

Insight Communications Company and David Beebe.
Case 25–CA–25583

January 7, 2000

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS LIEBMAN AND HURTGEN

On June 9, 1999, Administrative Law Judge Nancy M. Sherman issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, limited cross-exception, and supporting brief, and the Respondent filed a reply to the General Counsel's answering brief to Respondent's exceptions and an answering brief to the General Counsel's limited cross-exception.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Insight Communications Company, Noblesville, Indiana, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Alan L. Zmija, Esq. and Miriam C. Delgado, Esq., for the General Counsel.

James D. Morgan, Esq. and Michael L. Fantaci, Esq., both of New Orleans, Louisiana, for the Respondent.

Suzanne S. Newcomb, Esq., of Indianapolis, Indiana, for the Charging Party.

DECISION

STATEMENT OF THE CASE

NANCY M. SHERMAN, Administrative Law Judge. This case was heard before me in Indianapolis, Indiana, on March 2–6, 1998, pursuant to a charge filed by David Beebe, an individual, against Respondent Insight Communications Company on September 10, 1997; an amended charge filed by Beebe on October 29, 1997; a second amended charge filed by Beebe on February 11, 1998; a complaint issued on December 31, 1997; and an

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

In affirming the judge's finding that Respondent unlawfully discharged employees, Beebe, Choi, and Phillips, we do not rely on the judge's speculation about the Respondent's policy on length of break-times. We agree with the judge that the Respondent seized on the discriminatees' alleged violation of its break policy as a pretext for discharging them in retaliation against their union activities.

amended complaint issued on February 11, 1998. The complaint in its final form alleges that Respondent violated Section 8(a)(1) of the National Labor Relations Act (the Act) by creating an impression among employees that their union activities were under surveillance; by interrogating employees about their own and other employees' union activities; by promising employees increased benefits and improved terms and conditions of employment if they refrained from union organizational activity; and by threatening employees with loss of benefits if they selected Communications Workers of America (the Union) as their collective-bargaining representative. The complaint further alleges that Respondent violated Section 8(a)(3) and (1) of the Act by increasing employee benefits and wages, and by discharging employees Lonnie Phillips, Ki Young Choi, and David Beebe, to discourage membership in the Union.¹

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

FINDINGS OF FACT

I. JURISDICTION AND THE UNION'S STATUS

Respondent is a corporation with an office and place of business in Noblesville, Indiana, where it is engaged in the installation and servicing of cable television and communications products. During the 1-year periods preceding the issuance of the complaint and the amended complaint, Respondent, in conducting such business operations, purchased and received at its Noblesville facility goods valued in excess of \$50,000 directly from points outside Indiana. I find that, as Respondent admits, Respondent is engaged in commerce within the meaning of the Act, and that assertion of jurisdiction over its operations will effectuate the policies of the Act.

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

II THE ALLEGED UNFAIR LABOR PRACTICES

A. Background

Respondent owns and operates 9 cable-system facilities throughout the United States, and employs about 500 individuals. At all material times, Respondent's key executives in New York, Respondent's human resources manager in New York, and each of Respondent's general managers (but nobody else) had in their possession a "personnel guidelines" booklet which is marked "confidential" and includes the following material:

ORIENTATION

....

1-3. Every manager and every person involved in the orientation of new employees should become thoroughly familiar and communicate the Company's position on unions [sic]. The concepts contained in this statement should be communicated to every new employee shortly after being hired. Although the statement should not be read to the new employee, since this can detract from its effective-

¹ Just before the conclusion of his case in chief, counsel for the General Counsel moved to conform his pleadings to the proof as to minor matters. As I perceive no lack of conformity, I deny the motion as moot.

ness, the statements made to the employee should closely follow Attachment 40 [partly quoted infra]

. . . .

2-2. Although outlined in the first month of employment, the subjects indicated below should become a clear part of the employee's knowledge during the second month of probation.

. . . .

WHY UNIONS AREN'T NEEDED

. . . .

UNIONS

. . . .

1-1. It is the Company's belief that representation of its employees by a union would not be beneficial to either the Company or the employees. We believe in treating our people fairly. Whenever problems arise, every reasonable effort will be made to quickly resolve these problems to the satisfaction of all concerned. A union is not necessary for employees to receive fair, considerate and consistent treatment.

1-2. The Company is committed to job security and a benefits and pay package which is competitive with that of comparable cable television companies in the communities in which we operate. The Company is also committed to provide good working conditions and deal fairly and honestly with all employees as individuals. That is our pledge. No union is needed, or wanted.

When discussing unions with employees:

DO NOT - Threaten an employee with reprisal for participating in union activities.

DO NOT - Threaten or tell an employee they will be fired, lose their job or never be promoted if they participate in union activities.

DO NOT - Question or interrogate an employee about union activity or the union activity of other persons.

DO NOT - Ask an employee how they or other employees would vote in a union election.

DO NOT - Promise benefits, compensation or any other special treatment to an employee in return for opposing a union.

DO NOT - Attend, eavesdrop or spy on union activities.

When discussing union activities with employees:

DO NOT - Give them your opinion, stressing that a union is not needed in the Company to ensure job security or good working conditions.

DO - Listen to employees who will volunteer information of their own free will and thank them for talking to you about it.

DO - Give an employee factual information about unions: that there are dues, fees, fines and assessments; that unions call strikes and can cause disruption; and, that there are many advantages in dealing directly with the Company - without outsiders who cannot run the business.

HOW TO HANDLE GOVERNMENT AGENCY AND OTHER INQUIRIES

1. General

Managers should be prepared for contact by . . . federal government agencies or unions. Improper action can expose the Company to substantial liability.

2. Procedure/Instructions

2-1. Guidelines have been outlined in the attachments for the following situations.

- Unions
- National Labor Relations Board (NLRB)

. . . .

If you have any questions concerning these instructions, please contact, at the office or their home, Vice President of Operations, Executive Vice President of Operations, or President.

Attachment 12, "Orientation Checklist," consists of a document which is to be dated, signed by the appropriate "manager," and filed in the employee's personnel folder. The last item listed under "System Manager - First Orientation Session," states "Explain Policy on Union."

Attachment 40 states, in part, that "if [you] hear of union organizing activity among your employees" (emphasis in original):

HERE IS WHAT YOU SHOULD DO

1. Listen carefully to anything said.
2. Thank any employees who voluntarily give you information.
3. Write down anything reported - record date, time, place, what was said and who said it.
4. Keep your eyes open - observe.
5. Notify your Vice President of Operations or Home Office Manager *at once* by telephone.

DO NOT:

1. Panic . . . remain calm . . . and remember the following:
2. Don't threaten, promise or question any employee about the union.
3. Don't discuss the union with anyone (this doesn't mean you can't be a good listener) until you receive further instructions.
4. Don't terminate or discipline anyone before discussing it with one of the people listed in No. 5 above.

The foregoing material aside, the "personnel guidelines" booklet does not address discharges for union activity, or the actual granting of benefits to discourage union activity. None of Respondent's facilities is unionized.

B. The Union Campaign at Respondent's Noblesville Facility; Alleged Unlawful Interrogation by Plant Manager Karch

During the second week of June 1997,² after discussing the matter with employee Choi, employee Phillips contacted the Union in an effort to organize the Noblesville facility. A few days later, employees Phillips, Dan Soots, Joe Stern, and (perhaps) one or two other employees met with union representatives at a Noblesville Pizza Hut.³ During this meeting, one of the union representatives said that it would be a good idea for the employees to keep "talks" away from management, because in the past some employers had retaliated against employees because of their union activity at work. Some of the employees did in fact try to keep their union activities secret from management.

² All dates hereinafter are 1997 unless otherwise stated.

³ Choi was unable to attend this meeting. Nor was Beebe present.

At all material times, employee Beebe's immediate superior, admittedly a statutory supervisor, was Plant Manager Dennis Karch, whom Beebe regarded as "more of a friend than a supervisor." After work on or shortly before June 25, Karch called Beebe into Karch's office. Their conversation that day covered the subjects of fly fishing and the progress of the work. During this conversation, Karch brought up the subject of the Union. He said he had heard there were "talks of the Union," and asked Beebe what he knew about it and who was involved. Beebe did not tell Karch who was interested in the Union. However, Beebe did say that the employees were having a union meeting on July 10. Karch asked why the employees were interested in the Union. Beebe replied that employees were concerned with safety issues and Karch's "management style."⁴

On the evening of June 25, Karch telephoned Noblesville general manager Douglas Smith (admittedly a supervisor) at home and told him that Karch had spoken with Beebe about interest in the Union. In compliance with the "personnel guidelines" but without consulting them, the "first thing in the morning" of June 26 Smith telephoned James A. Stewart Jr., an admitted supervisor who is Respondent's senior vice president of operations, at his office in New York City. Smith advised Stewart that some employees at the Noblesville facility might be interested in the Union.

My finding as to the date of the Beebe—Karch conversation is based on Stewart's testimony about the date of Smith's message to him and Smith's testimony about the date of Karch's message to him, which testimony is consistent with the date given by Karch. As to the substance of the Beebe—Karch conversation, I discredit as highly improbable Karch's testimony that the subject of the Union was brought up by Beebe as a possible explanation for a service technician's rather "odd" conduct in asking the dispatcher to tell a customer that the service technician could not do anything more for him and had turned the problem over to "maintenance." However, I do not credit Beebe's testimony that during his conversation with Karch, when Karch asked who was involved with the Union, Beebe identified himself, Choi, and Phillips; Beebe's pretrial affidavit states that he did not tell Karch anyone's name.

C. Alleged Violations of Section 8(a)(1) through Vice President Stewart Prior to July 12

1. Background

Company Vice President Stewart's office is in New York, New York, and he resides in Stamford, Connecticut. He periodically visits each of Respondent's nine facilities, such visits ordinarily lasting "a couple of days." In 1996, he visited the Noblesville, Indiana facility three or four times. In 1997, he spent between 21 and 25 days at the Noblesville facility. He visited Noblesville for 2 or 3 days in February or March 1997. Before learning on June 26, 1997, about the union drive at Noblesville, he had anticipated that his next visit there would also consume 2 or 3 days, and he had no specific plans about the date of his visit. During the June 26 conversation when Smith reported to Stewart the existence of a union movement at Noblesville, the two men discussed the problems or concerns that may have led the employees to be discontented. Stewart testi-

⁴ My findings as to the substance of this conversation are based upon credible parts of Beebe's testimony; see *infra*. Karch admitted learning from Beebe, on or shortly before June 25, that there was interest in a union.

fied that he made his July 1 trip to Noblesville immediately after receiving Smith's call about the union movement there, because "when employees discuss Unions they're generally interested in communication, communication issues. And I wanted to . . . make myself available so that if employees wanted to discuss operational issues of the system that we'd be able to do so." This was Stewart's initial first-hand experience in dealing with employees of Respondent who were interested in a union.

Between July 1 and 28, Stewart flew from La Guardia Airport in New York to Indianapolis (inferentially, the airport nearest to Noblesville) on four separate occasions.⁵ During the month of July, he spent 12 nights in an Indianapolis hotel in connection with visiting the Noblesville facility.

On prior visits to the Noblesville facility, Stewart had ridden with the Noblesville "managers" to look at jobsites. In July 1997, Stewart rode into the field with the employees. This was the first occasion he had done this at any of Respondent's facilities; he had been senior vice president of operations for almost a year and a half.

2. Conversations with employees on July 1 and 2

On July 1, the first day in July 1997 when Stewart visited the Noblesville facility, he rode with installer Stern (who had attended the Pizza Hut union meeting) and (perhaps) installer Bryan Buzan.⁶ As to the events on that day, Stewart credibly testified, "I wouldn't call it a warm atmosphere . . . They didn't know me that well . . . weren't really interested in talking with me . . . we went out to lunch [which Stewart charged to his company expense account] and we talked about things in general but I didn't feel there was a lot of openness." Stewart did not ask them about the Union.

On the following day, Stewart rode with service technician Phillips. A quarter-hour or half-hour into the ride, Phillips told Stewart that some people were interested in the Union. Stewart said that he had heard that, and asked why; Stewart testified that this inquiry was due to "I guess . . . my curiosity." Phillips said that Plant Manager Karch berated people, that insurance "deductibles" had been changed, and that the employees resented the fact that the free cable television service which Respondent provided to them no longer included "pay-per-view" programs. Stewart said that the free "pay-per-view" had been discontinued because of Respondent's potential liability to pay-per-view providers and movie companies. Stewart further said that he would look into these concerns and Phillips' comments, and get back to Phillips at a later date (see *infra*, part II,C,3). Stewart did not ask Phillips if he was for the Union or for the names of other people who might be for the Union. That evening, Stewart flew back to New York. He testified that after this conversation with Phillips, Stewart drew New York management's attention to the insurance-deductibles matter, on a date which he was not asked to give (see *infra*, part II,D,2).

When visiting the Noblesville facility later that month, Stewart rode with one or two more employees, and took three or four to lunch, which he put on his company expense account. The record fails to show what they talked about, if anything.

⁵ On the first three occasions, he flew back to New York. On the last such occasion, after two nights in Indianapolis, he proceeded to Louisville, Kentucky.

⁶ Stewart testified at one point that he had ridden with Buzan, and at another point that he had not. Except as to the accuracy of Stewart's memory generally, the question is immaterial.

3. Conversations with employees Phillips and Choi on July 8

Stewart testified that from his conversations with employees during his initial July 1997 visit to Noblesville, he concluded that it would be best to have group employee meetings because the individual things that employees had said they wanted attended to would best be resolved by department. He flew back from New York on the evening of July 7. At 9 or 9:30 a.m. on July 8 (see *infra*, fn. 10), Stewart again joined Phillips in the vehicle he used when driving to his various jobsites.⁷ As soon as they pulled out of the driveway, Stewart said that even though the employees had been talking to the Union, that was not “necessarily” the reason that he wanted to ride with Phillips. Then, Stewart started asking why the employees felt they needed a union, what the employees’ concerns were, and why none of the employees would talk to him about it. Initially, Phillips tried to avoid the questions, but by lunchtime he told Stewart that although pay-per-view was an issue, it was not the main issue, that it was just the straw that broke the camel’s back. Phillips said that health benefits were an issue, verbal abuse from management was an issue, and tools were an issue. Stewart said that he felt “we didn’t need a third party to intervene, that [Respondent] and the employees could take care of the problems on their own.” During this or their July 2 conversation, it was discussed that Phillips was the employee who had called the Union.⁸

Phillips’ last job before lunch that day required digging up some cable. Stewart helped him to perform this digging. After the cable had been exposed, the two men concluded that completion of the job required more cable than Phillips was carrying in his truck. Phillips thereupon used Respondent’s inter-truck radio communications system to call Choi and ask him to bring over the extra cable. After Choi had done so and left the immediate area, Stewart proposed to Phillips that they go to lunch at the Waterfront Restaurant; Phillips agreed. Then, Stewart asked whether Phillips would like to invite anyone else to lunch. Phillips called Beebe, but he was busy. Then, perhaps at Stewart’s suggestion, Phillips called Choi, who accepted Phillips’ invitation.

The three men spent an hour and a half to 2 hours at lunch, which Stewart paid for and charged to Respondent as a business expense. Although the employees were paid by the hour and were normally entitled to an unpaid 1-hour lunch period, Phillips was not docked for the extra time, and neither was Choi, so far as the record shows. Over lunch, Stewart said that Respondent had an open door policy and a good benefit package, and asked Choi why he thought that the employees needed a union, why the employees felt that they needed a union, why

⁷ My finding that Stewart rode with Phillips on two different occasions is based on Stewart’s testimony. Stewart attached to the first occasion, on July 1, his testimony about conversing with Phillips alone, and was not asked about the content of the conversation with Phillips alone on the second occasion. I believe Phillips was mistaken when he testified, in effect, that Stewart rode with him on only one occasion. My findings as to the content of Stewart’s July 8 conversation with Phillips alone on this second occasion are based on credible parts of Phillips’ testimony. My findings as to the content of a lunchtime conversation that same day between Stewart, Phillips, and Choi are based on a composite of credible parts of the testimony of all three participants.

⁸ This finding is based on Phillips’ testimony. For demeanor reasons, I do not credit Stewart’s testimony that he did not learn this until a job-site conversation with Phillips several days later (see *infra*, fn. 31 and attached text; and part ILE).

he felt the need for someone else to come in to negotiate for more benefits, and what were some of the “issues” that Choi had. When Choi displayed reluctance to answer, Phillips, who by this time was “comfortable” with Stewart and believed the employees could trust him, told Choi to go ahead and tell Stewart what Choi thought. Choi then said that the attitude of management—especially Choi’s direct supervisor—toward the employees was not “professional.” In addition, he brought up the health-insurance issue, the pension plan, the pay-per-view policy, and Respondent’s perceivedly unfair advancement policy.⁹ In addition, Choi expressed dissatisfaction with the length of time, and the procedures, necessary to obtain tools from the warehouse, and asked whether there would be “any change in the tool policy issue.” Stewart said that he believed the “tool policy issue” was wrong, that the employees should be able to get tools from the warehouse without any problem, and that he would “work on that.” Stewart said that so far as the Union was concerned, Respondent would not retaliate against anyone, and that nobody was going to lose his job over the Union. He further said that he wanted 2 weeks to solve some of the problems “we” were having. Choi said that he was having difficulty in processing a year-old health insurance claim. Stewart said that he would take care of the matter if Choi gave him the relevant papers. After receiving them from Choi on the following day, Stewart spent a half-day in successfully processing Choi’s claim.¹⁰

Inferentially thereafter, some time in mid or late July, Stewart asked Phillips in the hallway whether Phillips was the person who had advised a local newspaper that Respondent’s employees were involved in the Union. The record fails to show Phillips’ reply, if any.¹¹

4. Respondent’s July 8 conclusions as to the identity of union supporters

Also on July 8, Stewart, Smith, and Karch conferred about which employees favored the Union and which did not. They concluded that Phillips, Choi, Soots, and 5 other employees¹² likely favored the Union, that James Curnutt and 12 other employees¹³ likely disfavored the Union, and that Beebe might or might not favor the Union. At the General Counsel’s instance, Smith’s notes reflecting this conclusion, dated July 9, 1997, were received into evidence during the March 1998 hearing.

⁹ Choi believed that he had been better qualified for a job vacancy for which he had applied than was the former employee whom Respondent had rehired for that job at a higher wage rate than Choi’s.

¹⁰ My findings as to the content of the lunchtime conversation are based on a composite of credible parts of Choi’s and Phillips’ testimony. For demeanor reasons, I do not credit Stewart’s testimony that he did not bring up the subject of the Union. Further, to the extent inconsistent with my findings in the text, I do not credit Stewart’s testimony that he did not ask either of these employees about their union activity, or tell them that Stewart would help them out with jobs or benefits in return for their stopping union activity. My findings as to the date of the events described under this heading are based on the testimony of both Stewart and Phillips connecting their joint ride with their lunch with Choi, Choi’s testimony that this lunch occurred on July 7 or 8, and the notation in Stewart’s itinerary that he did not reach the Noblesville area until the evening of July 7.

¹¹ The complaint does not allege that this inquiry violated the Act.

¹² Stern, Buzan, Royer, Fuller, and Simmons.

¹³ Kercheval, Koch, Ross, Eller, Bund, Nydegger, Miracle, Young, Tuland, Head, Stringer, and Hewson.

5. Stewart's July 9–11 meetings with various departments

a. Introductory remarks

On July 9, 10, and 11, Stewart and Smith conducted a series of departmental meetings with Respondent's Noblesville employees. Smith testified that the purpose of these meetings was to talk to employees and ask for their feedback concerning the state of the operation and any concerns they might have. Stewart began each of these meetings by talking of Respondent's "pledges"—more specifically, Respondent's unlimited-sick-leave policy, its open-door pledge, its pledge that wages and benefits would be competitive with surrounding cable operations, and its no-layoff pledge. He said that he knew there had been some interest expressed in unions and that he was interested in finding out what was on people's minds. Stewart told the employees that the purpose of the meetings was to try to help make things better and to give better support to the employees.¹⁴

b. Stewart's July 9 meeting with Respondent's installers

The first of these departmental meetings was held between 8 and 10 a.m. on July 9, and was attended by nine installers.

After making the introductory remarks described above, Stewart said that as to insurance, no changes in payroll deductions had been effected since the original plan as it was in December 1996. Employee Kercheval expressed concerns over the effect of a new billing system on employees' opportunities to obtain payments for collecting unpaid bills; Smith and Stewart explained the new system and told the employees that the collections program was not going away. Employee Buzan expressed interest in a retirement program; Stewart said that a 401(k) program was under review, but he could not promise the outcome.¹⁵ When an employee brought up the matter of wasp spray for employees' vehicles, Smith said that Respondent was buying more, because its supply had been exhausted, but employees could charge the spray at local stores if it was needed right away. A proposal by Kercheval for two separate sets of terminating tools was discussed by Stewart and other employees, who identified the tools whose duplication was proposed; the matter was left open for further consideration. When an employee said he wanted a bigger tool pouch, Stewart "indicated there could be some flexibility in different tool pouches available."

When Kercheval brought up past incentives for discovering "illegals"—inferentially, people who were receiving cable service for which they were not paying Respondent and by means of cable connections not made by Respondent, Smith said that the incentive program was still available and would be explained in an easily understood outline. Kercheval and another employee expressed concern over difficulties in communications with "dispatch" when they were in the field, and proposed a second radio frequency, which with a new phone system to route calls around "dispatch" was characterized as a "huge

benefit."¹⁶ One of the employees proposed a change in the kind of vehicle used to make deliveries of certain types of equipment, and also proposed hiring more employees in a certain area. Kercheval made a "comment about what would happen with franchises if installer not here for a month or 2? Concerned about what would happen if a strike took place."¹⁷

c. Stewart's July 9 departmental meeting with service technicians and maintenance technicians

The next departmental meeting was conducted by Stewart and Smith later that same day between 10:05 a.m. and 12:30 p.m. This meeting was attended by about 10 service technicians and maintenance technicians, including Beebe, Soots, Choi, Simmons, and Phillips.¹⁸

Stewart made the opening remarks described supra, part II,C,5,a, and asked the employees why they felt that they needed a union, why they felt a need for a third party to negotiate for them when Respondent had an open-door policy, and what their complaints and problems were.¹⁹ An employee or employees raised the issue of medical benefits. Stewart said that this would be dealt with in a proper manner, and that Respondent was going back to the original insurance program. Stewart went on to discuss Respondent's incentive program. After reference was made to the fact that the existing incentive committee had not met for a while, Stewart said that Respondent could get "stuff" from suppliers like satin jackets and free food, and Smith said that baseball and restaurant tickets were already available for the incentive committee. Also, Stewart referred to a forthcoming company picnic, with Smith as picnic chairman.

Some of the employees complained that they did not have needed tools and had to wait for months on end to get them. Stewart said that this would be dealt with in a proper manner, that he knew some employees were using their own tools, that Respondent should be supplying the tools, and that he would correct the problem. Stewart said that there were more than 30 issues that he wanted to work on, and asked the employees to give him a chance and a little more time. He and Smith handed out blanks which itemized different tools, and asked each employee to take a inventory of his tools and give Respondent an idea of what he needed. Most of the employees filled out these documents and returned them.

An employee or employees requested kneeling pads and cordless drills; the record fails to show management's response, if any. An employee or employees complained about difficulties in communicating with the office when the employees were in the field. Stewart said that changes were coming to "dispatch" in the form of a second radio frequency and reconfigura-

¹⁶ In late August, Respondent added a second radio frequency, and assigned one frequency to technicians and another to installers.

¹⁷ Except as otherwise indicated, my findings as to this meeting, including the quoted material, are based on Smith's contemporaneous notes.

¹⁸ My finding that David Beebe attended this meeting is based on the testimony of Beebe and Choi; and on the fact that Smith's contemporaneous notes attribute certain remarks to "Dave Beebe" (see G.C. Exh. 21, pp. 4–5, especially the second line on p. 5). Beebe's name is not included in Smith's listing of the employees present. Smith's notes also attribute certain remarks to one "Bryan" (Respondent's employees included Bryan Buzan), although Smith's listing does not include anyone named Bryan.

¹⁹ My findings in this sentence are based on a composite of credible parts of the testimony of employees Beebe, Choi, Soots, and Phillips.

¹⁴ My findings in the last two sentences are based on credible parts of Stewart's and Smith's testimony, which is partly corroborated by Phillips, Beebe, Choi, and Soots as to the meeting attended by them.

¹⁵ The 401(k) plan described in the handbook distributed to the employees a few days later (see infra, part II,C,7) had been modified after the 1992 publication of this handbook. Respondent's 1997 payroll records show that some of Respondent's employees were having 401(k) payments deducted from their wages.

tion of phones (see *supra*, fn. 16). Employee Phillips complained about incomplete sets of maps; Stewart said that Neil Fladlin, whom Phillips testimonially identified as a member of management, was working on this with the proper authorities. Some of the employees, including Beebe, raised concerns regarding safety matters, adequacy of training, and sufficiency of wages. Some of the employees raised concerns about perceived favoritism in promotions and in permitting employees to drive company vehicles home; Stewart said that construction superintendent Dale Lambert would be alerted to the vehicle problem, and that these concerns would be dealt with in a proper manner. When an employee asked about increases in call-in pay, Stewart replied that this would be taken under review. Beebe and another employee proposed what was (inferentially) a system more advantageous to employees than the existing system for scheduling and paying “on-call” employees. Several employees brought up deductions and allowances for work uniforms; as to such allowances, Stewart said that he would like to review the matter but would not want to change current policy, and pointed out the perceived benefits of the new uniforms which had been issued to all employees.

Beebe asked, “Is there a time frame that we can expect to see changes take place?” Stewart replied that “we are committed to making appropriate changes! Some already in motion. Some will take a bit longer. Changes will take place!”²⁰

Phillips and others complained about perceived harsh verbal treatment, often in the form of yelling, from Karch. Stewart said that this would be taken care of in a proper manner, that Respondent had absolutely no tolerance for disrespectful treatment of employees, and that Respondent was firmly committed to providing a fair and healthy atmosphere in which everyone could feel comfortable working. Phillips said that some of the employees felt it was not worth the “hassle” of telling Karch about a needed tool because they might get yelled at, and, “It’s worth it to me to go out and buy my own.” Karch remained in Respondent’s employ until September 1997, when he resigned and received 3 months’ severance pay.²¹

d. Stewart’s July 9 meeting with some of the customer service representatives

Later that afternoon, Stewart and Smith met for 2 hours with 6 customer service representatives, including Wyman and La Duron. After making the remarks summarized *supra*, part II,C,5,a, Stewart discussed the changes in the employees’ health plan and the recent loss of pay-per-view benefits. He went on to say that Smith would be in charge of the company picnic, that Respondent should have had one the preceding year, and that this year, the picnic would be a good one. One of the employees said that suggestions to management were not followed up on, that she had consequently stopped making suggestions, and that she had recently run out of certain material. La Duron and (perhaps) others raised questions regarding inoperable or inoperative equipment and delays in repairing it. An employee complained that employees were expected to report to work when they were sick. Employees complained about perceived inconsistencies in expectations for different

²⁰ My findings as to this Beebe—Stewart exchange are based on Smith’s contemporaneous notes, from which the quoted material (including exclamation points) is taken.

²¹ My findings as to the events at this meeting are based on a composite of credible parts of the testimony of Beebe, Phillips, Choi, Soots, and Smith, and on Smith’s contemporaneous notes.

people, about perceived inadequate training, about perceived security problems, and about perceived excessive workloads.²²

e. Stewart’s July 10–11 meeting with other customer service representatives

On the afternoon of July 10, Stewart and Smith met for an hour and a half with five more customer service representatives.²³

After making the remarks summarized *supra*, part II,C,5,a, Stewart said that the previous quarter, he had started going into the field with general managers; and that this quarter, he had started going into the field to talk to employees. He went on to say that he had chosen Noblesville first “due to problems expressed with unaddressed concerns to the point of raising a union.” Stewart stated (accurately) that a union meeting with several employees was going to take place that evening, July 10; he testified that he had learned about this “because employees were talking about it,” but there is no evidence that he told his audience about the source of his information.²⁴ He said that he would not threaten the employees, interrogate them, promise them anything, or spy on them; and that people would not be penalized for speaking up at or attending the union meeting that evening.

Stewart said that many employees felt that benefits were being taken away, and mentioned that pay-per-view movies were no longer available and that health care benefits had been cut in the area of prescription costs and emergency-room visits. One of the employees said that existing eyeglass coverage might be less than had been represented, and another employee brought up the names of several alternative HMO’s in the area. Stewart said that fewer incentive programs were presently available because the marketing-manager position was open, and said that the forthcoming company picnic was “mandatory.”

A “big complaint” was made about being put on standby when using the telephone system in “dispatch.” Stewart or Smith said that Respondent was working on a second frequency (see *supra*, fn. 16). One of the employees suggested that customers’ use of the dispatch line would be prevented by blocking the “caller ID” for that line. Two of the employees expressed interest in headsets; Smith said that they were coming with the new phone system (see *supra*, fn. 16). One of the employees asked about incentive programs, and cited a commission program used by (inferentially) one of Respondent’s competitors; Stewart replied that Respondent’s benefits were comparable taking this into account. One of the employees said she wanted better procedures for “cashing out,” in order to enable the employees to leave on time; Stewart raised the possibility that one person be scheduled to stay 30 minutes past closing to complete the cashing out procedure. Some employees complained about being yelled at by Karch, about the fact that Saturday work was being scheduled by one of the employees

²² My findings as to the events at this meeting are based on Smith’s contemporaneous notes.

²³ After listing the names of the employees present, Smith’s contemporaneous notes add that a particular employee who did not attend any of the meetings was “on vacation—covered by [Stewart] the night before.”

²⁴ As noted *supra* part II,B–C, Stewart’s initial decision to visit the Noblesville facility in July had been sparked by Smith’s report to him about employee interest in a union. Smith had obtained this information from supervisor Karch, whose questions to Beebe had revealed that a union meeting was planned for July 10.

rather than by a supervisor, and about perceived consequent unfairness in the rotation of such work; Stewart said that he would take up the work-rotation matter the first thing on the following day. One of the employees complained that she had not received a “review” in 3 years.²⁵

This meeting was resumed on July 11. Some of the employees complained about Respondent’s perceived unfairness and inconsistency with respect to vacations, sick leave, and sick pay, and pregnancy. Stewart said that the matter would be reviewed, and that everyone should be held to the same standard. During the July 10 session, one of the employees had said that some of the chairs should be replaced; at the second session, Stewart said that he would “relook” at furniture needs. Stewart said that he would be back in the system on Monday and would be available to everyone accordingly.²⁶

6. The July 10 union meeting

The union meeting held on the evening of July 10 was attended by 2 union representatives and 19 to 23 employees, including lead customer service representative Diosa La Duron (not claimed to be a supervisor). The union representatives told the employees present that the Union would prefer to organize a group which included both the office employees (including customer service representatives) and the field employees (including technicians and installers); but that if there was insufficient support from the office employees, the Union would work with the field personnel only, and believed there were already enough field people there for this purpose. The employees present decided to go forward with the Union, and to urge fellow employees to support it. At the meeting five employees—field employees Phillips, Beebe (who attended at Phillips’ solicitation), Choi, and Simmons, and dispatcher Dawn Wyman—volunteered to form an organizing committee. Choi had urged the other field employees to attend this meeting.

Stewart testified without objection that Karch told Stewart and Smith that employee Diosa La Duron had told Karch that the union organizing committee was made up of three people—Wyman, field employee David Fuller, and an individual whose name Stewart testified that he could not recall but that it was not Phillips, Choi, or Beebe. Karch and Smith both testified for Respondent, but were not asked about this alleged conversation; La Duron did not testify. In view of this lack of corroboration, the absence of any evidence as to why either La Duron or Karch would have made inaccurate representations as to the identity of the committee, and demeanor reasons, except as to Wyman I do not credit Stewart’s testimony as to the names given him by Karch. Other than Stewart’s testimony, there is no evidence as to whether Fuller in fact engaged in any union activity, although Respondent’s management had concluded on July 9 that he supported the Union (see *supra*, part II,C,4).

7. Stewart’s speech to the entire Noblesville work force

A speech to all of the 30 or 40 members of Respondent’s Noblesville work force who were then present at the facility was delivered by Stewart at about 8 a.m. on the morning of July 11.²⁷ At least partly because of reports from some of the

employees that the Union had told them the no-layoff pledge meant nothing because it had not been written down, during this meeting Stewart distributed to each of the employees present a handbook, dated September 1992, entitled *Insight Employee Information Summary*. This handbook, which had been out of print for some time and which had been newly reproduced for the purposes of distribution to the Noblesville employees,²⁸ contained a pledge “that no full-time hourly employees will lose their job due to lack of work as long as they do a good day’s work and we continue to hold and operate our franchises in the communities where we operate. If necessary, we will retrain or reassign an employee to ensure their continuing employment.” Also, the handbook purported to describe the fringe benefits afforded to Respondent’s employees, including a medical and dental benefits package with a choice of “either a conventional medical/hospitalization plan or an HMO plan, if available, in your system.” This September 1992 handbook stated that employees would receive “complimentary cable television service” excluding pay-per-view events and programs. However, it is undisputed that for a period which ended about December 1996, the Noblesville employees were receiving pay-per-view benefits without charge. Also, the handbook contained a statement, captioned “Open Door Pledge,” that every employee should feel free to talk with his supervisor, general manager, or home office manager about questions or problems, without fear of repercussion. “If you believe your thoughts are not being fairly considered, you have the right to state your position through all levels of the Company through to the President.” Under the heading “Direct Communication with your Supervisor,” employees were asked to bring problems to their supervisor as an initial matter. “However, every now and then a solution to a disagreement may prove elusive and then you should take advantage of the open door policy to either reach some compromise or, at least, become more comfortable with the reasons behind the supervisor’s position. The Company is committed to direct and open communications with its employees, strongly believing that direct conversation is exceedingly better than relying on outside, third party representatives such as unions.”

Using note cards to assist him in his presentation, Stewart stated that efforts were under way to get a union into the facility, and accurately stated that a union meeting had been held the previous evening. He said that a successful union campaign would have profound effects on the employees and their families, and would take away Respondent’s right to talk about the employees’ jobs, pay, and benefits. Pointing to the no-layoff

10 union meeting. Beebe eventually gave similar testimony, although he initially testified that Stewart gave his speech on July 10. Choi, whose first language is Korean, testified that Stewart delivered his speech “Right after the July 10th meeting, July 10th morning”; the context of his testimony suggest that he was likely referring to the July 10 union “meeting,” but he may have been referring to the July 9 technicians’ “meeting” with Stewart. I believe Stewart was mistaken in testifying, initially with some doubt, that the “all-hands” meeting was held on July 15. Company witnesses Karch, Smith, and Mary Hoffman (Respondent’s installation manager) were present during this meeting but were not asked about this matter, and other individuals present whom Phillips testimonially described as members of management (Jane Hawkins, Neil Fladlin, and Dale Lambert) did not testify at all.

²⁸ Beebe, who was discharged in August 1997, credibly testified that Respondent had given him an employee handbook when he was hired in 1990 (2 years before the date on the handbook distributed to employees at this July 1997 meeting) but had never given him another.

²⁵ See *infra* part II,D,3. The “personnel guidelines” booklet states, “All non-probationary employees will receive a performance review annually, which may or may not result in a salary adjustment.”

²⁶ My findings as to this July 10–11 meeting are based on Stewart’s testimony and Smith’s contemporaneous notes.

²⁷ My finding as to the date is based on the testimony of Phillips, who testified that Stewart delivered this speech on the day after the July

policy and the open-door policy provisions in the handbook which had just been distributed, he said that any time the employees had a problem, they could come to “any management” and “we can work it out.”

Stewart stated that Respondent was completely and entirely against a Union’s getting into the system. He urged the employees not to sign a union card or petition before they knew what they were getting into. Stewart said that the Union would promise the employees “anything,” including better tools, in order to get them to sign, but that the Union could guarantee them nothing. He went on to say that if the Union got in, Respondent would have to bargain in good faith, but would not have to agree to demands which it felt were not in the best interest of the employees or Respondent. Stewart said that it was not true that employees could only get more from bargaining. One of the employees said that the Union could negotiate a contract. Stewart said that when an employer and a union sit down to negotiate a first contract, the contract looks like a blank piece of paper, and does not have pay rates, insurance, or a no-layoff commitment. He said that nothing goes into a contract unless the employer and the union agreed to it; that bargaining is a give-and-take process; that employees could end up with more and could end up with less, depending on how the bargaining goes; and that this was the reason the Union could not guarantee its promises. He went on to say that it was usually when a company refused to make good on union promises that a union calls a strike. Holding up a copy of the handbook which the employees had just received, he said that “it was our contract, our agreement . . . this is your guarantee that there is an open door policy, and that we didn’t need to have the union in there.”²⁹ Stewart said that Respondent had a good group of employees, that he was proud of and appreciated their efforts, that Respondent was a far-from-perfect company, that things had to be done in the system, that among these things were tools which should be provided by Respondent but which the employees were purchasing at their own expense, and that attention needed to be paid to this and to the difficulties employees were experiencing in getting tools because of the procedure which had been set up by management. He went on to say that he knew Respondent had to improve “the way we work with one another here,” and that he was absolutely committed to do what needed to be done “to address our issues.”

An employee or employees asked about their health insurance benefits. Stewart said that he knew there was a problem about these benefits, that he and the “home office” had not been aware of the change in the health benefits, that Respondent was in the process of trying to negotiate with the insurance carrier in order to restore benefits to their previous level; and that in the meantime, Respondent was going to reimburse any employee for payments he had made under the new arrangement but would not previously have been required to make.³⁰

²⁹ However, p. iii of this booklet states: “*Note:* This booklet is not a contract and benefits and practices described herein may be added to or changed from time to time.” A similar entry appears on p. 8.

³⁰ My findings as to what was said at this meeting are based on a composite of credible parts of the testimony of Stewart and employees Beebe, Phillips, and Choi, all in light of Stewart’s note cards. See *infra*, part II,G,1,c.

8. Stewart’s alleged unlawful interrogation of and promises to employee Beebe on July 11

Later that same morning, July 11, Stewart decided to go out and meet with employee Beebe. Stewart drove out to the job where Beebe was working, and talked to him on the jobsite for an hour or an hour and a half. Then, Stewart invited Beebe to the Texas Barbecue Restaurant for lunch, which took about an hour and which Stewart paid for and charged to his company expense account.

Stewart began their conversation by talking “about the job and issues”; Beebe commented about these subjects and also talked about “things in general that were occurring in the system.” Stewart gave Beebe Stewart’s opinion of the Union, and asked Beebe what he felt was needed to do a better job in operating the system. During their conversation that day, Stewart asked Beebe “who else was strongly for the Union,” to which Beebe replied that Phillips was “basically the head guy and . . . the individual who made the initial call.”³¹ Stewart also asked what was needed so that the Union did not get brought in. The record fails to show Beebe’s reply, if any. Stewart said that Respondent wanted the employees to know about the “open door policy,” that they should not fear for their jobs, and that management “just [wanted] to talk and get this all straightened out.” Stewart said that he would “look into” the “operational day to day issues” they had been discussing, but that he could not make any promises.³²

D. Alleged Unlawful Grant of Benefits, in Violation of Section 8(a)(3) and (1)

1. Tools

In 1996, having concluded that Respondent had a problem with security in its warehouse, Noblesville management put together a plan to rebuild the warehouse and improve its security. About January 1997, while the construction project was in progress, Noblesville management prepared an inventory of its tools, whereupon Noblesville management realized that it needed a lot of replacement and new tools. Noblesville management put together a standardized list of tools which were to be carried on all trucks used by Respondent’s Noblesville field personnel; this list included tools which had not been carried in the past. On March 25, 1997, Smith submitted to Stewart, for his approval, purchase requisitions for “replacement and new tools” from three different vendors, whose “projected amount” totaled about \$14,230; this would have been an unusually high order. After consultations between various members of New York management, including Stewart, Smith was asked to take another look at these requisitions because the requested dollar amount was very large. On April 17, 1997, Smith submitted to

³¹ This finding is based on Beebe’s testimony. To the extent inconsistent with such testimony by Beebe, for demeanor reasons I do not credit Stewart’s testimony that he never had any conversations with Beebe which led Stewart to suspect that Beebe favored the Union, never asked him the names of the people who were for the Union, and did not learn until a conversation with Phillips at his jobsite later that month that it was he who had first contacted the Union. Indeed, as noted *supra* part II,C,3, on July 2 or 8 Stewart discussed with Phillips the fact that it was Phillips who first called the Union.

³² My findings as to this conversation are based on a composite of credible parts of Stewart’s and Beebe’s testimony. To the extent that Stewart’s testimony about this conversation may be inconsistent with Beebe’s testimony, for demeanor reasons I do not credit Stewart’s denials.

Respondent's New York office, for its approval, a revised set of requisitions for "replacement tools"; only two vendors were involved, and the total projected amount was about \$7800. After consultation among New York management including Stewart, Smith was requested (on an undisclosed date prior to May 16, 1997) to try to make additional reductions in the overall cost of the project. Stewart testified that New York management had an additional problem with the request in that Noblesville management had been requesting capital dollars to purchase these tools, no capital dollars had been budgeted for this purpose, and items under a hundred dollars per tool (like most of the tools listed in both the March and the April requisitions) were supposed to be expensed and go to repair and maintenance. However, there is no specific evidence that the problem described in the preceding sentence was ever described to anyone in the Noblesville facility.

On May 16, 1997, Smith forwarded to New York management, for its approval, another set of proposed requisitions which, like the March and April requisitions, were attached to an authorizing document for "replacement tools." The total "projected amount" was \$6193; two of the items listed had a unit cost of more than \$100; and each individual proposed requisition bore the handwritten entry "Replacement tools for lost or worn-out tools." Stewart's testimony suggests that in May 1997, Respondent ordered about \$4500 worth of small tools which had been specified in the earlier, unapproved requisitions; however, the record fails to include any small-tool requisitions which were approved before late July 1997. He further testified that "in the meantime," the Noblesville facility was purchasing, without any problems, the items that were over \$100 per tool in value "because they were going through our regular purchase authorization process."

Before January 1997, an employee who wanted a new or replacement tool would request the tool from one of his supervisors or from the "tool man." Sometimes, the employee would be given the tool immediately; sometimes, he would be directed to procure one from a retail hardware store, at company expense; and sometimes, he would be told that he would receive the requested tool from Respondent in the future or if it was "in the budget." On the occasions when he was promised a tool, he would sometimes have to wait for it for up to 3 months, and sometimes, would never receive it at all. In January 1997, Noblesville management initiated a procedure under which the employee was required to put a request for a tool into writing, obtain his supervisor's written approval, bring this documentation to the warehouse, and (sometimes) wait for days before receiving the tool.³³ Some of the employees had to give their written requests for tools to Supervisor Karch, whom at least some employees regarded as ill-tempered.

On an undisclosed date in early July 1997, before Stewart asked the employees about their tool concerns, Construction Supervisor Lambert's assistant inventoried the tools in each employee's truck. As previously noted, on July 8 employees Phillips and Choi told Stewart that employee interest in the Union was partly due to the tools problem (*supra*, part II,C,3). Inferentially thereafter, on an undisclosed date in July, Stewart told Beebe that requests for tools had been put in, that they were sitting in New York awaiting signature, and that this was

one of the things that Stewart was going to look into. As previously noted, during Stewart's July 9 meeting with the technicians, some of the employees complained that they did not have needed tools and had to wait for months to get them; to which Stewart replied that this would be dealt with in a proper manner, that he knew some employees were using their own tools, and that Respondent should be supplying the tools. When employee Beebe asked for a time frame within which employees could expect to see changes taking place, Stewart replied (according to Smith's contemporaneous notes), "we are committed to making appropriate changes! Some already in motion. Some will take a bit longer. Changes will take place!" Also during this meeting, Respondent distributed blanks which itemized different tools, and asked each employee to take an inventory of his tools and give Respondent an idea of what he needed; most of the employees filled out these blanks and returned them at the end of the meeting. When preparing these blanks, Respondent had dated them, but they were not offered into evidence. When asked when Respondent had prepared these blanks, Smith testified that it "could have been in June." However, he testified that the preparation of these documents was part of a project which Lambert had started in January or February.

On July 22, 1997, Smith sent to the New York office, for its approval, a set of purchase orders totalling about \$5520, with "required" delivery dates of August 15 or 22.³⁴ An accompanying explanatory document was headed, "Replacement tools second order/per Jim Stewart"; Smith testified that this entry indicates that these purchase orders had probably been approved in advance, at least by Stewart. Attached to these documents was a memorandum from Smith to Stewart which stated, "tool list as discussed—taken from inventory sheets completed by employees." Respondent's monthly expenditures for small tools (with a unit cost of less than \$100) at Noblesville between January 1997 and July 1997, inclusive, varied from about \$142 (in February) to about \$1195 (in January), with an average of about \$530. Respondent's Noblesville expenditures for small tools amounted to about \$9300 in August 1997 and to about \$1800 in September 1997.³⁵ After the July 22 Telewire requisition had been approved by the New York office on or before July 25 and before Beebe's August 27 discharge, he received a water cooler (which he had never previously received), safety cones, and a coring tool.³⁶ Safety cones and coring tools had been specified on the May 16 requisition, which was never approved. After the July 22 Sears requisition had been approved by the New York office on or before August 11, Beebe received a shovel and a nut driver set.³⁷ A nut driver set had

³⁴ None of the items listed had a unit cost exceeding \$83, but the total cost of multiple-unit items ranged up to \$670.

³⁵ These figures are derived from R. Exh. 29. It should be noted that this document, as well as R. Exh. 28 reflecting large-tool orders, does not reliably show the dates on which tools were ordered. Stewart, who prepared these documents from Respondent's records, testified that when these records failed to show the date on which a particular item was ordered, he inserted the invoice date, that is, a date when or after the item was received. Accordingly, as to the items where the date under "Order Date" is the same as the date under "Invoice Date," the actual date on which the item was ordered cannot be ascertained.

³⁶ My finding as to the date on which he received these items is based on their inclusion in the July 22 Telewire requisitions, and on Respondent's payments to Telewire on July 25 and 28. Beebe was not asked for the date when he received these tools.

³⁷ My finding as to the date the requisition was approved and the date he received these items is based on their inclusion in the July 22

³³ This finding is based on Smith's and Stewart's testimony. For demeanor reasons, I do not credit Hoffman's testimony that the tool policy did not change in 1997.

been specified in the May 16 requisition, which was never approved. In addition, Beebe received flares, a crescent wrench, and a sledge hammer. Tools he was provided during this period duplicated all of the tools personally owned by Beebe which he had been using on the job. Inferentially at about the same time, if a particular employee did not have any company-owned tools which Respondent believed he should have, Respondent issued such tools to him.

Beginning in July 1997, an employee was able to obtain a needed tool simply by asking for it. Stewart testified that the Noblesville facility changed to this policy in response to the employee complaints made to him during his July visits to that facility, accompanied by some employees' statements that the existing tool-supply systems had caused them to buy their own tools. Rather similarly, Smith testified that these changes came about as a result of some of the meetings Stewart had with employees.

2. Health care costs

Some of Respondent's Noblesville personnel are covered by a contract to provide health care through a health maintenance organization called Health Source. On an undisclosed date in late 1996, Health Source sent a letter to Respondent's home office in New York, announcing that effective on January 1, 1997, Health Source was making some changes in the deductibles for prescription drugs, allergy testing, ambulance service, urgent care, and durable medical equipment. This letter is not in the record; Stewart's testimony at least implies that it was sent to Respondent's then manager of personnel and benefits, who by July 1997 no longer worked for Respondent.

As previously noted, on July 2, 1997, when Stewart asked employee Phillips why some people were interested in the Union, Phillips gave, as one of the reasons, that insurance "deductibles" had been changed; Stewart thereupon said that he would look into this concern among others. That evening, Stewart flew back to New York. He testified that after this conversation with Phillips, but on a date Stewart was not otherwise asked to give, he drew New York management's attention to the insurance-deductible matter.³⁸ On July 8, the day after Stewart's return to the Noblesville facility, Stewart again asked why the employees felt they needed a union, to which Phillips again replied by referring to the health benefits matter. Stewart replied that he felt "we didn't need a third party to intervene, that [Respondent] and the employees could take care of the problem on their own." Later that same day, in response to similar questioning by Stewart, employee Choi brought up the health-insurance issue. In a speech to the entire work force on July 11, during which Stewart told the employees that "there is an open door policy [and] we didn't need to have the union in there," he responded to questions about health insurance benefits by stating that he knew there was a problem about these benefits; that he and the "home office" had not been aware of the change in the health benefits; that Respondent was in the process of trying to negotiate with the insurance carrier in order to restore benefits to their previous level; and that in the meantime, Respondent was going to reimburse any employee for

payments he had made under the new arrangement but would not previously have been required to make.

By letter to all the Noblesville staff dated July 21, 1997, Stewart stated that "through a communication breakdown," changes made by Health Source in medical coverage effective January 1, 1997, had not been made known to him or other "key home office personnel." The letter went on to say that Respondent would reimburse participants for any charges related to certain listed plan changes, including the prescription drugs plan. The letter further stated that an open enrollment process (inferentially, procedures under which dissatisfied HMO participants could change their health-insurance carrier) would begin "shortly," and that "we believe in providing our employees with a strong benefits package of which your medical coverage is a big part."

Stewart testified that after his July 2 conversation with Phillips about health insurance but before Stewart sent his July 21 letter to the employees, he talked to "the person who [was] responsible for Human Resources at that time," who told him that the employees had been informed of this change by Health Source; she did not testify, and the record suggests that at the time of the hearing she no longer worked for Respondent. Stewart went on to testify (without objection, limitation, or contradiction) that the employees told him that they had never received a notification from Health Source. Stewart further testified that until the investigation by him which had been prompted by the Noblesville employees' complaints in early July 1997, he had not been aware of the change.³⁹ Stewart further testified that he asked Respondent's president and executive vice president if they were aware of this change, and they said no. Still according to Stewart, he asked Respondent's chief financial officer whether she had decided to make the change, to which she replied that she had not been aware of the change. Respondent's president, vice president, and chief financial officer did not testify. Between January 27, and May 15, the January 1, 1997 changes in the prescription reimbursement program directly affected plant manager Smith, who at all relevant times was the top-ranking supervisor stationed at Noblesville; more specifically, between these dates he was compelled to make, on behalf of himself and his small daughters, five prescription payments which each exceeded (by \$4.50 or \$10) the payments which he would have had to make before 1997. Smith was called as a witness by Respondent,⁴⁰ but was not asked whether he ever mentioned these newly imposed expenses (totalling about \$45) to Stewart or any other member of Respondent's management in New York. Because Respondent's management obviously knew whether they had previously been advised of the changes in the Noblesville health plan, and because of the good possibility that Smith brought up at least his own unanticipated prescription expenses with Stewart, I infer that if they had been asked about this matter they would have given testi-

³⁹ However, Stewart testified that during his visits to Respondent's facilities, "insurance is probably one of the big questions I get asked about."

⁴⁰ By the time of the March 1998 hearing, he had resigned from Respondent's employ effective January 21, 1998, but under a severance agreement was scheduled to continue receiving his full salary until the end of May 1998. Such payments would likely have ceased if he had violated that agreement.

Sears requisition and Respondent's payments to Sears on August 11 and 12. Beebe was not asked for the date on which he received these items.

³⁸ Stewart was the only member of New York management who was called as a witness.

mony showing that New York management had found out about the changes before July 1997.⁴¹

After July 21, 1997, at least 13 people employed at Noblesville (including supervisors Smith and Hoffman) received from Respondent payments for the difference between their 1997 out-of-pocket costs for prescription drugs and what their out-of-pocket costs would have been under the plan in effect before 1997. These payments totalled about \$1600 and varied between about \$3 and \$300, with an average of about \$42.⁴² Stewart testified that Respondent made these reimbursements because the insurance company would not change the policy back; Respondent “couldn’t” change the premium that it was paying to “have it go back retroactively” and could only negotiate it for the next year, 1998; and “so to ensure that the employees were whole, [Respondent] self-insured basically, on those claims, to bring the benefits to where they always had been.” The reimbursed employees did not include Choi (discharged in late August 1997, allegedly for union activity), who in late July 1997 submitted a form seeking reimbursement for part of a \$15 co-pay (increased from \$5) for medicine prescribed for a poison ivy rash.

3. Wages

Respondent has a practice of trying to maintain a wage package that is competitive with other cable operators. When Respondent concludes that its wage package lags behind that offered by other cable operators, Respondent puts into effect what is frequently referred to in the record, and is referred to in this decision, as a “wage adjustment.” Although a wage adjustment is designed mostly to raise the entry level wages for particular job classifications, it affects all employees in these job classifications in order to avoid pay compression. Although on rare occasions Respondent makes an adjustment limited to a single area where it has been having difficulty, all the other employees usually receive “some type of adjustment” when a wage adjustment is made with respect to a particular classification or classifications. Virtually every system operated by Respondent received some type of wage adjustment during each of the 5 years preceding the March 1998 hearing before me.

Respondent also has a practice of giving employees “merit increases” effective each July. The amount (if any) received by each employee is based mostly on his supervisor’s opinion regarding the employee’s individual performance.

The wage increases given to all of Respondent’s employees in their July 15 paychecks, effective on July 1, 1997, included both merit increases and wage adjustments. The General Counsel contends, in effect, that the portion of these wage increases attributable to wage adjustments (although not the portion attributable to merit increases) was given to all the employees in July 1997, rather than to only some of the employees on some other date, to discourage the union movement.

As to the Noblesville system in 1997, Stewart testified:

We’d been having an on-going problem in bringing in entry level installers. And the unemployment rate was extremely low in this market and . . . it’s been difficult for us to [hire] new people. In fact, we’re having the exact same problem in Jeffersonville, Indiana. Where it’s very difficult to bring on

Customer Service [Representatives] and Installers . . . we were clearly behind the surrounding operators and we clearly had a problem hiring new people and based on that we decided to adjust various levels . . . [Smith] started talking about it, could have been as early as April or May, saying we’ve gotta do something because we can’t hire people

On June 2, 1997, Stewart sent to Smith, as well as to the general managers in charge of Respondent’s other systems, a memorandum with respect to “the annual wage review process.” The attached material included a form “to be used when completing your wage and benefits survey of surrounding cable operators. At a minimum, wages should include the entry level rate for each position . . . [as to merit increases.] I would like you to work toward a recommended wage pool for 1997 of 4% . . . Please provide this information back to me via e-mail at your earliest convenience but in no event later than Friday, June 13.”

On June 16, before learning about the union activity, Karch put together a document recommending specific 1997 merit wage increases, ranging between 30 and 60 cents an hour, for the employees under him. These recommended increases averaged about 44 cents an hour, an average percentage increase of 4.2 percent. Stewart credibly testified that the decision with respect to giving merit increases (including but not limited to Karch’s subordinates) was probably made between June 20 and 25.

Between June 20 and 23, Smith made a series of telephone calls to various competitors, asking them, among other things, for their wage rates for customer service representatives, installers, installer technicians, service technicians, maintenance technicians (also referred to in the record as sweep technicians), and warehouse persons.⁴³ Smith credibly testified that the results of his survey were completed in his computer “probably by [June] twenty-third or twenty-fourth,” and were computer printed “somewhere close to [June] twenty-fourth, twenty[fifth].” A day or two later, Smith expressed to Stewart the opinion that an upward wage adjustment would be appropriate in order to make Respondent’s Noblesville facility competitive in being able to attract and retain employees.

At some time during the first 10 days in July, Respondent’s home office in New York gave final approval as to the exact “adjustment” of the starting rates for certain job classifications. These adjustments amounted to between 30 and 75 cents an hour. The following table compares as to each job classification the wage adjustments in Respondent’s starting rates at Noblesville with the lowest and highest starting rates among Respondent’s local competitors according to Smith’s late June 1997 memorandum to Stewart:

Job Classification	Respondent’s Wage Adjustment	Lowest-paying Competitor’s Differential	Highest-paying Competitor’s Differential
Customer service representative	\$.75	\$.25	\$3.05
Installer	\$.65	\$.00	\$.50 ⁴⁴

⁴³ My findings in this sentence are based on a composite of handwritten notations made by Smith on a copy of a form supplied by Stewart for purposes of facilitating the survey (but not submitted to Stewart with these handwritten notations) and Smith’s testimony.

⁴⁴ Two of Respondent’s competitors paid “installer/tech” starting rates which were 50 cents and \$1 more, respectively, than Respondent’s starting rate for “installer.”

⁴¹ See *NLRB v. Dorothy Shamrock Coal Co.*, 833 F.2d 1263, 1269 (7th Cir. 1987); *Jim Walter Resources, Inc.*, 324 NLRB 1231, 1233 (1997); *Olive Garden*, 327 NLRB 5, 6 (1998).

⁴² A total of about 38 payments were made; some individuals received more than one payment. Smith received five payments.

Service technicians	\$.65	\$.20	\$.35
Maintenance technicians	\$.75	\$.40	\$.15
Warehouse	\$.30	\$.50	\$.50

The July 1996 merit increases for Noblesville employees in these classifications had ranged between 20 and 70 cents, with an average of about 47 cents. However, because the 1997 wage adjustments and the 1997 merit increases to the Noblesville employees were all retroactively effective as of July 1, their hourly increases as reflected in their July 15 paychecks ranged up to \$1.35 an hour, with an average of about \$1.08.⁴⁵ Stewart testified that Respondent raised its pay schedules in July 1997 because it had been experiencing difficulty in obtaining qualified employees. He further testified that union activity had no impact on the process or decision as to the pay raises,

But I . . . can't say that the thought didn't come up when we started implementing [the pay raises], at that point we knew that some of the employees were interested in a Union and we thought that . . . people are going to think that we made the adjustment . . . to buy off the employees some way.

And the fact of the matter is that it had nothing to do. I've got to run a business. I have to be competitive. We have to ensure that we can hire people into our operation and the competitive data indicated that this is where the salary levels should be so we went forward and made the change, because I'm not going to stop the operation because somebody says the word, Union within the operation.

Stewart testified that "generally" Respondent likes to put wage adjustments into effect at the same time as merit wage increases "because it just makes it easier . . . in dealing with the employees and explaining the increases." However, he testified, when a general manager who complains of difficulty in hiring can show that his system is paid below the surrounding market rate, Respondent will do an "out-of-July" wage adjustment in that system. As to the Noblesville system, the record shows that the wage adjustment had been put into effect in April 1996 and the merit increases had been put into effect in July 1996, but contains no other specific evidence as to whether wage adjustments and merit increases at Noblesville had previously been given simultaneously. The record also shows that in Respondent's Jeffersonville system, which is geographically near Noblesville, wage adjustments and merit increases were put into effect simultaneously in July 1996 and July 1997. However, the record contains no other specific evidence in support of Stewart's testimony. On what Stewart testimonially characterized as "rare occasions," Respondent limits wage adjustments to a single classification of employees.

4. Pay per view

At all times relevant here, Respondent has provided its employees with a cable-television package, without charge. Before 1997, this package at Noblesville included free pay-per-view service. In order to avoid potential problems with the pay-per-view providers, free pay-per-view for employees was discon-

⁴⁵ Excluded from this calculation are salaried employees and La Duron, whose increases reflected a promotion.

tinued at some time during the first quarter of 1997, more than 2 months before the union drive began.⁴⁶

Thereafter, Respondent instituted the practice of issuing a coupon, good for one pay-per-view movie, to each employee who had perfect attendance for 1 month.⁴⁷ Employees Beebe and Phillips testified that this practice began in mid-July—in other words, several weeks after Respondent learned about the union drive; and that when this practice began, each of them received four, or perhaps five, coupons all at once because of their perfect attendance during preceding months.⁴⁸ Smith testified that the coupon practice was instituted simultaneously with the discontinuance of free pay-per-view. Karch testified that the coupon practice was instituted "within a couple of months" after the discontinuance of free pay-per-view, and before Beebe told him about the union movement, but when Karch testified in March 1998 he could not remember even the year of the discontinuance. I credit Phillips and Beebe, for demeanor reasons and the following additional considerations: Smith's contemporaneous notes of his and Stewart's meeting with some of the customer service representatives on the afternoon of July 10 show that in an effort to make his employee audience feel less unhappy about the loss of free pay-per-view movies, Stewart pointed out that Respondent had made the Tyson-Holyfield fight available "@ cost @ \$27.50." Stewart in effect denied that he also referred to any attendance-coupon program (see *infra*), either during this session or during his second session with the same employees on July 11; nor is there any evidence or claim that the attendance-coupon program was referred to by Smith during either session. I regard their silence in this respect as tending to show that the attendance-coupon program had not yet come into existence. The weight of such evidence is not significantly diminished by Stewart's testimony that he did not then know about the coupon program's existence; such testimony fails to explain why this program, if it was already in existence as testified by Smith, was not brought to the employee audience's attention by him. Moreover, particularly because Smith regarded as sufficiently important to include in his notes the mitigating benefit (a reduced-price boxing match) referred to by Stewart in discussing the loss of free pay-per-view, if the coupon program had already been in existence Smith would likely have drawn it to Stewart's attention before his scheduled July 10, 1997, continuation of the customer service representatives' meeting and his July 10 speech to the entire work force, both of them directed to learning employees' complaints. However, Stewart testified that he did not learn about the coupon program until the March 1998 hearing before me.

On an undisclosed date after the introduction of the coupon practice and March 1998, Respondent began a systemwide

⁴⁶ My finding that pay-per-view was discontinued during the first quarter of 1997 is based on the testimony of Beebe and Smith. For reasons summarized *infra* fn. 48, I believe that Phillips was mistaken in dating the discontinuance as May 1997, and that the free pay-per-view was abolished in February or March 1997. However, the exact month of discontinuance is immaterial.

⁴⁷ My finding as to the length of the required perfect attendance is based on the testimony of Smith, Phillips, and Beebe. I believe Karch was mistaken in his testimony that only a week's perfect attendance was required.

⁴⁸ Because I credit their testimony in this respect (see *infra*), I infer that free pay-per-view was abolished in February or March 1997.

practice of permitting employees to purchase pay-per-view programs at half price.

5. Gatorade

Over a period which began in 1995, Respondent has purchased, for the use of employees in the field, bug spray, fans, bandanna devices for cooling the neck, and coolers. Also, Respondent maintains on its premises a water machine and an ice maker from which employees are permitted to stock their coolers. In addition, Hoffman (as an installation supervisor or, later, an installation manager), for a period beginning about 1995, has from time to time brought Cokes, Gatorade, coffee, and lunch to some employees in the field, sometimes paid for by Respondent or by Hoffman personally. Hoffman brought bottled Gatorade to some employees in the field during the summer of 1995. However, prior to July 1997, Beebe, a field employee since 1990, had never received a cooler, Gatorade, or any other company-supplied refreshments except coffee in the office.

As previously noted, during various periods in July, Stewart visited the Noblesville facility, the timing and length of his visits having been caused by the union movement there (see *supra*, part II,B,1). A month or two earlier, when working in the field in Respondent's Phoenix, Arizona, facility during exceedingly hot weather, Stewart had learned that the Phoenix general manager was following the practice of buying Gatorade for the employees during hot weather. Throughout Respondent's system, whether to do this is up to the manager's discretion. When working in the field at Respondent's Noblesville facility about July 10, 1997, during 95-degree weather,⁴⁹ Stewart commented on the heat to Hoffman, who said that sometimes the Noblesville facility purchased Gatorade in hot weather. Deciding that such a purchase was a good idea, he recommended this to Hoffman, who on July 11 purchased about \$67 worth of Gatorade from a local store. Initially, the approximately 20 field employees were given individual bottles of Gatorade. After that, Respondent purchased powdered Gatorade for the employees to mix into their water containers. The bottled Gatorade was available for about 2 weeks.⁵⁰ After this, only powdered Gatorade was kept in stock. A requisition for additional coolers was approved by Smith on July 22, and by New York management on or before July 25, 1997; and thereafter (as previously found) Beebe received a cooler for the first time since his hire in 1990. At the time of the March 1998 hearing, some powdered Gatorade was on the shelf in Noblesville; the record fails to show whether this was left over from the original, July or August 1997 purchase or from some other, subsequent purchase. Gatorade was supplied in 1997 on a larger scale than previously. When asked why Respondent supplied Gatorade to employees, Hoffman testified, "Human kindness."

E. Aftermath

On an undisclosed date shortly after July 11, Stewart told the employees that his departmental meetings with the employees had caused him to prepare a list of more than 30 items which the employees had complained about, and that he was going to

⁴⁹ Stewart testified that he was working with "Lonnie Smith." So far as the record shows, the only "Lonnie" on Respondent's Noblesville payroll was General Counsel's witness Lonnie Phillips, with whom Stewart worked on July 8, and the only "Smith" on Respondent's payroll was Respondent's witness Douglas Smith. Neither of them was asked about this matter.

⁵⁰ This finding is based on Beebe's testimony.

see directly that the list was taken care of. A few days later, and after the employees had received in mid-July the wage increases effective on July 1, Beebe told Smith that the employees were not going to continue on with the Union, and would give Respondent a chance to make good on its promises with respect to this list. At about this same time, the Union advised the employees who had been attending its meetings that it was not a good idea to take a vote unless the employees knew that the Union had a "proper majority."⁵¹

At about this same time, Stewart asked to accompany Choi to the field. Stewart remarked to Choi that Stewart's automobile (unlike Choi's truck) was air conditioned, and offered to exchange vehicles that day, but Choi declined. During or shortly after Choi's performance of this job, Stewart remarked that he was very impressed with the Noblesville system, that everyone he had ridden with was doing a "great job." Then, he asked Choi where Phillips was working that day. Choi thereupon led him by truck to Phillips' jobsite, and then drove away.⁵²

On reaching Phillips' jobsite, Stewart asked him "how strong the support was for the Union and . . . how the guys felt about the Union now that some of the problems had been solved." Phillips said that "some of the guys had been swayed by some of the promises that [Respondent] had made and stood behind and that we were just going to wait and see." Stewart asked why Phillips had called the CWA instead of some other union. Phillips replied that the CWA was the first one he had found in the telephone book that fit the description of the employees' duties. Stewart gave Phillips Stewart's business card with various telephone numbers on it, and told Phillips to call him if Phillips had any problems.⁵³

Thereafter, and until Phillips' discharge in late August, he kept in touch with the Union, "letting [the Union] know what [Respondent] was doing now. Basically just hoping that [Respondent] wouldn't stand good on one of their promises so . . . our support would come back up because we lost a lot of our support once [Respondent] made promises, made good on some of the promises." Until being discharged with Phillips and Beebe in late August, Choi continued to urge his fellow employees to support the Union. However, Smith testified that by the end of July and in the middle of August, he believed that there was no more interest in the Union (cf. *supra* fn. 51).

⁵¹ Beebe credibly testified to the opinion that after receiving the July raises, a majority of the employees who had been displaying interest in the Union decided not to continue their union support.

⁵² My finding that it was Stewart who initiated his visit to Phillips' job site is based on the testimony of Choi and Phillips. For demeanor reasons, I do not credit Stewart's testimony that he proceeded to Phillips' jobsite because Choi said that Phillips wanted to talk to him.

⁵³ My findings as to the content of this conversation are based almost entirely on Phillips' testimony. For demeanor reasons, I do not credit Stewart's version of the conversation except where specifically reflected in my findings. Among other things, I do not credit Stewart's testimony that Phillips said he was no longer interested in the Union. The complaint does not allege that during this conversation, any unfair labor practices occurred.

F. Allegedly Discriminatory Discharges

1. Background

a. The September 1995 incident at the Big Boy restaurant

As further discussed *infra*, part II,G,3, Respondent's employees are entitled to a 1-hour unpaid lunch period and two paid breaks, one in the morning and one in the afternoon. Respondent's service technicians visit the homes of customers throughout Respondent's service area, an irregularly shaped area whose easternmost and westernmost boundaries are about 13 miles apart and whose northernmost and southernmost boundaries are about 14 miles apart, to fix picture problems for about 28,000 customers.⁵⁴ The service technicians report to Respondent's facility at about 8 a.m. to pick up their trucks and equipment and to receive a written list of service calls to be made that day, sometimes including instructions as to time frame—for example, before noon or within particular hours of the day. Later in the day, the service technicians may receive instructions to make additional service calls, either directly when they return to the facility to pick up additional materials or equipment, or by means of the radios or cellular telephones with which each service truck is equipped. Consistent with their written and oral instructions as to time frame, the order in which the service technicians perform their jobs is "pretty much" up to their discretion. On occasion, a service technician may drive to a complaining customer's home, find that nobody is there to admit the technician, and, in consequence, return to the home later that day. Respondent's sweep technicians (also referred to in the record as maintenance technicians) work throughout the entire service area. Their primary responsibility is to maintain the "trunk" (main) lines, which come from the antenna facility; in addition, the sweep technicians may occasionally work with the distribution lines, which carry the cable signal along public streets to individual homes. On occasion, sweep technicians may be responsible for correcting certain kinds of problems that the service technicians may report to them. In addition, the sweep technicians are responsible for sweeping the cable system—that is, electronically going through every amplifier to make sure that it is meeting specifications. When fulfilling this responsibility, the sweep technician is assigned a series of "nodes" and performs his checks node by node, with at least some discretion as to the order in which each node is checked. At least on occasion, the sweep technicians begin their workday at 6 a.m. As of July 1997, Respondent employed a total of at least 12 service technicians and sweep technicians. At all times relevant here, all of them were under the direct supervision of Plant Manager Karch, who oversaw all technical operations, inside and outside the plant. Respondent's staff also includes installers, who install and remove cable television service for subscribers throughout Respondent's service area. At all material times, their supervisor was installation Manager Hoffman.

As to the hour of the morning when employees were permitted to take their paid breaks, Stewart testified that service technicians "are self-managing with regards to taking their breaks. And they would take a break that is convenient to them, based on what their workload is during that time, based on the complexity of the job that they are doing . . . they can take their

morning break and their afternoon break pretty much any time." Rather similarly, Karch credibly testified, "I am not sure we really have a set time for that. We are pretty flexible because you have to work those breaks around customer service calls. You never know how long any particular service call is going to take." On various occasions before September 1995, Karch told Beebe that employees were allowed a morning and an afternoon break of between 15 and 20 minutes each, at the employee's discretion as to the time of day, as long as it did not interfere with scheduled service calls, outages (problems experienced by more than 3 customers in one area), or emergency situations. At least before September 1995 (see *infra*, fn. 57), nobody from management ever described Respondent's break policy to Choi or Phillips. Phillips took his breaks "whenever time was available." Choi stopped and took a break "when everybody wanted to take a break."

In the morning of September 6, 1995, installer Buzan, and service technicians Beebe (who was later promoted to sweep technician), Choi, Phillips, and Royer, gathered at Frisch's Big Boy restaurant, about 2 miles from Respondent's facility. The Big Boy was located at the intersection of two roads which are boundaries of Noblesville and of Respondent's service area; the record fails to show whether the restaurant was outside (that is, across a street from) or within that area. The restaurant was about midway between the northernmost and the southernmost points of that area, and about four-fifths of the distance between the westernmost and easternmost points of that area. Although the employees gathered there by prearrangement, they did not all arrive at the same time (see *infra*, fn. 56). Before coming to the restaurant, Beebe had made one service call, about a 5-minute drive away; his next call was 5 or 6 miles from the Big Boy. Phillips' then service area was in in-town Noblesville; he credibly testified that he could not recall whether he had made any service calls before coming to the restaurant. The record fails to show Choi's then service area or whether he made any calls before coming to the Big Boy, but he performed all of his assigned service calls that day without receiving any complaints from customers. The restaurant was not very busy that morning (it subsequently closed down for lack of business). All five employees obtained their refreshments at the breakfast bar, from which for a fixed price a patron could help himself to as much as he wanted. All of them ate at the same table.

At 8:30 a.m. that morning, Construction Superintendent Lambert or Smith was advised by "dispatch" that a call "from the field" had reported that some of Respondent's personnel were at the Big Boy. In response to this call, Lambert and Smith drove to the Big Boy, where, upon their arrival at about 8:55 a.m., they saw all five of the employees proceeding between their table and the cashier's desk; Smith credibly testified to the belief that they had been eating breakfast. Smith was not asked his then belief as to how long any of these five employees had been at the Big Boy, and so far as the record shows, he never asked any of them how long they had been there, or whether any other employees had left the restaurant before the arrival of Smith and Lambert.⁵⁵ On seeing the employees at the restaurant, Smith (who was visibly upset) said that he was disappointed in them, and told them to meet him in the conference

⁵⁴ This and certain other findings as to distances are based on Jt. Exh. 1a. It should be noted that 2 miles on the photocopied map equals 1 mile on the photocopied scale.

⁵⁵ The record suggests that Choi, Beebe, and Phillips were the last employees to reach the Big Boy. Beebe and Phillips (who arrived together) and Choi (who arrived before them) each testified that he was there for 15 or 20 minutes. Buzan and Royer did not testify.

room at 8 a.m. the next morning. Thereafter, for the rest of the day, the employees went about handling their service calls; the record affirmatively shows that Beebe and Choi completed their calls without incident, and fails to show otherwise as to Phillips, Buzan, or Royer. When Beebe returned to Respondent's facility later that day, Karch said that he understood that Smith had met Beebe and other employees at a restaurant that morning and that the employees were to meet with Smith the following day. Karch asked Beebe not to tell Smith about the blanket authorization Karch had given Beebe. Beebe said that he would not.

Smith testified that after leaving the Big Boy, he conferred with then Vice President of Operations Roger Worboys, who was then Smith's immediate superior, and put together a written list of points to be covered when Smith met with the five employees he had seen at the Big Boy.

As employees who had gathered at the Big Boy were waiting on the following morning to be called into the conference room to meet with Smith, Beebe told the others present about his conversation with Karch on the previous day. Then, Beebe and/or Choi suggested, in Phillips' presence, that to protect Karch's job, Smith should not be told that Karch had given the employees a blanket authorization in connection with breaks.⁵⁶ During the September 7 meeting with Smith, nobody claimed that Karch had given such an authorization.

Smith told the employees that before taking breaks which were longer or (perhaps) at a different hour than usual, the employees would have to obtain authorization from their department heads (see *infra*, fn. 57). However, employees Beebe, Phillips, and Choi all credibly testified to the belief that Smith said that before taking any break, they had to obtain prior authorization from their department head—in their case, Karch.⁵⁷ The employees told Smith that they would make sure they had prior authorization, and Buzan said that a group breakfast was not an everyday thing. Smith said that he was concerned because, while the employees were in the restaurant, Respondent had had an "outage" (simultaneous loss of cable signal by more than three customers in one area) and had been unable to "raise people in the field to dispatch accordingly."⁵⁸ Smith's testi-

⁵⁶ My findings in this sentence are based on a composite of Beebe's and Choi's testimony, which I credit notwithstanding Phillips' credible testimony that to his knowledge, there was no conversation among "the five of you" before Smith came into the room, that nothing stood out in his mind. Choi testified that he did not recall whether anyone other than himself, Beebe, and Phillips was in the room during the conversation about Karch.

⁵⁷ In view of this employee testimony, whose honesty is supported by their statements to Karch a few minutes after the meeting (see *infra*), because the notes which Smith at least allegedly made in preparation for the meeting state "No prior authorization" without any reference to length or location of breaks, because of the Big Boy's location and the other evidence discussed *infra*, part II,G,3, and for demeanor reasons, I do not credit Smith's testimony that he told the employees that "break time should only be up to 15 minutes and that would include travel time, as well. The concern was that the time that it took to travel to a destination like that, sit down and have breakfast and also the travel time afterward, wasn't achievable within 15 minutes." However, to the extent inconsistent with my findings in the text, I find that the employees were mistaken in their testimony that Smith did not talk to them about the length of their break at the Big Boy.

⁵⁸ Beebe credibly testified that he was in a good position to know whether outages had taken place that week, that he knew of none, and that written reports required in case of outages had not been filled out for that day. There is no evidence or claim that while the employees

mony at least implies, and no other testimony contradicts it, that at this meeting he further stated as follows: Other employees had expressed concern to management that people were taking breakfast at times when they should have been working, and that Respondent had "documentation" of other days at other locations.⁵⁹ Customers had complained "accordingly." Productivity had been lower over the last month, and management either had already defended or anticipated having to defend time and productivity to customers, Respondent's home office, and franchise authorities.

Smith went on to say that if customers had seen the employees in the restaurant, the customers could complain to management that they were not being serviced properly,⁶⁰ that what those five employees had done was not fair to fellow employees, that what they had done might mean that they were getting paid for overtime while not working during their regular working hours, that what they had done was simply not honest, and that he was very disappointed at their conduct. He stated that the employees might be terminated if "it" happened again.⁶¹ Beebe said that he did not feel that he had done anything wrong, and that he had followed company procedures.

Then, the persons present discussed safety equipment and a perceived need for spotlights on the employees' trucks.⁶²

A few minutes after the meeting with Smith broke up, Karch asked the employees who had attended the meeting (with the possible exception of Buzan) what Smith had said. The employees told him that Smith had said the employees were not supposed to be taking breaks without preauthorization. Following such a practice as to each break would have required Karch to preauthorize about 12 morning and about 12 afternoon breaks every day. Karch asked whether the employees had told Smith that Karch had already given them permission to take the Big Boy break; Beebe said no. The employees asked Karch if they had permission to take breaks as they saw fit. Karch said that he had no problem with the employees' taking breaks as they had always taken them, and had no problem with their taking morning breaks the way they had been doing it, as long as it did not interfere with their scheduled work or with servicing emergencies and outages.

b. Events between the Big Boy incident and the 216th Street Caf  incident

The record specifically shows that after this September 1995 Big Boy incident, Beebe, Choi, and Phillips continued to take their breaks as they had before. Choi, at least, sometimes obtained "drive-through" refreshments, and sometimes took re-

were at the Big Boy, Respondent made any effort to summon them by means of the telephones or radios in their trucks, or by means of an arrangement which enables "dispatch" to honk the horns of trucks which are away from the facility. (At this time, the employees had not yet been issued pagers.) Cf. *supra*, fn. 16, and attached text, and part II,C,8,e.

⁵⁹ No such documentation was offered at the hearing.

⁶⁰ During the working day, the field employees wear shirts identifying them as Respondent's employees.

⁶¹ This finding is based on Smith's testimony, which is consistent with his at least allegedly preparatory notes. For demeanor reasons, I do not credit the employees' denials.

⁶² This finding is based on the testimony of Beebe, Choi, and Phillips. For demeanor reasons, I do not credit Smith's rather equivocal denial.

freshments while sitting down.⁶³ Laying to one side the incident described *infra*, fn. 102, and Phillips' July 1997 review (see *infra*), between September 8, 1995, and their discharge on August 27, 1997, nobody from management complained to them about their break practices. Installation Manager Hoffman, who testified to the belief that employees' breaks were limited to 10 minutes (cf. *infra*, part II,G,3), testified that in 1996 and in 1997 before August, she heard on occasion that the break policy may have been violated, and drove to various places (mostly with Karch) to find out whether this was true, but during this period never caught anyone violating the policy.

In April 1996, Beebe was promoted from service technician to sweep technician, with a wage increase of \$1.80 an hour.⁶⁴ As discussed *supra*, part II,D,3, in July 1997 Respondent conducted individual merit reviews with each of its employees. During Beebe's review, although criticizing his penmanship and paperwork, Karch told him that he had been doing "really good," that he had "made a lot of improvements," and that Karch appreciated Beebe's willingness to help other employees. Karch further said that he had no problem with the employees' taking morning breaks the way they did, as long as it did not interfere with their scheduled work or "no cables or outages." Karch told Choi that he had shown a "lot of improvement," that he was "doing good," and that his work had no deficiencies. Karch further said that he was aware that the employees were taking breaks, and that he had no problem as long as they got the job completed and it did not interfere with their work.

Before Phillips' review, Karch asked Smith how to handle the fact that Karch had seen Phillips' vehicle at a Wal-Mart for an extended period of time when he did not appear to be on break; and also whether or not and how to handle what Smith testimonially characterized as "the rumors of breakfast." Smith went on to testify to telling Karch that "it was definitely appropriate [to] raise that issue and tell [Phillips] what [Karch] had observed and generally approach that and say, this is not acceptable."⁶⁵ During this review, Karch told Phillips that he was a good, hard worker, but that he should watch his language on the radio. Karch said that he understood that the employees were still taking their morning break, that he did not have a problem with their having their morning break as long as it did not affect their jobs and their job performance, but that Phillips' vehicle had been spotted in inappropriate places at odd times of the day. When Phillips asked for specifics, Karch said that Phillips' truck had been seen parked at Wal-Mart during working hours—an incident which Karch had not previously mentioned to Phillips. Phillips said that he had been buying film for the company camera which he and all other employees who work in underground areas carry with them to take pictures of plant

⁶³ Respondent's posthearing brief deprecates Beebe's testimony that his breaks consumed 15 to 20 minutes, on the ground that he did not wear a watch. A clock was in his truck and on his pager. Moreover, most places (including the Big Boy) where he took his break displayed a clock on the wall, and almost everyone he took a break with wore a watch.

⁶⁴ See p. 993 l. 22— p. 994 l. 3, in light of R. Exh. 26. Of this \$1.80 increase, 25 cents was attributable to an increase (almost simultaneous with his promotion) in the entry level for sweep technician in Noblesville.

⁶⁵ My findings as to this conversation, which Karch was not asked about, are based on credible parts of Smith's testimony. See *infra*, fn. 66.

damage where people cut cable. Karch said that 20 minutes seemed a little excessive for such an errand, and that he had received reports from other employees about seeing Phillips' truck parked in inappropriate places at odd hours. Karch said that Phillips "really shouldn't be anywhere like that for any excessive amount of time unless it was on company business." Phillips' personnel file contains no conversation document (a term explained, *infra*) with respect to any of these incidents. Karch testified for Respondent that "Overall, [Phillips'] review was pretty positive. [Phillips] was always, as far as productivity was always one of my top people. The only negative aspect at all" was the Wal-Mart incident.⁶⁶ After this discussion, Karch reported to Smith that Karch had covered the Wal-Mart incident and the "rumors of breakfast," and that Phillips had "basically sat here and nodded his head." This July 1997 conversation, and the incident described *infra*, fn. 103, were the only occasions on which Phillips' breaks were mentioned to him by management between the day after the September 1995 Big Boy incident and the allegedly discriminatory discharges in late August 1997.

Smith testified that he discussed the September 1995 Big Boy incident with Karch before the July 1997 merit reviews of the employees involved in that incident. All of them received July 1997 merit wage increases within the 30- to 60-cent range received by the other employees under Karch—35 cents (Choi, Phillips, and Royer), 40 cents (Buzan), and 45 cents (Beebe). Smith testified that prior to the September 1995 Big Boy incident, he regarded Beebe, Choi, and Phillips as valued employees.

A few days after Choi's review, Karch went out in the field with him and took him to lunch, for which Karch paid. While they were eating, Karch said that because of the "Union thing," he, Smith, and office manager Jane Hawkins were "very concerned" that they might lose their jobs. The lunch took about 2 hours; so far as the record shows, Choi was not docked for the 1-hour period by which this exceeded his usual 1-hour unpaid lunch break.

The "personnel guidelines" booklet includes the following provisions:

DISCIPLINARY ACTION/COUNSELING

...

2. Procedure/Instructions

2-1. All employees should be given proper counseling if they fail to meet acceptable standards, and at the same time the employee should be clearly advised of possible disciplinary consequences if the unacceptable behavior persists. Normally, counseling should be done verbally with a written confirmation placed in the employee's personnel file (Attachment 39). Do not discuss this document with the employee, do not ask the employee to sign the conversation document and do not give them a copy . . . Evidence of misconduct or poor performance must be concrete, substantial, and documented.

⁶⁶ In view of this testimony, I do not credit Smith's testimony that Karch "had some concern about [Phillips'] productivity at times . . . I think Karch was okay with [Phillips'] productivity, but I don't think [Karch] felt that [Phillips] was at the top of the scale or bottom of the scale." For similar reasons, I do not credit Smith's testimony to the extent it suggests that during the period covered by the review, Karch "could have" noted that "there were times when repeat service calls had to be performed" as to calls initially serviced by Phillips.

“Attachment 39” in the booklet is a form headed “Conversation Document,” which calls for entries after (inter alia) “Background (Specific employee action and reason for discussion),” and “Action . . . to be taken by employee to correct problem.” The form calls for the signature of the employee’s immediate supervisor and the “Manager or Personnel Dept.”

During Smith’s meeting with the employees about the Big Boy incident, nothing was said about putting anything in the employees’ files. No “conversation document” about the Big Boy incident appears in the personnel files of any of the five employees whom Smith saw at the Big Boy. On a date not shown by the record, Smith put into a file labelled “Breakfast Club” the one-page, 17-line notes which he had at least allegedly used during the September 8, 1995 conference. This is the only document in that file, which he left in his office when he resigned in January 1998, and which was produced at the March 1998 hearing pursuant to subpoena. The individual employees’ personnel files do not include copies of this document. When asked why he kept this, and conversation documents involving 5 to 10 other employees, in his own office files rather than in the employees’ personnel files, Smith said that about 1992, “It was what I was instructed to do. It was part of the procedure that I was requested to do . . . I think as I recall it was suggested that I keep a separate file on conversation documents if I had those with individual employees.” Smith testified that he kept these separate files on “conversation documents” because “the Vice President of Operations at the time had suggested that we keep separate files on . . . conversation documents.” Inferentially, Smith was referring to Worboys, who was Smith’s immediate superior at least as early as October 1993 and at least until October 1995. Employee Willis’s personnel file includes a conversation document for poor productivity dated February 1994 and signed by Smith and Lambert. Stewart, who became Smith’s immediate superior in early 1996, testified that when an employee is counseled (all counseling is oral), his supervisor is supposed to put a “conversation document” (not necessarily on the written form) into the employee’s personnel file, and that the conversation document is not put anywhere else. According to Stewart’s testimony, managers fail to follow this policy “very rarely. Because one of the first questions that I ask of a manager when they call me in New York, is to produce conversation documents that they have had with the employee regarding their performance.” A “conversation document” is not shown to the employee, nor is he advised that such a document has been placed in his file. As discussed *infra*, part II,F,8, Smith did not insert a “conversation document” into the personnel file of employee Soots, a participant in an incident involving a break at a restaurant called the 216th Street Café, which incident allegedly motivated Smith and Stewart in deciding on the August 1997 discharge of the other participants. Stewart testified that under company policy, the “warnings” given to Soots in August 1997 and the participants in the September 1995 Big Boy incident should have been put in these employees’ individual personnel files, and that these omissions meant that company policy had not been complied with.⁶⁷

⁶⁷ The “personnel guidelines” booklet is dated September 1, 1992. Smith testified that in 1992 or 1993, he told his subordinates to start keeping conversation documents in their own files instead of the employees’ personnel files. Phillips’ personnel file includes an unsigned 1994 memorandum (in a handwriting which resembles Hoffman’s) of a

2. The 216th Street Café incident in August 1997⁶⁸

On August 26, 1997, field employees Beebe, Choi, Phillips, and Soots arranged with each other to take a morning break at the 216th Street Café restaurant (also referred to in the record as the Blue Beacon and George’s Cozy Café), about 2 miles outside a boundary of Respondent’s service area. That morning, sweep technician Beebe performed a job between about 6 and 7:45 a.m., then returned to Respondent’s facility and told Karch where Beebe was going to be working that day, and after leaving the facility at 8 or 8:15 performed two more jobs before driving 2 or 3 miles to the 216th Street Café, which he reached at about 8:30 a.m.⁶⁹ His last job before he drove to the 216th Street Café was in Hortonville, which is much farther from almost all of Respondent’s remaining service area than from the 216th Street Café. Phillips and Choi left the facility at 8 a.m. in their respective trucks for a tire shop about 2 miles from the facility. After Choi had dropped his truck off at the tire shop to have a tire replaced, the two men drove in Phillips’ truck about 11 miles to the 216th Street Café, which is located in an area (Westfield) where Phillips and Choi had service calls that day. Soots reported to work at 7:45 a.m., picked up his supplies and work order, and then drove to the 216th Street Café, a 5-minute drive from Soots’ first service call that morning. The four men parked their trucks in the restaurant parking lot, and all of them entered the restaurant at or about the same time—namely, about 8:35. They sat down together, ordered and were served refreshments, discussed the Union and other subjects while they were eating, and left together, at about 8:55 a.m.⁷⁰ There is no evidence or claim that while they were at the restaurant, “dispatch” made any effort to reach them by pager, radio, telephone, or remote-control honking.

Installation Manager Hoffman testified that at about 8:30 a.m., technician Jim Curnutt telephoned her from his truck that he had seen three of Respondent’s trucks parked at the 216th Street Café. Hoffman testified that Curnutt was “upset” because

conversation with him regarding his failure to call in sick early enough to enable Respondent to obtain a replacement, and a 1996 memorandum from Karch (who had been plant manager since before Smith became general manager) describing conversations with Phillips about his conduct on the job. Choi’s personnel file includes an October 1993 conversation document, signed by Karch, regarding a traffic accident in which Choi was at least allegedly at fault.

⁶⁸ Smith testimonially identified R. Exh. 9, a purported summary of certain events which occurred on August 26, 1997, as a document written by him from memory on a computer on August 26 “or the next day or something close to that,” and retained in his files. He testimonially identified R. Exh. 10 (a purported summary of certain events which occurred on Aug. 27) as a document written by him on a computer within 3 days of the event, and retained by him in his files. He testimonially identified R. Exh. 11 (a purported summary of certain events on August 27 and September 2, and of Beebe’s August 26 timesheets) as a document which Smith probably completed on September 2 and maintained as a record in his computer files. All were offered and received into evidence without objection or limitation. Although Smith testimonially referred to these documents as “conversation documents,” for purposes of clarity they will be referred to herein as Smith’s memorandums. Unlike other documents which Smith also testimonially referred to as “conversation documents,” his memorandums were not inserted into the employees’ respective personnel folders.

⁶⁹ My findings in this sentence are based on Beebe’s testimony. An August 27 memorandum by Smith (see *supra*, fn. 68) states that Beebe had recorded beginning work at 6 a.m. on August 26.

⁷⁰ The basis for my finding as to the hour of their arrival and departure is summarized, *infra*.

“it was early in the morning and we are out working and we have employees sitting in a restaurant.”⁷¹ On receiving this message, she looked around for another manager to accompany her to the restaurant. Initially, she looked for Karch, the technicians’ immediate supervisor, but he was not in the building. Then, she looked for Lambert, but could not find him either. Then, she went to Smith’s office. She testified that he was talking on the telephone, that she left him a note stating that “we had some employees sitting in a restaurant,” and that he “nodded”; he testified that she “indicated some of our employees were at a restaurant eating breakfast.” Thereafter, the two left the building and drove to the 216th Street Café. Hoffman testified that they left the facility no earlier than 8:35; she and Smith testified that the drive to the 216th Street Café consumed 20 to 25 minutes. Hoffman testified that they reached the 216th Street Café about 9:05 a.m.; certain portions of Smith’s testimony indicate that they arrived at 8:50 or 8:55 a.m.⁷²

By the time Hoffman and Smith reached the restaurant parking lot, the employees had driven away in the trucks which they had parked there. At Smith’s instance, he and Hoffman went into the restaurant, sat down at a counter, and ordered coffee. Smith asked a waitress whether some people had been there from Insight. She said that there had been a number of people in there and that they had been there for breakfast that morning. Smith asked what they typically got; she named some items on the menu. Smith said that “Lonnie” had said that something else on the menu was good; she pointed to an item.⁷³ At that time, seated about 10 feet away were two casual acquaintances of Smith and Hoffman—namely, Charles Barton (Bart) Rowland, who is employed by an excavating company which sometimes works on the same job as Respondent, and his brother John Robert (Bob) Rowland, who is president and owner of that firm. The Rowlands had been in the restaurant when Respondent’s employees had left; all four of these employees had been wearing shirts identifying them as employees of Respondent;

⁷¹ Hoffman initially testified that Curnutt had said he had been driving to Tipton. On cross-examination, she testified that Curnutt had said he was “on [Route] 31, on the way—I believe actually he said he was on the way . . . to do a job. I am not positive he said Tipton.” Route 31, on which the 216th Street Café is situated, is a north-to-south road which is about 5 miles due west of Respondent’s Noblesville facility and of a road (route 19) proceeding from Noblesville due north to Cicero and then to Tipton. The earliest completion times (9:25 and 10:10 a.m.) which Curnutt reported that day were for jobs in Cicero; he attached the completion time of 11:10 a.m. to the only Tipton job which he reported to have been completed that day. There is no evidence that any of his jobs that day would logically have called for his taking Route 31 or driving by the 216th Street Café. Respondent’s dispatcher could have overheard any radio exchanges between the employees with respect to the 216th Street Café gathering, which she could then have objected to by radio, telephone, or pager.

⁷² His memorandum (supra at fn. 68) states that he received Hoffman’s report at about 8:30 a.m., and reached the restaurant at about 9:30 a.m. Respondent’s brief states (p. 4) that the 216th Street Café was about a 25-minute drive from Respondent’s office.

⁷³ In addition to taking breaks at the 216th Street Café from time to time, Lonnie Phillips (as well as Beebe) sometimes ate lunch or dinner there. My finding as to Smith’s reference to “Lonnie” is based on Hoffman’s uncontradicted testimony. Her and Smith’s testimony indicates that nobody who had been in the restaurant when Hoffman and Smith arrived identified the departed Insight employees by name until after Smith’s conversation with the waitress. However, Smith testified that when heading for the restaurant with Hoffman, he had not known the identity of the Insight personnel who were thought to be there.

and all but Soots were known to one or both of the Rowlands by name. After an exchange of courtesies, Hoffman said that she had been going to meet “some of the guys out here” but had apparently missed them. Bob Rowland said that they had just left (see *infra*). Hoffman asked who had been there. Bob Rowland said that four people had been there, and named Beebe and Choi, but said that he did not know the names of the other two.⁷⁴

When asked whether she learned from her conversation with the Rowlands how long the employees had been at the 216th Street Café, Hoffman merely testified, “Long enough to order breakfast and eat it.” I conclude that this much was all that she and Smith did learn. Thus, Bart Rowland, who sat with his brother during the entire time when Hoffman and Smith were in the 216th Street Café, did not testify that either of the Rowlands told Smith how long the employees had been there. Bob Rowland testified that in response to an inquiry by Smith as to how long the employees had been there, Bob Rowland said, “probably an hour or a little bit longer.” However, by his own admission he did not really know how long they had been there.⁷⁵ Moreover, although his testimony indicates that he said this in Hoffman’s presence, she testified that “I suppose it is possible” that the employees had been there for only 15 minutes. Furthermore, although Smith’s memorandum dated that day avers that the “contractors . . . indicated [that the employees] had been there about an hour”; Smith testified that “the Rowlands . . . said [the employees] had been there a good 45 minutes or so”; and Stewart testified that later that day, Smith told him the employees had been there for 45 minutes.

As previously noted, the credible testimony shows that all four of the employees entered the restaurant at about the same time (Phillips and Choi drove up in the same truck) and that all four left together. My findings as to the hour of the day when they entered and left are based mostly on the testimony of Soots, who at the time he testified was still in Respondent’s employ. He credibly testified to the following effect: On August 26, 1997, he reached Respondent’s Noblesville facility at 7:45 a.m.⁷⁶ After receiving his work order for the day, at about 8:15 a.m. he began a 15-minute drive from that facility to the 216th Street Café.⁷⁷ The work order issued to him by Respon-

⁷⁴ My findings in this sentence are based on a composite of credible parts of the testimony of Bob Rowland (who testified that of the four employees in the restaurant that day, he knew only Beebe and Choi by name) and Hoffman (who testified that Bob Rowland named only two employees, not including Soots). For demeanor reasons, I do not credit Smith’s testimony that “the Rowlands” named Beebe, Choi, and Phillips, and said it was common practice for them to be there from 30 minutes to an hour; and that Smith did not learn until after they had been discharged that a fourth employee had also been present (see *infra*, part II,f,6, fns. 85 and 88, and attached text). Laying to one side Smith’s testimonial reference to “the Rowlands,” there is no evidence that Bart Rowland named any of the employees present.

⁷⁵ Bob Rowland testified that he had reached the restaurant at some time between 7:15 and 8:15 a.m., and that the employees were already there when he arrived. He further testified that the employees left the restaurant about 15 minutes before Smith and Hoffman arrived, but he was not asked when Smith and Hoffman arrived. As previously noted, Hoffman testified that they arrived at 9:05 or 9:10, and Smith testified, in effect, that they arrived about 8:50 or 8:55, but Smith’s memorandum bearing that date states that they arrived at 9:30 a.m.

⁷⁶ There is no contention or evidence that Respondent’s records show otherwise.

⁷⁷ Karch testified that as a rule, Respondent’s field personnel do not leave the facility until 8:15 or 8:20 a.m. Smith testified that the drive

dent on that day, which document was received into evidence with some additions written by Soots and explained *infra*, states, *inter alia*, that before noon that day he was to perform a fix in a particular apartment on Harbourtown Drive. This apartment is about a 5-minute drive from the 216th Street Café. Throughout Soots' employment with Respondent (which began about 17 months before this incident), he has followed the practice of noting on his work order the hour of the day when he reaches the address at which he is to perform the fix. His notation attached to the Harbourtown address states "9:00." Soots credibly testified that when he first arrived at the address in question he could not perform the fix because nobody was home; and that he returned to that address later that day to perform the service call.⁷⁸ Soots' testimony as to the time of their departure is corroborated by Bob Rowland's testimony that the employees left the 216th Street Café about 15 minutes before Hoffman and Smith arrived, in view of Hoffman's and Smith's testimony that they reached the restaurant no later than 9:05 a.m. Moreover, during their drive, which began no earlier than 8:30 a.m., they overheard some job-related conversations between Beebe and Phillips over Respondent's radio communications system. A memorandum by Smith dated August 26, the day before the discharges, states, in effect, that these employees' use of the radio led Smith to conclude that by the time Smith and Hoffman overheard these conversations, Beebe and Phillips had left the restaurant. As previously noted, Phillips and Choi were both riding in the same company truck that day. Furthermore, Respondent produced no payroll records or testimony to contradict their testimony that they had reported to Respondent's office at 8 a.m. before driving to the tire shop and then to the 216th Street Café; or Beebe's testimony that he conversed in the office with company witness Karch before performing two more jobs and then driving to the 216th Street Café.

3. The Smith-Stewart conversation on the day of the 216th Street Café incident

Later that same morning, as soon as Smith and Hoffman returned to the Noblesville facility, Smith telephoned Stewart at his New York office. As a witness for Respondent, Smith testified that he told Stewart that "we had people out at breakfast in a location that was not located in our system area. It wasn't in our service area." Smith further testified that he relayed to Stewart the conversation that he and Hoffman had had with the Rowlands, but Smith did not otherwise testimonially describe

between this facility and the restaurant took about 25 minutes; Hoffman gave the time as 20 minutes. If accurate, such testimony as to the length of the drive would show that the employees entered the restaurant between 8:35 and 8:45 a.m. As discussed *infra*, Soots' testimony and records show that they left at about 8:55 a.m.

⁷⁸ Accordingly, the evidentiary value of this document (GC Exh. 26) is not diminished by the fact that Respondent's records show that he reported the Harbourtown job to have been completed at about 11 a.m., and reported as having been completed at 9:35 a.m. the job which was the second one listed on the work order. The fact that the work order bears two different handwritings points toward its authenticity, in view of Soots' testimony that he made notations therein after receiving a handwritten work order form from the dispatcher. Although the document is not a business record of Respondent, it is at least arguably a business record of Soots (see Rule 803(6) of the Federal Rules of Evidence), is receivable under Rule 801(d)(1)(B), and, moreover, could properly be read into the record under Rule 803(5). In any event, Respondent's failure to object to its receipt at the hearing precludes such an objection now; see Rule 103(a)(1).

what he told Stewart about the Rowlands' report (cf. *supra*, fn. 74). Stewart testified that during a conversation with Smith before the discharges, Smith said that "some people inside the restaurant" had told him that the employees had been there for "around" 45 minutes (according to Smith's testimony, the Rowlands told him "a good 45 minutes or so"), but Smith's memorandum (dated that day) about the incident gave the time as about an hour.

Smith's memorandum states that on his and Hoffman's return to the Noblesville facility that morning, "We researched the schedules for the morning and could not justify [the employees'] being out of our system area and not working when scheduled to do so." Neither he nor Hoffman testified about such an investigation. Smith testified that after looking at where "our people" were assigned that morning for service, he and Stewart concluded that "at best, the travel time in itself to get from any point in our system where they would have been, would have been ten minutes to twenty minutes one way." I do not credit the evidence summarized in this paragraph. Smith and Hoffman were not asked about the alleged research of schedules. Stewart did not corroborate Smith's memorandum about this portion of their conversation. Laying Smith's memorandum to one side, nothing in the record contradicts (1) Beebe's testimony that his third and last pre-216th Street Café job that morning was two or three miles from the 216th Street Café; and that after completing his first job that morning, he advised Karch where Beebe was going to be working that day; or (2) Karch's testimony that sweep technicians do not work pursuant to work orders, but "it is an ongoing preventative maintenance tasks that would be driven by other sources . . . I am not sure those [tasks] are really assigned. [When it was time to start sweeping a new node] I might assign a sweep tech to work in a particular node or we might get together and discuss what node to sweep in." Further, such testimony by Karch indicates that Respondent did not maintain any written records as to where sweep technician Beebe was supposed to or did work that morning, no such records were produced, and neither Karch, nor Smith, nor Hoffman testified to any conversations with Karch that morning about Beebe's assignments. As to Phillips and Choi, their first chore that morning was taking Choi's truck to the tire shop; Choi shared Phillips' truck for the rest of the day; and Respondent's records show a report by Phillips as to the repair of a cable (which had been chewed by a dog) in Westfield at 10:15 a.m. and the checking of a ground block at 10:30 a.m. in Noblesville on Westfield Drive (which proceeds from Westfield to the abutting community of Noblesville).⁷⁹

4. Smith's interviews with employees on the morning of August 27 regarding the 216th Street Café incident

a. Beebe

On August 27, Beebe reported to the office at about 7 a.m. After he had performed some preliminary chores at the office and was about to leave the office to perform his field duties,

⁷⁹ According to reports received from the other service technicians, of the approximately 42 fixes performed on August 26, about six were completed at or before 10:10 a.m. that day. All but one of them were directed to problems which had been reported to Respondent at least 15 hours earlier and, inferentially, were included in the written work orders which were received that morning by the technicians who performed the fix.

Smith called him into the conference room, where Hoffman was also present.⁸⁰

Smith asked Beebe if he remembered being talked to by Smith in September 1995 (see *supra*, part II,F,1). Beebe replied, "Vaguely." Smith asked where Beebe had been between 8 and 9:30 a.m. on the previous day. Beebe replied that he had come to the office at 6 or 7 a.m., had performed his checks at Westfield and Hortonville, had completed these jobs, had then gone to his break, and had then gone about his day.⁸¹ Smith asked Beebe where he had taken his break. After Smith said that he and Hoffman had been out to the 216th Street Caf , Beebe said that he had taken his break there. Smith asked who was with Beebe during the break. Beebe said that there was no need for him to tell Smith, because obviously he already knew. Smith asked what Beebe had been doing during his break. Beebe said that he had been eating breakfast, and that he saw nothing wrong with that. Smith asked why Beebe had taken his break outside of Respondent's service area. Beebe said that he saw nothing wrong with that. Smith expressed the opinion that it would have taken Beebe too long to get there and too long to get to the next job, and asked whether Beebe remembered that at the time of the September 1995 Big Boy incident, Smith had told the employees that they could be terminated for taking an unauthorized break. Beebe said that he did not think he had done anything wrong. Smith said that it had been made clear at the time of the 1995 Big Boy incident that "it wasn't supposed to be done and that Smith had gone around the room to make sure that everybody understood that and they all said they did" (cf. *supra*, fn. 57). Also, Smith read aloud from the notes he had at least allegedly made in preparation for the Big Boy discussion. Beebe said that he himself had not taken any notes in connection with the Big Boy incident, and that Smith was using his notes and not Beebe's. Smith asked if there was any question as to what could occur if "it" happened again. Beebe said nothing. Smith asked what Beebe would do if he were in Smith's position. Beebe said that he would listen to both sides. Smith asked for Beebe's side. Becoming angry, Beebe again said that he did not see anything wrong with what he had done. Smith said that he would have to have time to think about what he was going to do and would let Beebe know.⁸² Beebe then left the conference room. Thereafter, using the truck cell phone, he telephoned Phillips that Beebe had been called into the office and had been asked where he was the previous morning, and that "we may lose our jobs over it."⁸³ Then, Beebe resumed his duties.

⁸⁰ My finding that this person was Hoffman and not Karch is based on their and Smith's testimony and Smith's memorandum. I find that Beebe was mistaken in identifying that person as Karch. As discussed *infra*, it is uncontradicted that later that same day, Beebe had a conference with Smith and Karch but not Hoffman.

⁸¹ Smith's memorandum dated August 27, 1997, states that Beebe had made a written report that he had been working between 6 and 8 a.m. on August 26.

⁸² As discussed *infra*, my findings as to the content of this conversation are based on credible parts of Smith's memorandum (prepared from memory a day or two after the conversation) and of Smith's and Beebe's testimony. Smith's memorandum attributes to him the inquiry of "why [Beebe] would choose to do this at a location outside of our service area and do so after we had covered this same issue," in September 1995. As previously noted, the Big Boy was located in or across a street from Respondent's service area.

⁸³ This finding is based on Phillips' testimony.

b. Choi

Choi reported to Respondent's office for work at 8 a.m. on August 27. After picking up his truck from the tire shop and receiving his assignments for the day, he drove out to his first job. While he was performing this job, he received a telephone call from Phillips that "we are in trouble. Beebe is in Doug Smith's office, discussing about where we were yesterday . . . just be prepared."⁸⁴ Thereafter, Karch telephoned Choi and instructed him to come back to the office. Choi thereupon located Beebe, by means of a telephone call; went to see him; and asked what this was all about; inferentially, Beebe described the subject matter of his conversation with Smith earlier that morning. Beebe told Choi to tell Smith the truth about the 216th street Caf  visit on the previous day. Then, Choi drove back to the office.

When he arrived, Karch led him into the conference room and left him with Smith and Hoffman. Smith asked Choi where he had been between 8 and 9:30 the previous morning. Choi said that he had been performing service calls with Phillips. Smith asked if there was anything else that Choi wanted to tell him, and asked him to be "forthright" with Smith. Choi said that he had eaten breakfast at the 216th Street Caf . Smith asked who else was there. Choi said that Smith already knew who was there, and that Choi would not tell him. Smith asked whether Choi remembered "this very same conversation" in connection with the 1995 Big Boy incident. Choi said that he remembered the meeting and the conversation, apologized, and said that he would not do "it" again. Smith asked whether Choi remembered having been told that if "this" happened again, it would be grounds for termination. Choi said no. Smith said that he had not yet decided what to do with Choi; that Smith would have to talk to three others (whom he did not name), and that one of them was not there that day.⁸⁵ Smith told Choi to return to work, and he did so.

c. Phillips

A little later that same morning, Phillips was paged to come back to the office. When he arrived, Smith took him and Hoffman into the conference room. Smith asked Phillips where he had been on the previous morning. Phillips replied that he had been in the 216th Street Caf . Smith asked him what he had been doing there. Phillips replied that as Smith knew perfectly well, Phillips had been having breakfast, but that he had his work done. Smith said that he was disappointed in the employees, asked why they were having breakfast there, and asked who else was there. In the belief that Smith already knew who had been there and was "just trying to push [Phillips'] buttons," Phillips said, "Hey, I'm busted," but refused to reveal who else had been there. Smith asked Phillips why he was out eating breakfast when he had been warned in September 1995 about

⁸⁴ My findings in this sentence are based on Choi's testimony. Because of this testimony, Phillips' testimony about how he obtained this information from Beebe (see *supra*, fn. 83, and attached text), and the considerations discussed, *infra*, I conclude that Smith was mistaken in his testimony that his first conversation with Choi that day preceded Smith's first conversation with Beebe that day. Hoffman's testimony is consistent with either sequence, although the sequence in which she testimonially described these conversations suggests that the conversation with Choi came first.

⁸⁵ Cf. *infra*, fn. 88. Soots was out sick that day.

the consequences of doing this.⁸⁶ Phillips said that he did not understand what the problem was. Smith thereupon read to him the notes that Smith had at least allegedly made in preparation for the September 1995 meeting about the Big Boy incident. Phillips said that Karch knew Phillips was doing this and that Karch had said it was okay to have breakfast. Smith said that during his discussions with Karch both before and after Phillips' July 1996 review, Karch had raised the Wal-Mart incident (see supra, part II,F,1,b) and going out to breakfast on company time. Smith said that he would let Phillips know what Smith decided to do. Phillips thereupon returned to work. During this conversation, Smith did not indicate that he was concerned about the amount of time Phillips had spent in the 216th Street Café.⁸⁷

Later that day, installer Buzan approached Hoffman, his immediate supervisor, and said that he wanted to make sure she knew that he had not been out to eat breakfast that morning. He said that he had learned his lesson the first time and that when "the man" (referring to Smith) spoke, Buzan had listened.

5. The employees' August 27 lunch

On August 27, Phillips, Choi, and Beebe met for lunch in a Noblesville restaurant. During lunch, they expressed the fear that they were going to lose their jobs because they had been involved in the Union.

6. The August 27 Stewart-Smith conversation

Stewart alone generally has the ultimate authority to terminate nonprobationary employees like Phillips, Choi, and Beebe, but Smith's recommendation for such terminations was given weight. After Phillips' departure, Smith telephoned Stewart. As an adverse witness for the General Counsel, Stewart testified as follows:

[Smith] told me that the three employees had been caught out at [a] restaurant It is a little bit outside of our cable system.

And he referred it to the breakfast club [sic], that the employees had been out there . . . eating breakfast when they were supposed to be working.

He drove out to the location and the employees had already left. He went into the location. He talked with some people inside of the restaurant, who confirmed that the employees had been there for I believe it was around 45 minutes [see supra, part II,F,2], that they had breakfast, had I think even confirmed what some of them were eating.

actually, there were four employees out there. [Smith's] recommendation was to release the four employees [see infra, fn. 88] . . . one of the things that he told me was . . . that the employees did acknowledge having been out having breakfast when they should have been working.

Stewart went on to testify that he brought up the possible unfairness of terminating the fourth employee, who had not been warned; "we were going over prior warnings that they had had.

⁸⁶ This finding is based on Smith's memorandum. For demeanor reasons, I do not credit Phillips' testimony that during the August 27, 1997 interviews, Smith never mentioned that the 1995 "discussion" had any disciplinary consequences at all.

⁸⁷ This finding is based on Phillips' uncontradicted testimony

And it was determined that Dan Soots, who was out there, had not had a prior warning."⁸⁸

As a witness for Respondent, and after Smith had testified in his presence that employees were free to eat breakfast during their break, Stewart testified:

Smith assured me that his employees had been spoken to before about eating breakfast and it's not, the issue wasn't breakfast.

The issue was the extended period of time that they had taken on a break when they should have been working.

I'd been told that in 1995 there'd been an incident at the Big Boy restaurant that they had been caught having breakfast before on an extended break and that they had been warned that time not to do this, not to take these extended breaks and eating breakfast during that time period. they had been warned [and] had done it again.

As to the content of this conversation with Stewart, Smith testified:

I covered . . . how these meetings [with Beebe, Choi, and Phillips] had gone We concluded that since there was not any question about them having been warned the first time about what the ramifications could be and that we had been specific about it as eating breakfast out as we had, and the fact that this had taken place in an area that was even out of our service area, that it seemed to be [an] even more blatant attempt to try to hide it and it seemed appropriate to terminate the people.

When testifying for the General Counsel as an adverse witness, Stewart testified that when he was conversing with Smith on August 27, the question of union never came up. As a witness for Respondent, Stewart testified 2 days later that the "Union issue came up" during the conversation when they reached the termination decision, and "I was concerned that there could be a charge filed."

As to what was in fact said during this conversation, I credit Stewart's testimony that Smith initially recommended the discharge of all four employees; the testimony of both men that the subject of eating breakfast was referred to during their discussion about what action to take and why; Stewart's testimony in connection with the Big Boy incident that Smith represented that Phillips, Choi, and Beebe had previously received a warning; Stewart's testimony that the absence of any prior warning to Soots was brought up; the testimony of both men that (in effect) they eventually decided to discharge only Phillips, Choi, and Beebe; and Stewart's eventual testimony that the subject of the Union was mentioned. Because I conclude that as to the other portions of this conversation and as to related matters the testimony of Smith and Stewart is of questionable veracity, I make no findings as to how Smith described the warning, nor any other findings as to what was said during this conversation. Finally, I credit Stewart's testimony that he was concerned that there could be a charge filed.

⁸⁸ In view of Stewart's testimony about this conversation with Smith, I do not credit Smith's testimony that he did not find out until after the three discharges that a fourth employee had been present at the 216th Street Café. See also supra, fn. 85, and attached text.

7. The termination interviews⁸⁹*a. Choi*

At about 3 p.m. that same afternoon, August 27, Karch telephoned Choi and told him to return to the office, that Smith wanted to talk to him again. When Choi arrived, Karch escorted him to Smith's office and remained in the room. Smith asked Choi if there were any questions from the meeting in the morning. Choi did not indicate that there were any questions. Smith asked if there was anything he did not understand about the situation or if there were any details Smith had not got straight. Choi did not indicate anything, and apologized. Smith asked why Choi had done "this knowing what would happen." Choi said that he "just wasn't thinking" and that he knew he had done wrong. Karch said that he had addressed "this very thing" in department meetings and did not understand why "it" was not clear. Choi did not say anything to disagree. Smith's memorandum about this incident states:

I indicated to [Choi] that I couldn't allow these situations to exist as it wasn't fair to other employees and expressed my disappointment in his choices. I further indicated that other employees in the office were under the assumption that when technicians left the office with a routed schedule of work that they were on their way to complete that work and were informing customers accordingly. As there was no communication from [Choi] to the contrary, they were not performing the work as he was leading us to believe was being done when it was scheduled to be done.

Then, Smith told Choi that he was being discharged. Choi said that this was a little harsh, and asked for a second chance. Smith said that Respondent had given him a second chance after the first incident.

b. Beebe

That same afternoon, Respondent called Beebe back into the office. Present in the conference room were Beebe, Smith, and Karch.

Smith asked Beebe if he had any questions from their meeting that morning or if there was anything that Smith needed to know either that he did not understand or that did not come up earlier. Becoming visibly upset, Beebe said that he did not have any questions but felt it was unfair that management was taking up issue on something like this. He said that he did not see anything wrong with going out to breakfast if he wanted to, and that he did not see anything wrong with it the first time. Smith orally went through the notes which he had at least allegedly made in connection with the September 1995 Big Boy incident. Beebe said that these notes were Smith's and not Beebe's. Smith asked if there was anything Beebe did not understand about the message in 1995 when "we took up the same issue," and said that everyone involved in that incident had told Smith that "it" would not happen again and that they understood the consequences if it did. Beebe said that he still did not see the problem with "it." Smith said that part of the problem was that Beebe had his set of standards for what he felt he could do ver-

⁸⁹ My findings as to the termination interviews are based on a composite of credible parts of (1) the testimony of the employees in question, Smith, and Karch; (2) the memoranda which Smith prepared a few days later; and (3) material submitted by Respondent to the Regional Office in connection with Respondent's then statement of position. These documents were offered and received into evidence without limitation or objection.

sus what Smith had earlier told him what was acceptable and what was not acceptable. Smith testified that Karch said he had covered "that" with the department and "it" had been covered multiple times and should be very clear; Smith's memorandum and Respondent's statement of position assert that Karch "expressed his disappointment to [Beebe] and reminded him that these issues had been covered in department meetings as well and that everyone was held to the same standard." Smith said that Beebe was being discharged for taking an unauthorized break. Beebe said that this was nonsense, that he felt that Smith was making a wrong decision, and that this either was due to some personal vendetta or was related to the Union.⁹⁰ Smith said that the discharge decision was not related to the Union, and that Beebe had been warned earlier about "this very thing." Beebe asked whether the discharge decision was "New York's" decision or Smith's personal decision. Smith said that it was ultimately his decision.⁹¹ Beebe said that he felt that this was wrong and that he was going to seek some sort of legal way to rectify the situation. Smith gave Beebe his final paycheck.

c. Phillips

Phillips, too, was paged in the afternoon of August 27 to return to the office. By the time he arrived, Choi had already been discharged and Beebe was attending his discharge interview in the conference room. After Beebe's departure, Phillips was called into the conference room, where Smith and Karch were waiting.

Phillips uttered a few obscenities, and said that if they thought they were getting rid of "the thorns in their side," there were others that also favored the Union. Phillips said that he did not see anything wrong with what he was doing, that he had stopped in to have breakfast from time to time, and that he did not see that it mattered as he had all his work done. Smith said that it did matter, that Respondent was short-handed as it was and needed help from all employees who had time to spare. Phillips said that all his work was caught up and that he had offered his time in the past. Smith asked if the "cumulative leakage index work" had been completed in his area. Phillips said no. Smith said that this was a critical function whose completion was all the technicians' responsibility. Smith asked if there was anything that had not been clear "in the first discussion of this in 1995." Phillips said that Karch had given the employees permission to take the break. Smith said, "which break?" Karch said, the break in September 1995 and the break on the previous day. Karch said that he had told the employees that they could get a doughnut or coffee at a drive-in between jobs, but "it was not permissible to stop and eat breakfast. Breaks were still 15 minutes."⁹² Smith said that he had recently covered "this very issue" during Phillips' July 1997 merit review "Specifically indicating that it was not O.K. to stop at

⁹⁰ At the hearing, Beebe testified to the belief that this supposed "vendetta" was based on his union activity.

⁹¹ As previously noted, Stewart testified that the decision to discharge nonprobationary employees was ultimately his. As to the discharges at issue here, Stewart testified that Smith decided on them and that Stewart concurred.

⁹² The quotation is from Smith's testimony. For demeanor reasons, I do not credit Phillips' testimony that Karch said, "I did say you could take a break as long as it didn't interfere with your job and your job performance . . . but in this case, it is different." Further, to the extent inconsistent with my findings in the text, I do not credit Phillips' related testimony that he was given no reason for his discharge.

Wal-Mart between jobs unless taking a 15 minute break”,⁹³ and stated that it was not O.K. to stop at restaurants “as far out of our service area” as the 216th Street Café.⁹⁴ Smith said that he recalled having “this specific discussion” with Karch both before and after Phillips’ review “as [Karch] expressed concern to [Smith] about where [Phillips] had been spotted on a number of occasions.”⁹⁵ Phillips became orally abusive, obscenely saying that this was nonsense and only had to do with the Union. Smith asked Phillips “if there was any question after the incident in 1995 as to what the consequences could be.” Phillips said that Karch had said “it was O.K.” Smith said that he had heard all he was going to hear; that it was not fair to other employees, to Respondent’s customers, or to Respondent for Phillips to lead Respondent to believe that he was working when he was not; and that Smith had Phillips’ last paycheck. Smith also said that he was very concerned about what Phillips might do, as he had “a history of violence in the past.”⁹⁶ Phillips took his paycheck and left without incident.

8. Postdischarge conversations with employees

Soots went home sick late in the morning on August 26, and stayed home sick all day on August 27 and 28. In the evening of August 27, Phillips telephoned Soots that Phillips, Beebe, and Choi had been discharged because they had gone out to eat breakfast. When Soots indicated that he thought Phillips was joking, Phillips told him to call Choi if Soots thought Phillips was joking. Later that evening, Soots telephoned Choi, who said that the three employees had been fired for having breakfast. When Soots expressed disbelief, Choi told him to call Beebe, who told Soots that the three men had been fired for having breakfast.

On an undisclosed previous date, Soots had told Smith that Soots was at least considering a union and thought it might be better for him. On August 29, when Soots returned to work, he asked Karch if it was true that Phillips, Choi, and Beebe had been fired. Karch said yes. When Soots asked why, Karch said that they had been fired because they had gone out and had

breakfast. Soots said that he had been there and had not heard anything about it, and asked whether he, too, was going to be fired. Karch said that until Soots told him, he had not known who the fourth person was.⁹⁷

Later that same day, Soots went to Smith’s office and asked why Choi, Phillips, and Beebe had been fired. Smith said that they had gone out to breakfast and were not supposed to do this. Soots said that he thought this was a “pretty lousy excuse” for firing somebody. Smith said that the discharges had been warned once before about going out to breakfast and had chosen to ignore that warning and eat. Soots, who had attended the two union meetings in mid-June and on July 10 but had not engaged in any subsequent union activity, asked whether he, too, was going to be fired. Smith said no, that Soots had never before done something like this or been warned for it; that he should consider this to be his first warning, that Respondent valued him as an employee, and that as long as he kept his nose clean and followed Respondent’s rules, he would be fine. Soots asked whether his attendance at union meetings had put him in a position of jeopardy. Smith said that Soots should just consider this as his first warning, and that the two were not related at all. During this conversation, Smith said nothing about how long the August 26 morning break had taken.⁹⁸ Although Stewart testified that Respondent’s policy called for a warning letter in Soots’ personnel file with respect to what Smith told him about the 216th Street Café incident, no such letter appears in that file. A memorandum by Smith about this conversation with Soots is dated September 2, and was kept in Smith’s computer but not inserted in Soots’ personnel file. Soots, who was still employed by Respondent at the time of the hearing, credibly testified in March 1998 that there was no longer any union activity among Respondent’s Noblesville employees; “After the three guys got fired; that was the end of it . . . nothing else was breathed about it.”

On a date not clear in the record, Stewart had told the employees that if they ever felt “repercussion from the union activity or for talking about any of the supervisors to contact him and he would handle it.” Because Phillips believed that the three men had been fired on August 27 because of the union activity, on and after August 28 he made repeated efforts, including leaving messages, to reach Stewart by telephone. Eventually, Phillips succeeded in reaching him at the Noblesville office about September 2. When Phillips stated that the discharges believed they had been discharged because they had been talking to the Union, Stewart stated that he knew of no company that would allow their employees to take a “sit-down break,” and that Respondent had fired other employees for the same thing.⁹⁹

⁹³ The quotations are from Smith’s memorandum and Respondent’s statement of position. This evidence aside, there is no evidence that Karch made such a remark during Phillips’ merit review (see supra, part II, F1b).

⁹⁴ Stewart testimonially described the 216th Street Café as “a little bit outside” of Respondent’s service area.

⁹⁵ The quotation is from Smith’s memorandum and Respondent’s statement of position. This evidence aside, there is no evidence that such conversations occurred between Smith and Phillips, or between Smith and Karch after Phillips’ review.

⁹⁶ In October 1995, Smith orally warned Phillips because, on company property in the presence of three supervisors who complimented a rifle which Phillips had lent to a fellow employee, Phillips had accepted return of the rifle, which was not loaded, and put it into his car, which was parked in the employee parking lot. Respondent’s posthearing brief (p. 11) describes this as a warning “for [bringing] firearms onto Company premises.” This incident, and another incident in which Beebe had put a banana on employee Dean Clayton’s chair, had led Clayton’s attorney to advise Respondent that Clayton feared for his personal safety. Counsel’s letter was occasioned by Respondent’s threat to discharge Clayton if he continued to fail to report for work at least allegedly because of fears for his personal safety. After receiving oral assurances from Smith regarding Clayton’s safety, he returned to work. Laying this matter to one side, the record contains no explanation for Smith’s remarks about “violence.” Smith attached to his file documents in connection with Clayton’s complaint the notation, dated October 30, 1995, “No one at Insight has ever been [physically] injured by another employee.”

⁹⁷ My findings as to this Soots-Karch conversation are based on Soots’ testimony. For demeanor reasons, I do not credit Karch’s testimony that he told Soots that the reason he had not been discharged was that he had not been warned before, that the discharges had been warned, and that “this is your warning. The same thing could happen to you, just don’t let yourself get in that situation again.”

⁹⁸ My findings as to the content of this Soots—Smith conversation are based on a composite of credible parts of their testimony and of Smith’s memorandum of the incident. My findings as to the date and location of the conversation are based on the testimony of Soots, a more reliable witness than Smith, whose testimony gave a September 2 date and whose testimony and memorandum placed the conversation in the parking lot. However, these differences are immaterial.

⁹⁹ The General Counsel subpoenaed all of Respondent’s Noblesville personnel files, but found no file which stated that an employee had

Karch resigned from Respondent's employ on September 9, 1997, although, without signing a severance document, he continued to receive his salary for about 11 weeks thereafter. On the last day of Karch's active employment, Beebe came to Karch's office to return some company equipment which he had lent Beebe after his discharge. During this conversation, Karch expressed amazement at the power the word "Union" had in the Company. The two men agreed to help each other if they could. Then, Beebe remarked to Karch that since he had nothing now to lose, would he tell "them" that Karch had said it was all right for the employees to be out there? Karch said no, that all he had ever told the employees was that "if they got . . . out of the office at 8 o'clock and were at their job at 8:30 or on the way to the first job, it was okay to stop for coffee in the morning." Beebe said that this was not the way the employees remembered it (see *supra*, part II,F,1,a). Karch said that he did not care what they remembered, that was what he said. About February 1998, Beebe asked Karch to come forward and tell the truth that he had given the employees authorization prior to the 216th Street Café incident. Karch said that nobody should expect him to say anything but the truth, and that was all he would tell. Beebe said that this was all he wanted Karch to say.

About 10 days after the discharges, Choi telephoned Karch and asked about the possibilities of getting Choi's job back. Karch said that he did not think it was very likely at all. Karch went on to say that Choi was the one out of the three whose discharge Karch did not "feel real good about." Karch said that because Choi's truck was in the repair shop that day, he had been riding with Phillips, that Phillips was a "fairly hefty fellow" who could be "pretty intimidating," and that Karch wondered whether Choi had had any "real choice." Choi replied that even if he had been in his own truck, he still might have been there. Karch said that this made him feel a little bit better about Choi's termination.

After the discharges, but on a date not otherwise shown by the record, one of the remaining employees who had gone to the Big Boy in September 1995 (Buzan or Royer) told Stewart, "I knew not to be out there. I listened the first time. And I knew that I shouldn't have been doing that."

About mid-February 1998, during a chance encounter at a department store, Smith told Choi, "If I could roll back the time, I wish I could have done a little different for you." By this time, Smith had resigned from Respondent's employ.

9. Respondent's personnel situation on the date of the discharges

All three of the discharges completed their August 26 work assignments on August 26. So far as the record shows, no customers complained about the quality or timing of the work performed by Phillips and Choi that day, nor is there any contention or evidence that Beebe's work that day was deficient in any way. Karch credibly testified that Phillips was generally in the top percentile with respect to the number of service calls completed (see *supra*, fn. 66); Smith testified that Karch said "there were times . . . when repeat service calls had to be performed," and that "I believe [Karch's report] could have been during the period covered by [Phillips' wage] review," but the record fails to show whether such repeat calls after Phillips' fixes were more or less frequent than average. Beebe had re-

been discharged or warned for abuse of break (although see *infra*, fn. 102). The record otherwise fails to show whether other employees had in fact been discharged for this reason.

ceived written compliments from customers, for which Respondent rewarded him with \$10 or \$20 gift certificates. On three occasions, Choi had received gift certificates from Respondent because of customers' compliments. Smith testified that prior to the Big Boy incident, all three of the discharges were valued employees; and that Soots was a valued employee after the 216th Street Café incident, as well as before.

Smith further testified to telling Smith in June 1997 that Respondent should raise its Noblesville pay schedules because it had difficulty obtaining qualified employees and in keeping employees, and to continuing difficulties as to hire even after the pay schedules were increased in July 1997.¹⁰⁰ Smith's notes and Respondent's statement of position attribute to him, during service technician Phillips' discharge interview, the assertion that Respondent was short-handed. After the discharge of sweep technician Beebe, Respondent replaced him by three new sweep technicians, all at the same time.

10. Proceedings before the Indiana Civil Rights Commission and the Indiana Work Force Development Department

The initial charge in this case, which alleges (inter alia) that Phillips, Choi, and Beebe were discharged on August 27, 1997, because of their union activity, was dated by Beebe on September 3, 1997, and filed on September 10. These allegations were repeated in an amended charge signed by Beebe on October 25, 1997, and filed on October 29. Both of the charge forms signed by him contained the printed statement, "Willful false statements on this charge can be punished by fine and imprisonment." In March 1998, Beebe testified to the belief that his union activity was the only reason for his discharge. On September 24, 1997, Beebe swore to and filed, on advice of counsel, a charge with the Indiana Civil Rights Commission (the ICRC) alleging that Respondent "discriminated against [him] on the basis of his sex by terminating his employment because he took a break, while female employees, who routinely take morning and afternoon breaks are not disciplined or terminated." Beebe testified before me that this claim "was based on the fact that Doug Smith stated that he fired me for taking a break, an unauthorized break . . . I believe that if I was a female and [not] in the Union, the [chances] of me getting fired are slim to none . . . in today's society a non Union female has more rights than a male individual." He further testified that after his discharge from the job of sweep technician, Respondent assigned three males, all at the same time, to replace him. Also on September 24, Phillips signed a virtually identical ICRC charge, without reading it, on the advice of his lawyer. Phillips testified before me that he did not believe he was fired because he is a man. Also on September 24, Choi signed and swore to an ICRC charge which alleged that Respondent had discriminated against him "on the basis of his sex, male, his national origin, Korean, and his race, Asian, by terminating his employment because he took a break, while female, non-Korean and non-Asian employees who routinely take morning and afternoon breaks are not disciplined or terminated." Choi

¹⁰⁰ Stewart testified that at least partly because of Respondent's then wage scale, as of July 1997 Respondent had an ongoing problem in hiring installers and customer service representatives. R. Exh. 24 suggests that as of July 1, 1997, Respondent had openings for two installers (of whom it then had seven incumbents) and one part-time customer service representative (of whom it then had 10 full-time incumbents). All three of the alleged discriminatees had at one time been installers.

testified before me that he did not believe he lost his job because of his race, his gender, or his Korean descent. In making my credibility findings, I have taken into account the employees' action in filing and signing these charges and their testimony in connection therewith.¹⁰¹

Following their discharge, all three employees applied for unemployment compensation. Thereafter, the Indiana Workforce Development Department solicited Respondent's version of the facts leading up to the discharges. Smith's replies with respect to all three were nearly identical. As to each of the three, Smith stated that the claimant was discharged for "not working when he was supposed to be on the job." As to the "specific details of the final incident which resulted in the discharge," Smith stated; "Claimant and others were confronted about being at restaurant outside of our service area when they were supposed to be working. Claimant had received previous specific warning about this and was terminated after admitting to it." Smith checked the "yes" boxes in reply to the questions "Does the company have an employees rules and/or disciplinary policy?," "Was the claimant aware of the policy?," and "Is the policy uniformly enforced?"; but did not provide "a copy of the policy" as the form called for. In response to the question, "How, when and by whom was the claimant made aware of the policy?," Smith stated, "Claimant was specifically warned about this policy on 9/7/95 after finding him at a restaurant when he was supposed to be working." Smith went on to state, "Warning was given verbally . . . along with other employees present at the first incident . . . it was made clear that termination could result if it happened again." Under "Additional comments," Smith wrote, "Four employees were confronted about and admitted to eating breakfast at the 216th Street Café. Three of the four had received a previous warning after having been caught doing the same on 9/7/95 at [the Big Boy]. The three receiving the previous warning were discharged as they were told another occurrence could result in termination. The fourth employee received a warning and was not discharged." All three replies are dated September 20, 1997.

As to all three, the determination of the Indiana Work force Development Department (dated September 29 or October 2, 1997) stated, in part:

CIRCUMSTANCES OF CASE

.....
This determination is based on the available information.

The claimant was discharged for breach of duty in connection with the work. The information provided does not support the allegation that the claimant's conduct showed a breach of duty reasonably owed to the employer.

CONCLUSION OF CASE

The claimant was not discharged for just cause. It has not been established that the claimant's conduct was a breach of duty in connection with the work . . . no penalty is imposed under these conditions.

These three determinations were never appealed. The General Counsel subpoenaed all of Respondent's Noblesville per-

sonnel files, but found no file which stated that an employee had been discharged or warned for abuse of break.¹⁰²

G. Analysis and Conclusions

1. Allegations relating to solicitations of complaints and grievances, promises of increased benefits and improved conditions of employment, increases in benefits, and threats of loss of benefits, to discourage union activity

a. Solicitations and promises; related interrogation

It is well settled that an employer violates Section 8(a)(1) of the Act by promising to grant benefits to his employees for the purpose of inducing them to refrain from choosing union representation. *NLRB Berger Transfer & Storage Co.*, 678 F.2d 679, 691 (7th Cir. 1982); see also, the cases cited *infra*, fns. 103–104. In the instant case, the credible evidence shows that in the course of the July 11 "all-hands" meeting, whose convening Company Vice President Stewart's introductory remarks attributed to Respondent's efforts to keep the Union from getting into the system, Stewart told the employees that Respondent was going to reimburse any employee for the new copayments increases about which the employees had complained during that and Stewart's other employee meetings and conferences. Further, during this same meeting, Stewart said that he was absolutely committed to do what needed to be done "to address our issues" (which amounted to a promise to remedy at least some of them),¹⁰³ and the evidence (largely consisting of Smith's notes) shows that during earlier meetings with groups of and individual employees, employees had complained about the elimination of free "pay-per-view," perceived verbal abuse from and unprofessional treatment by management, problems in obtaining needed tools and in obtaining them in a timely manner, perceived deficiencies in field employees' ability to communicate with "dispatch," perceived deficiencies in equipment, perceived requirements that employees report to work when they were sick, perceived inconsistencies in expectations for different people, perceived inadequate training, perceived security problems, perceived excessive workloads, difficulties in leaving on time because of existing "cashing out" procedures, perceived unfairness and/or inconsistency in vacations, sick leave and sick pay, pregnancy, and rotation of work, and failure to obtain wage reviews (at least ordinarily, a required preliminary for merit increases). I find that by thus promising to "address our issues," Stewart promised its employees additional benefits for the purpose of inducing them to refrain from choosing union representation, in violation of Section 8(a)(1) of the Act. Although the record fails to show that he in terms conditioned the fulfillment of such promises on the employees' refraining from union organizational activity, Respondent's pur-

¹⁰² However, in September 1996, Phillips received a warning for failing to work during a 20-minute period which began more than an hour after Respondent would have expected him to take an afternoon break. No contention is made that this incident had anything to do with his discharge.

¹⁰³ See *Raley's Inc.*, 236 NLRB 971 (1978), *enfd.* 608 F.2d 1374 (9th Cir. 1979), *cert. denied* 449 U.S. 871 (1980); *Forrest City Grocery Co.*, 306 NLRB 723, 728–729 (1992); *Bakersfield Memorial Hospital*, 315 NLRB 596, 600–601 (1994).

¹⁰¹ The record fails to show the disposition of these September 24, 1997 ICRC charges.

pose in making such promises is sufficient to render them unlawful.¹⁰⁴

Further, the record shows that for the purpose of causing the employees to reject unionization, during the July 9–11 departmental meetings Stewart, by soliciting employee complaints and grievances, promised employees increased benefits and better terms and conditions of employment. Although Respondent's "open-door pledge" did assure employees that they need not fear "repercussion" for talking with their superiors about questions or problems,¹⁰⁵ there is no evidence that before word of the union campaign led Stewart to make a previously unscheduled and unusually long visit to the Noblesville facility, Respondent had followed the practice of affirmatively soliciting employee grievances or complaints. However, Respondent tried to make sure that every employee attended one of these meetings (see *supra*, fn. 23); Smith testified that their purpose was to ascertain the employees' concerns; and Stewart began each meeting by telling the employees that he knew there had been some interest expressed in a union, that he was interested in finding out what was on people's minds, and that the purpose of the meeting was to try to help make things better for the employees. Then, in Smith's presence, Stewart devoted about 6 hours of employees' paid time to receiving employees' complaints about working conditions. In response to some of the complaints made at these meetings, Stewart promised some specific improvements (technical improvement in the communications system used between on-the-road employees and "dispatch"; and compensation for the copayments newly required by the health insurance program); said that complaints about rotation of Saturday work would be taken up on the following day; stated in response to complaints about unavailability of tools that Respondent should be supplying them, and then obtained from the employees written lists of what they needed; and stated that other complaints would be dealt with in a proper manner or would be taken under review.¹⁰⁶ In reply to employee Beebe's inquiry during one of these meetings as to the time frame within which employees could expect the indicated changes to take place, Stewart replied (according to Smith's punctuated notes); "we are committed to making appropriate changes! Some already in motion. Some will take a bit longer. Changes will take place!"

In short, in the express context of Respondent's desire to prevent the Union from organizing the facility, Stewart solicited employees' complaints and grievances and then promised in terms to rectify some of them and promised to give serious consideration to others. I conclude that by such conduct, Respondent violated Section 8(a)(1) of the Act; see cases cited *supra*, fn. 104. In any event, even in the absence of such express promises, Stewart's remarks during these department

meetings constituted an implicit promise that Respondent would rectify some of these grievances, and an implicit statement that Respondent would take such action for the purpose of causing the employees to reject union representation. Accordingly, such remarks violated Section 8(a)(1) of the Act. *Hertz Corp.*, *supra*, 316 NLRB at 686–687; *Columbus Mills, Inc.*, 303 NLRB 223, 227 (1991); *Raley's Inc.*, *supra*, 236 NLRB 971; *Lasco Industries*, 217 NLRB 527, 531 (1975). As the Board said in *Reliance Electric Co.*, 191 NLRB 44, 46 (1971), *enfd.* 457 F.2d 503 (6th Cir. 1972), quoted in *Palm Garden of North Miami*, 327 NLRB 1175 (1999):

Where, as here, an employer, who has not previously had a practice of soliciting employee grievances or complaints, adopts such a course when unions engage in organizational campaigns seeking to represent employees, we think there is a compelling inference that he is implicitly promising to correct those inequities he discovers as a result of his inquiries and likewise urging on his employees that the combined program of inquiry and correction will make union representation unnecessary.

In the instant case, such an inference is rendered even more compelling by Respondent's action in subsequently rectifying employees' complaints during these meetings with respect to tools and health insurance copayments; and by Stewart's subsequent inquiry to Phillips about the strength of the Union's present support "now that some of the problems had been solved."

For similar reasons, I find that Respondent further violated Section 8(a)(1) of the Act: (a) when, on July 2, Stewart asked employee Phillips why some of the employees were interested in the Union and—when Phillips cited perceived verbal abuse by supervisor Karch, the change in health-insurance "deductibles," and discontinuance of free "pay-per-view"—said that Stewart would look into these concerns and get back to Phillips; (b) when, on July 8, Stewart again asked him why the employees felt they needed a union and what the employees' concerns were, and, upon Phillips' mention of pay-per-view, verbal abuse from management, and tools, said that "we didn't need a third party to intervene, [Respondent] and the employees could take care of the problems on their own"; and (c) when, on July 8, Stewart told employee Choi that Respondent had an open door policy and a good benefit package, asked why Choi and other employees thought they needed a union, and—when Choi specified the health-insurance issue, the pay-per-view policy, the tool policy, Respondent's perceived unprofessional attitude toward employees, Respondent's perceived unfair advancement policy, and the pension plan—said that employees should be able to get tools from the warehouse without any problem, and that Stewart would "work on that." In addition, I find that during these conversations, Respondent further violated Section 8(a)(1) when Stewart interrogated Phillips and Choi about other employees' union sympathies, and interrogated Choi about his own union sympathies. In so finding, I rely on the fact that Respondent used the information which Stewart thereby obtained from Phillips and Choi as a basis for unlawfully promising benefits to them and other employees and for selecting the benefits which Respondent later unlawfully granted (see *infra*). I also note that Stewart was a member of Respondent's top out-of-town management; that as the employees must have come to realize, he had decided to accompany Phillips during his service calls, and to take him and Choi to lunch, for the specific purpose of asking them what dissatisfac-

¹⁰⁴ *Bakersfield Memorial Hospital*, *supra*, 315 NLRB at 600; *Hertz Corp.*, 316 NLRB 672, 686–687 (1995); see also *NLRB v. Exchange Parts Co.*, 375 U.S. 405, 408–410 (1964).

¹⁰⁵ See Respondent's out-of-print September 1992 employee booklet, reproduced copies of which were distributed to the employees during Stewart's "all-hands" meeting on July 11, 1997. However, as noted *supra*, part II,C,5,d, 2 days earlier a customer service representative had told Stewart that she had stopped making suggestions to management because they were not followed up on.

¹⁰⁶ Complaints about medical benefits; safety matters; adequacy of training; sufficiency of wages; perceived favoritism between employees; perceived verbal abuse from supervisors; perceived unfairness as to vacations, sick leave and sick pay, and pregnancy; furniture needs; and tool pouches.

tions underlay their and other employees' interest in the Union; and that both employees had initially attempted to avoid Stewart's questions.¹⁰⁷

b. Grant of benefits

It is well settled that an employer violates Section 8(a)(1) and (3) of the Act by granting benefits to his employees for the purpose of causing them to lose interest in unionization.¹⁰⁸ As noted above part II,B,3,5, during Stewart's July 8 conversations with employees Phillips and Choi, and during Stewart's July 9–11 departmental meetings with employees, employees complained about the procedures and waiting time involved in getting tools (in consequence of which, the employee sometimes bought their own). During these meetings, which Stewart conducted for the avowed purpose of finding out the employee concerns which had led to the interest in union representation, Stewart said that employees should be able to get tools from the warehouse without any problems, that he would "work on that," that the problem regarding waits for tools would be dealt with in a proper manner, and that Respondent should be supplying the tools which the employees had been paying for out of their own pockets. After that, Respondent changed the procedures for obtaining tools, so that employees could obtain needed tools simply by asking for them. Further, during the July 9 meeting with Respondent's technicians, Stewart and Smith obtained from the technicians written lists of the tools each of them thought he needed and, on the basis of these lists, thereafter successfully requested the approval of the New York office for substantially increased purchases of small tools. Also, in July 1997, Respondent issued to its employees tools which they did not have but which Respondent believed they needed. I conclude that the evidence preponderantly shows that Respondent's provision of new tools was motivated at least in part by a desire to discourage the employees' interest in union representation. Furthermore, Respondent has failed to show by a preponderance of the evidence that it would have taken this action as early as July 1997 even if the employees had not been displaying interest in the Union.¹⁰⁹ Although Stewart did testify that the tool-supply practice which he effected at Noblesville following his July visits was the practice followed at Respondent's other systems, Stewart asked top management to approve his July 22 "replacement tools" purchase order on the basis of the inventory sheets which he had asked the employees to complete during the July meetings where, for the purpose of causing disaffection from the Union, he expressly and impliedly promised to rectify the employees' complaints about tools. Accordingly, I find that Respondent violated Section 8(a)(1) and (3) of the Act by giving employees new tools in order to discourage the employees from seeking union representation.

This context of Stewart's efforts to ascertain the employee concerns which had caused interest in unionization and employees' complaints about the newly instituted copayments in

connection with their health insurance, and of Stewart's promise that Respondent would reimburse them therefor, leads me to conclude that the evidence preponderantly shows that Respondent's action in making such reimbursements was likewise motivated, at least in part, by a desire to discourage employees' interest in unionization. Further, I find that Respondent has failed to show, by a preponderance of the evidence, that it would have made such reimbursements even if the employees had not shown interest in union organization. In the first place, Respondent had previously failed to take such action even though (as I have inferred) Respondent had been aware of such changes for more than 5 months. Further, there is no evidence that absent the union movement, Respondent would have made such reimbursements even if it had in fact remained ignorant for many months that such changes had been effected. Accordingly, I find that Respondent violated Section 8(a)(1) and (3) of the Act by reimbursing employees for copayment expenses.

As previously found, after Stewart's conversations with employee Phillips and Stewart's meetings with the customer service representatives had revealed that the employees were unhappy about the elimination of "pay-per-view" from their free cable-television package, Respondent instituted the practice of giving coupons good for one pay-per-view movie for each month of perfect attendance. In view of Stewart's purpose in conducting these meetings, I conclude that the evidence preponderantly shows that Respondent's institution of the coupon program was motivated by a desire to discourage employees from supporting the Union. Because Respondent has failed to tender any lawful reason for the timing of such action, I find that it violated Section 8(a)(1) and (3) of the Act.

However, I do not agree that Respondent violated the Act by granting "wage adjustments" to all the employees, and granting such adjustments at the same time as the "merit increases" routinely given in July. The evidence shows that on June 2 (before the union activity began) Stewart asked all of Respondent's local managers for recommendations regarding merit increases and for local wage surveys to be used in determining local wage adjustments; that before Respondent learned about the union movement, Karch made his merit-increase recommendations and the completed results of the wage survey had been put into Smith's computer; that such results were computer-printed on or shortly before the date when Respondent first learned about the union movement; and that the "wage adjustments" put into effect were not markedly out of line with the results of the survey. Further, Respondent's action in putting both the "wage adjustments" and the "merit increases" into effect simultaneously was not unprecedented, and indeed, may have reflected Respondent's usual, although not invariable, practice. The General Counsel's posthearing brief relies mostly on the fact that the wage adjustments were not limited to the job categories which Stewart's testimonial explanation of the wage adjustments specified as difficult to fill, but, instead, extended to categories not specified by him (service technicians, maintenance technicians, and warehouse persons). However, Smith credibly testified to expressing to Stewart concern about remaining competitive with respect to retaining employees. Moreover, Stewart credibly testified that in adjusting entry-level rates, he did not want to effect compression in salaries; and installer to service technician to sweep technician constitutes a normal path of promotion. Furthermore, Respondent employed only one Noblesville warehouseman. As to the wage adjustments, the complaint will be dismissed.

¹⁰⁷ *Berger Transfer*, supra, 678 F.2d at 689; *Family Foods*, 300 NLRB 649, 661 (1990), enf'd. 968 F.2d 1214 (6th Cir. 1992); *Triec, Inc.*, 300 NLRB 743, 749 (1990).

¹⁰⁸ *Marriott Corp.*, 310 NLRB 1152, 1158 (1993); *Yale New Haven Hospital*, 309 NLRB 363, 366–367 (1992). See also *Exchange Parts*, supra, 375 U.S. at 408–410.

¹⁰⁹ See *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 398–403 (1983); *NLRB v. Bestway Trucking*, 22 F.3d 177, 180 (7th Cir. 1994); *Matson Terminals, Inc. v. NLRB* 114 F.3d 300, 303–304 (D.C. Cir. 1997).

I shall also dismiss the complaint as to the provision of Gatorade. Respondent had provided Gatorade and Coke to some employees in previous years, had consistently provided ice and other aids to keeping cool during hot weather, and had provided coolers to a number of employees. Moreover, there is no evidence that at any material time, any of the field employees complained to Respondent about the heat or requested Respondent to provide soft drinks. I conclude that the record fails preponderantly to show that the 1997 provision of Gatorade was motivated by the union movement rather than by the considerations which had led Respondent to provide other summer amenities.

c. Alleged threats

As to Stewart's allegedly unlawful July 11 statements about Respondent's open-door and no-layoff policies, I have credited Choi's testimony, largely corroborated by Stewart's testimony and the notes from which he spoke, that Stewart said that under Respondent's present "open door" policy, the employees could come to management and work out problems; but that if the employees chose union representation, such a policy might no longer be followed. Such a statement reflects fairly accurately the legal result of a union's designation as the employees' exclusive bargaining representative.¹¹⁰ In addition, although I also credit Choi's testimony that Stewart said he could not "guarantee" the continuation of Respondent's existing no-layoff policy, this statement must be evaluated in light of the credible evidence that he accompanied this statement by accurately stating that bargaining is a give-and-take process under which the employees could end up with more and could end up with less.¹¹¹ Accordingly, I find that the credible evidence fails to support the complaint allegations then during this speech Respondent, through Stewart, violated Section 8(a)(1) by threatening that if the employees selected the Union as their collective-bargaining representative, Respondent would eliminate its "open-door" policy and its "no-layoff" policy. *Shaw's Supermarkets, Inc. v. NLRB*, 884 F.2d 34 (1st Cir. 1989) (per then Circuit Judge Breyer); *Purolator Products*, 270 NLRB 694, 695-696 (1984), *enfd.* 121 LRRM 2120 (4th Cir. 1985); *Pembroke Management, Inc.*, 296 NLRB 1226 (1989).

2. Other, independent 8(a)(1) allegations
(impression of surveillance, interrogations)

I do not agree with the General Counsel that Respondent unlawfully conveyed to employees the impression of surveillance over union activities. Unlike the General Counsel, I do not conclude that such an impression was conveyed by supervisor Karch's late June remark to employee Beebe that Karch had heard there were "talks" about the Union; by Vice President Stewart's July 2 response, to employee Phillips' statement that some people were interested in the Union, that Stewart had heard that; or by Stewart's accurate July 11 statement at the "all-hands" meeting that a union meeting had been held the previous evening. Although Stewart's remarks were likely

¹¹⁰ See *Emporium Capwell Co. v. Western Addition Community Organization*, 420 U.S. 50, 61-70 (1975); *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 652 (1965).

¹¹¹ I do not credit either Phillips' testimony that Stewart said the "no-layoff" policy would "probably" no longer be in effect, or Beebe's testimony, credibly denied by Stewart, that he said that if the employees chose union representative "would go back to ground zero. And we would have to negotiate each item all over again." I believe that these employees misunderstood Stewart's remarks.

based partly on information which Karch obtained from his interrogation of Beebe (which I find to be unlawful, see *infra*), I do not believe that the nature and the degree of specificity of the employer knowledge revealed by Karch or Stewart to the employees was such as to likely lead them to believe that it was obtained through illicit spying on union meetings or on employees' discussions about unions.

However, I do agree that Karch's interrogation of Beebe about the Union violated Section 8(a)(1). In so finding, I rely on Beebe's failure to comply with Karch's request to name the leaders of the union movement, on the fact that Karch's report to Smith about Karch's conversation with Beebe prompted Stewart's decision to visit the Noblesville facility and embark on an unlawful antiunion campaign, and on the absence of any claim or evidence of any legitimate purpose for such inquiries. In addition, I find that Respondent violated Section 8(a)(1) on July 11 when Stewart interrogated Beebe about the identity of who supported the Union. In so finding, I rely upon the fact that Stewart was thus seeking information useful for discrimination, that Respondent thereafter used for that very purpose the information which Beebe gave in reply, that no legitimate purpose for such interrogation was given by Stewart or appears in the record, and that Stewart gave no assurances against reprisal.¹¹²

3. The allegedly discriminatory discharges

The instant record leaves no room for doubt that Respondent strongly opposed the union movement. Furthermore, Stewart's July 11 inquiry to Beebe about "who else" supported the Union shows Respondent's belief that by that time, Beebe was a union supporter; Stewart's July 8 interrogation of Choi disclosed Choi's support of the Union; Respondent's July 8, 1997 notes (which were still in existence in March 1998) specifying which employees were believed to favor the Union and which were believed to oppose it show that Respondent believed Choi and Phillips to be union supporters; and Stewart's July 11 interrogation of Beebe revealed that Phillips was "basically the head guy and . . . the individual who made the initial call" to the Union.¹¹³ In addition, Respondent discharged these three employees at a time when Respondent was short-handed (as Smith told Phillips on the very day he was discharged) and was having difficulty attracting qualified applicants and keeping incumbent employees, although all three of the alleged discriminatees had been considered valuable employees.¹¹⁴ Phillips was generally in the top percentile with respect to the number of service calls

¹¹² See *Berger Transfer*, *supra*, 678 F.2d at 689; *NLRB v. Shelby Memorial Hospital*, 1 F.3d 550, 558-560 (7th Cir. 1993); *BRC Injected Rubber Products*, 311 NLRB 66, 71-72 (1993); *NLRB v. McCullough Environmental Services*, 5 F.3d 923, 928 (5th Cir. 1993); *Marriott*, *supra*, 310 NLRB at 1157; *Cumberland Farms*, 307 NLRB 1479 (1992), *enfd.* 984 F.2d 556 (1st Cir. 1996).

¹¹³ In view of this evidence, and for demeanor reasons, I do not credit Stewart's testimony that in August 1997 he was unsure whether Beebe was interested in a union and did not think Choi was interested. I note Stewart's self-contradictory testimony about whether the Union was mentioned during the August 26, 1997 conversations during which the discharge decision was reached. I note, moreover, Stewart's testimony that at that time, he was concerned that there could be a charge filed.

¹¹⁴ The suggestion in Smith's testimony that he did not so regard them after the Big Boy incident is undermined by his testimony that he continued to regard Soots as a valued employee after the 216th Street Caf  incident.

completed, and Beebe and Choi had to Respondent's knowledge received compliments from customers. Moreover, during the wage reviews less than 2 months before the discharges, all three of them received favorable comments; and the merit wage increases received by all three were comparable to those received by others. Further, after the Big Boy incident, and about 16 months before the discharges, dischargee Beebe had been promoted with an hourly wage increase of \$1.80. Also, about 5 weeks before the discharges, Stewart told Choi that everyone Stewart had ridden with (who included Choi and Phillips) was doing a "great job."

Additionally contributing to the General Counsel's case are the incoherence and disjointedness of Respondent's explanations for the discharges. Thus, on direct examination Smith testified that Phillips, Choi, and Beebe had been fired "for being out eating breakfast after having been warned specifically not to." Similarly, Karch told Soots that these employees had been discharged because they had gone out and had breakfast. Also, later that same day Smith told Soots that Phillips, Choi, and Beebe had been fired because they had gone out to breakfast and were not supposed to do this, and that they had been warned once before (referring to the Big Boy incident) about going out to breakfast and had chosen to ignore that warning and eat. Likewise, Stewart testified at the hearing that "having breakfast on company time" was "basically the reason" for the discharges. However, Stewart later testified that if an employee took a break for an acceptable length and an acceptable hour, Stewart did not care what the employee ate during this period. Similarly, when asked at the hearing whether employees could have breakfast during a break, Smith replied, "Sure."

The honesty of Respondent's reliance upon the September 1995 Big Boy incident is further drawn into question by the absence of any reference thereto in any of the participants' personnel folders, notwithstanding the instructions in the "personnel guidelines" booklet that "conversation documents" be included in the employees' personnel file, and notwithstanding the testimony of Stewart (one of Respondent's executives for 11 years) that this procedure is disregarded "very rarely" because he regularly inquires about such documents when discussing employees with his subordinates, and that the September 1995 "warning" should have been in the employees' file. Indeed, the 216th Street Café incident which allegedly motivated the discharge of Phillips, Choi, and Beebe was not reflected in the personnel folder of Soots, whose participation in that incident was noted only in Smith's computer, with the concomitant risk that upon Smith's separation (he resigned while Soots remained in Respondent's employ), this record would be forgotten or even destroyed. The sincerity of Respondent's reliance on the Big Boy incident is also undermined by Smith's August 1997 assertion to the employees and to Stewart that, in effect, the 1995 Big Boy "warning" had specifically encompassed breaks outside the service area, although the Big Boy had been located 2 miles from Respondent's office and either inside or across a street from Respondent's service area. Moreover, although Respondent's witnesses testified at various points that the discharge action was based to some extent on the fact that the 216th Street Café was outside Respondent's service area, Stewart described this location as "a little bit outside" Respondent's service area, Smith testified that the "service area" would be an issue only if "the travel time was unreasonable," and Stewart testified, in effect, that the service area issue related entirely or almost entirely to whether the employees

were trying to "hide" their break¹¹⁵ and that "where [the 216th Street Café] is located, if you are passing from one part of the service area to another part of the service area, you could be driving down that road." Indeed, the 216th Street Café was only 2 miles outside of Respondent's sprawly service area and was much closer to the participants' work locations that day than was most of the service area itself.¹¹⁶

Further reflecting on the sincerity of Respondent's tendered lawful explanations for the discharges is the inapplicability of some of these explanations to what the employees had in fact done. Thus, Stewart testified that all three employees were discharged for eating breakfast during the time period when they were supposed to be working on their first job. As to Beebe, this assertion disregards the fact that he had been working since about 6 a.m. that day, had completed three jobs, and took his break between jobs, which were situated at separate locations and did not consist of customer service calls;¹¹⁷ indeed, during Beebe's discharge interview Smith made no claim that Beebe had been at the 216th Street Café at a time when he should have been working on his first job. It is true that during Phillips' and Choi's termination interviews, Smith attributed their discharge partly to the fact that before visiting the 216th Street Café they had not yet performed any service calls even though "dispatch" would properly be acting on the assumption that they were in the course of making the calls set forth on their work orders for the day. However, these claims disregarded the fact that Phillips and Choi had begun their workday by dropping Choi's truck off at a tire shop for replacement of a tire; the dispatchers' ability to reach personnel in the field by telephone, radio, pager, and remote-control honking; and the evidence that Phillips and Choi completed all their assigned service calls that day even though they had only one truck between them. Furthermore, there is no evidence or claim that either their work orders that day or any oral communications they may have received from "dispatch" included any specifications as to the time of day when the calls were to be made.¹¹⁸ In view of this evidence, Respondent's alleged concern with the timing of the dischargees' break that morning is also difficult to reconcile with Stewart's and Karch's testimony about the timing of breaks. Thus, Stewart testified that service technicians "are self-managing with regards to taking their breaks. And they would take a break that is convenient to them, based on what their work load is during that time, based on the complexity of the job that they are doing . . . they can take their morning break and their afternoon break pretty much any

¹¹⁵ "[I]t is not really an issue of whether you are in the service area or not in the service area . . . it appeared . . . that employees . . . could potentially be hiding or trying to hide the fact. And I don't know where the vehicles were parked at that time. But the primary issue was the fact that they were taking breakfast when they should be working . . . that is the reason why they were terminated."

¹¹⁶ Indeed, the shortest route between certain points within Respondent's service area would have been almost entirely outside that area.

¹¹⁷ Beebe reported having completed one "fix" more than 7 hours later, at 5:20 p.m. As previously noted, sweep technicians occasionally correct certain kinds of problems that the service technicians may report to them.

¹¹⁸ Stewart testified that in most of Respondent's systems, the plant manager expects employees to notify "dispatch" when they are taking breaks. However, Beebe's undenied and credible testimony shows that no such requirement existed at the Noblesville facility. Beebe credibly testified to an ongoing problem in reaching "dispatch" for any purpose; cf. supra, fn. 16, and attached text, and part II,C,5,e.

time.” Rather similarly, Karch testified that Respondent does not have a set time for morning breaks, “We are pretty flexible because you have to work those breaks around customer service calls. You never know how long any particular service call is going to take.” Although Karch testified at one point that service technicians “need to get [to the repair site] by 8:30 in order for it to be a first call,” he later testified that the service technicians do not always have a first call at 8:30, and that as a rule, the technicians would not leave the facility for the field until 8:15 or 8:20. Also, although Stewart at one point suggested to Phillips that he and the other employees had been discharged for taking a “sit-down break,” it seems unlikely that Respondent cared whether the employees took their breaks sitting down or standing up; indeed, both Stewart and Karch testified, in effect, that the time consumed in picking up takeout refreshments would not be chargeable against the length of the morning break to which employees were entitled; and (as noted) Stewart and Smith testified that employees were free to use their morning break by eating breakfast.

The opening statement of Respondent’s counsel claimed that the employees were discharged at least partly for taking “unauthorized breaks,” a contention renewed on page 4 and page 15, lines 3–4, of counsel’s posthearing brief. There is no evidence that Respondent so advised Choi and Phillips during their termination interviews. Moreover, it is difficult to determine the meaning of this claim. Thus, Stewart’s testimony at least strongly suggests that employees would be considered as taking an authorized break if their supervisor had initially advised them about the permitted length and timing of their breaks with the statement that such information would not be periodically reiterated, their breaks subsequently conformed with these guidelines, and they were not reproached therefor. Further, the record shows that in September 1995 Karch had told the employees they could continue taking morning breaks the way they had been doing it, that the employees had in fact continued to do this, and that laying to one side Phillips’ July 1997 wage review and the September 1996 Phillips incident summarized supra fn. 102, until the August 1997 216th Street Café incident nobody from management complained to them about their break practices. I regard as inherently unlikely any suggestion that Respondent’s management remained unaware of these employees’ break practices for almost 2 years, particularly in view of Hoffman’s and Karch’s testimony that from time to time since 1995, they had been monitoring employees’ morning presence at restaurants.

The principal reason tendered by Respondent for the discharges appears to be that Respondent allegedly believed in good faith that they had overstayed their break. A major difficulty with this contention is the total absence of evidence that Respondent ever asked any of the participants how long he had taken for his break that morning. Indeed, Phillips’ testimony is undenied that Smith said nothing to Phillips about the length of time he spent at the 216th Street Café; and Soots’ testimony is undenied that when giving him a purported explanation for the discharge of Phillips, Choi, and Beebe, Smith said nothing about the length of the 216th Street Café break.¹¹⁹ Moreover,

¹¹⁹ Although Smith did ask the discharges where they had been and what they had done between 8 or 8:30 and 9:30, there is no evidence that Respondent ever suspected that they had been on break throughout this period, there is no evidence that the employees’ responses included any claim as to the length of their break or the time when it began and ended, and there is no evidence that Smith ever requested these details.

although Beebe credibly testified that Smith said that the 216th Street Café was out of Respondent’s area and it would have taken too long to get there and too long to get to the next job (see supra, part II,F,4,a), Beebe’s testimony is undenied that Smith did not talk with Beebe about how long he was in the restaurant. This omission is particularly difficult to square with Respondent’s reliance on the length of the 216th Street Café break in view of the fact that Respondent had no way of knowing (except as to Choi and Phillips, who were sharing a truck) whether the employees had entered the 216th Street Café together or separately. Indeed, Smith did not testify that the length of the employees’ break was mentioned during his conversation with Stewart during which the discharges were decided upon. Any honest belief by Respondent that the length of time the employees spent in the 216th Street Café rendered their visit a dischargeable offense is also rather difficult to reconcile with Respondent’s de facto policy with respect to field employees’ breaks, a policy necessarily accommodated to the unpredictability of their work locations, of the amount of time each job would consume, and of the number of service technicians’ service calls. Further, incumbent service technician Soots advised Stewart, inferentially after the discharges, that sometimes Soots worked through or during part of his lunch hour or a break, and that sometimes he compensated for this by taking a lunch period or break longer than the period called for by Respondent’s policies.¹²⁰ Similarly, Beebe credibly testified that sometimes he did not take a break because of an emergency situation such as an outage or because taking a break would have interfered with scheduled service; and that Karch knew this and never said anything about Beebe’s not taking a break. From the probabilities of the case, I infer that other service technicians also followed such practices, and that Respondent knew this.

That Respondent was normally very loose in its break policy is further shown by the failure of management witnesses to give consistent testimony about the length of the permissible breaks. More specifically, Installation Manager Hoffman, who had worked at the Noblesville facility for 8 or 9 years, testified that the permissible length was 10 minutes, and that from time to time, she would “make rounds” to ascertain whether Respondent’s break policy was being followed. Stewart testified that the permissible length was 10 to 15 minutes. Karch, who had also worked for Respondent for 8 or 9 years and had also made such “rounds,” testified that the permissible length was 15 minutes.¹²¹ Smith testified that the break policy was a break of “up to 15 minutes,” that “something beyond” 20 minutes “would . . . start to get in to a problem,” and that anything to exceed 15 minutes by more than a minute or so should be worked out by the employee with the department head. Respondent’s posthearing brief states at one point (p. 4) that the permitted paid break was “only 15 minutes” and at another point (p. 7) that the employees “are permitted two formal 15–20 minute paid breaks (one in the morning and one in the afternoon).” Management’s ordinarily casual attitude about the length of breaks is further shown by the credible March 1998 testimony of incumbent

¹²⁰ Subsequent to the discharges, Respondent prohibited employees from working during their lunch hour.

¹²¹ However, just before so testifying, he testified, “It wouldn’t be a break if they had stepped into this restaurant to get a cup of coffee and a donut and be on their way, and they were there for ten or fifteen minutes.” Thus, he went on to testify, “I would say, well, that was their morning break.”

employee Soots, hired by Respondent in March 1996, that management had never told him how long he could take on breaks, that he had received his only information about the matter from his fellow employees, and that they had told him he was allowed about 10 minutes.¹²² Further, I do not accept the assertion in Respondent's brief (p. 7) that "The employees understood that their break period begun when they left their last job." In attempted support of this claim, Respondent's brief cites only Karch's rather uncertain testimony that "I suppose" the permitted break period starts to run "when you left your last job." Even standing alone, such a rule would prevent employees from taking a restaurant break after any job which was more than 10–20 minutes (depending on which management witness' testimony is accepted as to the length of the break) from the nearest restaurant with parking for trucks.¹²³ Opportunities for breaks would be even scarcer were I to accept Smith's testimony (not referred to in Respondent's brief, and which I reject as inherently unlikely) that the 15-minute breaktime to which he testified includes traveltime to and from the place where the employees took their break. Such a rule would preclude breaks between jobs which were less than 15 minutes apart.¹²⁴

In view of the foregoing evidence, I conclude that the record preponderantly shows that Respondent discharged Phillips, Choi, and Beebe at least partly to discourage union activity. No different inference is warranted by Respondent's failure (at a time when it was shorthanded and was having difficulty in hiring qualified employees) to discharge all of the employees who were or at least believed to be union adherents, rather than merely a group which included the employee, Phillips, whom Respondent knew to be the one who was leading the union movement.¹²⁵ The pretextuous nature of the reasons advanced by Respondent for the discharge precludes any contention that the evidence preponderantly shows they would have been discharged for lawful reasons even if they had not been union

¹²² In view of Soots' testimony in this respect, Choi's credible testimony that his understanding that breaks were 15 to 20 minutes long was based on what other employees had told him, Hoffman's testimony that breaks were 10 minutes long, and for demeanor reasons, I do not credit Smith's testimony that the 15-minute break period to which he testified was communicated to employees on a number of repeat occasions, including "all-hands" meetings, and was also communicated to employees when they first came on board. Karch, the immediate supervisor of all three dischargees, did not testify that he had so advised employees, but testified that they were supposed to learn about Respondent's break policy from their fellow employees during training.

¹²³ Certain portions of Beebe's testimony suggest his understanding that break time began to run when he left his last job, and ended on his return to his truck. However, his testimony as a whole shows that in practice, he regarded his breaktime as beginning at the time he entered the establishment where he took his break.

¹²⁴ For this reason and the reasons discussed supra, fn. 57, I do not credit Smith's testimony that he so advised the employees in September 1995 when discussing the Big Boy incident.

¹²⁵ See *Union-Tribune Publishing Co. v. NLRB*, 1 F.3d 486, 492 fn. 3 (7th Cir. 1993). I note that because Phillips and Choi were using the same truck the morning of the 216th Street Café incident and had both been involved in the Big Boy incident, Respondent's decision to use the Big Boy incident as a pretext for discharging Phillips virtually required Choi's discharge as well. Moreover, Beebe, too, had been involved in the Big Boy incident. Cf. *O'Dovero Construction, Inc.*, 264 NLRB 751 (1982); see also *NLRB v. Rich's Precision Foundry, Inc.*, 667 F.2d 613, 628 (7th Cir. 1981).

adherents,¹²⁶ indeed, their pretextuous nature supports the conclusion that the discharges were unlawful.¹²⁷ Accordingly, I conclude that the discharge of Phillips, Choi, and Beebe violated Section 8(a)(3) and (1) of the Act.

CONCLUSIONS OF LAW

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

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

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

(a) On July 2, 8, 9, 10, and 11, 1997, through Vice President Stewart, by promising employees additional benefits, for the purpose of inducing them to refrain from choosing union representation.

(b) On July 2, 1997, through Stewart, by interrogating employees Phillips and on July 8, 1997, through Stewart, by interrogating Phillips and Choi about why employees were interested in a union and their union sympathies.

(c) On July 11, 1997, through Stewart, by interrogating employee Beebe about who was supporting the Union.

(d) About June 25, 1997, through Supervisor Karch, by interrogating employee Beebe about the identity of the employees who were leading the union movement.

4. Respondent has violated Section 8(a)(1) and (3) of the Act by engaging in the following conduct.

(a) By providing new tools to employees.

(b) By reimbursing employees for copayment expenses in connection with their health insurance.

(c) By giving employees coupons for "pay-per-view" movies.

(d) By discharging employees Beebe, Choi, and Phillips.

5. Respondent has not violated the Act in the following respects.

(a) By granting wage adjustments to the employees.

(b) By providing its employees with Gatorade.

(c) By telling employees that if the employees chose unionization, Respondent might not follow its present "open door" policy and could not guarantee the continuation of Respondent's existing no-layoff policy.

(d) By conveying the impression of surveillance.

6. The unfair labor practices described in Conclusions of Law 3 and 4 affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has violated the Act in certain respects, I shall recommend that Respondent be required to cease and desist from such conduct, or like and related conduct, and to take certain affirmative action necessary to effectuate the policies of the Act. Thus, Respondent will be required to offer Phillips, Choi, and Beebe reinstatement to their former positions, or, if no such positions exists, to substantially equivalent positions, and to make them whole for any loss of earnings and

¹²⁶ *J.W.F. Bolin Co. v. NLRB*, 70 F.3d 863, 873 (6th Cir. 1995); *Aero Metal Forms*, 310 NLRB 397, 399 (1993).

¹²⁷ False defenses become a two-edged sword in that they may serve to support an ultimate inference of unlawful motive. *Western Plant Services*, 322 NLRB 183, 194 (1996). See also *Laro Maintenance Corp. v. NLRB*, 56 F.3d 224, 230 (D.C. Cir. 1995); *NLRB v. Industrial Erectors, Inc.*, 712 F.2d 1131, 1137 (7th Cir. 1983).

other benefits they may have suffered by reason of their unlawful termination, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). In addition, Respondent will be required to expunge from its records all references to the employees' unlawful terminations and to notify them in writing that this has been done and that the actions and matters reflected in these documents will not be used against them in any way. Also, Respondent will be required to post appropriate notices.

On the basis of these findings of fact and conclusions of law, and the entire record, I issue the following recommended¹²⁸

ORDER

The Respondent Insight Communications Company, Noblesville, Indiana, its officers, agents, successors, and assigns shall

1. Cease and desist from

(a) Promising employees additional benefits, for the purpose of inducing them to refrain from choosing representation by Communications Workers of America or any other labor organization.

(b) Interrogating employees about activities on behalf of the Communications Workers or any other labor organization, in a manner constituting interference, restraint, or coercion.

(c) Discouraging membership in the Communications Workers, or any other labor organization, by discharging employees, by granting employees additional benefits, or by otherwise discriminating in regard to hire or tenure of employment or any term or condition of employment.

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

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

(a) Within 14 days from the date of this Order, offer Lonnie Phillips, Ki Young Choi, and David Beebe full reinstatement to their former positions or, if these positions no longer exist, substantially equivalent positions, without prejudice to their seniority or any other rights and privileges previously enjoyed.

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

(c) Within 14 days from the date of this Order, remove from its files all references to these employees' unlawful termination, and within 3 days thereafter, notify them in writing that this has been done and that the action and matters reflected in these documents will not be used against such employees in any way.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary or useful in analyzing the amount of backpay due under the terms of this Order.¹²⁹

¹²⁸ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board, and all objections to them shall be deemed waived for all purposes.

¹²⁹ See *Bryant & Stratton Business Institute*, 327 NLRB 1135 fn. 3 (1999).

(e) Within 14 days after service by Region 25, post at its facility in Noblesville, Indiana, copies of the attached notice marked "Appendix."¹³⁰ Copies of the notice, on forms provided by the Regional Director for Region 25, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at its Noblesville facility at any time since June 25, 1997.

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

Paragraphs 5(a)(i), d(i), e(i), e(ii), 6(a), and 6(c) of the complaint are dismissed.

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.

WE WILL NOT promise you additional benefits for the purpose of inducing you to refrain from choosing representation by Communications Workers of America or any other union.

WE WILL NOT interrogate you about activities on behalf of the Communications Workers or any other union in a manner constituting interference, restraint, or coercion.

WE WILL NOT discourage membership in Communications Workers of America, or any other union, by discharging you, granting you additional benefits, or otherwise discriminating in regard to your hire or tenure of employment or any term or condition of employment.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of your rights under the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Lonnie Phillips, Ki Young Choi, and David Beebe reinstatement to their former jobs or, if these jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make them whole, with interest, for any loss of earnings and other benefits they may have suffered by reason of their termination.

¹³⁰ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL, within 14 days from the date of the Board's Order, remove from our files all reference to the unlawful discharge of Lonnie Phillips, Ki Young Choi, and David Beebe, and WE WILL, within 3 days thereafter, notify them in writing that this

has been done and the actions and matters reflected in these documents will not be used against them in any way.

INSIGHT COMMUNICATIONS COMPANY