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MEMC Electronic Materials, Inc. *and* International Association of Machinists & Aerospace Workers, AFL–CIO. Cases 14–CA–27036 and 14–CA–27251

September 23, 2004

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND WALSH

On August 28, 2003, Administrative Law Judge Paul Bogas issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed a response to the Respondent's exceptions, and the Respondent filed an answering brief.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions, and to adopt the recommended Order as modified.[2]

Introduction

The judge found that the Respondent violated Section 8(a)(1) and (3) of the Act by implementing wage restorations on two occasions prior to union elections. For the reasons set forth below, we adopt the judge's finding that the implementation of the wage restorations violated Section 8(a)(1), but find it unnecessary to pass on the finding that the implementation also violated Section 8(a)(3).

Relevant Facts

The Respondent manufactures silicon wafers, a building block of semiconductor devices. The Respondent's worldwide headquarters and original facility is located in Saint Peters, Missouri, where it employs approximately 1200 employees. The Respondent also has facilities in Pasadena, Texas, Sherman, Texas (known as the "Southwest" facility), Italy, Japan, Malaysia, and South Korea. Hourly employees at Saint Peters consist of maintenance team technicians (MTTs) and operating team technicians (OTTs). In February 2002, the International Association of Machinists & Aerospace Workers (Union) began a campaign to represent the hourly employees at the Saint Peters facility. The Union planned to organize both the MTTs and the OTTs at Saint Peters.

The Respondent experienced financial difficulties in 2001, and as a result decided to cut wages for its hourly and salaried employees worldwide in 2002.[3] In all, the Respondent reduced wages for about 2700 of its employees, 700 of whom were hourly employees at the Saint Peters facility.[4] The Respondent announced these wage cuts to employees at the Saint Peters facility in December of 2001. Salaried employees were told that their cuts were due to the Respondent's financial situation, and would be restored when the Respondent achieved its financial goals. The Respondent told the hourly employees that they would receive a permanent "market adjustment" cut of 10 percent to their base pay. They were told that the cut resulted from a wage survey that revealed hourly employees were overpaid relative to similar employees in the region, and from the Respondent's intention to move toward a pay-for-performance wage structure.

Hourly employees at the Saint Peters facility were highly dissatisfied with the wage cuts, and the cuts became a key issue in the union campaign, which began in February 2002. The Respondent became aware of the campaign at its inception, and thereafter responded by asking its supervisors to report on the union sympathies of employees and by holding antiunion meetings with employees.

The Respondent's financial situation improved somewhat in the first two quarters of 2002. However, its sales

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

We find it unnecessary to pass on the judge's finding that the General Counsel sustained his initial burden under *Wright Line*, 251 NLRB 1083 (1980), with respect to the 8(a)(3) allegation concerning the discharge of Avis High. The judge found that a prima facie case of discrimination was established regarding High's discharge, but ultimately found that the Respondent met its burden of establishing that it would have discharged High even in the absence of her protected activity. Although there were no exceptions filed to the judge's dismissal of this complaint allegation, the Respondent excepts to the judge's finding of a prima facie case of discrimination regarding High's discharge. Because the Respondent's exception raises no issue that would change the ultimate finding of no violation, we find it unnecessary to pass on this exception.

[2] In *NLRB v. MEMC Electronic Materials, Inc.*, 363 F.3d 705 (8th Cir. 2004), the Eighth Circuit enforced the Board's bargaining order against the Respondent in 338 NLRB No. 142 (2003). Therefore, the judge's recommended bargaining order in this proceeding is not necessary. Accordingly, we shall delete par. 2(a) of the judge's recommended Order.

[3] There is no contention that the decision to cut wages violated the Act.

[4] Approximately 300 hourly employees at the Respondent's Southwest facility experienced a 10 or 11 percent cut in overtime pay. At the Respondent's other facilities, only salaried employees received cuts.

volume for the first quarter of 2002 was still significantly lower than for the same period in 2001. As a result of a general rebound in the silicon wafer industry and the sale of the Respondent to another corporation, the Respondent's condition improved, and it showed a profit in the second quarter of 2002. As part of its attempt to turn the business around, the Respondent hired a new CEO, Nabeel Gareeb, in April of 2002.

The Union filed a petition to represent the MTTs at the Saint Peters facility on April 23. On May 3, the parties entered into a stipulated election agreement for the MTTs at Saint Peters, with the election scheduled for June 5 and 6.

Three days later, on May 6, the Respondent's compensation committee decided that 50 percent of the reductions in wages and salaries worldwide would be restored. The committee also determined that the remaining half of the reduction for salaried employees worldwide would be restored on September 1, if there was continued financial improvement. Regarding the hourly employees at Saint Peters, the committee determined that the remaining wage cut would be restored as incentive pay in periodic lump-sum payments.

On May 10, 7 days after entering into the stipulated election agreement, the Respondent announced to employees that the Respondent's first quarter financial performance had been better than expected, and that it planned to restore one half of the wage cuts to both salaried and hourly employees. The Respondent announced that for hourly employees, half of the wage cut would be restored on June 1, 4 days before the scheduled MTT election, and the other half may be paid out in "some form of monthly lump sum payments" in the fourth quarter, only if the Respondent's financial performance continued to improve. At one of the meetings where the announcement was made, an employee asked Human Resources Manager Andrew Ploeger if the increase was tied to the upcoming union election. Ploeger denied this, and reiterated that the change was due to economic considerations.

On May 29 and 30, 5 days before the election, MEMC's recently hired CEO, Nabeel Gareeb, met with the MTTs at Saint Peters in groups of 10 to 15. At the beginning of the meetings, Gareeb went around the room and asked each employee what his/her number one concern was, and what Gareeb could do to fix the problem. While employees stated their concerns, Gareeb took notes. The concerns raised by the employees included overtime, pay and pension cuts, and scheduling. After hearing the employees' concerns, Gareeb stated that he could fix some of the problems, but needed a few months to do so. Gareeb then said that he had gone through a divorce with his wife, and the two of them had worked out an equitable settlement. However, his wife then hired an attorney, whom Gareeb referred to as a "third party." Gareeb explained that in doing so, his wife received less than she would have had she not hired an attorney. Gareeb then stated that this was why he did not like third parties, and that he viewed the Union as a third party. Gareeb told employees that it would be easier to address their issues "one on one," without a third party involved. Gareeb also said, "people who get lawyers and have third parties involved usually lose."[5]

On May 31, the Union filed a petition to represent OTTs at the Saint Peters facility. The MTT election occurred on June 5 and 6 as scheduled, and the Union won the election. On June 28, the Board directed an election for the OTTs at the facility, scheduled for July 30.

The Respondent's compensation committee met again on July 25, and approved the restoration of the second half of the wage cut for salaried employees, effective September 1. For hourly employees, the committee approved the creation of an incentive program. Later, however, the Respondent decided to restore the base pay cut for the hourly employees effective September 1. The Union filed the first of the instant unfair labor practice charges on July 26, blocking the OTT election.

On August 19, hourly and salaried employees were told that the second half of the wage cuts would be restored, effective September 1. The Respondent stated that the changes were due to the improved financial performance on the part of the Respondent, and improved productivity on the part of employees, although productivity had not reached the target levels set by management. The Respondent also stated that its goal was to treat salaried and hourly employees the same, and that one reason for the change was to "eliminate a significant source of distraction" and to "heal wounds between hourly and salaried groups." The restoration of the second half of the wage cuts was implemented on September 1.

The Judge's Decision

The judge found that the May 10 and August 19 wage-restoration announcements were made for the purpose of inducing employees not to vote for or support the Union, and therefore violated Section 8(a)(1) of the Act.[6] The judge also found that the June 1 and September 1 wage restorations violated Section 8(a)(1) and (3) of the Act. In finding the Section 8(a)(3) violation, the judge ana-

[5] The judge found, and we agree, that by these comments, Gareeb violated Sec. 8(a)(1) by soliciting and promising to remedy employee grievances, and by threatening employees with loss of benefits if they chose to select the Union.

[6] We adopt these 8(a)(1) findings for the reasons stated by the judge.

lyzed the wage restorations under *NLRB v. Exchange Parts*, 375 U.S. 405 (1964), and found that, under all the evidence, the Respondent's May 10 announcement and June 1 grant of the first wage restoration had the purpose of inducing employees to vote against the Union. The judge emphasized that the Respondent knew that the hourly employees' dissatisfaction with the permanent wage cuts was a key motivation behind the union campaign. The judge found that the timing of the announcement and grant of benefits, so soon before the election, was very suspicious, especially in light of the Respondent's earlier statements that the wage cuts were permanent. The judge further noted the absence of any documentary evidence indicating that the decision to restore the wage cuts predated the union campaign, or that the Respondent in previous years had granted wage increases in May or June. The judge also found that the Respondent harbored anti-union animus, and rejected the Respondent's claim that the restorations were inspired by the global restoration of wages that took place at this time. The judge emphasized that hourly and salaried employees worldwide were always treated differently, and that hourly employees at the Saint Peters facility were the only employees who had their wage reductions restored after being told that the reductions were permanent.

Using a similar analysis, the judge found that the announcement and implementation of the second half of the wage restoration was motivated by a desire to discourage employees from supporting the Union. The judge found that, although the election for hourly production employees had been blocked at the time of the announcement, the possibility of an election remained very real. Further, the judge explained that the decision to restore the base pay cut not only contradicted the Respondent's initial claims that the cut was permanent, but also contradicted the decision of its compensation committee on July 25 to create an incentive program for hourly employees. For these reasons, the judge found that the Respondent's wage restorations violated Section 8(a)(3) and (1) of the Act.

As explained below, we agree that the Respondent's wage restorations violated Section 8(a)(1). In view of this finding, we find it unnecessary to pass on whether the wage restorations also violated Section 8(a)(3), because it would not materially affect the remedy in this case.

Discussion

It is well established that granting benefits while a representation petition is pending has a tendency to coerce employees' free exercise of their rights. *NLRB v. Exchange Parts Co.*, 375 U.S. 405 (1964). As the Supreme Court stated, "[t]he danger inherent in well-timed increases in benefits is the suggestion of a fist inside the velvet glove. Employees are not likely to miss the inference that the source of benefits now conferred is also the source from which future benefits must flow and which may dry up if it is not obliged." Id. at 409. The Board particularly scrutinizes wage increases given prior to an election, because they have "a potential long-lasting effect, not only because of their significance to employees, but also . . . because the increases regularly appear in paychecks . . . [as] a continuing reminder." *Holly Farms Corp.*, 311 NLRB 273, 281-282 (1993), enfd. 48 F.3d 1360 (4th Cir. 1995), affd. 517 U.S. 392 (1996).

In conferral-of-benefits cases, the Board has consistently inferred a violation of Section 8(a)(1) from nothing more than conferral itself during the pendency of an election, leaving it to the employer to make an affirmative showing that the grant of benefits was governed by factors other than the impending election. See, e.g., *Speco Corp.*, 298 NLRB 439, 443 (1990); *Brooks Bros.*, 261 NLRB 876, 882 (1982); *Gordonsville Industries*, 252 NLRB 563, 575 (1980). Applying that analysis here, we find that the Respondent's wage restorations on June 1 and September 1, 2002, during the critical period prior to two representation elections, gave rise to an inference that the Respondent violated Section 8(a)(1). We further find that not only has the Respondent failed to present evidence sufficient to explain the wage restorations based on factors independent of the union campaign, there is additional evidence that buttresses the finding of a violation.

One way in which an employer may explain the conferral of benefits during the pendency of an election is to establish that the grant of benefits "had been conceived and implemented prior to the union's arrival, and that the preelection announcement simply made known to employees a predetermined and existing benefit, legitimately processed and unveiled in accordance with the dictates of business constraints, not union considerations." *Gordonsville Industries*, 252 NLRB at 575. The Respondent certainly cannot exonerate its wage restorations based on this justification.

Prior to the union's campaign, the Respondent told hourly employees that their wage cuts were permanent "market adjustment" cuts that would never be restored, regardless of the Respondent's financial performance. On May 6, however, a mere 3 days after entering into a stipulated-election agreement for the MTTs, the Respondent's compensation committee reversed course and decided to restore the first half of the wage cut for both hourly and salaried employees. Thereafter, the Respondent announced this decision to employees on May 10,

only 4 days before the MTT election was to begin. There is no evidence that, prior to the Union's campaign, the Respondent had planned to restore the wage cuts to hourly employees, or that the Respondent had a past practice of granting wage increases in June.

The Respondent likewise cannot exonerate the second half of the wage restoration on the basis that it was "predetermined" before the advent of the Union, because not only had the Respondent not decided upon this part of the wage restoration before the Union's organizing campaign, the Respondent's decision to restore the second half of the wage cut to hourly employees was inconsistent with the prior decision of its compensation committee, which had decided to restore the cut to salaried but not hourly employees on July 25.[7] The Respondent gave no explanation for this reversal.

The Respondent attempts to explain its wage restorations based on factors unrelated to the Union campaign by contending that its decision to restore hourly employees' wages so shortly before an election was due to its improved business condition in the first two quarters of 2002. While it is clear that the Respondent's financial situation improved in the first half of 2002, it is also clear that the Respondent continued to experience financial difficulties during this period. Indeed, the Respondent's sales volume for the first quarter of 2002 was still significantly lower than for the same period in 2001. The Respondent only began to turn a profit during the second quarter of 2002. Thus, we find that this argument fails to explain the wage restorations.

The Respondent further argues that its decision was unrelated to the union campaign, as shown by the fact that it restored wages to 2700 employees worldwide, only 700 of whom were hourly employees at the Saint Peters facility, and only 115 of whom were MTTs about to vote in the election. This contention ignores the fact that the Respondent treated hourly and salaried employees differently. The Respondent claimed from the outset that it would restore the cuts to salaried employees. As discussed above, however, it decided to restore the cuts for the 700 hourly employees targeted by the union campaign only after the campaign began. In addition, the only hourly employees to experience a cut in base pay were the 700 Saint Peters employees. Although, as the dissent points out, wages were also restored to hourly employees at the Southwest facility, those employees had not experienced an initial base pay cut, and were not told that their wage cut would be permanent. This distinguishes them from the hourly Saint Peters employees. In any event, as the Board has held, merely changing benefits at multiple locations does not by itself establish a lawful motive in such cases. *Sears Roebuck & Co.*, 305 NLRB 193, 195–196 (1991).

Additional evidence further supports a finding that the Respondent's wage restorations were intended to undermine employee support for the Union in violation of Section 8(a)(1). When the Respondent decided to grant the wage restorations, it was well aware that employee discontent over the wage reductions was one of the main issues driving the union campaign. The Respondent alluded to this fact when it announced the second wage restoration, stating that a purpose of the restoration was to "eliminate a significant source of distraction," and to "heal wounds between hourly and salaried groups." Indeed, these comments indicate an acknowledgement by the Respondent that the hourly employees were angry with the Respondent for cutting their wages, and that this anger was a direct cause of the union campaign. Contrary to our dissenting colleague's contention, there is no evidence of tension between hourly and salaried employees, or that these remarks referred to any situation other than the union campaign. Rather, the evidence shows that the hourly employees' anger over the wage reductions was inextricably linked to the union effort, and was the primary motivating factor for most employees' support of the Union. In other words, this was a typical case of employees deciding to unionize because of their anger with their employer's decision to reduce wages. Any suggestion that the Respondent was acting as a peacemaker between hourly and salaried employees is nothing more than an attempt to disguise the true nature of the conflict occurring at the facility.

CEO Nabeel Gareeb's unlawful solicitation of grievances and threat of loss of benefits at the May 29 and 30 employee meetings shed further light on the Respondent's intent in restoring the wage cuts. The Supreme Court has held that other unlawful conduct on the part of an employer may be evidence of the motive behind a grant of benefits and, to that extent, is relevant to the legality of the grant. *Exchange Parts* at 410. Contrary to our dissenting colleague, we find that the significance of this evidence is not diminished by the fact that the May 29 and 30 violations occurred after the decision and announcement regarding the first wage restoration. Gareeb was integrally involved in both the unlawful statements and the decision to restore wages, and his statements reveal that the Respondent was motivated to convince

[7] The Respondent announced the second half of the wage restoration on August 19, while the election petition for the unit of OTTs was blocked by a pending unfair labor practice charge. As the judge pointed out, the possibility of an election remained very real at this point. Indeed, the Board has found that conferring benefits in instances where an election is not presently scheduled, but the possibility of an election remains very real, violates the Act. See *Wis-Pak Foods, Inc.*, 319 NLRB 933, 939 (1995), enfd. 125 F.3d 518 (7th Cir. 1997).

employees not to vote for the Union. The fact that these unlawful threats came from the Respondent's CEO reveals an effort at the highest level of management to thwart the union effort. In these circumstances, the violations by Gareeb provide substantial evidence of the Respondent's antiunion motivation and show that employees could reasonably view the wage increases as an attempt to influence their votes in the upcoming election.[8]

For the reasons stated above, we find that the Respondent has failed to explain its wage restorations based on factors unrelated to the union campaign, and we therefore conclude that the wage restorations violated Section 8(a)(1).

Our dissenting colleague argues that our finding of an 8(a)(1) violation is procedurally improper, because the General Counsel alleged that the wage restorations violated Section 8(a)(3) and (1) of the Act, but did not independently allege that the conduct violated Section 8(a)(1). We disagree. The wage restorations were fully litigated at trial. First, the conduct was alleged to be unlawful, violating Section 8(a)(3) and—at least derivatively—Section 8(a)(1). Second, the General Counsel's theory of a violation at trial focused on the Respondent's intent to influence the employees' vote by changing terms and conditions of employment. This theory of a violation, and the applicable standard of proof, is effectively indistinguishable from the 8(a)(1) *Exchange Parts* standard that we have applied.[9] Next, the Respondent submitted evidence at the hearing to support its claim that its purpose in restoring the wages was not to influence the employees' vote. This is the same defense that would have been presented under the 8(a)(1) theory of violation that we found. Finally, the *Exchange Parts* factors were discussed at length in the judge's decision, in the Respondent's brief to the judge, and in its brief to the Board accompanying its exceptions. In fact, the Respondent's argument in support of its exceptions urged that the Board overrule *Exchange Parts*. In light of these circumstances, it is clear that the 8(a)(1) violation we have found was fully and fairly litigated, even though it was derivatively alleged in the complaint. There simply is no basis to find that the Respondent has been unfairly prejudiced by our finding.

In sum, for the reasons stated above, we find that the evidence demonstrates that the Respondent's implementation of the two wage increases was motivated by the desire to induce employees not to vote for the Union in the upcoming elections. Accordingly, the implementation of those increases violated Section 8(a)(1) of the Act.

[8] Because Gareeb's statements provide sufficient evidence of the Respondent's unlawful motivation in granting the wage restorations, we find it unnecessary to rely on the other evidence of animus cited by the judge.

[9] Under either standard, the intent of this conduct is to undermine employee support for the Union.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and orders that the Respondent, MEMC Electronic Materials, Inc., Saint Peters, Missouri, its officers, agents, successors, and assigns shall take the action set forth in the Order as modified.

1. Delete paragraph 2(a) of the judge's recommended order and reletter the subsequent paragraphs.

2. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C. September 23, 2004

Wilma B. Liebman, Member

Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

CHAIRMAN BATTISTA, dissenting in part.

Contrary to my colleagues and the judge, I find the Respondent did not violate the Act when it restored wage cuts to hourly employees at its Saint Peters facility.[1]

At the outset, I have a procedural disagreement with the majority's finding that the Respondent's wage restorations violated Section 8(a)(1) of the Act. This finding is based on Section 8(a)(1) as an *independent* violation, as distinguished from an 8(a)(1) violation that is *derivative* from Section 8(a)(3). This independent allegation was neither included in the complaint nor litigated at trial. Rather, the 8(a)(1) violation regarding the wage restorations was alleged only as a derivative of the alleged 8(a)(3) violation. Thus, the majority's finding is beyond the General Counsel's theory of the case.

Further, contrary to my colleagues' claims, there is a significant difference between an independent 8(a)(1) violation (based on *NLRB v. Exchange Parts*, 375 U.S. 405 (1964)), and the 8(a)(3) violation alleged by the General Counsel. In alleging an 8(a)(3) violation, the General Counsel contends that the Respondent engaged in the conduct with an intent to discriminate against employees because of their union activities. The majority's 8(a)(1) analysis, conversely, is predicated on their finding that the Respondent's conduct interfered with the

[1] I agree with my colleagues' findings in all other respects.

election. Thus, the complaint required the Respondent to defend against the allegation that it intended to discriminate against employees because of their union activity by implementing the wage increases; it did not require the Respondent to defend against a claim that the conduct interfered with the election. That issue is beyond the General Counsel's theory of the case, and accordingly is not appropriate for consideration.

Further, assuming arguendo that an independent 8(a)(1) allegation alleging interference with the election is properly before us, I find no merit to it. More particularly, I disagree with the finding that the decision to restore the wage cuts was for the purpose of interfering with the election.

The record shows that the Respondent experienced major financial troubles in 2001. As a consequence, it cut wages and benefits for all its employees worldwide. The Respondent informed employees of the financial circumstances that necessitated the cuts, and told *salaried employees* that their cuts would be restored as soon as the Respondent regained profitability.

The Respondent's decision to reduce wages created a firestorm of controversy among employees at the Saint Peters facility. Hourly employees were angry at being treated differently than salaried employees, i.e., their pay cuts were said to be permanent while the cuts given to salaried personnel were only temporary. This discontent led to decreased morale among employees and created a significant distraction in the workplace. This divisive result was not anticipated by the Respondent at the time it made the cuts. However, this problem became clear early in 2002. Thus, although the original plan was to treat the two groups differently (making salaried cuts temporary and hourly cuts permanent), the ensuing controversy required a change in the plan.

Further, the Respondent experienced several significant changes in the first half of 2002 that permitted this change. First, the Respondent's financial situation began to improve. Although its losses still exceeded its profits in the first quarter of 2002, the Respondent regained profitability in the second quarter. Second, the Respondent was sold to a new company, and it hired a new CEO, Nabeel Gareeb, in April 2002. When Gareeb came in, he saw the divisiveness that had been caused by the wage cuts, and he immediately acted to remedy the dissension. Thus, shortly after he took office, on May 6, the Respondent's compensation committee met and resolved to restore the first half of the wage cuts to all employees on June 1, regardless of hourly or salaried status. This change was announced to employees on May 10. Employees were told that the restoration was due to the Respondent's improved financial situation and improved productivity. The wage restorations were worldwide, and were received by every employee who had received a wage cut in December.

The Respondent's compensation committee met again on July 25, and resolved to restore the second half of the wage cuts for salaried employees worldwide, effective September 1. Subsequent to that meeting, the Respondent's managers decided to also restore the second half of the wage cuts to hourly employees on September 1. This restoration was announced to both hourly and salaried employees on August 19. The employees were told the reasons for the restoration, which were the Respondent's improved financial situation and the employees' improved productivity. The Respondent also clearly told employees that its goal was to mend the divisions between hourly and salaried employees caused by the unequal wage restorations. The Respondent made no reference to the Union during these announcements, and there was no reason for employees to believe that the restorations were in any way linked to the union campaign.

The judge's finding, that the Respondent deliberately timed its worldwide wage increases in response to a union election among only the employees at one location, strains credulity. The wage restorations affected 2700 employees and cost the Respondent $10 million. This was a substantial outlay for a financially struggling company. However, in Gareeb's view, there was an urgent need to boost morale and end the divisions between hourly and salaried employees. All employees who received wage cuts in December got wage restorations in June and September of 2002. This included hourly and salaried employees at the Saint Peters facility and everywhere else. For example, it included hourly employees at the Southwest facility, who were not involved in the union campaign.

The manner in which the Respondent announced the wage restorations further belies the judge's findings. The Respondent specifically informed employees that the reasons for the restorations were the Respondent's increased profitability and its desire to "heal wounds between hourly and salaried groups" and to "eliminate a significant source of distraction." Clearly, these statements were in reference to the conflict between hourly and salaried employees caused by the disparate treatment. There was no evidence presented that the employees would reasonably tie these references to the union campaign. In fact, when an employee raised the union issue at one of the meetings, he was immediately informed by the human resources manager that there was no connection between the Union and the wage restorations. Other than this remark, no reference was made to the Union during the announcements.

With respect to the first 50-percent restoration for both salaried and hourly employees, that decision was made in early May, shortly after the hiring of the new CEO, who saw that the divisiveness would be exacerbated by a restoration for one group and not the other.

With respect to the second 50-percent restoration for both salaried and hourly employees, that decision was made in July, after the second-quarter figures were in. Again, it would have been divisive to restore the wage reduction for one group and not the other. Further, this decision was announced in August, after the election had been held.

I also disagree with the judge's findings of animus. The judge cited the following as evidence of the Respondent's antiunion animus: (a) a statement in the Respondent's handbook indicating that remaining "union-free" is an objective of the company, (b) the Respondent's postcertification refusal to bargain with the Union, (c) Human Resources Manager Andrew Ploeger's statements, in testimony, that the desire to stay union-free colored the Respondent's decision making during the union campaign, (d) Plant Manager Henry Midgett's statements, in testimony, that the Respondent made an effort to address employee complaints during the campaign, in part with the goal of remaining union-free, (e) the Respondent's attempt to withdraw from the election stipulation involving the maintenance employees and seeking of an emergency stay to prevent the counting of the ballots, and (f) Gareeb's unlawful threats of loss of benefits and unlawful solicitation and promises to remedy employee grievances.

I now address these matters seriatim. The "union-free" statement in the Respondent's handbook is a lawful statement of opinion, protected by Section 8(c) of the Act. Such a statement, devoid of any threatening context, does not indicate that the Respondent would take unlawful action to achieve that goal. Next, the Respondent's refusal to bargain with the Union to test certification is not evidence of animus to support an 8(a)(3) violation. It is the only way to judicially test a certification. See, e.g., *Wright Motors, Inc.*, 237 NLRB 570 (1978), enfd. 603 F.2d 604 (7th Cir. 1979). The Respondent's attempt to withdraw from the MTT election was premised on the Union's filing of a petition to represent the OTTs at the facility shortly before the election, causing the Respondent to question the scope of the stipulated unit. Its seeking of an emergency stay to prevent the counting of the ballots postelection was similarly motivated. These procedural positions do not in any way demonstrate antiunion animus.

Next, the judge relies on testimony from Midgett and Ploeger regarding the Respondent's desire to remain union-free. Midgett testified that while the Respondent was concerned with remaining union-free, this was not a significant factor in the decision to address employee concerns about wages. Ploeger stated that addressing employee concerns was a way to create a good working relationship, which could lead to staying union-free, and that one of the Respondent's goals was to remain union-free. Neither of the statements was made to employees. Although both statements suggest that the goal of remaining union-free may have influenced some decision making during the campaign, the record does not establish that the specific decision to restore wage cuts was caused by a desire to win the election.

Concededly, Nabeel Gareeb's remarks at the May 29 and 30, 2002, employee meetings constitute an unlawful solicitation of and promise to remedy employee grievances, and a threat of loss of benefits if employees select the Union as their bargaining representative. However, there is no nexus between these statements and the prior decision to restore wages. Gareeb's remarks were made 3 weeks after the decision to restore the first half of the wage cuts, and there was no connection between the topics discussed at the Gareeb meetings and the wage restorations. Gareeb made no mention of the wage restorations during the meetings at which he made the 8(a)(1) statements. Thus, the record includes no linkage between the wage restorations and Gareeb's subsequent unlawful solicitation of grievances and threat of loss of benefits. It is simply too great a leap to infer that these subsequent statements demonstrate that the Respondent acted with an election motive when it previously decided to restore wages to the hourly employees at Saint Peters.

Because the General Counsel failed to prove by a preponderance of the evidence that there was an improper motive in the Respondent's conduct, the General Counsel has not established a violation of the Act.

Dated, Washington, D.C. September 23, 2004

Robert J. Battista, Chairman

NATIONAL LABOR RELATIONS BOARD

APPENDIX

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

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT make announcements regarding changes in compensation for hourly employees for the purpose of inducing you not to vote for, or otherwise support, a union.

WE WILL NOT solicit and promise to remedy employee grievances for the purpose of discouraging support for a union.

WE WILL NOT threaten that selecting a union as your collective-bargaining representative will result in your loss of benefits.

WE WILL NOT maintain or enforce any overly broad no-distribution policy that is not restricted to working time and work areas.

WE WILL NOT implement any changes in compensation for the purpose of inducing you not to vote for, or otherwise support, a union.

WE WILL NOT implement any unilateral changes to the base pay rate of hourly maintenance employees at our Saint Peters facility without providing the International Association of Machinists and Aerospace Workers, AFL–CIO (the Union) with adequate prior notice and an opportunity for bargaining.

WE WILL NOT implement any new pay programs for hourly maintenance employees at our Saint Peters facility without providing the Union with adequate prior notice and an opportunity for bargaining.

WE WILL NOT change the areas where hourly maintenance employees at our Saint Peters facility are permitted to take their breaks without providing the Union with adequate notice and an opportunity for bargaining.

WE WILL NOT change the practice of allowing hourly maintenance employees to work on personal projects at our Saint Peters facility during their nonwork time, without providing the Union with adequate notice and an opportunity for bargaining.

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

WE WILL, within 14 days from the date of this Order, notify all hourly employees at our Saint Peters facility that the provision in the Company's employee handbook which prohibits employees from distributing literature at any time for any purpose is rescinded, void, of no effect, and will not be enforced.

WE WILL, within 14 days from the date of this Order, rescind, if requested to do so by the Union, the changes in the base pay rate for hourly maintenance employees at our Saint Peters facility that we unilaterally implemented after the representation election of June 5 and 6, 2002.

WE WILL, within 14 days from the date of this Order, rescind, if requested to do so by the Union, the incentive pay programs for hourly maintenance employees at our Saint Peters facility that we unilaterally implemented after the representation election of June 5 and 6, 2002.

WE WILL, within 14 days from the date of this Order, rescind the unilateral change, made on July 23, 2002, which altered the areas where hourly maintenance employees at our Saint Peters facility were permitted to take their breaks, and notify all such employees that the change has been rescinded.

WE WILL, within 14 days from the date of this Order, rescind the unilateral change, made on July 23, 2002, which discontinued the practice of allowing hourly maintenance employees to work on personal projects at our Saint Peters plant during their nonwork time, and notify all such employees that the change has been rescinded.

MEMC ELECTRONIC MATERIALS, INC.

Christal J. Key, Esq., for the General Counsel.

Richard E. Jaudes, Timothy J. Sarsfield, Stephen D. Smith, and *Esqs. (Thompson Coburn LLP),* Saint Louis, Missouri, for the Respondent.

DECISION

STATEMENT OF THE CASE

PAUL BOGAS, Administrative Law Judge. This case was tried in Saint Louis, Missouri, on April 28, 29, 30, and May 1, 2003. The International Association of Machinists & Aerospace Workers, AFL–CIO (the Union) filed the original charge in Case 14–CA–27036 on July 26, 2002, and the amended charge on November 26, 2002. The Union filed the original charge in Case 14–CA–27251 on December 26, 2002, and amended charges on January 10 and February 13, 2003. The Director of Region 14 of the National Labor Relations Board (the Board) issued the consolidated complaint on February 24, 2003, and the amended consolidated complaint (the Complaint) on April 16, 2003. The complaint alleges that MEMC Electronic Materials, Inc. (the Respondent), attempted to discourage union support in violation of Section 8(a)(1) of the National Labor Relations Act (the Act) by: announcing that it would reverse an earlier wage cut; soliciting and promising to remedy grievances; implying that selection of the Union would result in loss of benefits; threatening employees with plant closure; announcing that it would implement a quarterly incentive pay plan for employees; and maintaining a restriction on the distribution of literature. The complaint further alleges that the Respondent violated Section 8(a)(1) and (3) of the Act by discriminating because of employees' Union and concerted activity when it: reversed a wage cut; implemented a quarterly incentive pay

plan; implemented a new overtime policy; and discharged employee Avis High. The complaint also alleges that the Respondent failed to bargain in violation of Section 8(a)(1) and (5) by: unilaterally instituting new policies regarding breaks and outside projects; unilaterally reversing the second half of the wage cut; and unilaterally implementing a quarterly incentive pay plan.[1]

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the parties, I make the following findings of fact and conclusions of law.

FINDINGS OF FACT[2]

I. JURISDICTION

The Respondent, a corporation, manufactures, distributes, and sells silicon wafers. During all material times it had offices and a manufacturing facility in Saint Peters, Missouri, and in conducting its operations has sold and shipped from that facility, goods valued in excess of $50,000 directly to points outside the State of Missouri. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

The Respondent manufactures silicon wafers—a building block of semiconductor devices. At the time of trial, the Respondent employed between 4000 and 5000 persons. The Respondent's worldwide corporate headquarters and original facility is located in Saint Peters, Missouri, where it has approximately 1200 employees. The Respondent also has facilities in: Pasadena, Texas; Sherman, Texas (sometimes referred to as "MEMC Southwest"); Italy; Japan; Malaysia; and South Korea.[3]

As of early 2002, employees at the Respondent's Saint Peters facility were not represented by a union.[4] In February of that year, the Union began a campaign to represent hourly employees at the Saint Peters facility. On May 3, 2002, the Respondent entered into a stipulated agreement for an election to determine if a majority of the hourly maintenance employees (classified as maintenance team technicians or MTTs) at that facility wished to be represented by the Union.[5] On the day before the election, the Respondent tried to withdraw from the stipulated election agreement, but the Acting Director for Region 14 rejected this request. The election was held on June 5 and June 6, 2002. The Respondent sought an emergency stay to prevent the Board from counting the employees' ballots, but on June 10 the ballots were counted, revealing that employees had voted in favor of the Union by a margin of 72 to 36. On October 24, 2002, the Union was certified as the exclusive collective-bargaining representative of the maintenance employees. Despite the certification, the Respondent has refused to bargain with the Union, apparently contending that the certification was improper because the unit definition in the election stipulation it had previously agreed to did not include production workers. On April 10, 2003, the Board upheld the certification of the Union, and ruled that the Respondent's refusal to bargain was a violation of Section 8(a)(1) and (5) of the Act. 338 NLRB No. 142 (2003) (Case 14–CA–27224).[6]

On June 28, the Board directed an election for another unit of hourly employees at the Respondent's Saint Peters facility. This prospective unit was composed of hourly production employees, classified by the Respondent as operating team technicians (OTTs). The production employees were scheduled to start voting on July 30, 2002, but on July 26, the Union filed an unfair labor practices charge that blocked the election.

B. State of the Respondent's Business

During much of the period leading up to the start of the union campaign, the Respondent was in financial distress. In 1998 the Respondent lost $315 million, in 1999 it lost $150 million, in 2000 it lost $40 million, and in 2001 it lost $530 million. On November 13, 2001, the Respondent was sold by its then-owner, a German company called E.On, to Texas Pacific Group (TPG). TPG paid $6 for the Respondent and, under the terms of the sale, E.On was required to make a large cash infusion to the Respondent and to relieve the Respondent and/or TPG of $1.1 billion of the Respondent's debt to E.On.

The Respondent engaged in a number of cost cutting measures during the period of financial distress. In 2001, the Respondent laid off approximately 2300 of its 7000 employees. In December 2001, the Respondent announced that it would carry out various changes in compensation and benefits at the Saint Peters facility. For example, the Respondent announced that it would reduce the base wage rate for hourly employees by 10 percent effective January 2002. Henry Midgett (the plant

[1] The Complaint also included an allegation that the Respondent bypassed the Union and dealt directly with bargaining unit employees in violation of the Sec. 8(a)(1) and (5) of the Act by distributing a survey seeking employees' sentiments regarding overtime policy. (GC Exh. 1(s) par. 8). At the start of trial, I granted the General Counsel's motion to withdraw this allegation.

[2] The Respondent's unopposed motion, dated June 19, 2003, to correct the transcript is granted and received in evidence as Respondent's Exhibit (R. Exh. 39). The General Counsel's motion, unopposed motion, dated June 20, 2003, to substitute a superior copy of one page contained in GC Exh. 47 is granted and received in evidence as GC Exh. 49.

[3] In addition, the Respondent has a number of sales' offices and a 40-percent ownership interest in a facility in Taiwan.

[4] Unions represent employees at the Respondent's facilities in Italy, South Korea, and Pasadena, Texas.

[5] The election stipulation defined the unit as: "All full-time and regular part-time employees employed in the MTT classification at the Employer's Saint Peters, Missouri facility EXCLUDING all utility operators, office clerical and professional employees, guards, supervisors as defined in the Act, and all other employees."

[6] As of the time of the trial, and despite the Board's decision in Case 14–CA–27224, the Respondent maintained that it had no obligation to bargain with the Union. At the trial in the instant matter, the parties stipulated that the final decision issued by the Board in Case 14–CA–27224, or the decision of the highest court that reviewed that decision, would be determinative of the issues relating to the certification of the Union, and that the question of whether the certification was valid would not be litigated in the instant proceeding.

manager of the Saint Peters facility) and Andrew Ploeger (the Respondent's human resources manager) met with employees to discuss this change, which they described as a "permanent" reduction that was based on the necessity of conserving cash, wage studies indicating that the Respondent was overpaying employees, and the company's desire to move towards a pay-for-performance wage structure. The hourly employees were also told that they would not receive any wage increases in 2002.[7] At the same time, the Respondent reduced or eliminated a number of employee benefits. Most notably, the Respondent discontinued contributions to the employee's pension plan and eliminated retiree medical and life insurance benefits for many, and probably most, employees.[8] The Respondent also reduced the base salary of employees in salaried positions by between 5 and 20 percent. Unlike the "permanent" reductions for the hourly employees, the reductions for the salaried employees were described by the Respondent as "temporary." The salaried employees were told their wage reductions would be fully reversed when the Respondent met its financial targets—probably within 12 months. At the same time, the Respondent awarded stock options to all employees, both salaried and hourly, whose pay had been reduced. The Respondent also informed employees that it was considering a plan to provide incentive pay, previously available only to a select group of salaried employees, to all salaried and hourly employees.

The reductions in compensation were not confined to the Saint Peters facility. The Respondent also reduced compensation for salaried and hourly workers at the Sherman, Texas facility, for nonunion employees at the Pasadena, Texas facility, and for management officials at facilities in Japan, Korea, Malaysia, and Taiwan.[9] The Saint Peters facility was, however, the only location at which hourly employees saw a reduction in their base pay rate. At the Sherman, Texas, facility the Respondent made changes in the way overtime pay was calculated for hourly workers, and this resulted in a reduction in pay of about 10 or 11 percent, but the employees' base pay rate was not changed. In all, between 2600 and 2700 of the Respondent's employees were affected by wage cuts in 2002, approximately 700 of whom were hourly employees at the Saint Peters facility. The Respondent expected that the worldwide pay cuts would save the company $10 million over the course of a year.

In 2002, the silicon wafer industry saw a significant recovery, with an increase in volume of about 31 or 32 percent over the previous year. Nevertheless, for the first quarter of 2002 (January 1 to March 31), Respondent's sales volume was still significantly lower than for the same period in 2001. As of April 2002, the Respondent's chief financial officer's view was that "market activity justifie[d] guarded optimism," but that new growth could not yet be predicted. Later in 2002, the industrywide improvement began to buoy the Respondent. The Respondent also benefited from its sale to TPG, which enhanced customers' perception of the Respondent's financial condition and ability to deliver its product. At the beginning of 2002, the Respondent's orders began to rebound and the Respondent was profitable for the second quarter of 2002.[10] In February 2002, the Respondent began to recall employees to the Saint Peters facility in order to meet the reinvigorated demand for its product. The Respondent eventually recalled between 200 and 300 of its Saint Peters employees—everyone on its recall list. In a further effort to boost production, the Respondent assigned an unusual amount of mandatory overtime. This led to discontent among workers, many of whom apparently did not care for the overtime work, and felt it was not being assigned on a fair or consistent basis. In May and June 2002, a group of employees approached the Respondent's officials on at least three occasions to complain about the overtime policy.

Despite the recall of laid-off workers, and the increased use of mandatory overtime, the Respondent was not able to meet its production requirements or consistently ship orders to customers in a timely fashion. For example, in July 2002, the Respondent met its shipping target dates for only about 65 percent of orders. John Jansky (corporate vice president) held a meeting on July 23 with supervisory personnel at the Saint Peters facility and announced new production and on-time shipping goals that he said the facility was to meet within 28 days. Jansky stated that the facility "had" to accomplish the improvements, but did not state what the consequences would be if the goals were not met. At the same meeting, Jansky announced that three company officials, including the plant manager of the Saint Peters facility, were being replaced.

[7] I do not credit Midgett's testimony that at the December 2001 meetings on compensation, and in informal discussions around that time, he told hourly employees that the Respondent would "get money back in their pockets as quick as possible." (Tr. 495.) Several witnesses gave testimony that contradicted Midgett's claim that he had made such a representation, at least prior to when Gareeb arrived in April 2002. (Trs. 158, 181, 308, 801–802, 803–804.) In addition, I find it implausible that Midgett would have made such a claim given his statement at the December 2001 meeting that the wage cut for hourly employees was permanent. (GC Exh. 10, R Exh. 6, R. Exh. 18; Tr. 493–494.) Moreover, based on his demeanor and testimony, I did not find Midgett a particularly credible witness regarding disputed matters. At times he clearly attempted to shade his testimony to present matters in a manner favorable to the Respondent. For example, he testified that he "couldn't speculate" on whether the Respondent was opposed to having a union at the Saint Peters facility, but then admitted that the Respondent did "make a statement . . . that we were not for unionization at the Saint Peters site." (Tr. 512.) Similarly, Midgett at first denied that one of management's goals during the organizing campaign was to solicit employee complaints, but then admitted that finding out what employees' issues were became of greater concern to the Respondent during the organizing campaign. (Tr. 512–513.)

[8] The only employees who would continue to accrue pension benefits and retain their retiree medical and life insurance were those who, as of December 31, 2001, were at least 50 years of age with 5 years of service, or had at least 25 years of service.

[9] Reductions were not implemented for unionized employees at the Respondent's facility in Pasadena, Texas.

[10] The Respondent's profits in the second quarter of 2002 were less than its losses during the first quarter of 2002. Overall for 2002, the Respondent showed a net loss of $5 million, although it would have shown a profit of approximately $50 million if not for a special accounting charge that arose out of the transactions surrounding TPG's purchase of the Respondent.

Later that day, Nancy Coleman and Steve Beckerman, both supervisors in the production department, held a joint meeting with a group of OTTs at which they discussed what had been communicated to them by Jansky. Coleman began the meeting. She discussed the new production and on-time shipping goals and told employees that they had 28 days to turn things around "or else." One attendee asked what Coleman meant by "or else," and Coleman looked at her notes and then said, "or else" they "would be without jobs."[11] Coleman also told employees that she "had just recently been called back [from layoff] and that for seven months . . . had looked for a job and was not able to find one really that would replace" her job with the Respondent. She said "we should all be thankful for a good place to work that had good benefits and that paid well that was a good place of employment." Coleman also told the employees about the three company officials who were departing the company effective that day. During his presentation, Beckerman urged employees to work "as a team," "concentrate on [their] jobs and not focus on the Union." He said, "Just make sure the union activity is not becoming a distraction to you guys." Beckerman stated that he would like to be able to retire from the Respondent, but that it did not look like he was going to be able to do that. Coleman and Beckerman also asked the employees to propose ideas that could help the facility meet the new production goals. At some point after Jansky held the July 23 meeting, Coleman also discussed the new goals with Alan Mills, a maintenance worker and active union supporter who Coleman did not supervise. Mills asked Coleman what would happen if the new goals were not met. Coleman's response was, "I don't know but I would sure hate to see the plant close."

Charles "Buddy" Mueller is a maintenance operating supervisor at the Saint Peters facility who attended Jansky's July 23 meeting. Afterwards, Mueller had a meeting with maintenance employees he supervised. Mueller described the new production and on-time shipping goals. He also set forth what he and the maintenance department coaches wanted to do to help achieve the goals. Mueller told the production employees that maintenance employees would no longer be permitted to work on personal projects at the shop or to bring in outside materials such as newspapers and magazines. Internet access in the shops would be discontinued. Mueller stated that employees would be required to take their breaks in the breakroom, not in the maintenance shops, and to clock out during their lunch breaks. Mueller advised the employees that they should expect to receive temporary assignments and to move more frequently between production areas. The point of these changes, according to Mueller, was to make sure that the maintenance employees spent more time on the manufacturing floor working on equipment and less time in the shop.

Prior to July 2002, maintenance employees at the Saint Peters facility had been permitted to take their breaks anywhere they chose other than a production area. They were also permitted to work on personal projects in the shop during their own time and did so on all shifts. The Respondent did not give the Union notice or an opportunity to bargain before instituting the rules restricting maintenance employees to the breakroom during their breaks and prohibiting outside projects and materials from being brought into the shop. After approximately 4 weeks, some employees resumed bringing personal projects to work and taking breaks in the shop.

C. Union Campaign

The Union began its campaign to represent hourly maintenance and production employees at the Saint Peters facility in February 2002. In March or April 2002, employees began to wear prounion buttons in the workplace. Over 100 employees could be seen wearing these buttons at the facility at any given time.[12] Employees also began to distribute prounion handbills in front of the facility. They distributed the materials on 15 to 20 occasions and there were 40 to 60 different handbills. During the union campaign, at least two employees, Allen Mills and Avis High, displayed prounion messages on vehicles that they took to work.

On April 23, the Union filed a petition to represent the Respondent's maintenance employees, and, as discussed above, a representation election was held on June 5 and 6 at which maintenance employees voted in favor of the Union by a two-to-one margin. On October 24, the Board certified the Union as the collective-bargaining representative of the hourly maintenance employees at the Respondent's Saint Peters' facility.

The Union also sought to represent a unit comprised of hourly production employees at the Saint Peters' facility. On May 31 the Union petitioned to represent these employees and on June 28 the Board issued a decision directing that the election be held starting on July 30, 2002. However, prior to the scheduled election, the Union filed an unfair labor practice charge that blocked the election.

D. Respondent's Actions After the Start of the Union Campaign

The Respondent found out about the Union's organizing effort almost as soon as it started, and responded swiftly. Andrew Ploeger, the Respondent's human resources manager, questioned supervisory personnel to see what they knew about the organizing campaign and asked them to report to him on what they gleaned from employees. The Respondent made an effort to determine who the leaders of the union campaign were among its employees. By February 26, Ploeger prepared a memorandum setting forth what he had learned and what he thought needed to be done by the company to respond. In the memorandum, he reported that a meeting had taken place be-

[11] Joann Schleeper and Annette Sederquist, both production employees who attended the meeting, testified credibly to these statements by Coleman. (Tr. 361–362, 371–372.) Coleman admitted that she talked about the goals and the 28-day time period, but denied that she used the phrase "or else," and also denied that she answered a question by indicating that employees could lose their jobs if the goals were not met. The testimony by Schleeper and Sederquist was detailed and quite consistent and I found it more credible than Coleman's denials. I also considered the fact that when Beckerman, the other supervisory official at the meeting, testified on behalf of the Respondent, he did not deny either that Coleman used the term "or else," or that Coleman had said employees could lose their jobs.

[12] Since the Respondent ran three shifts per day at the Saint Peters facility, this apparently would mean that over 300 of the Respondent's 700 hourly employees wore prounion buttons at the facility.

tween a representative of the Union and employees of the company. He reported on the issues raised at the meeting, the location of the meeting, the approximate number of employees who attended, and the shift on which most of the attendees worked. Ploeger stated the issues that concerned employees were: the reductions in pay, retirement benefits, and life insurance; job security; the possible institution of a 12-hour shift; and mandatory overtime. Ploeger recommended that the Respondent react by: reiterating to management officials "how important it is for them, that [the Saint Peters] facility remain union free"; training management to help the Respondent "legally implement our response"; holding team meetings to discuss the value of the stock options that employees had been granted; making a decision about shifts and schedules; and, considering the implementation of a profit sharing plan in 2003. Ploeger stated that, based on what he had learned from supervisors, the employees supporting the effort to unionize "could involve our solid citizens with leadership ability." In early March, the human resources department informed management that the Union had made a formal invitation to all hourly employees at the Saint Peters facility to meet with the Union on March 12, 2002.

The Respondent began to keep lists in which it recorded whether particular employees supported the Union or the company. Some of these lists also stated whether the Respondent viewed the employee as a "leader" or a "follower,"[13] whether the Respondent viewed the individual as a "target for support," what the individual's particular "issues or complaints" were, and who might be able to influence the employee. For the maintenance employees the list was updated as late as May 29—7 days before the start of the election.

During the period leading up to the representation election for maintenance employees, the Respondent conducted a large number of meetings to state, and advocate for, the Respondent's position opposing unionization. At the time of the election there were approximately 115 eligible maintenance employees. Ploeger and Henry Midgett (plant manager) met with the maintenance employees in groups of 15 to 20 and had approximately 10 to 12 meetings per week for a period of 3 or 4 weeks. In other words, the Respondent held between 30 and 48 antiunion meetings with eligible employees over the course of the month prior to the election.

In addition to these meetings, Ploeger and Midgett held a number of larger meetings on May 10 at which they informed hourly employees that effective June 1 the Respondent would reverse half of the 10 percent, "permanent," wage reduction announced 6 months earlier. This increase would take effect less than a week before the representation election.[14] The Respondent indicated to employees that this positive change in compensation was made possible by the Respondent's improved financial situation and productivity. During the same meetings, the Respondent's officials told employees that the Respondent might compensate employees for the other half of the wage reduction by making lump sum payments of some type later in the year. Employees objected to the idea that they would receive lump sum payments instead of restoration of their hourly wage rate. The June 1 pay restoration took place as announced. At around the same time, the Respondent also restored a portion of the recent wage reductions that affected employees at other facilities in the United States and around the world.[15]

In addition to the many antiunion meetings conducted by Ploeger and Midgett, the Respondent's CEO, Nabeel Gareeb, met with the maintenance employees. Gareeb's meetings with maintenance employees took place at the end of May[16]—approximately 8 days before the representation election for maintenance employees. Each of these prearranged meetings was attended by between 10 and 17 maintenance employees. According to one employee of 13 years, it was completely unprecedented for a CEO of the Respondent to meet directly with hourly employees at the Saint Peters facility. Gareeb himself testified at trial that he met in this manner exclusively with hourly workers at the Saint Peters facility—i.e., with employees at the one facility where a union drive was underway.[17] Gareeb also admitted that, to start, he met only with the hourly *maintenance* employees at the Saint Peters facility—i.e., with that group of employees at the Saint Peters facility who were not only the subject of a union campaign, but were about to vote in a representation election. He put off meeting with the hourly production employees until the Union filed an election petition for that group.

Employees' accounts of the various meetings conducted by Gareeb are fairly consistent and indicate that Gareeb altered his presentation to only a limited extent from meeting to meeting. Gareeb would ask every attendee to state what his or her most important complaint was, and to identify a solution. As employees spoke, Gareeb generally took notes. The employees raised a variety of issues, including the reduction in wages and

[13] Although I did not credit Henry Midgett's testimony regarding some disputed matters, I do credit his testimony that on these lists "leader" referred to persons who were leaders in the workplace, not leaders of the campaign for, or against, the Union. See *American Pine Lodge Nursing*, 325 NLRB 98 fn. 1 (1997) ("A trier of fact is not required to accept the entirety of a witness' testimony, but may believe some and not all of what a witness says."), enf. granted in part, denied in part, 164 F.3d 867 (4th Cir. 1999); *Excel Container, Inc.*, 325 NLRB 17 fn. 1 (1997) (nothing is more common in all kinds of judicial decisions than to believe some and not all, of a witness' testimony). I reach this conclusion because in a number of instances employees were listed as "leaders," at the same time that the section regarding their union sympathies was left blank. If "leader" meant a leader with respect to the union campaign, then I would expect that the union sympathies of everyone identified as a "leader" would also be known. Moreover, some of the union supporters who were identified as "leaders," were also identified as targets for persuasion by the Respondent. I would not expect that the Respondent would see the employees who were leading the union drive as persons particularly susceptible to persuasion.

[14] The employees would not receive the first paychecks reflecting the higher wage rate until shortly after the election, but those paychecks covered a time period that began before the election.

[15] During a meeting on May 6, 2002, the compensation committee of the Respondent's board of directors had authorized the reversal of half of the pay reductions.

[16] Gareeb had begun working for the Respondent only weeks earlier, in April 2002.

[17] Gareeb testified that he talked to employees at other facilities, but did so only informally as he walked the floor at those facilities.

benefits, proposed changes in work schedules, forced overtime, and inequities between the treatment of hourly employees and management. At one or more of the meetings, Gareeb promised to look into the issues, and stated that he could address some of the complaints that had been raised, but that he needed a few months. He said employees had already seen results regarding some of their issues and that it would be a lot easier for him to address other issues if the employees did not involve a third party. During at least one of the meetings he asked the employees to give him "a chance prior to voting a union in the shop . . . for 3 to 6 months to turn things around." Gareeb told employees that the intervention of "third parties will always increase mistrust and the lack of communication and understanding." Gareeb testified that the third parties he was talking about were unions. At least one employee remembered Gareeb explicitly stating that a "union is like a third party." In one or more instances, Gareeb stated that he did not like third parties. He told the employees that he "prefer[red] interacting directly . . . resolving the issue one-on-one or two-on-one." He said that he had recently gone through a divorce, and that he had made a reasonable offer to his wife, but then she had elected to involve a lawyer and that as a result of the involvement of this third-party his wife had ended up getting less than if she had dealt with him directly.[18] In at least one of the meetings, Gareeb stated that "people who get lawyers and have third parties involved usually lose."[19]

The most recent version of the Respondent's employee handbook, which had last been distributed in 1999, states: "Employees are not permitted to solicit other employees during working time or to distribute literature at any time for any purpose." As discussed above, on or after July 23, 2002, Mueller told employees that they would no longer be permitted to bring outside materials into the maintenance shops. There is no other evidence indicating that the handbook provisions regarding solicitation and distribution were enforced, or reaffirmed, by the Respondent after the start of the union campaign. There is, likewise, no evidence that the Respondent acted to disavow or rescind the prohibitions on solicitation and distribution at any time before or after the union campaign commenced.

In July 2002, the Respondent's human resources department distributed a survey asking production employees at the Saint Peters facility for their views on overtime policy. Betty Brock, a representative in the human relations department, told employees that the surveys would be used to help formulate a new policy regarding overtime. As discussed above, a number of the Respondent's employees were not pleased with the way overtime work was being distributed, and, in particular, with the way forced overtime work was being assigned. In his February 26 memorandum, Ploeger identified mandatory overtime as one of the issues motivating the organizational activity. Overtime policy was also one of the subjects that hourly employees complained about during the meetings Gareeb conducted with them. In May and June 2002, a group of employees approached the Respondent's officials on at least three occasions to complain about the way overtime work was being assigned. The questions in the July survey concerned problems with the current overtime policy and the desirability of certain changes. In August, the Respondent implemented a pilot program in one department at the plant that altered the way forced overtime was assigned. In March 2003, the Respondent promulgated a new overtime policy for production employees. The new policy differed from the old one in that it applied to all areas of the plant, whereas previously different sections/departments had been permitted to adopt their own overtime rules. The new policy also reduced supervisors' discretion in the assignment of forced overtime. Under the new policy, overtime would generally be distributed based on hours and seniority.

On August 19, 2002, Ploeger and McLaughlin held meetings with hourly maintenance and production employees at the Saint Peters facility and announced that the company would reverse the remaining half of the wage reduction effective September 1. Ploeger told employees that a reason for this change was to "eliminate [a] significant source of distraction and get on to the critical business issue of becoming more competitive." The Respondent's officials commented on the need to "heal wounds between hourly and salaried groups." Employees were told that productivity had improved, but not to the target levels management had set. The pay restoration took place, as announced, on September 1. At the August 19 meeting, the Respondent also informed employees that the Respondent would institute a

[18] The notes that Gareeb created in preparation for this series of meetings show that he had planned in advance to discuss his divorce and the role that third parties played in it.

[19] At trial, Gareeb denied that he had participated in "the plant's campaign to educate employees or to try and persuade them not to vote for the Union." (Tr. 842.) In light of the evidence regarding the meetings that Gareeb conducted with hourly employees at the Saint Peters plant, Gareeb's denial is clearly false and, in my view, his willingness to make such a denial under oath reflects negatively on his overall credibility. The record is clear that the only hourly employees with whom Gareeb arranged to hold organized meetings were those at the facility where a union campaign was underway. At that plant he chose to meet first with the group of employees—hourly maintenance workers—who were about to vote in a representation election. My view of Gareeb's credibility is further dimmed by his testimony that the union election came up at the meetings because "people brought it up, but to me, you know, I focused—I tried to focus on what the issues were, as opposed to the union or non-union." (Tr. 838.) Under cross-examination Gareeb conceded that he was the one who brought up the issue of "third parties," by which he meant unions, and his preparatory notes for the meetings indicate that he had always intended to discuss the subject of unions at length. Similarly, Gareeb's testimony that "I don't think I said anything specific about unions," (Tr. 839), is either a lie, or an intentional effort to mislead and evade, given his subsequent admission that when he discussed third parties at the meetings he meant unions (Tr. 858, 860). In light of the evidence, I find Gareeb's suggestion that the purpose of his meetings with the 115 or so maintenance employees eligible to vote in the upcoming union election was not to influence their votes, but rather to investigate the poor health of a company with approximately 4000 employees to be patently false. Gareeb's apparent expectation that such an obvious misrepresentation would be believed demonstrates an unusual level of audacity. My conclusion regarding Gareeb's credibility is also based on his demeanor and testimony. He was very expansive during direct examination, giving rather lengthy speeches about his "philosophy" and subjects tenuously related to the question posed. During cross-examination, however, he became evasive and, sometimes, unnecessarily defensive.

quarterly incentive pay plan beginning in the fourth quarter of 2002, and that incentive pay for that quarter would be received sometime in January 2003.[20] The new incentive plan was implemented on October 1, 2002, and the first quarterly payout was made in January 2003. The changes announced on August 19 were different than what the Respondent's compensation committee had authorized at a meeting on July 25. The compensation committee approved an incentive pay plan for hourly employees in the United States, but it did not approve restoration of the second half of the base pay reduction for those employees even though it did so for salaried employees. The Respondent's managers, however, decided to manipulate the compensation committee's resolution—implementing a smaller incentive pay program for hourly employees than was approved by the compensation committee in order to cover the cost of restoring base pay.

E. Discharge of Avis High

Avis High worked for the Respondent as an hourly production employee at the Saint Peters facility for 15 years. She was discharged on October 18, 2002. Claudia Reed was High's regular supervisor until October 2002, when Coleman assumed Reed's responsibilities. In September 2002, High was temporarily assigned to light duty work due to an injury, and in October she returned to her regular job. While High was assigned to light duty, Cindy Earle was her supervisor. Prior to 2002, the only discipline of record for High was a 1997 letter criticizing her for poor attendance.

High supported the Union during the 2002 campaign. She attended a union meeting on March 12, 2002, and at that time signed a petition. The next day at work she wore a button that read, "I Am Voting Yes," and she continued to wear this button in the workplace until the time of her termination. Display of such a button was not unusual among the employees at the Saint Peters facility. Over 300 of the 700 hourly employees at the Saint Peters facility wore prounion buttons. High also showed support for the Union by writing "union vote yes," in six-inch-high letters on the back window of the vehicle she parked in the Respondent's parking lot. The record does not show that High was among the 40 or so employees who distributed handbills, or that she otherwise took part in organized outreach on behalf of the Union. There was also no evidence that High had any position or responsibilities within the Union or the organizing campaign. Nonetheless, High's support for the Union did not escape the notice of supervisory and management personnel at the Saint Peters facility. Both Ploeger and Wendy Decker (an engineer with supervisory authority) observed that High wore a prounion button, and High was identified by the Respondent as prounion on a list it compiled regarding employees' sympathies with respect to the organizational campaign.

The record shows that High was a very prickly employee, particularly about the details of her assignment. In one incident, on May 2, 2002, High was in the breakroom when a coworker, Joe DeGrasso, suggested that a particular task was going to be assigned to her permanently. High became upset and, in the presence of a number of coworkers, told DeGrasso, "You can go fuck someone, pull it out and suck your own dick." Later that day, High was called to a meeting with Reed and Brock. Brock asked High about the incident with DeGrasso, and, in particular, asked what High had said to DeGrasso. High admitted that she had said something not "very nice," but refused to tell Reed and Brock what it was. On May 7, 2002, High received a letter suspending her for 3 days for "using extreme and vulgar profanity" with one of her coworkers, "while several other coworkers watched and listened to you." The letter, which was signed by Reed, stated that such behavior would not be tolerated and that employees should not be exposed to "intimidation, violence, or aggressive behavior." The letter concluded, "Please consider this your *Final Warning*." (Emphasis in original).

In September 2002, while High was assigned to "light duty," John Jansky (Respondent's corporate vice president), told Cindy Earle (High's temporary supervisor), that he had observed High sleeping on the job. Earle doubted that High was actually sleeping. Still, Earle thought it wise to give High a "heads up" about Jansky's perception.[21] Earle met with High and told her that "a corporate person" had been in the department and had "perceived" that High was sleeping. Earle said that she did not believe High was sleeping, but told High to make an effort not to appear "too relaxed" and "kicked back," because the corporate official might visit the department again. High responded by accusing Earle of harassing her. Earle was "taken aback" by High's reaction. Earle discussed High's reaction with Clarence "Junior" Wilp, a higher-level supervisor. Wilp believed that High's reaction was inappropriate, and he told Earle to give a written account of what had happened to the human resources department.

On October 8, 2002, Wendy Decker, an engineer who had authority to give direction to hourly production employees, told High to obtain a number of samples of the Respondent's recent product and deliver the samples to the laboratory no later than 4 p.m. that day. Taking samples to the lab was apparently not a task that High did on a regular basis; however, the testimony showed that High, as the only employee working in the finished goods area at the time, was an appropriate person for Decker to assign the task. In the past, Decker has directed at least four other production employees in the finished goods area to perform this type of task. On October 9, Decker discovered that High had not delivered the samples to the laboratory as she had

[20] The record does not support the Respondent's contention that, prior to the June election, company officials had told employees that the Respondent would announce a final decision regarding compensation restoration by August 1, 2002. This contention is based on Gareeb's testimony that "we may have said somewhere along that we were—that we would announce what we would do for the second part of the restoration by August 1st." (Tr. 830.) However, Gareeb did not testify *when* employees were informed that the Respondent would make the announcement by August 1, or whether they were informed prior to the June election. Moreover, for reasons discussed above, I do not consider Gareeb a credible witness and, in any case, his testimony here is uncertain on its face and is not corroborated by other credible evidence.

[21] As discussed above, Jansky was the corporate official who in July 2002, had announced the Respondent's very demanding new goals for production and on-time shipping.

been directed, causing a significant delay in production and shipping. This incident came to the attention of Coleman, High's supervisor, but Coleman did not ask High about the incident or otherwise investigate it.[22]

Two days later, on October 10, at about 1:45 p.m., Decker again came to High with an assignment. Decker directed High to enter certain information on 30 forms relating to product that had been improperly processed by other employees. Decker told her that after filling in the information, High should take the forms to the final shipping area, approximately a 5-minute walk away, and associate the forms with the misprocessed materials. It was important that the suspect product be quarantined until after the Respondent determined whether the processing error had degraded the product to an unacceptable degree. Prior to giving this assignment to High, Decker obtained Coleman's approval for doing so. Decker chose High because the finished goods area, where High was assigned, was not very busy.[23] Indeed, when Decker came to High's workstation to make the assignment, High was reading a magazine.

At about 3 p.m., Decker returned to the finished goods department and discovered that High was not there and had placed the forms on a shelf with a note informing an employee on the next shift, which started at 4 p.m., to take the forms to final shipping and associate those forms with the misprocessed material there.[24] Decker considered it improper for High to pass this important work to the next shift when there was still an hour to go before the end of High's own shift. Decker informed Coleman about this, who, in turn sought out High. Coleman believed that High's failure to complete the task could mean that the misprocessed material was not being promptly quarantined. Coleman located High, who was walking back towards her work area. Coleman asked to talk to High, but High continued walking, and so Coleman followed until the two reached the finished goods area where High was assigned. Coleman asked High why she had not finished the assignment regarding the misprocessed material. High responded that she had placed the necessary information on the forms, but had her regular job duties to attend to, and had not had time to take the forms over to the final shipping area. Coleman asked what other work High had accomplished. High responded that if Coleman wanted to know what work had come "through the window" Coleman should "look it up on the computer." At some point during the incident High's sister, Julie Uhrham, who is also an employee of the Respondent, arrived. As Coleman was leaving, High complained to Uhrham that Coleman was harassing her and that she was "just sick of it." Coleman overheard this and stated: "Avis, I'm not harassing you. I was simply just asking you some questions." High responded, "You call it what you want to, but it's harassment." High began writing something down, and stated that she had to document the harassment. Both Coleman and High became angry during the exchange. Afterwards Coleman reviewed computer records and ascertained that High had not been unusually busy with her regular duties during the period when the special assignment from Decker was pending.

Coleman discussed the matter with Wilp, her superior. Coleman told Wilp that High's behavior was creating a "hostile work environment" for "any kind of salaried person who tries to talk to or deal with her." Coleman told Wilp that she did not "want to deal with it anymore." Wilp and Coleman then talked to Brock, of the human resources department, about the incident. Wilp testified credibly that he felt that the matter had to be taken to the human resources department because High had not completed assigned tasks on two occasions and had accused Coleman of harassment when Coleman tried to talk to her about the second incident. At the meeting with Brock, Wilp recommended that the Respondent terminate High. Brock told Wilp that High should be placed on administrative leave while the human resources department investigated the matter. After this meeting, Wilp spoke to High and informed her that she was suspended pending investigation.

It was Brock's responsibility to investigate the allegations about High, but Brock did not testify and the record is unclear about exactly what she did, or did not do, to investigate. At some point Brock informed Frank McLaughlin, who had replaced Midgett as plant manager on July 23, about the matter. McLaughlin reviewed the documentation he received about the incidents, and discussed High's behavior with Brock, Wilp, and Coleman. Brock and Wilp, as well as Ploeger, recommended that High be discharged. The record does not show that anyone involved in the decision opposed discharging High. Brock's recommendation was made in a memorandum that discussed the October 8 and 10 incidents. The memorandum also mentioned

[22] High denied that Decker asked her to obtain samples and take them to the finished goods area. I credit Decker's contrary testimony, which was corroborated by contemporaneous documentation. Decker was not an unduly defensive or hostile witness and her testimony was free of significant contradictions. On the other hand, High appeared to be an unreliable witness based on her demeanor and testimony. High's memory was demonstrably faulty about some matters with respect to which she professed utter certainty. For example, High testified that she was "very certain" that she attended a meeting in July 2002 that was conducted by Gareeb and attended by both hourly and supervisory employees. High gave detailed testimony regarding, among other things, where other individuals were sitting, the facial expressions of a supervisor, Gareeb's appearance, and statements she herself made to a coworker. However, the record, including the testimony of other witnesses for the General Counsel, shows that Gareeb never conducted such a meeting for hourly and supervisory employees. High also claimed to be certain that there was no production problem at the Saint Peters facility on October 8 (and thus, presumably, no necessity for sample testing), however, documentary and testimonial evidence establish that there was such a problem.

For these reasons, I also do not consider High's testimony regarding the meeting she says she attended with Gareeb to be reliable.

[23] The General Counsel suggests that the assignment should not have been given to High because she was not the employee who identified the problem and the Respondent's employee handbook states that the person who identifies that material has been misprocessed is the one who is supposed to "initiate" the forms. I reject this flimsy argument. Decker had already initiated the forms and completed much of the information required on them before she gave those forms to High. High was not being asked to initiate the forms, but to add certain information and deliver the forms to final shipping.

[24] The Respondent has a procedure under which an employee who cannot complete an assigned task before the end of his or her shift, informs an employee on the next shift what is left to do. This process is referred to by the Respondent's employees as "tying in," and can be accomplished either verbally or in writing.

as "previous discipline," High's suspension in May 2002, and the incident in September 2002, when High was alleged to have been sleeping on the job. Based on the information he obtained through this process, McLaughlin made the final decision to terminate High. He testified that his decision was based on a number of factors—the suspension that High had received in May 2002 for vulgar statements to a coworker, the repeated incidents of poor performance, the history of belligerence towards supervisors, and the lack of improvement.

After High was discharged, she appealed the decision using the Respondent's internal review procedures. In November, a meeting was held in which High, Alan Mills (an employee she designated to assist her), Ploeger, and McLaughlin, participated. High's discharge and the allegations against her were discussed, but apparently the discussions did not persuade the Respondent to reverse the termination. Ploeger provided High with a letter, dated November 22, 2002, stating that the reasons for High's discharge were: the May 2002 incident involving vulgar comments to a coworker; the September 2002 incident when High was observed sleeping at work; and the October 2002 incidents involving Decker and Coleman.

In an effort to show that High's discharge was for unlawful reasons, the General Counsel discusses evidence of lesser discipline meted out to other employees at the Saint Peters facility—Bart Sandrowski, Matthew Burger, David Sommer—during the period from January 2001 to February 2003. In none of these cases were Decker, Earle, Coleman, Wilp, or McLaughlin shown to be involved in issuing the discipline. Ploeger is informed about all suspensions, and Brock is consulted about all disciplinary letters, but the record does not reveal whether those individuals played a significant part in the disciplinary decisions involving Sandrowski, Burger, and Sommer. In the earliest of the three incidents of discipline identified by the General Counsel, the Respondent gave Sandrowski a final warning letter on January 4, 2001, and stated that the discipline was the result of six or more episodes in which Sandrowksi demonstrated erratic, disruptive, and hostile behavior. In the most recent incident Sandrowski had stated, "If I go over there, I might kill someone." In the first incident, approximately 6 months earlier, he received a verbal warning for unsafe driving practices. On other occasions he was cited for "poor team behavior" and "confrontative behavior" with a coworker. In all, during a 6-month period, Sandrowski received four verbal warnings and one partial day suspension prior to the issuance of the final warning. Pursuant to the terms of the final warning, Sandrowski was required to attend an employee assistance program on his own time as a condition of continued employment.

On May 2, 2002, the Respondent issued a disciplinary letter and 1-day suspension to Matthew Burger for negligence. According to the letter, Burger's negligence had resulted in over $27,000 of damage to equipment and loss of product. The letter notes that Burger had shown "no remorse," and had failed to turn in paperwork related to the incident. On February 6, 2003, the Respondent issued a final warning letter to David Sommer. The letter states that Sommer had refused assignments on two occasions, and had generally demonstrated "poor work attitude, lack of teamwork and respect toward . . . coworkers."

F. Complaint Allegations

The complaint alleges that the Respondent interfered with, restrained, and coerced employees in the exercise of their Section 7 rights in violation of Section 8(a)(1) when: on about May 10, 2002, Midgett and Ploeger told employees that the Respondent was reversing half of an earlier wage reduction, and might reverse the remaining half of the wage reduction in the fourth quarter of 2002; on about May 29, 2002, Gareeb solicited employee grievances, promised to remedy many of those grievances if employees refrained from union organizational activity, and implied that selection of the Union would result in loss of benefits; in June and July 2002, Brock solicited employee grievances by distributing an overtime survey and impliedly promised to remedy the grievances regarding overtime if employees refrained from organizational activity; on about July 23, 2002, Coleman and Beckerman impliedly threatened employees with plant closure if they selected the Union as their collective-bargaining representative; on August 19, 2002, Jansky and McLaughlin told employees that the Respondent would reverse the other half of the wage cut effective September 1, 2002, and would implement a quarterly incentive pay plan effective October 1, 2002; since January 26, 2002, the Respondent maintained an employee handbook provision that prohibited employees from distributing literature at any time for any purpose. The complaint also alleges that because employees engaged in union and concerted activities, and in order to discourage such activities, the Respondent discriminated in regard to the hire or tenure or terms and conditions of employment in violation of Section 8(a)(1) and (3) when: on about June 1, 2002, it reversed half of the earlier wage cut; on about September 1, 2002, it reversed the other half of the wage cut; on about October 1, 2002, it implemented a quarterly incentive pay plan; on about October 17, 2002, it discharged High; and on about January 22, 2003, it implemented a new overtime policy for production employees. The complaint further alleges that the Respondent has failed and refused to bargain in good faith with the exclusive collective-bargaining representative of its employees in violation of Section 8(a)(1) and (5) when it made the following changes without giving the Union an opportunity to bargain: on about July 23, 2002, told employees that they had to take their breaks in the designated break area, and prohibited employees from bringing personal projects to work; on about September 1, 2002, reversed the second half of the wage cut; and, on about October 1, 2002, implemented a quarterly incentive plan.

III. ANALYSIS

A. Wage Restoration in June 2002

On May 10, the Respondent told hourly employees at the Saint Peters facility that, effective June 1, it would reverse half of the wage cut that it earlier imposed on them and that it might later compensate them for the remainder of the cut. The Respondent made this announcement 7 days after it agreed to a representation election for maintenance employees, and 25 days before that election was to commence. The first half of the wage restoration went into effect, as promised, on June 1—just 4 days before the scheduled election. The General Counsel

alleges that the Respondent unlawfully interfered with employee's exercise of their Section 7 rights, in violation of Section 8(a)(1), on May 10 when it announced the wage restoration. The General Counsel also alleges that when the Respondent implemented the wage restoration on June 1, it violated Section 8(a)(1) and (3) by discriminating as to terms and conditions of employment in an effort to discourage union and concerted activities.

The Supreme Court has held that an employer violates the Act when it grants a wage increase or other benefits "while a representation election is pending, for the purpose of inducing employees to vote against the union." *NLRB v. Exchange Parts Co.*, 375 U.S. 405, 409 (1964). The Court explained that Section 8(a)(1) "prohibits not only intrusive threats and promises but also conduct immediately favorable to employees which is undertaken with the express purpose of impinging upon their freedom of choice for or against unionization and is reasonably calculated to have that effect." Id. The *Exchange Parts* standard applies to allegations both that an employer unlawfully announced a benefit in violation of Section 8(a)(1), see, e.g., *Village Thrift Store*, 272 NLRB 572 (1983), and that it unlawfully implemented a benefit in violation of Section 8(a)(3), see *In Home Health, Inc.*, 334 NLRB 281, 284 (2001), and *Perdue Farms*, 323 NLRB 345, 352–353 (1997), enf. denied in relevant part on other grounds 144 F.3d 830 (D.C. Cir. 1998).[25]

The employer's "legal duty in deciding whether to grant benefits while a representation proceeding is pending is to decide the question precisely as it would if the union were not on the scene." *United Airlines Services, Corp.*, 290 NLRB 954 (1988). To determine whether an employer has met, or failed to meet this legal duty, the Board considers whether all the evidence, including the employer's explanation for the timing of the increase, supports "an inference of improper motivation and interference with employee free choice." *Holly Farms Corp.*, 311 NLRB 273, 274 (1993), enfd. 48 F.3d 1360 (4th Cir. 1995), affd. 517 U.S. 392 (1996). Among the factors used to determine whether a preelection grant of benefit is unlawfully motivated are: the size of the benefit conferred in relation to the stated purpose for granting it; the number of employees receiving it; how employees reasonably would view the purpose of the benefit; the timing of the benefit, *Perdue Farms*, 323 NLRB at 352; the employer's explanation for the timing of the benefit; prior statements by the employer indicating that the benefit would not be granted, *Lampi, L.L.C.*, 322 NLRB 502, 503, 506 (1996), *Holly Farms Corp.*, 311 NLRB at 274; whether the grant of benefit was consistent with the employer's prior practice, *Lampi, L.L.C.*, 322 NLRB at 502, *Marine World USA*, 236 NLRB 89, 90 (1978); and the employer's knowledge that the benefit involved was an important issue in the union organizing effort, *Huck Store Fixture Co.*, 334 NLRB 119, 123 (2001), enfd. 327 F.3d 528 (7th Cir. 2003).

The evidence here supports an inference that the Respondent's May 10 announcement and its grant of the wage restoration effective June 1 had the purpose of inducing employees to vote against the Union. At the time of these actions, the Respondent was well aware that employee discontent over the "permanent" wage reductions was a major, and probably *the* major, issue driving the organizing campaign. The Respondent's decision to reverse the wage reduction for hourly employees was directly contrary to its pronouncements, prior to the start of the union campaign, that those reductions were permanent and that no raises would be granted in 2002. The timing of the announcement and grant of benefits so shortly after a schedule was set for a representation election and so soon before that election was held, is very suspicious, especially in light of the Respondent's earlier representations that the wage reductions were permanent. Moreover, the Respondent failed to produce any documentation showing that, before the representation petition was filed, the Respondent planned to grant, or even had discussed granting, wage restoration to the hourly employees in 2002. Nor was there credible evidence indicating that, in the past, the Respondent had a practice of routinely granting wage increases in May or June.

The record also shows that the Respondent bore antiunion animus. The Respondent's employee handbook states that remaining "union-free" is an objective of the company. More importantly, the record demonstrates that the Respondent was willing to resort to unlawful means to further that objective. In a case decided earlier this year, the Board found that the Respondent unlawfully refused to bargain with the Union even after it was properly certified as the collective-bargaining representative of hourly maintenance employees. 338 NLRB No. 142 (2003).[26] Indeed, at the time of the trial in the instant matter the Respondent was still refusing to bargain with the Union even though the Board had ordered it to do so. In addition, Ploeger, the Respondent's human resources manager, has made statements acknowledging that a desire to stay union-free colored the Respondent's decisionmaking about employees' terms and conditions of employment during the union campaign. (Tr. 87–88, 106–107.) Similarly, Midgett admitted that the Respondent made an effort to address employee complaints during the organizational campaign, in part, with the goal of remaining union-free. (Tr. 514.) I also found telling, the Respondent's unsuccessful effort to scuttle the maintenance employees representation election. As discussed above, the Respondent had previously entered into an election agreement, but then tried to withdraw from that agreement on June 4 (one day before the scheduled election), and subsequently sought an emergency stay to keep the Board from counting the ballots employees had cast. Also as found below, Gareeb, unlawfully threatened em-

[25] The Respondent argues that the Board "should abandon the paternalistic and unwarranted assumptions underlying the *Exchange Parts* doctrine." (R. Br. at 45–49.) If that argument has any merits, those merits are for the Board to consider, not me. I am bound to follow Board precedent applying the Supreme Court's decision. See *Hebert Industrial Insulation Corp*., 312 NLRB 602, 608 (1993). *Lumber & Mill Employers Assn.*, 265 NLRB 199 fn. 2 (1982), enfd. 736 F.2d 507 (9th Cir. 1984), cert. denied 469 U.S. 934 (1984); *Los Angeles New Hospital*, 244 NLRB 960, 962 fn. 4 (1979), enfd. 640 F.2d 1017 (9th Cir. 1981).

[26] It is proper to rely on the findings and evidence in recent cases against the Respondent as background in this case. *Stark Electric*, 327 NLRB 518 fn. 2 (1999); *Tama Meat Packing v. NLRB*, 575 F.2d 661 (8th Cir. 1978), enfg. as modified 230 NLRB 116 (1977), cert. denied 439 U.S. 1069 (1979).

ployees with adverse consequences if they elected to have a collective-bargaining representative.

I reject the Respondent's contention that the evidence shows that the May 10 announcement and June wage restoration were the result of lawful considerations. A number of the Respondent's specific arguments do not warrant discussion or can be disposed of quickly. The Respondent argues that since the Union prevailed in the June 5 and 6 election, the wage restoration on June 1 did not discourage union support. The Board has made clear, however, that whether an employer's effort to discourage union support succeeds in defeating an organizational campaign has no bearing on whether that effort was lawful or not. *Hyatt Regency of Memphis*, 296 NLRB 289 (1989). The Respondent also notes that at one of the May 10 meetings an employee suggested that the wages were being restored because of the upcoming union election, and that Ploeger responded by denying this and attributing the action to economic considerations. Not surprisingly, the Board has declined to accept such self-serving denials by a Respondent as persuasive evidence that a grant of benefit shortly before an election did not have, or was not perceived by employees as having, the purpose of discouraging employees from supporting the Union. See, e.g., *Holly Farms*, 311 NLRB at 274. Indeed, the fact that an employee openly raised this suspicion to Ploeger at a public meeting is some evidence of employee perception that the pay restoration was tied to the antiunion campaign.

The Respondent argues that I should not infer an antiunion motivation for the wage restoration, given that all 2700 of the employees whose wages were cut in December 2001, had wages restored at around the same time as the employees who were scheduled to vote in the June representation election. Of those employees who had wages restored in or around June 2002, only about 700 were hourly employees at the Saint Peters facility and of those only 115 were maintenance employees about to vote. The annual cost of the wage restoration was about $10 million, the Respondent points out, only $1.8 million of which was paid to Saint Peters hourly employees. According to the Respondent, it would be unreasonable to believe that the Respondent provided wage restoration to 2700 employees in hopes of influencing 115 eligible voters. This argument has some merit, but after considering the totality of the evidence I am not persuaded by it. It is true that the hourly employees at the Saint Peters facility were not the only employees whose wage reductions were reversed, but it is also true that they *were* the only ones who the record shows had their wage reductions reversed after the Respondent told them that the reductions were *permanent*, regardless of economic performance. The salaried employees who had their wages restored, on the other hand, had been told from the outset that their wage reductions were temporary and would be reversed when the Respondent met its economic targets, thus showing that the Respondent viewed wage restoration to salaried employees as a separate issue from wage restoration for hourly employees. Moreover, although only 115 hourly employees at the Saint Peters facility were scheduled to vote in a representation election when the pay restoration was announced, the Respondent knew that the union campaign was directed at all of the approximately 700 hourly employees working there. In light of these factors I consider it reasonable to infer that the Respondent had an unlawful, antiunion, motive when it reversed the wage reductions for the 700 hourly employees at the Saint Peters facility even though employees who were not the object of the union organizing campaign also had their wages restored. See *Sears Roebuck & Co.*, 305 NLRB 193, 195–196 (1991) (merely changing benefits at multiple locations, some of which are not facing an organizing campaign, will not alone establish a lawful motive).

I am also unpersuaded by the Respondent's argument that the wage restoration for the hourly employees at the Saint Peters facility is explained by the improvement in the Respondent's economic situation. That is not to say that I reject the Respondent's representation that its economic picture had brightened substantially in 2002 as compared to the prior few years. However, while I believe that the improvement in the Respondent's business explains why the company was *able* to reverse the wage reductions for hourly employees at the Saint Peters facility, it does not explain why the company *did* reverse those reductions, given that the company had previously decided that those wage reductions would be permanent and that no increases would be granted in 2002, irrespective of future business conditions. The Respondent had previously indicated that the it was making the wage reductions for hourly employees permanent because a wage survey showed that those employees were being overpaid, and because the company wished to move towards a pay-for-performance wage structure. There was no evidence that the Respondent's reversal of its decision to make the wage reduction permanent followed a discovery that the wage surveys were inaccurate or out-of-date, or a decision by the company to abandon or delay implementation of a pay-for-performance wage structure.

The Respondent also tries to explain its decision to reverse the "permanent" wage reductions as the product of a new "philosophy" brought to the company by Gareeb when he became CEO in April 2002. Gareeb testified that his philosophy was not to cut wages, and to treat salaried and hourly employees the same. However, based on the totality of the evidence, I decline to credit Gareeb's convenient and self-serving statements about his philosophy. First, as noted earlier, I conclude that Gareeb was not a credible witness. (See fn. 19.) I have no doubt that he lied in an effort to minimize and deny his own anti-union efforts. Id. Moreover, there is no credible corroboration for Gareeb's claims about his philosophy. The Respondent did not show instances in which Gareeb acted on, discussed, or documented, his supposed philosophy regarding equality and wage reductions prior to when he arrived at the Respondent in the midst of the union campaign.

Moreover, even if I believed that Gareeb's management philosophy would have led the Respondent to reverse half of the hourly employees' permanent wage reduction for reasons unrelated to the union campaign, that would not explain why the Respondent chose to announce and implement the wage restoration so shortly before the June election. If the Respondent did not intend for this action to influence the election, it could

have planned to wait until after the election to announce it.[27] The Respondent admits that it had the ability to time-wage changes in just this way—stating that it intentionally delayed the later, September 1, wage restoration to occur after the scheduled election for production employees. (R. Br. at 13; Tr. 542.) Delaying announcement of the June 1 wage restoration until immediately after the June 5 and 6 election would not have negatively affected employees if the Respondent made the wage restoration retroactive by a few days to June 1.

I conclude that the evidence shows that the Respondent's May 10, 2002, announcement regarding wage restoration was made while a representation election was pending for the purpose of inducing employees not to vote for, or otherwise support, the Union, and therefore violated Section 8(a)(1) of the Act. I further conclude that the grant of wage restoration to hourly employees at the Saint Peters facility, which took effect on June 1, 2002, less than a week before a scheduled representation election, also had the purpose of inducing employees not to vote for, or otherwise support, the Union and violated Section 8(a)(1) and (3) of the Act.

B. September and October 2002 Changes in Compensation

On about August 19, 2002, the Respondent announced that the company was reversing the second half of the wage reduction, and instituting a quarterly incentive pay plan for hourly employees in the United States. The wage restoration was implemented on September 1, 2002, and the quarterly incentive plan was implemented on October 1, 2002. At the time of these changes, the Union was engaged in an effort to represent the Respondent's hourly production employees at the Saint Peters facility. Those employees had been scheduled to vote in a representation election from July 30 to August 2, but the election was blocked when the Union filed an unfair labor practice charge against the Respondent on July 26. The General Counsel alleges that the August 19 announcements regarding compensation violated Section 8(a)(1) of the Act, and that the pay restoration and quarterly incentive plan violated Section 8(a)(1) and (3) of the Act. The General Counsel further alleges that, with respect to the hourly maintenance workers, the Respondent violated Section 8(a)(1) and (5) of the Act by making the changes to compensation without giving the Union prior notice or an opportunity to bargain.

Based on the record evidence, I find that when the Respondent announced and implemented the decision to reverse the second half of the wage reduction for hourly employees at the Saint Peters facility, it was motivated by a desire to discourage employees from voting for, or otherwise supporting, the Union. I infer this for some of the same reasons discussed above regarding the June 1 wage restoration. The Respondent was aware that the wage reductions were a central issue in the organizing campaign. Moreover, employees had expressed their discontent with the Respondent's previously announced plan to make lump sum payments in the fourth quarter of 2002 instead of restoring the base pay rate of those employees. At the time the benefit was announced, the scheduled election for hourly production employees had been blocked, but the organizing campaign had not been abandoned and the possibility of an election in the future remained very real. See *Wis-Pak Foods, Inc.*, 319 NLRB 933, 939 (1995) (finding a violation where employer conferred benefits when an election was not presently scheduled, but the possibility of an election was very real), enfd. 125 F.3d 518 (7th Cir. 1997). The restoration of base pay was contrary not only to the Respondent's December 2001 statements that the reductions for hourly employees were permanent, but also to its May 10, 2002, statement that any further pay restoration in 2002 would likely take the form of lump sum payments. The Respondent's decision to restore base pay to hourly employees as of September 1 was even inconsistent with the decision by the compensation committee of the Respondent's board, which passed a resolution on July 25, 2002, to restore base pay rates for salaried employees, but not for hourly employees in the United States. (R. Exh. 9; Tr. 462–463.)

The Respondent's contention that improvements in its performance explain the September base pay restoration is unconvincing for many of the same reasons that it was unconvincing as in regards to the June 1 pay restoration. Moreover, the explanation is further undercut by the Respondent's statements on August 19 that it was restoring the base wages of hourly employees in order to "eliminate [a] significant source of distraction" and "heal wounds between hourly and salaried employees" even though the company had *not* met its productivity targets.

I conclude that the evidence shows the Respondent's August 19, 2002, announcement regarding wage restoration for hourly employees at the Saint Peters facility was made during the pendency of an organizing campaign for the purpose of inducing employees not to vote for, or otherwise support, the Union, and violated Section 8(a)(1) of the Act. I also conclude that the grant of that wage restoration on September 1, 2002, had the purpose of inducing employees not to vote for, or otherwise support, the Union and violated Section 8(a)(1) and (3) of the Act.

The Respondent fares better with respect to the General Counsel's allegations about the announcement and implementation of the quarterly incentive pay plan. Unlike the restoration of base pay, the Respondent's grant of an incentive pay plan was not substantially inconsistent with the Respondent's prior statements about what it intended to do. To the contrary, since before the union campaign the Respondent had been expressing its intention to implement such initiatives. At the time it announced the base pay reductions in December 2001, the Respondent also informed employees that it wished to move to a performance based wage structure and was considering a plan to provide incentive pay to hourly employees. At the meeting with employees on May 10, the Respondent announced the possibility that in the fourth quarter of 2002 it would make lump sum payments under some type of "variable pay approach," based on performance. At its July 25 meeting, the

[27] As it happened, the Union filed a petition on May 31, 2002, to represent hourly production employees. Therefore, if the Respondent had planned to wait until shortly after the June 5 and 6 election to announce the wage restoration, it still would have ended up making the announcement while a representation proceeding was pending. However, the Respondent could not have known about this complication at the time of the May 10 announcement, and has not claimed that it anticipated that another petition would be filed prior to the June election.

compensation committee of the Respondent's board of directors resolved to extend incentive pay programs to hourly employees at the Saint Peters and Southwest facilities, as well as to all salaried employees in the United States. Thus the record give every indication that the announcement and implementation of incentive pay for hourly employees at the Saint Peters facility was part of a plan by the Respondent, which predated the union campaign, and which involved many employees who were not the subject of an organizing effort. Moreover, the record does not show that a lack of incentive pay initiatives for hourly employees was an issue the Respondent believed was driving the organizing campaign. It does not appear that the Respondent had reason to believe that the adoption of such a program would discourage employees from voting for, or otherwise supporting, the Union.

I conclude that the record does not give rise to an inference that the Respondent's August 19, 2002, announcement regarding the incentive pay program had an antiunion purpose or would tend to interfere with the free exercise of employee rights under the Act. Similarly, I conclude that the record does not show that the Respondent's implementation of that program on October 1, 2002, had an antiunion purpose. The General Counsel's allegations that the Respondent's announcement and implementation of the incentive pay program violated Section 8(a)(1) and Section 8(a)(1) and (3) should be dismissed.

The General Counsel also alleges that the Respondent violated Section 8(a)(1) and (5) by failing to give the Union notice or an opportunity to bargain before reversing the second half of the wage reduction for hourly maintenance workers at the Saint Peters facility on September 1, 2002, and implementing the quarterly incentive pay plan for those employees on October 1, 2002. In *Mike O'Connor Chevrolet*, the Board stated:

> The Board has long held that, absent compelling economic considerations for doing so, an employer acts at its peril in making changes in terms and conditions of employment during the period that objections to an election are pending and the final determination has not yet been made. And where the final determination on the objections results in the certification of a representative, the Board has held the employer to have violated Section 8(a)(5) and (1) for having made such unilateral changes.

209 NRLB 701, 703 (1974) (fns. omitted), enf. denied on other grounds, 512 F.2d 684 (8th Cir.1975). In this case, the Respondent does not dispute that it implemented the September and October changes in hourly maintenance employees' pay and wages after the representation election on June 5 and 6, and before the Board certified the Union as collective-bargaining representative on October 24. The Act expressly provides that "rates of pay" and "wages" are mandatory subjects of bargaining.

The Respondent argues that it had no choice but to apply the worldwide changes in compensation to the group of hourly maintenance employees at the Saint Peters facility because withholding those benefits from that group would have been a violation of Section 8(a)(3). The Respondent relies on *Noah's Bay Area Bagels, LLC*, 331 NLRB 188 (2000), a case in which the Board found that an employer had violated Section 8(a)(3) by withholding generally applicable changes in benefits from a group of employees for whom a representation petition had been filed, but an election not yet held. As discussed above, during the preelection period an employer's "legal duty in deciding whether to grant benefits . . . is to decide the question precisely as it would if the union were not on the scene." *United Airlines Services Corp.*, 290 NLRB 954 (1988). In the instant case, however, the Respondent made the unilateral changes during the period *after* the election. The Respondent has not cited any authority for the proposition that the standard discussed in *Noah's Bagels*, is applicable when a unilateral change is made during the period *after* the representation election on the basis of which the Union is certified as the collective-bargaining representative of employees. Pursuant to Board precedent, see *Mike O'Connor Chevrolet*, supra, a new duty, not present during the preelection period, attaches postelection that imposes liability on employers who make unilateral changes. The Respondent does not cite any authority for the proposition that evidence showing an employer would have made certain changes in the absence of a union gives that employer the right to make those changes unilaterally during the period between an election and certification, any more than it would give the same employer such a right subsequent to certification. Moreover, even assuming that the preelection standards at work in *Noah's Bagels* do apply to changes made during the postelection/precertification period at issue here, the Respondent still would not inhabit the corner into which it pretends to be painted. This is true because the Board has recognized an exception allowing an employer to withhold wage increases during the preelection period as long as the employer has a haphazard pattern of wage increases and truthfully tells employees that the increase has merely been postponed or deferred to avoid the appearance that the company had interfered with the election. *Pennsylvania Gas & Water Co.*, 314 NLRB 791, 792–793 (1994), enfd. 61 F.3d 895 (3d Cir. 1995), mem.; *Village Thrift Store*, 272 NLRB 572, 573 (1983). Finally, and perhaps most importantly, contrary to an underlying supposition of the Respondent's argument, the record shows that the Respondent would *not* have granted the wage restoration to hourly employees in September 2002 if the union was not "on the scene." Rather as found above, the Respondent's decision to grant the wage restoration was itself unlawfully motivated by antiunion animus. For these reasons, I reject the Respondent's argument that it was compelled by Section 8(a)(3) to apply the September and October changes in compensation to hourly employees at the Saint Peters facility.

The Respondent also contends that it did not violate the Act because the wage restoration and incentive pay plan for hourly employees that it implemented in September and October were an "established term or condition of employment" prior to the election of June 5 and 6. It is true that on May 10, prior to the representation election, the Respondent announced the *possibility* that it would make certain changes regarding compensation in the fourth quarter of 2002. The Respondent did not, however, state that a decision to make those changes had been reached or that changes would automatically occur if specified economic targets, or other triggers, were met. The Respondent did not even state the specifics of the changes that were being contemplated. To the extent that the Respondent indicated what those

changes would be, it talked about some sort of lump-sum payments, not about the change in base pay rates that was implemented in September. Indeed, it was not until July 25—6 weeks after the election—that the Respondent's compensation committee approved changes in compensation for the fourth quarter. Even then, the changes endorsed by the compensation committee were not the changes that the Respondent actually implemented in September and October, and did not include a restoration of base pay rates for hourly maintenance employees at the Saint Peters facility. The Board has held that a newly implemented benefit is not an "established term or condition of employment," regarding which bargaining is not required, unless there is reasonable certainty as to the timing and criteria of the new benefit. See, e.g., *Mid-Continent Concrete*, 336 NLRB 258, 268 (2001), enfd. 308 F.3d 859 (8th Cir. 2002); *Maple Grove Health Care Center*, 330 NLRB 775, 780 (2000); *Eugene Iovine, Inc.*, 328 NLRB 294 (1999), enfd. mem. 242 F.3d 366 (2d Cir. 2001); *Dynatron/Bondo Corp.*, 323 NLRB 1263, 1265 (1997), enfd. in relevant part 176 F.3d 1310 (11th Cir. 1999). There was no such certainty with respect to the terms, timing, and criteria of the changes at issue here until well after the representation election. Under these circumstances, the Respondent's contention that the wage changes made in September and October were already an existing term of employment as of the time of the representation election on June 5 and 6, is frivolous. Indeed, from all appearances the specific changes were not decided on until some time after the July 25 executive committee meeting, and were not announced to hourly employees until August 19.

I conclude, that the Respondent violated Section 8(a)(1) and (5) of the Act by, on September 1, 2002, changing the base pay rate of hourly maintenance employees at the Saint Peters facility without affording the Union an opportunity to bargain. I further conclude that the Respondent violated Section 8(a)(1) and (5) of the Act by, on October 1, 2002, implementing a quarterly incentive pay plan for those employees without affording the Union an opportunity to bargain.

C. Gareeb's May 2002 Meetings With Employees

The General Counsel alleges that Gareeb, during his late May meetings with hourly maintenance workers, violated Section 8(a)(1) of the Act by: soliciting employees grievances and promising to remedy many of those grievances if employees refrained from union organizational activity; and implying to employees that selection of the Union would result in loss of benefits. The record here showed that days before hourly maintenance workers at the Saint Peters facility were scheduled to vote in a representation election, Gareeb singled them out for a series of meetings. At those meetings Gareeb: asked each employee to state his or her most important complaint about the company; stated that he could address some of the problems, but needed time; claimed that it would be easier for him to address employees' concerns if the employees did not involve a third party; asked employees to give him a chance prior to voting a union in the shop; stated that third parties always increased mistrust and lack of communication and understanding, and that he did not like third parties; stated that people who get lawyers and have third parties involved usually lose; and asked employees to give him a chance prior to voting a union into the shop.

An employer violates Section 8(a)(1) when it solicits, and promises to remedy, employee grievances as part of an effort to discourage union activity. *Hospital Shared Services*, 330 NLRB 317 (1999); *Reliance Electric Co.*, 191 NLRB 44, 46 (1971), enfd. 457 F.2d 503 (6th Cir. 1972). The promise to remedy grievances need not be explicit to constitute a violation. "There is a compelling inference that [the employer] 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." *Embassy Suites Resort*, 309 NLRB 1313, 1316 (1992), enf. denied on other grounds 32 F.3d 588 (D.C. Cir. 1994); see also *Kmart Corp.*, 316 NLRB 1175, 1177 (1995). A violation is established even if the employer does not actually promise to remedy the problems, but rather only to "consider and try to correct the sources of employee dissatisfaction." *Bakersfield Memorial Hospital*, 315 NLRB 596, 600 (1994); see also *Majestic Star Casino*, 335 NLRB 407, 408 (2001).

I conclude that during the May meetings, Gareeb unlawfully solicited, and promised to remedy, employee grievances in order to try to convince employees that union representation was unnecessary. As noted above, Gareeb singled out for the meetings in May that group of about 115 employees among its workforce of over 4000, who were about to vote in a union election. During the meetings he made a show of taking notes when the employees made their complaints, thus suggesting that he would try to take some action regarding the complaints. See *Hanson Aggregates Central, Inc.*, 337 NLRB 870, 880–881 (2002). This activity by a CEO was not consistent with the Respondent's existing practices. To the contrary, the record indicates that no CEO of the Respondent had ever before held meetings with groups of hourly employees. Indeed, Gareeb conceded that as of the time of trial the *only* hourly employees he himself had met with in this manner, were the maintenance and production employees at the Saint Peters facility who were the subject of an organizational campaign. The record gives rise to a compelling inference that the Respondent was promising to correct, or at least "consider and try to correct," the inequities he discovered as a result of his inquiry. At any rate, here it is not necessary to rely entirely on the compelling inference. Gareeb *told* employees he could address some of the complaints if only they would give him the time to do so. In this context, "address" the complaints can most reasonably be interpreted as a promise to remedy, or try to remedy, those complaints. Moreover, he made the connection between his promise and employees' withholding support from the Union clear for any who might have missed it, stating that it would be easier for him to address the sources of the employees' discontent if they did not bring in a "third party."

I conclude that Gareeb, during his May 2002 meetings with hourly maintenance employees, solicited and promised to remedy employee grievances for the purpose of discouraging union support in violation of Section 8(a)(1).

The record also supports the allegation that during the May meetings Gareeb violated Section 8(a)(1) by implying to em-

ployees that selection of the Union would result in loss of benefits. During the meetings Gareeb referred to unions as "third parties," and said that "people who get lawyers and have third parties involved usually lose." He told employees it would be easier for him to address their concerns if they did not bring in a third party. Gareeb also told employees that during his divorce he had offered his wife a fair settlement, but that she then involved a lawyer in the negotiations and, as a result, received a settlement that was less advantageous to her. Pursuant to the Supreme Court's decision *NLRB v. Gissel Packing Co.*, the analytical question posed here is whether Gareeb's statements constituted an unlawful threat of retaliation in response to protected activity, or a lawful, fact-based prediction of economic consequences beyond the employer's control. 395 U.S. 575, 617–619 (1969). In order to fall into the latter category the employer's predictions as to the negative effects of unionization must be supported by objective fact. Id. I conclude that Gareeb's statements were threats, not fact-based predictions of economic consequences beyond his control. Indeed, the only "fact" he offered to support his statement that employees who involve unions "usually lose," was his assertion that his wife received a lesser divorce settlement after involving a third party in the negotiations. Even if one accepts Gareeb's uncorroborated claim that this happened, and even if one believes that it can meaningfully be analogized to the labor setting, it would not be evidence of a "third party" causing "consequences beyond [Gareeb's] control," since it was within Gareeb's power to insist that his lawyer continue to offer the larger settlement that he had contemplated prior to the lawyer's involvement in the negotiations. I conclude that reasonable employees would understand Gareeb as essentially stating that while he was disposed to be generous towards employees, he would withdraw that generosity if employees chose to allow a collective-bargaining representative to interfere in matters at the facility. This is particularly true given the economic dependency of employees on their employer and the tendency for the former to "pick up intended implications" from the latter "that might be more readily dismissed by a more disinterested ear." *Gissel Packing Co.*, 395 U.S. at 617.

I conclude that Gareeb violated Section 8(a)(1) during his May 2002 meetings with hourly maintenance employees by impliedly threatening that selection of the Union would result in employees' loss of benefits.

D. Overtime Policy

The General Counsel alleges that the Respondent unlawfully solicited and impliedly promised to remedy employees' grievances when it distributed a survey regarding the company's overtime policies to employees. An employer has been held to violate Section 8(a)(1) by conducting a survey of its employees' views regarding their conditions of employment when the employer had not previously, or at least not recently, conducted such a survey, and the survey took place shortly before a union election. See, e.g., *Orbit Lightspeed Courier Systems, Inc.*, 323 NLRB 380, 393 (1997); *Weather Shield of Connecticut*, 300 NLRB 93, 94, 104 (1990). In July 2002, shortly before the date of a scheduled union election for hourly production employees, the Respondent distributed a survey asking those employees for their views on overtime policy. The Respondent indicated to employees that the survey would be used to formulate a new overtime policy. The record shows, however, that even before the union campaign the Respondent had a practice of using surveys to obtain employees' views on issues regarding scheduling and overtime. The Respondent had used surveys in this fashion once in 2001 and several times during the 1990s. The General Counsel did not show that the procedures the Respondent used for the 2002 overtime survey were any different than those used for surveys in the past. Moreover, in May and June of 2002, employees of the Respondent had approached the Respondent on at least three occasions to request changes in the way overtime was being assigned. The record indicates that the employees made these complaints spontaneously, without being solicited by the Respondent. Although the timing of the survey is cause for some suspicion, the evidence suggests that this timing was probably dictated by a resurgence in the Respondent's business, which had made unusually large amounts of overtime a necessity and thus intensified problems in the operation of the existing overtime policy. The General Counsel cites no authority showing that, when an election is pending, it becomes unlawful for an employer to continue its prior practice of distributing surveys to employees about possible changes in schedule or overtime policy. The facts present here do not give rise to an inference that the employer was motivated by a desire to discourage union activity or support when it distributed the overtime survey.

For these reasons, I conclude that the allegation that the Respondent's actions with respect to the overtime survey violated Section 8(a)(1) should be dismissed.

The General Counsel also alleges that the Respondent discriminated in violation of Section 8(a)(1) and (3) when in, March 2003,[28] it implemented a new overtime policy for hourly production employees in order to discourage union activity. As discussed above, in March 2003 the company responded to employees' spontaneous expressions of discontent regarding inconsistencies in overtime policy by implementing a new facilitywide overtime policy for production employees that reduced supervisor discretion. The same *Exchange Parts* standards that were discussed above in reference to the allegation regarding wage restoration apply to the allegation that this action violated Section 8(a)(1) and (3). As discussed above, the Respondent's "legal duty" in such circumstances is "to decide the question precisely as it would if the union were not on the scene." *United Airlines Services, Corp.*, 290 NLRB 954 (1988).

I conclude that the evidence is insufficient to raise an inference that the Respondent implemented the new overtime policy as part of an effort to discourage union support. As discussed above, the Respondent's survey of employee attitudes regarding overtime policy was consistent with the Respondent's past practices. The change in policy was appropriate to address the stated purpose of bringing greater consistency to decisions

[28] The Complaint alleges that the overtime policy was implemented on about January 22, 2003. In its brief the General Counsel alleges that the policy was, in fact, implemented in March 2003. The record indicates that the policy was implemented in March, not January.

about the assignment of overtime. The timing of the Respondent's initiative to change the overtime policy is adequately explained by the large increase in the amount of overtime being assigned and employees' spontaneous complaints regarding current overtime practices. The record does not show that, prior to the union campaign, the Respondent made any statements inconsistent with its decision to implement the new overtime policy in March 2003. Although the evidence did show both that the Respondent was aware that overtime policy was an issue in the union organizing campaign, and that the Respondent bore animus towards the union effort, the evidence adduced is insufficient to show that implementation of the policy was driven by the Respondent's desire to defeat the Union. Rather, the factors discussed above, and the record as a whole, lead me to conclude that the decision to implement the new policy more likely was driven by the Respondent's recognition that the old system for distributing overtime assignments was not functioning acceptably given current conditions.

For these reasons, I conclude that the allegation that the Respondent violated Section 8(a)(1) and (3) when it implemented a new overtime policy in March 2003 should be dismissed.

E. Meetings Conducted by Coleman and Beckerman

The complaint alleges that, at a meeting on about July 23, supervisors Coleman and Beckerman "impliedly threatened employees with plant closure if employees selected the Union as their collective-bargaining representative." It is a violation of Section 8(a)(1) for an employer to threaten that it will choose to close the facility where employees work if they select a union as their collective-bargaining representative. *Interstate Truck Parts*, 312 NLRB 661 (1993), enfd. 52 F.3d mem. 316 (3d Cir. 1995); *Almet, Inc.*, 305 NLRB 626 (1991), enfd. 987 F.2d 445 (7th Cir. 1993). The test for purposes of Section 8(a)(1) is not whether the speaker intended the remark as a threat but "'whether a remark can reasonably be interpreted by an employee as a threat.'" *Concepts & Designs, Inc.*, 318 NLRB 948, 954 (1995) (quoting *Smithers Tire*, 308 NLRB 72 (1992), enfd. 101 F.3d 1243 (8th Cir. 1996)).

I conclude that the statements made by Coleman and Beckerman at the July 23 meeting cannot reasonably be interpreted as threats that the Respondent would close the facility if the production employees selected the Union. To put matters in context, I note that the subject of the meeting was not the Union or union activity, but rather new production benchmarks that had just been announced by the company. Jansky informed management and supervisory personnel of the benchmarks earlier that day and supervisors Coleman and Beckerman were communicating to hourly employees what they had learned from Jansky. The record indicates that the production and shipping benchmarks were introduced as the result of the Respondent's very real concern over its inability to deliver product to customers in a timely manner. In her remarks at the meeting in question, Coleman stated in response to question that employees would "be without jobs" if the benchmarks were not met, but she made absolutely no mention of the Union or any protected activity. I conclude that an employee would not reasonably interpret Coleman's statement that employees would lose their jobs if the benchmarks were not met as a threat that the plant would close if employees chose the Union as their bargaining representative. Coleman's statement has nothing to do with the threat the General Counsel alleges that she made.

During his presentation, Beckerman stated his concern that he would not be able to retire from the Respondent and also urged employees not to let the union issues distract them from focusing on their jobs. The General Counsel's allegation that this constituted a threat that the plant would close if employees selected the Union is unsupportable. First, Beckerman did not state that the plant would close. At best he expressed concern that his own position was in jeopardy. I conclude that reasonable attendees would have interpreted Beckerman's statement as an expression of concern about his own prospects, not as a threat of plant closure—especially given that Coleman had just told the employees about the departures of three other company officials. Furthermore, the evidence does not show that Beckerman mentioned employees' selection of the Union as collective-bargaining representative. It certainly does not show that he stated, or even implied, that selection of the Union would bring about the loss of anyone's job. It is true that Beckerman made statements to the effect that employees should not permit union activity to distract them from their jobs and, presumably, from meeting the new production goals. Even if the Complaint fairly could be read to encompass an allegation that Beckerman warned employees not to allow union activities to distract them from their assigned tasks (and I doubt that the Complaint can be so read), the General Counsel has not cited any authority that such a warning is unlawful.

It appears to me that the General Counsel may be hoping to make out this allegation by cobbling together glosses on selected portions of Coleman's statement with glosses on selected portions of Beckerman's statement. It is proper, I believe, to consider the import of the remarks made by Coleman and Beckerman in the context of the entire meeting. However, I conclude consideration of that context supports the view that what Coleman and Beckerman communicated, and would be understood by reasonable employees as communicating, was that there would be dire consequences if the Respondent did not find a way to meet the new production and shipping benchmarks, not that any consequences, dire or otherwise, would flow from selection of the Union as collective-bargaining representative.

For the reasons stated above, I conclude that the allegation that the statements by Coleman and Beckerman at the July 23, 2002 meeting violated the Act should be dismissed.

F. No-Distribution Rule

The General Counsel alleges that since January 26, 2002, the Respondent has violated Section 8(a)(1) of the Act by maintaining an employee handbook that contains a rule prohibiting employees from distributing literature "at any time for any purpose."[29] "A no-distribution rule which is not restricted to work-

[29] The Complaint allegation quotes the entire handbook provision, which states: "Employees are not permitted to solicit other employees during working time or to distribute literature at any time for any purpose." In its brief, the General Counsel limits its argument to the portion of this provision involving distribution of literature, and makes no argument that the prohibition on solicitation during working time is

ing time and to work areas is overly broad and presumptively unlawful." *Teletech Holdings, Inc.*, 333 NLRB 402, 403 (2001). The governing principle is that a rule is presumptively invalid if it prohibits distribution on the employees' own time. See *Our Way, Inc.*, 268 NLRB 394 (1983). Under this standard, the Respondent's no-distribution rule is presumptively unlawful. The Respondent's no-distribution rule is not restricted to working time or work areas, but rather clearly applies to "any time" and is unrestricted as to place. This conclusion is unaffected by the Respondent's protestations that the rule has not been enforced and that the handbook has not been distributed to employees since 1999. As the Board has stated, "[t]he mere existence of an overly broad rule of this kind tends to restrain and interfere with employees' rights under the Act, *even if the rule is not enforced*." Id. (emphasis added); see also *Alaska Pulp Corp.*, 300 NLRB 232, 234 (1990), enfd. 944 F.2d 909 (9th Cir. 1991).

Although the Respondent's policy is presumptively unlawful, the Respondent would be able to avoid a finding of violation if it could demonstrate that it conveyed to employees a clear intent to permit distribution of literature in nonworking areas during nonworking time. *Teletech Holdings*, 333 NLRB at 403. "A clarification of an ambiguous rule or a narrowed interpretation of an overly broad rule must be communicated effectively to the employer's workers to eliminate the impact of a facially invalid rule." Id. "Any remaining ambiguities concerning the rule will be resolved against the employer, the promulgator of the rule." Id. The Respondent has not shown that the Respondent ever told employees to whom it had issued the handbook that the handbook was no longer in effect. Indeed, the Respondent failed to show that it had ever taken any action to disavow, rescind, clarify, or narrow, the overly broad no-distribution rule that appears in its employee handbook. Moreover, to extent that there is any ambiguity about whether the unlawful rule remained in effect, that ambiguity is to be resolved against the Respondent. For these reasons, I conclude that the Respondent has failed to rebut the presumption that it violated the Act.

I conclude that, since January 26, 2002,[30] the Respondent has violated Section 8(a)(1) by maintaining an overly broad no-distribution policy.

G. Prohibitions Regarding Breaktime and Personal Projects

The General Counsel alleges that on July 23, 2002, the Respondent violated Section 8(a)(1) and (5) of the Act by unilaterally changing the areas where hourly maintenance employees were permitted to take their breaks, and by discontinuing its practice of allowing those employees to bring personal projects into the plant. As discussed above, absent compelling economic considerations, when an employer makes unilateral changes in terms and conditions of employment during the period that objections to an election are pending, such unilateral changes violate Section 8(a)(1) and (5) of the Act if the final determination on the objections results in the certification of a representative. *Mike O'Connor Chevrolet*, 209 NRLB 701, 703 (1974).

The record shows that prior to July 23, 2002, the Respondent's hourly maintenance workers were permitted to take breaks anywhere other than a production area and to bring personal projects to the facility and work on those projects during their own time. However, on July 23, Mueller began informing hourly maintenance employees that they could now take their breaks only in the breakrooms, and could no longer bring personal projects to the plant. The Respondent acknowledges that it made these changes. (R. Br. at 103.) The record is clear that these changes were made without giving the Union notice or an opportunity to bargain, and at a time subsequent to the election that resulted in the Union's certification as the bargaining representative of maintenance employees.

Changes in the location where employees are permitted to take their breaks, and in the practice of permitting employees to bring personal projects to work have both been held to be mandatory subjects of bargaining. *Doefer Engineering*, 315 NLRB 1137, 1141 (1994), order set aside on other grounds 79 F.3d 101 (8th Cir. 1996) (personal projects); *Circuit-Wise, Inc.*, 308 NLRB 1091, 1106 (1992), enfd. 992 F.2d 319 (2d Cir. 1993) (Table) (location of breaks). The Respondent argues that the subjects of the changes at-issue here were not substantial enough to require bargaining, but it does not mention, much less distinguish, the contrary, on-point, Board precedent. Therefore, I reject the Respondent's argument that the changes here did not involve mandatory subjects of bargaining.[31]

The Respondent also argues that the changes, and the new production benchmarks that prompted them, were not motivated by any antiunion sentiment, but rather by "fundamental business facts," (R. Br. at 107), and were "ordinary and necessary adjustments in running a business," Id. at 108 (quoting *Waste Stream Management, Inc.*, 315 NLRB 1088, 1090 (1994)). The record supports the view that when Mueller made the unilateral changes he was motivated by a desire to meet the new production benchmarks announced by Jansky. Mueller's motivation is not dispositive however. Board precedent is clear that unilateral changes in mandatory subjects of bargaining violate Section 8(a)(1) and (5) *whether or not* they are unlawfully motivated. *Mike O'Connor Chevrolet*, 209 NLRB at 704.

unlawful. Therefore, I will not consider whether the prohibition on solicitation is also unlawful.

[30] The no-distribution rule has been maintained since well before January 26, 2002. That date is dictated by the 6-month charge filing period under Sec. 10(b). The original charge challenging the no-distribution policy (Case 14–CA–27036) was filed on July 26, 2002.

[31] The Respondent also argues that the changes were not substantial because they were temporary, having been adhered to only for a period of about 4 weeks. However, the Respondent cites no precedent for the proposition that a unilateral change in terms and conditions of employment is lawful if the Respondent reverts to the previous rule after such a period of time. Moreover, in this case, Mueller testified that the Respondent had never announced that the unilateral changes were being revoked (Tr. 655), and also stated that the unilaterally imposed rules were still being followed to a degree in some of the Respondent's approximately eight or nine maintenance shops (Tr. 654). At any rate, 4 weeks is not an inconsequential effective period for a unilateral change. See, *Dixie Ohio Express Co.*, 167 NLRB 573, 575 (1967), enf. denied 409 F.2d 10 (6th Cir. 1969) (unilateral changes a violation even though less than 3 weeks later the employer satisfied its duty to bargaining obligation with respect to changes).

The Respondent would escape liability for the unilateral changes at-issue if it showed "compelling economic considerations" sufficient to justify an exception to its bargaining obligation. The Respondent does not appear to argue that this economic exception applies, but if that is the Respondent's position, I reject it. I note first that there is a heavy burden on any party claiming the benefit of this exception. Under Board precedent, the phrase "compelling economic considerations" refers only to "extraordinary, unforeseen events having a major economic effect that requires . . . immediate action." *Maple Grove Health Care Center*, 330 NLRB 775, 779 (2000). The Respondent has not cleared this high hurdle. The Respondent argues that the unilateral changes were justified so that production department supervisors would not be left with the "perception" that maintenance department employees were avoiding work. The Respondent has not shown that the opinions held of maintenance employees by supervisors from other departments were extraordinary or unforeseen or that those perceptions were a compelling economic consideration requiring immediate action. Indeed, the Respondent has not shown that such perceptions were having any meaningful impact at all on a compelling economic consideration. The Respondent also argues that the unilateral changes were necessary because the maintenance department was operating with fewer supervisors/coaches, and as a result it was difficult for supervisory personnel to determine if maintenance employees in the shops were on break unless they confined their breaks to the breakroom. (R. Br. at 107–108.) However, Mueller, who came up with the unilateral changes, testified that the deficit in supervisory personnel was not even something he considered at the time. (Tr. 653.) Thus this factor appears to be merely a post facto rationalization for a decision that was not really compelled by a supervisor shortage.

Moreover, even were I to conclude that there were compelling economic considerations present at the time of the changes, the record would still fail to trigger the economic exigencies exception because the Respondent failed to show that those economic considerations compelled *these* changes. As observed by the Respondent, at the same time that Mueller made the changes at-issue here, he also announced a variety of other changes aimed at meeting the new production benchmarks. (R. Br. 105–106.) Since the Respondent has not shown that these other steps[32] were inadequate to satisfy the Respondent's interest in meeting the new production benchmarks, it is doubtful that the Respondent can show that it was compelled by those benchmarks to bypass bargaining and make unilateral changes in the mandatory bargaining subjects at issue here. At any rate, if the unilateral changes were compelled by economic considerations so unforeseen and exigent as to warrant granting the Respondent an exception to the obligation to bargain, one would expect the Respondent to have enforced those changes rather strictly. According to Mueller, however, most maintenance employees adhered to the unilateral changes only for a period of about 4 weeks. While the unilaterally imposed rules were being breached, the Respondent's on-time shipping performance improved.

For the reasons discussed above, I conclude that the Respondent violated Section 8(a)(1) and (5) of the Act on July 23, 2002, by unilaterally changing the areas where hourly maintenance employees were permitted to take their breaks, and by discontinuing its practice of allowing those employees to bring personal projects into the Saint Peters plant and work on them during their own time.

H. Discharge of Avis High

The General Counsel alleges that the Respondent discriminated in violation of Section 8(a)(1) and (3) when it discharged Avis High on October 17, 2002. In *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied, 455 U.S. 989 (1982), approved in *NLRB v. Transportation Corp.*, 462 U.S. 393 (1983), the Board set forth the standards for determining whether an employer has discriminated against an employee on the basis of union or protected activity. Under the *Wright Line* standards, the General Counsel bears the initial burden of showing that the Respondent's actions were motivated, at least in part, by antiunion considerations. The General Counsel may meet this burden by showing that: (1) the employee engaged in union or other protected activity, (2) the employer knew of such activities, and (3) the employer harbored animosity towards the Union or union activity. *Senior Citizens Coordinating Council*, 330 NLRB 1100, 1105 (2000); *Regal Recycling, Inc.*, 329 NLRB 355, 356 (1999). If the General Counsel establishes discriminatory motive, the burden shifts to the employer to demonstrate that it would have taken the same action absent the protected conduct. *Senior Citizens*, 330 NLRB at 1105.

Under the standards stated above, I conclude that the General Counsel has met its initial burden. The evidence in this case shows that High engaged in union activities and that the Respondent was aware of High's support for the Union. Ploeger and Decker testified that they were aware that High wore a prounion button to work, and High was identified as prounion on a list that the Respondent maintained. As discussed above, the Respondent has demonstrated antiunion animus and a willingness to act unlawfully in its campaign to defeat the organizational effort.

Since the General Counsel has made the required initial showing, the burden shifts to the Respondent under *Wright Line*, supra, to show that it would have taken the same actions even in the absence of High's protected activities. I conclude that the Respondent easily satisfies that burden here. I note first, that the evidence connecting High's discharge to the Respondent's antiunion animus, while adequate for purposes of meeting the General Counsel's initial *Wright Line* burden, is very weak indeed. High was just one of hundreds of employees at the Saint Peters facility who displayed prounion messages. However, not one other employee is alleged to have been disciplined in any way for supporting the Union. High was not shown to be a leader of the organizing drive, nor was she shown to be one of the 40 employees who engaged in active outreach for the Union by

[32] Among the other changes were: increased use of temporary assignments; employees moved between areas more frequently; internet access eliminated from maintenance shops; maintenance personnel expected to attend production meetings; during shifts when no maintenance supervisors were present, production supervisors would help maintenance employees set priorities; and, training increased in areas prone to bottlenecks.

distributing handbills. High was unexceptional in her support for the Union, and the General Counsel provides no plausible explanation why the Respondent would single her out for discriminatory discipline on the basis of that support. Moreover, High began displaying the prounion slogans in March. The evidence does not show that High engaged in any new or different prounion activities in the weeks leading up to her termination on October 17. It is hard to understand why, if indeed the Respondent wished to single out High for punishment because of her union support, the Respondent would have waited until October to do so. See *Detroit Paneling Systems, Inc.*, 330 NLRB 1170 (2000) (timing is an important factor in assessing motivation in cases alleging discriminatory discipline based on union or protected activity); *Bethlehem Temple Learning Center*, 330 NLRB 1177, 1178 (2000) (same); *American Wire Products*, 313 NLRB 989, 994 (1994) (same).

Moreover, I find that the record supports the Respondent's explanation for its decision to terminate High. McLaughlin, who made the final decision to terminate High, testified that his action was based on: the suspension that High had received for vulgar statements to a coworker; High's repeated instances of poor performance; High's history of belligerence towards supervisors; and High's lack of improvement. The record shows that High repeatedly became belligerent with others in the workplace for reasons that had nothing to do with union or protected activity. In one instance High, without appreciable provocation, directed an unusually vulgar insult at a coworker. When asked about the incident during a meeting with her supervisor (Reed) and a human resources official, High refused to reveal what she had said. In another instance, a different supervisor (Earle) advised High that a high-ranking management official believed he saw High sleeping on the job. The supervisor appeared to go out of her way to communicate this information to High in a gentle manner as possible—stating that she did not think High actually slept on the job, and suggesting ways that High could avoid the perception that she was sleeping. High reacted to this "heads up" conversation by becoming angry and accusing the supervisor of harassment. In yet another instance, a third supervisor (Coleman) asked why High had failed to complete an important assignment and High, rather than express remorse or a desire to improve, responded by accusing the supervisor of harassment. When the supervisor asked High what other work had kept her from completing the special assignment, High declined to answer and instead told the supervisor to go look it up for herself on the computer.

The record shows that High's propensity to launch inappropriate verbal attacks in the workplace was not the only problem that Respondent was legitimately concerned about. On two occasions over the 3-day period from October 8 to 10, High failed to perform important assignments that were given to her. Worse yet, the record leads me to infer that, at least in the second instance, High intentionally shirked the assignment.[33] In neither instance did High even inform her supervisor that she would not complete the work she had been assigned, thus creating a possibility that urgent assignments would be overlooked or delayed. As stated above, in another instance, a corporate vice president observed High appearing to sleep while on duty.

I also note that in a hearing where High was attempting to obtain unemployment compensation she alleged that the Respondent terminated her in retaliation for her having filed a workers' compensation claim. Assuming that that such retaliation caused the Respondent to terminate High, then the 8(a)(3) claim regarding that termination in this case would fail because an employee's individual pursuit of a worker's compensation claim is not activity protected by Section 7. *Zartic, Inc.*, 277 NLRB 1478 (1986), affd. 810 F.2d 1080 (11th Cir. 1987); *Central Georgia Electric Corp.*, 269 NLRB 635 (1984). At any rate, the record before me provides no basis for concluding that High's allegation regarding her worker's compensation claim is true and not merely another expression of High's desire to lay the blame for her termination somewhere other than on her own conduct.

The record paints a picture of High as a disruptive, belligerent, employee who had come to feel that she was free not to perform an assignment that did not suit her and who acted as though her supervisors had no right to question or counsel her about performance deficiencies. Over the course of about 5 months, she ran afoul of not just one supervisor, but of Reed, Earle, Coleman, and Decker, not to mention coworker DeGrasso. I conclude that the Respondent would have terminated High for the reasons testified to by McLaughlin regardless of High's union or protected activity.

The General Counsel contends that High's vulgar statement to a coworker could not legitimately have played a part in her termination because vulgarity was common in the workplace. High testified that other employees said "fuck" "damn" and "shit" at work. She did not claim, however, that the employees had directed these words at others in the workplace. Even assuming I credit High's testimony that these words were commonly used in the Respondent's workplace, the fact remains that High did not merely use profanity. Rather she said the following to a coworker: "You can go fuck someone, pull it out and suck your own dick." I conclude that the Respondent could reasonably view this statement, hurled angrily at a coworker as an insult, to be much more disturbing and disruptive than the simple use of profanity.

The General Counsel also argues that the Respondent has offered "shifting" explanations for the decision to terminate High, and that this indicates the decision was unlawfully motivated. I have considered the inconsistencies raised by the Respondent, but conclude that the Respondent's explanation for High's termination has, in the main, been constant.

The General Counsel argues that I should not credit Decker's testimony that she made the October 8 assignment to High. For reasons already discussed, I have credited Decker's testimony regarding this matter. Moreover, even had I concluded that Decker was lying, the most plausible explanation for such a lie would be that Decker was attempting to shift blame for her own lapse. That, indeed, is the explanation suggested by the General Counsel for this portion of Decker's testimony. (GC Br. 20.) The problem for the General Counsel is that assuming this was the reason that Decker accused High of failing to perform

[33] With at least an hour remaining in her own shift, High left the assignment for the next shift with a "tie-in" note about what needed to be done. Then High proceeded to take an extended break.

the October 8 assignment it would have nothing to do with antiunion animus. Moreover, the record does not provide a basis for concluding that antiunion animus was what inspired any of the Respondent's officials to believe Decker. See *Hanson Aggregates Central, Inc.*, 337 NLRB 870, 879 (2002) (no violation of Section 8(a)(3) where discipline is based on employer's decision to credit one employee's allegation against another, and the decision to believe the allegation was not discriminatory).

According to the General Counsel, the legitimacy of the Respondent's explanation for terminating High is undermined by the lesser discipline the Respondent imposed on three employees—Sandrowski, Burger,[34] and Sommer—who the General Counsel contends engaged in more severe misconduct. It is true that when employees who were not involved in protected activity are given lesser discipline for worse conduct it is an indicia of improper motive. *Aldworth Co., Inc.*, 338 NLRB No. 22, slip op. at 86 (2002); *Dai-Ichi Hotel Saipan Beach*, 337 NLRB 469, 473 (2002). For a number of reasons, the comparator evidence presented by the General Counsel does not rebut the nondiscriminatory explanation offered by the Respondent.[35] First, the General Counsel did not show that Burger and Sommer were not, like High, open supporters of the Union. Indeed, Sommer was identified by the Respondent as a prounion employee. (GC Exh. 22.) Even assuming that the Respondent disciplined High more harshly than other employees who engaged in the same type of protected activity that would not tend to show that antiunion animus accounted for the difference in treatment; to the contrary it would suggest that some factor other than antiunion animus accounted for the harsher treatment High supposedly received. Sandrowski's discipline was issued over a year before the start of the union campaign, and therefore, presumably, Sandrowski had not had an opportunity to support, or oppose, the Union at that time. The discipline decision involving Sandrowski was made almost 21 months before the decision to terminate High. Given the significant passage of time, I believe that the evidence regarding Sandrowski's discipline is of extremely limited probative value regarding the question of whether High's termination was the result of antiunion animus. Second, High's misconduct had a significant component that was not shown to be present in the misconduct of any of the alleged comparators. The record showed that High not only had recurrent conduct and performance problems, but that she also repeatedly reacted unhelpfully, and even hostilely, when supervisors tried to question or counsel her about those problems. None of the alleged comparators were shown to have reacted to a supervisor's questioning or counseling by verbally attacking the supervisor or refusing to answer the supervisor's questions. See *Avondale Industries*, 329 NLRB 1064 (1999) (indicating that an employer may meet its *Wright Line* burden by showing that the disparity in discipline between alleged discriminatees and the General Counsel's comparators is attributable to factors unrelated to union activity). Third, even if I believed that the misconduct of the alleged comparators was meaningfully similar to High's, that evidence would be of little value under the circumstances present here because the supervisors and managers who made the decision to terminate High had no involvement in the discipline issued to the three alleged comparators. Coleman and Wilp, who initiated the termination proceedings regarding High, and McLaughlin, who gave final approval for the termination, did not recommend or approve the discipline issued to Sandrowski, Burger or Sommer.[36] Given the type of misconduct at issue here, I would not expect that different supervisors would necessarily react in precisely the same way. Based on any one of these reasons, I would conclude that the comparator evidence adduced by the General Counsel was of limited probative value. Certainly when taken together, these reasons lead me to conclude that the evidence regarding discipline issued to other employees does not significantly undermine the record evidence showing that High engaged in misconduct that justified the discipline she received and that the Respondent would have terminated her for such misconduct even absent her protected activity. The Respondent has met its burden under *Wright Line*.

For the reasons discussed above, the allegation that the Respondent violated Section 8(a)(1) and (3) by terminating High should be dismissed.

CONCLUSIONS OF LAW

1. The 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. The Respondent interfered with employees' exercise of Section 7 rights in violation of Section 8(a)(1) of the Act by: making an announcement on May 10, 2002, regarding wage restoration while a representation petition was pending for the purpose of inducing employees not to vote for, or otherwise support, the Union; soliciting and promising to remedy employee grievances for the purpose of discouraging union support; impliedly threatening that selection of the Union would result in employees losing benefits; making an announcement on August 19, 2002, regarding wage restoration for the purpose of inducing employees not to vote for, or otherwise support, the Union; and maintaining an overly broad no-distribution policy.

4. The Respondent violated Section 8(a)(1) and (3) of the Act by: on June 1, 2002, reversing half of the wage reduction

[34] In its brief, the General Counsel refers to discipline imposed on James Bailey. However, the record indicates that the discipline described was actually imposed on Matthew Burger *by* James Bailey, a supervisor. (GC Exh. 35; Tr. 382-83.)

[35] Since the General Counsel has carried its initial burden using other evidence, "the value of the disparate treatment evidence lies principally in its tendency to rebut the employer's own attempt to carry its now-shifted burden under *Wright Line* of demonstrating that it would have taken the same action against the [union] activist even absent his or her union activities." *Avondale Industries*, supra at 1066, quoting *New Otani Hotel & Garden*, 325 NLRB 928 (1998).

[36] In the normal course of events, Brock, who participated as a human resources representative in the decision to discharge High, would also have been consulted about the discipline received by Sandrowski, Burger, and Sommer. However, the record reveals nothing regarding the nature or extent of Brock's involvement in the discipline decisions regarding the three alleged comparators. It does not show that she had significant input into those decisions, and certainly not that she had the power to impose more severe discipline than the supervisors involved were seeking.

to hourly employees at its Saint Peters facility for the purpose of inducing employees not to vote for, or otherwise support, the Union; and, on September 1, 2002, reversing the other half of the earlier wage reduction to hourly employees at the Saint Peters facility for the purpose of inducing employees not to vote for, or otherwise support, the Union.

5. The Respondent violated Section 8(a)(1) and (5) of the Act when, without giving the Union an opportunity to bargain, it: unilaterally changed the base pay rate of hourly maintenance employees at the Saint Peters facility on September 1, 2002; implemented a new quarterly incentive pay plan for hourly maintenance employees at the Saint Peters facility on October 1, 2002; unilaterally changed the areas where hourly maintenance employees at the Saint Peters facility were permitted to take their breaks; and, unilaterally discontinued its practice of allowing hourly maintenance employees to work on personal projects at the Saint Peters facility during their nonworktime.

6. The Respondent did not commit the other unfair labor practices alleged in the complaint.

REMEDY

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

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[37]

ORDER

The Respondent, MEMC Electronic Materials, Inc., Saint Peters, Missouri, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Making announcements regarding changes in compensation for hourly employees for the purpose of inducing employees not to vote for, or otherwise support, a union.

(b) Soliciting and promising to remedy employee grievances for the purpose of discouraging support for a union.

(c) Threatening employees that selection of a union as collective-bargaining representative will result in employees losing benefits.

(d) Maintaining or enforcing any overly broad no-distribution policy that is not restricted to working time and work areas.

(e) Implementing any changes in compensation for the purpose of inducing employees not to vote for, or otherwise support, a union.

(f) Implementing any unilateral changes to the base pay rate of hourly maintenance employees at its Saint Peters facility without providing the International Association of Machinists and Aerospace Workers, AFL–CIO (the Union) with adequate prior notice and an opportunity for bargaining.

(g) Implementing any new pay programs for hourly maintenance employees at its Saint Peters facility without providing the Union with adequate prior notice and an opportunity for bargaining.

(h) Changing the areas where hourly maintenance employees at the Saint Peters facility are permitted to take their breaks without providing the Union with adequate notice and an opportunity for bargaining.

(i) Changing the practice of allowing hourly maintenance employees to work on personal projects at the Saint Peters facility during their nonwork time, without providing the Union with adequate notice and an opportunity for bargaining.

(j) 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) Bargain collectively and in good faith with the Union as the exclusive collective-bargaining representative of employees at the Respondent's Saint Peters facility in the appropriate unit set forth below:

> All full-time and regular part-time employees employed in the MTT classification at the Employer's Saint Peters, Missouri facility, EXCLUDING all utility operators, office clerical and professional employees, guards, supervisors as defined in the Act, and all other employees.

(b) Within 14 days from the date of this Order notify all hourly employees at the Saint Peters facility that the provision in the Company's employee handbook which prohibits employees from distributing literature at any time for any purpose is rescinded, void, of no effect, and will not be enforced.

(c) Within 14 days from the date of this Order rescind, if requested to do so by the Union, the changes in base pay rate for hourly maintenance employees at the Saint Peters facility that it unilaterally implemented after the representation election of June 5 and 6, 2002.

(d) Within 14 days from the date of this Order rescind, if requested to do so by the Union, the incentive pay programs for hourly maintenance employees at the Saint Peters facility that it unilaterally implemented after the representation election of June 5 and 6, 2002.

(e) Within 14 days from the date of this Order rescind the unilateral change, made on July 23, 2002, which altered the areas where hourly maintenance employees at the Saint Peters facility were permitted to take their breaks, and notify all such employees that the change has been rescinded.

(f) Within 14 days from the date of this Order rescind the unilateral change, made on July 23, 2002, which discontinued the practice of allowing hourly maintenance employees to work on personal projects at the Saint Peters plant during their nonwork time, and notify all such employees that the change has been rescinded.

(g) Within 14 days after service by the Region, post at its facility in Saint Peters, Missouri, copies of the attached notice

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

marked "Appendix."[38] Copies of the notice, on forms provided by the Regional Director for Region 14, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by 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 any time since May 10, 2002.

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

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. August 28, 2003

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 Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT attempt to induce you not to vote for, or otherwise support a union, by announcing and/or implementing changes in compensation.

WE WILL NOT solicit and promise to remedy employee grievances for the purpose of discouraging support for a union.

WE WILL NOT threaten that selecting a union as your collective-bargaining representative will result in your loss of benefits.

WE WILL NOT maintain or enforce any overly broad no-distribution policy that is not restricted to working time and work areas.

WE WILL NOT make unilateral changes to the base pay rate of hourly maintenance employees at the Saint Peters facility without providing the International Association of Machinists and Aerospace Workers, AFL–CIO (the Union) with adequate prior notice and an opportunity for bargaining.

WE WILL NOT implement any new pay programs for hourly maintenance employees at the Saint Peters facility without providing the Union with adequate prior notice and an opportunity for bargaining.

WE WILL NOT change the areas where hourly maintenance employees at the Saint Peters facility are permitted to take their breaks without providing the Union with adequate notice and an opportunity for bargaining.

WE WILL NOT discontinue the practice of allowing hourly maintenance employees to work on personal projects at the Saint Peters facility during their nonwork time, without providing the Union with adequate notice and an opportunity for bargaining.

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

WE WILL, bargain collectively and in good faith with the Union as the exclusive collective-bargaining representative of employees at our Saint Peters facility in the appropriate unit set forth below:

> All full-time and regular part-time employees employed in the MTT classification at the Employer's Saint Peters, Missouri facility, EXCLUDING all utility operators, office clerical and professional employees, guards, supervisors as defined in the Act, and all other employees.

WE WILL, within 14 days from the date of the Board's Order, notify all hourly employees at the Saint Peters facility that the provision in our employee handbook that prohibits employees from distributing literature at any time for any purpose is rescinded, of no effect, and will not be enforced.

WE WILL, within 14 days from the date of the Board's Order, rescind, if requested to do so by the Union, the unilateral changes in base pay rate for hourly maintenance employees at the Saint Peters facility that we implemented after the representation election of June 5 and 6, 2002.

WE WILL, within 14 days from the date of the Board's Order, rescind, if requested to do so by the Union, the incentive pay programs for hourly maintenance employees at the Saint Peters facility that we implemented after the representation election of June 5 and 6, 2002.

WE WILL, within 14 days from the date of the Board's Order, rescind the unilateral change, made on July 23, 2002, which altered the areas where hourly maintenance employees at the Saint Peters facility were permitted to take their breaks, and notify all such employees that the change has been rescinded.

WE WILL, within 14 days from the date of the Board's Order, rescind the unilateral change, made on July 23, 2002, which discontinued the practice of allowing hourly maintenance employees to work on personal projects at the Saint Peters facility during their nonwork time, and notify all such employees that the change has been rescinded.

MEMC ELECTRONIC MATERIALS, INC.

[38] 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."