifically, although all of these reports predated the transfers, almost all of them erroneously stated that work was already in the process of being transferred.<sup>209</sup> The only exceptions were November 1993 reports to Buhle and Union Steward Arnie Ray Goens by unit employee Teresa Goens (his wife, who became the Union's alternate steward about March 1994) that in mid-November 1993, Day Warehouse Manager Kramer had said that the Company had bought out Bosart, the Springfield branch formerly owned by Bosart was close to Super Value, and the Super Value account was going to be moved and serviced out of the Springfield branch. This piece of information did in fact turn out to be accurate. However, it involved only a part of the transfers which were effected, the decision to make these transfers was not reached by top management until 3 months or more after Line Supervisor Kramer's remarks to Teresa Goens, the April 1994 Super Value transfer was not effected until 5 months after Kramer's remarks (and was later rescinded), and in April 1994 the Company assured the Union's representatives (including Teresa Goens) that no transfers had been effected or finally decided on. In view of the inaccuracies in the employees' reports to the Union regarding work transfer, and the Company's concealment of and misrepresentations about what transfers were really planned and were really occurring, the Union's failure to request pretransfer bargaining about the decision to transfer and its effects did not constitute a waiver of the Union's right to bargain about such matters. See *Porta-King*, supra, 14 F.3d at 1262–1263. Moreover, because the Union failed to receive prior notice of the transfers, the Company's unilateral conduct was not cured by the Union's failure to request bargaining about the decision, and its effects, after the Company had completed all the transfers and then accurately told the Union about them. *Walker Construction Co.*, 297 NLRB 746 (1990), enfd. 928 F.2d 695 (5th Cir. 1991); *John Cowley*, supra, 297 NLRB at 771; *Dow Jones & Co.*, 318 NLRB 574 (1995); *Gannett Co.*, 319 NLRB 215 (1995), supplemental decision 321 NLRB 602 (1996); *Migali Industries*, 285 NLRB 820, 821 (1987).<sup>210</sup> Nor do I attach any legal significance to the Union's failure to file a grievance upon receiving inaccurate

<sup>209</sup> Patricia Reynolds testified that since late 1992 baseless rumors had been circulating in the plant that the Indianapolis facility was going to close or was going to move to Kansas City, Arizona, or Ohio. Jones testified that beginning 2 or 3 months before the 1993 election, he had heard rumors that the Company was going to close the Indianapolis facility and move to Springfield; on occasion, the rumors were conditioned on the Union's winning the election.

<sup>210</sup> Because both the Company and the Union were proposing a bargaining agreement retroactive to August 1993 and encompassing the dates of the March 28–May 9, 1994 work transfers, the April 22–June 1, 1994 discussions regarding art. XXI of the expired agreements, severance pay, transfer rights, and the Union's proposals for a minimum employee guarantee and reinstatement offers to all employees separated or transferred after 1992, as a practical matter dealt with the work transfer and effects issues; see supra, part V,F,7–11, infra, part V,G. However, the Union could not have realized this until the Company advised it on May 10 that the transfers had occurred.

information that transfers had occurred. The Company withdrew recognition from the Union in August 1993; and, when meeting with the Union in March and April, told the Union that no transfers had occurred.

For the foregoing reasons, I find that the Company violated Section 8(a)(5) and (1) of the Act by unilaterally transferring unit work from the Indianapolis facility to the Springfield facility, without the Union's having been afforded prior notice and an opportunity to bargain about the decision to transfer and its effects on unit employees.

*G. The Company's Alleged Unlawful Failure and Refusal to Recognize and Bargain with the Union, in and after March 1994*

As previously found (supra, part V,D,2), the Company unlawfully withdrew recognition from the Union about August 1993. Moreover, the Company did not thereafter even purport to recognize the Union until March 1994. I agree with the General Counsel that the Company continued to violate Section 8(a)(5) in and after March 1994.

The Company admittedly withdrew recognition from the Union in about August 1993 and (so far as the record shows) made no subsequent effort to communicate with the Union, about negotiating a new contract to replace the contract which had expired in August 1993, until March 1994. Meanwhile, by late February 1994, the Company had decided to transfer certain unit work from the Indianapolis to the Springfield facility. However, unless the Union first relinquished its right to bargain about the transfers, either by failing to accept a company offer to bargain or by agreeing to a contractual waiver, the work transfers might expose the Company to a Board order requiring that the work be transferred back to Indianapolis, and to a make-whole order for the benefit of, inter alia, any Indianapolis employees who had lost work by reason of the transfer to Springfield. See the discussion infra, under "The Remedy."

Before the parties had agreed to an April 22 meeting, the Company advised the Union that unless it took the Company up on its offer to meet, "it [would] be assumed" that the Union did not desire to negotiate for a new contract—in short, that the Union had waived bargaining rights which it otherwise would have had. Moreover, the Company took action which would tend to discourage the Union from asserting such rights or (if the Union did assert them) aggressively pursuing and persisting in negotiations—namely, untruthfully advising the Union that the Company was going to close most of the Indianapolis operation, withholding from the Union the Company's plan to transfer more than 27 percent of the Indianapolis work to Springfield, and emphasizing that any contract agreed to would become void if and when the July 1993 election results were certified.

From these circumstances and the Company's unwavering insistence on omitting from a new and retroactive contract the entire clause (art. XXI) which in the expired agreement had limited the Company's right to transfer work between facilities, I infer that the Company's initiation of contract discussions was at least largely motivated by a desire to protect itself from any NLRA-generated liability for the work transfers which the Company was about to begin. In order to improve its chances of obtaining a retroactive waiver of work—transfer claims, the Company withheld from the Union the fact that work had already been transferred, and untruthfully represented that the Company had no specific plans to transfer work in the future.

Furthermore, when Chestnut asked the Company's representatives (including Golden and Patricia Reynolds) about a possible shutdown of the Indianapolis facility (inquiries which were almost certainly generated by Golden's inaccurate March 9 representation that the Company planned such a shutdown, except for a shuttle garage), no company representative revealed to the Union that no shutdown plans existed, although this was admittedly known by Reynolds, at least. Instead, by at least implying that such a shutdown was under consideration, by insisting on unrestricted freedom to transfer unit work, and by rejecting the Union's proposals for work-transfer restrictions, for a minimum employee complement, and for severance benefits, the Company left the Union with a seeming choice between agreeing to an unfavorable contract in order to diminish the prospect of a shutdown, or abandoning contract discussions (as the Union eventually elected to do) because the prospect of a shutdown rendered them futile. Moreover, far from attempting to remedy the preelection and post-election unfair labor practices which preceded the April-June 1994 discussions with the Union, the Company chose to exacerbate unlawful conduct directly impinging on the Union's bargaining rights. Thus, after unlawfully and unilaterally limiting Business Representative Buhle's access to the facility before the election, and unlawfully denying such access after August 1993, the Company sought to perpetuate at least some of such unlawfully imposed limitations by incorporating them into a new bargaining agreement on the tendered ground that they had been followed in practice. Also, although the pending complaint attacked the Company's unlawful restrictions on off-duty employees' access to company property, the Company adhered to a proposal (rejected by the Union) that this rule be incorporated into a new contract, with modifications which did not affect the unlawful aspects of the rule. In addition, the Company advanced and adhered to a proposal which would have exposed Union Steward Douglas Jones, whose discriminatorily imposed probationary status while he was participating in contract discussions was due to expire in a few weeks, to about 2 more years of vulnerability flowing from the 1993 absenteeism occurrence into which the Company had discriminatorily entrapped him. Finally, the Company encouraged the Union to believe that discussion was futile, by giving grudging and equivocal responses to the Union's repeated requests for clarification of the status which the Company was affording the Union. Although the Company advised the Union that a failure by the Union to reply to the Company's proposal for a meeting would cause the Company to assume the Union did not want to negotiate over a new contract, the Company's letters proposing such meetings stated that the Company believed that because of the July 1993 election the Union should be decertified, and that negotiations were to be viewed as "without prejudice" to this position. Moreover, at the outset of the first meeting pursuant to the Company's March 22, 1994 letter, Golden gratuitously asserted that any contract agreed to would be tentative pending resolution of the charges, and would be null and void if the results of the decertification election were upheld, as (according to the Company) they should be. The Company's wistful reference to an eventual voiding of any contract to be negotiated could not have been intended to convey any new procedural information to the Union, which must have known that this would be the effect of validating the decertification election.<sup>211</sup>

<sup>211</sup> See *RCA Del Caribe, Inc.*, 262 NLRB 963, 966 (1982).

However, when viewed in light of the Company's refusal to make even a pretense of recognizing the Union during the preceding months, such a statement, and the Company's expressions of adherence to its claim that the election was valid, add weight to my inference that during the March-June 1994 meeting the Company failed to fulfill its duty to bargain in good faith. See *Brooks, Inc.*, 228 NLRB 1365, 1366-1367, *enfd.* in relevant part 593 F.2d 936 (10th Cir. 1979); *Parents & Friends of the Specialized Living Center*, 286 NLRB 511 (1987), *enfd.* 879 F.2d 1442 (7th Cir. 1989) (citing *Brooks* with approval, 879 F.2d at 1455).

#### CONCLUSIONS OF LAW

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

(a) Telling employees, through Day Warehouse Manager Michael Kramer, that it had called in the police, was going to press charges, and intended to take other actions against employees, because the stickers which they had affixed to a public stop sign urged a vote in favor of the Union.

(b) Telling employees, through Copresident Thomas Wake, that the reason they had no retirement plan was that the Company had spent so much money in fighting grievances.

(c) Promising employees, through Copresident Thomas Wake, that the Company will give preferential treatment to employees who supported the Company by opposing the Union.

(d) Telling employee Teresa Goens, through Copresident Thomas Wake, to choose between perceived continued discrimination based on union activity and quitting her job with the Company.

(e) Telling employee Beverly Wilke, through Copresident Thomas Wake, to choose between describing the Union in favorable terms and remaining in the Company's employ.

(f) Telling employees, through Day Warehouse Manager Michael Kramer, that the Company had spent so much money on the decertification campaign that the Company did not have anything to sit down at the bargaining table with.

(g) To the extent that such prohibition extends to employees' presence for the purpose of engaging in activities protected by Section 7 of the Act, maintaining and enforcing a rule which, with respect to areas other than in company buildings and in working areas, prohibits off-duty employees' presence on company property.

(h) Telling employees, through Day Warehouse Manager Michael Kramer, that they could not pass out union hats or buttons on company premises.

(i) Telling employee Beverly Wilke, through Night Warehouse Manager Michael Grigdesby, that she could not distribute union literature anywhere on company property at any time.

(j) Telling employee Beverly Wilke, through Night Warehouse Manager Michael Grigdesby, that she was not allowed to distribute union literature anywhere in the building.

(k) Telling employee Douglas Jones, through Night Warehouse Manager Michael Grigdesby, that Jones could not pass out union literature on company property or company time.

(l) Through Day Warehouse Manager Michael Kramer, telling off-duty employees who were distributing union handbills

in nonworking outdoor areas on company property that they could not distribute handbills on company property.

(m) Through Day Warehouse Manager Michael Kramer, asking employees who were engaged in protected union hand-billing whether they wanted their names to be submitted to the police.

(n) Through Day Warehouse Manager Michael Kramer, calling the police because employees were engaged in protected union handbilling.

(o) Prohibiting employees from wearing union insignia on their individually owned back belts and on company-owned back belts issued to the employees for their use.

(p) Telling employee Donald Hall, through Driver Manager Paul Lodies, that Hall had received a low bonus because of his union activity.

(q) Through Night Warehouse Manager Michael Grigdesby, telling employee Douglas Jones that he was receiving a reduced evaluation because of his union activity, and soliciting him to resign his employment because of such activity.

(r) Through Personnel Director Stephen Reynolds, telling employee Douglas Jones that he was being denied disability pay because of his protected union activity, and soliciting him to resign because of such activity.

(s) Blaming the Union for possibly preventing or delaying past and future wage increases by filing charges and election objections with the Board.

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

(a) Reprimanding employees Randy Jewell, Danny Rakes, and Douglas Jones on the ground that they had put the Union's name on the back belts which the Company had issued to them.

(b) Requiring employee James Edmond Sr. to go home during worktime, but without pay, to replace his individually owned back belt (which bore the Union's name) with the one provided to him by the Company.

(c) Withholding a bonus from employee Arnie Ray Goens in August 1993.

(d) Lowering the August 1993 bonus given to employee Donald Hall.

(e) Increasing the bonuses paid in August 1993 to employees Robert Burnett, Mark Mayfield, and Clyde Erwin.

(f) Transferring employee Arnie Ray Goens to new routes in August 1993.

5. The Company has violated Section 8(a)(1), (3), and (4) of the Act by engaging in the following conduct with respect to employee Douglas Jones:

(a) Lowering his July 1993 evaluation, and withholding a bonus from him in August 1993.

(b) Issuing disciplinary documents to him dated September 15, 16, 17, 20, and 23, 1993.

(c) Laying him off between September 28–30 and October 11–14, 1993.

(d) Denying him disability pay between September 27 and November 2, 1993.

(e) Telephoning his doctor, and then directing Jones to return to work, on November 2, 1993.

(f) Giving him onerous work assignments effective November 2 and November 8–December 16, 1993.

(g) Transferring him between shifts on November 8, 1993.

(h) Denying him a 40-hour week between December 27, 1993, and June 7, 1994.

(i) Determining the existence of an attendance occurrence on December 27, 1993.

(j) Putting him on attendance probation between December 27, 1993, and June 27, 1994.

6. The following employees of the Company constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All delivery men, warehousemen, janitor(s) and maintenance employees employed by the Company at its Indianapolis, Indiana, facility; but excluding salesmen, vending machine department employees, office clerical employees, and all guards, professional employees and supervisors as defined by the Act.

7. At all material times, the Union has been the exclusive collective-bargaining representative of the unit, pursuant to Section 9(a) of the Act.

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

(a) In April 1993, by unilaterally changing the conditions under which Union Business Representative Brian Buhle could obtain access to the facility, without giving the Union prior notice and an opportunity to bargain.

(b) In September 1993, by unilaterally withdrawing Union Business Representative Brian Buhle's access to the facility, without giving the Union prior notice and an opportunity to bargain.

(c) At all times after about late August 1993, by withdrawing recognition from and failing and refusing to bargain with the Union.

(d) In March, April, and May 1994, by unilaterally transferring work out of the unit, without giving the Union prior notice and an opportunity to bargain about the decision and its effects.

9. The unfair labor practices set forth in Conclusions of Law 3–5 and 8 affect commerce within the meaning of Section 2(6) and (7) of the Act.

10. The Company has not violated the Act in the following respects:

(a) The Company has not violated the Act by interrogating employee Larry Thomas Benefiel Jr.

(b) The Company has not violated the Act by increasing the number of its surveillance cameras in response to its employees' union activities.

(c) The Company has not violated the Act by increasing the August 1993 bonus paid to employee Teresa Deutscher.

(d) The Company has not violated the Act by telling employee Arnie Ray Goens that because of his "attitude" he was not receiving a bonus.

(e) The Company has not violated Section 8(a)(5) of the Act by dealing directly with employees in the unit.

(f) The Company has not violated Section 8(a)(3) of the Act by transferring work out of the bargaining unit in March, April, and May 1994.

#### THE REMEDY

Having found that the Company has violated the Act in certain respects, I shall recommend that the Company be required to cease and desist from such conduct, and from like or related conduct, and to take certain affirmative action necessary to effectuate the policies of the Act.

Thus, the Company will be required to rescind the unlawful portions of its rule limiting off-duty employees' access to com-

pany property. Moreover, in order to remedy the Company's action in discriminatorily paying antiunion employees higher August 1993 bonuses than they would otherwise have received, the Company will be required to pay every employee who was eligible for consideration for a bonus in August 1993 (including but not limited to Arnie Ray Goens, Douglas Jones, and Hall) the difference between the bonus (if any) he in fact received and \$850, the highest amount received by an employee because of his antiunion activity. *Aero-Motive Mfg. Co.*, 195 NLRB 790, 793 (1972), enfd. 475 F.2d 27 (6th Cir. 1973), cert. denied 414 U.S. 922 (1973); *Rubatex Corp.*, 235 NLRB 833, 835-836 (1978), enfd. 601 F.2d 147 (4th Cir. 1979), cert. denied 444 U.S. 928 (1979).<sup>212</sup> In addition, the Company will be required to make employees James Edmond Sr. and Arnie Ray Goens whole for any loss of pay (including, as to Edmond, transportation expenses) they may have suffered by reason of the discrimination against them. Also, the Company will be required to make employee Douglas Jones whole for any loss of pay (including, but not limited to, bonuses for 1994 and disability pay) he may have suffered by reason of the Company's discrimination against him between September 15, 1993, and June 26, 1994. In addition, the Company will be required to remove the following documents from the employees' personnel records, and advise the respective employees in writing that this has been done and that the material set forth in these documents will not be held against them in any way: (a) the reprimands issued on March 31, 1993, to Randy Jewell and Danny Rakes and the May 11, 1993 letters referring thereto; (b) the evaluations issued in July 1993 to Arnie Ray Goens and Donald Hall; and (c) the following documents with respect to Douglas Jones: (1) his March 31, 1993 reprimand and the May 11, 1993 letter referring thereto; (2) his July 1993 evaluation; (3) the disciplinary documents issued to him dated September 15, 16, 17, 20, and 23, 1993; (4) any record of his layoffs between September 28-30 and October 11-14, 1993; (5) any record of his having an absenteeism occurrence on December 27, 1993; and (6) any record of his being on attendance probation between December 27, 1993, and June 26, 1994. Also, the Company will be required, on request by the Union, to afford union representatives the same access to the facility which they were afforded as of March 1993. I find unmeritorious the Company's seeming contention that as to access, such an order is rendered inappropriate by the 1994 negotiations about this matter. During these negotiations, the parties' eventual agreement to memorialize in the bargaining agreement the access practice which had in fact been followed was rendered nugatory by the parties' inability to agree on what that practice had been, and this inability was due in significant part to the Company's April 1993 unlawful unilateral change in its access procedures and the Union's noncompliance therewith.

In addition, the Company will be required, on request by the Union, to transfer back to the Indianapolis facility the work which was transferred to the Springfield facility between March 1994 and May 1994. Where (as here) an employer has unilat-

erally transferred work out of the bargaining unit, in violation of Section 8(a)(5) and (1) of the Act, restoration of the status quo ante (at least on the bargaining representative's request) is prima facie appropriate, and the burden is upon the employer to demonstrate that such a requirement is not appropriate, whether because such a requirement would be unduly burdensome or for some other reason. See *Stroehmann Bakeries*, supra, 318 NLRB 1069; and *N.C. Coastal Motor Lines*, 219 NLRB 1009 (1975), enfd. 542 F.2d 637 (4th Cir. 1976). The Company has failed to discharge that burden.

Thus, when sizable customer Super Value threatened to take its business to another firm unless the Company transferred the servicing of the Super Value account from Springfield back to Indianapolis within 1 week, the Company effected the transfer within the prescribed period. Moreover, the March 4 memorandum (not received by the branch managers until several days thereafter) called for transfers of work from Indianapolis to Springfield to begin on March 28, and contemplated that Indianapolis volume would decrease 20 percent in consequence of the transfers to occur over that 1 week, even though virtually simultaneous transfers were projected from Springfield to Ypsilanti. Furthermore, that memorandum contemplated that each of the first two phases of the transfers (including those from Springfield to Ypsilanti) would take place during respective periods of less than a week. Moreover, Copresident Thomas Wake testified that transfers of work between branches is "fairly common. We've freely made transfers throughout the history of the Company," and that it was not unusual for the Company to shift the servicing of a particular store from one branch to the other. Also, Company Attorney Golden testified that during the April 22 meeting, when the Union pointed out that the Springfield facility was continuing to service a customer which had been acquired from Bosart and was located 5 miles from the Indianapolis facility, he replied that "a reorganization of how customers would be serviced is always an ongoing process for the Company."

In addition, the transfers did not lead to any capital expenditures or divestments, so far as the record shows; the Company's improvements and additions to the Springfield facility were planned before the closing date (Dec. 30, 1993) of the purchase contract and had begun about 2 months before Copresident Thomas Wake decided in late February 1994 on the work transfers from Indianapolis to Springfield, and the Company leases all of its trucks; indeed, there is no evidence or claim that the transfers caused the Company to lease fewer trucks than it had leased before. Although the transfers from Indianapolis to Springfield did enable the Company to stop leasing the Hilliard shuttle garage, the signing of a lease with a shorter term does not constitute capital divestiture; moreover, because the Hilliard garage operations involved mostly nonunit employees, the Union might be agreeable to accepting (instead of the pretransfer Hilliard work) the transfer from Springfield to Indianapolis of servicing customers who had been serviced by Springfield under Bosart but were in fact closer to Indianapolis.

Finally, because before the transfers the Indianapolis facility was in fact servicing the customers whose servicing was transferred to Springfield, and in view of Patricia Reynolds' October 1994 testimony that the Company was then soliciting new business for the Indianapolis facility, I infer that the Indianapolis facility would be able to resume servicing its former customers if the work was returned to Indianapolis. The testimony cited by the Company in its brief, about the full utilization of the

<sup>212</sup> As the Board said in *Aero-Motive*, supra, 195 NLRB at 793:

Rescission would appear to be inappropriate and impractical. . . . The only practical method, therefore, of restoring the statutorily required equality of treatment as between employees who engaged in concerted activity and those who refrained therefrom is to require the payment of an equivalent amount to the employees who did engage in the concerted activity and who were denied the payment.

Indianapolis warehouse, relates to the period before the transfers; the evidence shows that after the transfers, vacant space existed in the Indianapolis warehouse.<sup>213</sup> It is true that Patricia Reynolds testified that return of the work to Indianapolis would require some reprogramming of the Company's Indianapolis computer, would cause partly empty trucks to be sent from Indianapolis, and might cause the loss of some customers owing to the Company's inability to continue next-day delivery. However, the Company has failed to quantify its anticipated reprogramming or partial-load costs, some reprogramming costs would appear to be required by the Company's "fairly common" interbranch transfers for reasons unrelated to remedying unfair labor practices, and there is no evidence that any of the customers serviced from Indianapolis before the work transfers had expressed a desire for next-day service.<sup>214</sup>

Contrary to the Company (Br. 285), the record fails to show that the Company's unilateral transfer of bargaining unit work to Springfield has caused no "harm . . . to any member of the bargaining unit" at Indianapolis. As to the bargaining unit employees who transferred to Springfield in consequence or anticipation of the transfer of work to Springfield (the record shows that there were some, although not how many), the record fails to show whether their Springfield wages and working conditions equaled those at Indianapolis, or whether they would have changed their residences (particularly because they had to pay their own moving expenses) if assured of job security at Indianapolis. Moreover, the work transfers diminished the route choices available to the Indianapolis drivers, whose starting and quitting hours, days off, and work locations were virtually controlled by the particular routes they drove. Further, "the change had an adverse impact on the bargaining unit since it diminished [by 20] the whole number of jobs performed by [unit] members" (*General Motors*, supra, 381 F.2d at 266). Moreover, the Company's reliance on the absence of unit lay-offs overlooks the fact that "the real injury is . . . to the union's status as bargaining representative, and it would be difficult to translate such damage into dollars and cents" (*NLRB v. C & C Plywood Corp.*, 385 U.S. 421, 429 fn. 15 (1967)). The Company's unlawful conduct in connection with the transfer has aggravated the pressures which the Company's other unfair labor practices exerted against employee support of the Union; the Company's conduct advised the unit employees that the Union would not even be afforded the opportunity to express its views before the Company decided to transfer more than 27

<sup>213</sup> Teresa Goens credibly testified that when she resigned from the Company's employ in August 1994, the area which had been used for back cigarette stock was almost completely empty, and there was "a lot of room" for storage in the Indianapolis warehouse. Kramer testified in September 1994 that since March 1994, about 10 percent of the Indianapolis warehouse storage space was not being utilized; that the warehouse could handle additional product "if need be"; and that although no more storage space could be provided, the existing storage space could be reconfigured to put in more product. Although in September 1994 Thomas Wake testified to the opinion that the Indianapolis warehouse did not have enough room to stock the proprietary items which the Company had to carry for the Bosart locations which the Company began to service in January 1994, this evidence is irrelevant to whether it would be unduly burdensome to require the Company to restore to the Indianapolis warehouse the work which the Company had performed there before March 1994.

<sup>214</sup> Indeed, as noted supra, part V,A,c,(4), none of the customers on driver Arnie Ray Goens' overnight route before August 1993 had requested next-day delivery service.

percent of the bargaining unit work and to invite Indianapolis employees who were "interested" in "possible relocation" to Springfield to consult the branch personnel manager. Nor should the Company be permitted to keep the unlawfully transferred work in Springfield because its return to Indianapolis might cause some Springfield workers to lose their jobs, at least if the Company decides to keep in Ypsilanti the work transferred there from Springfield in connection with the transfer of work from Indianapolis to Springfield. The welfare of innocent beneficiaries of unlawful conduct cannot properly be preferred over the legal rights of its innocent victims. See *Aguayo v. Tomco Carburetor Co.*, 853 F.2d 744, 750 (9th Cir. 1988). Moreover, the Company's return of work from Springfield to Indianapolis would not preclude it from similarly transferring Springfield employees.

In addition, the Company will be required to bargain with the Union, on request. Laying to one side, for the moment, the Company's other unfair labor practices, such an order is called for by the Company's failure to continue recognizing and bargaining with the Union during the pendency of the Union's objections to the election; see *Angelica Corp.*, 276 NLRB 617, 617 fn. 2 (1985).<sup>215</sup> The reasons for such an order are articulated in *Krueger*, supra, 299 NLRB at 915-918, and *Presbyterian Hospital in the City of New York*, 241 NLRB 996, 998 (1979); briefly, such an order furthers industrial relations stability while the Board determines whether the seeming employee choice was freely made, and discourages the employer from acting prematurely on the basis of an unreliable tally and from engaging in preelection unfair labor practices which would render the tally unreliable.<sup>216</sup> My finding that during the March-June 1994 meetings the Company failed to comply with its bargaining obligations renders unsupportable the Company's contention that a bargaining order is rendered inappropriate by the Company's and the Union's conduct during these meetings. In any event, the Union's bargaining power during these meetings had been undermined by the Company's prior unfair labor practices, which have never been remedied and some of whose

<sup>215</sup> Such an order issued in the case principally relied on by the company—*St. Agnes Medical Center*, 304 NLRB 146, 147-149 (1991).

<sup>216</sup> Although no affirmative bargaining order issued in either of these cases, in both of them the results of the decertification election, which the incumbent union lost, had been certified before the Board's order issued. The dissenting opinion in *Krueger*, supra, expressed the view that the Court of Appeals for the Seventh Circuit, where the Company's unfair labor practices took place, had rejected the conclusion that an employer is obligated to continue bargaining with an incumbent union pending disposition of the objections to a decertification election which the union lost and whose results were eventually certified. See 299 NLRB at 920 fn. 3, citing *Weather Shield Mfg. v. NLRB*, 890 F.2d 52, 60 fn. 5 (7th Cir. 1989), not cited in either of the posthearing briefs filed with me. In *Weather Shield*, the court found that the Board erred in sustaining the objections to the decertification election which the union lost, and concluded that this holding rendered moot the appropriateness of the Board's order to bargain while the case was pending. In the instant case, the objections to the election have been found meritorious. In any event, "The Board takes the view that an Administrative Law Judge's duty is to apply established Board precedent which the Supreme Court of the United States has not reversed, despite reversal of Board precedent by courts of appeals." *Ford Motor Co. v. NLRB*, 571 F.2d 993, 996 (7th Cir. 1978), aff'd. 441 U.S. 448 (1979) (but see *Pyramid Management Group*, 318 NLRB 607 (1995)). Because of the venue provisions of Sec. 10(e) and (f) of the Act, the identity of the court of appeals (if any) which reviews the instant case cannot be predicted.

substantive effects the Company's bargaining position sought to retain.

However, a bargaining order which thus remedies the Company's unlawful refusal to recognize the Union pending the certification of the results of an election pursuant to the decertification petition is a remedy separate and distinct from a bargaining order pursuant to *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 582, 610–616 (1969), to the exclusion of a rerun election. *Angelica*, supra, 276 NLRB 617 at fn. 2. *Gissel* itself dealt with the standards to be used in determining whether a bargaining order, or merely what the Court characterized as "traditional" remedies (e.g., a cease-and-desist and notice-posting order), were appropriate to remedy an employer's unfair labor practices which have invalidated an election loss by a nonincumbent union, where that union has demonstrated at least a one-time majority status by means of authorization cards. Nevertheless, the Board has applied such standards in determining whether to require the employer to discharge bargaining obligations beyond those owed to an incumbent union pending the results of a decertification election.<sup>217</sup> Moreover, consistent with the Board's practice as to a representation petition filed with respect to a nonincumbent union which has obtained a *Gissel*-type bargaining order after losing the election—namely, dismissal of the petition,<sup>218</sup> the Board will dismiss a decertification petition with respect to an incumbent union which has lost the election but obtains a bargaining order pursuant to *Gissel* standards. See *St. Agnes Medical Center*, supra, 287 NLRB 259–261; cf. the Board's supplemental decision, supra, 304 NLRB at 147–148.

In agreement with the General Counsel, I find that the instant case calls for a *Gissel*-type order and dismissal of the decertification petition. Thus, I conclude that this is a second-category *Gissel* case (see 395 U.S. at 611–615) in which the possibility of erasing the effect of past practices and ensuring a fair rerun election by the use of traditional remedies, though present, is slight and is outweighed by the considerations (here, including the Union's election victory some years ago) which generate the presumption of majority. In so finding, I give substantial weight to the Company's treatment of union steward/charging party Douglas Jones and Union Steward Arnie Ray Goens in light of Copresident Thomas Wake's statements to employees, who had been assembled by the Company for the very purpose of listening to antiunion speeches, that the Company wanted prounion employees to resign and would give preferred treatment to antiunion employees, that employees who believed themselves to be the victims of this discriminatory policy should resign, and that the Company had no retirement plan because of the expense of fighting grievances, as well as Night Warehouse Manager Grigdesby's expressed resentment at

Jones' having reported to the Board's Regional Office conduct by Grigdesby which constituted both unfair labor practices and objectionable conduct. In order to obtain pretexts for disciplining Jones and thereby putting him on absenteeism probation which exposed him to possible discharge, the Company used techniques which included lies, entrapment, deceptive concealment, and work assignments which it knew were in violation of his medical restrictions. Further, the Company underscored its reluctance to entertain grievances by unilaterally limiting (before the contract expired) the union business representative's access to the plant for that purpose, and underscored its opposition to Board processes by blaming the Union's resort to the Board (to secure redress of the Company's misconduct) for alleged disadvantages to employees. I do not think that the "traditional remedies" of a cease-and-desist order, excision of Jones' discipline, and a backpay order would suffice to erase from employees' minds the message that the Company was willing to use untruthful sworn testimony, misrepresentation, and other dishonest tactics in order to rid itself of (or, at least, punish) a union activist who was the only employee who signed a bulletin board notice stating that he wanted to act as night steward when that vacancy arose, and who had cooperated with the Board's Regional Office in order to obtain legal redress for the Company's unlawful action against himself and other employees, or to erase the Company's repeatedly evinced unwillingness to entertain grievances filed by or through the Union. Rather similarly, the union activity of the only other union steward in the facility (Arnie Ray Goens), caused him to receive a poor evaluation, and to be transferred over his protest from a route which he liked and which he had run for years, even though his evaluation said that he did a good job as a driver and did very well on his paper work. I conclude that such discrimination against union stewards will have the lingering effect of persuading the employees that union activists are subject to retaliation on false charges even if they do their jobs well, and that the Company's resentment at grievances presented through the Union will to that significant extent make collective representation useless. Also, and still in light of Company Copresident Thomas Wake's statement to assembled employees that preference would be given to antiunion employees, I do not think that the "traditional remedies" of a cease-and-desist and make-whole order will erase from employees' minds the message conveyed by the Company's discrimination in favor of antiunion and against prounion employees in connection with bonuses, which are given semiannually and for which most employees are entitled to consideration.

The likely continuing effect of the foregoing unfair labor practices is augmented by the Company's other, concomitant unfair labor practices. Thus, at all relevant times, the Company has maintained unlawful restrictions on off-duty employees' access to company premises for the purpose of engaging in union activity, and has unlawfully forbidden employees to distribute union literature during paid breaks. Moreover, prior to the election, the Company unlawfully told employees (usually, in groups) that they could not distribute union literature or paraphernalia on company property, unlawfully required employees (sometimes, in the presence of other employees) to refrain from such activity, and on one occasion responded to such activity by summoning the police (whose presence was visible to a number of employees) and by threatening to press charges. In view of the Company's repeated announcement of these restrictions to a large number of employees (on occasion,

<sup>217</sup> *Angelica*, supra; *St. Agnes Medical Center*, 287 NLRB 242 (1987), enfd. in part, reversed in part, and remanded in part 871 F.2d 137 (D.C. Cir. 1989), supplemental decision 304 NLRB 146 (1991). In short, as to this "separate and distinct" remedy, the Board affords to the union's incumbency status (whether based on a certification more than a year old, collective-bargaining agreements, or, as here, both) essentially the same weight which *Gissel* afforded to recent authorization cards. See *Gissel*, supra, 395 U.S. at 610–616; *Fall River Dyeing Corp. v. NLRB*, 482 U.S. 27, 37–39 (1987); *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 794–796 (1990); and *Auciello*, supra, 116 S.Ct. at 1758.

<sup>218</sup> See, e.g., *White Plains Lincoln Mercury*, 288 NLRB 1133, 1136–1140 (1988).

an entire shift) over a period of several weeks, the Company's inclusion (at all relevant times) of some of these restrictions in its written rules, and its open enforcement of such restrictions, I think it unlikely that their mere rescission would assure the employees that they are hereafter free to further a pronoun vote by engaging in union handbilling in nonworking areas when not expected to be actively working. In addition, the Company further purported to enlist the police in its unlawful campaign by telling the day warehouse employees, in effect, that the Company was going to call the police and press charges because stickers which employees had attached to a stop sign urged a pronoun vote. Also, the Company disciplined several employees for writing pronoun messages on the back belts issued to them, although an employee who wrote support for a local university on the back belt issued to him was not penalized, the Company instructed employees to write identification on the back belts issued to them and inked out such identification when an employee resigned and his back belt was assigned to a new employee, and the Company—while permitting employees to work without back belts—caused an employee to lose work time by requiring him to substitute a company-owned belt for a back belt owned by him which was indistinguishable from the company-owned belts but which bore the Union's name.<sup>219</sup>

Moreover, there is a significant possibility that the Company will continue to engage in unfair labor practices. Thus, the participants in the Company's June 1993–January 1994 unfair labor practices included persons at all levels of the Company's managerial hierarchy (from the Company's copresident to line supervisors) all of whom<sup>220</sup> were still on the Company's payroll at the time of the July–October 1994 hearing. Furthermore, the Company continued to engage in unfair labor practices after the Union lost the decertification election, and after receiving the initial complaint in the instant case. Nor has the Company made any effort whatever (so far as the record shows) to remedy any of the 8(a)(1), (3), and (4) violations in which these still-incumbent members of management engaged; indeed, during the April–June 1994 discussions with the Union, the Company sought to incorporate into a bargaining agreement the unlawful rule restricting off-duty employees' access to company property, a provision specifying discipline for violation of the no-solicitation/no-distribution rules which the Company had unlawfully enforced, and a provision which would have prolonged the effects of the Company's unlawful discrimination against steward Jones.

In determining whether to issue a *Gissel*-type order with respect to an incumbent union, the Board does not (at least ordinarily) give weight to employer action in withdrawing recognition, and engaging in unlawful unilateral conduct, after an election lost by the incumbent but before the results have been certified; see *Angelica*, supra, 276 NLRB 617. Accordingly, for

this purpose, such unlawful conduct by the Company will be disregarded here. However, analysis of the practical consequences of an *Angelica*-type order as compared to a *Gissel*-type order indicates that in determining which kind of order to issue, certain aspects of the Company's postelection 8(a)(5) conduct—namely, the role played by the pendency of the decertification petition—should be taken into account. If a *Gissel*-type bargaining order issues (and, consequently, the decertification petition is dismissed), a new decertification petition would be barred by a bargaining agreement reached during the compliance period. However, if an *Angelica*-type bargaining order issues (and, consequently, the decertification petition is merely held in abeyance), such a bargaining agreement would not bar an election pursuant to that petition.<sup>221</sup> As shown supra, part V,G, the fact that a second election pursuant to the decertification petition would not be barred by the new contract at least ostensibly under discussion between April and June 1994 not only was used as a tool by the Company to discourage the Union's pursuit of negotiations, but also contributed to their eventual collapse. Accordingly, there is some basis for apprehending that if the decertification petition is not dismissed, its pendency will inhibit the bargaining required by the Board's order.

For the foregoing reasons, I find that a *Gissel*-type bargaining order should issue here, and that the decertification petition should be dismissed. See *Texaco, Inc. v. NLRB*, 436 F.2d 520 (7th Cir. 1971), cert. denied 409 U.S. 1008 (1972); *NLRB v. Brown Specialty Co.*, 436 F.2d 372 (9th Cir. 1971); *NLRB v. Don's Olney Foods*, 870 F.2d 1279, 1285–1286 (7th Cir. 1989); and *Madison Industries*, 290 NLRB 1226 (1988). No different result is called for by the evidence that as of the close of the hearing on October 28, 1994, 11 of the 67 bargaining unit employees had not been employed by the Company when the decertification election was held on July 8, 1993; surely, these 11 might well be informed by the remaining 56 employees of the Company's postelection unfair labor practices. As the Court of Appeals for the Seventh Circuit stated in *Justak Brothers & Co. v. NLRB*, 664 F.2d 1074, 1082 (1981), enfg. 253 NLRB 1054, 1086 (1981), "If we were to accept the Company's contention, an employer could engage in a scheme of unfair labor practices and yet escape a bargaining order by delaying and waiting for employee turnover. *NLRB v. L. B. Foster Co.*, 418 F.2d 1, 5 (9th Cir. 1967), cert. denied 397 U.S. 990 (1970); *Chromalloy Mining & Mineral v. NLRB*, 620 F.2d 1120, 1132–1133 (5th Cir. 1980). We cannot allow this perversion of the Act's purpose." See also *Q-1 Motor Express*, 308 NLRB 1267, 1268 (1992), enf. 25 F.3d 473 (7th Cir. 1994); *Tufo Wholesale Dairy*, 320 NLRB 896 (1996). Nor is a different result called for by *St. Agnes Medical*, supra, 304 NLRB at 147–148, on which the Company principally relies. In *St. Agnes*, the union

<sup>219</sup> Although the unfair labor practices involving the back belts occurred before the decertification petition was filed, unlawful conduct does not have to occur after the filing of the decertification petition to be relevant to a determination of whether a *Gissel* order is appropriate. *Holly Farms Corp.*, 311 NLRB 273, 282 fn. 36 (1993), enf. 48 F.3d 1360 (4th Cir. 1995), aff. 517 U.S. 392 (1996).

<sup>220</sup> Except Assistant Night Warehouse Manager Troy Payne, who played a minor part in the discipline received by Jones on September 12 and 17, 1993 (supra, part V,B,2,a–b). The record fails to show whether Payne was a supervisor. However, former Indianapolis driver manager, Lodics, is now the driver manager at Springfield.

<sup>221</sup> See *City Markets*, 273 NLRB 469 (1984); *Hermet, Inc.*, 207 NLRB 671 (1973); *Mercy-Memorial Hospital Corp.*, 221 NLRB 1 (1975); *Automotive Supply Co.*, 124 NLRB 1380, 1381–1382 (1959); and *Armco Drainage & Metal Products*, 116 NLRB 1260 (1956). Dismissal of the instant petition would also require an employee who wished to file another decertification petition to undergo the labor, and possible expense, of obtaining a new showing of interest among the current employees. On the other hand, conduct of a second election pursuant to the instant petition, which was supported by a showing of interest already more than 3 years old, might cause the very kind of waste which the showing-of-interest requirement was designed to prevent (see *NLRB v. J. I. Case Co.*, 201 F.2d 597, 598–599 (9th Cir. 1953)). However, I regard these considerations as secondary to those discussed in the text.

steward's unlawful suspension had been rescinded before the hearing, and the employer's only postelection unfair labor practices consisted of withdrawing recognition from the union and engaging in unilateral conduct.

Also, the Company will be required to offer, to any unit employees who transferred from the Indianapolis facility to the Springfield facility in anticipation of or in consequence of the unlawful unilateral transfer of work, reinstatement at the Indianapolis facility to the job he performed there, or (if that job no longer exists), to a substantially similar job, together with his moving expenses from the Springfield to the Indianapolis area, without prejudice to his seniority or other rights previously enjoyed, and make him whole for any loss of pay (including moving expenses from the Indianapolis to the Springfield area) he may have suffered by reason of his transfer.

All sums due under this Order are to be paid with interest as called for by *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Backpay resulting from transfer from or other separation from the Indianapolis facility is to be calculated in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950).

In addition, the Company will be required to post appropriate notices. Because some of the employees who worked at the Indianapolis facility during the commission of the Company's unfair labor practices transferred to the Springfield facility, in consequence of or perhaps as a reaction to such unfair labor practices, such notices are to be posted at both facilities.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>222</sup>

#### ORDER

The Respondent, Eby-Brown Company L.P., Indianapolis, Indiana, its officers, agents, successors, and assigns, shall

##### 1. Cease and desist from

(a) Telling employees that it has called in the police, is going to press charges, and intends to take other action against employees, because the stickers which they had affixed to a public stop sign urged a vote in favor of Chauffeurs, Teamsters, Warehousemen and Helpers Local Union No. 135, a/w International Brotherhood of Teamsters, AFL-CIO.

(b) Telling employees that the reason they have no retirement plan is that the Respondent had spent so much money in fighting grievances.

(c) Promising employees that Respondent will give preferential treatment to employees who support Respondent by opposing Local 135.

(d) Telling employees to choose between perceived continued discrimination based on union activity and quitting their jobs.

(e) Telling employees to choose between describing Local 135 in favorable terms and remaining in Respondent's employ.

(f) Telling employees that Respondent had spent so much money on the decertification campaign that Respondent did not have anything to sit down at the bargaining table with.

(g) As to off-duty employees present on company property for the purpose of engaging in activities protected by Section 7 of the Act, maintaining and enforcing a rule, with respect to

areas other than in company buildings or working areas, which prohibits such employees' presence on Respondent's property.

(h) Telling employees that they cannot pass out union hats or buttons on company premises.

(i) Telling employees that they are not allowed to distribute union literature (1) anywhere on company property at any time; (2) anywhere in company buildings; or (3) on company property or company time.

(j) Telling off-duty employees who are distributing union handbills in nonworking outdoor areas on company property that they cannot pass out handbills on company property.

(k) Asking employees who are engaged in protected union activity whether they want their names to be submitted to the police.

(l) Calling the police because employees are engaged in protected union handbilling.

(m) Prohibiting employees from displaying union insignia on their individually owned back belts.

(n) Forbidding employees to display union insignia on company-owned back belts, while permitting employees to display other messages on such belts.

(o) Telling employees that they received low bonuses or evaluations because of their union activity.

(p) Soliciting employees to resign their employment because of their protected activity.

(q) Telling employees that they are being denied disability pay because of their union activity.

(r) Blaming Local 135 for possibly preventing or delaying past and future wage increases by filing charges and election objections with the Board.

(s) Disciplining employees; requiring them to go home without pay; withholding, lowering, or increasing employee bonuses; transferring employees to new routes; lowering employees' evaluations; laying employees off; denying them disability pay; transferring them between shifts; telephoning employees' doctors and then telling such employees to return to work; giving employees onerous work assignments; denying employees a longer work week; or otherwise discriminating with respect to hire or tenure of employment or any term or condition of employment, to discourage membership in Local 135 or any other labor organization.

(t) Lowering employees' evaluations; withholding bonuses from employees; disciplining employees; laying off employees; denying employees disability pay; transferring them between shifts; telephoning employees' doctors and then directing such employees to return to work; giving employees onerous work assignments; denying employees a longer work week; discharging them; or otherwise discriminating against employees; because they have filed charges or given testimony under the Act.

(u) Failing and refusing to bargain with Local 135 as the exclusive collective-bargaining representative, within the meaning of Section 9(b) of the Act, with respect to the following unit:

All delivery men, warehousemen, janitor(s) and maintenance employees employed by the Respondent at its Indianapolis, Indiana, facility; but excluding salesmen, vending machine department employees, office clerical employees, and all guards, professional employees and supervisors as defined by the Act.

(v) Unilaterally withdrawing the access of Local 135 representatives to Respondent's Indianapolis, Indiana, facility, or

<sup>222</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

changing the conditions under which access may be obtained, without giving Local 135 prior notice and an opportunity to bargain.

(w) Unilaterally transferring work out of the aforesaid unit, without giving Local 135 prior notice and an opportunity to bargain about the decision and its effects on employees.

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

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

(a) Pay each unit employee who was eligible for consideration for a bonus in August 1993 the difference between \$850 and the bonus (if any) he in fact received, in the manner set forth in that part of this Decision entitled the remedy.

(b) Make employees James Edmond Sr., Arnie Ray Goens, and Douglas Jones whole for any loss of pay they may have suffered by reason of the discrimination against them, in the manner set forth in that part of this Decision entitled the remedy.

(c) As to all employees who transferred at any time from Respondent's Indianapolis, Indiana, facility to Respondent's Springfield, Ohio facility in anticipation of or in consequence of the transfer of work from the Indianapolis to the Springfield facility in March, April, and May 1994:

(1) Within 14 days from the date of this Order, offer each such employee reinstatement, with moving expenses from the Springfield to the Indianapolis area, to the job which he held before his transfer or, if such a job no longer exists, a substantially equivalent job, without prejudice to his seniority or other rights previously enjoyed.

(2) Make each such employee whole for any loss of pay he may have suffered by reason of the transfer to Springfield, including moving expenses from the Indianapolis area to the Springfield area, in the manner set forth in that part of this Decision entitled the remedy.

(d) Within 14 days from the date of this Order, remove the following documents from the employees' personnel records, and within 3 days thereafter advise the respective employees that this has been done and that the material set forth in these documents will not be held against them in any way:

(1) The reprimands issued on March 31, 1993, to Randy Jewell and Danny Rakes and the May 11, 1993 letters referring thereto.

(2) The evaluations issued in July 1993 to Arnie Ray Goens and Donald Hall.

(3) The following documents with respect to Douglas Jones:

(aa) His March 31, 1993 reprimand and the May 11, 1993 letter referring thereto.

(bb) His July 1993 evaluation.

(cc) The disciplinary documents issued to him dated September 15, 16, 17, 20, and 23, 1993.

(dd) Any record of his layoffs between September 28-30, 1993, and between October 11-14, 1993.

(ee) Any record of his having an absenteeism occurrence on December 27, 1993.

(ff) Any record of his being on attendance probation between December 27, 1993, and June 26, 1994.

(e) Except as to company buildings and in working areas, rescind its rule which prohibits off-duty employees' presence

on company property for the purpose of engaging in activities protected by Section 7 of the Act.

(f) On request by Local 135, recognize and bargain collectively with Local 135 as the exclusive representative of the employees in the aforesaid unit, with respect to wages, rates of pay, hours of employment, and other terms and conditions of employment, and, if an understanding is reached, embody it in a signed written agreement.

(g) On request by Local 135, afford its representatives the same access to Respondent's Indianapolis facility which they were afforded as of March 1993.

(h) On request by Local 135, transfer back to Respondent's Indianapolis facility the bargaining unit work which was transferred to Respondent's Springfield facility between March 28 and May 9, 1994, inclusive.

(i) Preserve and, within 14 days of a request, make available to the Board, for examination and copying, all payroll records, social security records, timecards, personnel records and reports, and all other records necessary or useful for analyzing the amounts due under the terms of this Order.

(j) Within 14 days after service by Region 25, post at its facilities in Indianapolis, Indiana, and in Springfield, Ohio, copies of the attached notice marked "Appendix."<sup>223</sup> Copies of the notice on forms provided by the Regional Director for Region 25, after being signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt 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 Respondent to ensure that these 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 its Indianapolis and/or its Springfield facility, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent in the closed facility or facilities since November 15, 1992.

(k) 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.

The complaint is dismissed to the extent that it alleges that Respondent violated the Act by interrogating employee Larry Thomas Benefiel Jr. by increasing the number of its surveillance cameras in response to its employees' union activities, by increasing the August 1993 bonus paid to employee Teresa Deutscher, and by telling employee Arnie Ray Goens that because of his attitude, he was not going to receive a bonus. The complaint is also dismissed to the extent that it alleges that Respondent violated Section 8(a)(5) of the Act by dealing directly with employees, and violated Section 8(a)(3) by transferring work out of the bargaining unit.

IT IS FURTHER ORDERED that the election in Case 25-RD-1171 be set aside and that the petition in that case be dismissed.

<sup>223</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."