

**Overnite Transportation Company (Blaine, Minnesota Terminal) and International Brotherhood of Teamsters, AFL-CIO and Dennis Blaskowski and Teamsters Local 120, affiliated with International Brotherhood of Teamsters, AFL-CIO**

**Overnite Transportation Company (Norfolk, Virginia Terminal and International Brotherhood of Teamsters, Local 822, AFL-CIO**

**Overnite Transportation Company (Louisville, Kentucky Terminal) and General Drivers Warehousemen & Helpers Local Union #89, affiliated with International Brotherhood of Teamsters, AFL-CIO**

**Overnite Transportation Company (Lawrenceville, Georgia Terminal) and International Brotherhood of Teamsters, AFL-CIO and International Brotherhood of Teamsters, & Teamsters Local 728**

**Overnite Transportation Company (St. Louis and Bridgeton, Missouri Terminals) and Highway, City and Air Freight Drivers, Dockmen, Dairy Workers and Helpers, St. Louis and Vicinity, Missouri, Marine Officers Association, the Navigable Inland Waterway Systems of the United States Local 600, affiliated with International Brotherhood of Teamsters, AFL-CIO and Highway, City and Air Freight Drivers, Dockmen, Marine Officers Association, Dairy Workers and Helpers, Local Union 600 affiliated with International Brotherhood of Teamsters, AFL-CIO.**

**Overnite Transportation Company and International Brotherhood of Teamsters, AFL-CIO and Teamsters Local 773, affiliated with International Brotherhood of Teamsters, AFL-CIO and Drivers, Chauffeurs and Helpers Local Union #639 and Teamsters Local #651, affiliated with International Brotherhood of Teamsters, AFL-CIO.** Cases 18-CA-13481, 18-CA-13642, 18-CA-13394, 18-CA-13438, 18-CA-13484, 18-CA-13394-51 (formerly 5-CA-25268), 18-RC-15812 (formerly 5-RC-14153), 18-CA-13394-35 (formerly 9-CA-32726), 18-CA-13395-36 (formerly 9-CA-32800-2), 9-CA-33793, 18-RC-15814 (formerly 9-RC-16508), 18-CA-13394-27 (formerly 10-CA-28242-1), 8-RC-15786 (formerly 10-RC-14595), 18-RC-15782 (formerly 10-RC-14595), 18-CA-13394-91 (formerly 10-CA-28463), 18-CA-13394-13 (formerly 14-CA-23487), 18-RC-15768 (formerly 14-RC-11501), 18-CA-13916, 4-RC-18747, 5-RC-14213, 9-RC-16504, and 9-RC-16505

November 10, 1999

## DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS LIEBMAN AND HURTGEN

On April 10, 1998, Administrative Law Judge Benjamin Schlesinger issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel and the Charging Parties filed answering briefs. The Respondent filed reply briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.<sup>1</sup>

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,<sup>2</sup> and conclusions as modified<sup>3</sup> and to adopt the recommended Order as modified and set forth in full below.<sup>4</sup>

<sup>1</sup> The Respondent filed a motion for recusal of Member Liebman. For the reasons discussed in Member Liebman's attached separate statement, the Respondent's motion is denied.

<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. Additionally, the Respondent asserts that the judge's findings are a result of bias and prejudice. After a careful examination of the entire record, we find no evidence that the judge prejudged the case, made prejudicial rulings, or demonstrated bias in his credibility resolutions, analysis, or discussion of the evidence.

We find it unnecessary to rely on fn. 34 of the judge's decision in which he cited, *inter alia*, *General Knit of California*, 239 NLRB 619 (1978), a case that was overruled by *Midland National Life Insurance Co.*, 263 NLRB 127 (1982).

<sup>3</sup> Because of the cumulative nature of the allegation and because the finding of this additional violation would not materially affect the remedy, we find it unnecessary to pass on whether Atlanta Service Manager Schager's promise of benefits to employees, discussed in sec. III.A.3, par. 12 of the judge's decision, violated Sec. 8(a)(1) of the Act.

In addition, we reverse the judge's finding that the Respondent violated Sec. 8(a)(5) and (1) of the Act by implementing the 1996 productivity agreement for employees in the six contested units. The General Counsel specifically stated at the hearing that he was not litigating this issue.

<sup>4</sup> We shall modify the judge's recommended Order to correct inadvertent errors and conform to the violations found. In addition, because the Respondent's conduct demonstrates a general disregard for the employees' fundamental rights, we shall substitute a broad cease-and-desist Order for the narrow one recommended by the judge. *America's Best Quality Coatings Corp.*, 313 NLRB 470, 473 (1993), *enfd.* 44 F.3d 516 (7th Cir. 1995), *cert. denied* 515 U.S. 1158 (1995); *Hickmott Foods*, 242 NLRB 1357 (1979).

In the remedy section of his decision, the judge recommended that the Respondent be ordered to rescind in whole or in part the overtime portion of the productivity package at its service centers in Chicago, Illinois; West Sacramento, California; Kansas City, Kansas; Blaine, Minnesota; Indianapolis, Indiana; Grand Rapids, Michigan; Miami, Florida; and Tucson, Arizona. The Respondent asserts that inclusion of this provision would be clear error because it never implemented its overtime provisions at those locations. The General Counsel concedes that this remedy would be inappropriate. Accordingly, we shall not order such rescission.

The principal issue raised by the Respondent's exceptions is whether the judge correctly found that *Gissel*<sup>5</sup> bargaining orders were warranted at four of the Respondent's service centers.<sup>6</sup> For the following reasons, we agree with the judge.

As explained in greater detail in the judge's decision, this enormous proceeding arises in the context of a campaign conducted by the International Brotherhood of Teamsters, AFL-CIO, and its affiliated locals (the Union) to organize many of the Respondent's approximately 175 service centers throughout the country. On July 29, 1995, the parties formally settled almost all the 8(a)(1) violations alleged in this proceeding and the 8(a)(3) allegations for which the only remedies required were cease-and-desist orders and the posting of a notice. They also settled certain 8(a)(3) allegations that concerned the Respondent's failure to implement the March 1995 wage and benefit package at "the four certified centers," i.e., the four service centers where the Union recently won elections and was certified by the Board.<sup>7</sup> As part of the settlement, the Respondent made the employees whole for the monetary losses suffered and agreed to post a notice, at all its service centers, in which it pledged not to violate the Act.

Specifically left for resolution in this proceeding were the so-called "national allegations," which related to all of the Respondent's facilities, and other allegations that, in the General Counsel's view, supported bargaining orders under *Gissel*. The General Counsel specifically reserved the right to use any competent, relevant, material and otherwise admissible evidence to support his claim for *Gissel* relief, even if the evidence pertained to allegations that had been previously settled.

After carefully and thoroughly reviewing the voluminous evidence the parties adduced in this proceeding, the judge determined that the Respondent had committed unfair labor practices affecting employees on a nationwide basis and that the issuance of *Gissel* bargaining orders was warranted. As stated above, we agree with the judge.

In *Gissel*, the Supreme Court "identified two types of employer misconduct that may warrant the imposition of a bargaining order: 'outrageous and pervasive unfair labor practices' (category I) and 'less extraordinary cases marked by less pervasive practices which nonetheless still have the tendency to undermine majority strength

and impede the election processes' (category II)."<sup>8</sup> The Supreme Court stated that in fashioning a remedy in the exercise of its discretion in category II cases, the Board "can properly take into consideration the extensiveness of an employer's unfair labor practices in terms of their past effect on election conditions and the likelihood of their recurrence in the future. If the Board finds that the possibility of erasing the effects of past practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order, then such an order should issue."<sup>9</sup>

In agreeing with the judge that *Gissel* bargaining orders should be issued, we find, for the reasons stated in the judge's decision and those set forth below, that the Respondent's course of misconduct, both before and after the elections, clearly demonstrates that the holding of fair elections in the future would be unlikely and that the "employees' wishes are better gauged by [ ] old card majorit[ies] than by [ ] new election[s]."<sup>10</sup>

Because this case falls within category II, we have, as mandated by the Supreme Court in *Gissel*, examined the extensiveness of the Respondent's unfair labor practices and the likelihood of their recurrence in the future. In this regard, we observe that the unfair labor practices committed in this case include "hallmark" violations<sup>11</sup> such as the granting of an unprecedented wage increase, as well as threats that employees would lose their jobs and that the business would be closed if the employees selected the Union. The Respondent also committed numerous other serious and pervasive unfair labor practices<sup>12</sup> at each terminal: asserting to employees that it would be futile, as it had been in Chicago, to select the Union as their representative; promising employees better benefits, including better uniforms, overtime policies and vacations, and participation in employee committees to determine how benefit dollars would be spent if employees voted to keep out the Union; threatening employees with stricter discipline and adherence to work rules and more onerous working conditions if the employees voted in the Union; threatening employees with loss of pension benefits; threatening employees that relationships between employees and supervisors would deteriorate if employees voted for the Union; inviting em-

In light of the General Counsel's agreement with the Respondent that the date in par. 2(h) of the Order should be December 11, 1995, we shall substitute that date for February 10, 1995, the date recommended by the judge.

<sup>5</sup> *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).

<sup>6</sup> Louisville, Kentucky; Lawrenceville, Georgia; Norfolk, Virginia; and Bridgeton, Missouri.

<sup>7</sup> West Sacramento, California; Kansas City, Kansas; Blaine, Minnesota; and Indianapolis, Indiana.

<sup>8</sup> *Charlotte Amphitheater Corp. v. NLRB*, 82 F.3d 1074, 1077 (D.C. Cir. 1996) (quoting *Gissel*, 395 U.S. at 613-614).

<sup>9</sup> 395 U.S. at 614-615.

<sup>10</sup> *Charlotte Amphitheater Corp. v. NLRB*, supra, 82 F.3d at 1078.

<sup>11</sup> The term "hallmark violations" has been used to describe unfair labor practices that are highly coercive and have a lasting effect on election conditions. See *NLRB v. Jamaica Towing*, 632 F.2d 208, 212-213 (2d Cir. 1980).

<sup>12</sup> Because most of this conduct pertained to "allegations that had previously been settled," the judge did not provide remedies for the unlawful conduct. Instead, he considered the conduct, as the settlement agreement allowed, "to support the bargaining orders."

ployees to quit working for the Respondent if they wanted to have a job with a “union company”; discriminatorily denying employees access to company bulletin boards to post pronoun information; soliciting and promising to remedy employee grievances through supervisors, managers, and troubleshooters,<sup>13</sup> and failing to observe the *Johnnie’s Poultry*<sup>14</sup> safeguards when the Respondent’s attorneys interviewed employees in connection with this case.

All bargaining unit employees were directly affected by the Respondent’s misconduct. On a nationwide basis, the Respondent orchestrated a highly coercive “carrot and stick” campaign: First, in March 1995, at the height of the organizational effort, the Respondent unlawfully granted its unrepresented employees an unprecedented wage increase, just months after the employees had received their normal (January) increase. The total of both increases constituted the largest annual increase ever granted by the Respondent. As the judge recognized, “[s]uch unlawful wage increases have a particularly long lasting effect because the Board’s traditional remedies do not require that an employer rescind its wage increase. . . . Because such increases regularly appear in employees’ pay checks, they are a continuing reminder that ‘the source of benefits now conferred is also the source from which future benefits must flow and which may dry up if not obliged’” (quoting *NLRB v. Exchange Parts Co.*, 375 U.S. 405, 409 (1964)).

At approximately the same time that the Respondent was illegally rewarding its unrepresented employees, the Respondent proclaimed in the company newsletter that “unfortunately” employees at the “four certified centers” where the Union had recently won Board elections “will not get these pay increases,” but “will have to wait for negotiations.” The judge correctly found that the withholding of the March 1995 increase from the union-represented employees was unlawfully motivated and violated Section 8(a)(3) of the Act. The message that the Respondent’s combined actions sent to employees was unmistakably clear: they could choose to remain unrepresented and enjoy any pay increase the Respondent may

grant in the future, or they could vote for union representation and forego such benefits.

The Respondent communicated to its employees a special meaning of the phrase “will have to wait for negotiations” by repeatedly citing the example of the Chicago service center where, despite 13 years of bargaining and a lengthy strike, the Union had not been able to negotiate a collective-bargaining agreement with the Respondent.<sup>15</sup> The judge correctly found that the Respondent’s narration of the Chicago experience violated the Act in two respects: first, the Respondent gave employees the impression that bargaining would be futile; second, the Respondent threatened that the only way the Union could bring pressure on the Company was by striking. Therefore, when the Respondent stated that union-represented employees would have to “wait for negotiations” to settle the pay raise issue, the real message conveyed was that these employees would not receive any increase because, as the Respondent had made so clear, collective bargaining had no chance of success.

In granting benefits the following year, the Respondent again distinguished among its service centers based on their union or nonunion status. Early in 1996, the Respondent unlawfully withheld from its employees at 14 union-represented service centers the regular, annual wage increase it granted employees at its approximately 160 other service centers. As it had done in 1995, the Respondent publicized the withholding to demonstrate that voting for the Union had serious, adverse consequences. Thus, the Respondent distributed antiunion campaign flyers stating that, after the 1996 wage increase, employees in the represented units were 50 cents per hour behind nonunion employees, and the Respondent blamed the Union for the disparity. Again, the message was clear: companywide wage increases would not be granted to employees who voted for the Union. If it is a fair assumption that employees seek union representation in the hope that the union might be successful in negotiating wage increases, then the Respondent had surely established, as it had maintained all along, that voting for the Union was a futile act.

The severity of the misconduct is compounded by the involvement of high ranking officials.<sup>16</sup> The Respondent’s unfair labor practices emanated from the highest level officials, with many attributable to Jim Douglas, president and chief operating officer. Paul Heaton, senior vice president for operations strategy, and Mark Goodwin, the Respondent’s general counsel, helped di-

<sup>13</sup> The troubleshooters, a group of current and former Overnite drivers, traveled the country throughout the course of the union campaign visiting service centers to solicit from employees the cause of their unrest and to determine which employees supported the Union. The troubleshooters determined through their solicitation of grievances that the primary causes of employee unrest included low wage and mileage rates and the lack of overtime pay. In addition to promising to remedy many employee grievances and actually remedying some, the troubleshooters reported their findings to Bobby Edwards, vice president of safety, at corporate headquarters in Richmond. Overnite covered all the troubleshooters’ expenses, including airfare, hotels, meals, and car rentals and paid them \$14.50 per hour for 60 hours per week.

<sup>14</sup> 146 NLRB 770 (1964), enf. denied 344 F.2d 617 (8th Cir. 1965). Having found, in agreement with the administrative law judge, that the Respondent committed *Johnnie’s Poultry* violations with respect to questions 2 and 4, we find it unnecessary to pass on the propriety of questions 3 and 5.

<sup>15</sup> As discussed in detail in the judge’s decision, the Board and the court of appeals found that the Respondent engaged in bad-faith bargaining at Chicago. *Overnite Transportation Co.*, 296 NLRB 669 (1989), enf. 938 F.2d 815 (7th Cir. 1991).

<sup>16</sup> *Consec Security*, 325 NLRB 453 (1998), enf. mem. 185 F.3d 862 (3d Cir. 1999).

rect the campaign.<sup>17</sup> In fact, Bobby Edwards, who directed the troubleshooters' unlawful activities, reported directly to Heaton. Goodwin advised Douglas throughout the campaign and accompanied him on his visits to numerous terminals during the campaign. "When the antiunion message is so clearly communicated by the words and deeds of the highest levels of management, it is highly coercive and unlikely to be forgotten."<sup>18</sup>

Douglas traveled to more than 50 service centers between January and April 1995 conducting the Respondent's unlawful campaign. He repeatedly conveyed to employees the impression that bargaining would be, as it had been in Chicago, futile.

Douglas continually reminded employees of all the improvements he had unlawfully implemented. He told them that he had granted unrepresented employees an unprecedented wage increase in March 1995 while withholding the increase from employees in four recently certified units. He also reminded employees that he had eliminated speed and mileage limits which had long been the focus of employee complaints and reinstated safety dinners and bonuses. Douglas promised that he would do even more to improve the lot of employees if his hands were not tied by the Union.

Douglas solicited employee grievances and when employees suggested changes in benefits, he promised to include the employees in the decision-making process, telling them, "I don't know whether we're spending [our benefit dollars] in the right way. And we ought to go back to people like you and a cross-section of our employee population and say, 'what's the right way to do this.'"

Douglas threatened employees with the possible closing of the business and loss of jobs if they selected the Union as their exclusive representative. In one gathering, he asked a prounion employee if he "was willing to sacrifice the jobs of 14,000 people" in order to have the Union and if he understood that if the Union's campaign was successful "everything was being jeopardized—the jobs and welfare benefits—everything." Douglas said that a Union victory would "drive this thing into non-profit and put 14,000 jobs in jeopardy." He "glower[ed]" when he told that same employee that if the Union were voted in there would be a "big change in management's attitude, especially at the local level, in the manner that Overnite enforced its work rules, and that Overnite was going to toughen up."

The Respondent asserts that bargaining orders would be inappropriate because, among other things, of its adherence to a labor law compliance program which it established pursuant to the settlement agreement and be-

cause of the turnover of employees in the bargaining units since the close of the hearing.

The Respondent argues that pursuant to its labor law compliance program it took "extraordinary steps to avoid future unfair labor practices." The program's success, however, was anything but extraordinary. The settlement was signed on July 29, 1995. Since that time, the Respondent violated Section 8(a)(5) and (1) of the Act, as found in this proceeding, by, inter alia, bypassing the Union and dealing directly with employees in the eight recognized and six contested units with respect to its 1996 productivity package and violated Section 8(a)(5), (3), and (1) by unilaterally and discriminatorily withholding the wage and mileage increases from those same employees.<sup>19</sup> (The withholding of the 1996 wage and mileage increases also violated Section 8(a)(3) because it was unlawfully motivated.) The Respondent also violated Section 8(a)(1) by announcing and granting to unrepresented employees the overtime portion of the productivity package in order to dissuade them from seeking union representation. It further violated Section 8(a)(1) of the Act by disregarding the procedural safeguards required under *Johnnie's Poultry*, supra.<sup>20</sup> The Respondent's labor law compliance program, therefore, did little to alleviate the need for a *Gissel* bargaining order.<sup>21</sup>

<sup>19</sup> The judge found that, by the above conduct, the Respondent violated Sec. 8(a)(1) of the Act, but he inadvertently failed to find that Sec. 8(a)(5) was also violated. We hereby correct the judge's error.

<sup>20</sup> The Respondent continued to violate the Act as found in other cases as well. Pursuant to the alternative dispute resolution procedure established in the settlement agreement, a neutral arbitrator determined on October 10, 1997, that the Respondent violated Sec. 8(a)(3) of the Act by discharging Columbus, Ohio employee Kenneth Gosney. In addition, on February 13, 1998, an administrative law judge found in Case 26-CA-17715 that the Respondent violated Sec. 8(a)(3) of the Act by discharging and discriminating against Tupelo, Mississippi employee Cary Ewing. In the absence of exceptions, the Board affirmed the judge's decision on May 1, 1998. See *Operating Engineers Local 12 (Associated Engineers)*, 270 NLRB 1172 (1984) (a judge's decision to which no exceptions are filed may be considered by the Board when determining whether a respondent has demonstrated a proclivity to violate the Act).

<sup>21</sup> The General Counsel reserved in the settlement agreement the right to seek bargaining orders at the four service centers in issue here. Therefore, the settlement itself does not preclude the granting of *Gissel* relief. In addition, to the extent that the settlement agreement requires the Respondent to comply with traditional remedies for conduct that would violate the Act, the Respondent's reliance on its compliance with the settlement to avoid the imposition of *Gissel* bargaining orders is clearly misplaced. Our conclusion that *Gissel* bargaining orders are warranted in this case is necessarily based on a finding that such traditional remedies are *inadequate* to "eras[e] the effects of past practices and . . . ensur[e] a fair election." *Gissel*, supra, 395 U.S. at 614-615.

Member Hurtgen does not agree with this paragraph. If the Respondent had complied with the settlement, that compliance may well have obviated the need for a *Gissel* order. In Member Hurtgen's view, the effectiveness of a remedy is related, at least in part, to the promptness of a remedy. A settlement agreement, if complied with, can promptly restore conditions necessary for the holding of a fair election. In the instant case, the Respondent did not comply with the settlement, and thus the settlement did not obviate the need for a *Gissel* order.

<sup>17</sup> As of at least June 30, 1998, Overnite still employed Heaton and Goodwin.

<sup>18</sup> *Consec Security*, supra. See *Electro-Voice*, 320 NLRB 1094, 1096 (1996); *America's Best Quality Coatings Corp.*, supra, 313 NLRB at 472.

The Respondent further argues that a *Gissel* bargaining order is inappropriate because of employee turnover since the events in this case occurred and moves to reopen the record for the purpose of presenting evidence on this issue. The Respondent asserts that as of June 1998, turnover of employees who were eligible to vote in the elections at various terminals ranged from 28 to 37 percent. It maintains that those percentages have increased to a high of approximately 40 percent as of June 1999 and that such turnover renders a bargaining order untenable.

The Board traditionally does not consider turnover among bargaining unit employees in determining whether a bargaining order is appropriate, but rather assesses the situation at the time the unfair labor practices were committed. *Salvation Army Residence*, 293 NLRB 944, 945 (1989), enfd. mem. 923 F.2d 846 (2d Cir. 1990). Otherwise, the employer that has committed unfair labor practices of sufficient gravity to warrant the issuance of a bargaining order would be allowed to benefit from the effects of its wrongdoing. These effects include the normal delays inherent in the litigation process as well as employee turnover, some of which may occur as a direct result of the unlawful conduct. Thus, the employer would be rewarded for, or at a minimum, relieved of the remedial consequences of, its statutory violations. See *Intersweet, Inc.*, 321 NLRB 1 (1996), enfd. 125 F.3d 1064 (7th Cir. 1997). Such a result would permit employers, particularly in businesses like the Respondent's that experience significant turnover in normal circumstances,<sup>22</sup> to disregard the requirements of the Act with impunity, with little expectation of incurring the legal consequences of their violations.

Even when turnover is considered, as some circuit courts require,<sup>23</sup> a *Gissel* bargaining order remains an appropriate remedy when the Board finds that traditional alternatives are insufficient. Thus, when an employer, in response to a union organizing campaign, terminated its entire workforce and refused to rehire most of the employees who had signed union authorization cards, the court agreed with the Board that the egregious unlawful conduct warranted a bargaining order despite turnover among employees and managers. *Intersweet*, supra, 125 F.3d 1064. In that case, 9 of the 31 employees employed at the time of the mass discharge were still employed at the plant, and the employer had hired 105 new workers. In addition, the official who had ordered the discharge was deceased. The court found that the employer did not

<sup>22</sup> In asserting that its 1995 wage increase was justified by a desire to retain employees who might otherwise leave the Respondent's employ, the Respondent stated in its brief in support of exceptions that employee turnover was a problem as early as 1992 and had become more widespread in 1994, reaching a level of 36 percent. Thus, the turnover that the Respondent has experienced since the close of the hearing can hardly be termed extraordinary.

<sup>23</sup> See, e.g., *Flamingo Hilton-Laughlin v. NLRB*, 148 F.3d 1166 (D.C. Cir. 1998).

demonstrate that employee turnover had eliminated the effects of its violations, noting that the employees would certainly be aware of the unlawful conduct and would have no reason to believe that they were less expendable than their predecessors in the event that they attempted to organize. The court further found that the management of the company had not meaningfully changed. Similarly, in *NLRB v. Gerig's Dump Trucking, Inc.*, 137 F.3d 936, 943-944 (7th Cir. 1998), the court enforced the Board's bargaining order, even though only 5 of 21 unit employees remained, and the company president and general manager at the time of the violations either had left or were no longer involved in management.

In the present case, even accepting, arguendo, the facts asserted by the Respondent concerning employee turnover, we find the effects of the Respondent's unlawful conduct are not likely to be sufficiently dissipated by turnover to ensure a free second election. Although a significant number of the employees who were employed at the time of the unlawful conduct surrounding the elections may have left the facilities for reasons related or unrelated to the Respondent's unfair labor practices, more than a majority (approximately 60 percent) remain who would recall these events. We further find that the new employees may well be affected by the continuing influence of the Respondent's past unfair labor practices. As the Fifth Circuit has recognized, "Practices may live on in the lore of the shop and continue to repress employee sentiment long after most, or even all, original participants have departed."<sup>24</sup> In the present case, it is difficult to believe that the impression made by the Respondent's barrage of serious unlawful conduct during the period before and after the Board elections, and continuing to the time of the hearing and beyond, could have dissipated in the minds of those employees who were then employed, and that the virulence of the Respondent's response to the previous election campaign would not restrain employee free choice in second elections. Indeed, as noted above, the Respondent's violations are precisely the types of unfair labor practices that endure in the memories of those employed at the time and are most likely to be described as cautionary tales to later hires.<sup>25</sup>

<sup>24</sup> *Bandag, Inc. v. NLRB*, 583 F.2d 765, 772 (5th Cir. 1978).

<sup>25</sup> For these reasons, the evidence concerning turnover that the Respondent seeks to introduce would not require a different result. Accordingly, we deny the Respondent's motion to reopen the record. *Salvation Army Residence*, supra, 293 NLRB at 945. We have, however, as discussed above, fully considered the evidence the Respondent seeks to introduce and find that it would not preclude the issuance of the bargaining order herein.

Member Hurtgen believes that the propriety of a *Gissel* order is dependent upon the circumstances existing at the time of the order. That is, the Board must be satisfied, at that time, that a fair election is unlikely even if traditional remedies are imposed. In the instant case, Member Hurtgen believes that this test has been met. The Respondent engaged in extensive and severe unfair labor practices, including "hallmark" violations. Even accepting as fact the Respondent's evidence of employee turnover, it can reasonably be concluded that this

As stated, the Board generally evaluates the appropriateness of a *Gissel* bargaining order based on the circumstances when the unfair labor practices occur. In some recent cases, however, the Board has considered the passage of time, and particularly the delay of the case at the Board, in declining to issue a bargaining order. See, e.g., *Wallace International de Puerto Rico*, 328 NLRB No. 3 (1999). In *Wallace*, we found that the employer threatened plant closure if the employees selected the union as their collective-bargaining representative. We concluded that certain special remedies were necessary in view of the severity of the violation and its effect on employees' exercise of their rights under the Act. However, in view of the delay at the Board following the administrative law judge's August 1995 decision, we concluded that court enforcement of a bargaining order based on this violation, which occurred in June 1994, would be difficult and that "employee rights would be better served by proceeding directly to a second election." *Id.* In contrast to *Wallace*, we conclude that a bargaining order is a necessary element of the remedy in the present case despite the lapse of time since the Respondent's violations. Initially, we observe that the violations occurred in 1995 and 1996 and the hearing ran from February 12, 1996, to January 28, 1997, creating a hearing record of more than 14,000 transcript pages and many thousands of exhibits. The judge issued his decision on April 10, 1998, and the Board issues this decision approximately 1-1/2 years later. Such a time frame has been found not excessive in prior cases. In *Intersweet*, supra, the Seventh Circuit enforced the Board's *Gissel* bargaining order and found that a period of 3 to 4 years is an "ordinary institutional time lapse . . . inherent in the legal process." 125 F.3d at 1068, quoting *America's Best Quality Coatings Corp. v. NLRB*, supra, 44 F.3d at 522.

The time this case has spent at the Board, as well as the total lapse of time since the unfair labor practices, does not approach the time found to render the *Gissel* orders stale in some cases. Compare, for example, *Montgomery Ward & Co. v. NLRB*, 904 F.2d 1156, 1160 (7th Cir. 1990) (8 years between violations and order, including 6 years at the Board); *Impact Industries Inc. v. NLRB*, 847 F.2d 379, 381 (7th Cir. 1988) (7-1/2 years between violations and order, including 5-1/2 years at the Board); *NLRB v. Thill, Inc.*, 980 F.2d 1137, 1138 (7th Cir. 1992) (over 9 years between violations and order, including 7 years at the Board).

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unlawful conduct has a continuing impact on the current unit employees. In this regard, however, Member Hurtgen finds it unnecessary to rely on an assumption (unsupported by evidentiary fact) that the employee-victims of unfair labor practices occurring more than 4 years ago will necessarily apprise new employees of those events. Rather, Member Hurtgen relies upon the continuing disparity between the treatment of represented units and the treatment of unrepresented units. That disparity presents an ever-present message that a carrot is given to nonunion employees and a stick is used on unionized employees.

More importantly, the extent and severity of the violations in this case surpass the hallmark violation found in *Wallace*. Under these circumstances, we conclude that the Respondent's unfair labor practices cannot be adequately remedied at the present time by the Board's traditional remedies or by more limited special remedies like those ordered in *Wallace*. Rather, we find that the circumstances of this case fully warrant the issuance of bargaining orders as a necessary and appropriate means of effectuating the policies of the Act.<sup>26</sup> See *Garvey Marine, Inc.*, 328 NLRB No. 147 (1999) (citing number and severity of violations in finding that delay at the Board of more than 3 years did not render a *Gissel* order unwarranted).

As discussed above, in concluding that a *Gissel* order is warranted, as required by some circuit courts we have

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<sup>26</sup> In fashioning his remedy, the judge stated that "the Bridgeton proceeding is by far the closest to the kind of pure grant of wage increase case" (without any negative acts of reprisal) that troubled the court in *Skyline Distributors v. NLRB*, 99 F.3d 403 (D.C. Cir. 1996). He opined that enforcement of a *Gissel* bargaining order at Bridgeton might be difficult because the primary preelection violation that occurred at Bridgeton was the announcement of the March 1995 wage increase. We do not agree with the judge's assessment of the Bridgeton situation, and we find *Skyline Distributors* to be distinguishable. In expressing his doubts about the enforceability of a *Gissel* bargaining order at Bridgeton, the judge overlooked the relevance of the postelection conduct in which the Respondent engaged on a nationwide basis, including acts of reprisal. See *Long-Airdox Co.*, 277 NLRB 1157, 1160 (1985), citing *Chromalloy Mining & Minerals v. NLRB*, 620 F.2d 1120 (5th Cir. 1980) ("postelection violations 'are always relevant because they demonstrate that the employer is still opposed to unionization'"). After the Bridgeton election, the Respondent, as discussed in detail above, violated Sec. 8(a)(3) by denying the March 1995 increase to employees who had voted for the Union in the Board-conducted elections. In addition, the Respondent violated Sec. 8(a)(5) and (1) of the Act by bypassing the Union and dealing directly with employees in the eight recognized and six contested units with respect to its 1996 productivity package and unilaterally withholding 1996 wage and mileage increases from those same employees. (The withholding of the 1996 wage and mileage increases also violated Sec. 8(a)(3) because it was unlawfully motivated.) The Respondent also violated Sec. 8(a)(1) by announcing and granting to unrepresented employees the overtime portion of the productivity package in order to dissuade them from seeking union representation. The Respondent further violated Sec. 8(a)(1) of the Act by questioning employees in preparation for this litigation without adhering to the procedural safeguards required under *Johnnie's Poultry*, supra. In other cases, the Respondent has been found to have unlawfully discharged employees. Thus, the Respondent's conduct after the election clearly indicated to employees that it remained "opposed to unionization" and hostile to the exercise of employee rights.

Nor do we agree with the judge that the seriousness of the Bridgeton violations is "undercut by the Union's success the same day in its election at Hall Street, only 17 miles away." It is the objective tendency of the unfair labor practices to undermine union support that is critical, not the actual effect of the unfair labor practices. *NLRB v. Gissel Packing Co.*, 395 U.S. at 614. The fact that the Union was victorious at Hall Street does not mitigate against the need for a remedial bargaining order at Bridgeton. See *United Oil Mfg. Co. v. NLRB*, 672 NLRB 1208, 1212 (3d Cir. 1982), citing *NLRB v. Permanent Label Corp.*, 657 F.2d 512, 519 (3d Cir. 1981) (en banc) (rejecting the contention that unfair labor practices which occurred before the union actually achieved majority status could not be relied upon by the Board in issuing a bargaining order).

examined its appropriateness under the circumstances existing at the present time and we have considered the inadequacy of other remedies. See, e.g., *Flamingo Hilton-Laughlin v. NLRB*, 148 F.3d 1166, 1173 (D.C. Cir. 1998). Further, as discussed below, we have given due consideration to the employees' Section 7 rights, another concern expressed by some courts. *Id.*

In *Gissel*, the Supreme Court rejected the argument advanced by the employers there that a bargaining order is a punitive remedy that "needlessly prejudices employees' Section 7 rights." 395 U.S. at 612. The Court stated that a bargaining order not only deters "future misconduct," but also remedies "past election damage." *Id.* The Court reasoned as follows:

If an employer has succeeded in undermining a union's strength and destroying the laboratory conditions necessary for a fair election, he may see no need to violate a cease-and-desist order by further unlawful activity. The damage will have been done, and perhaps the only fair way to effectuate employee rights is to re-establish the conditions as they existed before the employer's unlawful campaign.<sup>33</sup> There is, after all, nothing permanent in a bargaining order, and if, after the effects of the employer's acts have worn off, the employees clearly desire to disavow the union, they can do so by filing a representation petition. For, as we have pointed out long ago, in finding that a bargaining order involved no "injustice to employees who may wish to substitute for the particular union some other . . . arrangement," a bargaining relationship "once rightfully established must be permitted to exist and function for a reasonable period in which it can be given a fair chance to succeed," after which the "Board may, . . . upon a proper showing, take steps in recognition of changed situations which might make appropriate changed bargaining relationships." [395 U.S. at 612-613 (quoting *Franks Bros. Co. v. NLRB*, 321 U.S. 702, 705-706 (1944).]

<sup>33</sup> It has been pointed out that employee rights are affected whether or not a bargaining order is entered, for those who desire representation may not be protected by an inadequate rerun election, and those who oppose collective bargaining may be prejudiced by a bargaining order if in fact the union would have lost an election absent employer coercion. [Citation omitted.] Any effect will be minimal at best, however, for there "is every reason for the union to negotiate a contract that will satisfy the majority, for the union will surely realize that it must win the support of the employees, in the face of a hostile employer, in order to survive the threat of a decertification election after a year has passed." Bok, *The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act*, 78 Harv.L.Rev. 38, 135 (1964).

This passage clearly shows that in approving the Board's use of the bargaining order remedy in category I and II cases, the *Gissel* Court explicitly took into account the rights of employees who both favored and opposed

union representation.<sup>27</sup> The Court stated that if an employer's unfair labor practices have the tendency to undermine a union's majority strength and destroy election conditions, then "the only fair way to effectuate employee rights" is to issue a bargaining order. In these circumstances, the interests of the employees favoring unionization are safeguarded by the bargaining order. The interests of those opposing the union are adequately safeguarded by their right to file a decertification petition at an appropriate time pursuant to Section 9(c)(1) of the Act. On the other hand, if the facts of a case fall within category III, i.e., the employer committed only "minor or less extensive unfair labor practices" with only a "minimal impact on the election machinery," then a bargaining order may not issue, notwithstanding the fact that a majority of employees signed authorization cards in support of the union. 395 U.S. at 615.

In sum, the *Gissel* opinion itself reflects a careful balancing of employees' Section 7 rights "to bargain collectively" and "to refrain from" such activity. Therefore, if a bargaining order has been adequately justified under the *Gissel* standards, then we respectfully submit that due consideration has been given to the employees' Section 7 rights consistent with the concerns expressed by some courts.<sup>28</sup>

Accordingly, for all these reasons, we agree with the judge that *Gissel* bargaining orders are warranted in this case.

#### ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Overnight Transportation Company, Richmond, Virginia,<sup>29</sup> its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified and set forth in full below.

##### 1. Cease and desist from

(a) Announcing and implementing the overtime portion of the productivity package in order to discourage and dissuade its employees from selecting the International Brotherhood of Teamsters, AFL-CIO (the International) or one of its locals as collective-bargaining representatives.

(b) Failing and refusing to grant wage and mileage increases to certain of its employees to retaliate or discriminate against them for selecting the International or one of its locals as their collective-bargaining representatives and to discourage or dissuade its other employees from selecting the International or one of its locals as collective-bargaining representatives.

<sup>27</sup> *MJ Metal Products*, 328 NLRB No. 170, slip op. at 3 (1999); *General Fabrications Corp.*, 328 NLRB No. 166, slip op. at 3 (1999).

<sup>28</sup> *MJ Metal Products*, supra; *General Fabrications Corp.*, supra.

<sup>29</sup> The Respondent's corporate headquarters are located in Richmond, Virginia.

(c) Bypassing the exclusive representatives of its employees and dealing directly with its employees.

(d) Unilaterally changing the terms and conditions of employment of its employees by failing and refusing to grant them established wage and mileage increases.

(e) Unilaterally changing the terms or conditions of employment of certain of its employees by implementing the overtime and nonwage portions of its productivity package.

(f) Exceeding the legitimate scope of interviews with its employees in preparation for a hearing by unnecessarily and coercively intruding into their Section 7 activities.

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

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

(a) On request, bargain with General Drivers, Warehousemen & Helpers Local Union #89 a/w International Brotherhood of Teamsters, AFL-CIO as the exclusive representative of its employees in the following appropriate unit concerning their terms and conditions of employment, and, if an understanding is reached, embody the understanding in a signed agreement:

All full-time and regular part-time road drivers, city drivers, dock workers, jockeys, and mechanics employed at Overnite Transportation Company's Louisville, Kentucky facility, excluding office clerical employees, account managers, dispatchers and all guards and supervisors as defined in the Act.

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

All full-time and regular part-time dock workers, city drivers, road drivers and jockeys, employed at Overnite Transportation Company's Lawrenceville, Georgia facility, but excluding shop employees, temporary employees, office clerical employees, managers, guards, and supervisors as defined in the Act.

(c) On request, bargain with International Brotherhood of Teamsters, Local 822, AFL-CIO as the exclusive representative of its employees in the following appropriate unit concerning their terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

All full-time and regular part-time over the road drivers, city pick-up drivers, delivery drivers, yard workers, dock workers, and mechanics employed at Overnite Transportation Company's Norfolk, Virginia facility,

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

(d) On request, bargain with Highway, City and Air Freight Drivers, Dockmen, Dairy Workers and Helpers, St. Louis and Vicinity, Missouri, Marine Officers Association, the Navigable Inland Waterway Systems of the United States Local 600, affiliated with International Brotherhood of Teamsters, AFL-CIO as the exclusive representative of its employees in the following appropriate unit concerning their terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

All full-time and regular part-time city drivers, dockmen, road drivers and mechanics, employed at Overnite Transportation Company's Bridgeton, Missouri terminal, EXCLUDING all office clerical and professional employees, guards, and supervisors as defined in the Act.

(e) Make whole its employees in the bargaining units at its service centers (terminals) located in Bedford Park, Illinois; Kansas City, Kansas; Blaine, Minnesota; Indianapolis, Indiana; West Sacramento, California; Grand Rapids, Michigan; Miami, Florida; Tucson, Arizona; St. Louis, Missouri; Milwaukee, Wisconsin; Rockaway, New Jersey; Romulus, Michigan; North Canton, Ohio; and Atlanta, Georgia, for the monetary losses suffered as a result of its failure and refusal to grant them its wage and mileage increases, announced on December 11, 1995, and effective December 31, 1995, with interest as set forth in the remedy section of the judge's decision.

(f) At the request of the exclusive representatives of the unit employees at its service centers at Norfolk, Virginia; Lawrenceville, Georgia; Louisville, Kentucky; and Bridgeton, Missouri, rescind in whole or in part the overtime and nonwage portions of the productivity package.

(g) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of back-pay due under the terms of this Order.

(h) Within 14 days after service by the Region, post copies of the attached notice marked "Appendix"<sup>30</sup> at all its service centers. Copies of the notice, on forms provided by the Regional Director for Region 18, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all

<sup>30</sup> If this Order is enforced by a Judgment of the 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."

places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. Because Respondent has closed certain of its service centers, Respondent shall duplicate and mail, at its own expense, copies of the notice to all former employees employed by it at those service centers since December 11, 1995.

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

IT IS FURTHER ORDERED that the election in Case 4–RC–18747 be set aside and this case transferred to the Regional Director for Region 4 for the setting of a second election at such time and place as she deems circumstances afford a free choice of a bargaining representative in the appropriate unit.

IT IS FURTHER ORDERED that the election in Case 5–RC–14213 be set aside and this case be transferred to the Regional Director for Region 5 for the setting of a second election at such time and place as he deems circumstances afford a free choice of a bargaining representative in the appropriate unit.

IT IS FURTHER ORDERED that the election in Case 9–RC–16505<sup>31</sup> be set aside and the case be transferred to the Regional Director for Region 9 for the setting of a second election at such time and place as he deems circumstances afford a free choice of bargaining representative in the appropriate unit.

IT IS FURTHER ORDERED that the elections held in Cases 18–RC–15768, 18–RC–15786, 18–RC–15812, and 18–RC–15814 are set aside and that the petitions in those cases are dismissed.

IT IS FURTHER ORDERED that jurisdiction be retained regarding the relief, if any, to be granted to remedy the violations found in Case 18–CA–13916 at the other service centers where the complaints in this consolidated proceeding request bargaining orders.

IT IS FURTHER ORDERED that the protective orders entered into during the hearing prohibiting the parties from disclosing the contents of certain testimony and exhibits be, and the same hereby are, continued in full force and effect and that all exhibits introduced in evidence under seal will continue to be maintained under seal.

<sup>31</sup> The judge recommended that the election in Case 9–RC–16504 be set aside and a new election held. After the issuance of the judge's decision, on August 11, 1999, the Board issued a Decision and Certification of Representative in that case. Accordingly, there is no reason to set that election aside.

IT IS FURTHER ORDERED that the complaints ruled on in this Decision are dismissed insofar as they allege violations of the Act not specifically found.

Separate statement of MEMBER LIEBMAN.

Overnite Transportation Company (the Respondent or Overnite) has filed a motion seeking my recusal from this proceeding, arguing that a reasonable person could question my ability to decide this case impartially and without bias. The primary basis for the Respondent's motion is my prior employment from 1980 to 1989 as staff counsel to the International Brotherhood of Teamsters, AFL–CIO (Teamsters). For the reasons set forth below, I deny the Respondent's motion.

#### I.

The Respondent is correct that, as a party to this proceeding, it is "entitled as a matter of fundamental due process to a fair hearing." Citing 28 U.S.C. § 455, defining the circumstances that mandate the disqualification of Federal judges, the Respondent contends that these standards should apply as well to officials of administrative agencies, such as Members of the National Labor Relations Board. I agree.

The Respondent's specific arguments for refusal are based on §§ 455(a) and (b). These sections provide in relevant part as follows:

(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter.

I will address each of the Respondent's arguments. I turn first to its contentions based on § 455(b) because that section enumerates specific grounds for disqualification.

#### II.

Under § 455(b)(1) actual bias or prejudice must be shown. *Hook v. McDade*, 89 F.3d 350, 355 (7<sup>th</sup> Cir. 1996), cert. denied 519 U.S. 1071 (1997). "In determining whether a judge must disqualify himself under 28 U.S.C. § 455(b)(1), the question is whether a reasonable person would be convinced the judge was biased." *Id.* The bias or prejudice "must be grounded in some personal animus or malice that the judge harbors . . . of a kind that a fair-minded person could not entirely set aside when judging certain persons or causes." *Id.* "Sec-

tion 455(b)(1) may alternatively require recusal in situations wherein the judge has pre-trial knowledge of the facts of a case, independent of any possible bias or partiality.” *United States v. Winston*, 613 F.2d 221, 223 (9th Cir. 1980).

I have no “personal bias or prejudice” against the Respondent. Nor do I have “personal knowledge” of any “disputed evidentiary facts.”<sup>1</sup> Indeed, my relationship with the Teamsters terminated over 10 years ago. And, throughout the course of my employment with the Teamsters, I did not work on a single *Overnite* case. Given these circumstances, no reasonable person would be convinced that I was biased against Overnite merely because I represented the Teamsters in unrelated matters during the prior decade.

With respect to § 455(b)(2), the Respondent’s recusal argument is based on the premise that the history of bargaining at its Chicago terminal constitutes a “matter in controversy” in the instant proceeding. That history can be briefly summarized as follows. In 1982, Teamsters Local 705 won a Board election and was certified as the employees’ bargaining representative. In 1989, the Board issued a decision finding that the Respondent violated Section 8(a)(1) of the Act during the course of its antiunion campaign and violated Section 8(a)(5) and (1) by thereafter bargaining in bad faith. *Overnite Transportation Co.*, 296 NLRB 669. In 1991, the Seventh Circuit upheld the Board’s decision. 938 F.2d 815. In 1992, the Board dismissed complaint allegations that the Respondent had committed additional violations of Section 8(a)(1) and had continued to bargain in bad faith in violation of Section 8(a)(5). *Overnite Transportation Co.*, 307 NLRB 666. As of the close of the hearing in the instant case, the parties still had not negotiated a collective-bargaining agreement at Chicago.

The present matter arises from the organizational effort the Teamsters and its affiliated locals commenced in October 1994 at numerous Overnite terminals across the country. As part of its opposition to unionization, the Respondent related to employees its views on the history of bargaining at Chicago. The General Counsel and the Charging Parties contend that the Respondent’s statements about the Chicago experience violated the Act, while the Respondent maintains that such statements were lawful.

In its motion, the Respondent argues that because “Chicago bargaining is a ‘matter in controversy,’” I must recuse myself if I “worked on matters relating to, or [have] any knowledge regarding, the Chicago Service Center,” including 10 enumerated unfair labor practice cases. For the same reason, the Respondent maintains that I must recuse myself if, during the time I served as

staff counsel, “any other Teamster attorney worked on cases or issues regarding bargaining” at Chicago.

I will assume arguendo that, as the Respondent contends, the Chicago bargaining history constitutes a “matter in controversy” within the meaning of § 455(b)(2). Therefore, under the statute, the initial question is whether, while employed by the Teamsters, I “served as lawyer” with respect to matters involving the Chicago terminal. The answer to the question is an unequivocal “no.” As stated above, I did not work on any Overnite matters involving any Overnite terminal. Nor do I have any extrarecord knowledge concerning the history of bargaining at Chicago.

The remaining issue under § 455(b)(2) is whether “a lawyer with whom [I] previously practiced law served during such association as a lawyer concerning” issues involving the Chicago terminal. To the best of my knowledge, none of the lawyers with whom I practiced while employed at the Teamsters “served during [our] association as a lawyer concerning” Chicago matters because the Teamster local at that terminal was represented by a Chicago law firm. The accuracy of my recollection is confirmed by the reported Board and court cases involving the Chicago terminal, which all list Chicago counsel as the attorney of record.<sup>2</sup>

With respect to the unreported cases, I have searched the case records maintained by the Board’s Executive Secretary, which date as far back as 1982, in order to determine if a Teamster staff attorney with whom I was associated “served . . . as a lawyer” with respect to matters involving the Chicago terminal. My research failed to identify any such case.<sup>3</sup>

In sum, even assuming that the Chicago bargaining history is a “matter in controversy” in this proceeding, there is still no basis for my disqualification under § 455(b)(2) because while employed by the Teamsters I

<sup>2</sup> Sheldon M. Charone of Carmell, Charone, Widmer, Mathews & Moss represented Teamsters Local 705 in the following cases, all of which are cited in the Respondent’s motion: Case 13–CA–22606, reported at 296 NLRB 669, 672 (1989), enfd. 938 F.2d 815, 816 (7th Cir. 1991) (John F. Ward of the same law firm also represented Teamsters Local 705 before the court of appeals); Case 13–CA–28668, reported at 306 NLRB 237, 240 (1992), modified on reconsideration 311 NLRB 1242 (1993); Cases 13–CA–29357 and 13–CA–29749, reported at 307 NLRB 666 (1992).

<sup>3</sup> With regard to Case 13–CA–30815, which is cited in the Respondent’s motion, the Executive Secretary’s records show that the case involved the Respondent’s petition to revoke an investigative subpoena, but the records fail to reveal who, if anyone, represented the charging party, Teamsters Local 705.

The Executive Secretary’s Office does not have a record of the remaining five unfair labor practice cases cited by the Respondent (Cases 13–CA–23224; 13–CA–24163; 13–CA–24246; 13–CA–26474; and 13–CA–28485).

Although not cited in the Respondent’s motion, the Executive Secretary’s records reveal that in Case 13–RC–15990 Teamsters Local 705 was represented by Sherman Carmell of Carmell, Charone, and Widmer. This 1982 representation proceeding is apparently the one that resulted in the certification of Teamsters Local 705 as the bargaining representative of the employees at the Chicago terminal.

<sup>1</sup> Contrary to the Respondent’s assertion, I do not have “personal knowledge of the Teamsters’ organizing tactics that are at issue in this case.”

did not “serve as lawyer” regarding issues involving the Chicago terminal and no “lawyer with whom [I] previously practiced law served during such association as a lawyer concerning [Chicago] matter[s].”

### III.

The Respondent’s final argument is based on § 455(a), which requires a judge to “disqualify himself in any proceeding in which his impartiality might reasonably be questioned.” The purpose of this section “is to promote confidence in the judiciary by avoiding even the appearance of impropriety whenever possible.” *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 865 (1988).

Under this section, “the standard to be employed is an objective one. That is, the . . . judge is required to recuse himself only when a reasonable person with knowledge of all the facts would conclude that the judge’s impartiality might reasonably be questioned.” *United States v. Winston*, supra, 613 F.2d at 222. “An objective standard is essential when the question is how things appear to the well-informed, thoughtful observer rather than to a hypersensitive or unduly suspicious person.” *In re Mason*, 916 F.2d 384, 385–386 (7th Cir. 1990).

It is true, as the Respondent maintains, that there is a “long and contentious history between Overnite and the Teamsters,” which encompasses the period when I served as staff attorney. Thus, as stated by the Respondent, during the past 20 years, the Teamsters and its affiliated locals have conducted numerous campaigns to organize Overnite employees, have filed and litigated unfair labor practice charges against Overnite, and have been engaged in collective-bargaining negotiations with Overnite. Claiming that the Teamsters have a “fixation on Overnite,” the Respondent argues that “a reasonable person—the man on the street—would find it hard to believe that Member Liebman was wholly untouched by these efforts during her ten years with the Teamsters.” Therefore, according to the Respondent, my “impartiality might reasonably be questioned,” and I should recuse myself to avoid any appearance of impropriety.

As stated above, the standard under § 455(a) is an objective one, requiring examination of the issue from the perspective of a reasonable person knowing all the circumstances. Accordingly, the following additional facts must be considered.

First, I played no role whatsoever in the longstanding dispute between Overnite and the Teamsters. Instead, I represented the Teamsters in other diverse matters. To the extent that these matters included organizational campaigns, these were campaigns conducted among employees of other companies, primarily those covered by the Railway Labor Act. While I was, of course, not unaware of Overnite and the Teamsters’ interest in organizing that company, I have only very limited and general recollections of the Overnite activities that transpired

during my tenure at the Teamsters. Furthermore, while I was, of course, an advocate for the Teamsters, and also served as in-house counsel, a reasonable person would understand that I was nonetheless the attorney, not the client, and that there is a difference between the two.

Second, 10 years have now elapsed since I last worked for the Teamsters. It is well established that “the long passage of time since [a judge’s] last representation of [a party] requires the conclusion that no reasonable person could question his impartiality.” *Cipollone v. Liggett Group, Inc.*, 802 F.2d 658, 659 (3d Cir. 1986). Thus, in *Chittimacha Tribe of Louisiana v. Harry L. Laws Co., Inc.*, 690 F.2d 1157, 1166 (5th Cir. 1982), cert. denied 464 U.S. 814 (1983), the Fifth Circuit held that a judge’s representation of a party on unrelated matters 6 years prior to his appointment to the bench was “too remote and too innocuous” to warrant his disqualification under § 455(a).

Finally, for the 4 years immediately preceding my appointment in 1997 as a member of the National Labor Relations Board, I was employed by the Federal Mediation and Conciliation Service (FMCS), an independent government agency created by Congress to promote sound and stable labor-management relations. I served initially as special assistant to the FMCS director and later as deputy director of the agency. In those positions, I represented neither labor nor management, but assumed the role of a neutral assisting both sides to break down traditional barriers and build better working relationships.

Under all the circumstances, an objective observer would not reasonably question my impartiality. Given my lack of involvement with any Overnite matters, the long passage of time since I last represented the Teamsters, and my employment during the past 6 years with two neutral government agencies, no reasonable person would harbor doubts about my ability to decide this case fairly on its merits.

### IV.

For all of the above reasons, the Respondent’s motion is denied.

## 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 announce and implement the overtime portion of the productivity package in order to discourage and dissuade our employees from selecting the International Brotherhood of Teamsters, AFL-CIO (the International or one of its locals as collective-bargaining representatives).

WE WILL NOT fail and refuse to grant wage and mileage increases to certain of our employees to retaliate or discriminate against them for selecting the International or one of its locals as their collective-bargaining representatives and to discourage and dissuade our other employees from selecting the International or one of its locals as collective-bargaining representatives.

WE WILL NOT bypass the exclusive representatives of our employees and deal directly with our employees.

WE WILL NOT unilaterally change the terms and conditions of employment of our employees by failing and refusing to grant them established wage and mileage increases.

WE WILL NOT unilaterally change the terms or conditions of employment of certain of our employees by implementing the overtime and nonwage portions of our productivity package.

WE WILL NOT exceed the legitimate scope of interviews with our employees in preparation for a hearing by unnecessarily and coercively intruding into their Section 7 activities.

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

WE WILL, on request, bargain with General Drivers, Warehousemen & Helpers Local Union #89 a/w International Brotherhood of Teamsters, AFL-CIO as the exclusive representative of our employees in the following appropriate unit concerning their terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

All full-time and regular part-time road drivers, city drivers, dock workers, jockeys, and mechanics employed at Overnite Transportation Company's Louisville, Kentucky facility, excluding office clerical employees, account managers, dispatchers and all guards and supervisors as defined in the Act.

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

All full-time and regular part-time dock workers, city drivers, road drivers and jockeys, employed at Overnite Transportation Company's Lawrenceville, Georgia facility, but excluding shop employees, temporary employees, office clerical employees, managers, guards, and supervisors as defined in the Act.

WE WILL, on request, bargain with International Brotherhood of Teamsters, Local 822, AFL-CIO as the exclusive representative of our employees in the following appropriate unit concerning their terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

All full-time and regular part-time over the road drivers, city pick-up drivers, delivery drivers, yard workers, dock workers and mechanics, employed at Overnite Transportation Company's Norfolk, Virginia facility, excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

WE WILL, on request, bargain with Highway, City and Air Freight Drivers, Dockmen, Dairy Workers and Helpers, St. Louis and Vicinity, Missouri, Marine Officers Association, the Navigable Inland Waterway Systems of the United States Local 600, affiliated with International Brotherhood of Teamsters, AFL-CIO as the exclusive representative of our employees in the following appropriate unit concerning their terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

All full-time and regular part-time city drivers, dockmen, road drivers and mechanics employed at Overnite Transportation Company's Bridgeton, Missouri terminal, EXCLUDING all office clerical and professional employees, guards, and supervisors as defined in the Act.

WE WILL make whole our employees in the bargaining units at our service centers (terminals) located in Bedford Park, Illinois; Kansas City, Kansas; Blaine, Minnesota; Indianapolis, Indiana; West Sacramento, California; Grand Rapids, Michigan; Miami, Florida; Tucson, Arizona; St. Louis, Missouri; Milwaukee, Wisconsin; Rockaway, New Jersey; Romulus, Michigan; North Canton, Ohio; and Atlanta, Georgia, for the monetary losses suffered as a result of our failure and refusal to grant them our wage and mileage increases, announced on December 11, 1995, and effective December 31, 1995, with interest.

WE WILL, at the request of the exclusive representatives of the unit employees at our service centers at Norfolk, Virginia; Lawrenceville, Georgia; Louisville, Kentucky; and Bridgeton, Missouri, rescind in whole or in part the overtime and nonwage portions of the productivity package.

OVERNITE TRANSPORTATION COMPANY, INC.

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DECISION

PRELIMINARY STATEMENT OF THE CASE

BENJAMIN SCHLESINGER, Administrative Law Judge. This massive proceeding results from the attempt of the International Brotherhood of Teamsters, AFL-CIO (the International) to organize Respondent Overnite Transportation Company, Inc. (Respondent or Overnite or Company), one of the largest non-union trucking companies with up to approximately 175 service centers (or terminals) in the United States. In the course of that struggle, the complaint alleges, Respondent granted a wage increase in early 1995 to squash the Teamsters' organizing efforts not only by affecting elections held at various of its service centers or terminals but also by discouraging support of the Teamsters in the future, all in violation of Section 8(a)(3) and (1) of the National Labor Relations Act. The complaint seeks bargaining orders at numerous service centers under the authority of *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969), and this decision deals with four of them. Respondent denies that it violated the Act in any manner.<sup>1</sup>

<sup>1</sup> The relevant docket entries are as follows: The charge in Case 18-CA-13481 was filed by the International on February 21, 1995. The charge in Case 18-CA-13394 was filed by Dennis Blaskowski on December 5, 1994, and amended on January 13, 1995. The charge in Case 18-CA-13438 was filed by Teamsters Local 120 on January 17, 1995. The charge in Case 18-CA-13484 was filed by Teamsters Local 120 on February 22, 1995. The charge in Case 18-CA-13642 was filed by the International on June 9, 1995. The charge in Case 18-CA-13394-51 (formerly 5-CA-25268) was filed by Teamsters Local 822 on April 7. Thereafter, on August 9, 1995, Case 18-RC-15812 (formerly 5-RC-14153) was consolidated with Case 18-CA-13394-51 (formerly 5-CA-25268). The charge in Case 18-CA-13394-35 (formerly 9-CA-32726) was filed by Teamsters Local 89 on March 16, 1995, and amended on April 19 and May 8, 1995. The charge in Case 18-CA-13394-36 (formerly 9-CA-32800-2) was filed by Teamsters

JURISDICTION

Respondent, a corporate subsidiary of Union Pacific Corporation, with its headquarters and principal place of business in Richmond, Virginia, has been engaged in the interstate transportation of general commodity freight by truck on a less-than-truckload (LTL) basis. It is the fifth or sixth largest LTL trucking company in the country, employing, when the hearing commenced, approximately 14,000 employees, including over-the-road and city drivers, dockworkers, and mechanics. During the calendar year ending December 31, 1994, Respondent derived gross revenues in excess of \$50,000 for the transportation of freight from the State of Minnesota directly to points located outside the State of Minnesota. I conclude, as Respondent admits, that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. I also conclude, as Respondent admits, that the International and its Locals 120 (known as General Drivers, Helpers and Truck Terminal Employees, Teamsters Local Union No. 120), 822, 89 (known as General Drivers, Warehousemen & Helpers Local Union #89), 728, 600 (known as Highway, City and Air Freight Drivers, Dockmen, Dairy Workers And Helpers, St. Louis and Vicinity, Missouri, Marine Officers Association, the Navigable Inland Waterway Systems of the United States Local 600),<sup>2</sup> 773, 639, 651, 406, 390, 705, 41 (known as Teamsters Local Union No. 41, Over-the-Road and City Transfer Drivers, Helpers, Dockmen, and Warehousemen), 150 (known as Chauffeurs, Teamsters and Helpers Local Union No. 150), 135 (known as Chauffeurs, and Teamsters, Warehousemen and Helpers Local Union No. 135), 104, 200, 560, 299, and 92 are labor organizations within the meaning of Section 2(5) of the Act.<sup>3</sup>

The following employees of Respondent in the four *Gissel* locations involved in this decision constitute units appropriate for purposes of collective bargaining:

All full-time and regular part-time road drivers, city drivers, dock workers, jockeys, and mechanics employed at Overnite Transportation Company's Louisville, Kentucky

Local 89 on April 5, 1995. Thereafter, Case 18-RC-15814 (formerly 9-RC-16508) was consolidated with Cases 18-CA-13394-35 (formerly 9-CA-32726) and 18-CA-13394-36 (formerly 9-CA-32800-2). The charge in Case 18-CA-13394-27 (formerly 10-CA-28242-1) was filed by the International on February 14, 1995. The charge in Case 18-CA-13394-91 (formerly 10-CA-28463) was filed by the International and Teamsters Local 728 on May 15, 1995. Thereafter, on May 24, 1995, Case 18-RC-15786 (formerly 10-RC-14595) was consolidated with Case 18-CA-13394-27 (formerly 10-CA-28242-1). The further consolidation on January 31, 1996, of Case 18-RC-15882 (formerly 10-RC-14595) appears erroneous, as it duplicates the earlier consolidation, but with a different case number. If that is so, this consolidation ought to be rescinded. The charge in Case 18-CA-13394-13 (formerly 14-CA-23487) was filed by Teamsters Local 600 on February 22, 1995, and amended on April 11, 1995. Thereafter, on April 20, 1995, Case 18-RC-15768 (formerly 14-RC-11501) was consolidated with Case 18-CA-13394-13 (formerly 14-CA-23487). The hearing dealing with the allegations decided herein was held in this section was held in Minneapolis, Atlanta, Louisville (occasionally New Albany, Indiana), Norfolk, St. Louis, Richmond, and Washington, on about 65 days between February 1996 and February 1997.

<sup>2</sup> It is also known as "Highway, City and Air Freight Drivers, Dockmen, Marine Officers Association, Dairy Workers and Helpers, Local Union 600."

<sup>3</sup> The International and its various Locals are most often separately referred to herein as the "Teamsters" or "Union." Hopefully, the correct reference to the appropriate union is obvious.

facility, excluding office clerical employees, account managers, dispatchers and all guards and supervisors as defined in the Act.

All full-time and regular part-time dock workers, city drivers, road drivers and jockeys, employed at Overnite Transportation Company's Lawrenceville, Georgia facility, but excluding shop employees, temporary employees, office clerical employees, managers, guards and supervisors as defined in the Act.

All full-time and regular part-time over the road drivers, city pick-up drivers, delivery drivers, yard workers, dock workers and mechanics employed at Overnite Transportation Company's Norfolk, Virginia facility, excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

All full-time and regular part-time city drivers, dockmen, road drivers and mechanics employed at Overnite Transportation Company's Bridgeton, Missouri terminal, EXCLUDING all office clerical and professional employees, guards, and supervisors as defined in the Act.

In addition, the following are the other labor organizations and units involved in this Decision: On June 25, 1982, Local 705 was certified as and since then, by virtue of Section 9(a) of the Act, has been the exclusive collective-bargaining representative for the purpose of collective bargaining of Respondent's employees in the following unit, which is appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time local drivers employed at Overnite Transportation Company's Bedford Park, Illinois facility; but excluding all office clerical employees, guards and supervisors as defined in the Act, and all other employees.

At all times material herein, Local 705 has requested that Respondent recognize it and bargain collectively with it as the exclusive collective-bargaining representative of the Bedford Park unit (referred to as Chicago).

On December 16, 1994, Local 41 was certified as and since then, by virtue of Section 9(a) of the Act, has been the exclusive collective-bargaining representative for the purpose of collective bargaining of Respondent's employees in the following unit which is appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time over-the-road drivers, city pickup and delivery drivers, hostlers, yard and dock employees employed by Overnite Transportation Company in the Greater Kansas City area but EXCLUDING office clerical employees, O/S/D clerks, mechanics, shop employees, professional employees, guards, and supervisors as defined in the Act.

At all times material herein, and particularly at all times on and after December 11, 1995, Local 41 has requested that Respondent recognize it and bargain collectively with it as the exclusive collective-bargaining representative of the Greater Kansas City unit.

On December 28, 1994, Local 135 was certified as and since then, by virtue of Section 9(a) of the Act, has been the exclusive collective-bargaining representative for the purpose of collective bargaining of Respondent's employees in the following unit which is appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time over-the-road drivers, city pickup and delivery drivers, hostlers, yard and dock employees, shop employees, and O. S. & D clerks employed at Overnite Transportation Company's Indianapolis, Indiana facility; BUT EXCLUDING all office clerical employees, all professional employees, and all guards and supervisors as defined in the Act.

At all times material herein, and particularly at all times on and after December 11, 1995, Local 135 has requested that Respondent recognize it and bargain collectively with it as the exclusive collective-bargaining representative of the Indianapolis unit.

On January 24, 1995, Local 150 was certified as and since then, by virtue of Section 9(a) of the Act, has been the exclusive collective-bargaining representative for the purpose of collective bargaining of Respondent's employees in the following unit which is appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time drivers and dock employees employed at Overnite Transportation Company's West Sacramento, California facility; excluding all other employees, guards and supervisors as defined in the Act.

At all times material herein, and particularly at all times on and after December 11, 1995, Local 150 has requested that Respondent recognize it and bargain collectively with it as the exclusive collective-bargaining representative of the West Sacramento unit.

On February 7, 1995, Local 120 was certified as and since then, by virtue of Section 9(a) of the Act, has been the exclusive collective-bargaining representative for the purpose of collective bargaining of Respondent's employees in the following unit which is appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time drivers, dockmen, and mechanics employed at Overnite Transportation Company's Blaine, Minnesota facility; excluding office clerical employees, guards and supervisors as defined in the Act.

At all times material herein, and particularly at all times on and after December 11, 1995, Local 120 has requested that Respondent recognize it and bargain collectively with it as the exclusive collective-bargaining representative of the Blaine unit.

On June 7, 1995, Local 406 was certified as and since then, by virtue of Section 9(a) of the Act, has been the exclusive collective-bargaining representative for the purpose of collective bargaining of Respondent's employees in the following unit which is appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time over-the-road and city drivers, dockworkers, mechanics employed at and out of Overnite Transportation Company's facility located at 2693 Courier Court, NW, Grand Rapids, Michigan; but excluding all office clerical employees, guards and supervisors as defined in the Act.

At all times material herein, and particularly at all times on and after December 11, 1995, Local 406 has requested that Respondent recognize it and bargain collectively with it as the exclusive collective-bargaining representative of the Grand Rapids unit.

On August 15, 1995, Local 390 was certified as and since then, by virtue of Section 9(a) of the Act, has been the exclusive collective-bargaining representative for the purpose of

collective bargaining of Respondent's employees in the following unit which is appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time over-the-road drivers, city drivers, dock workers, jockeys, driver leadpersons, dock leadpersons and mechanics employed at Overnite Transportation Company's Miami, Florida facility; excluding all other employees, office clerical employees, janitors, managerial employees, confidential employees, guards and supervisors as defined in the Act.

At all times material herein, and particularly at all times on and after December 11, 1995, Local 390 has requested that Respondent recognize it and bargain collectively with it as the exclusive collective-bargaining representative of the Miami unit.

On November 24, 1995, Local 104 was certified as and since then, by virtue of Section 9(a) of the Act, has been the exclusive collective-bargaining representative for the purpose of collective bargaining of Respondent's employees in the following unit which is appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time dock employees and city drivers employed at Overnite Transportation Company's 325 East Medina Road, Tucson, Arizona service center; excluding all other employees, including office clerical employees, sales personnel, guards and supervisors as defined in the Act.

At all times material herein, and particularly at all times on and after December 11, 1995, Local 104 has requested that Respondent recognize it and bargain collectively with it as the exclusive collective-bargaining representative of the Tucson unit.

On June 16, 1995, Local 600 was certified as the exclusive collective-bargaining representative for the purpose of collective bargaining of Respondent's employees in the following unit which is appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full time and regular part-time city drivers, dockmen, road drivers and mechanics employed at Overnite Transportation Company's St. Louis, Missouri terminal, EXCLUDING all office clerical and professional employees, guards, and supervisors as defined in the Act.

At all times material herein, and particularly at all times on and after December 11, 1995, Local 600 has requested that Respondent recognize it and bargain collectively with it as the exclusive collective-bargaining representative of the St. Louis unit.

On November 8, 1995, Local 200 was certified as the exclusive collective-bargaining representative for the purpose of collective bargaining of Respondent's employees in the following unit which is appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time dock workers, city drivers, road drivers, yard jockeys and mechanics employed at Overnite Transportation Company's Milwaukee, Wisconsin facility; but excluding office clerical employees, managers, guards and supervisors as defined in the Act.

At all times material herein, and particularly at all times on and after December 11, 1995, Local 200 has requested that Respondent recognize it and bargain collectively with it as the exclusive collective-bargaining representative of the Milwaukee unit.

On July 28, 1995, Local 560 was certified as the exclusive collective-bargaining representative for the purpose of collective bargaining of Respondent's employees in the following unit which is appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time city drivers, road drivers, driver lead persons, platform lead person, platform workers and jockeys employed at Overnite Transportation Company's Rockaway, New Jersey facility; but excluding all office clerical employees, guards, professional employees and supervisors as defined in the Act.

At all times material herein, and particularly at all times on and after December 11, 1995, Local 560 has requested that Respondent recognize it and bargain collectively with it as the exclusive collective-bargaining representative of the Rockaway unit.

The following employees of Respondent, constitute a unit appropriate for purposes of collective bargaining:

All full-time and regular part-time drivers, dock workers, mechanics and switchers, employed at Overnite Transportation Company's Romulus, Michigan facility; but excluding all professional employees, confidential secretaries, leadmen, guards and supervisors as defined in the Act.

Pursuant to a petition filed by Local 299, the Board conducted an election on March 15, 1995, among Respondent's employees employed in the Romulus unit. 57 employees voted for representation by Local 299, and 34 employees voted against. Challenged ballots were insufficient to affect the results of the election. Thereafter, Respondent filed timely objections to conduct affecting the results of the election. In the event that Local 299 is ultimately determined by the Board to be the exclusive collective-bargaining representative of Respondent's employees in the Romulus unit, based on Section 9(a) of the Act, since March 15, 1995, Local 299 has been the exclusive collective-bargaining representative of the Romulus unit. At all times material herein, and particularly at all times on and after December 11, 1995, Local 299 has requested that Respondent recognize and bargain collectively with it as the exclusive collective-bargaining representative of the Romulus unit.

The following employees of Respondent constitute a unit appropriate for purposes of collective bargaining:

All full-time and regular part-time city drivers, road drivers, jockeys and dock workers employed at Overnite Transportation Company's 7900 Cleveland Avenue, N.W., North Canton, Ohio facility; excluding all office clerical employees, professional employees, mechanics, guards and supervisors as defined in the Act.

Pursuant to a petition filed by Local 92, the Board conducted an election on April 6, 1995, among Respondent's employees employed in the North Canton unit. 25 employees voted for representation by Local 92, and 17 employees voted against. Challenged ballots were insufficient to affect the results of the election. Thereafter, Respondent filed timely objections to conduct affecting the results of the election. In the event that Local 92 is ultimately determined by the Board to be the exclusive collective-bargaining representative of Respondent's employees in the North Canton unit, based on Section 9(a) of the Act, since April 6, 1995, Local 92 has been the exclusive collective-bargaining representative of the North Canton unit. At all times

material herein, and particularly at all times on and after December 11, 1995, Local 92 has requested that Respondent recognize and bargain collectively with it as the exclusive collective-bargaining representative of the North Canton unit.

The following employees of Respondent constitute a unit appropriate for purposes of collective bargaining:

All full-time and regular part-time dock workers, city drivers, combo drivers, jockeys and leadmen employed at Overnite Transportation Company's Moreland Avenue, Atlanta, Georgia service facility; but excluding office clerical employees, managerial employees, shop employees, guards and supervisors as defined in the Act.

Pursuant to a petition filed by Local 728, the Board conducted an election on April 17, 1995, among Respondent's employees employed in the Atlanta unit. 136 employees voted for representation by Local 728, and 100 employees voted against representation. Challenged ballots were insufficient to affect the results of the election. Thereafter, Respondent filed timely objections to conduct affecting the results of the election. In the event that Local 728 is ultimately determined by the Board to be the exclusive collective-bargaining representative of Respondent's employees in the Atlanta unit, based on Section 9(a) of the Act, since April 17, 1995, Local 728 has been the exclusive collective-bargaining representative of the Atlanta unit. At all times material herein, and particularly at all times on and after December 11, 1995, Local 728 has requested that Respondent recognize and bargain collectively with it as the exclusive collective-bargaining representative of the Atlanta unit.

#### FINDINGS OF FACT AND CONCLUSIONS OF LAW

##### I. EARLIER SETTLEMENT

In July 29, 1995, the General Counsel and Respondent formally settled, with certain exceptions, all the numerous 8(a)(1) unfair labor practices alleged in the various complaints consolidated in this proceeding and 8(a)(3) allegations for which the only remedies required were a cease-and-desist order and the posting of a notice.<sup>4</sup> They also settled certain 8(a)(3) allegations that concerned Respondent's failure to implement the wage and benefit package on March 5, 1995, discussed herein, at Blaine, Kansas City, West Sacramento, and Indianapolis (sometimes referred to as "the four certified centers") which at that time were the only service centers where the employees were represented by the Teamsters as a result of Board-conducted elections that Respondent did not contest. There, Respondent made the employees whole for the monetary losses suffered; and Respondent also posted a notice to employees at all of its service centers nationwide, essentially promising not to commit any of the violations again.

Specifically left for resolution in this proceeding were so-called "national" allegations which related to all of Respondent's facilities and other allegations that, the General Counsel contended, supported bargaining orders under *Gissel*, in addition to those ruled on in this Decision, in Nitro, West Virginia; Lafayette, Indiana; Rockford, Illinois; Bensalem, Pennsylvania; Parkersburg, West Virginia; Elmsford, New York; Dayton, Ohio; Nashville, Tennessee; Richfield, Ohio; and Chattanooga,

<sup>4</sup> The settlement was approved by the Board and incorporated in its Decision, DS-2350, dated September 6, 1995.

Tennessee.<sup>5</sup> The General Counsel specifically reserved the right to use any competent, relevant, material, and otherwise admissible evidence to support the bargaining orders, even if the evidence pertained to allegations that had been previously settled.

In addition, the parties entered into a novel agreement to enforce the settlement and to resolve future violations. First, they divided Respondent's supervisors and managerial personnel into two categories: category A, which included all of Respondent's service centers' supervisors not included in category B, which included service center managers, all supervisory or managerial personnel above the level of service center manager, and one additional supervisor designated by Respondent in each of its 38 largest service centers. If the General Counsel determined that any person or persons defined in category B engaged in two or more "hallmark violations" of the National Labor Relations Act; or in any five violations of Section 8(a)(1) or (3) or in any four violations of Section 8(a)(1) or (3) of the Act at a single service center, then the matter would be submitted to an agreed-upon neutral arbitrator for a speedy disposition. Notwithstanding that, the General Counsel reserved the right to issue a complaint and notice of hearing on the same conduct if the alleged violations required a remedy other than a cease-and-desist order and posting of a notice.

The effect of the settlement agreement limited this proceeding primarily to the *Gissel* and discipline cases, and the parties agreed to litigate a sampling of the *Gissel* cases, and to have those cases decided, with the hope that the partial decision would aid them in determining how best to proceed with the remaining issues in this proceeding. That requires that I examine, first, whether the "national" allegations, if proved, are of such magnitude that they justify the grant of *Gissel* bargaining orders. If there is no proof of those national violations, or, secondarily, if there is no proof that a majority of the employees at the various locations designated the Teamsters as their collective-bargaining representative, then there is no necessity to examine all, except one, of the various other alleged violations at the individual service centers heard thus far, because all of them have been resolved in the settlement agreement. I, thus, turn to the national allegations.

##### II. THE MARCH 1995 WAGE INCREASE

For at least 11 years prior to 1991, Respondent granted across-the-board annual raises each October to its field hourly employees wholly in the form of increases in their base wage or, in the case of road drivers, base mileage rates. As a result of Respondent's disappointing 1991 financial performance, then president and chief executive officer, Thomas Boswell, deferred the October 1991 raise to January 1992, when Overnite gave a 25 cents per hour increase, plus a \$500 one-time payment. January increases followed in 1993 and 1994; but the 1994 increase was different because Respondent granted a smaller wage increase, averaging approximately 25-cent-per-hour (30 cents for local drivers), and introduced its performance incentive plan (PIP), which was designed to provide employees with additional compensation if certain quarterly and annual earnings targets were reached. Respondent's financial performance was not as rosy as its management had antici-

<sup>5</sup> The complaint also sought bargaining orders at Memphis, Tennessee; Toledo, Ohio; and Moonachie, New Jersey. During the course of the hearing, the General Counsel moved for orders, which I granted, severing and dismissing those cases.

pated. It met its earnings targets only in the second quarter of 1994, when there was a PIP payout, but there was none in the first or third quarters, and by the early fall no likelihood, at least in the opinion of some, of a bonus for the fourth quarter or the whole year.

Perhaps as a result of the employees' disenchantment with PIP, the Teamsters began organizing Respondent's employees in September 1994. Boswell wrote to the employees on November 22, warning that the Teamsters' main goal was to capture the employees' money through dues and their pension plan. Excoriating the Teamsters for everything from violence and corruption to embezzlement and greed, he charged that the Teamsters often caused strikes which harmed not only the employer but also the employees, pointing out that the Teamsters conducted a 24-day strike in April 1994 against the union trucking employers, resulting in a net loss of almost \$3000 for each employee, while the Teamsters obtained average yearly increases of only 32-1/2 cents over a 4-year contract. He defended Respondent's pay structure, adding:

Everyone is disappointed we haven't met our earnings targets for 1994 and, hence, have not received the bonuses we had hoped for. But, I assure you, we are all affected. Every member of senior management will make significantly *less* in 1994 than in 1993 when we met our targets. So you need to know the system is fair, and I guarantee you, based on what they have done at other companies, the Teamsters will not help us to better make our targets or to pay you bonuses or salary increases. It is a fact that of the fifty top trucking companies in America thirty years ago—almost all of which were represented by the Teamsters—only eight are surviving today. The long lasting record of the Teamsters is not just that they failed to deliver on their promises, but that when their demands have been met, trucking companies have often lost the battle to survive.

It is now that time of year when we consider pay and benefit changes for Overnite for the next year. We have already made decisions for 1995 that strike a balance between the current needs of all employees and our Company's future needs. It would be irresponsible to do otherwise—unfair to everyone if we don't consider both current needs and long term survival. We will be announcing the 1995 changes shortly. When we do, I believe everyone will recognize that remaining a profitable, viable company permits us to provide continued and much better improvements in our pay and benefit packages than the Teamsters achieved with their painful 24-day strike. [Emphasis in original.]

A nearly identical letter was sent on December 7, 1994, to the drivers and dockworkers in Los Angeles, who were attempting to organize. Respondent forecast the lack of success of negotiations and told of the inevitability of strikes: "the only way the Union could *try* to bring pressure on the Company is to call you employees out on strike," and "*the only way to guarantee you will not be involved in a Teamsters Union strike or lockout is to vote "NO" in the upcoming election.*" (Emphasis in original.) And strikes would be ineffective, giving as examples Overnite's experiences in Chicago—"Two years later [after being certified], when their wages, benefits and working conditions were no different from those of any other local drivers in the Company, the Union called them out on strike"—and Bal-

timore—"Just like in Chicago, after the Union was unable to keep the wild promises it made before the vote, it called the employees out on strike." In sum, nothing would do any good.

The letter also implied that, if the Teamsters was successful, Respondent would not expand or be successful. Rather, Respondent might fail. Thus, Respondent answered the question why it cared if Teamsters won:

The answer is that our whole future here in Los Angeles—expanding and making a success of this operation—increasing your satisfaction with your work—strengthening your security in your job—all *definitely depend upon our pulling together and not pulling apart. The close relationship we have tried to build and hopefully can continue is absolutely essential. Whatever tears down that sort of relationship will prove fatal in the long run.* [Emphasis in original.]

Respondent argued that Teamsters could not provide job security:

We know that everyone is interested in job security. But what a lot of people don't realize is that job security is possible only with a successful company—that is, a company that is well operated and sufficiently profitable to generate the ability to reinvest in new trucks, trailers, tow motors, terminals and technology to stay in business. We have been a part of the transportation industry for a long time and have seen firsthand what the Teamsters have done to unionized companies—the dilapidated and obsolete equipment—run-down terminals, thousands of employees without jobs, only occasional work for many others, and in the end financial disaster and shutdown for many of them.

Look at all of the closed trucking terminals in the Country. Look at Churchill, St. Johnsbury, PIE, Standard Trucking, Spector-Red Ball, American/Smith, Eazor Express, Akers-Central, Eastern Express, Mercury Motor Express, Branch, Interstate, IML, Mason Dixon and Smith Solomon to name only a few—all of them forced into bankruptcy in the face of unreasonable demands and pressures from the Teamsters Union. In fact, since 1980, there have been more than 150 unionized carriers who have gone out of business resulting in loss of jobs for over 170,000 persons. And there will be more in the future.

The letter ended with the additional comparison of life with and without the Teamsters:

We hope that you will think carefully about all these things before you vote. As matters now stand at Overnite, you have a steady job at good wages and a good place to work. We all hope to make things even better. Do you see any good reason to bring this outside Union in, pay your money to it, and at the same time run the risk of tearing apart everything you now have?

In the meantime, by letter dated December 2, 1994, Boswell announced the 1995 regular wage increase. First, he advised the employees that PIP "just didn't do what we intended it to do" and was going "back to the drawing board," and, "if and when it's reinstated," it will be better. Effective January 1, 1995, there would be a 50 cents an hour raise and other improvements, including a promise to formalize a pay schedule to compensate road drivers for time lost due to breakdowns or

weather-related delays. That 3.5-percent increase, essentially the normal yearly increase, is not at issue in this proceeding. What followed is.

In early January, Boswell was ousted by Union Pacific. On January 9, Jim Douglas became Respondent's new president and chief operating officer. That day, Douglas testified, he determined that the employees should be given another raise; and the General Counsel claims that that raise, announced by letter a month later, was given to discourage Respondent's employees from organizing and to affect the outcome of the many elections that the Teamsters and its Locals were seeking throughout Respondent's service centers, in violation of Section 8(a)(3) and (1) of the Act, relying on *NLRB v. Exchange Parts Co.*, 375 U.S. 405 (1964).

Douglas wrote the employees on February 10 that, as the new president, it was an opportunity "to begin solving the problems we've seen developing at Overnite over the past months and years." His letter continued:

This opportunity to refine our vision of what things ought to be began immediately after I became president. Days later, at the annual Management Leadership Conference in mid-January, I asked the 350 managers there to look hard at the business problems we were having and then give us their recommendations on what we could do to respond to them as quickly as possible.

They went to work, independently in their own regional sections, and came up with basically the same priorities I had reached long before: concentrate on our people, who really are the company, and concentrate on the quality of our service product. Those priorities are absolutely connected. Our Number 1 job is to serve Overnite's customers, and there's no way a turned-off employee can turn on a customer.

When we started this process, I gave myself no more than a month to begin eliminating the problems we identified, the ones that get in the way of doing the job we want to do for our customers. Since then, I've introduced myself face-to-face to hundreds of our people in numerous locations. I've talked to others on the telephone, and again and again, they confirmed what I've believed for a long time. This letter—and the actions I'm going to announce—are my first steps toward meeting the deadline I set for myself. I say "first," because I believe there's still a lot more to do.

It's been clear to me for months that our base pay has fallen behind that of some of our competitors. I really believe that this company cannot continue to subject productive, talented, loyal employees to this kind of situation. We paid a one-time bonus back in 1992, but the base-pay increase still wasn't high enough to keep us where we should have been. Then last year, we paid a heavy penalty for our inability to reach our targets. The irony is that we worked harder in 1994 than we ever had, and still came up short.

The Performance Incentive Plan simply did not provide you with the compensation that was intended, and that's the primary reason we discontinued it. Unfortunately, the most recent wage increase did not make up for the ground you and all our employees lost as the result of 1994's failed Performance Incentive Plan.

What we need now is action that remedies that situation.

Well, here it is. It's not everything, but as I said, it's a first step in the right direction. It brings us more in line with our competitors (especially when you include our great benefit package in any comparison). Most important, it's the right thing to do.

Douglas then announced the increases, which included a 55 cents per hour increase at the top rate of base pay for local P & D drivers, dockworkers, yard jockeys, and mechanics, effective March 5, 1995, an increase in the mileage rate for road drivers, and the reinstatement of safety bonuses (\$250), which had been eliminated when PIP was in effect, for road drivers. Douglas further explained:

These adjustments are in addition to increases announced in January. They represent the highest annual hourly raise in Overnite's history. As an example, they give P&D drivers and dock workers total 1995 increases of \$1.05 per hour.

Through all this, I ask you to remember three things:

- First, these are big steps in getting us back to a point where Overnite's compensation package is competitive. But to continue that, we've got to meet our service targets and grow our business. There's no other way. You—and our customers—deserve no less;
- Second, these things have bothered me for a long time, and as soon as I became president, I wanted you to know how I thought we could make this a better, fairer, more customer-responsive company. So, my first priority has been to go to work on solutions that have the greatest impact on our customers, our employees and our business;
- Third, you're going to keep hearing from me. Some things will take longer to accomplish than others, but I give you my pledge: When I know it, you will. Look for more announcements in the coming weeks and months about how we implement our vision of what the new Overnite will look like.

My own analysis shows plainly that we're on the way to doing what's right—for our customers and our company. I need your help, your commitment, your enthusiasm and your desire to give our customers, every day, the best we're capable of. And it's got to be cost effective for them and for Overnite. To stay competitive, we've got to grow. We all benefit when every action we take feeds that growth and the success of our customers.

I fully intend to keep you informed of our plans for the company. This letter is the first demonstration that I'm committed to making Overnite work better, to solve the problems we've seen building over the months and years, and to take advantage of the chance I've been given to do it the right way—our way.

On the same day as Douglas's letter to the employees, John Pollard, Respondent's counsel, sent Douglas's letter to the Unions that represented the four certified centers, advising them that, because they were the bargaining representatives of the drivers and dockworkers, "Overnite is prohibited from unilaterally implementing this discretionary increase for those employees." But his letter served as formal notice of Respondent's "general plans" and its willingness to bargain over this and other issues. Locals 41 (Kansas City) and 135 (Indianapolis)

replied on February 22 that they requested that the increases be implemented “on no less favorable conditions than any other employee or group of employees.” They thought that the increases could be effected without a formal bargaining session, but asked for one as soon as possible if Pollard felt that one was necessary. On February 22, Local 120 (Blaine) took exception to the fact that Overnite was giving the increase to all employees, except those that voted for the Teamsters. It charged that Respondent’s refusal was discriminatory and unlawful, noting that Respondent had consistently granted across-the-board increases to all employees who were not covered under a union contract. Pollard replied to the three Locals on March 9 that Respondent would “bargain in good faith regarding hourly and mileage increases, the amounts and effective dates for each and any other subjects you choose to raise on behalf of Overnite’s employees represented by your union at collective bargaining sessions as required or permitted by applicable law.”

The procedure in Chicago was different. There, Local 705 had been certified in 1982. Respondent would announce its yearly companywide increase, and Pollard would advise Local 705 of the increase. Pollard would ask the Local’s representative if he wished to bargain about the increase and typically advised that, if he did not hear from the representative by a date certain, he would assume that the Local had no objection to its implementation. That is what happened in 1995, and the Chicago employees received their increase; but the employees at the four certified centers did not receive the March 1995 wage and mileage increases at the same time as did other employees.<sup>6</sup>

Douglas’ February 10 letter refers to the “problems” and the “business problems” that he was trying to solve. The General Counsel contends that the sole problem was the Teamsters’ organizing activity and that Respondent granted the increase only to affect the outcome of the Board-conducted elections. Clearly, in about late summer or early fall 1994, the Teamsters began an unprecedented drive to organize the Respondent’s employees, not, as in the past, at just one or two or a few service centers, but at many locations, particularly in the Midwest. By the time Douglas became president, the Teamsters had filed petitions for elections in Kansas City (October 27, 1994); Los Angeles (Commerce) (November 14); Indianapolis (November 15); Southborough, Massachusetts (November 28); West Sacramento (December 5); Avon, Massachusetts (December 9); Blaine (December 20); and Cornwell Heights, Pennsylvania (January 4, 1995). The Teamsters had been certified at Kansas City (December 16, 1994) and Indianapolis (December 28); and there were to be two more certifications at West Sacramento (February 3, 1995) and Blaine (February 7).

By the time of the announcement of the March increase, 21 new petitions for elections had been filed. On the day of the announcement, another five were filed. It could be anticipated that the Teamsters was not going to give up, and they did not. By the effective date of the increase, yet another nine petitions were filed. Day after day, from shortly after Overnite held its annual San Antonio conference of managers, which began on January 12, until April, when the number of Teamsters’ petitions began to ebb, Douglas went to the service centers where petitions had been filed, hardly returning home or to his Richmond office. (He was to complain that he was spending only 2 days a month running the Company, being so absorbed in the

union campaign.) Typically, he would meet at the dock with the employees, staying late into the night, so that he could talk with the night shift, returning the next morning to talk with the day shift and the drivers, and then attending a dinner for the employees and their wives, at which he and other officials of Respondent, both local and national, would urge the employees not to vote for the Teamsters. He held numerous conversations; and, although Douglas emphasized that they were about his attempt to get the employees to meet him and talk with him about his management style and his direction, the real impact of these conversations were his attempts to draw the difference between him and Boswell and to emphasize that he looked upon the employees more favorably and would take care of them. Thus, the discussions included wages and overtime and benefits, and Douglas’s purpose was to explore and remove the employees’ concerns.<sup>7</sup>

Douglas was also concerned with spreading Respondent’s attitude towards unions. In its employee handbook, Overnite made known that it had no use for labor organizations. Entitled “Union-Free Environment,” it advised:

It is important for you to know that this Company values union-free working conditions. We believe that true job security can come only from you and the management of this company working together in harmony to produce a quality product. A union-free environment allows this kind of teamwork to develop. We look forward to working with you as an individual, with dignity and in a spirit of mutual trust and respect.

The filing of the representation petitions disrupted the “harmony.” Douglas was later to say and write:

This company is facing the most serious organized labor threat that we have ever been through. . . . It is a very, very serious threat to this company. I think at any time, because we are the largest LTL carrier in the country, we have some of the highest profitability numbers that anyone can see, we also have the highest revenue numbers that any non-union carrier will report, that makes us a natural target for the Teamsters to organize. So to say on any particular year that we will not have a petition or two come our way, I think we’ve got to expect that. But, folks, what we’ve got going on right now is very, very, very serious. And I am here to tell you that it is our franchise. If we do not solve this problem and [sic] the Overnite Transportation Company that you and I know today and the Overnite Transportation that we want in the future, will not exist. That is a guarantee, and it is not Jim Douglas’ guarantee, that is a Teamster guarantee. It will change dramatically if we cannot solve that particular problem as we go forward. [Opening speech to the San Antonio management conference, January 12, 1995.]

You obviously are all aware we are in the biggest war of our lives. Those that win wars are able to muster their troops to all out attack. You must sound the bugle call and

<sup>6</sup> They eventually received the increases as part of the settlement, referred to above.

<sup>7</sup> This was consistent with headquarters’ earlier advice to all of its service center managers, after the loss of the election in Indianapolis, “to intensify our efforts to really communicate—face to face—to find out what’s bugging people and then do something about it. It takes listening even more than talking. It takes being out on the dock, not behind a closed office door. It means being out in the yard, calling people by name, and letting them know just how much we value their efforts and their skills. It means responding, doing what you say you’ll do (or explaining why you can’t).”

unleash the fury of the Overnite machine. [March 2, 1995 profs note to the service center managers.]

Although his words constitute a full-scale battle cry, his views are not, per se, illegal. But the tenor of his comments indicates that Respondent intended not to lose the battle, and its troops were commissioned to find out what caused all this to happen and to bring down the enemy. Thus, Overnite brought out its “quality team” or “troubleshooters,” the responsibility of vice president of safety Bobby Edwards, who was in control of labor relations, assisted by Richmond-based safety department officials, Danny Green and Roy Terry, Richmond-based director of operations—training and development, Mike Morgan, and field safety department officials, Les Bishop, Bill Hartle, Dennis Teeter, and Marty Flynn. The troubleshooters were a group of roving, solid supporters of Respondent, current and former truckdriving employees from various service centers throughout the United States, who were assigned (and those who were still working had agreed to give up their work) to travel to other service centers to find out the cause of employee unrest and report their findings to Richmond, including their assessment of who favored the Teamsters and who did not.

And so, as early as October 31, 1994, these present and former employees—among them, Robert Akers, Andy Hamilton, and Larry Parks—traveled at Overnite’s expense (including airfare, rental cars, hotels, and meals, and 60 hours’ pay at \$14.50 per hour per week), from service center to center, where representation petitions had been filed, staying for weeks at a time, usually until a day or two before the representation election, rode all day with selected (by supervisors) drivers, buying them lunch, or talked to employees while they worked on the dock and elsewhere at Overnite’s facilities, and quizzed them about what was wrong. The answers were low wage and mileage rates [from Indianapolis: “most feel the (January 1995) raise was not enough”], lack of overtime pay, insurance and pensions, scheduling, seniority, job security, bidding for runs, too many hours, waiting and breakdown pay, supervisors’ indifference to employee concerns, subcontracting deliveries, elimination of safety bonuses and dinners, speed and mileage limits, and the PIP program.

The troubleshooters’ conduct went beyond merely soliciting grievances, which in the midst of a union campaign inherently constitutes an implied promise to remedy the grievances, even when the employer merely states that it would look into or review the problems but does not commit to remedying them. *Flexsteel Industries*, 316 NLRB 745, 745 fn. 1 (1995), enf. mem. 83 F.3d 419 (5th Cir. 1996).<sup>8</sup> The troubleshooters promised to bring the grievances back to Overnite’s headquarters in Richmond and resolve them. Some were resolved while they were still at the concerned service center. Employees in Kansas City complained about a supervisor, Larry Sanderson, who was almost immediately transferred to another service center. In Indianapolis, employees complained about local management. The Indianapolis service center manager was replaced while the

troubleshooter was still there. In Kansas City, employees complained to Hamilton about the absence of load bars. Hamilton testified that he notified either Edwards or Green (or both) about this problem and was told that load bars would be sent out.

The troubleshooters cajoled the employees to “Give Jim [Douglas] a Chance,” a recurring theme in each election campaign, evidenced by T-shirts and buttons; and they pointed to the second, contested 1995 wage increase to ensure that the employees were aware that Douglas was responsible for the increase, was making good use of the chance that employees were to give him, and had more improvements in store. In addition, the managers and other supervisors joined in extolling the virtues of the new president, a “people’s person” who, unlike Boswell, really cared about the improvement of Overnite. And what was the improvement? The improvement was the elimination of PIP, which failed and did not give them the monetary gains that Overnite had represented to the employees would be theirs and that the employees in turn expected.

The supervisors knew what was troubling the employees. At the San Antonio meeting in January, Douglas wanted to know what the employees were so dissatisfied about and why they were seeking out the Teamsters. The answers, among others and with varying degrees of importance, were the same as the troubleshooters were hearing—wage rates, Respondent’s failure to pay time and a half for overtime, the number of hours employees were working, fringe benefits, Respondent’s cancellation of safety bonuses and dinners, Respondent’s limitation on the speed and the amount of miles that a driver could travel, and the breakdown in communication between employees and management. The consensus was that the speed and mileage limit policies should be eliminated and that pay rates should be increased. With the information supplied by the troubleshooters and the supervisors, Douglas, if he had not known before, now had the knowledge of the cause for the Teamsters’ petitions.

And so, if Overnite wanted to persuade the employees that the Teamsters’ path was the wrong one to follow, a wage increase would certainly be helpful. As stated above, the March increase was not the normal increase, effective at the beginning of the year. It was different for yet another reason. The January increase was granted to all employees, regardless of their location and the state of the union campaign at any service center. More particularly, the first increase was granted even to the employees at the Kansas City and Indianapolis service centers, where the Teamsters had already been certified. But the March increase was larger, if only by 5 cents, more than doubling what the employees had been originally been granted two months before. The total of both increases constituted the largest annual increase ever granted by Respondent, and, in a leaflet, Overnite was later to compare its \$1.05 increase with what Teamster-represented employees received over 4 years under the new Teamsters’ contracts (the National Master Freight Agreement or “NMFA”).<sup>9</sup>

The new increase was not granted silently. Rather, Respondent trumpeted it, in about March 1995, in the first edition of its new newsletter, *The Overniter*, in large, bold type, that there would be “hourly wage increases across the board.” This beneficence was contrasted with the smaller, but also bold type, which stated that “Kansas City, Indianapolis, West Sacramento

<sup>8</sup> The fact that, from time to time, Overnite’s managers stated that they could not promise anything had little substance, in light of the benefits given in early 1995 and the “Give Jim a Chance” campaign, discussed below. As the Board stated in *Raley’s, Inc.*, 236 NLRB 971, 972 (1978), enf. mem. 608 F.2d 1374 (9th Cir. 1979), “[w]e conclude that Respondent’s oft-repeated stock phrase of ‘no promises’ was a mere formality, serving only as an all-too-transparent gloss on what is otherwise a clearly implied promise of benefit.” During dome of Douglas’s testimony, he repeated, too frequently, the “stock phrase.”

<sup>9</sup> The \$1.05 Overnite represented as the NMFA increase is less than what Boswell wrote in his November 1994 letter, quoted above.

and Blaine employees who voted for Teamsters not eligible.” In the text, Overnite wrote that most employees would notice a “big difference” in their paychecks; but that “[u]nfortunately, the Overnite employees in Kansas City, Indianapolis, West Sacramento and Blaine will not get these pay increases on March 16. They voted for Teamster representation and will have to wait for negotiations between the union and Overnite to settle that and many other issues.” The clear implication was that a vote for the Teamsters forfeited any benefits given by the Company to the nonunion employees.

*The Overniter* was essentially propaganda in Overnite’s campaign against the Teamsters. In addition to this second announcement of the March wage increase, there was a separate, lengthy comparison of Overnite’s fringe benefits, including pension and insurance, with those in the NMFA. In an attack on the Teamsters, similar to Boswell’s letters before the turn of the year, Douglas contrasted Respondent with “[c]ompany after company [that had] gone to the Teamster graveyard in the past few years,” resulting in the loss of “thousands of jobs.”<sup>10</sup> He also threatened that Teamsters’ election victories would result in “uncertain change . . . for you, your families and for Overnite,” including “potential loss of the Overnite Pension Plan.” He extolled his own actions, linking them with the union campaign: “So far this year, you’ve seen big changes at Overnite. We’re going to change more—and for the better. Yes, there have been mistakes in the past, but we’re not afraid to correct them.” In sum, the employees were cautioned that a vote for the Teamsters would be “fatal,” resulting in the demise of Overnite and the loss of its pension plan. But a vote against the Teamsters would reward the employees with guaranteed changes for the better.

Some of those changes had already taken place. Over-the-road drivers had been limited to driving 60 (or 55) miles per hour and 490 miles per day; and, although employees had frequently complained about the policy, Edwards continually rejected any change on the grounds that the speed limits increased fuel efficiency, was safer, and resulted in less maintenance. On February 16 or 17, 1995, the speed limit was increased to the maximum permissible speed limit for trucks permitted under applicable state law and the mileage to as many miles as the driver chose in a single day subject to the 10-hour time limit established by the U.S. Department of Transportation. Some service center managers had been telling employees much earlier that the change was going to be made. In mid-January, Blaine service center manager Al Weber told employees that Overnite “knew that they screwed up and there was no way talking out of it”; Jim Douglas “was a people[’s] person and there was quite a few things that they wanted to do. One of the things was to turn up the speed limit of the trucks . . . to make the drivers happy.” (He could not talk about the other “things” because of the upcoming vote.) Lawrenceville man-

ager Bill Carter told employees that the service center managers had identified the speed and mileage limit policies as sources of employee dissatisfaction during the San Antonio management conference and that the managers had recommended that the policies be changed. Douglas told Lawrenceville employee Michael Stuckey Sr., in early April that the elimination of the speed and mileage limits were examples of changes Douglas had made that would be beneficial to the drivers. The elimination of safety bonuses (\$250, for driving 6 months without an accident that was the driver’s fault) and dinners had been similarly identified as a source of unhappiness. The managers had recommended reinstating the bonuses and dinners, and they were, with the March increase.<sup>11</sup>

The newsletter’s diatribe against the Teamsters essentially repeated the earlier Boswell letter to the Los Angeles employees, quoted above, but the post-Douglas era led to a new twist, a promise of a new dawn. For example, in its January 24, 1995 letter to its Blaine employees (Edwards read this letter to those employees during a meeting he and Douglas attended prior to the election) and its February 8 letter to its Philadelphia employees, Overnite wrote that “[t]he Teamsters Can Guarantee Nothing But Trouble. . . . We have a new President at Overnite and we are definitely trying to listen and to solve problems with you. Give us that opportunity.” (Emphasis in originals.) On the other hand, the letters threatened that bargaining would be futile by telling the employees that local drivers at its Chicago service center had earlier voted for representation; that, despite a 16-month strike at the Chicago facility, “the Company did not yield to a single demand of the Union” (emphasis in original); and that the wages, benefits, and working conditions of the Chicago local drivers were still the same as those of every other Overnite city driver. They repeated the threat of the inevitability of strikes and further threatened that the Teamsters’ would tear down the close relationship between Overnite and its employees that “will prove fatal in the long run” and that a Teamsters’ victory ran “the risk of tearing apart everything you now have.” (Emphasis in original.) Taken together, the message was that a Teamsters’ victory would be fatal to Overnite and that the Teamsters in any event could not deliver on its promises, but Respondent would. Indeed, throughout the campaign Douglas admitted that Overnite had made mistakes in the past; but there was a new management team that would listen to the employees more closely; that employees had already seen improvements, including increased wages and lifting of the speed and mileage limits; that they could expect to see more improvements in the future; and that the employees should “Give Jim A Chance” to solve their problems, not business problems, but the problems that were driving them to the Teamsters for help, help that Douglas now promised.

Only Douglas could deliver. The Teamsters could not, Overnite repeatedly claimed, as shown by its dealings with the Union in Chicago, where Local 705 was certified in 1982 and bargaining had little favorable results for the Teamsters. The employees struck, equally unsuccessfully. The strike ended, but the employees were not replaced, Respondent fearing that the strike might be found to be an unfair labor practice strike, as indeed it was, in 1989. *Overnite Transportation Co.*, 296 NLRB 669 (1989), enfd. 938 F.2d 815 (7th Cir. 1991). After

<sup>10</sup> *Harrison Steel Castings Co.*, 293 NLRB 1158 (1989). Although not specifically alleged, there was posted at the Louisville and Norfolk service centers a poster of a “Teamsters Graveyard,” featuring the gravestones of the Union trucking firms and Overnite’s headstone with an open grave and a “?”. That violated the Act. *Eldorado Tool*, 325 NLRB 222 (1997). *Electromation, Inc.*, 309 NLRB 990 (1992), enfd. 35 F.3d 1148 (7th Cir. 1994), relied on by Respondent, is distinguishable. The employer there made clear that it was not claiming that the Teamsters caused the companies to close, but that unions could not provide job security. Here, time and again, Overnite claimed by words and pictures that the Teamsters caused companies to go out of business.

<sup>11</sup> Keeping road drivers happy was important. Overnite perceived that they were its most influential job class and most senior and loyal work force, who, if alienated, would harm Overnite’s labor relations.

the resolution of the unfair labor practice proceeding, bargaining resumed, but with no appreciable results. Finally, there was a breakthrough. One of the stumbling blocks had been the Teamsters' insistence on its own welfare plan, which Respondent opposed because of its cost. The Teamsters reduced that cost. Another obstacle was the Teamsters' insistence on its pension plan, which Respondent also contended was too expensive. In addition, the Teamsters opposed extending credit for the employees for the time that they were covered under Overnite's Section 401(k) plan. The Teamsters finally acceded. Other issues were compromised, and the negotiators reached an agreement. However, the Teamsters' executive committee<sup>12</sup> refused to ratify the agreement; and negotiations recommenced "at square one," further delayed by the death of the Local's counsel and the assumption of the duties of negotiations for the Teamsters by a national negotiating committee.

Respondent, however, never gave the employees all these facts and never told them that the 7-year delay was caused by its own unfair labor practices. Rather, it told only of a subsequent Board proceeding, in which a complaint against it of bargaining in bad faith was dismissed; and Respondent claimed to its employees only that that decision proved that it had negotiated in good faith in Chicago.<sup>13</sup> Thus, it selected those facts that were calculated to lead the employees to the inescapable conclusion that a vote for the Teamsters would not give them a collective-bargaining agreement but would lead to years of talk and no action, not even Board action, with Respondent giving exactly what it wanted to give, no more and no less. And Respondent could give less, because negotiations were a two-way street, wages could go up or down, and nothing was guaranteed. Thus, Respondent told the employees that "collective bargaining is potentially hazardous for employees and that as a result of such negotiations employees might possibly wind up with less benefits after unionization than before."<sup>14</sup>

The message was the same in almost all locations. For example, in Louisville, Respondent told its employees that: "[N]othing will automatically happen if the Teamsters win the election. Overnite will sit down with IBT's representatives and will bargain in good faith over your pay, benefits, and working conditions. However, no law requires the company to agree to anything or to make concessions; and impasse—that is, an agreement to disagree—is always possible." Respondent then followed with the example of Chicago, with no mention that the Board had found that it had not bargained in good faith and had violated the Act: the Teamsters was elected 12 years before and still had not negotiated a contract, even after a 16-month strike that caused an average wage loss of \$35,000. Respondent added that there was nothing speedy about negotiations. They "take time, and results are sometimes not realized for months or years," again pointing to the experience of the Chicago negotiations. Furthermore, if Respondent could not or would not agree to what the Teamsters proposed, there were only two results: first, the union would have to accept what Respondent was willing to agree to, "and there goes all the union's big promises"; and, second, a strike, which besides all the losses that strikes generate, was futile, as shown by Chicago, as Respon-

dent bragged, because "the Teamsters return[ed], empty handed, to work. They did not gain one single concession from Overnite; indeed, they still do not have a contract with Overnite."

Respondent's narration of the Chicago experience violated the Act in two respects. First, rather than telling the whole truth about what happened in Chicago, Respondent explained it in a way that made it implicit that Respondent had no intention of bargaining in good faith. Rather, it would agree to nothing that the Teamsters wanted, only what Respondent wanted; and that it would interminably stall negotiations. Respondent thus gave the impression that bargaining would be futile. *Atlas Microfilming*, 267 NLRB 682, 685-686 (1983), *enfd.* 753 F.2d 313 (3d Cir. 1985); *Naum Bros., Inc.*, 240 NLRB 311, 317 (1979), *enfd.* 637 F.2d 589 (6th Cir. 1981). Respondent also threatened that the only way that the Teamsters could bring pressure on Overnite was by striking, and that is clearly unlawful. *Fred Wilkinson Associates*, 297 NLRB 737 (1990), citing with approval *Amerace Corp.*, 217 NLRB 850, 852 (1975).

The only hope was to vote "no" (written on the back of T-shirts worn by supervisors, troubleshooters, and some employees) and to give Douglas a chance (written on the front of those T-shirts), of which he is deserving, as shown by his beneficence—wage increase, reinstatement of safety bonuses and dinners, increase of speed and mileage limits—and the promise to make other changes that would correct the mistakes of the past. The "Give Jim a Chance" campaign was also unlawful and not protected as free speech under Section 9(c). Rather, Respondent's comments lost their protection when its request for a chance was coupled with the earlier benefits already bestowed and promises, both express and implied, to remedy grievances in the future. The campaign "would be interpreted by reasonable employees as an implied promise either to grant additional benefits or to remedy employees' grievances, or both." *Reno Hilton*, 319 NLRB 1154, 1156 (1995). For this reason, *National Micronetics*, 277 NLRB 993 (1985), cited by Respondent, is inapposite, for there the statements were held to be too vague to rise to the level of illegal promises of benefits, whereas here, there was a direct relation between the statement and the benefits previously given and those, by implication, to be given.

Respondent's reliance on *Mercy-Memorial Hospital*, 231 NLRB 1108 (1977), is also misplaced. There, the administrative law judge did not read one leaflet's reference to the bargaining history as conveying the message that it would be futile for the employees to select the union as their representative because Respondent would refuse to abide by its obligation to bargain in good faith. Rather, he found that the leaflet, distributed only once, "was merely intended to place the responsibility of the [u]nion for their failure to conclude an agreement . . . and for the breakdown in negotiations, and thereby to demonstrate that the . . . employees had nothing to gain from voting for the [u]nion." *Id.* at 1122. Had Respondent said more, rather than less, and explained the history of its Chicago negotiations, reliance on *Mercy-Memorial Hospital* may have been well-founded. However, the emphasis of its campaign was not, in a single leaflet, the Union's failure but, repeatedly, in dinner speeches and meetings with its employees, that negotiations had no end and that it would never give anything that it was not willing to give; it would never make any concessions; and the Union's only alternative to taking what Respondent would give would be to strike. As in *Amerace Corp.*, 217 NLRB 850, 852

<sup>12</sup> I assume that this was the International's committee, not the Local's, which was negotiating the agreement.

<sup>13</sup> 307 NLRB 666 (1992).

<sup>14</sup> Quoting from *Coach & Equipment Sales Corp.*, 228 NLRB 440, 441 (1977).

(1975), Overnite demonstrated an “attitude of predetermination that bargaining itself [would] accomplish nothing.” Its message to the employees was “to instill in them a fear of the adverse effects of collective bargaining, coupled with the admonition that the selection of [the Union] was an excursion into complete futility.”

An employer violates Section 8(a)(1) when, during a union organizing campaign, it grants pay increases or other benefit improvements “for the purpose of inducing employees to vote against the union” or is reasonably calculated to impinge on employees’ freedom of choice for or against unionization, *NLRB v. Exchange Parts Co.*, 375 U.S. at 409, or “with an eye toward achieving union disaffection.” *Acme Bus Corp.*, 320 NLRB 458 (1995). In assessing whether or not benefit increases are unlawful, the issue is whether they are actually or could reasonably be perceived by employees to be contingent on the Union’s loss of the election. *Pembrook Management*, 296 NLRB 1226 (1989). Here, Overnite openly proclaimed that most of its employees would receive the increase, but those employed where the Teamsters had been certified would not. From this, employees could reasonably assume that, if they voted for the Teamsters, they too would forfeit any increases that Overnite might give in the future, especially because the Company had made so clear that bargaining was an exercise in futility. That is the ultimate “fist inside the velvet glove,” which concerned the Supreme Court in *NLRB v. Exchange Parts Co.*, 375 U.S. at 409.

The Board in *Acme Bus* found a violation even though the wage increase was in keeping with the employer’s established past practice. Here, the General Counsel’s case is even stronger because of the timing: the increase was unusual, the second in 1995, granted within 10 weeks of the first increase, and even larger than the first. Like *Acme Bus*, Overnite’s announcement of the March increase was tied to the correction of past mistakes that Overnite had heard; the only way that Overnite could move forward was to keep the Teamsters out; and voting the Union in could cost employees their jobs. The statements in *The Overniter*, to paraphrase *Acme Bus*, amount to a declaration to employees that Overnite’s actions were a direct product of the dissatisfaction expressed at the outset of the Teamsters’ organizational effort and that the best way to ensure the continuation of such improvements was to support Overnite rather than the Teamsters. If one did support the Teamsters, there would be no present increases; and there would be no future increases, because collective bargaining for as long as 12 years would gain nothing, and the employees would be forced to strike, resulting in a similar lack of concession by Overnite, as well as loss of pay during the strike and threat of replacement.

Overnite insists that it was entitled to withhold the wages from its Teamsters-represented employees. As a general rule, when granting wage increases to its unorganized employees, an employer need not grant those increases to its represented employees, who may be seeking in collective-bargaining negotiations much greater gains. *B. F. Goodrich Co.*, 195 NLRB 914 (1972). However, if the employer is unlawfully motivated, the rule is different. *Shell Oil Co.*, 77 NLRB 1306 (1948). Such an “unlawful motive” would be found: “Had the grant been accompanied by statements encouraging the employees to abandon collective representation in order to secure the benefit.” Then there would be clear evidence of unlawful 8(a)(3) motivation.” *B. F. Goodrich*, 195 NLRB at 915 fn. 4. The grant of the March increase was conspicuously accompanied by the state-

ment, highlighted in *The Overniter*, that the four certified centers would not be receiving the increase, pending negotiations, which the employees by then knew would result in no result. The inclusion of that statement had no purpose other than to encourage the employees to “abandon collective representation,” because that was the only way to qualify for the wage increase.

Although the Board makes no presumption that increases granted during an organizing campaign are unlawful, it will draw an inference of improper motivation and interference with employee free choice from all the evidence and Respondent’s failure to establish a legitimate reason for the timing of the increases. *Speco Corp.*, 298 NLRB 439, 439 fn. 2 (1990), and case cited therein. Respondent defends on the ground that the wage increase had nothing to do with the election and that it was not granted to discourage the employees’ efforts to organize, but to stop them from leaving as a result of Overnite’s non-competitive wages and to encourage new employees to come to work for Overnite.<sup>15</sup> This is proved, Respondent contends, by the fact that Douglas, even prior to the Teamsters’ campaign, had recommended higher wage increases than Boswell finally approved. Therefore, Douglas could not have increased them for reasons related to the Teamsters’ organizing campaign.

The facts are: After about 20 years working for Union Pacific and certain of its subsidiaries, Douglas transferred to Respondent in 1991 as a vice president responsible for watching over Respondent’s financial well-being. One of his duties involved budgetary functions, and he served on two groups, the budget committee, a large group consisting of Boswell, Respondent’s senior staff, and its vice presidents, and a smaller group, the quality council, composed of Boswell; Paul Heaton, senior vice president; and John Sarto, senior vice president-marketing and sales (later marketing and customer services). The committee initially reviewed the compensation recommendations that were made early by Respondent’s wage and benefits section and frequently requested further studies. The council then reviewed the committee’s recommendations and made the final decisions, but that statement is accompanied by a caveat. Corporate management, at least in Respondent’s case, was not a democracy. There was one vote that counted to the exclusion of all others: President Boswell always made the final decision, just as Douglas took responsibility for the second 1995 wage increase and the increase in 1996, discussed below.

In the fall of 1991, Boswell concluded that Overnite, because of poor performance, should delay its normal October wage increase to January. That would result in a smaller impact on the Company’s finances. Then, he increased wages only by 20 cents per hour, which was less than had been customary, but also gave employees an unprecedented one-time lump sum payment of \$500. While the increase appeared in total to be a good one, an additional 24 cents per hour, the effect was to lower the base pay of the employees who had pocketed the bonus. Thus, any later wage increase would be based on a

<sup>15</sup> Respondent contends that the increase was given to employees other than those whom the Teamsters was attempting to organize, but that does not prove a lack of intent to coerce or discriminate against the objects of the Teamsters’ campaign. *Holly Farms Corp.*, 311 NLRB 273, 274 (1993), enfd. 48 F.3d 1360 (4th Cir. 1995). Respondent also frequently contends that it exhibited no animus, but this Decision is replete with Respondent’s unlawful purpose to discriminate against the Union and its adherents. *Florida Steel Corp. v. NLRB*, 587 F.2d 737, 744 (5th Cir. 1979).

lower hourly wage. Heaton had three reservations: this was a change of a practice that employees historically had come to expect; the employees would soon forget the lump sum, but not the smaller hourly increase; and Overnite was already paying less than many of its competitors, and the smaller raise would merely increase the differential.

In the wage discussions in the fall of 1992, Heaton, joined by Jim D'Alessio, the regional vice president for the Northeast region, again complained that wages were falling behind and claimed that the wage situation was hurting morale and seriously affecting Respondent's ability to attract and hire new employees and retain the current employees. Boswell raised the idea of changing Overnite's pay structure to an incentive pay system. Both Heaton and Douglas opposed that, particularly because, with the earlier lump sum payment, there was a lower base wage increase. Boswell, while delaying implementation of an incentive plan, ordered that an amount be accrued to fund it, which became PIP, to begin in 1994. In the meantime, the hourly pay for 1993 was increased 50 cents. During the discussions in the fall of 1993, D'Alessio became even more heated about losing employees in the Northeast to competitors and having trouble keeping employees. Heaton expressed reservations about the PIP plan, the widening of the wage gap, and the bad effect on employee morale. Douglas and Sarto agreed with him, recommending a large base wage increase instead of PIP. Boswell discounted their concerns, implemented PIP in January 1994, and granted a wage increase of 25–30 cents per hour, depending on the job classification. Overnite again accrued an amount to pay for PIP, which was designed to increase employee compensation in 1994.

At a meeting of the quality council in the second quarter of 1994, Douglas expressed his "deep" concern that, although there would be a small incentive payment for that quarter, there would be none for the rest of the year, because of escalating costs and the unprofitability of the type of freight being carried. Overnite's problems with recruitment and retention of employees began to spread. There were one or two complaints weekly from service center and field human resources managers across the country, causing Director of Compensation Lynn Willis to recommend to the budget committee to adopt a 5.5-to 7-percent wage increase. Willis explained to the budget committee that over the last 6 years Overnite's wages had not kept pace with the labor market or even with the consumer price index. Overnite would fall even further behind if PIP failed to pay out for the remainder of 1994. Douglas and others continued to be pessimistic about the likelihood of payouts from the end of the second quarter forward.

During the September committee meeting, Douglas, particularly, attempted to persuade all members to pay attention to Willis's market data and to discuss the fact that Overnite was behind the marketplace.<sup>16</sup> However, Boswell, who remained optimistic and did not acknowledge PIP's failure until sometime late in the fall budget discussions, interrupted these discussions, stating that Willis's survey data was inaccurate. D'Alessio supported the concerns about competitiveness of wages in the Northeast and gave the general opinion of the regional vice-presidents that Overnite's pay was behind in

<sup>16</sup> This was the first time that Douglas actively sought a higher increase. Before he appeared to be more passive, generally agreeing with Heaton. As Douglas admitted, he was a financial officer, not that familiar with the operations of Overnite earlier in his employment.

every part of the country. When one vice president tried to provide examples of his problems to Boswell, Boswell angrily cut him off and accused him of "stretching the situation, that it wasn't as bad as it was." Douglas and Heaton continued to advocate a larger increase to base wages designed to make up for the shortfalls of past years. Willis prepared a more detailed report of the survey data to examine more closely Estes Express and Southeastern Express who, with Conway Carriers, Old Dominion, AAA Cooper, and Averitt Express, were the nonunion competitors Overnite most wished to emulate. Boswell was not persuaded. (Even Douglas conceded that there is no way, in such a competitive industry, to obtain the precise wages paid by other companies.) He agreed with the council that PIP had been a failure and dropped it, but he authorized an increase of only 3.5 percent for 1995.

These facts show that Douglas wanted a higher wage for the drivers and did not get his wish and that, as Sarto testified, turnover of employees had been and continued to be a serious problem in the trucking industry. Contrary to the contention in Respondent's brief, however, that does not end this case. Douglas's professed notion of fairness and desire to remain competitive do not result in the automatic finding that, once becoming president, he had the power to authorize it for those reasons or that those reasons motivated his actions in early 1995. Times change, and certainly the onset of the Teamsters' campaign in late September 1994 could have made Douglas's desires more urgent and compelling.

What Douglas wanted, however, is certainly not the whole story, because Union Pacific, Overnite's owner, was not a silent parent corporation. Union Pacific was concerned with making money, more particularly, a profit from its subsidiary's operations. Yearly, Union Pacific approved Overnite's budget. Its officials visited Overnite's headquarters on a regular basis to monitor Overnite's operations to ensure that it was not doing something that would make it difficult to meet the net income target that Union Pacific had set. In late 1994, Boswell could not agree with the recommendations of his colleagues on the council because Union Pacific had set an overall wage increase at 3.5 percent; and he could find no way to rearrange Union Pacific's net earnings targets to permit a greater increase. From Boswell's perspective, it was not he who made the final decision but the planners at Union Pacific.<sup>17</sup> Yet Douglas testified that he alone made the decision in 1995 to grant the second increase, never consulting with Union Pacific and essentially ignoring Union Pacific's budget determination. Sarto testified that it might be an act of insubordination to ignore the net income target set by Union Pacific, and that one might be fired for doing so. Douglas countered that he and Union Pacific's president and chief operating officer, Drew Lewis, had a "much more open and communicative" relationship that empowered

<sup>17</sup> For example, at the October 17, 1995 meeting, discussed in detail, below, in sec. IV, Union Pacific agreed to reduce the earnings it budgeted Overnite to make from \$30 to \$10 million. On September 21, 1995, Union Pacific wrote to Overnite, setting forth Union Pacific's corporate guidelines and economic assumptions for Overnite's use in preparing its budget. Regarding preliminary assumptions, Union Pacific wrote: "The final Corporate-wide salary guidelines are not yet established. In the meantime, use an average of 4.5%." Even Douglas told employees in Atlanta that Lewis permitted him to do his own thing, unless he got "off target."

him to make his own decisions, strangely enough, without communication.<sup>18</sup>

That is hard to believe, and I do not. Douglas had just reached the pinnacle of his career and would be unlikely to risk being discharged, as Boswell was. Indeed, Douglas felt a need to back up his decision with paperwork, commissioning his human resources staff to prepare comparisons of Overnite's pay structure with that of its competitors, after he had, Douglas testified, already announced the increase. If he had such a special relationship with Lewis, why would he have felt it necessary to protect himself by justifying his increase to Union Pacific? And would not his "open and communicative" relationship with Lewis lead to a sharing of information with Lewis, rather than going behind his back? He certainly shared information with Lewis in January, when Douglas went to him with his plan to bring in an outside management consultant, hoping, Douglas testified, that Lewis would pay for it. (Lewis did, and Overnite, or Union Pacific,<sup>19</sup> hired the consultant, A. T. Kearney.) Why would Douglas go to Lewis with a rather minimal budget item, and not consult with Lewis about a second wage increase, an \$18.8 million expense? After all, Lewis is paying for that increase just as much as he is paying for the cost of the consultant, because the expense results in less profit for Overnite and thus less profit for Union Pacific.<sup>20</sup>

Furthermore, assuming the importance of the union activity to the existence of Overnite, as Douglas proclaimed to his managers, it would be strange had Douglas not discussed the problems of the union organizing drive with Union Pacific. Yet, Douglas recalled nothing of the sort. At the time that he was offered the top job, no reason for his appointment was given. No one ever told him the reason that Boswell was leaving. The day that Lewis visited Overnite to install Douglas in his new position, although he recalled talking with Lewis, he remembered nothing of the substance of that conversation. Thus, according to what Douglas testified that he remembered, the change of Overnite's management happened in a vacuum. Douglas was selected for no reason, and Boswell retired or left or was dismissed for no reason.<sup>21</sup>

<sup>18</sup> The General Counsel points out that the reason for Boswell's less than positive relationship with Lewis was, according to Douglas, that Lewis was angry that Boswell, without Lewis's consent, had increased the amount that Union Pacific paid for Overnite. However, Lewis then rewarded Boswell by making him the president and chief executive officer of Overnite, not a very good example of an angry reaction. As if Douglas's explanation were not difficult enough to believe, Douglas failed to explain why his increase of wages would not have resulted in the same less than positive relationship. I agree that Douglas's explanations are not credible.

<sup>19</sup> It is difficult to know who was the guiding force. Initial reports of Kearney indicate a "Union Pacific Task Force." The steering committee guiding management's position consisted of Douglas and White Matthews, Union Pacific's executive vice president. In addition, the Union makes an interesting case for the proposition that, in light of Douglas's lack of experience with trucking operations, Kearney was hired by Union Pacific to examine what was wrong with Overnite, while Douglas spent almost all of his time campaigning against the Teamsters, the reason for his selection as president, in addition to insulating the current administration from the mistakes of those who had left, primarily Boswell and Edwards. Although I agree with this premise, it is unnecessary to use it to support the findings herein.

<sup>20</sup> Union Pacific paid \$1.2 billion for Overnite.

<sup>21</sup> Lewis was never called to testify, nor was any other official of Union Pacific. I infer that their testimony would not have supported Douglas'.

I believe neither that Douglas lacked memory nor that the change of Overnite's management and the wage increase were unrelated to the Teamsters' organizing efforts. Rather, I am convinced that Union Pacific gave its approval to Douglas, and it would have been simple for Douglas to aver (although I would not necessarily have believed him) that he had talked to Union Pacific and made them aware of his reason for the increase—that Overnite was having difficulty attracting and retaining personnel—so that Union Pacific could have determined whether to authorize this additional expenditure. The absence of that discussion leads to the conclusion that the approval was not based on such a lawful rationale. Rather, it was based on something that Douglas wanted to conceal, and that had to be the union activity that absorbed him for the first 4 months of his new position. Indeed, that is what Douglas frequently told employees, linking the increase and other changes to correcting past errors and giving him a chance to make the employees happy. For example, in a preelection speech at the St. Louis service center on February 26, Douglas bragged about what he had done to rectify past problems, specifically referring to the February 10 announcement of the wage increase and "a number of managerial changes" and noting that Overnite wanted to ensure that it "did right" by its employees. Overnite could move forward if it and its employees could solve their own problems and not have the Teamsters between them. Similarly, at the Romulus service center on March 11, Douglas asked for the employees' support, noting that the Act handcuffed him from making certain changes; but he wanted them to be sure that they saw the changes thus far, which included the pay increase and speed and mileage limits. And at the Lawrenceville service center on April 12, Douglas told employees that the only changes he could make because of the union campaign were "operational," including the pay increase, because what Overnite had done was "wrong."

Douglas was somewhat more sophisticated and guarded in his approach to the employees that some of Overnite's service center managers. Roger Schager, from Atlanta, told employees that Overnite would not have granted the March 1995 wage increase or made other improvements had it not been for the organizing. Jeff Woods, from Wichita, told Mark Frederick, a St. Louis (Hall Street) employee, that the Teamsters' campaign made Overnite realize it had "screwed up" in its wage policy. In addition, Dave Heaton, from St. Louis, asked employee Thomas Kane what he thought of Overnite's \$1.05-per-hour wage increase. Kane replied that it would have swung some votes if there were a "2" in front of the "\$.05," but Heaton said that it was just the "first step."

Although the wage increase is the prime focus of the national allegations, the curing of the employees' discontent with their pay was merely part of Overnite's strategy to improve conditions so that the employees would not feel it necessary to seek the aid and support of the Teamsters. Thus, at a campaign meeting at Blaine in mid-January, Regional Director of Operations Mike Knight told employees that Overnite had a new president, Douglas, and a new regional vice president, Mac Bronson; that Overnite was heading in "a whole new direction"; that Overnite was going to "make your environment better and make your job easier"; and that employees would be able to give Bronson "more feedback" and he could "react faster, better, quicker" in furnishing equipment such as "two-wheelers" and "forklifts [with] windshields in winter." Manager Weber added that "[o]ne thing I can guarantee you is that Jim Douglas will know

that that [pay] was talked about at this meeting, and Jim Douglas has said, 'Hey, we're going to have to look at pay'; and that "we've heard, we've listened, and believe me, we've done a lot of disgruntled talking that I think may have forced a decision at the top." Knight also told the employees: "Drew Lewis mentioned that during his speech with us the other day . . . it's one thing when you've got a new head coach, you know, we all go back to square zero, we start all over again. It's a whole new deal, and I don't think it was to give you guys false hope, you know. For the 31st [the day of the election]." Knight added that Lewis told Douglas that he had the full backing of Union Pacific to "turn this thing around."

At another preelection meeting at Blaine, Douglas told employees that he realized that employees were not being treated properly and that Overnite had made mistakes. He said that he was going to correct those mistakes, that it would take longer to do so if the employees voted for union representation, that the Teamsters would be an impediment to change, that Overnite was a family, that the Teamsters and its Locals were outsiders who would break up that family, and that a vote against the Teamsters would help Douglas in making improvements. He added that he was looking at the employee pension plan in an effort to improve it and that Respondent had some things in the works that he could not talk about with the election approaching and asked that the employees give him another year and "give us a chance." Added to this, at the locations where they were sent, the troubleshooters asked the employees, with little guile, what was wrong and what would make them feel better, and openly promised to get their complaints remedied.

With all this evidence that the problems that Douglas and others were addressing were employee discontent and dissatisfaction, I reject Respondent's defense that the changes it made were solely "operational and customer service related."<sup>22</sup> Any change can be categorized that way. A raise in pay makes employees happy; a happy worker performs better and smiles at customers. Indeed, the wage increase and change to the mileage and speed limits could be looked at as operational changes, as well as the removal of managers and the supply of new equipment, and the reinstatement of the safety dinners and awards of the safety bonuses as a method to encourage drivers to be more cautious in their driving. But it is more than coincidental that all of these changes were noted on the troubleshooters' list of employee concerns, that many of them were raised by the managers at the San Antonio meeting,<sup>23</sup> and that they were finally

<sup>22</sup> As Douglas said in mid-April 1995 to employees in Lawrenceville who were talking about concerns with their pay, "You want to talk about trust. Hold on! Hold on! You want trust and I'm telling you I got these handcuffs on me like crazy because of all the stuff that's going on out there. And about the only thing I can do is make some operational changes. And I can't do hundreds of 'em, I can't do hundreds of 'em. So all I'm trying to demonstrate in three months here is stick with me and we're going to do these things." (Emphasis added.)

<sup>23</sup> Among the comments of the managers at San Antonio: "Safety dinners give [service center managers] opportunity to meet and get to know wives (union issue)." "[M]etro terminals could fight off union, not the pay issue." "Teamsters are pounding us on the time and a half issue." "Safety bonuses back to the road drivers." "The company and the region have stopped listening to their people. Most of the union situations within the region are coming from our people not wanting to unionize but to be recognized and be heard." "Compensation and benefits issues were of major concern. The field does not have control of the 'World Hunger' issue of compensation/benefits but Senior Management does and it needs to be addressed." "[B]ottom line of the money

responded to only after the Teamsters' organizing campaign became so onerous to Overnite.

Indeed, the "business problem" addressed in Douglas' February 10 letter is really employee compensation. He pledged to concentrate on his people, particularly the turned-off employee. He pledged to meet face-to-face with the employees. The increase was the right thing to do and was only a first step in the right direction, and the employees were to look for more announcements. There were mistakes in the past, but he was not afraid to correct them and was committed to solving the problems. Some things would take longer to accomplish, but he was on his way to doing what was right. The wage increase remedied what the troubleshooters reported had made the employees unhappy, and the visits of Douglas and other leading members of management remedied the employees' complaint of the lack of personal contact. Douglas' announcement of more to come foretold the soon-to-be-announced increase of the mileage and speed limits and reinstatement of the safety dinners and bonuses, also prominent on the troubleshooters' lists. I find that the defense was merely a catch-all phrase to justify as a business reason what was otherwise a change in terms and conditions of employment to solve the concerns of the employees that led them to organizing. Accordingly, I discredit Douglas' responses to the contrary.<sup>24</sup>

Nor do I credit Douglas' denial that he knew of the existence of the troubleshooters no earlier than the 2 weeks after February 15, 1995, when Goodwin first told him. Douglas had a fairly good memory of events that he wanted to remember, at least with his own slant. He was able to recall many of the employees at the various locations who testified about conversations with him that would have supported unfair labor practice allegations. Regarding the troubleshooters, however, he recalled nothing. Yet he traveled with Boswell to both Kansas City and West Sacramento in late 1994 to campaign (unsuccessfully) there and met at least Hamilton twice. Parks and Hamilton were in West Sacramento when Douglas, Heaton, Goodwin, and Green were there. Parks told Goodwin that he was from Baltimore and that he was at the West Sacramento service center to find out what the problems were. Boswell, Heaton, and Edwards came to Indianapolis when Parks was there performing his troubleshooter duties. Al McBride, a regional vice president, and Keith Dobson, vice president of fleet services, were also there. The troubleshooters were advised to report what they learned to Edwards and that Edwards would tell other management officials, including Boswell and Heaton, of their findings. Akers reported what he found to management. Parks told at least McBride and Edwards what problems the troubleshooters found in Indianapolis. On at least one occasion, Edwards told Parks that Overnite was working on solving the overtime problem, and Green told Hamilton that Overnite was looking into the problems.

issue that we have all discussed in San Antonio and Bensalem. Money."

<sup>24</sup> In doing so, I find that Douglas often slanted what he had to say with his own false impression of reality. A prime example is his announcement in 1995, more fully discussed below, that Overnite would pay overtime pay in 1996 after an employee worked 47 hours. He testified that this was intended as a management tool to limit the hours that employees were assigned work to under 47 hours, so that Overnite would not be required to pay time and one-half. Yet, he told the employees that this was a "reward," in the circumstances a blatantly false description.

So, if Douglas did not meet all the troubleshooters (there were at least 13), word of their activities must have filtered back to him, through Green or Edwards or Bronson or McBride or Heaton or Goodwin or even Boswell.<sup>25</sup> Some of these people were his trusted advisers<sup>26</sup> and traveled with him on his tours of election locations, and all of them were at those locations at one time or another. It is unbelievable that all would remain silent on the company plane or at the election locations, never mentioning the problems of Overnite, as gleaned from the troubleshooters. Furthermore, only days after being named to head Overnite, Douglas spoke to the managers in San Antonio of the “very, very, very serious” dangers of Teamsters organization; and he must have known something to base that judgment on. In addition, Douglas said that he was aware of all the problems that the managers reported to him at the San Antonio conference, so he must have been getting regular reports of the findings of the troubleshooters. Furthermore, although I suspect that not all the reports of the troubleshooters were produced and that expense reports are not accounted for, surely Douglas would have seen the expenses that the troubleshooters were incurring. Overnite spent a minimum of \$51,330 in wages alone (59 weeks x 60 hours per week x \$14.50 per hour) to identify the problems that were causing employees to seek union representation. The record does not disclose the additional substantial amount Overnite spent on airline tickets, hotels, meals, car rentals, and other expenses for at least 13 troubleshooters. Finally, Douglas sought to create the impression that he knew nothing about the troubleshooters and, when finding out about them for the first time from Goodwin in February (indeed, Parks told Goodwin in late 1994 what he was doing in West Sacramento), immediately ordered their use discontinued. Not only do I not believe him, but I draw the opposite conclusion, based on Respondent’s attempt to create this impression and then hiding behind the attorney-client privilege when asked about the details of his entire conversation with Goodwin. All this persuades me that Douglas knew well of the existence of the troubleshooters and used their illegally obtained product to learn of and correct the employees’ grievances in order to discourage employees from supporting the Teamsters.

I find that Douglas’ testimony that there was any motivation other than to thwart the Teamsters’ organizing drive<sup>27</sup> is false

<sup>25</sup> Goodwin, Heaton, and Edwards, among others, did not testify.

<sup>26</sup> Goodwin was with Douglas almost every day that he testified. Douglas, by his own admission, promoted Heaton to take over all labor relations and moved Bronson to take over Respondent’s central region. Heaton had more authority than Douglas was willing to admit, as shown by Respondent’s organizational chart, distribution of Goodwin’s letter of December 29, 1994, and Sarto’s testimony that Edwards reported to Heaton. That Douglas would misstate this seemingly innocuous fact demonstrates that it probably had more meaning in the context of this proceeding, an attempt to blame Edwards to take the pressure off the person actually running much of the campaign, Heaton.

<sup>27</sup> Douglas attempted to show how urgently he sought a greater increase, first, by relating a purported conversation with Boswell in November and, second, by threatening Matthews that he would resign. The conversation with Boswell, one that Douglas quoted Boswell stating an epithet that Douglas said that he would never forget, Douglas forgot to include in his precomplaint investigatory affidavit, which was prepared by his counsel. Neither Boswell nor Matthews testified, and I infer from Respondent’s failure to call them that their testimony would not have been helpful to Respondent’s cause. I do not believe Douglas’ testimony.

and misleading.<sup>28</sup> Although there may have been some justification for a greater increase in January 1995, but Union Pacific would not approve it in 1994. The employees were unhappy with their wages and turned to the Union for help in increasing numbers. Union Pacific realized that Boswell had underestimated the employees’ discontent and replaced him. Douglas, in turn, sought to increase the wages and eliminate that source of unhappiness to stop employees from supporting the Teamsters and to affect the results of upcoming elections.<sup>29</sup> The rest of Respondent’s explanation of the reasons for the increase is all pretext. To conceal his unlawful purpose, Douglas ordered prepared material to back up his decision to increase wages, even though he had already made the decision. The material was prepared, not to show to Union Pacific, because Union Pacific had approved the decision, but solely to supply a business justification for the increase should a Board complaint ever issue. But in the preparation of that document, Respondent made a fatal error. Although it supports an increase for many of the reasons that Douglas relied on, namely, the perception that employees had suffered a loss by the payment of the lump-sum

<sup>28</sup> In making this and other credibility findings, I have fully reviewed the entire record and carefully observed the demeanor of all the witnesses. I have also taken into consideration the apparent interests of the witnesses; the inherent probabilities in light of other events; corroboration or the lack of it; the consistencies or inconsistencies within the testimony of each witness and between the testimony of each and that of other witnesses with similar apparent interests. Testimony in contradiction to that upon which my factual findings are based has been carefully considered but discredited. See generally *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962). Where necessary, however, I have set forth the precise reasons for my credibility resolutions, bearing in mind the oft-quoted advice: “It is no reason for refusing to accept everything that a witness says, because you do not believe all of it; nothing is more common in all kinds of judicial decisions than to believe some and not all.” *NLRB v. Universal Camera Corp.*, 179 F.2d 749, 754 (2d Cir. 1950). Finally, there are some misstatements of fact that weigh more heavily in my consideration, being purposeful rather than merely reflecting a misunderstanding of events. In such instances, it is reasonable to believe the very opposite of what the witness says. *Walton Mfg. Co.*, 369 U.S. at 408; and to disbelieve the witness utterly.

<sup>29</sup> Other reasons for discrediting Douglas are the following: Douglas testified that Boswell was called in by the board of directors one day and told that he was no longer employed. Within a minute or two, Douglas denied having so testified. Respondent contends that it was not the Teamsters that Douglas opposed, only the NMFA; yet Douglas testified that the flexibility of being nonunion was critical to Overnite’s survival and that he opposed unions at Overnite. He testified on February 20, 1996, that he was unaware that Respondent had been found in violation of the Act in Chicago, despite the fact that the Board and court proceeding had been drawn to his attention when he testified at a Congressional hearing in the early summer of 1995. He falsely claimed that the “Give Jim a Chance” campaign was adopted by the employees, rather than started by the managers at the San Antonio meeting, repeated by managers (and Douglas) elsewhere, and often, and paid for by Overnite in the form of T-shirts worn by managers and representatives of Overnite. This was contrary to his testimony before the Congressional oversight committee, which he told: “Many of our supervisors and managers at our various field locations adopted a slogan that said ‘Give Jim a Chance.’” Respondent’s brief attempted to salvage some of Douglas’s testimony by contending, without record evidence, that his failure to testify about the reason for Boswell’s dismissal resulted from his knowledge “from preparation and instructions during his testimony not to speculate.” Yet, in attempting to justify his answer about the origins of the “Give Jim a Chance” slogan, the brief contends, on the very same page, that Douglas “speculated based on his understanding.”

payment in 1993 and the failure of PIP to pay what had been expected, the compensation analysis states only: "Wage rates substantially below union carriers market data and not always competitive to non-union carriers." It omits mention of what Douglas testified was the compelling reason for the increase—turnover and retention of employees.<sup>30</sup> I thus find those reasons a sham and unworthy of belief.<sup>31</sup>

<sup>30</sup> Kearney found that Overnite was operating inefficiently, with too many employees. Many were laid off, and Overnite closed a number of its terminals. Admittedly, it may have been that Overnite was failing to retain only the very best of its employees, but this record is silent on that issue.

<sup>31</sup> Similarly, I reject Respondent's contention that Douglas could not have been influenced by the Teamsters' campaign because, even before organizing began, he wanted greater wage increases that Boswell was willing to approve. The issue here is the reason for Douglas' urgency in granting the March increase when he did. The Teamsters' organizing campaign was raised at one quality council meeting, if not more. By the time of Douglas' San Antonio speech, he had to know of the seriousness of the Teamsters' efforts. He said so in his speech. Although it is not wholly clear the exact date that Respondent knew of the Teamsters' organizing efforts, Respondent was aware of them at the time that serious discussions of the proposed 1995 wage increase began. In Boswell's November 22, 1994 letter, he began: "Over the past few months most of you around the nation have been the subject of a well-orchestrated organizing campaign by the Teamster's Union. You have been handed literature spelling out great promises; many have had visitors at your homes; and some of us have been bullied and threatened." Boswell professed knowing about a letter that had been sent to the employees, recruitment of employees to "spread the word," and planting of organizers. Because Overnite's "prime budgeting time" was October, Douglas surely knew of the Teamsters' campaign by then.

The General Counsel seeks adverse inferences from Respondent's failure to produce hundreds of documents. At the beginning of this proceeding, Respondent moved to quash the General Counsel's subpoenas on numerous grounds, including the assertion of the attorney-client and work product privileges. Respondent did not list in its motions which documents it believed were protected, and I ruled, similar to rulings I made regarding motions for similar relief made by the General Counsel and the Union, that Respondent should prepare a log and produce the documents for my in camera inspection. No one objected to that ruling; but, months later, when Respondent finally prepared its log, it made clear that it had no intention of producing the documents, although I questioned how I could possibly rule on the assertion of the privilege without examining the documents. In its brief at the close of the hearing, Respondent, for the first time, relied on *U.S. v. Zolin*, 491 U.S. 554 (1989), in which the Supreme Court ruled that one who asserts an attorney-client privilege has a right to refuse production of documents for wholesale in camera inspection, where the proponent of the subpoena does not supply proof that the documents should be turned over under the crime or fraud exception to that privilege. *Patrick Cudahy*, 288 NLRB 968 (1988), has practically obliterated that exception, so *Zolin* is of limited application to Board proceedings.

In any event, neither the General Counsel nor the Union urged the application of the exception. All they wanted was the assurance, as they gave to Respondent in submitting their claimed privileged documents to me for in camera inspection, that Respondent's documents were similarly privileged. In camera inspections are well-established procedures in the Federal courts, *U.S. v. Smith*, 123 F.3d 140, 151–152 (3d Cir. 1997), and have been approved by the Board, *Brink's Inc.*, 281 NLRB 468 (1986). Furthermore, although Respondent's logs are somewhat helpful, tens of documents bear the description "labor law compliance," hardly an adequate description for me to make an informed judgment as to whether the claimed privilege applies, and other documents were prepared by persons who were never identified in the record, so I cannot hold that they were communications between an attorney and a client. *U.S. v. Construction Products Research*, 73 F.3d 464, 473–474 (2d Cir. 1996). The General Counsel asks that I draw

Because I have found that the business justification was pre-textual, it is unnecessary to dispose of the General Counsel's and Union's attack on the bona fides of Douglas' selection of 55 cents as the amount of the increase.<sup>32</sup> Both parties use all manner of statistics to support their respective positions, but none of them are more particularly compelling or persuasive than the others. The most that can be said is that there were reasons that a greater increase, as recommended by Heaton and Douglas in the fall, might well have been considered. But the evidence does not compel that conclusion, nor compel the conclusion that an additional 2 percent or 3.5 percent (the increase recommended was 5.5 to 7 percent) was the appropriate one.

The Union contends that the 55-cent increase is more than the 7-percent figure that Douglas recommended and that the figure was arrived at so that Respondent could make the argument to its employees, as it did, that Teamster-represented employees who struck during the spring of 1994 achieved wage increases of \$1.05 over 4 years, whereas Overnite employees received the same increases in 1 year. The Union is correct, if using the base figure of the wages given in the prior year. But Respondent's brief contends that the 7 percent was an increase over what Respondent had allocated for all wages, and that included the amount that had been set aside for PIP increases. I did not understand that to be the position of Overnite's witnesses. If the January increase was 3.5 percent and was 50 cents, an additional increase of the same amount would have been an additional 3.5 percent. In fact, Respondent's compensation analysis does not support the brief's contention, as it states that the 55-cent-an-hour increase represented a 3.8-percent increase. However, there is insufficient proof that 55 cents was selected to make the argument that the Union contends.

Nor do I find that Respondent's timing of the announcement in February and effective date of an increase in March had any particular significance, affecting 11 elections scheduled during the interim. The action would have had equal significance at any time, from the date Douglas became principal officer, as there were elections throughout this period and 21 new petitions were filed between January 17 and February 9. In fact, employees at Overnite's Norfolk service center were threatened outright that they would not receive the wage increase if they voted for representation.

The General Counsel and the Union also attack Respondent's contention that its pay level left it at a competitive disadvantage in attracting and retaining qualified employees—that the turnover rate was "escalating dramatically" and that service to customers and productivity were deteriorating because of noncompetitive wages. Indeed, problems relating to turnover had existed at least since 1990. Yet, Boswell was to write in his November 22, 1994 letter that, "Every day we at Overnite are getting job applications from Teamsters." In addition, Overnite's March 1995 business review indicated that service and productivity had both improved during 1994, with decreasing

adverse inferences from Respondent's refusal, but does not suggest which ones he deems appropriate. Probably, Respondent's failure to produce lends support to and bolsters my findings of fact; but my findings would have been exactly the same, had Respondent produced the documents. *Pioneer Hotel & Gambling Hall*, 324 NLRB 918 (1997).

<sup>32</sup> Douglas explained that the increase was to make up for the 20-cent increase in 1992 and the 25-cent increase in 1994, both of which should have normally been 50-cents. That testimony is inconsistent with what he wrote on February 10, that the increase was to make up for the "loss as a result of 1994's failed Performance Incentive Plan."

claims in March and April. And in a letter a month later, a month after the second increase became effective, Overnite bragged to Union Pacific that its overall service had dramatically improved, with substantial increases of on-time service.

Once again, there is some substance to their position. Respondent's proof shows no dramatic escalation of turnover, and there appears to be no provable correlation between the wage level and service to customers and productivity. But there is evidence to support the contrary, and there is ample proof (Willis was receiving one or two phone calls or faxes weekly) that, for whatever reason, Respondent was losing employees whom it valued, particularly in the Northeast, and its managers blamed Respondent's hourly wage level, which, depending on the companies Respondent chose to compare, were generally lower for drivers, but higher for dockworkers. There is no proof that Respondent's valued employees were flocking to its prized competitors, such as Estes and Northeastern, which Respondent suggests by implication. Rather, many were simply leaving the industry or going into different types of jobs, and some were moving to union carriers, which traditionally have paid far greater hourly rates than Overnite. And the numbers of employees who left appears minuscule, when compared to Respondent's total employee complement, particularly when Respondent was soon to consider a reduction of its workforce. Indeed, one of Overnite's reports found that turnover was isolated to certain areas and that turnover was not even consistent in the Northeast and would not justify an across-the-board differential for the entire Northeast. In addition, by April 1995, Overnite was not even hiring or replacing road drivers, and in the Northeast the regional vice president proclaimed that the region was properly staffed. All these points are matters of legitimate dispute and probably favor the General Counsel's cause. But, because of my finding of pretext, it is unnecessary to conclusively determine these issues.

But I do find that Overnite reinstated the safety dinners and the bonuses and increased the speed and mileage limits for unlawful reasons. Witnesses often err in recalling dates, and those mistakes are frequently meaningless in assessing credibility. Here, however, there are documents and testimony about dates that give me more than the usual problems. Douglas issued a memorandum on February 17 directing Edwards to increase the speed and mileage limits and reinstate the safety dinners. Edwards, however, directed that the dinners be reinstated the day before, February 16, and on February 17 issued another one concerning the speed and mileage limits. But Douglas was in St. Louis on February 17, and Edwards was in Parkersburg, West Virginia, and Lexington on February 16 and 17, respectively.

When first confronted with this discrepancy, Douglas had no explanation, but did 2 days later, when he explained that he had returned to Richmond and signed the memorandum. As to how Edwards would have issued directives when he was not in Richmond, Douglas explained that he had advised Heaton early in the week to direct Edwards to issue his memoranda. As pointed out earlier, neither Heaton nor Edwards testified; and I am asked to accept Douglas' explanation. That is troubling, in light of the fact that the issue of the speed and mileage limits had apparently been decided on weeks before, when Weber and Norfolk Service Center Manager Mike Mendenhall announced it and Carter prepared his memorandum, on February 2, even though he may not have posted it until later. There is nothing to explain these facts, except to find that Douglas' memorandum

was prepared at a later date to supply some written business justification that it did not really have.

There is no question that, for whatever reasons, the over-the-road drivers had been complaining for years about the fact that they were not being allowed to drive the speed limits. Douglas decided to change that rule, but he claimed that he did not do so for an unlawful purpose but for operational efficiency. Yet that it not what the February 17 memorandum states. It relies solely on Douglas' "sense" that Overnite had been inconsistent in enforcing the rule, which was designed to save fuel, and Douglas' "doubt" that there had been "much in the way of fuel savings." Then Douglas stated his preference that "we simply have a uniform posted limits policy," when the policy before had been "uniform." There is no "smoking gun" here, to be sure; but there certainly is an implausible explanation for the change of the rule, supported by documents which appear to reflect concocted dates or, at least, a sequence of events that make no sense.

I find that the rule was changed to solve a grievance that the drivers had complained of for years and to affect the union elections.<sup>33</sup> Similarly, the reinstatement of the safety dinners was prompted by the troubleshooters, who reported the lack of them as one of their grievances. Douglas' only justification for their reinstatement appears to be that they were removed with the institution of PIP, and, with the removal of PIP, they should be reinstated. But PIP was removed with the January wage increase. Respondent made no attempt to reinstate the safety dinners at that time. The announcement in February was merely another correction of a prior mistake, to induce employees to vote against the Teamsters. That is graphically demonstrated by the fact that, in Lawrenceville, although Overnite held a safety dinner within 2 weeks of the April 17, 1995 election, no subsequent safety dinners had been held within the next year, despite the fact that drivers had qualified. Once that election had been held, the reinstatement of the dinner had its effect; and there was no pressing need to hold another dinner.

Despite the fact that the Blaine service center was not a *Gissel* bargaining order location, the General Counsel introduced evidence of unlawful conduct there on the theory that it was relevant to the national issues litigated in these cases and supported a finding that Overnite's unlawful conduct was authorized, directed, and participated in by officials at the very highest levels, including Douglas. Except for some of the more minor issues of the campaign, there is little question that the point the General Counsel was seeking to make has been amply proved. The campaign was directed by Douglas, with the help of at least Goodwin, Edwards, and Heaton, and, equally important, orchestrated by outside counsel, many of whom participated in this case. They prepared the leaflets, arranged for the videotapes, prepared the scripts for the meetings that the service center managers were to hold, and led seminars on the operation of the campaign. The troubleshooters were sent from place to place, officials from the Richmond headquarters were sent as needed, managers from other service centers were sent to help, and Douglas and Edwards were there to sum up. The service center managers may have selected certain issues that they wanted to emphasize and may have decided on other issues that they did not feel were important to the employees in

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<sup>33</sup> Contrary to Respondent's contention, there is a benefit to drivers. They make more money in a shorter time period and can spend more time with their families.

their locations, and so decided not to distribute various leaflets that had been distributed at other locations, but the campaigns were essentially the same from place to place—solicitation, promises, “Give Jim a Chance,” Chicago, Teamsters” graveyard, futility.

The same kind of threats of futility were made. Edwards told employees that Overnite’s Chicago facility had been organized for 13 years, but Overnite had not yielded to a single union demand, despite lengthy bargaining. No mention was made that Overnite had been found to have engaged in bad-faith bargaining at that facility. It may not be that both Edwards and Weber threatened employees that Overnite would never sign a contract with the Teamsters, but they did not have to be that crude. The point was clearly made by the Chicago example, as admitted by employee Patrick Shipshock, who was called as a witness by Overnite, that the experience of the Chicago negotiations demonstrated that Overnite would never sign an agreement. Other than these general matters, because of the settlement of all the 8(a)(1) allegations, I find that what happened at Blaine is of no significance to a determination of whether to grant *Gissel* relief at the four service centers that are the subject of this Decision. That Weber or one of the supervisors may have engaged in conduct that may have affected the results of the election at Blaine had no far-reaching consequences.

One final matter must be considered before turning to the four *Gissel* service centers, that is, whether the unfair labor practices are of a kind that would warrant the relief of a bargaining order. For, unless there could be such relief, the settlement agreement prohibits the revisitation of all the alleged 8(a)(1) violations that were settled. The Court of Appeals for the Second Circuit has characterized grants of benefits as “hallmark” violations, warranting the issuance of a bargaining order. In such cases, “the seriousness of the conduct, coupled with the fact that often it represents complete action as distinguished from mere statements, interrogations or promises, justifies a finding without extensive explication that it is likely to have a lasting inhibitive effect on a substantial percentage of the work force.” *NLRB v. Jamaica Towing, Inc.*, 632 F.2d 208, 213 (2d Cir. 1980). The Board has found that a wage increase, with little else, has an enduring impact on the bargaining unit and is enough to warrant *Gissel* relief. *Skyline Distributors*, 319 NLRB 271 (1995), enf. denied 99 F.3d 403 (D.C. Cir. 1996); *Honolulu Sporting Goods*, 239 NLRB 1277, 1282 (1979), enf. mem. 620 F.2d 310 (9th Cir. 1980); *Skaggs Drug Centers*, 197 NLRB 1240 (1972), enf. 84 LRRM 2384 (9th Cir. 1973); *Tower Records*, 182 NLRB 382, 387 (1970), enf. 79 LRRM 2736 (9th Cir. 1972). As the Board stated in *Pembroke Management*, 296 NLRB 1226 (1989), quoting from *Tower Records*, supra at 387, “it is a fair assumption that in most instances where employees designate a union as their representative, a major consideration centers on the hope that such representative may be successful in negotiating wage increases.” And the granting of the increase by the employer makes it likely that the employees will be less likely to vote for the union, because the employees received what they wanted. *NLRB v. WKGR-TV, Inc.*, 470 F.2d 1302, 1319–1320 (5th Cir. 1973). Members of unions pay dues, and there is less reason for employees to pay those dues if the employer has already granted what the employees originally sought from the union.

When Overnite unilaterally granted the March increase, in recognition of the employees’ complaints that wages were still less than what they wanted, it became difficult to conceive of

conduct more likely to persuade the employees that the Teamsters was no longer needed and that Overnite would solve all their problems, particularly in light of Overnite’s “Give Jim a Chance” campaign to promise relief from all past “mistakes” and rectify everything. Such unlawful wage increases have a particularly long-lasting effect because the Board’s traditional remedies do not require that an employer rescind its wage increase. *Koons Ford of Annapolis*, 282 NLRB 506, 508 (1986), enf. mem. 833 F.2d 310 (4th Cir. 1987). Because such increases regularly appear in employees’ paychecks, they are a continuing reminder that “the source of benefits now conferred is also the source from which future benefits must flow and which may dry up if it is not obliged.” *NLRB v. Exchange Parts Co.*, 375 U.S. at 409. That becomes particularly compelling in light of Overnite’s simultaneous campaign emphasizing the harm of voting for the Teamsters, that is, that the same company-wide wage increase would not be granted to the employees who had voted for Teamsters’ representation. They would have to wait for collective bargaining, which had no chance of success. In sum, under Board law, the wage increase alone is sufficient to support the relief of a bargaining order<sup>34</sup>; and I turn to the individual locations that are the subject of this Decision.

### III. THE *GISSEL* BARGAINING ORDER CASES

#### A. Lawrenceville, Georgia

##### 1. Majority status

The parties’ earlier settlement agreement allows the litigation of the 8(a)(1) allegations to support a bargaining order under *Gissel*, which generally, with exceptions, permits the Board to order an employer to bargain with a union that has demonstrated majority strength prior to the commission of the unfair labor practices that the order is meant to remedy. 395 U.S. at 613–614. Having determined that Respondent’s unfair labor practices are of the nature that would permit a *Gissel* bargaining order, it is necessary, first, to inquire into the Teamsters’ support, because, if the Union never attained a majority, I need not even consider the 8(a)(1) allegations. Respondent contested the majority strength of the Teamsters in this and others of the *Gissel* locations.

The parties agree that, as of February 4 through 17, there were 85 employees in the Lawrenceville unit. They disagree about the status of two others, both of whose names appear on Respondent’s *Excelsior* list: Robert Nevins, who Respondent contends was a statutory supervisor; and Thomas Mash, who the General Counsel contends had left Respondent’s employ. Nevins worked fulltime, Monday to Friday. On the first 4 days, he assisted road dispatcher and supervisor, Mike Rivers; but, because Rivers’ workweek was from Sunday to Thursday, Nevins assumed Rivers’ functions on Friday; and he also did so sporadically on other days when Rivers was absent. When he did so, Respondent paid him Rivers’ rate of pay, more than \$4 an hour more than Nevins’ normal rate of his classification by Respondent as a full-time dock employee.

Primarily, his duties involved dispatching of drivers and the paperwork and computer entries that were associated with it.

<sup>34</sup> Respondent’s reliance on J. G. Getman, S. B. Goldberg & J. B. Herman, *Union Representation Elections: Law and Reality* (1976), is undermined by the Board’s views in *General Knit of California*, 239 NLRB 619 (1978). See also the dissent of Member Jenkins in *Shopping Kart Food Market*, 228 NLRB 1311 (1977).

When he was alone, his functions also included calling in and assigning extra board drivers, telling dock supervisors and leadmen what work to load, instructing dockworkers regarding loading procedures, reporting to Overnite's central dispatch office in Richmond, and dispatching additional drivers, if needed, to carry loads to Overnite's Atlanta terminal before proceeding on their regular routes. The assignment of extra board drivers would result in more pay for the drivers, but much of the selection process was governed by a first in–first out policy which made Nevins' choice little more than routine. In addition, there is no evidence that Nevins disciplined employees. On the only occasion that Respondent relies on, Nevins merely reported an incident for the file, as requested by his superiors, and relayed a policy that should have been known to all employees. In sum, his work for one-fifth of his time was nominally that of Rivers, an admitted supervisor, but only nominally. Otherwise, he did work in the office and occasionally helped out on the dock. Clearly, Respondent treated him as an employee, classifying him and paying him the same rate as a full-time dock employee, putting him on the *Excelsior* list, and permitting him to maintain his prouinion sympathies, which one would have expected would have not been condoned, had Respondent really thought that he was a supervisor. Furthermore, Respondent did not invite him to its training programs regarding the Union's organizing campaign that all its supervisors and managers were required to attend.

Respondent has the burden of proving that Nevins is a supervisor. *Pacific Dry Dock Co.*, 303 NLRB 569 (1991). I find that he was not; but, even if he was when he relieved Rivers, this does not exclude him as an employee, because his exercise of supervisory authority must be both regular and substantial, and it was irregular and minimal. *Hexacomb Corp.*, 313 NLRB 983, 984 (1994); *Latas De Alumino Reynolds*, 276 NLRB 1313 (1985). Alternatively, Respondent contends that Nevins was an office clerical employee, and that is specifically excluded. However, because Nevins does not work in the office and his duties do not relate to the general office operations, he is a plant, not an office, clerical employee. *J. Ray McDermott & Co.*, 240 NLRB 864, 869 (1979); Cf. *Mitchellace, Inc.*, 314 NLRB 536 (1994). Furthermore, *Viacom Cablevision*, 268 NLRB 633 (1984), instructs that in a stipulated unit, the Board's function is to establish the parties' intent and, if the intent is unclear, the community-of-interest principles should be utilized. Here, Nevins had daily contact with the drivers and assisted them in loading trailers. Furthermore, Respondent originally urged his exclusion only because he was a supervisor, and not an office clerical, and placed him on the *Excelsior* list, an acknowledgment that he at least belonged with the dock workers and drivers, and not the office clericals. I find that he is a member of the appropriate unit.

Mash was first employed in September 1993, but did not work during the three payroll weeks ending February 4, 11, and 18, 1995, when his name on the payroll sheets was crossed out. From this, the General Counsel contends that he was not employed permanently, even though he was paid for the following pay periods, up to May, when he took a leave of absence, failed to report back, and was fired in July. No one seemed to know what Mash was doing in early February, and the only person who may have known was his supervisor, who was not called to testify by Respondent. Furthermore, Respondent's only reason that his name was crossed out was one that the witness had no knowledge of. If Mash's name had not been on the payroll,

he would not have been considered an employee. The fact that his name was on the payroll, but was crossed out, should, in these circumstances, lead to the same conclusion. Without some explanation of his whereabouts, I am constrained to find that he was not employed by Respondent for these 3 weeks.

With the addition of Nevins, the total number of employees in the unit from February 4 to 17, 1995, was 86, and 44 would constitute a majority. The General Counsel proved the signatures of employees on papers, some 21 petitions, most of which stated at the top:

Yes: We want a voice through collective bargaining

WE BELIEVE THAT ONLY THROUGH COLLECTIVE BARGAINING CAN WE HAVE A VOICE IN OUR WORK PLACE, ACHIEVE FAIR TREATMENT FOR ALL, ESTABLISH SENIORITY, JOB SECURITY, BENEFITS, WAGES AND WORKING CONDITIONS. THEREFORE, THIS WILL AUTHORIZE THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, AFL–CIO TO REPRESENT ME IN COLLECTIVE BARGAINING WITH MY EMPLOYER. THIS WILL ALSO AUTHORIZE SAID UNION TO USE MY NAME FOR THE PURPOSE OF ORGANIZING.

Two of the petitions substituted for the Teamsters, "the AFL–CIO and/or its appropriate affiliate," and they added the permission to use the employee's name on leaflets.<sup>35</sup> That was followed by ten boxes, with spaces to be filled in for the printed name, date, address, department, shift, phone, job, rate of pay, and signature. Some pages were signed by only 1 employee: others, by as many as 10 employees.

In *Gissel*, 395 U.S. at 606–608, the Supreme Court approved the Board's *Cumberland Shoe* doctrine<sup>36</sup> for determining the validity of authorization cards (here petitions), describing Board law, 395 U.S. at 584, as follows:

Under the *Cumberland Shoe* doctrine, if the card itself is unambiguous (i.e. states on its face that the signer authorizes the Union to represent the employee for collective bargaining purposes and not to seek an election), it will be counted unless it is proved that the employee was told that the card was to be used *solely* for the purpose of obtaining an election.

The petition refers solely to a single purpose and, even though there is a reference to using the signatories' names for purposes of publicity, the petition does not refer to an election or make any statement inconsistent with the stated single purpose of designating the Union as the collective-bargaining representative. This type of petition is an unambiguous single-purpose authorization card. *Ona Corp.*, 261 NLRB 1378 (1982), *enfd.* in relevant part 729 F.2d 713, 723–724 (11th Cir. 1984).

The Supreme Court, in *Gissel*, 395 U.S. at 606, set forth the following rule for an unambiguous single-purpose authorization card:

[E]mployees should be bound by the clear language of what they signed unless that language is deliberately and clearly canceled by a union adherent with words calculated to direct the signer to disregard and forget the language above his signature.

<sup>35</sup> The designation of a parent union instead of the local union does not invalidate the petition. *Cam Industries*, 251 NLRB 11 (1980), *enfd.* 666 F.2d 411 (9th Cir. 1982).

<sup>36</sup> *Cumberland Shoe Corp.*, 144 NLRB 1268 (1963), *enfd.* 351 F.2d 917 (6th Cir. 1965), *reaff.* in *Levi Strauss & Co.*, 172 NLRB 732 (1968).

Since the petitions on their face clearly state a single purpose to designate the Union as the collective-bargaining representative, the only basis for denying face value to the petitions is affirmative proof of misrepresentation or coercion. *Levi Strauss & Co.*, 172 NLRB 733 (1968).

Respondent called numerous witnesses to contest their authorizations. Their testimony—that they did not know how their signatures ended up on the documents shown to them, or that they did not sign the documents that were placed before them, or that they signed different documents—was weak, often confused, frequently inconsistent, sometimes bordering on the silly, and uniformly unbelievable. That they so testified was not necessarily unexpected. The Supreme Court commented in *Gissel*, 395 U. S. at 608, that: “[E]mployees are more likely than not, many months after a card drive and in response to questions by company counsel, to give testimony damaging to the Union, particularly where company officials have previously threatened reprisals for union activity in violation of Section 8(a)(1).” (Footnote omitted.) Overnite made known in its personnel policies, quoted above, its distaste for any labor organization, further reason that employees would wish to hide their one-time allegiance to the Union. However, part of the confusion of the employees may be attributed to the fact that the Union sought support through a variety of means. At first, the Union used authorization cards, not petitions, that are ordinarily seen in union drives and these proceedings; and it may be that, when it did, the solicitors told employees that the cards were being used solely to obtain an election. That, in turn, may be the reason that the Union discontinued using the cards, changed to the petitions, and ceased advising the potential signatories that their signatures would be used only for that purpose. Later, the Union solicited signatures for a leaflet entitled “Give Us A Chance,” on papers which asked only for the employee’s name, department, and years of service. I am persuaded that much of what Overnite’s witnesses testified to was the signing of other cards or written material and helps to explain the testimony of many of them that they signed other documents, forgetting (or misstating) that they also signed the petitions.

I am also persuaded that they signed the petitions, in the form that was introduced at the hearing.<sup>37</sup> The Teamsters’ campaign started in December 1994. Union meetings were held every weekend, and the employees would have been aware of the significance of the document that they were being asked to sign, especially knowing of the feelings of Overnite as expressed in the personnel manual. Thus, I find it difficult to believe that these employees would have signed a blank piece of paper<sup>38</sup> or that the solicitors were distributing blank pieces of paper as a means of obtaining addresses to send employees information about the Teamsters.<sup>39</sup> In addition, not all of Over-

nite’s witnesses testified that the papers that they signed were blank. Other witnesses it called did not take the same position, indicating that they were presented with petitions in the same form as those in evidence—with the full authorization at the top of the document.

Almost all of Respondent’s witnesses testified that the signatures on the petitions were theirs,<sup>40</sup> but some testified that they were told something different from what was placed on the paper, or that they did not understand what they were signing. Those witnesses who testified that they were told only that the petitions were to obtain an election misstated the facts.<sup>41</sup> A few solicitors mentioned that that was a purpose of the petitions, but they never testified that that was the sole purpose. I credit the solicitors who testified that they also told the employees that the petitions were being presented to show that the employees wanted the Teamsters to represent them as their collective-bargaining agent. That statement was clearly reflected at the top of the petition, which could not be mistaken; and the petitions signed by the employees who were told about the dual purpose of the petitions must be counted. *DTR Industries*, 311 NLRB 833, 839 (1993), enf. denied 39 F.3d 106 (6th Cir. 1994). Some employees who signed petitions could not recall what they were told. I do not credit them and I credit the solicitors, whose recollections were far better and clearer and whose demeanor exhibited sincerity, not the unreal quality of many of Respondent’s witnesses.<sup>42</sup> There was also testimony about the signing of petitions at a union meeting on December 10, 1994. Respondent makes much of the fact that the testimony of the solicitors was inconsistent in their recall of whether the signers went to the front of the room and gathered around a table, waiting to sign the petitions, or whether they stood in line. The important fact is that the employees signed the petitions, and I do not discredit the General Counsel’s witnesses who said that they saw the employees sign. I note, in so holding, that, according to Lawrenceville Manager Bill Carter, employee Gus Stephenson attended the meeting and reported that he saw the employees sign the petitions.

Jerry Williams filled out the petition but, by inadvertence, forgot to sign it, and he was sorry that he had not. The unsigned petition is valid. *Skyline Transport*, 228 NLRB 352, 354 fn. 11

<sup>40</sup> To the extent that Gerald Jennings testified only to the effect that he believed that the signature purporting to be his was probably his signature, I find that it unmistakably was. I summarily reject the testimony of John Green and Bobby Truitt, who denied, or at least could not agree, that the signatures on the petitions were not theirs. They obviously were not telling the truth.

<sup>41</sup> Even if I credited them, the petitions would nonetheless be valid under *Levi Strauss & Co.*, supra.

<sup>42</sup> Respondent contends that Nevins, Smith, and Wilcox solicited petitions that were not offered to support the Union’s majority. At least, a Teamsters’ organizer so testified. From this, Respondent argues that the solicitors who appeared at the hearing were lying about those whom they asked to sign, because they were actually asked by the three named employees. Even if I credited the union organizer, I cannot make the finding that Respondent seeks. I have no idea whether the petitions obtained by the three exist or what they contain. Respondent was free to subpoena those employees (including Nevins, whom Respondent claimed was a supervisor) and their petitions, but there is nothing in the record to demonstrate that it did so. Furthermore, the petitions in evidence contain many more names of employees than were used to support the Teamsters’ majority. It is likely that they revoked their authorizations, and the petitions solicited by the three employees may have also contained signatures of employees who subsequently revoked their authorizations.

<sup>37</sup> Perhaps, as Respondent suggested, by photocopying, the words at the top could have been omitted and inserted at a later date, but the test sample that Respondent prepared using its photocopying machine was not tested scientifically for dust or dirt spots or other markings that might appear under closer examination.

<sup>38</sup> Incredibly, Danny Brady testified at one point that he thought that what he signed was a raffle ticket.

<sup>39</sup> Although Craig Roberts claimed that Nevins (it was actually Huff), the solicitor of his petition, told him that the reason for signing the document was to send him information by mail, Roberts conceded that it would have been impossible to receive mail because he did not write his complete address on the petition.

(1977). To the contrary, Jimmy Lee purposely did not sign the petition because he did not believe in it and was merely trying to rid himself quickly of the solicitor. I will not count his petition. To the extent that Respondent contends that, by signing "Billy" and not "William," Lovins was not be legally bound, Lovins admitted that he wrote "Billy" because that was the name that he was known by. I shall count his signature. While Mike Stuckey's petition is undated, I credit testimony that it was signed sometime in February. It must have been signed by February 27, because that is the date placed there by the Regional Office. I shall count his signature. *Pilgrim Life Insurance Co.*, 249 NLRB 1228, 1241 (1980), enfd. mem. 659 F.2d 1070 (3d Cir. 1981). Larry Smith printed his name in both the space for his printed name and for his signature. Block printing is sufficient to support a holding that his petition should be counted. *Ibid.* Pat Reed testified that he attempted to write his signature differently in order to avoid the clear language of the petition. Similarly, Randy McCall said he signed his petition "R. McCall" rather than with his full name, to avoid the consequences of the petition. (He also claimed that what he signed must have been altered and that the petition was so unclear that he could not read it.) I believe neither of them. Rather, I find that they, like many of the other witnesses called by Respondent, were afraid of the consequences of their act, now in the open, and were willing to do anything, even to give false testimony, to preserve their jobs and their good standing with their employer.

In conclusion, the petitions of the following employees are valid authorizations for union representation: Gerald Jennings, David Riddle, Mike Smith, Reginald Wilcox, Jerry Williams, Vincent Greer, Gary Hicks, and Willie Huguley (December 10, 1994); Joe Huff (January 8, 1995); William Elkins, Robert Nevins,<sup>43</sup> Romney Ramey, Craig Roberts, Danny Brady, Billy Lovins, Robert Meredith, Scott Powell, Larry Smith, and Robert Crocker (January 9); Shandur Burke, Grover McCullors, James Hayes, John Dickens,<sup>44</sup> and R. McCall (all January 10); Harry Gibbs and Bobby Truitt (January 11, 1995); Gerald Ford and Ed Davis (January 16); Angelo Byrd (January 18); Tom Miller (January 19); Tracy Harris (January 21); Ernie Trippy (January 23); Keith Thomas and Jimmy Thompson (January 24); Pat Reed (January 25); Bruce Garmon and Gerald Rice (January 26); Marvin Bennett and Randy Rich (January 28); Timothy McGee and Jesse Woodlee (January 31); George Cates (February 1); Jerry Covington (February 2); Richard Lewis (February 3); Brooks Fiveash (February 8); John Green (February 9); Kenneth Fisher (February 24); Mike Stuckey (on or before February 27); and James Whorley (March 10). Thus, from February 4 through 17, 1995, with 86 employees in the unit, the Union had 44 valid petitions. As of February 25, there were still 86 employees in the unit (Bennett was terminated, and Mash was again on the payroll); and the Union had 45 valid petitions. As of March 11, 1995, there were 88 employees in the unit (Stuckey and Broedell were hired); and the Union had 46 valid petitions. I conclude that the Union had, at these times preceding the election, valid petitions from a majority of the employees in the unit.

<sup>43</sup> I note that Nevins' petition, although dated January 9, may have been signed on January 10, because it follows the petition of Dickens, which is dated January 10. On the other hand, Dickens may have written the wrong date by inadvertence.

<sup>44</sup> See fn. 35, *supra*.

## 2. Credibility

Notwithstanding Respondent's sometimes blistering attacks on the credibility of the General Counsel's witnesses, I found them sincere, truthful, and generally reliable. They were not concocting the various incidents about which they testified. Various incidents occurred, and sometimes I had difficulty finding that the General Counsel's witnesses accurately perceived those incidents, but they did not make them up. So, I have generally credited them, wholly independent from, but certainly consistent with, Board law, which recognizes that the testimony of current employees that contradicts statements of their supervisors is likely to be particularly reliable. *Flexsteel Industries*, 316 NLRB 745 (1995), enfd. mem. 83 F.3d 419 (5th Cir. 1996). The testimony of current employees that is adverse to their employer is "given at considerable risk of economic reprisal, including loss of employment . . . and for this reason not likely to be false." *Shop-Rite Supermarket*, 231 NLRB 500, 505 fn. 22 (1977). The wisdom of these Board decisions is supported by Atlanta Manager Schager, who testified that some of his employees had voluntarily told him that, although they had signed union cards, they would nonetheless support Overnite in the election. Because the Union received a majority of votes at the Atlanta terminal, Schager said they had lied to him to "cover . . . their butt" in case the Teamsters lost. Obviously, even Schager acknowledged the employees' fear of retaliation; and I find it unlikely that the employees knowingly lied about their employer's misdeeds. I have thus generally credited those that testified in support of the unfair labor practices.

I do so not only because I so distrusted the veracity of the employees who testified falsely about the circumstances of their signing the petitions, but also because the kinds of illegal activity was so consistent throughout the hearing, from Blaine to the four *Gissel* locations. On the one hand, Overnite emphasized blaming Boswell, praising Douglas, the correction of the past mistakes, the announcement of the second wage increase and the increase of the speed and mileage limits, and "Give Jim a Chance." On the other hand, Overnite tried to ensure that its employees would understand that the Teamsters was a "plague," ridden with crime and filled with greed to fill its ailing union coffers and to fund its bankrupt pension plan. Besides, Overnite contended, it would do no good to vote for the Teamsters, because it had already had its chance in Chicago, and look what happened. This is not to say that many of the topics discussed were not fair game, but, as found below, the credited testimony is consistent with Overnite's campaign; and Overnite often exceeded the bounds of what it could lawfully do, similar to the kinds of threats found in *Overnite Transportation Co.*, 296 NLRB 669 (1989), enfd. 938 F.2d 815 (7th Cir. 1991).

Furthermore, I must note that Douglas commented on June 14, 1995, in response to the press release that the Board intended to seek a 10(j) injunction:

I have reviewed the specific charges made against me, and can say without hesitation that they're flat-out lies. They're obviously being made by individuals who believe either that I'm so stupid that I'd violate the law, or they're folks who either have problems hearing what I say or whose moral and ethical character won't let them tell the truth. Knowing our management team as I do and you do, and because I know the allegations against me personally are without merit, there is

strong reason to believe that the charges against others in our company are lies as well.

So no one tells the truth except Douglas, and the managers and supervisors should be sure that their senior officer knows that they, too, committed no violations. Whatever strain there may have been on the employees who were actively supportive of the Union to testify in favor of the complaint's allegations, there was equal pressure on Overnite's witnesses to deny any wrongdoing.

### 3. The unfair labor practice allegations

Respondent maintained two bulletin boards in the employee break room and an additional one outside the break room on the dock. Before the commencement of the organizing drive began, all three were open to the Lawrenceville employees to post anything on them, but employees posted their union propaganda primarily on the two in the break room, particularly during the campaign, and they also left literature on the tables in the break room. In March 1995, 3 months after the organizing campaign had begun, Manager Carter enclosed the two bulletin boards in the break room in glass, under lock, preventing the employees from posting union literature in the break room. Respondent gave no reason for making those boards inaccessible. (There are a spate of arguments in its brief, but those are unsupported by fact.) Although employees still left literature on the tables and they could use the third board on the dock, Respondent changed its practice of permitting the posting of literature by employees, limiting particularly the places that employees customarily looked. I find that Respondent's purpose was to discourage the employees in their campaign and conclude that Respondent violated Section 8(a)(1) of the Act. *Vincent's Steak House*, 216 NLRB 647 (1992).

In January, employee Kevin Adams told Carter that he had heard some rumors about the Union and asked what was going on, as Adams apparently did not know. Carter replied that there had been a meeting at the union hall, that he knew which employees had attended and what they had said at that meeting, and that he hoped that the employees would wait to see what changes Douglas would make before making their decision. Carter added that someone had placed flyers or leaflets in the trucks and that a city driver had removed them and brought them to Carter. Even though he had received his information legally, Carter gave the impression to Adams that he was monitoring the union activities of the employees. That is unlawful and violated Section 8(a)(1) of the Act. *Flexsteel Industries*, 311 NLRB 257 (1993).

On February 10, at a meeting of employees, Carter told them that he had attended the San Antonio management conference, where the service center managers had met in groups to try to come up with solutions to the "problems that were going on at Overnite." Mike Smith testified that Carter announced that he had a list of 23 improvements, such as incentives for bringing back business lost in the 1994 Teamsters strike and bringing in new business, a picnic budget, paying for overtime, night-liners (Smith could not explain what this was), vacation time, and better uniforms. Carter also compared Boswell, a tougher businessman who would not talk to employees or improve working conditions, with Douglas, a "hands-on guy" who would try to communicate with the employees better than Boswell did.

Despite Carter's denials, I generally credit Smith, who was no longer employed by Overnite and thus had no reason to fabricate his testimony. One of the purposes of the San Antonio

conference was to discuss employee complaints, and the reason for doing so was to rid Overnite of the causes of employee unrest. By comparing Douglas with Boswell, who would not improve working conditions, Carter gave the impression that Douglas would, and in the particulars that Carter enumerated. The list that Smith recalled was perhaps somewhat faulty, but sufficient enough to include overtime and uniforms, causes for complaints in many locations. The statement about Douglas' character was also consistent with what was frequently said throughout the campaign. Carter's statements, made in response to the Union's campaign, unlawfully promised benefits in order to discourage employees from supporting the Teamsters. *Harbor Cruises*, 319 NLRB 822, 839 (1995). I conclude that Respondent Section 8(a)(1) of the Act.

That same evening, Carter held another meeting, telling employees that Douglas had just given them the March 5 raise, which was overdue. He then said that Overnite could not survive under a Teamsters' contract and that it would cost too much to bring Respondent's employees up to the Teamsters' pay scale and would probably hurt Overnite more than help it. He then praised Overnite because it was not as strict as other trucking companies and did not have as many tough rules. But he had "a list of things in his office" if he needed to get rid of people; and that could be done "very easily." Finally, the employees' pension plan would probably go into the Teamsters' fund and be used to pay other Teamsters' members who were then retiring.

Compared with the "carrots" offered at the earlier meeting, Carter added some "sticks" at night, which, the General Counsel claims, constitute illegal threats. Carter's threat that he had a list of things in his office he could use if he wanted to get rid of employees—even though Carter denied this, he admitted telling two other employees that he could have fired them for certain incidents, but had decided not to do so—was illegal. He was advising them that, if they voted to be represented by the Teamsters, he would not be as lenient. That violated Section 8(a)(1) of the Act. *Aero Tec Laboratories*, 269 NLRB 705, 706 (1984).

The remainder of what Carter said raises an issue which is often presented in this proceeding. Many of the witnesses called by the General Counsel testified to various threats that Overnite would never sign a contract and that, if the employees voted for the Union, there would be various adverse consequences. Carter and many of Overnite's managers and supervisors testified that their discussions related to the NMFA and not to unions or the Teamsters. Thus, any implied threats were merely reflections of what would happen if the Teamsters successfully obtained the terms and conditions of the NMFA and applied them to Overnite's facilities. On the other hand, the General Counsel's witnesses, with somewhat less uniformity, testified that the implied threats had nothing to do with the NMFA but were merely predictions of dire consequences, unprotected by the Act and unsupported by objective facts.

Section 8(c) of the Act protects an employer's right to address the issues of union representation, provided that its views are devoid of threat of reprisal or promise of benefit. The Supreme Court gave the following guidance in *Gissel*, 395 U.S. at 618:

[A]n employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain "threat of reprisal or force or promise of bene-

fit.” He may even make a prediction as to the precise effects he believes unionization will have on his company. In such a case, however, the prediction must be carefully phrased on the basis of objective fact to convey an employer’s belief to demonstrably probable consequences beyond his control . . . . If there is any implication that an employer may or may not take action solely on his own initiative for reasons unrelated to economic necessities and known only to him, the statement is no longer a reasonable prediction based on available facts but a threat of retaliation based upon misrepresentation and coercion, and as such without the protection of the First Amendment . . . . As stated elsewhere, an employer is free only to tell what he reasonably believes will be the likely economic consequences of unionization that are outside his control,” and not “threats of economic reprisal to be taken solely on his own volition.” [Citations omitted.]

To the same effect, see, e.g., *General Electric Co.*, 321 NLRB 662 (1996); *Action Mining*, 318 NLRB 652, 656–657 fn. 12 (1995); *Deer Creek Mining Co.*, 308 NLRB 743 (1992).

Here, the focus the remarks of Respondent’s managers and supervisors must be on the fact that the Teamsters was attempting to organize the employees at the Lawrenceville service center (or Louisville or Norfolk or Bridgeton to follow), not all 175 service centers operated by Overnite. What Overnite is then privileged to say is how the organization of that single facility may impact on its operation of that facility. Carter admittedly talked about the Teamsters’ contract, but there was no objective fact stated to the employees at Lawrenceville, nor is there even one in the record, to show that the application of the NMFA to Lawrenceville would cause Overnite to go out of business. Respondent did offer evidence to show that, if the NMFA had been applied generally to all Overnite’s employees throughout its operations, it would have, instead of making a profit, lost substantial moneys. Again, even that was never stated to the employees, and there is no proof that Carter relied on those figures when making his threat. Carter’s prediction thus had no objective factual basis and is unlawful. Similarly, his statement about the pension fund is not objective.<sup>45</sup> Even if it were true that the Teamsters would ask for its own pension fund, a merger of Overnite’s funds into the Teamsters’ funds would not even probably be a likely result, unless Overnite permitted it. What Carter was saying was that the employees would lose all the money that had vested in Overnite’s fund, and that was not the likely result of a union contract or even the NMFA.

Part of Overnite’s campaign at each of the service centers was a series of meetings that employees were required to attend (“mandatory meetings”). Schager, even though the manager of the Atlanta service center, conducted three or four mandatory meetings with the Lawrenceville employees on January 25, and he made a number of statements that are alleged to violate the Act. One was that he believed that Overnite could not operate under a union contract and that if the Company were forced to do so, the company would be forced to go out of business. Another one was that, if the employees voted for representation by the Teamsters, it would lose 40 percent of its business because its customers would not use union carriers and it would lose 55 percent of its managers. Yet another is that 150 unionized truck

companies had gone out of business and that, if Overnite had been unionized in 1994, it would have lost \$44 million.

Schager testified that whatever he said was in the context of the NMFA, but not even Respondent’s own employee witnesses (who testified is support of some milder language) corroborated that testimony. Anyone who tells an employee, albeit one employed at the Atlanta service center, that Overnite was going to play hard ball and was thinking of closing down is capable of making the statements that the employees attributed to him. Schager misstated that he had not made this threat, and I do not credit him generally. I find violations of Section 8(a)(1) of the Act. There is no objective support for any of his predictions of loss of business, customers, or managers. *Reeves Bros., Inc.*, 320 NLRB 1082, 1083 (1996). Further, his statement that Overnite could not operate under a union contract constituted an illegal threat of closure of the business and loss of the employees’ jobs. Such a threat violated Section 8(a)(1) of the Act, under the circumstances herein. The necessary implication of Schager’s statement that 150 unionized truck companies had gone out of business is that the Teamsters was to blame for those closings. That, too, violated the Act. *Eldorado Tool*, 325 NLRB 222 (1997).

At the same meetings, Schager, while threatening the employees with dire consequences if they supported the Union, made the same kind of promises as did many others of Respondent’s managers and supervisors. Thus, he recognized that Overnite had problems, but Boswell was the culprit, caring more about profits than about the employees. Douglas, however, cared more about people; he was going to make a lot of changes; and the employees should give him a chance. I conclude that Schager promised benefits to the employees in violation of Section 8(a)(1) of the Act. *Reno Hilton*, 319 NLRB 1154, 1156 (1995).

After watching films at one of the meetings, Smith and Schager had a heated discussion, starting with Smith’s complaint that he was insulted by the antiunion film that Overnite showed. When Smith began to advocate the Union, Schager contended that the Union was not such a good thing; and he told Smith: “[I]f you want a Union job why don’t you go and get a Union job with a company that is a Union company.” At another meeting, Schager said that if anyone who worked for Overnite was not satisfied with its nonunion status, Schager could try to help the employee get work with a union carrier. His invitation to Smith and others to quit interfered with their right under Section 7 to engage in union activity and thereby violated Section 8(a)(1) of the Act. *IMAC Energy*, 305 NLRB 728, 731 (1991).

At the same meeting, employee Jerry Williams asked Schager if the employees would have been given the wage increase and if Respondent would be trying to improve the employees’ conditions had the Union not tried to organize the employees. To both questions, Schager responded: “[N]o.” Smith, apparently believing that the Union should receive credit for the wage increase and any future benefits, asked the other employees what more they needed to hear. Whether Smith was correct or not, Schager was contending that the employees did not need the Union, because Overnite would respond to their organizing drive by taking care of them, thereby attempting to dissuade them from supporting the Union and interfering with the exercise of their Section 7 rights. *Hamilton Avnet Electronics*, 240 NLRB 781, 790 (1979); *Topeka Discount*, 181 NLRB

<sup>45</sup> This may not have been directly alleged in the complaint, but it was litigated and briefed by all parties.

17, 18 (1970). I conclude that Respondent violated Section 8(a)(1) of the Act.

The testimony of the General Counsel's witnesses about overtime and pensions was hardly the model of consistency. Overnite's failure to pay employees for overtime was a major issue at Lawrenceville. Only Joe Huff testified to Schager's threat that, if the Union won the election, Overnite would not pay overtime, but would hire more employees to keep from paying time and one-half. On the other hand, employee Gerald Jennings testified that Douglas, shortly before the election, told the employees that, if they became represented by the Union, Overnite would probably have to lay off workers if it was forced to pay overtime. As to pensions, Huff testified that Schager threatened the employees that, if they selected the Union as their representative, they would lose their pensions. Overnite's pension plan for employees would have to be renegotiated, and the contributions paid into the Teamsters' pension fund would be used to pay the retirement benefits of those who had retired under that fund, because it was broke. Smith added Schager's threat that Overnite's employees would lose credit for all the time they had worked for Overnite, and that would have to be renegotiated. On the other hand, employee Bob Crocker testified that at the meeting he attended, Schager said that the Teamsters' retirement fund was underfunded, that it could go broke if the Teamsters did not get more members, and that Overnite's plan was fully funded. Another twist was added by Atlanta employee Dwayne Strickland, who testified that Schager said that the only reason that the Teamsters wanted to organize them was to capture their retirement plan and they would lose their retirement money to the Union. Finally, the General Counsel relies on statements that Carter made to Smith and several other Lawrenceville employees that, if the Union won the election, the employee's money from Overnite's plan would be put in one pot and be used to pay the employees who were presently retiring from the Teamsters.

Schager admitted that he talked to employees about pensions, but said that all he told them was that if the Union won the election, everything, including pensions, would be subject to negotiation. While he discussed the fact that the Teamsters' pension fund was underfunded, and Respondent's was fully funded, he denied that he told employees that Overnite's pension would go into the underfunded Teamsters' fund, denied that he told employees that they would lose what they had if the Union won the election, and denied that he ever said that the Union wanted to get its hands on Respondent's retirement fund. Carter also denied that he told employees that, if Respondent were to contribute to the Teamsters' fund, the money would be used to pay retirement benefits for employees of other carriers.

I cannot believe that Respondent sent out as many diverse messages about pensions as these employees related. It is likely that Schager said more about the pensions than he was willing to admit; but, from all this testimony, I cannot tell what. Nor do I find it probable that Douglas was espousing laying off employees, if forced to pay overtime, while Schager was stating that Respondent would hire more employees. Even if I believed one or the other, it is problematic whether either, properly understood, is a violation of Section 8(a)(1) of the Act, or merely a prediction of what might result from Overnite's grant of overtime pay. I conclude that the General Counsel did not prove any of these allegations by a preponderance of the evidence.

At the January 25 meeting, Schager repeated Overnite's mantra about bargaining in Chicago, that the Chicago employ-

ees had voted for union representation long ago and still did not have a contract. All that Respondent had to do was bargain in good faith. Schager said that this demonstrated that voting for a union does not mean that the employees will get a negotiated contract, because employees in Chicago did not have one after 12 to 13 years. By Schager's omission of any reference to the Board's finding that Overnite bargained in bad faith, Respondent implied that bargaining would be futile, lasting for years without any possibility of agreement.<sup>46</sup> For the reasons set forth above, I conclude that Respondent violated Section 8(a)(1) of the Act. *Taylor Chair Co.*, 292 NLRB 658, 662 (1989).

One of the major issues in the Lawrenceville campaign was the status of the service center's part-time employees. Schager told the employees that the union contract allowed only casual employees and not part-time employees to work. Although employee witnesses testified that Schager threatened that, if the Teamsters became the employees' representative, the current part-time employees would lose their jobs and could be replaced by casuals from other Union carriers, I find that he did not misstate the logical effect of the NMFA contract. Thus, I find no violation.

In March 1995, dispatcher Rivers told employees that a team of Overnite's lawyers had come to the terminal and informed the managers that Overnite had set aside \$20 million to fight the Teamsters and that Overnite would break the Teamsters before it could organize the employees. He pointed out that, despite the fact that the employees at the Kansas City terminal had voted for the Teamsters, they did not receive the March 5 pay raise; and, based on what the lawyers told Rivers, Overnite would never sign a union contract. He asked the employees to look at what had happened at the Chicago service center, that those employees had been represented by the Teamsters for 10-13 years and still did not have a contract. All Overnite had to do was bargain in good faith. Finally, he threatened that, if Overnite's employees were represented by the Teamsters, employees from other unionized employers who were laid off could bump Overnite's part-time employees and take their jobs. In another conversation later that month, when a driver made a pro-Teamsters comment, Rivers responded that the employees should vote for the Teamsters. "Chicago did and what good did it do them." The Chicago service center still did not have a contract.

Respondent contends that Rivers was a low level supervisor and not an agent. The Board wrote in *Zimmerman Plumbing Co.*, 325 NLRB 106 (1997):

It is well established that apparent authority results from a manifestation by the principal to a third party that creates a reasonable basis for that party to believe that the principal has authorized the alleged agent to perform the acts in question. See generally *Dentech Corp.*, 294 NLRB 924 (1989); *Service Employees Local 87 (West Bay)*, 291 NLRB 82 (1988). Thus, in determining whether statements made by individuals to employees are attributable to the employer, the test is

<sup>46</sup> I do not find, as Huff testified, that Schager threatened directly that Respondent would not sign a contract, but the intent was to clearly demonstrate the futility of bargaining with Overnite. I also do not find, as Schager testified, that his only mention of Chicago was in response to employees' questions. The Chicago experience was a linchpin of Overnite's campaign strategy, repeated by Edwards and various managers and supervisors at every location involved thus far in this proceeding.

whether, under all the circumstances, the employees “would reasonably believe that the employee in question [alleged agent] was reflecting company policy and speaking and acting for management.” *Waterbed World*, 286 NLRB 425, 426–427 (1987).

Rivers attended management meetings on labor relations (the ones from which Nevins was excluded) and was in charge of dispatching the drivers. Furthermore, his comments represented nothing particularly new or startling in the context of the evidence in this proceeding. He was merely parroting much of Respondent’s propaganda line, and employees would reasonably believe that he was acting for management. Thus, Respondent should be responsible for it. I conclude that Respondent violated Section 8(a)(1) of the Act by threatening that the selection of the Union would be an exercise in futility because Respondent would ensure that there would be no contract; and by threatening employees, including part-time employees, without any factual basis, with the loss of work by casual employees from employees at other carriers taking the jobs of current employees, if the Union won the election. *General Electric Co.*, 321 NLRB 662, 666 (1996), modified and remanded 117 F.3d 627 (D.C. Cir. 1997).

In late March, Edwards repeated to the Lawrenceville employees the Chicago story, with a little more detail than at any other service center—that the employees there had voted for Teamsters’ representation and had been in negotiations with Respondent for about 10 years and still did not have a contract, although the negotiators had come close a couple of times. Edwards said that Overnite had been negotiating in good faith and then added that the employees at Respondent’s service centers that had voted for Teamsters’ representation in 1994 and 1995 would not receive the March 1995 pay raise because it would have to be negotiated. At another meeting, Edwards said that contract negotiations for the Chicago service center had been going on for 13 years; that during that time a lawyer had died, and the officials of the Local had changed; and negotiations had to start over. The Teamsters had tried to call a strike and only seven employees participated.<sup>47</sup> All Respondent had to do was negotiate in good faith, Edwards adding “that Overnite could be negotiating with the Union for years and that they could make this thing go on for years and they could drag it out in the court for years.” In the meantime, Edwards announced that the employees at Respondent’s five terminals that had voted for union representation before March 5 would not receive the increase, because the raise was “on the negotiating table.”

Edwards’ comments were intended to convey to employees the message that it would do them no good, and would be an effort in futility, to vote for representation by the Union, because there never would be an agreement. *El Rancho Market*, 235 NLRB 468, 472 (1978), enfd. mem. 603 F.2d 223 (9th Cir. 1979). The employees would also be punished for voting for the Teamsters, because doing so would effectively deprive them of any future increase. I conclude that Overnite violated Section 8(a)(1) of the Act in both instances.

In early April, Douglas and Adams, among others, were talking about the employees’ complaint that Overnite was contracting out freight that the Lawrenceville drivers used to carry to

Florida. Douglas told them that he was looking into ways that Respondent could return this work. The discussion then turned to the benefits that Respondent provided to its employees. Douglas said that Overnite spent \$120 million dollars annually on benefits and that perhaps employees were not happy with the way that the money was being spent. He wanted to form committees to get employee input on how to spend that money and told Adams that Overnite needed people like him to serve on such a committee. There had been no such committees before. About a week later, Douglas told some employees that they needed to put the organizing drive behind them and eliminate all the hard feelings. Employee Paul Carpinez had been talking about things that he felt were wrong, and Douglas said to him that Overnite needed someone like him to serve on a committee to provide input to help solve problems.

Douglas tried to hedge his answers, but did admit that he wanted to get “cross sections of our employees to help us to determine how to spend our benefit dollar.” In fact, Douglas’ suggestion and offer was a way to solve problems, with the employee groups to tell management what the best way to solve a problem was. For example, Carpinez was suggesting that Overnite’s retirement be changed from 65 to 58, as in the Teamsters’ plan; and Douglas explained the costs of such a change and the limitations on the activities of a retiree. Then he repeated: “My whole point is I don’t know whether we’re spending it in the right way. And we ought to go back to people like you and a cross-section of our employee population and say ‘what’s the right way to do this.’”

Respondent contends that there was nothing wrong with Douglas’s statements, but I find a clear promise, made during the course of an organizational campaign, never before in effect, that a group of employees would help Respondent to determine what the best way was to spend the money available for employee benefits. That violated Section 8(a)(1) of the Act. *Torbitt & Castleman, Inc.*, 320 NLRB 907, 909–910 (1996). In addition, Douglas’ offer to Carpinez to serve on a committee to help solve problems amounted to solicitating grievances from employees with a promise to redress them. *Valley Special Needs Program, Inc.*, 314 NLRB 903, 904 (1994).

During the first conversation, Douglas asked Adams whether, during his employment by Overnite, he had ever missed a paycheck. Adams replied that he had not, but his paycheck had become smaller, even with the raises that Overnite had given, as a result of changes, including route changes, that Respondent had been making. Douglas asked whether Adams was willing to sacrifice the jobs of 14,000 people for “this campaign.” Adams responded that he was, but did not believe that Douglas understood, with the cutbacks in jobs being made, including the subcontracting of freight to Florida, that employees already felt that their jobs were being threatened. Douglas repeated that he could not believe that Adams was willing to sacrifice wages and benefits of his fellow employees for the campaign. Later, one of the employees asked about the reduction of some full-time employees at the Atlanta terminal to part-time status. When Douglas said he knew nothing about it, Adams said that he did; but Douglas brushed him off and told him to check with Schager and get his facts straight. Douglas then threatened Adams that, if the union campaign were successful, everything was being jeopardized—the jobs and welfare benefits, everything—and the employees would see a big change in management’s attitude, especially at the local level, in the manner that Overnite enforced its work rules, and that

<sup>47</sup> One witness called by Respondent recalled Edwards saying that almost all of the employees who had voted the Teamsters in at Chicago were no longer employed by Overnite.

Overnite was going to toughen up. Douglas glowered at Adams as he said this.<sup>48</sup>

During Douglas' conversation a week later, Douglas asked the employees how the Teamsters could solve the problems that they were raising. Adams answered that the Teamsters would merely bring existing problems to light. Douglas said the Teamsters would create problems by going after the NMFA, and the company would lose money, a situation that Adams had said earlier he did not care about. Adams disagreed, saying he did care, but that might be necessary to get the point across about how upset employees were. Douglas then said, "[S]o, and so we'll drive this thing into nonprofit and put 14,000 jobs in jeopardy and that's the way to answer that."

The Teamsters was seeking to represent the employees in Lawrenceville. The issue of representation by the Teamsters in Lawrenceville cannot conceivably bring down the entire company because the NMFA would apply only to Lawrenceville. Besides, Respondent repeatedly said that it would not sign a contract that was not beneficial to it. Accordingly, there was no objective factual basis to threaten these employees that their vote would cause not only their downfall but also the demise of the entire company. I conclude that Respondent violated Section 8(a)(1) of the Act. Further, Douglas' threat that management would change its attitude in the way it enforced its work rules in the event the employees voted for union representation is a threat to retaliate because of the employees' exercise of their Section 7 rights. That also violated Section 8(a)(1) of the Act. *Aero Tec Laboratories*, 269 NLRB at 706.

#### 4. The objections

The International filed a petition for an election in Case 10-RC-14595 (now Case 18-RC-15786) on February 27, 1995. An election was held on April 17, 1995, which the Union lost, 38 to 42, with an insufficient number of ballots challenged to affect the results of the election. The Union filed timely objections, and the Regional Director issued an order directing a hearing on all of them, deeming them coextensive with certain (without stating which) of the allegations in the unfair labor practice complaints issued relating to the Lawrenceville unit. That is no doubt true, but it leaves me with the task of picking out and sorting which of the 11 objections, many of which are duplicative and repetitive, relate to which of the many allegations of the complaint. It suffices that the March wage increase certainly interfered with the laboratory conditions of the election, as did the many threats of futility and other 8(a)(1) violations that I have found, to the extent that I have specifically found that they occurred within the critical preelection period, after the filing of the petition. *Ideal Electric*, 134 NLRB 1275, 1278 (1961). Those appear to be the ones pertaining to the bulletin boards and the unfair labor practices committed by Douglas and Edwards.

### B. Louisville

#### 1. Majority status

Unlike Lawrenceville, there is no issue about the majority status of the Union at the Louisville service center. On January 20, 1995, the Union requested Overnite to recognize it as the

<sup>48</sup> At one point in the hearing, the Counsel for the General Counsel asked Douglas a question about whether there was any written support for his position. Douglas glowered as he asked whether he was being called a "liar."

representative of the employees. As of then, 117 of 174 employees had signed cards designating the Union as their representative for the purposes of collective bargaining. In making this calculation, I have omitted the cards dated after January 20 and the card of Prince Greer, which was undated, but had to be signed before the date that the Region stamped as the date it received the card. I have included the cards of James Kinnamon and Dale Waford, which, although undated, bore postage cancellation stamps in October and December 1994, respectively, and the cards of James Hester and Charles Turner, as to whom Richard Shipp, the handwriting expert, opined that it was probable that they signed the cards. Under the Board's normal preponderance-of-the-evidence test, that expert opinion is sufficient. I have also included the card of Russell Anderson, who testified that he signed the card that is in evidence.

#### 2. Credibility

I rely on the same considerations for determining credibility that I stated above, noting that the pattern of Overnite's opposition to the Teamsters was so similar from location to location. There might have been little variations, but essentially Overnite's task was to find out what the problems were, attempt to resolve those problems, show why Overnite could resolve the problems better than the Union can, show the harm that voting for the Union might cause, and assure the employees that their best hopes rest with Overnite than with the Teamsters. In doing so, Respondent's conduct lapsed in the respects found below, and, in so finding, I reject Overnite's brief's full-scale attack on the credibility of the General Counsel's witnesses. I find it unlikely that they concocted the varied incidents about which they testified. Rather, I found them generally reliable, clear-headed, sincere, and able to recall accurately the events that transpired. To the contrary, I felt that Respondent's witnesses, with one exception, were relating what they wanted me to hear, rather than what actually occurred.

#### 3. The unfair labor practice allegations

The Union began organizing the Louisville employees around early October 1994 (the first authorization card was executed on October 3). In early November, Service Center Manager Dave Harmeier learned about the organizing efforts and, pursuant to Overnite's policy, called his immediate supervisor, Alan McBride, the central region vicepresident, to so advise him. Shortly after, in late November, McBride visited the Louisville service center and asked road driver Ken Trulock and his sleeper team partner, Mike Cantrell, if they had any problems in any areas or any complaints that he could help them with or anything that they had seen that could have been done better. Trulock responded that there were delays in getting into and out of terminals because there were dispatchers who were abusing their authority. McBride said that he would try to work on those areas and find out. With one exception, which occurred as many as 5 years before, no one not immediately associated with the Louisville terminal had asked Trulock, who had been employed by Overnite since 1979, if he had any work-related issues of concern. Implicit in McBride's unsolicited inquiry is the promise to correct Trulock's grievances, even if he said only that he would try to work on those areas. I conclude that that is sufficient to sustain a violation of Section 8(a)(1) of the Act.

About February 1, 1995, Harmeier held an impromptu meeting with the third shift. He asked what he could do to make the situation better so the Union would be kept out. The employees

raised the issue of overtime. Harmeier said he had some control over the number of hours worked but he could not promise time and one-half. "But possibly, in the future, things might get better." The employees expressed their grievances, Cunningham reminding him that in 1994, when the third shift had met with him to complain that they were being forced to work overtime at Lexington when the second shift was not required to go, he told them that they could quit. Harmeier promised that he would work with the employees as best he could. Again, I conclude that Respondent solicited employee grievances and impliedly promised improved benefits if the employees did not select the Teamsters, in violation of Section 8(a)(1) of the Act.

Harmeier conducted a series of five mandatory meetings. At one, Harmeier encouraged employees to give Douglas a chance. He said that Douglas had a "new vision" and was a very sincere person. If he said he was going to do something, Harmeier believed that he would; and if, at the end of 12 months, Douglas did not do what he said he would do, the employees could always vote for the Union to represent them. His remarks set the tone for Douglas' visits to the Louisville service center in March. A week before the election, about March 9 and 10, Douglas explained to employees some of the things that he thought had been wrong while Boswell was president. He promised that he was going to work on making conditions better for the employees, that he was trying to upgrade employee benefits, and that there were some other "things [Overnite was] working on." In a conversation with some dockworkers, Douglas said that he had just taken over and realized there were some problems; and that was the reason that he had been put in charge. He was going to try and "straighten stuff out" and would have an open line—employees could call and talk to him about problems. Douglas said to yet other employees that he was the new president and he was visiting terminals to learn about problems firsthand. Douglas asked Trulock about his areas of concern. Trulock was appreciative of his interest, noting that he had never met (except for McBride and a safety supervisor) anyone higher than a terminal manager. He said that he had no problems in Louisville, but did on the road, waiting for loads. Drivers ought to be paid for a wait in excess of an hour. Douglas replied that waiting 30 minutes was too much. During the conversation, Douglas showed how he was trying to make some changes, specifically mentioning the wage increase and the increase of the mileage limits. I conclude that Douglas promised improved benefits, which, in the context of Harmeier's introduction of him and the "Give Jim a Chance" campaign, were promised to dissuade employees from supporting the Teamsters as their collective-bargaining representative, in violation of Section 8(a)(1) of the Act.

During Douglas' same visit, employee Gregory Sageser arranged for a meeting with him (but specifically not including Harmeier) for the third-shift dockworkers and some city drivers to present their concerns and complaints.<sup>49</sup> Sageser asked why dockworkers were not receiving jockey pay (25 cents per hour more) when assigned to the yard. Douglas appeared amazed. Regional Vice President Bronson left the room and consulted with Harmeier on the dock. Subsequent to this meeting, employees began to receive jockey pay. Douglas told the employees that Drew Lewis had given him 12 months to turn things

around or he would be finding a new job. When employee Tim Nalley asked about time and one-half, Douglas responded that they would be looking into everything, but his hands were tied and he could not say because of the election. Douglas was wearing a "Give Jim a Chance" button, and Douglas referred to the slogan as one that some of his friends in Richmond had devised to indicate that he would turn the company around. Douglas also mentioned the upcoming March wage increase: the previous performance incentive plan had not compensated employees fairly and the second raise would make up for what the employees deserved in 1994.<sup>50</sup> The Union would probably try to block the increase, but Overnite was going to give it anyway. At the conclusion of the meeting, Douglas told employees to call him if they had any questions. Nalley asked for his telephone number, and Douglas supplied it. By the foregoing, Douglas solicited grievances and implied that he would continue to make improvements, such as the March wage increase—all in violation of Section 8(a)(1) of the Act. Although I find that Overnite also resolved the grievance about jockey pay by granting it, that was specifically withdrawn as an unfair labor practice allegation, but was still litigated.

In contrast to the promises that conditions would become better and improvements would be made, various of Respondent's managers warned of the harm to employees that would result if the Union were successful. Early in the campaign, in late January 1995, city dispatcher Johnny Gilreath saw Don Cunningham and another employee, Alan Kincaid, wearing Teamsters' hats and buttons. Gilreath said, "[I]f we go union the company will shut the doors." Also in January, Outbound Supervisor Jerry Ralston told Cunningham that the Union pin he was wearing could be hazardous to his health. In late January or early February, dock leadman Tim Nalley was wearing his Teamsters hat, and dispatcher Don Fulton asked him if had thought about what it would cost him if the Union got in. Fulton answered his own question: if the Union got all the extra wages and benefits, it was going to cost some of Nalley's fellow employees their jobs. Nalley replied that he would like everyone to be better off, but Fulton did not think it would end that way. Rather, Overnite could close down the terminal, change the name to "Special Services Division," and hire all new employees. Nalley protested that that was illegal, but Fulton just shook his head. Around the same time, Nalley had a similar conversation with another dispatcher, Larry Jones, who thought that Lexington was waiting for Louisville to vote the Union in so that the Lexington terminal could run freight around Louisville and starve the Louisville drivers to death. Nalley said that that was not feasible financially and was illegal, but Jones just laughed.

Later, in February 1995, Ralston reprimanded Cunningham after he had joked with another employee about shoving a skid. Ralston told Cunningham that, since the union campaign had started, Cunningham had an attitude problem. Cunningham disagreed and said that he was standing up for his own rights and the rights of other employees. Ralston asked if he realized that, if they voted a union in, Ralston would be forced by Harmeier to write employees up for anything that they could possibly get the employees for. Also in February, Dock Supervisor Joe Burke warned employees that if the Union won the elec-

<sup>49</sup> There was little agreement among the General Counsel's witnesses about what happened, and Douglas denied much of what they testified to. The facts that are set forth are the only ones I credit.

<sup>50</sup> Douglas did not testify at the hearing that he arrived at the 55-cents-an-hour increase from the money that the employees lost as a result of PIP. See fn. 32.

tion, Overnite would “play hardball” and employees would have to work harder than they were working now. In March, employee Carl King joined a conversation between some employees and Supervisor Steve Decker, who said that he did not understand why King wanted to get on a “sinking ship” because the Teamsters was going broke and “we’d all be out of work if we voted it in.” During a conversation about the Union, Decker suggested giving Douglas a year to see what came out of it. I conclude that Respondent violated Section 8(a)(1) of the Act by threatening employees with the loss of their jobs and more onerous working conditions if they selected the Teamsters as their bargaining representative.

In addition to the threats of harm, there was the familiar theme that voting for the Teamsters would not do the employees any good, because there were no favorable results that would be reached in bargaining. At one mandatory meeting, Harmeier said that Overnite was not going to sign any contract, including the NMFA, that made it less competitive. All it needed to do was bargain in good faith, and that could result in employees’ receiving less than they did now. Up to this point, his remarks were lawful; but then he briefly mentioned Overnite’s experience in Chicago, and said that Edwards could tell the employees better than he could. Edwards then said that Chicago facility still did not have any kind of contract, and it had been [at least] 10 years since the employees voted the Union in. At other mandatory meetings, Edwards said that the Union had been voted in during 1984 and Overnite had been bargaining in good faith since that time. Edwards claimed that all Overnite had to do was offer 5 days’ sick leave and that was bargaining in good faith; and, even if the Union was voted in, that did not mean employees would get the NMFA. Rather, “if it was voted in, then that means that they would start from scratch.” Edwards added that at terminals that had voted in the Union, the raise would have to be negotiated; and, if the Louisville employees voted in the Union, bargaining would be handled basically like negotiations in Chicago, repeating that all Overnite would have to offer would be 5 sick days and that was bargaining in good faith. At another meeting, Edwards pointed out that 13 years after voting a union in, there was no contract. He said that Respondent’s representatives would show up, charges would be filed for bargaining in bad faith, Respondent would go to court and pay a little fine, and then it would not have to show up again until the following year. Edwards’ statements constituted threats that it was futile for the employees to unionize in violation of Section 8(a)(1) of the Act.

At another mandatory meeting, Edwards pointed out that the Louisville employees would be receiving the wage increase, but terminals that had voted a union in, such as Kansas City, would not because they now had to negotiate first. At another meeting, Edwards stated that the only way that employees would get a contract was to go on strike, and, if they did so, they could be replaced. Harmeier also stated that the only leverage that the Teamsters had in bargaining was to call a strike and that it could do so without a vote by the employees. Edwards’ statements constituted threats that bargaining would be futile, and both his and Harmeier’s statements constituted threats that the only way that employees would get a contract would be to strike. The major presupposition of collective bargaining is that parties may be persuaded by discussion and good sense and common logic to reach an agreement amicably, without the necessity for a strike. *Fred Wilkinson Associates*, 297 NLRB 737 (1990), citing with approval *Amerace Corp.*, 217 NLRB

850, 852 (1975). All violate Section 8(a)(1) of the Act. Harmeier told employees that Overnite would never sign a contract that would make it uncompetitive and that the only leverage the Union would have was a strike. He passed out “The Wheel of Misfortune” during a discussion of strikes, which showed what an employee would lose, depending on pay rate and length of the strike. Harmeier said that negotiations would not start at the point where employees were at present, but would start from scratch and employees could actually lose what they had and end up getting less money and less benefits. Most of his comments are protected, too, except the one relating to the Union’s sole leverage being a strike. *Fred Wilkinson Associates*, supra. I find that only this comment violated Section 8(a)(1) of the Act.<sup>51</sup>

There were some other unfair labor practices litigated. Although Respondent had no rule prohibiting talking during worktime, in February or March, Dock Supervisor Jerry McKinley told employee Dallas Jones,<sup>52</sup> an open union adherent who was leaving work and had been briefly talking with another employee, that “these 10 minute huddles” were going to have to stop. On the other hand, employees opposed to the Union were permitted to talk with other employees without interference by supervision. Before the campaign, no supervisor ever cleaned the break room.<sup>53</sup> However, during the union campaign, Burke, McKinley, Ralston, and city dispatchers Gilreath and Jim Hammond removed union literature and buttons from tables in the break room but left antiunion flyers, newspapers, used coffee cups, and other trash. On one occasion, Burke literally pulled papers out of the hands of one employee who was reading it and threw it in the trash. (Although employee Diane Kress denied that this happened, I do not believe her. Something prompted her after that incident to call Burke a “jerk,” as she admitted.) On another occasion, Burke ensured that the leaflets would not be read by throwing them in the trash and then pouring the contents of coffee cups and soda cans over them. When Trulock complained to his dispatcher, Don Fulton, about Burke’s behavior, Fulton replied that they were under orders to keep the room clear of union literature and Trulock was wasting his time putting materials in there. The Friday night before the election, Burke told Nalley that Harmeier had instructed him to get rid of all the union literature the last week of the campaign. Nalley said that he put a lot of it out himself, and now Burke was asking him to throw it away. Burke replied only that Harmeier had told him to keep the tables clean. I find all these incidents of prohibiting employees from talking about the Union and distributing union literature, as they had in the past, in violation of Section 8(a)(1) of the Act. With respect to Fulton, however, I find that his response to Trulock’s complaint merely reflected Respondent’s illegal conduct of prohibiting the distribution of union literature and did not, as alleged, constitute an independent unfair labor practice declaring the futility of campaigning or distributing of pronoun literature

<sup>51</sup> The General Counsel’s witnesses had difficulty recalling with precision when various statements were made. I find that understandable, in light of the many meetings that were held and conversations that were engaged in over several months of the Union’s attempt to organize the employees. In so finding, however, it may be that this finding of a violation results from the same facts found earlier in this paragraph.

<sup>52</sup> When he testified, Jones was no longer employed by Overnite. He had little reason to fabricate these events.

<sup>53</sup> Respondent employed a person to clean up the room every morning.

There are a number of alleged violations that have no substance: (1) At the dinner meeting at the Marriott Hotel on March 12, Douglas reemphasized that Overnite would not sign a contract that made it less competitive and pointed out that Union Pacific, since purchasing Overnite, had put more money in than it had received. This is not an illegal threat, but is a statement of position that Respondent had no desire to dig its own grave. The logical result is that, if Respondent is not competitive, it cannot sustain its business. The comment about Union Pacific is mere surplusage and clearly not threatening. (2) Birch also heard Douglas speak at the dinner meeting. Douglas discussed doing whatever was necessary to become a world class company. He added that that did not include the Union. There was no testimony that Douglas either promised employees improved benefits if the employees did not select the Union or threatened futility and that Respondent would never sign a contract, as the complaint alleges. (3) At another meeting, in the course of a discussion that sales in the central region had decreased, Bobby Allgeier, the supervisor in charge of overages, shortages, and damages, commented that one customer had told him that, if Overnite went union, it would lose that customer's business. Allgeier's statement was a truthful statement of what one of the customers had told him, was thus objective, and did not violate the Act.

I also found Assistant Terminal Manager Harold Priest a generally credible witness and credit much of his testimony, rather than those who testified that he violated the Act. Thus, I find that in February 1995, Priest did not threaten employees that there would be a reduction of hours if they selected the Union as their representative. Rather, in a conversation involving the employees' interest in the Teamsters because of the overtime provisions of the NMFA, when Priest asked whether they would be satisfied if Overnite offered overtime after 45 hours, the employees expressed distrust of that idea, some saying that Respondent might work them for several 12-hour days and then give them only 3 or 4 hours another day. They wanted only 8 hours a day. Priest rejected that idea, because that would cause the elimination of several runs which lasted much more than 8 hours and would become unprofitable because of the overtime expense. As a result, hours from those runs might have to be reduced. That is a reasonable prediction based on known facts and does not violate the Act.

The complaint also alleged that on February 16 Priest informed the employees that it would be futile to vote for the Union and in March he threatened an employee that Respondent would never sign a contract. In fact, two of the General Counsel's witnesses testified that the latter statement was made twice in February, and there does not appear that there is any testimony about an incident in March. Nonetheless, I am not persuaded that anything illegal occurred. Rather, Priest in all his conversations made clear that he was talking about the effect of the NMFA on Overnite's operations. Thus, Priest merely told Sagaser of his experiences with a company that voted in the union. It was working as a government contractor and failed to get another contract. It is probable that Priest said that Overnite would never sign the NMFA, but I credit his denial that he used his prior experience as a threat that Overnite would similarly close. On another occasion in February, Nalley, Sagaser, and Ralston were debating pension benefits when Priest joined the conversation. He said that most of the union companies were on their last legs, and there were not many exceptions, and what Teamsters' companies paid for wages and benefits was

out of line with what the industry could afford. Priest added that he was an old man and had been around a long time, and he did not believe that Overnite would ever sign the NMFA. I find no violation.

The day before the election, March 16, about 10 persons walked around the yard wearing "Give Jim A Chance" T-shirts. At least one approached a Louisville employee to ask for his vote against the Teamsters. This is an area limited to dockworkers, drivers, and people making deliveries to the terminal. Dispatcher Decker told employee Herb Birch that they were Lexington, Kentucky, employees who were angry that their election had been canceled. The complaint alleges that this constituted surveillance and intimidation and an interrogation, but the evidence supports a finding of electioneering only, and no violation.

On the day of the election, March 17, Birch clocked in at his regular starting time of 7 a.m. Having been told that he would be dispatched after he voted, he, with Bill Thomas, another city driver, joined the end of the voting line which consisted of approximately 20 employees. Birch testified that, as he stood in line chatting, Field Safety Supervisor Richard Buntain told him that he was not supposed to be talking in the line. Birch said that he was not campaigning, but Buntain repeated his admonition; and then directed Birch and Thomas and another employee, Kevin Cornell, to go to the dock and wait and then he escorted them to the break room. About 15 minutes later, Priest advised them that they could vote. Respondent contends that there is no violation because it had established a schedule for the voting, and Birch and the other employees were not supposed to vote at that time. Overnite relied on a releasing schedule that it claims (the Union disagreed) was agreed to by the parties at the preelection conference. Because the Union submitted evidence, according to the Acting Regional Director's Report, that "the Employer informed several individuals who went to vote that they could not vote at that time and that they would be called when it was their time to vote," I agree that Buntain's action had nothing to do with Birch's talking or campaigning, except that Buntain came to the voting line because he had heard that Birch was campaigning. However, Buntain said nothing to him other than that Birch was not supposed to be voting at that time. Accordingly, I conclude that the allegation that this interfered with Birch's Section 7 rights has no merit.

In another impromptu meeting called by McKinley during the week of the election, according to employee Marvin Hammond, McKinley said that the employees in Lexington did not have their chance to vote. (The election had been canceled because of blocking charges filed by the Union.) McKinley called the Union a bunch of hoodlums and said that the employees would never get a contract, that they would have to go on strike, and they would all be out of a job. Hammond responded by telling McKinley that he was leaving himself open to charges. Don Cunningham, recalling that McKinley called the Teamsters "gangsters," testified that McKinley also said that the employees needed to vote no or they could lose their jobs. The only consistency in this testimony is that both recall McKinley threatening that the employees would or could lose their jobs. With these inconsistencies, although I suspect that McKinley made some kind of unlawful threat, I do not know what McKinley said and can make no finding of a violation.

In January 1995, Ralston offered to trade a cap with Respondent's logo for the Teamsters hat<sup>54</sup> that Charles Price Jr. was wearing. The complaint characterizes this as a threat of unspecified reprisals. I find none; and to the extent that the complaint is one involving illegal interrogation, I find none, either. *Vemco, Inc.*, 304 NLRB 911, 913 (1991), *enfd.* in relevant part 989 F.2d 1468 (6th Cir. 1993). In early to late January 1995, Harmeier asked why Price was wearing his Teamsters hat and button, and Price responded that employees had not received wage increases in several years. Harmeier said that was not true and that the increases that Overnite had granted had been better than Teamsters-represented employees had received. Price countered that his health insurance deductibles had risen and that Overnite had reduced the employees' benefits. A week later, Harmeier told Price that he had checked and Price had received raises. Price agreed, but again pointed out that the cost of benefits had increased. *Rossmore House*, 269 NLRB 1176 (1984), *enfd.* sub nom. *Hotel & Restaurant Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985), sets forth the relevant factors in considering whether the interrogation is coercive. I find nothing about this interrogation of a known union adherent coercive in the slightest and conclude that Respondent did not violate the Act. Finally, in early February, Supervisor Steve Decker asked Price why he was wearing his Teamsters hat and button. Price replied that he wanted better pay and benefits and he hoped it would reduce favoritism. The campaign had been going on for several months, and Price had been wearing his hat without discipline. There was no threat of discipline or penalty or future reprisals during this brief conversation. I conclude that there was no illegal interrogation. *Sunbeam Corp.*, 287 NLRB 996, 997-998 (1988). Nor do I find that Harmeier engaged in unlawful interrogation when he asked Price in early March if he thought that the Union could really help him. Harmeier cautioned that negotiations could result in a pay cut. Price agreed that all terms of a contract were negotiable; but, given Overnite's conduct over the last couple of years, employees had been backed into a corner and their only choice was a union. Again, there was nothing threatening to constitute a violation. Harmeier merely tried to convince Price that negotiations did not necessarily result in a gain for the employees.

There was one alleged 8(a)(3) violation alleged regarding the Louisville service center.<sup>55</sup> Respondent's employee handbook requires a driver who has an accident to "[r]eport the accident immediately by telephone as soon as possible or by other communication to the nearest Overnite terminal or to Central Dispatch in Richmond . . . . Violation of this rule will result in dismissal." Price, who knew the rule and its consequences, damaged his trailer on March 22, 1995, but did not report it because, he testified, he did not know that it happened. Rather, it was only when he was waiting for his last pickup at the B. F. Goodrich plant in the Bluegrass Industrial Park, a site approximately one-tenth of a mile from the terminal, that he noticed what appeared to be a dent in the upper right-hand corner of his trailer. In fact, a chunk of metal was torn off. He then returned

<sup>54</sup> Ralston described it as a Pittsburgh Pirates hat, because it had the colors of that team.

<sup>55</sup> This is the only 8(a)(3) violation alleged and disposed of in this Decision. However, there were about 15 discharges, in addition to suspensions and warnings, alleged in this consolidated proceeding, all of which were separately scheduled for hearing in mid-1997 and all of which settled, without formal decision. Respondent expressly claimed that it committed no violation of the Act.

to the Louisville service center and pointed out the damage to the shop mechanic on duty. The shop manager advised him to fill out an accident report. Price went to the dispatch office and notified Bart Adkins that it looked as if he had hit a tree limb. Adkins asked a few standard questions included in Respondent's accident form, excused Price, and completed the form.

The following day, Price reported for work but was instructed to see Shift Supervisor Ray Rhodes before leaving on his assignment. In response to Rhodes' questions, Price told him that he must have hit a tree limb, possibly on Chestnut Street along the Northwest Parkway, but denied that he had felt the impact with the tree. Rhodes, feeling that Price's story did not make sense, suspended him pending further investigation of the incident. The following Tuesday, March 28, Price was summoned to a meeting with Harmeier, Rhodes, and Adkins, at which Harmeier advised that he ought to fire Price for failing to report the accident, but he was aware that Price was a union supporter and would probably turn the situation into a union incident. After acknowledging Price's good driving record, Harmeier told Price that he would be given a formal warning. Nonetheless, Price lost 3 days' pay.

Price admitted that, if he had hit a tree, he would have reported it. Overnite's proof at the hearing convinces me that he did hit the tree and that the damage was sufficient enough that he would have known that he hit the tree and tore off a corner of the trailer. Particularly unconvincing was Price's explanation that he was "sort of immune to tree limbs." Nor do I believe his belated recollection on redirect examination that he had his radio "booming" that day. He had never told management that there was any reason that he was unable to hear (no less feel) the contact with the tree.

In sum, I find that Price hit the tree, he knew that he hit the tree, he knew that he was required to report to Overnite that he hit the tree, and he did not report the accident. The only issue here is whether Respondent disciplined Price disparately by suspending him for 3 days. Four years before, Overnite gave a final warning to, but did not suspend, a newly hired driver who had reported an accident to the police, but failed to report it to Overnite until he returned to the terminal 4 hours later. Overnite distinguishes that incident on the ground that at least he reported the accident, while Price did not. That is arguably so and persuasive enough to indicate that, even had Overnite based its discipline on Price's union activities—and I do not find that it did, and I find that there was not even a *prima facie* case of a violation here—Respondent showed that it would have taken the same action, even if Price had not been a union supporter. *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983); *Manno Electric*, 321 NLRB 278 (1996).<sup>56</sup> Accordingly, I dismiss this allegation.<sup>57</sup>

<sup>56</sup> Harmeier, who thought there was sufficient evidence to terminate Price, became the service center manager in December 1991, after the earlier warning had been given.

<sup>57</sup> There were a number of other unfair labor practices alleged in the complaint, but I could find no evidence to support them; and the General Counsel's brief did not refer to them. Thus, to the extent that no findings have been made, the allegations are dismissed for lack of proof.

#### 4. The objections

As found above, Local 89 filed a petition for an election in Case 9-RC-16508 (now Case 18-RC-15814) on January 24, 1995. An election was held on March 17, 1995, which the Union lost, 85 to 83, with one ballot challenged but not determinative of the results of the election. The Union filed timely objections,<sup>58</sup> and the Acting Regional Director issued an order directing a hearing on many of the issues that mirror the unfair labor practice complaint, including, among others, the March wage increase, threats of futility, and discriminatory removal of campaign materials. As found above, the record supports the Union's Objections 1, 2, 11, 12, 13, and 15. I have previously found lacking in merit the underlying substance of Objection 3, and I specifically find in the evidence supporting that objection, no creation of fear and coercion that destroyed the laboratory conditions for the election. There was no evidence elicited to support Objection 7.

The employees normally entered the facility through a gate, which Overnite locked for approximately 1 hour on the morning of the election. Employees were let into the facility by Mark McGloghlin, but there was no evidentiary support for Objection 4's charge that he campaigned. Even assuming that I were to disregard the reasons that Overnite alleged that it changed its policy on election day, I find that, under these facts, the mere change of the employees' entrance to the facility could not affect the laboratory conditions for the election. No one was precluded from voting. Accordingly, I reject this objection. *Candle-Lite, Inc.*, 180 NLRB 1072, 1073 (1970). I find, however, that Objection 8 is meritorious, even though the facts on which it is based, Buntain's removal of Birch from the voting place, did not constitute an unfair labor practice. There was no agreed-upon release schedule; and, despite Respondent's agreement to the time for voting all day, it plucked voters from the line, when under the agreement of the parties all employees were entitled to vote, and removed them from the polling place, all in front of other voters. That destroyed the laboratory conditions for the election. *Roney Plaza Mgt. Corp.*, 310 NLRB 441, 447-448 (1993), relied on by Respondent, is inapposite. There, the employer did not interfere with the election when its attorney told an employee who had been in the polling place to vote quickly and leave. The employee voted. Here, Buntain did not permit Birch and others to vote, despite the fact that the polls were open.

#### C. Norfolk

##### 1. Majority status

From January 24 through February 8, 1995, there were at most 91 employees in the appropriate unit. As in Lawrenceville, the Teamsters used petitions, in the form quoted above in section III, A, 1, and the General Counsel's handwriting expert Schipp established that 65 signatures on the petitions, well more than half, were authentic. There is no issue, as there was dealing with the Lawrenceville case, of the authenticity of the signatures or whether the top of the petition contained writing, but there are many issues relating to the circumstances of the signing of the petitions by 29 employees and, particularly, whether the petitions were folded.

<sup>58</sup> The Union, however, filed no brief in support of its objections.

Labeeb Salaam Sr. signed a petition, filling in all the spaces, but he testified that, although he saw all the writing on the petition, he was working and had to hurry, so he signed it without ever reading it and did not know its purpose. However, he knew there was a union organizing campaign going on and that George Buck, who asked him to sign, was a union supporter. Buck testified that he asked Salaam to read the petition and told him that it was about being represented by the Union at Overnite. Salaam did not deny Buck's testimony, and I do not find, as Respondent contends, that Buck was an unreliable witness.<sup>59</sup> The petition clearly stated that Salaam authorized the Union to represent him in collective bargaining, and I will count his signature.<sup>60</sup>

Rick Williams (R. Williams) testified that he asked Frank Shuman to read the petition and then asked him if he understood what he was being asked to sign. Shuman replied he understood it, he supported getting the Union as the collective-bargaining agent, and he would sign the petition. Shuman, while admitting that he had "signed a lot of stuff" or "several different things" or "a couple of different things," remembered only filling out the little block on the petition, which had no writing at the top. I do not trust his rather shaky memory, and I find it improbable that Shuman had to sign "stuff" so he could get propaganda that was readily available at the service center. Furthermore, Shuman talked with union supporters about the Union being a possible help in obtaining for him full-time status (he was then part-time), overtime, and better pension benefits and attended a union meeting. He also feared that being found out as a union supporter would hurt his chance to become a full-time employee, so he would have been careful to look at the entire contents of any document that he was being asked to sign. I find that he was well aware of what the petition stated and will count his authorization.<sup>61</sup>

Respondent objects to counting the petition allegedly signed by Joseph Small on the grounds that the handwriting expert could not verify Small's signature and that, at least according to the legal authority cited by Respondent, Buck, the solicitor of the petition, did not see the petition signed or the petition was not returned to him by Small. I reject the latter contentions. Buck gave employee the petition to Small to read and sign and told him that it was a "a petition for the Union to be representing us as far as workers" and that at least half the employees were needed in order to be represented by the Union. He saw Small sign the petition. The mere fact that Buck may have had trouble recalling the precise place that Small signed is inconsequential. I will count his signature.

<sup>59</sup> Respondent makes much of some inconsistencies between Buck's testimony and the investigatory affidavit that he gave to the Regional Office. His lack of clearly recalling, among other facts, whether a paper was folded or whether Salaam gave him back the petition that same day, had nothing to do with what Salaam testified to—that Salaam did not know what he was signing, even though he saw all the writing on the petition.

<sup>60</sup> Buck's affidavit stated, "[W]ith respect to the people I solicit I told each of them the petition was so that we could have an actual vote to get the Union in. I did not tell anyone that this was the sole purpose of the petition." Salaam never stated that Buck even mentioned any purpose for the petition.

<sup>61</sup> Shuman testified that he signed another piece of paper when he was told that the Union needed between 60 and 70 names to get a vote. Because the unit consisted of only 91 employees, and the Board requires only 30 percent to support a showing of interest, I do not believe that anyone would have told him that that number was required.

Charles Bruner testified that employee David Copp (not Buck, who testified that he did; David Copp is referred to as D. Copp) asked him to sign the petition if he did not want another Johnny Glass, a particularly disliked, previous service center manager, to come in to the facility and that D. Copp never said anything else about the petition's purpose. Bruner signed without reading it, but read the petition minutes later and never crossed off his name or revoked it. It makes no difference whether I believe Buck or not. I am persuaded that Bruner signed precisely what he intended to sign.<sup>62</sup>

Paul George and George Upton never signed the petition. What they signed was the right half of the petition, which had been previously torn from the left half, and later the left half was taped onto it. So, even if they saw the words written on top, and they both denied it, and even if Bill Moore explained what they were signing, and they both denied that, the words on the right side of the document would not make sense. Similarly, the words on the left half of the petition, signed by Arthur Harrington,<sup>63</sup> would have no meaning. What they signed are no better than blank pieces of paper and may not be used to support the Union's majority status. I will not credit their petitions.

While making no credibility findings as to these two petitions, I was impressed with the candor of Moore's admission that he gave only the right hand portion of the petition to George and Upton, and that forms part of my basis for crediting two of the other petitions that he obtained, from Richard High and Troy Freeman. Although Respondent attacks Moore's credibility, I find High, who testified that he was 95 percent sure that there was nothing on the top of the petition (at least, that he could read) and that Moore told him only to sign the petition to "get the ball rolling," less than credible. Moore testified that nothing was hidden from High's view, and I believe him; and I do not believe that an employee would merely sign a document, in the calm of his house, without inspecting the document, and only for the purpose of getting the ball rolling. I will count his petition, noting that *Nissan Research & Development*, 296 NLRB 598, 598-599 (1989), cited by Respondent, is distinguishable because the authorization card there was ambiguous. There is no ambiguity here.

Freeman's testimony on direct examination was that Moore telephoned and asked to meet at a parking lot and that he went because Moore said something about \$17 an hour. When there, Moore gave him something that looked like a raffle ticket, something you would tear off, perhaps in a little black booklet, and there was no other writing, because it "looked like the box that [he] signed." Freeman denied that Moore said anything to him, particularly Moore's testimony that he told Freeman that the employees were trying to get a union to be their bargaining agent and asked him to read the top of the petition. On cross-examination, some new facts emerged, such as the fact the Freeman drove 25 minutes to meet Moore, a lengthy journey to sign such a meaningless paper as a "raffle ticket." Freeman admitted that others had signed the petition, indicating that he was shown more than just the box that he signed. He admitted using Moore's notebook as a hard surface to write on; but, if one folds the petition so that only one box appears, the writing

surface is hard enough to write on without the use of a notebook, so Freeman must have seen more of the petition than he was willing to admit. Freeman also remembered that Moore asked him to meet him in the parking lot to fill out "a piece of paper" so he could get better wages if he had the Union representing him. Finally, he admitted that he did not pay attention to the language at the top of the page and did not remember seeing it, an acknowledgment that it could have been there. It was, and I am convinced that Freeman was looking to raise his wages from his current \$13 hourly rate to the union hourly pay rate of \$17. As he testified, he wanted to get better wages and that would be possible if the Union represented him. It was important that he go to the parking lot, and he did what he had set out to do. In any event, even if Freeman did not read the language at the top of the petition, his petition is still valid. *Ona Corp.*, 261 NLRB 1378, 1410 (1982), *enfd.* in relevant part 729 F.2d 713 (11th Cir. 1985).

R. Williams testified that, when he solicited employees to sign the petition, he told them to read the petition, made sure they understood what they read, filled out the block, and signed, dated, and returned it. He solicited the signatures of employees A. A. Armstrong Jr., Bryan Yates, and Gregory Holman, who wanted to know what the petition was for. He explained the employees were trying to start an organizing drive to get collective bargaining at the terminal and to get the Union as their representative and asked what they thought about it.

Despite the testimony of both R. Williams and David Spaugh that they each presented to Bryan Yates the petition in evidence, testimony which, without further explanation, is patently erroneous (at least as to one of them), Yates' signature was authenticated by the expert handwriting witness, and Yates conceded that it was his signature on the petition. The principal issue is whether Yates, who testified that he received the petition from Roadway driver and Teamsters business agent, Bill Haley, and signed only one petition, was talking about the same document that is in evidence. Yates explained that Haley told him that if he signed the paper, it would be one way to get rid of Glass, who was then the terminal manager, and have an election. However, at the time that the petition is dated, January 23, 1995, Glass had not been the terminal manager for 2 months, having left in late November or very early December 1994 (Mendenhall became the service center manager on December 4). Thus, the petition in evidence could not possibly be the document that Yates was testifying about. I find, therefore, that no proof has been submitted to question the integrity of the petition, and I will count his signature.

It is undoubtedly strange if Gregory Holman signed a petition on the same day as and between two other employees who were solicited by Rudy Copp, yet R. Williams testified that he solicited Holman. Be that as it may, and I will discuss credibility below, Holman identified his signature; and, although he had no recollection of this particular petition, testified that he always read any documents that he signed and that he wanted to sign for union representation. Thus, there is no material fact that is at all persuasive that his petition should not be counted; and I will count it.

Gus Armstrong, by his own admission, signed the petition, but did not recall who gave it to him or that it had writing on the top. He recalled only that there were, at the time he signed, other employees' signatures on the petition and that he was asked to sign the petition to get the Union to come in and talk

<sup>62</sup> Overnite contends that, from Bruner's testimony, I should draw a series of conclusions which should essentially negate all of the cards that Buck solicited. I find no factual or legal basis for its position.

<sup>63</sup> The General Counsel's brief does not mention Harrington, and I am unclear that his petition is offered in support of the Teamsters' majority.

to the employees. Armstrong expressed some confusion in thinking that Glass was still the terminal manager when he signed, and he did not know if the union organizing campaign had yet started. I find it improbable that solicitors would actively engage in convincing employees to sign petitions so that the Teamsters could talk to the employees. There is nothing in this record to indicate any reluctance by the Union to do so. It appears more probable that the reason for the petition given to Armstrong was to get the Union to come in and represent the employees, and I credit R. Williams. Accordingly, I will count Armstrong's signature.

Spaugh solicited signatures from a number of employees, and in his investigatory affidavit given to the Regional Office stated that he might have told a person that the petition was "to secure an election process." He explained during his testimony that that was a wrong choice of words, which I found unconvincing; but he also explained that what that was intended to convey was that, if the Teamsters received enough signatures of the petitions, then the Teamsters could petition to secure an election. Had Spaugh stated in his affidavit that he may have told all the employees the quoted remark about the election process, I may have found that statement shifted the burden to the General Counsel to produce the various employees to whom Spaugh spoke. However, the sentence is by no means clear, and at most it might cause me to discount one signature.

Spaugh testified that he told employees whom he solicited to read the top and that the petition was intended to authorize the Teamsters to bargain for the employees; and Spaugh believed, but was not sure, that he did not tell any employees that the only purpose of the petition was to get an election. The only witness whom Respondent called was Robert Smith, who testified that, although it was his signature on the petition, the paper he signed was half the size of a postcard, with nothing else on it—no handwritten portions, no fold marks, and no language at the top. He recalled that the person told him that he was collecting signatures to get a union to organize or to get a union involved in talking for the people. If I credit Smith, there is no explanation for the manner in which Smith's signature appeared on the petition. He had to have seen some paper other than what he testified to. I will not credit him. I find, therefore, that Smith signed the petition and knew of its contents. I will count his petition. *DTR Industries*, 311 NLRB 833, 841 fn. 39 (1993).

The General Counsel's expert witness could not authenticate the signature of Clyde Kennedy, but Spaugh testified credibly that he asked Kennedy to read the top of the page and fill out the information and sign it, which Kennedy did, in Spaugh's presence, using the wall of the bathroom as his writing surface. I will count Kennedy's signature.<sup>64</sup>

Alvin Davenport could not remember whether there was writing at the top of the petition or what the language said or if he read it. Davenport signed the petition because he was unhappy with management at the terminal, so it seems probable that he read the language and knew precisely what the intent of the petition was. Because D. Copp did not say anything that negated the written language at the top of the petition nor did he say that the only purpose of the petition would be for an

election, Davenport's signature is valid and I will count it. *Id.* at 842.

Although Jeff Stewart testified that D. Copp told him the petition was for an election, I do not find that was so. Rather, Stewart had heard that there was a petition being circulated, which (he says) he thought was for an election, and so, knowing what its purpose was, he did not read it. Instead, he was summoned to the shop where D. Copp worked:

And he had pulled this out, you kind of knew what it was for, people, you know, you had heard kind of, that the card is being signed and stuff. So, I just went down and he was like, "Oh, yeah, just sign this," or fill out your name, address and stuff and sign.

Stewart had been unhappy with Glass and was anxious to sign the petition. As a result, I find that D. Copp made no representation to Stewart, and that, assuming that he did not read what was on the petition, his signature should be nonetheless be counted. *Id.* at 841 fn. 39.

D. Copp gave Danny Murphy the petition and asked if he was going to sign the paper now. Murphy asked who else had signed it, and D. Copp replied just about everybody else. Murphy then signed the petition. That D. Copp said nothing about the purpose of the petition and Murphy's lack of recall whether there was writing on the top of the petition provide no basis for invalidating his petition. *Id.* at 841. Frank Shuman's petition is clearly valid. The fact that he may have been told that a certain number of signatures were needed does not negate the clear written authorization of the petition. *Id.* at 842. Respondent objects to the petition of Donald Munden on the ground that D. Copp said nothing to clear up the "latent ambiguity" inherent in the petition. But the petition is not ambiguous. Furthermore, to the extent that Munden could not recall what was written on the petition, that proves nothing but a lack of recall. To the extent that he was "rushed" to sign it, that was his fault. D. Copp asked whether he had time to sign it. I will count Munden's petition.

I find the testimony of Earl Myers Jr. so incredible that I believe the opposite of what he said. His position was that D. Copp told him that the purpose of signing the petition was to find out whether he was for or against the Union and that he signed the petition to designate that he was opposed, even though he knew D. Copp was obtaining signatures on the petition to get the Union in as the employees' bargaining representative. In addition, even if I credited Myers' testimony that the petition as given to him was attached to a clipboard, the main body of the writing at the top of the petition could still be read. Myers' petition should be counted.

Jonathan Gibbs signed the petition in response to D. Copp's representation that the purpose of the petition was "for the union to come in to see if everyone was being treated fairly." Despite denying that he saw the top of the petition, it was Gibbs' understanding that the petition was "a vote." And that is what he effectively did, "voted" for the Union. Finally, I have trouble agreeing with Gibbs that the document was handed to him in the manner he described, because the folds do not appear to coincide with his description. I find that Gibbs was well aware of what he was signing and credit his petition.

Earl Myers III signed a petition, in response to D. Copp's sole explanation that the purpose of the petition was: "[D]id we want to vote the union in or out." Why he signed the petition was left unexplained, which is particularly troubling because he

<sup>64</sup> I have not counted the signature of Johnny Taylor, who did not testify and whose signature was also not authenticated by the expert handwriting witness.

considered himself a nonunion person and preferred that Overnite thought of him that way not only as of the day he testified but also as of January 1995. I do not believe him, as I did not his father. The son's testimony, and only the son's, was remarkably similar to his father's. I find, to the contrary, that he viewed the entire petition and signed it because he then believed in the Union. I will count his petition.

David Nordwall's insistence that the only time that he signed a document was when Glass was the service center manager persuades me that he confused some other document for the petition in evidence, dated January 23, 1995, which Nordwall concededly signed, almost 2 months after Glass left. In light of the fact that Nordwall went to some union meetings, and the fact that the document that he said that he signed bore no relationship to the petition, I find that he was merely trying to protect Overnite, and I do not credit him. I will count his petition.

Dennis Shea testified that D. Copp represented that the petition that he signed was just to get a head count and that D. Copp kept hidden the top portion of the petition, which Shea did not read. D. Copp did not testify, but Shea's name was included as a member of the Teamsters' in-plant organizing committee. The list of the members of the committee was posted on the Union's bulletin board, and there is no evidence that Shea asked that his name be removed from that list. I do not believe Shea and will count his signature.

The principal factual issue presented by Stanley Hall's testimony is whether the solicitor, Brian Metz, deliberately folded the petition in such a way so that Hall could not see the writing at the top. Hall was not definitive, answering that the petition was given to him folded; and he did not remember if he unfolded it. He did not pay any attention to any other writing, if any, that may have been on the document and just signed the block. Finally, according to Hall, Metz represented that, if over 50 percent of the employees signed petitions, the Union could get an election. On cross-examination, however, he did not recall precisely what his conversation was, but he knew that the Union was trying to become the employees' bargaining representative and that there were petitions circulating for employees to sign. I conclude that his petition should be counted. I find that, even if the petition was folded, it was not folded to conceal something and that Hall had the opportunity to unfold it. Furthermore, Metz did not tell him that the sole purpose of the petition was to get an election. Once again, that Hall chose not to read all the language on the petition (which I doubt) does not invalidate it.

Michael Smith was given the petition as a whole page, not folded. However, Metz told him, Smith testified, that the purpose of the petition was "to try to get the union in so we could have a bigger vote, I mean to have a real vote. It was just to see whether or not enough people were interested in actually having a union." When asked whether any reference had been made to any of the writing on the petition, Smith answered: "Just, the only thing that he really mentioned was, you know, it would have been more pay per hour and time and a half. Just like better, I guess better retirement." Smith testified that he did not remember the language printed at the top of the page. I conclude that Metz and Smith had a longer conversation than Smith was willing to admit,<sup>65</sup> and that their conversation related

to Smith's authorization of the Union as his representative. Smith knew there was an ongoing organizing campaign and that was its purpose. Clearly, Metz never told Smith that the sole purpose of the petition was to have an election. Smith was free to, and probably did, read the rest of the petition. Accordingly, his signature should be counted. Id.

Respondent's attempt to invalidate the petition of Johnny Johnson utterly fails. What appeared to question the petition in evidence was actually a blue document signed when Glass was still terminal manager. What is in evidence was the petition that Johnson signed at an early organizational meeting for the Union. I will count his petition.

Walter Pratt signed the petition, but testified that the solicitor of his signature said nothing. In addition, the petition was folded so he could not see the other names and it also had something else positioned so he could not see some other names; but he could see a portion at the top. He did not read the language at the top, because, he testified, he already knew what it was. Although he testified that he thought that the petition's purpose was to get an election, other reasons that he signed were to obtain job security and get better wages and pension benefits. I find nothing here that questions the validity of his petition, except perhaps his own misunderstanding, which I doubt. Contrary to Respondent's contention, there was no concerted effort to cover the top, which Pratt could have looked at. I will count his petition.

Keith Walker remembered little about signing the petition, except that one of the other drivers gave him the petition and said that the employees were trying to get a vote for the Union and asked whether he would mind signing the petition. Walker could recall no names; could not recall any more of the conversation, such as, if he had been asked to read the document before signing it; could not recall the petition, did not know what writing, if any, was on the petition; and did not remember if he read the document before signing it. On cross-examination, Walker testified that he signed a paper in order to get enough signatures for a vote when Johnny Glass was still the terminal manager, so he may have been confused about the document he signed. He testified that it was his practice most of the time to read documents before signing them. I find nothing here that indicates that his petition should not be counted. The petition sets forth its purpose, and there is no credible evidence that the petition was intended solely for another purpose, such as a vote.<sup>66</sup>

E. Allen Cooper remembered little of the circumstances of, but admitted signing the petition, of which he recalled almost nothing else. His signature did not appear out of nowhere. He signed the document, and the document has on its face the writing authorizing the Union to represent him; and his petition is valid. Respondent's contentions that the language on the petition must be disregarded and employees must be orally advised about what they are signing is frivolous and contrary to law.

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When Respondent's counsel then asked whether Metz used the word "representation," Smith then denied that Metz did, insisting that he (Smith) simply threw that in.

<sup>66</sup> There is no issue as to folded petitions or crease marks here, except the one raised in Respondent's brief by counsel, which has no basis in the record. It is obvious that these petitions were carried around by some of the solicitors in their pockets and had to be folded to get there. Merely because there are crease marks does not mean that every single employee was presented with a document folded in such a way that the heading was concealed.

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<sup>65</sup> On Respondent's re-direct examination, Smith testified that Metz told him "that by signing this, if we get enough people interested, that we would have an election so that we have union representation."

Finally, to the extent that Respondent questions the legitimacy of various signatures because the solicitor of the petitions so lacked credibility that none of the petitions he solicited should be credited, I find no basis for that contention. I have found that only one petition, containing three names, ought not be credited towards a union majority. Thus, the Union had a clear majority as of the period from January 24 to February 8, 1995.

## 2. Credibility

I have found that Respondent committed most of the violations alleged in the complaint. One of my reasons is that I found Spaugh particularly credible and honest. He quit his job shortly before the election, being obviously upset with the union campaign, not only what he perceived as management's bad treatment, but even with himself, getting so upset at Manager Mendenhall one meeting that he later apologized for his own behavior. He had absolutely nothing to gain by fabricating his testimony, which I credit. To the contrary, for reasons I have stated above, my judgment of Respondent's witnesses was less complimentary. In particular, one dialogue between counsel for the Union and Mendenhall was telling for pointing out the low esteem he held for adherents of the Union: they were disruptive and not team players. Indeed, filing a petition for a Board-conducted representation election is not commonplace in a nonunion company and employees should not engage in that kind of disruption. It was "odd" that employees should think about a union while working at Overnite. Thus, it is likely that he told an employee on about February 20 that he would lose credibility in his eyes, a statement that Mendenhall fervently denied making. By misstating the truth about that incident, he lost credibility in my eyes, and I have found that, despite his denials, he frequently violated the Act.

## 3. The unfair labor practice allegations

There are a few allegations regarding threats to employees that, if they obtained union representation in the upcoming election, they would lose the announced March 5 increase. Bill Moore<sup>67</sup> testified that Supervisor Nat Williams (N. Williams) told him on about February 13 that the employees were going to get a 55-cent-an-hour raise but, if the Union was voted in, they would lose it. N. Williams denied it, but did recall that, in a conversation with a small group of employees, including Moore, an employee asked what would be the effect of the upcoming election on the new pay raise. N. Williams testified that he answered that the pay raise would be prior to the new election, so the pay raise would not be affected; but he admitted saying that the unionized employees in Kansas City would have to negotiate their pay raise. For a variety of reasons, I do not believe N. Williams, who admitted that in the same conversation he told the employees of a number of bad consequences that could occur, including loss of hours and freight. He insisted that he was discussing only the results of a "strike," but that was pointedly omitted from the investigatory affidavit he gave to the Regional Office. In that affidavit, he also said: "No employee ever approached me to ask what would happen to the March 1995 raise if this terminal voted in the union." Strictly speaking, he was not approached in the conversation at issue, but N. Williams explained that an employee asked that question in a group conversation, and that the question was not asked

<sup>67</sup> All references to "Moore" in the remainder of this section are to Bill Moore.

directly of him, despite the fact that he was the only supervisor at that session. I find it incredible that one employee should be asking that question of another employee, and not the supervisor. I credit Moore and find a violation. *Jordan Marsh Stores Corp.*, 317 NLRB 460, 463 (1995).

At Norfolk, consistent with the practice at all other locations where there was an election campaign going on, management held a series of weekly mandatory meetings (except for 1 week, when there were two series). Moore testified that, at one meeting, Mendenhall said that the employees in Kansas City would not be getting the 55-cent-wage increase because they voted the Union in. Mendenhall recalled, however, only a discussion in the lounge area with some employees, including Buck, about what would happen if any terminal were unionized prior to the raise, to which Mendenhall commented that the employees there would have to negotiate in order to receive that raise, which was consistent with what later appeared in *The Overniter*. Buck denied Mendenhall's version, and I find that Mendenhall never explained the reason that the Kansas City employees were not being given the increase his position. Even Respondent's brief concedes that he left the impression that the Norfolk employees might not receive their increases if they similarly unionized. I conclude that Respondent violated Section 8(a)(1) of the Act.

Respondent had three bulletin boards, on one of which employees posted cartoons and personal notices, such as restaurant menus and post cards and sales of cars, dogs, boats, and mobile homes. The material remained on the board indefinitely, often until the item for sale was sold or until the person who posted it took it down because it was stale. In early 1995 R. Williams posted a union leaflet on the bulletin board. It remained posted only 1 day. Moore posted a different leaflet in March around midnight. Around 3 a.m., Supervisor Bill Norvell removed it. Moore and Buck observed other union literature posted on the bulletin board, but none remained more than a day. To the contrary, Rudy Copp said that the literature remained posted for weeks. With Mendenhall's admission that he cleaned off the bulletin boards weekly, I do not fully credit Copp's version; but it may be that the union literature remained posted longer than the other employees were willing to admit. Nonetheless, for the first time, with the possible exception of obscene notices, literature was removed; and that was union literature. Although employees do not have a statutory right to post literature on employer bulletin boards, when an employer has permitted employees to post personal material, it may not remove union-related materials from its bulletin boards and direct employees not to post union literature on the bulletin boards. *Jordan Marsh Stores*, 317 NLRB at 462. I conclude that Respondent violated Section 8(a)(1) of the Act by removing union literature from employee bulletin boards made available for employees' general use. *Bon Marche*, 308 NLRB 184, 185 (1992).

One removal of literature led to different unfair labor practice allegations. Spaugh posted a copy of an NLRB form on the bulletin board on February 16 around 8 or 8:15 a.m. After Spaugh punched out that day, around 5:45 p.m., he walked down to the shop where employee D. Copp was present. The form was still posted. Mendenhall then came into the shop with the form in his hand and asked Spaugh angrily who posted it. Spaugh replied that he knew, but he would not tell. When Mendenhall repeated his question and Spaugh repeated his answer, Mendenhall said, "people could get fired for this," and left the shop.

Mendenhall admitted that he took down the notice, but testified that he did so to show to George Sparrow, the shop manager, to find out if he had seen it. Sparrow's regular workday ended at 5 p.m., so either Mendenhall fabricated the reason that he removed the notice or was so angry that he did not think about when Sparrow was to leave. At any rate, he denied Spaugh's narration, admitting only that he asked both employees if they had ever seen this notice, and, when he left the shop, he replaced the notice on the bulletin board. But Mendenhall conceded that "it came down eventually. The bulletin boards were clean." I do not credit Mendenhall. The bulletin boards were not cleaned before the union campaign, and Spaugh did not concoct this incident. I conclude that Mendenhall interrogated the employees about their union and other protected, concerted activities and threatened them with discharge if they engaged in such activities, in violation of Section 8(a)(1) of the Act.

On about February 20, there was a lengthy, sometimes tumultuous meeting<sup>68</sup> between Mendenhall and the employees, numbering about a dozen at the beginning but growing to 25 or so at its conclusion. Respondent claims that the meeting was arranged by the employees to set up Mendenhall for some unpleasant questioning, but the employees insisted that Mendenhall wanted to meet with them. I find the resolution of that issue unimportant. No one forced Mendenhall to make the statements he did.<sup>69</sup> Mendenhall began the meeting by stating that the Union had filed a petition for an election and that any of the terminals, like Kansas City, that voted in the Union before March 5 would not receive the wage increase scheduled to be effective that day, because the wage increase could not be established until a contract was agreed to. He noted that the service center in Chicago had not had a contract after 13 years of negotiations.<sup>70</sup> R. Williams interjected that the NLRB might have something to say about the terminals being denied a raise just because they voted for representation.

Mendenhall warned that friendships would be stressed because of the union campaign. He talked about the different terminals that were voting on union representation and said that, if the Union won, the relationship between employees and supervisors would change because unions have their rules and the employees would have to abide by those rules. Overnite could not operate with as much flexibility if the Union won. Most companies preferred not to use union carriers and if "we" became a union carrier, "we" could possibly lose business.<sup>71</sup> He mentioned a million dollar account that he thought could be lost if the terminal went union. Mendenhall said that Overnite was trying to start a new era with its employees and that good things were planned for the employees and the Company; but things that Overnite had planned would have to be postponed because they would need to divert the funds to keep Overnite nonunion.

<sup>68</sup> The narration of this meeting is not intended to portray the precise order of the statements made.

<sup>69</sup> In so finding, I dismiss Respondent's seventh defense, which is based on a theory of entrapment.

<sup>70</sup> Mendenhall, while admitting that he mentioned the Chicago service center, said that he did so in answer to an employee's question. I find it improbable that any employee would have asked a question about that subject.

<sup>71</sup> Mendenhall also said that his discussion of loss of customers resulted from a question from an employee. I cannot imagine an employee at this meeting asking whether Overnite would lose customers.

Buck asked how Overnite would feel if he voted for the Union, and Mendenhall replied that he would lose his credibility with the Company. Buck asked why Overnite would look at him differently; he was the same person he was before. Mendenhall did not reply. R. Williams said he had known senior dispatcher Jim Dickerson for 16 years and asked whether Mendenhall thought that Dickerson would look at him differently because of his role in the union campaign. Mendenhall replied he had not known R. Williams that long but it would go towards his opinion of R. Williams.

Finally, Mendenhall gave some instructions about the way the union campaign was to be run. He stated that he had removed a piece of union literature from the bulletin board and that he would not stand for any union literature on his bulletin board. He would not tolerate conversations while employees were working or at any workplace, and the employees would have to be off the workplace.<sup>72</sup> If they did not comply with that policy, they had better be careful.

Respondent violated Section 8(a)(1) of the Act in numerous ways: (1) by threatening that, if the employees voted in the Union, they would not get the March 5 pay increase, *Jordan Marsh Stores*, 317 NLRB at 463; (2) by using the 13-year bargaining history in Chicago to threaten that it would be futile for the employees to select the Union as their collective-bargaining representative; (3) by threatening employees with loss of business and customers, without an objective basis, if they selected the Union as their collective-bargaining representative, *Reeves Bros. Inc.*, 320 NLRB at 1083; (4) by threatening employees that Overnite would withhold future plans for them if they selected the Union as their collective-bargaining representative; (5) by stating that employees lose their credibility if they vote for the Union, *Reno Hilton*, 320 NLRB at 207; and (6) and by limiting the use of the bulletin board and restricting union conversations and threatening unspecified retaliation for any breach of that policy, *Jordan Marsh Stores*, 317 NLRB at 462; *Industrial Wire Products*, 317 NLRB 190 (1995).

Within the week after the dock meeting, Spaugh went to Mendenhall's office to apologize for his conduct at the meeting. He was wearing his union hat, and Mendenhall told him that, if a customer called and requested that Spaugh not wear the union hat, he could ask Spaugh to remove it, and that if he did not, he could be discharged for insubordination. Spaugh, being the principal spokesman for the union committee at the dock meeting and having been somewhat outspoken and loud in his advocacy of the Union, asked Mendenhall, if the Union did not win, how long it would be before he was fired. Mendenhall answered: "Everyone will be held accountable." Mendenhall's threat of unspecified retaliation because Spaugh engaged in union and other protected, concerted activities violated Section 8(a)(1) of the Act.

On March 14, R. Williams and Spaugh distributed union literature to employees as they were coming to attend a mandatory meeting and then, although scheduled to attend a drivers' meeting the next day, went to the meeting that was not intended for them. They did so because they believed that the prounion employees were kept in separate meetings and that the anti-union employees were not getting a chance to hear the prounion

<sup>72</sup> The policy prior to the organizing campaign was that employees could talk to one another as long as their conversation did not interfere with their job.

employees' point of view.<sup>73</sup> Mendenhall made part of his presentation and was talking about the March pay raise and the fact that the employees in Kansas City were not going to get the raise at all, when R. Williams interrupted that he did not feel that both sides of the story were being presented, that he had spoken with the shop steward in Kansas City, and that Overnite and the Union were trying to work out a way for the raise to be given. Mendenhall said that was not true and that they were not supposed to be at the meeting. Just before Respondent started to show a videotape, R. Williams and Spaugh left the meeting, because they were scheduled to punch in for work, and Mendenhall followed them out. Mendenhall told them they were not supposed to be at that meeting and that they knew it. He was not going to stand for insubordination, the meetings were not going to be interrupted, disrupting the employees' concentration on the message that he was trying to get across, and it was not going to be tolerated. Mendenhall then said that, since he had been there, their personality had changed. R. Williams asked how so, and Mendenhall replied that he had become an agitator. He added that he liked them both and did not want to see anything bad happen because of the union campaign. They should be careful, reaching over and fanning some union literature on Spaugh's clipboard. One of the employees said that sounded like a threat, but Mendenhall said that it was not, but that he was concerned for their well-being.

The employees were not invited to and had no right to barge into the meeting that Mendenhall was holding with other employees. An employer has the right to hold its own meetings, without interference. Mendenhall properly reprimanded them for their behavior, but went too far, by telling them that they were agitators because of their union sympathies and activities, by threatening them with unspecified retaliation if they continued to engage in union activities, and by telling them to be careful about engaging in union activities. *Reno Hilton*, 320 NLRB at 207.

Also on March 14, Norvell, in the presence of Supervisor N. Williams told Moore that he had nothing personal against the employees for wanting a union, but he was afraid for himself and Overnite if the Union got in. He expressed his concern that Respondent would not be able to pay Teamsters' scale and that the employees should look at the union companies that had gone out of business and at such companies as Carolina Freight, which were struggling. When Moore told him about many of the union benefits, Norvell feared, without further explanation, that they would lose their company 401(k) plan. Based on these findings, which result from my determination of what was actually said, rather than what the witnesses testified to, I conclude that Norvell threatened Moore, without objective evidence, with the loss of the 401(k) plan, in violation of Section 8(a)(1) of the Act. The other comments were merely expressions of his fear that Overnite could not afford what the Teamsters might ask for, and not threats that Overnite would terminate its business.

About 2 weeks before the election, hats with "Vote No" printed on them were made available to employees in the dispatch office.<sup>74</sup> Moore went there and asked N. Williams for one, but N. Williams said that he could not have one until the

<sup>73</sup> I did not fully credit any of the witnesses who testified about this event.

<sup>74</sup> That appeared to be a well-known fact to all but Norvell, whose denial that he saw them there I do not believe.

employees who were going to vote against the Union had their chance. He could have a hat, however, if he voted no. Moore got a hat the next day. N. Williams offered hats to employees on the dock and in the office.<sup>75</sup> dispatcher Carroll Ward Jr., Norvell, and Dickerson, in addition to N. Williams, asked employees to wear "Vote No" hats and pins. I conclude that Respondent, by asking them to wear a "Vote No" hat, violated Section 8(a)(1) of the Act. That constitutes interrogation of employees about their union sympathies. *Houston Coca-Cola Bottling Co.*, 256 NLRB 520 (1981).

The complaint alleges a variety of violations Mendenhall committed at the mandatory meetings, but the witnesses were unable to identify the particular meetings at which the statements were made. Nonetheless, one of his themes was the familiar one that voting for the Union really would not help. In the 13 years that the Union had represented the employees at the Chicago service center, there was never a contract; and Overnite could continue to operate without having a contract. Norfolk would be just like Chicago: Overnite would negotiate in good faith, but the employees would never get any further than their vote. Instead, Overnite's interests would change; and there could be proposals that were worse than the current conditions, including stricter rules, an absenteeism and tardiness policy, and a management-rights clause. Even though Overnite would deal in good faith, it did not mean that there would be a contract; because Overnite did not have to agree to anything. The only options were for the Union to accept the Company's proposal, which could be less than what the employees were then making, or to go on strike. In the latter instance, Overnite had applications on hand for replacements, or companies that could supply replacement workers had already sent paperwork to him. Families could suffer with no paychecks, and the Union was broke and unable to pay strike benefits. Perhaps, Overnite would end as unhappily as Eastern Airlines. Even without bargaining, conditions would change for the worse. Communications between supervisors and employees would change, and the open-door policy would no longer be in existence. Instead of going to a supervisor, the employee would have to make his complaint to a shop steward, who would in turn take up the problem with management.

The "carrot and stick" approach was certainly evident.<sup>76</sup> Mendenhall threatened that if the Union won, more than likely Overnite would have to pay time and one-half after 40 hours; that the overtime would eat up half of the profits that Overnite made in 1994 (\$63 million); and that Overnite would not be able to buy trucks or build new terminals or expand in any way. Mendenhall held up (but did not show to the employees) a letter

<sup>75</sup> In so finding, I have discredited Williams's testimony that he told Moore that he could have a hat, but only after the procompany employees had the opportunity to get theirs. Williams was an unreliable witness. Witnesses, as everyone else, make mistakes, and there are often times that their mistakes may be overlooked. But, sometimes, they concoct unbelievable answers to explain their mistakes, and there they engage in not merely mistakes, but purposeful misrepresentation of fact. Thus, Williams testified that he never offered hats to employees, in direct contradiction to his affidavit, which stated that he "offered hats to employees." His explanation was that hats were available. I find his answer disingenuous.

<sup>76</sup> There was mention that Mendenhall also threatened that, if the Union was elected, the March raise would probably not go through. That may have been said at an early meeting, but it certainly was not repeated later, when in fact Respondent began paying the increase, effective about March 16.

from DuVall (or DeValle) Corporation, a company from the Midwest, that had discontinued its \$1 or 2 million account with Overnite because it was reluctant to do business with a union company and the Kansas City terminal had voted for representation. A loss of that size account locally should be of grave concern. There were some local companies (he did not identify their names) that also did not want to do business with union companies, and they had said that they would pull their accounts. As if those consequences were not enough, Mendenhall threatened that, if the terminals voted for representation, the business would be re-routed around them, and the employees' hours might be cut. He cited as an example the experience at Kansas City, where word was that that was what was happening.

The complaint also alleges that Mendenhall did not give the prounion employees the same opportunities to speak at the mandatory meetings as the antiunion employees. A Baltimore road driver who attended meetings when Rudy Copp was present was given opportunities to talk about how he had been a Teamster and that the benefits were not what he thought they would be. On the other hand, Mendenhall cut short employees who made prounion comments or asked questions for clarification. When Copp tried to explain to the group that employees themselves would vote whether to go on strike, Mendenhall cut him short and said it was time to move on.

I conclude that Overnite violated Section 8(a)(1) of the Act by threatening employees with customer loss and diversion of work and, by implication, loss of pay, if they selected the Union as their bargaining representative; by telling employees that strikes would be inevitable if they selected the Union and informing its employees that it would be futile for them to select the Union as their bargaining representative; and by disparately prohibiting employees from talking about the Union or otherwise engaging in activities on behalf of the Union. *Reeves Bros. Inc.*, 320 NLRB 1082, 1083 (1996); *Jordan Marsh Stores*, 317 NLRB 460, 463 (1995).

During the period from mid-February, when Moore returned from vacation, through March, Norvell and N. Williams constantly "watched [him] like a hawk" and stayed within listening distance. Norvell, contrary to his practice prior to the union campaign, even came to the lunchroom to eat lunch. In addition, although before the union organizing campaign, Overnite had no rules restricting conversations with fellow employees at work, Moore's supervisors broke up conversations he had with other employees while employees who were against the union were allowed to talk to other employees without interruption. Obviously, I have credited Moore, finding that he would not and did not concoct these incidents. I distrust the supervisors, noting that N. Williams testified that he did not know that Moore was a union supporter until the end of March, despite, among other evidence, the Union's letter of February 27 which identified Moore as a union committee member. The complaint alleges that these facts constitute a creation of an impression of surveillance. I conclude that there was actual surveillance and monitoring in violation of Section 8(a)(1) of the Act. *Capitol EMI Music*, 311 NLRB 997, 1006 (1993), *enfd. mem.* 23 F.3d 399 (4th Cir. 1994).

Moore testified that at 3 a.m. on February 13, he heard Norvell tell a group of 11 or 12 employees that, if the Union got in, they would lose their jobs, and that, if the employees went on strike, they would lose their jobs and the Company probably would not call them back. Spaugh testified that, in

March, he heard N. Williams tell a group of dockworkers, including Moore, that if the Union won the election, Overnite would not have the volume of freight it presently had. Norvell denied that he made the statement attributed to him. N. Williams testified that employees were worried about freight becoming slack if the Union got in, and he told them that they were overwhelmed with freight from other carriers because of the then ongoing Teamsters strike against the union carriers; and that what happened to the other carriers could happen to them, i.e., that Overnite's freight could be covered by other carriers. He said that if Overnite went union, a strike was possible; that the Company would lose freight; and that, instead of cutting manpower, Overnite would cut back hours. I find, even if N. Williams' narration was accurate, he still had no objective basis for claiming that there would be a strike and loss of freight and hours. Similarly, because I do not believe Norvell, I conclude that his comments, too, violated Section 8(a)(1) of the Act by threatening employees with loss of work if they selected the Union as their bargaining representative.

In early March, Ward told Spaugh that he knew that Spaugh did not get along with his dispatcher, Jim Dickerson. Ward asked, if Spaugh had to deal only with Ward, would he change his mind about the Union. Spaugh replied no. Ward, while admitting that he had a conversation about the relationship of the two, testified that it was unrelated to the union campaign, sealing his argument by noting that he did not even know that Spaugh was a union supporter until March. However, Ward was a witness to the February dock meeting, at which Spaugh was the principal prounion spokesman, and he had seen Spaugh wear his union hat. So, it was likely that Ward made his offer because he was trying to win Spaugh's vote, a conclusion that becomes more probable because Ward knew for 6 months that Spaugh had not been getting along well with Dickerson; and it was only at the time of the union campaign that he proposed help. I believe Spaugh and conclude that Overnite violated Section 8(a)(1) of the Act by promising Spaugh that he would have to deal only with Ward if he would change his prounion sympathies.

Finally, the complaint alleged several other solicitations involving Donnie Moore (D. Moore), then the Baltimore service center manager and the former manager at Norfolk, who came to the Norfolk terminal to help out with the antiunion campaign. About 2 weeks before the election, D. Moore asked Buck what he thought about what was going on. Buck replied that he always tried to understand both sides of the story and that was what he was doing with the union campaign. D. Moore said that Douglas was what he expected him to be and was working on improving the workplace and benefits and that there were some good things on the table to improve the Company.

At probably the same time, D. Moore also asked R. Williams how he was doing and if the Company was treating him all right. When R. Williams replied that it was, D. Moore said they were trying to get a meeting together with a group of employees to discuss with some executives from the Company how they could straighten "some of this out and get things settled" so that they could get to an end of the organizing drive. D. Moore suggested that R. Williams, Copp, and Spaugh meet with John Fain, senior vice president of operations. R. Williams replied that Overnite had adequate opportunity to take care of matters earlier and had neglected to do so. D. Moore countered by saying that the Teamsters would not do any good because

Overnite did not want anything to do with the Teamsters, whom he called crooks, adding that the Teamsters wanted only the employees' dues money. D. Moore asked, rhetorically, what would happen if a strike occurred, saying that it was inevitable it would happen. He answered himself, saying that employees would have trouble paying their bills and mortgage, and if they tried to go to work, they would have to cross the picket line and possibly get beaten up. R. Williams replied that all that remained to be seen. D. Moore asked him to think about the situation and opined that all the problems could be over "just like that"; and he snapped his fingers.

In yet another conversation, D. Moore talked to Copp, asking him how he was doing. Copp asked if he wanted the truth or a lie, and D. Moore said the truth. Copp said that they had a bad terminal manager when D. Moore left, that nothing he did did any good, that people were working hurt and quitting, and that Overnite would not listen to the employees. D. Moore asked what would it take for Copp to change his mind about voting on the Union. Would it help if Johnny Glass were fired? Copp said no, that would not do it.

D. Moore essentially denied everything that the employees testified to, but stated that he was sent to Norfolk by one of Overnite's attorneys and that some of his purposes in coming to Norfolk were to be available if any employee had questions, to make sure the employees had a complete understanding of all the facts, and to answer any questions that they might have. The problem was that D. Moore went a little beyond those purposes, soliciting complaints and trying or promising to resolve them and suggesting the formation of an employee committee to present grievances, in violation of Section 8(a)(1) of the Act. *Capitol EMI Music*, 311 NLRB 997, 1007 (1993). In addition, he told employees that Douglas was working on improvements of the workplace and benefits, an implied promise of those improvements; impliedly promised the termination of Glass, if that would change employees' prouinion sympathies; and informed employees that strikes were inevitable, all in violation of Section 8(a)(1) of the Act.<sup>77</sup>

#### 4. The objections

Local 822 filed a petition for an election in Case 5-RC-14153 (now Case 18-RC-15812) on February 9, 1995. An election was held on March 31, 1995, which the Union lost, 29 to 58, with ballots challenged but insufficient in number to affect the results of the election. The Union filed timely objections, and the Regional Director issued an order directing a hearing on the issues that mirror the unfair labor practice complaint, including, among others, the March wage increase. To the extent that I have found that Respondent violated Section 8(a)(1) of the Act between February 9 and the election, I find that the objections are meritorious.

#### D. Bridgeton

##### 1. Majority status

In early 1994, Overnite had one service center in the St. Louis area, at Hall Street, and decided to expand its facilities to Bridgeton, 19 miles away, which would be manned with Hall Street employees on a voluntary basis. It posted notices on October 25 for employees to sign, and on November 30 posted

the final list of transfers. The Bridgeton service center opened on December 19, staffed entirely by employees transferred from Hall Street. Of the 29 cards offered by the General Counsel to prove a majority of the 49 employees in the appropriate Bridgeton bargaining unit, as of January 17, 1995, only 5 had not been signed while the employees had still been employed at Hall Street.<sup>78</sup>

Overnite contends that the cards signed by then Hall Street employees should not be counted. I disagree. It was Overnite that decided that the Bridgeton facility was going to be manned with Hall Street employees. It was Overnite that posted notices for the Hall Street employees to sign. Those were the employees who were transferred to Hall Street, as Overnite had said, and the employees understood, they would be. Thus, the employees who authorized the Union to represent them knew well that they were going to be employed in Bridgeton. Except for location and the identity of supervision, nothing changed. The employees continued to perform the same work for the same employer with the same pay and benefits. Under a variety of theories, their cards should be counted, even though they signed while not formally employed at the new facility. In *Raley's Inc.*, 227 NLRB 670, 670 fn. 1, 672 (1976), enfd. 587 F.2d 984 (9th Cir. 1978), the Board relied on the union membership of employees of the employer prior to their transfer to a new store. The Board has held that authorization cards are valid for persons who had been hired but had not actually started working. *Riviera Manor Nursing Home*, 200 NLRB 333 (1972), enfd. mem. in part 487 F.2d 1405 (7th Cir. 1973). There is nothing to show that any of the Hall Street employees who signed up for transfer to the Bridgeton facility were not transferred. Finally, in *Burns* successorship cases, the Board has found majority status based on the fact that the employees of the predecessor were represented by a union. *Derby Refining Co.*, 292 NLRB 1015 (1989), enfd. 915 F.2d 1448 (10th Cir. 1990); *Cincinnati Bronze*, 286 NLRB 39 (1987).

I find that the cards authorize the Union to represent the employees at Bridgeton. In the circumstances of this proceeding, they did not limit the Union to represent them only at Hall Street, especially because they were soon to transfer to the new service center. As a result, I reject Overnite's contention and will count the cards that were dated prior to the opening of the Bridgeton service center. In doing so, I also reject the following additional contentions made in Respondent's brief: (1) That, from the Union's actions, the Union knew that the cards solicited from employees while still employed at Hall Street were invalid. There was no proof of the reason that the second card of Dan Chilese was obtained. The first card of Ralph Renschen was allegedly lost, and there is no proof that the Union, as opposed to an employee, made any statement about the first card being invalid. The second card of Freeman Robinson was signed because he was unsure that his first card had been turned in. (2) That eight cards "clearly and unambiguously authorize the Union to represent the signer at Hall Street." (Emphasis in original.) The cards merely recite Overnite's address where the employee was then employed. They are not limited to representation at that one address.

Scott Cannon's testimony was inconsistent and contradictory, in part caused by his lack of absolutely vivid recollection,

<sup>77</sup> Before he testified, D. Moore was sent a copy of a transcript of testimony. He should not have been. However, that transcript did not relate to his testimony, and I have not considered the breach of the sequestration rule in assessing his credibility.

<sup>78</sup> Daniel Chilese signed two cards, first while at Hall Street and later, after he transferred to Bridgeton. I have counted his second card among the five.

and in part by his too quickly and easily answering “yes” in response to some questions posed by Respondent’s counsel, who speaks very rapidly and sometimes, particularly in this instance, asked a new question before Cannon had a full opportunity to think out his answer. I was impressed by Cannon’s original answer, from which his testimony quickly went downhill, that his card was “the authorization card for the Teamsters to represent us,” which is what he had been told. Although, on cross-examination, he answered “yes” to the question whether the union representatives had told him that the purpose of the card “was just to get an election,” he immediately clarified that he really could not remember. And, although on cross-examination, he answered affirmatively that he was told that he would not have to pay initiation fees and that, if the Union won the election, his dues would never increase, on redirect by the Union, he changed again and could not remember exactly what was said, except perhaps that the employees would not be required to pay either dues or initiation fees until the Teamsters signed a contract with Overnite. This is not enough to taint his card, and I will count it.

The objection to William Ott’s card is that he signed on the same date as Cannon and must have been at the same meeting and thus heard the same promises as Cannon did. But Cannon could not clearly recall whether he signed his card at a meeting, and I cannot make the finding that Respondent seeks. I will count his card. Ralph Renschen signed two cards, the first in the fall of 1994, after employee Forrest Chapman told him that “you simply need to sign this card to have an election,” and the second, on January 19, 1995, to “submit them to the Teamsters for a vote.” Although Renschen testified that he probably read some of the card before he signed it and the solicitor of the first card could have said more about what the card meant, and he also understood that the Union was trying to organize Overnite employees because the Union was interested in representing them for purposes of collective bargaining, there is insufficient proof that he was told anything but that the cards were intended to get an election. I will not count his card. *Levi Strauss & Co.*, 172 NLRB 732 (1968).

Thomas Sethaler signed a card, according to the handwriting experts who testified on behalf of both the General Counsel and Respondent. However, Respondent’s expert disputed the date having been written by Sethaler, and there is nothing in the record—the testimony of the solicitor or Sethaler or the writer—to demonstrate that the date placed on the card, which may have been written with the same pencil, was the date that the card was signed. Instead, the General Counsel wants me to assume that it must have been signed the same day, based on the unproven fact that the same writing instrument was used, other cards were dated accurately by persons other than the signer, and the evidence does not conclusively establish that Sethaler did not date the card himself. I find that insufficient. In the circumstances of this proceeding, *Zero Corp.*, 262 NLRB 495, 499 (1982), enf.d. mem. 705 F.2d 439 (1st Cir. 1983), is distinguishable. The specific issue of the date of the card was raised by Respondent, which made Sethaler available to testify, but all other parties declined the offer and did not call other witnesses to testify about the date of the card. I will not count his card. To hold otherwise would permit a union to obtain cards far later than the relevant period and backdate them.

The card of Harold Luster is dated December 8, 1995, but Mark Wiczorek testified that the card was signed prior to the election. I find that it was signed on December 8, 1994. Al-

though the exemplars used to test the authenticity of the signature of Jack Franklin indicated that he may not have signed the card attributed to him—Respondent’s expert was definite that it was not Franklin’s signature; the General Counsel’s expert testified that it was probably not his signature—Franklin testified that it was. I find that he had no reason to lie about his support of the Teamsters by signing the card and credit it.

I have not counted 2 of the cards submitted to prove the Union’s majority. That leaves 27 valid cards. Because there are 49 employees, the Union has a majority.

## 2. Credibility

Once again, I find that the General Counsel’s witnesses did not make up from thin air the incidents about which they testified. For example, driver Kirk Ridenhour was strong and steadfast in his adherence to the Union and equally strong and steadfast in his testimony. He was not paranoid and simply did not fabricate his testimony that Bridgeton service center manager Walter Grimes shadowed him from the moment he began wearing Teamsters’ buttons, hat, and T-shirts. Nor did the Teamsters’ supporters concoct that their prounion propaganda was pulled from the bulletin board by Grimes almost as soon as it was posted. Grimes’s denials, therefore, that he neither shadowed Ridenhour nor removed literature make Grimes the fabricator of facts and the unbelievable witness.

As a further example, almost all parties to this proceeding were aware of the function of the troubleshooters during the union campaign. They were present to find out what was troubling the employees and to ensure that those problems would be relayed to their supervisors, so that the problems could be solved. But when the troubleshooters came to Bridgeton, Grimes did not think that the object of their disaffection was the Union or its adherents. Despite the fact that the troubleshooters went riding with the employees daily, Grimes thought that Richmond headquarters was after him. He had no other idea what the troubleshooters’ functions were. I find that he was in a wonderland; and, if anyone were paranoid, he was. But, in fact, he was not. He assuredly knew, as all knew, that the troubleshooters were present to help Overnite overcome its union problems. Finally, the testimony of Robert Hoffman is particularly damning. Hoffman, during much of the union campaign, was a supporter of Overnite’s position and, thus, became somewhat of a confidant of Grimes. However, for whatever reason, Hoffman changed allegiance, and his testimony was contrary to that of Grimes in some of the most critical disputes. Hoffman had no reason to misstate the facts. Grimes did. He had his job on the line.

## 3. The unfair labor practice allegations

From mid-January 1995, when Ridenhour began wearing Teamsters’ buttons, cap, and T-shirt, Grimes shadowed him at the terminal, following behind Ridenhour (even checking the bathroom) in the morning before he left on his route and in the evening after he returned from his route, but always staying within listening distance, from a few feet to 10 feet away. Around the beginning of February, District Sales Manager Mark Pluff took over these shadowing duties from Grimes. The shadowing continued only to the time of the election.<sup>79</sup>

<sup>79</sup> Admittedly, Pluff went to the hospital on the eve of the election and stayed there two weeks. When he returned to work, he was in the field, away from the service center.

Grimes' and Pluff's efforts were directed to ensuring that Ridenhour, as well as Mark Wieczorek, who were the first and, early in the union campaign, the only two open and active union supporters and became the most open and active union supporters at the service center, were not engaging in such lawful activities. Grimes told Hoffman in late January or early February that he needed "to get that son-of-a-bitch (Mark Wieczorek) off the dock and on the street so he would quit talking to people." Grimes told a supervisor at least four or five times to get Wieczorek's paperwork prepared and tell him to get out on the street. Grimes took the same action against Ridenhour; and, when open union supporters were talking to other drivers, they would be smothered by management. In contrast, Hoffman, who was then a company supporter, as well as other antiunion employees, was free to talk to the employees on the dock during the organizing campaign without interference from Grimes or any other supervisor.

Overnite contends that the fact that Grimes and Pluff spent more time walking the docks during the organizing campaign was only coincidental with the move to and the problems encountered at the new service center. However, they did not follow Ridenhour when he initially started working at Bridgeton in December, but only when he started wearing union insignia in mid-January. I conclude, therefore, that Respondent engaged in illegal monitoring of employees' union activities in violation of Section 8(a)(1) of the Act.

Grimes removed, almost daily, pro-Teamsters literature posted in the employee breakroom on the same bulletin board as was posted antiunion literature and personal notices. In addition, Grimes also removed pronoun literature left on tables in the break room and in the employee bathroom,<sup>80</sup> while anti-Teamsters literature was allowed to remain in all places. Overnite contends that the literature was removed only from the bulletin boards used for the posting of governmental notices and other company material. Although there was confusion in some of the testimony, it is clear that the General Counsel's witnesses were not referring to Overnite's bulletin board, either the open one or the one that was eventually enclosed in glass. That was the reason that Grimes confided to employee Freeman Robinson that he was concerned about the unfair labor practice charge that had been lodged against him for removing the literature from the bulletin board, because he was the one who did it. And Hoffman saw him do it: Grimes said, while removing the pro-Teamsters literature, that he "[didn't] like to see that shit hanging on his board." And employee Brian Aslin posted a pronoun notice on the bulletin board and stepped outside the break room for a few minutes. When he returned, the notice was in the trash can. The only person who went into the break room during this time was Grimes.<sup>81</sup> I conclude, as I have above, that Respondent violated Section 8(a)(1) of the Act by removing the union literature from the boards where employees had posted personal notices. There is no evidence, however, to support the complaint's allegation that Overnite installed a locked bulletin board and removed the employee bulletin board, and I dismiss that allegation.

The remaining alleged unfair labor practices committed at the Bridgeton service center relate to promises of benefits and

solicitation of grievances. The troubleshooters arrived in the St. Louis area about February 5 and stayed until February 14, shortly before the election. They rode with all the drivers, with the notable exception of Ridenhour and Wieczorek, who undoubtedly were considered too strong Teamsters' supporters to be swayed to Respondent's cause. Andy Hamilton rode with Brian Aslin, who was assigned a different tractor by the dispatcher because his tractor only had one seat in it. Hamilton said that he was working for director of operations Morgan and was seeking employees' ideas throughout the Company. Douglas was a people's person, Overnite was trying to turn itself around, it wanted to make its employees happy and accommodate them, and it wanted to improve its benefits and have more input from employees. That was the reason that he and the other troubleshooters (Hamilton referred to them as "riders") were working for Morgan and were doing this throughout the Company. Hamilton then asked what Aslin thought could make Overnite better. Aslin asked about time and one-half, which was the overriding issue in the election campaign at Bridgeton; and Hamilton said that it was in the works, but he really could not answer that until the benefits came out in January, but Aslin should not be surprised about the improvements of the benefits. Aslin also raised the issue of uniforms, and Hamilton replied that that was another big concern of the employees that he had spoken with. Aslin also suggested that Respondent form an employee committee to have input into the benefit package rather than just telling employees what their benefits would be. Hamilton thought that that was an excellent idea and he would look into it.<sup>82</sup> At the end of the day, Hamilton told Aslin that he was a good representative for Overnite and "we don't need a third party at Overnite."

Hamilton, by asking for Aslin's suggestions for improvements for the Company and coupling that with his statements that Overnite was looking into ways to improve benefits and that overtime benefits were in the works, solicited grievances and promised to remedy those grievances in violation of Section 8(a)(1) of the Act. I find that Hamilton<sup>83</sup> and Parks<sup>84</sup> engaged in similar conduct in violation of Section 8(a)(1) of the Act with many of the other drivers at the Bridgeton service center.

Complaints about the lack of overtime pay was also a subject at Overnite's mandatory meeting of about 15 employees on February 14. Morgan responded that they just had a change in upper management with Douglas taking over. He stressed how people-oriented Douglas was and that Douglas was going to look into these problems and come up with solutions for them, but he could not promise anything because of the ongoing organizing campaign.

The General Counsel relies on the testimony of Hall Street road driver Tom Henley that, during a conversation between Douglas and some Bridgeton dock employees Douglas stated to employees, "What if we gave you overtime at say, over 45, 48 hours, but we maybe lessen something here" and that they were

<sup>82</sup> This was before Douglas made a similar offer to employees Adams and Carpinez in Lawrenceville.

<sup>83</sup> Hamilton had similar talks as a rider with Hoffman, asking him what he would change if he could change anything about the Company. When Hoffman identified benefits and overtime pay, Hamilton said that he thought those things were in the works.

<sup>84</sup> Respondent admitted that Larry Parks, one of the troubleshooters, solicited employee grievances and promised, at least by implication, to remedy those grievances.

<sup>80</sup> Although the complaint alleges only the removal of items from the bulletin board, the removal from other places was fully litigated.

<sup>81</sup> There was another entrance to the break room; but, in light of the other testimony, it is probable that Grimes was the culprit.

looking into other medical benefits. Henley's testimony was clearly out of context, as shown by his admission that he arrived at a time that the conversation was already going on. Douglas testified that, in talking about pay for overtime, he stressed that there were both bad and good things about it. He noted that customers do not pay premiums for the extra hours worked and that Overnite would of necessity try to manage its work and thus reduce overtime in order to avoid extra costs. Even though Douglas told the employees that he was not making any promises, this conversation was about promises. Douglas raised the possibility of overtime after a certain number of hours, a benefit that employees never had and one that Douglas was later to refer to as a "reward." I find and conclude that Douglas and Morgan violated Section 8(a)(1) of the Act. *Raley's, Inc.*, 236 NLRB 971, 972 (1978), *enfd. mem.* 608 F.2d 1374 (9th Cir. 1979).

Moreover, in late January or early February, Grimes asked Hoffman what the employees wanted. Hoffman responded overtime and better benefits. Grimes responded, "They are in the works." This constitutes solicitation of grievances and an express promise to remedy them, in violation of Section 8(a)(1) of the Act. In February 1995, in a discussion among employees and Wichita service center manager Woods and Morgan, Robinson asked if Overnite was looking into overtime. Woods replied that it was, but he could not make any promises. He continued that he had been talking with someone in management (he could not tell who) and it was "almost a sure thing . . . almost a done deal." Insisting that he could not promise anything, he nonetheless said that he was "pretty sure" that it was going to happen and that the employees should wait until January to see what Woods was talking about.<sup>85</sup> Then he added that the Union "would not work within the Overnite environment" because Overnite would lose its flexibility and "the gains that Overnite is trying to make at this point with the improvements that they said they were going to make on the medical benefits and the time and a half issue . . . we'd lose all that." With that, Woods urged the employees to give the new management a chance. Although insisting that no promises are being made is often enough to ensure the lawfulness of a statement, what Woods was imparting here was a promise, and a promise that would be kept only if there was no Union. I find his statements violate Section 8(a)(1) of the Act. *Id.*

Much of the Bridgeton service center hearing involved alleged unfair labor practices committed at Hall Street. The General Counsel had two theories: first, that the violations pertained to its proof of a national conspiracy to engage in the violations of law; and, second, that, because of the proximity of the two centers and the fact that the employees at Bridgeton came from Hall Street and disseminated the various violations, such would have an effect on the Bridgeton employees and support the grant of a bargaining order. With respect to the first theory, those violations which were not disseminated do not support a bargaining order and allege the same type of violations seen at so many locations. They would generally support my conclusions in section I of this decision, but finding additional violations would be merely cumulative.

<sup>85</sup> Jeff Woods told Aslin a week before the election that overtime was being implemented and that the employees would be totally surprised with Overnite's benefit package in January.

Regarding the alleged violations that were disseminated,<sup>86</sup> most deal with soliciting grievances and promising to resolve them. In February, Morgan asked Henley what kind of changes he would like to see. Henley wanted better mileage, medical benefits, and overtime. Morgan said that he could not promise anything, but Overnite was looking into other options to see what could be done and added that all Henley had to do was to give "the man [Douglas] a chance." In another conversation, Morgan asked Henley if wearing the Union hat he was wearing would get him anything better. Henley stated that he did not know, but that he did not see Overnite doing anything. Morgan told Henley to give "them" a chance and added that he did not think that the Union would get the employees what they wanted right now.

In the first 2 weeks of February, Woods asked a few drivers, including city driver Mark Frederick, what could be done to stop this. Frederick asked what he meant, and Woods said that he knew Overnite had screwed up, and that Frederick knew, too, and what could Overnite do. Frederick answered that Overnite should give overtime, better insurance, and everything else the employees had been talking about. Woods said that Overnite was looking into overtime and better insurance, and the employees were going to get a good raise out of this. Frederick asked why Overnite was just started looking into it and did not do so a half year or year before. Woods responded that Overnite finally realized it had screwed up, and now it was going to cost Overnite a lot of money; but the employees would be better off sitting down with the Company rather than giving all their money to the Union.

Similarly, after a meeting on February 14, Morgan approached four or five employees who were walking back to work and asked them what could be done to stop this, saying that he did not think it was too late. He asked what the problems were. Frederick said that companies like Spartan, Central, and CCX were paying time and one-half and more money per hour, and their insurance and uniforms were paid for 100 percent. The funny thing, he added, was that these companies were not union, that Overnite could not catch the union ones or the nonunion companies, and that Overnite's profit was more than all the others combined. Morgan said that those were the kinds of questions they needed to ask Douglas, that they ought give Jim a chance, and that Overnite was working on the problems. Morgan's and Woods' statements constitute unlawful solicitation of grievances and implied promises of benefits, rendering representation by the Teamsters unnecessary. I conclude that Respondent violated Section 8(a)(1) of the Act.

In February, city driver Virgil Thomas, in a small group of three other drivers and sales representatives, asked Douglas why Overnite did not pay overtime. Douglas asked what Thomas meant by overtime, and Thomas replied anything over 8 hours a day or 40 hours a week. Douglas responded by asking "how about" after 45 or 48 hours a week, because he was not going to pay overtime after 40 hours a week, and the employees were not going to get it. On about February 16, Douglas, in a meeting with about 20-25 employees, said that he wanted to know what was on the drivers' minds and that he was trying to change things for the better. The employees asked him about,

<sup>86</sup> Shawn Gill told Bridgeton employees only that Morgan had said that premium pay was going back to the drawing board and Overnite was reviewing different options. Whatever the complaint alleges violated the Act in the Gill-Morgan conversation was not relayed to the Bridgeton employees. Terry Ditzler could not recall whom he spoke to.

among other things, Company-paid uniforms, sick days, and medical benefits; and in response to a question about overtime, Douglas responded by asking the drivers, who he said were currently working an average of 43 hours a week, what they thought about overtime after 45 to 48 hours. Douglas also said that he was looking into other aspects of the medical benefits and other companies that were paying for the employees' uniforms. Douglas then said that Overnite could take care of their own and did not need any third-party interference.

On about February 21 or 23, Frederick met Douglas, who asked what questions he might have. Frederick said that he had one question: everybody was talking about time and one-half, and what was the problem with Overnite giving it. Douglas said he was looking into it right now; that there should not be a problem with it, except when to give it. He said that 47 to 48 hours would be beneficial for the employees and Overnite as well. Frederick objected that with 47 hours, an employee was working 6 days, not 5, and one had to come in a seventh day to be paid overtime. Douglas replied only that that is what he was looking at. The issue of overtime was the most important one to the Bridgeton employees, who had never been paid overtime. Douglas, while making clear sometimes that he had no intention to pay overtime after 8 hours a day or 40 hours per week, suggested a compromise of premium pay after 45 or 48 hours, a benefit that the employees never had. That constitutes an implied promise of benefits, which was frequently the result of his own unlawful solicitations. I conclude that Respondent violated Section 8(a)(1) of the Act.

#### 4. The objections

Local 600 filed a petition for an election in Case 14-RC-11501 (now Case 18-RC-15768) on January 17, 1995. An election was held on February 28, 1995, which the Union lost, 24 to 22, with two ballot challenged but not determinative of the results of the election. The Union filed timely objections, and the Acting Regional Director issued an order directing a hearing on many of the issues that mirror the unfair labor practice complaint, including, among others, the announcement of the March wage increase. As found above, the record supports the Union's Objections 1, 3, 4, and 11 (only as to Parks). There was no evidence elicited to support Objections 2, 7, 8, and 9.<sup>87</sup> Objection 5 and 6 recite, respectively, that Overnite "made statements misrepresenting employees' legal rights" and "made threats of plant closing and that employees would earn less money, work less hours and that more people would be hired if the Union won the representation election." I have no idea what either objection refers to<sup>88</sup> and will dismiss them.

#### IV. 1996 WAGE INCREASE

Management Consultant Kearney's studies in the first half of 1995 proposed numerous operations changes that would result, it predicted, in savings of approximately \$65 million. Some proposals, involving closing of service centers and resultant loss of jobs and daily changes of employees' routes and equipment and resultant loss of hours and thus wages, would not be received well by the employees. But, by June, Douglas was convinced that the changes had to be made, and soon. By August, Overnite began to implement some other recommendations at various locations, testing the changes, refining them,

and obtaining the input of employees, with the hope of completing implementation by the end of the year.

With the oncoming implementation, management attempted to develop a strategy to communicate the changes so that its managers and employees would understand the necessity for them and feel that the changes were best for the Company and, thus, them. And it had to be communicated in a way that would avoid alienating the unrepresented employees, particularly road drivers and strong supporters of Overnite, causing them to seek union representation, and would satisfy, so Respondent contends, its bargaining obligation with the Teamsters under the Act. That was not going to be easy, for yet another reason. Overnite, for the first time, was losing money; and it would be difficult for the employees to happily adopt what could ultimately hurt them, while not giving them the increase in their wages that they expected. And so the strategy evolved to give the employees their normal wage increase, from 40 to 60 cents per hour, a decision that was made by early to mid-October.

On October 17, Douglas, Goodwin, and other officials of Overnite (John Fain; Dave Tuttle, chief financial officer; Dan Avramovich, senior vice president of sales and marketing; and Steven Enright, vice president of human resources) met with Lewis, Executive Vice President Matthews, and other Union Pacific officers, Carl Van Bernuth, general counsel; Charles Billingsley, vice president and corporate controller; and Dick Davidson, then-president and chief operating officer. The meeting concerned Overnite's plan to reduce its costs, improve service, and maintain employee flexibility, thus improving its operation and increasing Overnite's value, but "not increas[ing] union presence," for example, in the southeast region, which included pockets of employee dissatisfaction and very loyal, pro-Company employees with the most longevity. The participants recognized that the Teamsters was an impediment to unilaterally changing the employees' terms and conditions of employment and that Overnite's ability to deal directly with the employees was much more effective than having to deal with a bargaining representative. Finally, the participants perceived that Overnite's labor situation was "a disaster" and at least Lewis was willing to throw the proverbial caution to the winds: "Company [Overnite] worth only \$150 million and nothing to stock price; therefore Drew willing to take more risk in getting tough with the Teamsters (could even spin portions or all out of Corporation and let it go bankrupt)." Davidson was equally blunt: "Do you have an evaluation system to get the bad apples out?"<sup>89</sup>

Overnite planned to manage possible adverse reaction with an "[e]mployee communication plan" and a "[s]trategy to manage employee reaction." The essential elements included an "Aggressive Roadshow to Manage Employee Reaction" and a compensation package of wage increases and buyouts that was "Equal Or Better Than Key Competitors." The consensus was that communication was the key and should be tied "directly to individual impact." If the employees felt that the changes would increase Overnite's value, the changes would not increase the Teamsters' presence or employee unrest. There was discussion of the advantages and disadvantages of a wage increase, which was recommended by Overnite to be 40 cents, at

<sup>87</sup> There was no Objection 10.

<sup>88</sup> The Union filed no brief in support of its objections.

<sup>89</sup> Respondent's attempt to deflate the seriousness of Lewis' threat as merely a reflection of his frustration of the lack of progress in negotiations is hardly consistent with Davidson's attempt to rid Overnite of Teamsters' adherents.

a minimum. Matthews suggested 50 cents to “sweeten the pot” in exchange for productivity improvements at all facilities, especially including the Teamsters-represented service centers, because it was necessary to have the productivity changes in place at all facilities; and, to do so, either the Teamsters had to agree to Overnite’s proposed changes or the parties had to bargain to impasse.

On November 15, Lewis wrote Douglas that he wanted Overnite to address at the upcoming November 27 budget meeting, among other things, turnaround plans for 1996; accomplishments since the October 17 meeting and “[u]pdate on Teamster organizing campaign, plans to take out labor and other labor issues.” By November 20, Douglas had determined to increase wages by 50 cent-an-hour (he so told Mike Eastman, the manager of the terminal operations improvement project), and to pay for overtime after an employee worked 47 hours (but Overnite’s managers were not to schedule overtime). The wage increase would be paid for through significant productivity changes that would affect all facets of the employees’ jobs. Notwithstanding what Douglas told Eastman, according to Douglas, he had not finalized the amount; and, when Union Pacific and Overnite management met again on December 1 to discuss the proposed budget, Overnite proposed only a 40 cents’ wage increase.<sup>90</sup>

By December 7, the plan was set. Then, Overnite conducted conferences by satellite with managers from all its service centers to brief them on certain productivity changes that would be implemented during 1996 and provided a lengthy guide to use in presenting the productivity changes to the employees. It was very important to Douglas that the employees hear first about the productivity changes in a way that Overnite had determined was the best for them. On December 11, Respondent made its presentation to all its employees, with certain exceptions detailed below, of the 1996 wage increases and the productivity changes. That included the showing of a videotape of Douglas; and the employees were given supporting documents and then participated in a question and answer session with their managers, all in an effort to maximize the likelihood that the employees would “buy in” to the proposed changes.

As of this time, the Board had certified, and Overnite had recognized and commenced bargaining with various Teamsters locals as the representative of units (recognized units) of employees at Chicago, West Sacramento, Kansas City, Blaine, Indianapolis, Grand Rapids, Miami, and Tucson. In about October, the Teamsters formed a national committee to coordinate bargaining with Overnite, consisting of, among others, its chairman, Frank Busalacchi, Thomas Nightwine, and committee counsel Kurt Kobelt. Thereafter, the committee bargained with Overnite, represented by attorneys Pollard and John Raudabaugh, at various locations where a Teamsters local represented Overnite employees, with the understandings that coordinated bargaining would not alter the scope of the represented units and that any agreements reached would apply only to the single facilities.

On November 21, in Indianapolis, the day after Douglas told Eastman that there was going to be a 50-cents-an-hour-increase, Pollard told the committee: “Overnite typically makes im-

provements at the first of the year if it is to make improvements, it depends on the conditions. We hope to make that decision by the first week of or week of December whether [there would be] any improvements.” He asked whether the committee wanted to bargain any improvements, if made. Kobelt replied that the committee would get back to Overnite, which he did, in a letter, dated November 30: “It is the Union’s position that this wage increase is an established past practice of Overnite, and that, as you are obligated to maintain the status quo pending a collective-bargaining agreement, the wage increase must be extended to employees represented by Teamster locals.” The national committee maintained this position throughout negotiations.

The videotape announcing the 1996 increase was not shown to the employees at the recognized units. Instead, on December 11, Pollard sent a packet of material to Busalacchi, by overnight mail, to support Overnite’s proposed 1996 productivity agreement. The proposal applied to the recognized units and six other units for whom the Board had certified Locals, but Overnite refused to recognize them,<sup>91</sup> or where the Board certifications were pending<sup>92</sup> (nonrecognized units). Overnite proposed that the agreement would be effective on January 1, 1996, retroactive to January 1 if signed by February 15, or on the date of execution if after February 15. Among Overnite’s proposals were to increase wage rates by 50 cents-per-hour, together with a commensurate mileage increase; enhancements to medical and life insurance benefits;<sup>93</sup> no increase for employees of their cost of medical insurance for 1996; and, effective July 1, 1996, overtime pay of time and one-half for hours worked in excess of 47 hours per week.

In exchange, Overnite sought the national committee’s agreement that Overnite would have the right, within certain limitations, to “[s]et, change and cancel days and hours of work” for all job classifications; and, within certain limitations, to “[s]et . . . schedules, routes and running times for road drivers and city drivers.” The limitations would be inapplicable in the event of “extraordinary circumstances such as slowdown, strike, unanticipated fluctuations in freight volumes and/or employee unavailability.” Overnite further proposed that it would have the right to “[a]ssign and reassign work and equipment” with the understanding that employees who were temporarily assigned to a different job classification would be paid at the higher of the employee’s regular or temporary rate, and bidding for runs by seniority would be conducted no more than four times each year. In addition, it proposed that it would have the right, within certain limitations, to “[i]nvoluntarily separate within job classifications by Company seniority at each service center to effectuate productivity improvements and/or in response to productivity improvements.” The limitations would be inapplicable, up to a certain percentage of the persons employed in the job classification, in “extraordinary circumstances causing larger separations, such as full or partial service center closure, consolidation, relocation or substantial or unanticipated reduction of freight volumes for any reason.”

Overnite further proposed that it would have the right, within certain limitations, to “[c]ontract for casual or temporary per-

<sup>90</sup> I have doubts about Douglas’ narration, because Respondent declined to produce all the documents relating to the alleged December 1 meeting. Nonetheless, this testimony is not determinative of the result that I reach.

<sup>91</sup> St. Louis, Milwaukee, and Rockaway.

<sup>92</sup> Romulus, North Canton, and Atlanta.

<sup>93</sup> The benefits included preventative care coverage, an employee assistance program providing counseling services for various stressful situations, a catastrophic medical plan, and additional dependent life insurance.

sonnel to effectuate productivity improvements and/or in response to productivity improvements and/or to handle seasonal fluctuations in freight volumes.” The limitations would be inapplicable in the event of “extraordinary circumstances causing extraordinary contracting needs, such as slowdown, strike, substantial or unanticipated increases in freight volumes for any reason and/or employee unavailability.” Finally, Overnite proposed that it would have the right, within certain limitations, to “[d]ivert freight within the linehaul operation to alternative modes and carries to effectuate productivity improvements and/or in response to productivity improvements and/or to handle seasonal fluctuations in freight volumes.” The limitations would be inapplicable in “extraordinary circumstances causing extraordinary diversion needs, such as slowdown, strike, substantial or unanticipated freight volume fluctuation, employee unavailability, full or partial service center closure, consolidation or relocation, linehaul redesign, or changes in state or federal regulation.”

Also enclosed with Pollard’s December 11 packet was a letter from Douglas, dated December 5, which stated that, despite having suffered a loss of approximately \$10 million, and despite facing a tough economic environment and rigorous competition, Overnite was granting employees a 50-cents-an-hour increase and a commensurate mileage increase to be effective the pay period starting on December 31. Douglas announced that Overnite was also enhancing other benefits. Finally, Douglas advised that, absent significant volume gains, a reduction of the work force would be likely. Pollard also enclosed proposed new wage rates by classification, an explanatory booklet concerning new health benefits, an explanation of the proposed productivity agreement, and a videotape containing Douglas’s explanation of the productivity agreement. The written explanation and videotape repeated and expanded on the contents of Douglas’s December 5 letter.

Pollard sent the December 5 letter and the health benefits booklet only to Busalacchi. Pollard sent both Busalacchi and the employees in the nonrecognized units the remaining documents, except that the title and introductory paragraph of its explanation of the productivity agreement were modified in the document that was sent to the employees. He also sent substantially identical cover letters and proposed productivity agreements to all of the Teamsters locals that Overnite did not recognize and offered to bargain with them solely about the productivity agreement, without recognition that they represented the units. He also sent them the other documents that he had sent to Busalacchi.

On December 13, 2 days after Pollard mailed his packages, and 1 day after the Union received the proposal, Respondent held meetings at the 14 service centers represented by the Teamsters, represented by Busalacchi, or certified by the Board. The meetings had the same format as those Overnite held on December 11 at all the other service centers, which included those which are the subjects of *Gissel* bargaining order requests in this proceeding. Negotiations continued on December 15 in Chicago, where Pollard asked if the committee wanted to respond to Overnite’s proposed productivity agreement. Busalacchi replied that he was not prepared to respond that day, that he would do so when the parties next met in Minneapolis, and that the committee would discuss Overnite’s proposal in the context of an overall agreement, a position that the committee repeatedly restated and never changed. The parties next met in Minneapolis on December 18 and 19 and discussed

fully the productivity agreement, the committee asking questions, among others, about the proposal’s effect on the Blaine terminal. Pollard responded that he did not know what the effect would be, but Overnite needed flexibility and needed to implement the proposal. He added that the productivity agreement would replace all past practices and that one difference between the proposal and current practice was that employees would have the right to exercise seniority rights and change service centers.

In Kansas City shortly before Christmas, Overnite’s negotiators told the committee that the productivity agreement could be negotiated on a location-by-location basis. One of the Union’s negotiators said that the committee was unwilling to negotiate that agreement until Overnite responded to a forthcoming information request, which was supplied on January 12, 1996, when Busalacchi stated that the national committee was bargaining for all 14 units. By letter dated January 26, the committee stated that it could not engage in meaningful bargaining without the requested information and reiterated its position that it would discuss productivity improvements only as part of an overall contract. On February 15, Pollard supplied some of the requested information; and, in a letter the same day, stated that Overnite would furnish the additional information upon execution of an agreement to keep that information confidential. That led to extensive negotiations over the scope of a confidentiality agreement, culminating in agreement on March 1, the furnishing of the balance of the requested information, and the compliance with the committee’s request to allow its consultant to examine Overnite’s books.

From early 1996, the parties continued to talk around, if not about, Overnite’s proposed productivity agreement. Once again, by letter dated February 26, the national committee advised Overnite that it preferred to discuss productivity issues as part of an overall agreement, and that position applied equally to the eight units that Overnite recognized and those six that it did not. Whether Overnite continued to press its productivity agreement separately, as Raudabaugh testified that it did at each negotiating session, or, according to Nightwine, never mentioned it again, and I am inclined to believe Raudabaugh, makes little difference. The parties continued to meet, but the lines were clearly drawn: Overnite wanted to bargain the productivity agreement alone concerning the six units that it refused to recognize, but the national committee continued its position that it would negotiate productivity improvements as part of an overall agreement for all the units. Finally, at negotiations in Chicago on July 30 and August 1, at which time Overnite had begun to consolidate the facilities, with two of the contested units, Rockaway and North Canton, already closed, Pollard advised the national committee (confirmed by letter of August 2) that, because no bargaining had taken place as a result of the Teamsters’ position on overall bargaining, Overnite declared an impasse and intended to unilaterally implement the productivity agreement for the six nonrecognized units, effective August 4.

The complaint<sup>94</sup> alleges that (1) Overnite bypassed the Union and engaged in direct dealing by holding meetings with and

<sup>94</sup> Respondent seeks to reargue the propriety of my consolidation of this unfair labor practice complaint in this proceeding. The record adequately protects Respondent’s rights, and I will not burden this Decision with a repetition of what I have already disposed of, with the exception of noting the Board’s decision in *Service Employees Local 87*

explaining the productivity agreement to the employees in the Teamsters-represented units, before or without adequately negotiating with the Teamsters; and (2) that Overnite unilaterally changed its employees' terms and conditions of employment by not giving the wage, mileage, and fringe benefit improvements to the employees in the recognized units and by implementing the terms of the productivity agreement for the employees in the six nonrecognized units.

The obligation to bargain collectively requires the "recognition that the statutory representative is the one with whom [Overnite] must deal in conducting bargaining negotiations, and that it can no longer bargain directly or indirectly with the employees." *General Electric Co.*, 150 NLRB 192, 194 (1964), *enfd.* 418 F.2d 736 (2d Cir. 1969), *cert. denied* 397 U.S. 965 (1970). What Overnite did here was to send by overnight mail its productivity agreement to the Union, wait 1 day, and then make its presentation to the employees directly, 2 days before negotiations were to or did resume. That bypasses the Union in the same way as if Respondent never made any proposal at all to the Union, and Respondent certainly gave the Union no adequate opportunity to digest the proposal or to respond or to begin discussion. *Detroit Edison Co.*, 310 NLRB 564 (1993). There is no record support for Respondent's contention in its brief that its announcement on December 13 was intended "to quell rumors about the status of represented employees vis-à-vis" the presentation given to the unrepresented employees 2 days before. In light of the care taken by Respondent and its decision on October 17 to present the proposal in the way it wanted, Respondent's claim is improbable, at best. Nor is there support for Overnite's contention that it wanted the Teamsters' cooperation: it never consulted with the Teamsters before making its offer, even though it began testing Kearney's recommendations as early as August.

The violation is particularly egregious because Overnite knew, no later than December 7, 1995, when it briefed and prepared its service center managers, what it was going to propose and had been working on the productivity changes since prior to its meeting with Union Pacific on October 17, at the latest. Overnite and Union Pacific leadership also concluded that it would be "much more effective" to make the productivity package palatable by dealing directly with the unionized employees rather than having to deal only with their bargaining representatives; and so the conscious effort was made to bypass the national committee.<sup>95</sup> That Respondent wanted to present its proposal directly is shown by the failed attempt of Darryl Connell, an organizer for Teamsters Local 200, the certified representative of a unit in Milwaukee, to attend the meeting where the productivity agreement was being presented, Service Center Manager Michael Jeske insisting that he would call the police unless Connell left. It was also meant to pressure the employees at the recognized facilities by indicating that whether they re-

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(*Cresleigh Management*), 324 NLRB 774 (1997), which further supports my ruling during the hearing.

<sup>95</sup> During a question-and-answer period following the presentation of the productivity package by Schager in Atlanta, an employee commented that the Teamsters would file charges concerning what Overnite was doing. Another employee asked what Schager would be charged for. Schager answered: "Because we didn't notify the Union that we were having this meeting. We don't, we won't notify the Union any more on anything. That's the whole point of this on the productivity package and so forth. We now will make changes as we see 'em so we can get our company back to profitability."

ceived the wage increase was in the hands of their Union. Thus, Kelly Washler, a bargaining unit employee at the Indianapolis service center and a Teamsters' alternate steward, asked Manager John Jennings at a meeting whether the Indianapolis employees would receive the wage increase in January. Jennings responded that the employees would have to consult their Union. Another employee asked if the increase would be retroactive, like the last increase, which was not paid when the other employees were paid. (That was paid pursuant to the settlement agreement.) Jennings again referred the employee to the bargaining representative. I conclude that, regarding the recognized units, Respondent violated Section 8(a)(1) of the Act.

Since 1980, Overnite had a regular practice of granting across-the-board annual wage and mileage increases to all its employees. That was never broken.<sup>96</sup> From 1984 to 1990, Overnite paid the increase at the beginning of July; from 1992 to 1996, at the beginning of the year. Although it deliberately withheld the March 1995 increase from the four certified units, that increase was not the regular increase. The increase the previous January was, and, even then, Respondent increased the wages of *all* its employees, despite the fact that certifications had issued in West Sacramento and Kansas City. Similar increases have historically been granted after notice to the bargaining representative at Overnite's represented facility in Chicago. These system-wide, across-the-board increases, consistent within each job classification,<sup>97</sup> have become an established employee term or condition of employment.<sup>98</sup> *Dynatron/Bondo Corp.*, 323 NLRB 1263 (1997), citing *Daily News of Los Angeles*, 315 NLRB 1236 (1994), *enfd.* 73 F.3d 406 (D.C. Cir. 1996); *Fieldcrest Cannon, Inc.*, 318 NLRB 470, 471-472 (1995), *enfd.* in part 97 F.3d 65 (4th Cir. 1996); *L & M Ambulance Corp.*, 312 NLRB 1153 *fn.* 2 (1993).

The duty to bargain in good faith, protected under Section 8(a)(5) of the Act, is defined by Section 8(d) as the duty "to meet . . . and confer in good faith with respect to wages, hours, and other terms and conditions of employment." "[A]n employer's unilateral change in conditions of employment under negotiation is . . . a violation of § 8(a)(5), for it is a circumvention of the duty to negotiate. *NLRB v. Katz*, 369 U.S. 736, 743 (1962). Overnite could not unilaterally change that established term, and its doing so violated Section 8(a)(5) and (1) of the Act. *Rocky Mountain Hospital*, 289 NLRB 1347, 1348 (1988); *NLRB v. Katz*.<sup>99</sup> Respondent's arguments, when carefully analyzed, are nothing more than arguments previously rejected by

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<sup>96</sup> Respondent contends that no increase was given in 1991. That is true, but was caused by Respondent's decision to delay the regular October 1991 increase for 3 months, until January 1992. Except for that one 15-month period, increases have been given every 12 months.

<sup>97</sup> Except for the year in which PIP was instituted, the increase for a city driver varied between 30 and 50 cents.

<sup>98</sup> The General Counsel contends that Respondent admitted as much in its answer. If the complaint alleged that the yearly increase was an *established* term and condition of employment, I might agree. But the complaint alleged only that the increase of wages and mileage, fringe benefit improvements, overtime, and nonwage improvements were all terms and conditions of employment; and I find Respondent's admission of that allegation did not intend to concede the underlying fact on which this allegation was based.

<sup>99</sup> The Board has indicated that it will be "particularly vigilant in scrutinizing bargaining when an employer proposes to change terms of employment during initial contract negotiations, recognizing that such changes can jeopardize the efficacy of a newly certified union." *Central Maine Morning Sentinel*, 295 NLRB at 379.

the Board and by the majority of the circuits. Indefiniteness of the amounts of the otherwise regular yearly increase and “a flavor of discretion” do not prevent them from becoming terms and conditions of employment. *Eastern Maine Medical Center v. NLRB*, 658 F.2d 1, 8 (1st Cir. 1981). For example, in *Central Maine Morning Sentinel*, 295 NLRB 376 (1989), the Board held annual wage increases established practices, despite the fact that they varied from 4 to 8.9 percent.

Respondent contends that the manner in which it decided on increases varied from year to year, but Douglas testified from his experience that a salary survey was performed at least every other year, either directly by Overnite’s human resources staff or using a formal survey prepared by the American Trucking Association, in which Overnite participated, to get data by job class about other carriers. The survey by the Association was conducted in even years, but companies would supply data about that year and make projections about what they intended to do the following year, making the survey useful for 2 years. In addition, Douglas stated that Overnite missed a survey during his tenure only in 1993. Finally, because competition is so important in the trucking industry, it is probable that companies would attempt to remain competitive in their pay rates, to avoid the very problem that Douglas claimed (although I found falsely) prompted the March increase. Accordingly, I conclude that Overnite, although obviously using discretion, generally used the same kind of statistics in formulating its final decision of an appropriate yearly increase.

Overnite’s brief claims that it had no practice for pay increases in years that it lost money, but that did not stop its decision to grant the March increase, despite the fact that that increase would cause it to lose money. Furthermore, Respondent could have granted no increase in 1996, but it did so for 92 percent of its service centers, continuing its established practice of yearly increases and holding back on only the ones that had voted for the Teamsters.<sup>100</sup> If Overnite really had problems, it could have availed itself of *Bottom Line Enterprises*, 302 NLRB 373 (1991), enf. mem. sub nom. *Master Window Cleaning, Inc. v. NLRB*, 15 F.3d 1087 (9th Cir. 1994), which holds that:

[W]hen, as here, parties are engaged in negotiations for a collective-bargaining agreement, an employer’s obligation to refrain from unilateral changes extends beyond the mere duty to provide notice and an opportunity to bargain about a particular subject matter; rather it encompasses a duty to refrain from implementation at all, absent overall impasse on bargaining for the agreement as a whole.

In *Bottom Line*, the Board noted two exceptions to this general rule: when a union engages in tactics designed to delay bargaining and “when economic exigencies compel prompt action.” *Id.* at 374.<sup>101</sup> What Respondent did was in reverse. It had a duty to refrain from unilateral changes. That meant that it could not carve out from its approximate 174 service centers 14 whom it would not give the established yearly increase. Because the 160 service centers were nonunion, it had the right to impose on the employees any changes it wanted, including all of the productivity agreement’s provisions for changes of employment. But, regarding its unionized facilities, if it thought

that those provisions were compelled by economic exigencies, as it insisted in this proceeding, then *Bottom Line* provided a method for immediate bargaining and, upon impasse, piecemeal implementation. Overnite did not do so, preferring to put the pressure and the blame on the Union by withholding the wage increase, demonstrating that blame and the Teamsters’ campaign were more important than the alleged compelling reasons for the change. Accordingly, I reject Respondent’s contention that it fulfilled any bargaining obligation that it had.<sup>102</sup>

On the other hand, while the General Counsel proved Overnite’s historical practice of granting yearly wage increase, there was no proof that Overnite had any established practice relating to fringe benefit improvements. All that the record reveals is that in some years Overnite improved its benefits. Without proof of a practice and consistency in granting them—and there is no pattern of the type of benefit improvement or the time of the year or the interval between improvements—a change of the benefits cannot be an established term and condition of employment. I conclude that Respondent violated Section 8(a)(1) of the Act only with respect to the failure to give the wage and resultant mileage rate increases and will dismiss that portion of the complaint that alleges that the failure to grant the fringe benefit improvements violated the Act.

Respondent gave all the rest of its employees the wage increases and imposed the “productivity improvements.” However, if the certifications of the certified, but not recognized, units, are eventually upheld, Respondent would not have been entitled to change the terms and conditions of the employees there, because Respondent was required to bargain with the Locals (or the committee) before making any changes to their terms or conditions of employment. It acted at its peril in doing so while challenging the Teamsters’ status as the exclusive bargaining representative. *Mike O’Connor Chevrolet*, 209 NLRB 701, 703 (1974), enf. denied 512 F.2d 684 (8th Cir. 1975). Although Overnite offered to negotiate its proposed productivity agreement, it otherwise refused to recognize and bargain with the exclusive representative; and its offer, which was rejected by the national committee, constitutes conditional bargaining that the Board does not condone. *Dickerson-Chapman, Inc.*, 313 NLRB 907, 943 (1994); *Specialized Living Center*, 286 NLRB 511, 514–515 (1987), enf. 879 F.2d 1442 (7th Cir. 1989).

Accordingly, I conclude that Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally changing the terms and conditions of employment of the employees at the non-recognized units, assuming, of course, that the certifications are ultimately approved by the appropriate legal body. Furthermore, the same legal theory applies to the various service centers where the General Counsel is seeking *Gissel* orders in this proceeding. As found below, Overnite was obligated to recognize and bargain with the Teamsters in the four units that are the subject of this portion of the bargaining order case; and I conclude that Respondent bypassed the Teamsters and directly dealt with the employees at those units and unilaterally changed their terms and conditions without bargaining. I will withhold, however, an order on the *Gissel* cases that I have yet to hear in this proceeding pending determination of the Union’s majority

<sup>100</sup> Record evidence demonstrates that Respondent granted another increase of 45 cents in 1997.

<sup>101</sup> See also *RBE Electronics of S.D.*, 320 NLRB 80 (1995).

<sup>102</sup> To the extent that Respondent relies on *Stone Container Corp.*, 313 NLRB 336 (1993), and *American Packaging Corp.*, 311 NLRB 482 (1993), see the Board’s discussion in *Daily News of Los Angeles*, 315 NLRB at 1240–1241.

status and whether there were unfair labor practices committed that would justify the recommendation of a bargaining order. To that extent, I will retain jurisdiction of this issue.

There are two additional unfair labor practices alleged in the complaint. One charges that Respondent withheld the increases from the recognized units because it intended to discriminate or retaliate against them, in violation of Section 8(a)(3) and (1). I agree, for the reasons expressed above relating to the March 1995 increase. Just as the merit increases in *Daily News of Los Angeles* were held to be established terms and conditions of employment that could not be unilaterally changed, these are, too. For example, under the merit-pay program there, the “salary increase, if any, is based on merit, and may range from no increase to a substantial increase depending on the perceived efforts and ability of the employee, and his or her value to the [employer]. The amount of the increase, if any, is totally discretionary.” 304 NLRB 514. Here, the wage increase was based on the factors that Overnite looked at each year, including what its competitors were paying, and the amount of the increase depended on how Respondent’s management assessed Respondent’s performance and the economic climate, which included increases in the cost of living. With the exception of the one 3-month delay and the unsatisfactory PIP program, Overnite paid increases based on its yearly evaluation, a pattern and practice of the Company. Indeed with the announcement of the March 1995 increase, *The Overniter* advised the employees that the March increase would not result in the regular wage increase being moved to March, rather than keeping it in January: “The wage adjustment does not change the company’s plan to consider a general wage increase effective January, 1996.” As in *Central Maine Morning Sentinel*, 295 NLRB 376, 378 (1989), “Given the consistency of the Respondent’s practice, the work force was surely entitled to regard [the raise] as a permanent element in their wage structure program.”

In fact, the employees expected and anticipated the increase. Thus, when Douglas described the mood in the fall of 1991, he stated that a pay increase was “expected” by the employees in October, just as an increase had been given, according to Douglas’s memory, for the prior seven years. Douglas testified that the rationale for the amount of the lump-sum, one-time payment in 1992 was “dollars and cents wise a full expected increase.” He described the debate over the lump-sum payment being caused by a concern that Overnite was changing its pay practice: “Base wage increase[s] without any other frills or incentives or lump sum bonuses or whatever you call them, that is the history of the tradition . . . of Overnite and its pay practices.” Heaton was very concerned that departing from that practice “would be difficult . . . for people to understand.” And Douglas was concerned, too, for the payment was “a departure from tradition.” In relating how he calculated the amount of the March 1995 increase, Douglas testified that he looked at the “normal increases” that the employees should have received earlier. Even Pollard’s first, tentative announcement at negotiations of the possibility of a forthcoming increase—“Overnite typically makes improvements at the first of the year if it is to make improvements, it depends on the conditions”—demonstrates that Overnite had the practice that it now denies.

With Overnite’s tradition and its employees’ expectations, even at Chicago, where the employees had designated the Teamsters to represent them but were still paid their yearly increases, at least a reason that Overnite withheld it from the represented employees was to retaliate against them for their

union sympathies. *Phelps Dodge Mining Co.*, 308 NLRB 985, 995–998, enf. denied 22 F.3d 1493 (10th Cir. 1994); *L & M Ambulance Corp.*, 312 NLRB at 1157–1157. In addition, Respondent publicized the withholding of the increase to demonstrate that voting for the Teamsters presented serious, adverse consequences. Thus, Overnite distributed antiunion campaign flyers stating that employees in the represented units were 50 cents per hour behind nonunion employees after the 1996 wage increase and blamed the Union for refusing to allow the employees it represented to accept the increase and refusing to bargain about the increase.<sup>103</sup> As held above, the grant of benefits to unrepresented employees and the withholding of those benefits from represented employees, when accompanied by statements encouraging employees to abandon collective representation in order to secure the benefits, is “clear evidence of unlawful 8(a)(3) motivation.” *BF Goodrich Co.*, 195 NLRB 914, 915 fn. 4 (1972). I conclude that Respondent violated Section 8(a)(3) and (1) of the Act.

The second allegation complains that the “productivity increase” offer to all the employees was intended to dissuade them from their support of the Teamsters. Had Overnite in March 1995 granted the array of extra benefits that it provided in January of the next year, the complaint would plainly be meritorious. After all, what Overnite provided touched on, at least partially, grievances that Overnite had learned about as a result of the troubleshooters’ illegal solicitations. For the first time it addressed the lack of overtime, certainly one of the biggest sources of discontent. In addition, Overnite’s package included provisions dealing with bidding for routes, requests for time off, protections against subcontracting, and the use of temporary or casual employees. When Overnite finally made its offer, despite its net loss in 1995, it granted a wage increase and added health insurance benefits, with no increase in costs to the employees.

The issue raised by the complaint is whether these changes were intended for the unlawful purpose of dissuading employees from supporting the Teamsters, as the General Counsel contends, or, as Overnite contends, to “buy” flexibility and productivity improvements. My findings regarding the Bridgeton service center are helpful. There, Overnite promised repeatedly that the employees would see substantial improvements in their 1996 conditions of employment. Furthermore, there is ample evidence that the October 17 Union Pacific-Overnite meeting was devoted to an attempt to offer employees a proposal that would not tend to foster their support of the Teamsters. However, a mere showing that Overnite lost money in 1995 does not prove that it would have disregarded its traditional yearly wage increase, and even the General Counsel claimed (although I did not agree) that improvements of health benefits was an established condition of employment. The record does not supply enough to persuade me that these changes were linked with any illegal purpose. I thus find, under *Wright Line*, 251 NLRB 1083, no prima facie case as to them. However, as to the remainder of the offer, there is ample proof that the General Counsel has presented a prima facie case that the offer was made for purposes unlawful under the Act.

To show under *Wright Line* that it would have made the same offer, even without its unlawful motive, Respondent

<sup>103</sup> Additional flyers, apparently issued after Respondent increased wages in 1997, called attention to the fact that the nonunion employees earned 95 cents more than those represented by the Teamsters.

proved that it was proposing some drastic remedies, to close and merge service centers (it closed 13 centers in 1996), resulting in the layoff of more than 2000 employees, and to alter, fundamentally, the way many of the employees did their work, potentially shortening their hours and changing their work assignments, with little advance notice. Many of the changes about which the General Counsel complains were intended to make the pain of those remedies less harsh and to give some minimal protections to the affected employees; and I find sufficient proof from the Kearney report that Respondent would have provided them, as Kearney suggested, even in the absence of its illegal motive. I do not find that to be so regarding the overtime provision. Overtime was an issue that was widespread in the campaign, and Respondent's offer was an obvious response to the complaints of the employees and, in fact, could be anticipated from many of Douglas' conversations with employees early in 1995. It would have been difficult for him to renege on his promises without further erosion of employee support. In that respect alone, I conclude that Respondent did not prove that it would have made the offer, without its unlawful intent. In so finding, Douglas' explanation that he offered premium pay for overtime as a "reward" to employees because "management discipline needed to increase rather dramatically" is unreal.<sup>104</sup> That Douglas may have told the employees in his videotape that it was incumbent upon management to control the amount of overtime it would require, may have warned employees that management would be none too generous with its assignment of overtime. Nonetheless, there was a new "reward," premium pay, that employees never before were given.<sup>105</sup>

#### V. JOHNNIE'S POULTRY

While preparing for the hearing involving the Louisville service center, counsel for Respondent interviewed employees at the terminal and distributed an eight-page questionnaire. The General Counsel does not dispute that counsel's purpose was to obtain information to assist in the hearing and that the method and manner of the interviews comported with the procedural safeguards required under *Johnnie's Poultry*, 146 NLRB 770 (1964). Indeed, the General Counsel concedes that almost all eight pages of questions asked about Respondent's alleged misconduct were potentially relevant to the allegations of the complaints or the propriety of the *Gissel* bargaining order sought by the General Counsel. (For example, the General Counsel does not object to the questions: "Did management do or say anything that threatened you? If so, what? If yes, did it affect the way that you voted?" and "Did a wage increase affect the way you voted?")

However, the General Counsel alleges that five other questions "exceeded the limited scope of inquiry allowed for such

<sup>104</sup> In June 1996, as a result of employees' complaints, Overnite changed its overtime policy again by allowing employees to "opt out" of their entitlement to time and a half pay after 47 hours, thus permitting them preference in being selected to work overtime, but at their straight-time rate—further support that "management discipline" had nothing to do with Douglas' original decision.

<sup>105</sup> Overnite asserted the attorney-client and other privileges with respect to two documents ("Implementation challenge: balancing employee relations/labor law issues and productivity gains") relating to the October 17 meeting. Because it refused to submit these for my in camera inspection, I cannot determine whether the privilege was properly invoked. However, neither the General Counsel nor the Union has urged that I make any adverse inferences.

employee interrogations and, without justification, unlawfully pried into union matters," relying on *Johnnie's Poultry*, supra at 774–775:

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

These are the questions:

#### (1) Did anyone ask you to sign a union card or petition?

**Who?** The General Counsel does not object to the first question, but contends that asking the name of the solicitor exceeded the legitimate purpose of preparing a defense because the inquiry delved into the union activities of other employees. In *Oscro Drug, Inc.*, 237 NLRB 231 (1978), the Board found that in a *Gissel* case, an employer was entitled to inquire "as to whether and under what circumstances, individuals executed union authorization cards." Id. at 236. The Lawrenceville hearing that preceded the Louisville hearing demonstrated the detail in which counsel attacked the integrity of the authorization cards, and the question "Who?" was an integral part of the signing process. For example, if it was found that one solicitor told several signers that dues and initiation fees would be permanently waived, counsel would legitimately want to know who else that solicitor spoke with.

The General Counsel relies on *Salvation Army Residence*, 293 NLRB 944, 973 (1989), enf. mem. 923 F.2d 846 (2d Cir. 1990), but there the employees were given no assurance that they would be free from reprisal. Furthermore, although it is true that the Board stated that the question violated Section 8(a)(1), it also stated that asking the employee whether he had signed a card was also a violation; and the General Counsel concedes that that was not. As to the objected-to question, it is clearly in conflict with *Oscro Drug*. See also *Standard-Coosa-Thatcher, Inc.*, 257 NLRB 304 (1981), enf. 691 F.2d 1133 (4th Cir. 1982), cert. denied 460 U.S. 1083 (1983). Often, the later date of a Board decision governs; but, here, in preparing for a bargaining order case, there were a number of ways that the General Counsel could have proved a majority, and one was by the testimony of the solicitor of the card. For the purposes of preparation for trial, the obtaining of the name of the solicitor is well within the needs of the attorney and is a proper subject for questioning. I conclude that the language in *Salvation Army Residence* is too broad and that it is not a violation of Section 8(a)(1) to ask that question.

**(2) If you didn't sign the card or petition the first time you were asked, why did you sign it when you were asked to do so again?** All this asks for is the operation of the employee's mind, the subjective reasons for signing an authorization card that are irrelevant in assessing whether to credit the card to prove a majority. To the extent that Respondent contends that it was looking for illegal promises and other statements that may have invalidated the card, others of its questions covered those areas. I conclude that this question violated Section 8(a)(1) of the Act. *ITT Automotive*, 324 NLRB 609 (1997).

(3) **Who did you give the card or petition to after you signed it?** Either the card was signed or it was not. The circumstances of the signing are proper subjects for questions. The card does not become invalid because of the identity of the person to whom it was returned. The question merely seeks to pry into union matters and the union activities of other employees and thus exceeds any legitimate purpose for asking it. I conclude that this question violated Section 8(a)(1) of the Act. *ITT Automotive; Plastic Film Products Corp.*, 238 NLRB 135, 145 (1978).

(4) **Did anyone from the Union tell you it was important for you to report to the Union or any employee any problems you had with the Company since the Union needed unfair labor practice charges to help them overturn the election? If yes, who?** Respondent contends that this question does not relate to activities protected under Section 7 of the Act because it does not ask for conversation between employees. First, it clearly asks for participation in union activities, and that is protected. Second, "anyone from the Union" could mean an employee who is representing the Union, so in that sense the question asks for conversations between employees, protected under Section 7. Finally, the subject of the inquiry is irrelevant to anything under attack in the unfair labor practice complaint. During the hearing, I found irrelevant the fact that the Union may have fostered the filing of charges. Under the Act, anyone may file a charge. What is relevant is the substance of the charge, insofar as that becomes the subject of a complaint before an Administrative Law Judge. I conclude that this question violated Section 8(a)(1) of the Act. *ITT Automotive*.

(5) **Have you given a statement to anyone else regarding the election or the Company's or the Union's conduct?** The Union's conduct was not a subject of the complaint. The Union's conduct regarding the obtaining of authorization cards was undoubtedly going to be a subject of the hearing, but the question was not so limited. The Board appears to have approved a question asking whether an employee gave a statement (but not the contents) in connection with the complaint under investigation, and I would probably find not objectionable a question related to a statement given to the Union about the Objections that were the subject of this proceeding. However, the question goes far beyond that permissible area and exceeded the limited scope of inquiry allowed for employee interrogations. I conclude that this question violated Section 8(a)(1) of the Act. *ITT Automotive*.

#### Miscellaneous Objections Cases

A number of additional objections cases were consolidated with this proceeding only to the extent that the objections filed in those cases alleged that Respondent interfered with employee freedom of choice in the elections by announcing, presenting, or implementing the productivity improvements which were the subject of the complaint in Case 18-CA-13916. Because I have found that Respondent violated the Act, as that complaint alleged, I will recommend that the following elections be set aside and referred to the appropriate Regional Director for the setting of new elections at such times and places as the Regional Director determines:

(1) Local 773 filed a petition for an election in Case 4-RC-18747 on November 6, 1995. An election was held on December 14, 1995, which the Union lost, 6 to 16, with two ballots challenged but not sufficient to affect the results of the election. The bargaining unit was agreed upon, as follows:

**Included:** All full-time and regular part-time road drivers, pick-up and delivery drivers, and platform workers employed by Overnite Transportation Company at its Bethlehem, Pennsylvania service center.

**Excluded:** Office clericals, sales employees, guards, professional employees, and supervisors as defined in the Act, and all other employees of Overnite Transportation Company.

(2) Local 639 filed a petition for an election in Case 5-RC-14213 on June 5, 1995. An election was held on November 29, 1995, which the Union lost, 14 to 25. The bargaining unit was agreed upon, as follows:

All full-time and regular part-time dock workers (including leadmen), yard workers, city drivers, over-the-road drivers, OS&D clerks, and mechanics employed by Overnite Transportation Company at the Landover, Maryland terminal; but excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

(3) Local 651 filed a petition for an election at Respondent's Lexington, Kentucky, facility in Case 9-RC-16504 on January 23, 1995. An election was held on April 17, 1996, in which 127 votes were cast for the Union, and 123 against, with 5 ballots challenged, sufficient to affect the results of the election. The bargaining unit was agreed upon, as follows:

All full-time and regular part-time road drivers, city drivers, dock workers, yard jockeys, line haul employees, maintenance employees and janitors, but excluding all other employees, all office clerical employees, professional employees, guards and supervisors as defined in the Act.

(4) Local 651 filed a petition for an election at Respondent's Lexington, Kentucky, facility in Case 9-RC-16505 on January 23, 1995. An election was held on April 17, 1996, which the Union lost, 9 to 42. The bargaining unit was agreed upon, as follows:

All full-time and regular part-time motor mechanics, parts room employees, tire chanter, pump attendants, shop leadman and the shop maintenance employee, but excluding all other employees, all office clerical employees, professional employees, guards and supervisors as defined in the Act.

#### THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I will order it to cease and desist from further violations, except for the 8(a)(1) violations that have already been remedied by the settlement agreement, and to take certain affirmative action designed to effectuate the policies of the Act.

That involves a reconsideration of the General Counsel's request for *Gissel* relief, preliminarily discussed above. The dispute arises within the jurisdiction of numerous circuits, and, of course, the Court of Appeals for the District of Columbia also has jurisdiction. *Skyline Distributors*, 99 F.3d 403 (D.C. Cir. 1996), presents a problem, if ultimately an enforcement proceeding should be heard there, with respect to the Bridgeton service center. The election at Bridgeton was held before Overnite announced in *The Overniter* not only the increase but also the denial of the increase to those who had voted for the Union in Board-conducted elections. In addition, the election was held before the revision of the speed and mileage limits and rein-

statement of the safety dinners. All that the Bridgeton case concerns, therefore, in addition to the announcement or the increase, were some bulletin board violations and promises of better times to come. There was also some mention of the Chicago bargaining, but not with the intensity exhibited at other locations. As a result, the Bridgeton proceeding is by far the closest to the kind of pure grant of wage increase case, without the “negative acts of reprisal,” *Skyline Distributors*, 99 F.3d at 410, that so troubled the court of appeals. Indeed, the notion that the violation is so serious that no fair election may be held is undercut by the Union’s success the same day in its election at Hall Street, only 17 miles away, from which many of the Bridgeton employees came. Nonetheless, as Respondent recognizes in its brief, an administrative law judge is bound by Board law, unless and until the Supreme Court or the Board rules otherwise. *Hillhaven Rehabilitation Center*, 325 NLRB 202 fn. 3 (1997), citing with approval *Iowa Beef Packers, Inc.*, 144 NLRB 615 (1963), *enfd.* in part 331 F.2d 176 (8th Cir. 1964).

But the other three locations are distinguishable from *Skyline Distributors* on the ground that Overnite made so clear that a vote for the Union would mean the loss of future benefits. That was the underpinning of Overnite’s campaign as it developed and, when coupled with the various threats of closing and loss of jobs resulting from the existence of the NMFA and the Teamsters and from rerouting and loss of customers and business, as well as the additional threat that, even if the Union were chosen, bargaining would be futile, the meaning of the threats could hardly be lost on the employees. *Skyline Distributors*, 99 F.3d at 411. And the threats were repeated and reemphasized, first, with the 1995 propaganda that the Teamsters-represented service centers were lagging behind the nonunion centers in pay and, second, with the 1996 increase, which not only was a partial cure of the overtime grievance that was so important in the campaign but also was by Overnite highlighted as further evidence of how far behind in pay the Teamsters-represented centers were.

More specifically, Respondent committed numerous other violations of the Act at each of the service centers. At Lawrenceville, among the violations, it promised better benefits and to form committees to help solve employees’ problems, threatened the loss of the employees’ pension plan, threatened employees with discipline if they supported the Teamsters, invited employees to quit, and threatened that Overnite would lose business and close and that employees would lose work. At Louisville, it solicited and promised to resolve grievances, it actually resolved a grievance, it promised improved benefits, it threatened that it would close if the Teamsters’ drive was successful and would fire all its employees, and it threatened more onerous working conditions. At Norfolk, it threatened diversion of freight and loss of hours and customers and pay and the employees’ pension plan, it threatened employees with discharge and unspecified discipline if they engaged in union activities and supported the Teamsters, it threatened that they would lose their credibility with management, it threatened the inevitability of strikes, and it followed employees to ensure that they would not engage in union activities. Accordingly, there are numerous additional, serious unfair labor practices which support bargaining orders at each of the three other service centers. *St. Francis Federation of Nurses & Health Professionals v. NLRB*, 729 F.2d 844, 855 (D.C. Cir. 1984).

Respondent contends that no *Gissel* orders should issue because the Teamsters won elections subsequent to the unfair

labor practice found herein and that, therefore, the holding of free and fair elections is more than a slight possibility. I have previously denied Respondent’s motion to dismiss all the *Gissel* cases, and there has been no change of facts that requires my reconsideration of that order and no reason to burden further this Decision. I note only that Respondent was aware, at the time it imposed the productivity agreement, that the employees might rebel against the changes that Respondent intended to impose. It may well be that its attempt to get the employees to “buy in” was unsuccessful and that they showed their discontent by voting against the Company. It may also be that Respondent’s promise to grant premium pay for overtime and its subsequent partial removal of that extra “reward” convinced employees that it was better to support the Teamsters. I would not hazard a guess, but the Board’s rule of evaluating the situation as of the time of the commission of the unfair labor practices appears better than lengthy, additional hearings to determine employees’ subjective states of mind, with employees’ testimony having been influenced by their employer’s unfair labor practices. Finally, a free and fair election is not the legal equivalent of an election that a labor organization wins. A free and fair election is one in which none of the participants utilize unfair labor practices or objectionable conduct that may alter votes. I deny Respondent’s motion for reconsideration.

Respondent contends that changed circumstances militate against the issuance of *Gissel* bargaining orders, but the validity of a bargaining order depends on the evaluation of the situation as of the time the unfair labor practices were committed. *Fun Connection & Juice Time*, 302 NLRB 740 (1991). In support of its contention, Respondent cites the delay which has enveloped this proceeding. Without blaming anyone, Respondent is aware of the delay in setting the schedule for the hearing of the issues; its request for a delay after the presentation of the General Counsel’s case at each location so that Respondent could prepare its case; its filing of 1399 pages of its principal briefs, leaving aside its reply brief and numerous motions, some very lengthy, to supplement the record; and the setting for hearing of the numerous 8(a)(3) cases, the settlement discussions, and even a 4-day hearing in Kansas City, before most of that portion of the proceeding settled. Accordingly, although there was certainly a delay, this is a proceeding with numerous issues of extreme importance to the parties; and this kind of proceeding takes time to prepare and try. Respondent should not take advantage of its own actions in order to plead that delay warrants any lesser remedy than would ordinarily be granted.

Respondent contends that a variety of its principals have left their positions: Douglas, Edwards, Harmeier, Mendenhall, Lewis, Grimes, Carter, and Schager. The record fails, however, to establish the complete turnover or replacement of Respondent’s management, who, from top to bottom, are responsible for the extensive antiunion campaign affecting all of Respondent’s employees. Rather, as shown above, although Lewis retired from Union Pacific, none of the other officers did; and I have found that Union Pacific, as Respondent’s parent, had more than a little to say about Respondent’s conduct. Furthermore, as a large corporation, with many service centers throughout the United States, it appears likely that the many officers and managers that remain will continue to enforce Respondent’s institutional commitment to oppose any of its employees being unionized. For example, the troubleshooters have been replaced with a more sophisticated internal corporate group, originally called the “SWAT” team but later “PERT”

(positive employee relations team), whose duties are to stop trouble (which, I infer, includes union organization) as soon as it starts. In October 1995, Goodwin issued a "TEAMSTERS ALERT," notifying all service center managers that the Teamsters had started organizing again and advising:

PLEASE CALL ME, PAUL HEATON OR YOUR ASSIGNED ATTORNEY TO LET US KNOW IF THERE IS ANY KIND OF CAMPAIGN ACTIVITY AT YOUR SERVICE CENTER. IF PAUL OR I ARE NOT AVAILABLE TO TAKE YOUR CALL RIGHT AWAY, CALL THE ASSIGNED ATTORNEY OR HIS BACKUP.

Goodwin, Heaton, and their legal advisers remain.

In approving the 1996 wage increase for all but its unionized employees, in violation of the Act, Respondent has continued to fail to comply with the Act's requirements. There is also nothing that demonstrates that Overnite will necessarily improve. The threats found by the Board in 1989 in *Overnite Transportation Co.*, 296 NLRB 669, and repeated years later, demonstrate that Respondent has not learned as much as it should have. Furthermore, as the Board has stated, violations "are likely to 'live on in the lore of the shop,' and to be passed on from old employees or supervisors to new arrivals, thereby exerting a continuing coercive influence." *DTR Industries*, 311 NLRB at 847 fn. 51 (1993), citing *Bandag, Inc. v. NLRB*, 583 F.2d 765, 772 (5th Cir. 1978); *Salvation Army Residence*, 293 NLRB 944, 945 (1989).

Accordingly, I will recommend that, on request, Respondent bargain with the four Locals that are the exclusive representative of its employees at its Louisville, Lawrenceville, Norfolk, and Bridgeton service centers. I will also recommend that Respondent make whole its employees there and in the bargaining units at its service centers located in Kansas City, Blaine, Indianapolis, West Sacramento, Grand Rapids, Miami, Tucson, St. Louis, Milwaukee, Rockaway, Romulus, North Canton, and Atlanta for the monetary losses suffered as a result of its failure and refusal to grant them its wage and mileage increases, effective on December 31, 1995, as prescribed in *Ogle Protection*

*Service*, 183 NLRB 682 (1970), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

At the request of the exclusive representatives of the unit employees at Respondent's service centers at Chicago, West Sacramento, Kansas City, Blaine, Indianapolis, Grand Rapids, Miami, and Tucson, Respondent shall rescind in whole or in part the overtime portion of the productivity package. At the request of the exclusive representatives of the unit employees at Respondent's service centers at St. Louis, Milwaukee, Rockaway, Romulus, North Canton, and Atlanta, and, provided that their certifications by the Board are upheld, Respondent shall rescind in whole or in part the portions of the productivity package that do not provide wage and mileage improvements.<sup>106</sup>

Because the effect of the unfair labor practices found herein affect all the service centers of Respondent, I will recommend that notices be posted nationwide. Because a number of service centers have been closed, the notices shall be mailed to the employees who were formerly employed there. *Aiken Underground Utility Services*, 324 NLRB 187 (1997), citing *Indian Hills Care Center*, 321 NLRB 144 (1996). The date I have used is the announcement on the March 1995 wage increase, which is the first of the national allegations that would have affected the service centers that have been closed. *Excel Container, Inc.*, 325 NLRB 17 (1997). Finally, I have continued in effect the confidentiality agreement entered into by the parties during the course of the hearing.<sup>107</sup>

[Recommended Order omitted from publication.]

<sup>106</sup> I recognize that the Rockaway and North Canton facilities have been closed, but this relief is granted should they reopen or in the event that there is some other dispute regarding their status.

<sup>107</sup> By letters dated January 31 and February 3, 1997, Kearney's and Respondent's counsels, respectively, narrowed their claims of confidentiality to a limited number of specific pages.